Identity and Diversity in EU Law: Contextualising Article 4(2) TEU

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To my family

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This dissertation has proved to be a journey during which the mission to familiarise myself with the notion of national or constitutional identity has converted itself into a tortuous quest: Throughout, I have had the persistent feeling that the closer I came to identity, the blurrier the concept became. This has at times proved very trying, yet it also incited me to reflect on matters of personal identity, on how I perceived my own identity as a twin sister, as a German brought up in France by a mother born in Breslau and a father born in Barcelona. I could not have possibly completed this dissertation without the support and help of numerous friends and colleagues I wish to acknowledge.

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Summary

The primary objective of the present work is to contextualise the so-called national constitutional identity clause enshrined in current Article 4(2) TEU and, by doing so, to provide some guidance to its judicial and political interpreters. I provide explanations for the genesis of a new discourse revolving around 'identity' and 'diversity' at the time of the Maastricht Treaty revision in the context of European integration by analysing the positions of different EU institutions. This discourse is embedded in the European federalist tradition. I then proceed to contextualise the Member States' national identities through the lenses of the drafters of the different versions of current Article 4(2) TEU, as well as explore the provisions and instruments aimed at preserving diversity or national particularities as incorporated in the course of the various treaty revisions. Finally, I proceed to contrast the national constitutional courts' concept of constitutional identity with that of the Court of Justice of European Union.

Resumen

El objetivo del presente trabajo es contextualizar la llamada cláusula de identidad constitucional nacional consagrada en el actual artículo 4(2) TUE y orientar a sus intérpretes judiciales y políticos acerca de su interpretación. En primer lugar, identifico, mediante el análisis de las posiciones de las diferentes instituciones de la UE, la génesis del nuevo discurso que, en el momento de la revisión del Tratado de Maastricht, giró alrededor de 'identidad' y 'diversidad'. Este discurso está basado en la tradición federalista europea. A continuación me dedico a contextualizar las identidades nacionales de los Estados miembros a través de las lentes de los redactores de las diferentes versiones del artículo 4(2) TUE, así como de las disposiciones e instrumentos encaminados a preservar la identidad o diversidad incorporadas en el curso de las distintas revisiones de los

tratados. Por último, procedo a contrastar el concepto de identidad constitucional nacional concebido por los tribunales constitucionales nacionales con el que maneja el Tribunal de Justicia de la Unión Europea.

Abbreviations

AG	Advocate General
ATC	Auto del Tribunal Constitucional [Court order of the Spanish Constitutional Court]
BGBl	Bundesgesetzblatt [German Official Gazette]
BVerfG	Bundesverfassungsgericht [German Federal Constitutional Court]
BVerfGE	Entscheidungen des Bundesverfassungsgerichts [Official publication of the decisions of the German Federal Constitutional Court]
BL	German Basic Law
BOE	Boletín oficial del Estado [Spanish Official Gazette]
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the EU
CT	Constitutional Treaty [Treaty establishing a Constitution for Europe]
EAW	European Arrest Warrant
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights and Fundamental Freedoms

ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EMU	Economic and Monetary Union
EP	European Parliament
EU	European Union
EWS	Early Warning System
GATT	General Agreement on Tariffs and Trade
GC	General Court
IGC	Intergovernmental Conference
MEP	Member of European Parliament
MP	Member of Parliament
OJ	Official Journal
OMT	Outright Monetary Transactions
SC	Spanish Constitution
SEA	Single European Act
STC	Sentencia del Tribunal Constitucional [Judgment of the Spanish Constitutional Court]

TC	Tribunal Constitucional [Spanish Constitutional Court]
TEC	Treaty Establishing the European Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties

Contents

INTRODUCTION

The statement that identity (whether constitutional or national or both) has in recent years become rather *en vogue* is commonplace.[1] When it comes to EU law, scholars and practitioners alike have classified Article 4(2) Treaty on European Union (TEU), which calls upon the EU to respect the Member States' national constitutional identity as a 'shield and as a sword',[2] as the 'apex of a constitutional crescendo',[3] by all means a possible basis for nothing less than 'easing the conflicting positions of the Court of Justice of the European Union and the constitutional courts of many Member States on the thorny issue of primacy of EU law'.[4] Identity is positively *blooming*.[5] Strictly speaking, however, the identity trend (or - as some might say - hype) extends far beyond EU law. In the fields of constitutional law and legal and political philosophy, debates have arisen on the emergence and continuity of the identity of a constitution,[6] and social

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[1] See the contributions in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013). The contributors almost unanimously open their respective chapter with the assessment that identity is *en vogue.*

[2] Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2012) 13 Cambridge yearbook of European legal studies 195–218.

[3] Giuseppe Martinico, *The tangled Complexity of the EU Constitutional Process* (Routledge 2012) at 89.

[4] Armin von Bogdandy and Stephan Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, at 1417.

[5] In Roberto Toniatti's terms, see Roberto Toniatti, 'Sovereignty Lost, Constitutional Identity Regained' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) at 62.

[6] Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University

and political sciences have been dealing with identity – whether in terms of personal, cultural or collective identity or in terms of national consciousness or allegiance – for quite some years.

In 2000, Lutz Niethammer put the spotlight on 'the secret origins of an uncanny boom'.[7] The phenomenon he refers to is none other than the identity boom. Although he focuses his analysis on collective identity, he dedicates a first chapter to the notion of identity, warning that despite – or maybe precisely *due to* – its recent popularity, we should always bear in mind that we might be in the presence of a 'Plastikwort'. A Plastikwort is a term coined by philologist Uwe Pörksen in the 1980s, when analysing media and expert language.[8] By *plastic words* he referred to a set of terms, classified semantically as 'connotative stereotypes', which meant both everything and nothing at all, and which sounded scientific while pushing towards their realisation. Niethammer points out that the term 'identity' made it to the top of Pörksen's list of plastic words together with notions such as 'development', 'communication' or 'energy'.[9] Again, this concern of facing a void concept has quite recently been voiced by Millet[10] when

Press 2012); Michel Rosenfeld, 'The identity of the constitutional subject' (1995) 16 Cardozo Law Review 1049–1109.

[7] Lutz Niethammer, *Kollektive Identität. Heimlichen Quellen einer unheimliche Konjunktur* (Rowohlt Taschenbuch Verlag GmbH 2000).

[8] Uwe Pörksen, *Plastikwörter* (7th edn, Klett-Cotta 2011). for the translation into English see Uwe Pörksen, *Plastic words: the tyranny of a modular language* (Jutta Mason and David Cayley trs, Pennsylvania State University Press 1995).

[9] Niethammer, *Kollektive Identität. Heimlichen Quellen einer unheimliche Konjunktur* at 33.

[10] François-Xavier Millet, 'From Sovereignty to Constitutional Identity An Anthropological Inquiry in the Birth and Evolution of Legal Narratives,' 2012, unpublished paper presented at the EUI Workshop on Comparative Constitutional Cultures.

relating 'identity' to Alf Rosses' *tû-tû* pronouncements.[11] A review of recent essays on the subject fuels these suspicions: *Identities* are potentially unhappy,[12] embarrassing,[13] complicated,[14] or even murderous.[15]

Moreover, references to national or constitutional identity in academic texts have over the last decades increased significantly[16] - one could even say

[11] In order to demonstrate that the concept of right (despite being an empty word) may serve to establish relations between legal facts and consequences, Alf Ross uses a fictional state of mind of a South Pacific tribe, the *tû-tû*. He characterises *tû-tû* by '*not being a real thing; […] nothing at all, merely a word, an empty word devoid of all semantic reference – to be able to fulfil the two main functions of all language: to prescribe and to describe; or, to be more explicit, to express commands or rules, and to make assertions about facts*'; see Alf Ross, 'Tû-Tû' (1957) 70 Harvard Law Review 812, at 813. The analogy between *tû-tû* and *plastic words* is of course far from perfect, but the comparison interestingly illustrates that they share certain qualities, such as the functions of description and prescription embodied in an empty cliché, a *Worthülse*. In light of these similarities, it is hardly surprising that both *tû-tû* and *plastic words* have been employed to label 'identity'.

[12] Alain Finkielkraut, *L'identité malheureuse* (Stock 2013).

[13] Vincent Descombes, *Les embarras de l'identité* (Gallimard 2013).

[14] Alfred Grosser, *Les identités difficiles* (2nd edn, Les Presses de Sciences Po 2007).

[15] Amin Maalouf, *Les Identités Meurtrières* (Librairie generale française 2001).

[16] Armin von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' (2003) 63 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 156–288; Arnd Uhle, *Freiheitlicher Verfassungsstaat und kulturelle Identität* (Mohr Siebeck 2004); Meinhard Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' in Albrecht Randelzhofer and others (eds), *Gedächtnisschrift für Eberhard Grabitz* (C.H. Beck 1995); Karl Doehring, 'Die nationale 'Identität' der Mitgliedstaaten der Europäischen Union' in Ole Due and others (eds), *Festschrift für Ulrich Everling*, vol. 1 (Nomos 1995); Peter Lerche, 'Europäische Staatlichkeit und die Identität des Grundgesetzes' in Bernd Bender and others (eds), *Rechtsstaat zwischen Sozialgestaltung und Rechtsschutz. Festschrift Für Konrad Redeker* (CH. Beck 1993); Paul Kirchhof, 'Die Identität der Verfassung in ihren unabänderlichen Inhalten' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. I (C.F. Müller Juristischer Verlag

exponentially since the rephrasing of the national identity clause under EU law,[17] which inspired a series of doctoral theses to draw attention to this

1987); Anthony D. Smith, 'National identity and the idea of European unity' (1992) 68 International Affairs 55–76.

[17] *Inter alia*, Barbara Guastaferro, 'Coupling national identity with subsidiarity concerns in national parliaments' reasoned opinions' [2014] Maastricht Journal of European and Comparative Law 320–340; François-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014); Pierre Bon, 'La identidad nacional o constitucional, una nueva noción jurídica' (2014) 34 Revista española de derecho constitucional 167–188; Thomas Giegerich, Oskar Josef Gstrein, and Sebastian Zeitzmann (eds), *The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos 2014); Saiz Arnaiz and Alcoberro Llivina, *National Constitutional Identity and European Integration* ; Laurence Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Pédone 2011); Jean-Christophe Barbato and Jean-Denis Mouton (eds), *Vers la reconnaissance de droits fondamentaux aux états membres de l'Union Européenne?: réflexions à partir des notions d'identité et de solidarité* (Bruylant 2010); Silvia Morgades Gil, 'El principio del respeto de la identidad nacional y de las funciones esenciales de los estados miembros de la Unión Europea' in Andreu Olesti Rayo (ed), *La administración autonómica y el Tratado de Lisboa* (Tirant lo Blanch 2012); Sébastien Martin, 'L'identité de l'État dans l'Union européenne: entre 'identité nationale' et 'identité constitutionnelle'' (2012) 91 Revue française de droit constitutionnel 13–44; von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' ; Ingolf Pernice, 'Der Schutz nationaler Identität in der Europäischen Union' (2011) 136 Archiv des öffentlichen Rechts 185–221; Siniša Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7 Croatian Yearbook of European Law and Policy 11–41; Vlad Constantinesco, 'La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales. Convergence ou contradiction? Contrepoint ou hiérarchie?' in Chahira Boutayeb and others (eds), *L'Union européenne. Union de droit, union des droits. Mélanges en l'honneur du Professeur Philippe Manin* (Pedone 2010); Maria Rosaria Donnarumma, 'Intégration européenne et sauvegarde de l'identité nationale dans la jurisprudence de la Cour de justice et des Cours constitutionnelles' [2010] Revue française de droit constitutionnel 719–750; Édouard Dubout, ''Les règles ou principes inhérents à l'identité constitutionnelle de la France': une supra-constitutionnalité?' (2010) 83 Revue française de droit constitutionnel 451; Anne Levade, 'Identité constitutionnelle et exigence existentielle. Comment concilier l'inconciliable' in Chahira Boutayeb and others (eds), *L'Union européenne. Union de droit, union des droits. Mélanges en l'honneur du Professeur Philippe Manin* (Pedone

topic.[18] And yet, national constitutional identity is anything but confined to the academic world. Its incursions into politics –including European, national, and even subnational debates,[19] as well as into jurisprudence are increasingly frequent. In January 2014, for instance, in a letter addressed to Prime Minister David Cameron, no fewer than 95 British Conservative MPs demanded a national veto over future EU legislation precisely on the basis of the new national constitutional identity clause, Article 4(2) TEU. The letter finds its origins in a European Scrutiny's Report from December 2013, which calls for the introduction of such a mechanism as well as of a provision enabling the House of Commons to disapply – nothing less than

2010); Jean-Denis Mouton, 'Réflexions sur la prise en considération de l'identité constitutionnelle des États membres de l'Union européenne' in Chahira Boutayeb and others (eds), *L'Union européenne. Union de droit, union des droits. Mélanges en l'honneur du Professeur Philippe Manin* (Pedone 2010); Michel Troper, 'Identité constitutionnelle' in Bertrand Mathieu (ed), *1958-2008 Cinquantième anniversaire de la Constitution française* (Dalloz 2008); Thomas Oppermann, 'Nationale Identität und supranationale Homogenität' in Astrid Epiney and others (eds), *Die Herausforderung von Grenzen: Festschrift für Roland Bieber* (Nomos 2007).

[18] Elke Cloots, 'National Identity and the European Court of Justice' (Katholieke Universiteit Leuve 2013); François-Xavier Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' (European University Institute- Université Paris I 2012); Fausto Vecchio, 'Primacía del derecho europeo y salvaguarda de las identidades constitucionales (Consecuencias asimétricas de la europeización de los contralímites)' (Universidad de Granada/Universidade de Lisboa 2012).

[19] Catalonia's strife for independence has recently put Article 4(2) TEU in the limelight. Spain's legal argument against a Catalan secession in the framework of the EU –backed by Commissioner Reding- was based on the respect the territorial integrity of its members embodied in Article 4(2) TEU. C.f. the letters exchanged between Commissioner Reding and Secretary of State Méndez de Vigo y Montojo of October 2012, available online at http://ep00.epimg.net/descargables/2012/10/30/a1688dfbca8854a8f4744bc6b58f1c15.pdf (last checked 5 February 2014). See also the treatment by the Spanish newspaper El País: Carlos E. Cué and Luis Doncel, 'La Comisión Europea asume las tesis de Rajoy sobre una Cataluña fuera de la UE,' October 30, 2012.

– the existing acquis communautaire.[20] This outcry by the British right wing, traditionally known for its euro-scepticism, is only one of a series of recent critiques directed primarily against the EU's incursion into criminal law, the application of European Fundamental Rights in the UK,[21] and the effectiveness of the British opt-out from the Social Charter.[22] That these subjects trigger protective reflexes is anything but surprising, since fundamental rights and criminal law are traditionally located at the heart of state sovereignty.[23] And Article 4(2) TEU – the Union's duty to respect its

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[20] The European Scrutiny Committee refers to Damian Chalmers proposal of *a form of unilateral red card for national parliaments* when these take the view that their national identity is at stake (see Damian Chalmers, 'Democratic Self-Government in Europe. Domestic Solutions to the EU Legitimacy Crisis,' 2013), House of Common European Scrutiny Committee, Reforming the European Scrutiny System in the House of Commons, Twenty–fourth Report of Session 2013–14, Volume I: Report, together with formal minutes, at 57. See also examination of witness Professor Damian Chalmers contained in House of Common European Scrutiny Committee, Reforming the European Scrutiny System in the House of Commons, Twenty–fourth Report of Session 2013–14, Volume II: Oral evidence, especially at 152-154.

[21] Recently, the House of Commons European Scrutiny Committee prepared a report on 'the legal applicability of the rights, freedoms and principles of the EU Charter of Fundamental Rights in the UK, in the light of the case law of the Court of Justice of the EU and of UK courts, and of Protocol (No. 30) to the EU Treaties'. C.f. http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/inquiries/parliament-2010/the-application-of-the-eu-charter-of-fundamental-rights-in-the-uk/ (last checked 14 November 2014).

[22] Which, although never ratified by the UK, nevertheless became binding on them due to its incorporation by Article 136 TEC (Amsterdam Treaty revision). Article 136 TEC – together with the remaining Title XI provisions on social policy – had put an end to the British social opt-out from the Maastricht Treaty.

[23] Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, 'Introduction Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).The intersection of Fundamental rights protection and criminal law with Article 4(2) TEU have been explored by Aida Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter' in

Member States' national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government – appears – at least in the eyes of some– to entitle the Member States to protect such elements against the allegedly adverse effects of the European integration process. The present study is dedicated to the contextualisation and the scope of national identity protection under EU law. It will deal exclusively with the identity of the Member States of the European Union.

1. The current doctrinal debate on the 'national constitutional identity clause' enshrined in Article 4(2) TEU

As mentioned in this brief introduction, Article 4(2) TEU is commonly referred to as the 'constitutional identity clause' since it enshrines the Union's duty to respect its Member States' national *identities* inherent in their fundamental political and *constitutional* structures. Over the last decade, and as alluded to above, the notion 'constitutional identity' has acquired prominence in the case law of both the Court of Justice of the European Union and certain Member State constitutional courts.[24] Following Millet's account, we may speak of the emergence of a narrative of 'constitutional identity', which migrated from the European level, where it bore relation to the construction of a common European identity, to the national level where Member State constitutional courts used the notion 'in

Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) and Maribel González Pascual, 'Criminal Law as an Essential Function of the State: Last Line of Resistance?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

[24] Pedro Cruz Villalón, 'La identidad constitucional de los Estados miembros: dos relatos europeos' (2013) 17 Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid 501, at 502.

order to set a new limit to the action of the European institutions, in other words, a constitutional reservation that may partially overlap with the previously defined reservations such as sovereignty, ultra vires, or fundamental rights.'[25]

The trigger prompting certain national constitutional courts[26] to pick up this notion was the introduction into EU primary law (first though the failed Treaty establishing a Constitution for Europe and then in the Lisbon Treaty) of an explicit reference linking the Member States' national identities to their constitutional structures.

This dual reception of the notion of 'constitutional identity' had the consequence that the notion also acquired two quite different functions. In this vein, Pedro Cruz Villalón distinguishes the version of the Member States' constitutional courts, where 'constitutional identity' is afforded a capital 'i', from the version of the Court of Justice in which 'constitutional identity is written with a small 'i'.[27] While the Member States' constitutional courts employed 'identity' in an absolute manner, designating core constitutional values and preserving those against the EU integration process, the Court of Justice used the notion of 'identity' in a relative manner, conceiving the Member States' identities as interests that may compete with a plurality of categories and, in particular, conform

[25] Millet, 'The Respect for National Constitutional Identity in the European Legal Space' at 259 et seq.

[26] As Millet points out, the French, German and Polish constitutional courts were pioneers in this sense, Millet, 'The Respect for National Constitutional Identity in the European Legal Space' 259.

[27] Cruz Villalón, 'La identidad constitucional de los Estados miembros: dos relatos europeos' at 507, 510.

themselves to the proportionality principle.[28] In Millet's words, the Court of Justice makes the Member States' identities look like an 'unsophisticated second order reason to restrict fundamental market freedoms'.[29]

So from the very outset, it is apparent that national constitutional courts and the Court of Justice of the European Union have espoused different, even opposing views, on 'constitutional identity', a circumstance that may lead to a conflict – as the preliminary reference by the German Federal Constitutional Court concerning the so-called Outright Monetary Transactions (OMT) programme foreshadows.[30]

While there is general agreement in academia on the existence of this divergence between national constitutional courts and the Court of Justice on the functions of a concept called 'constitutional identity', there is none when it comes to the functions and scope of Article 4(2) TEU. While a number of commentators[31] see in Article 4(2) TEU the opportunity for

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[28] Cruz Villalón, 'La identidad constitucional de los Estados miembros: dos relatos europeos' at 514.

[29] Millet, 'The Respect for National Constitutional Identity in the European Legal Space' at 262.

[30] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014).

[31] *Inter alia*, Mattias Kumm and Víctor Ferreres Comella, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union' (2005) 3 International Journal of Constitutional Law 473, at 491; Leonard F. M. Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 Utrecht Law Review 36, at 47; von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1452; Denis Preshova, 'Battleground or Meeting Point? Respect for National Identities in the European Union - Article 4(2) of the Treaty on European Union' (2012) 4 Croatian Yearbook of European Law and Policy 267, at 298; Maja Walter, 'Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und

qualifying or even *overcoming absolute primacy*[32] and accordingly an authorisation for setting aside EU law on certain national constitutional grounds,[33] there are more recent positions that move away from the exceptionalism of constitutional conflicts and advocate either a 'broader and 'EU law dogma-friendly' use of […] Article 4(2) TEU'[34] or to shape the content of Article 4(2) TEU through negotiations between national and European actors.[35] According to the latter position, Article 4(2) TEU should not be interpreted as a treaty-based authorisation to invoke national constitutional identities against the supremacy of EU law.[36] Rather it should be used as a 'horizontal clause designed to bolster an interpretation of existing EU law doctrines and principles',[37] a use that would, in Guastaferro's view, be more favourable to the 'safeguarding of Member

französischer Perspektive' (2012) 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 177, at 192.

[32] von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1418.

[33] Albeit on the (ill-fated) predecessor of Article 4(2) TEU, see Kumm and Ferreres Comella, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union' at 491.

[34] Barbara Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 Yearbook of European Law 263, at 316.

[35] Monica Claes, 'National Identity: Trump Card or up for Negotiation' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) at 138.

[36] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 316.

[37] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 316.

States' discretion, regulatory autonomy, constitutional and cultural diversity.'[38]

If we were to follow the interpretation of Article 4(2) TEU that amounts to a qualification of the primacy principle, the uniform application of EU law could be endangered. If we were instead to follow Guastaferro's interpretation, the danger is that national constitutional courts will maintain their own express rejections of an absolute application of primacy, which the Court of Justice can do little to control.[39] Claes's call for direct and open negotiations between the actors concerned has the disadvantage, as she herself admits, of remaining unheard given the current practice of indirect communication between courts.[40]

Besides being divided on the functions of Article 4(2) TEU, academia also disagrees on the scope of the provision. Admittedly, both questions are related: While taking the view that Article 4(2) TEU contains the authorisation to overcome primacy presupposes being rather fastidious as to what kind of national provisions should be given the privilege to 'trump' EU law if one wishes to minimise the impact on the uniform application of EU law, adopting the opposing view permits us to be 'more lenient' with what provisions are to be covered by the Article 4(2) TEU. In this sense and based on the wording of the provision and the scheme of the TEU, von Bogdandy and Schill limit such scope to 'elements somehow enshrined in national constitutions or in domestic constitutional processes' excluding

[38] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 316 et seq.

[39] Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 4 Yearbook of European Law 1, at 37.

[40] Claes, 'National Identity: Trump Card or up for Negotiation' at 138 et seq.

elements of cultural identity.[41] Other commentators such as Besselink come to the opposite conclusion and, referring to a diverging interpretation of the scheme of the Treaty, advocate including cultural identity.[42]

Furthermore, the elements that in von Bogdandy's and Schill's view should be covered by Article 4(2) TEU should not include 'every particularity' but only fundamental aspects. They propose measuring the fundamental nature of an aspect protected by a national constitutional text by the depth of its constitutional entrenchment.[43]

The only agreement in relation to the scope of Article 4(2) TEU is that for national constitutional provisions to be considered 'eligible' for being covered by the 'national identity clause', such provisions are themselves to be subjected to limits. For Millet, they need to remain within the boundaries of constitutionalism, i.e. only *constitutional* 'constitutional identity' is admissible under Article 4(2) TEU.[44] Similarly, von Bogdandy and Schill insist that '[t]he protection of national identity […] cannot be understood as an exemption from complying with the basic substantive principles of

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[41] von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1430.

[42] Besselink, 'National and constitutional identity before and after Lisbon' at 44. Also favouring such inclusion, Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 317.

[43] von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' 1431 et seq. For a similar approach see Constance Grewe, 'Methods of Identification of National Constitutional Identity' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

[44] Millet, 'The Respect for National Constitutional Identity in the European Legal Space' at 264.

EU constitutional law', which would set the values enshrined in Article 2 TEU as such limit.[45]

Against this background of interpretative discrepancies, it appears highly necessary to provide the judicial interpreters of Article 4(2) TEU with some guidance on the scope and functions of the 'constitutional identity clause'. This task will be the central purpose of my work and will result from an exercise of contextualisation of the 'national identity clause' both throughout treaty revisions and among other relevant treaty provisions.

2. Some semantic and conceptual clarifications

Prior to outlining the scope and objectives and indeed the methodology and structure of the present study, the brief introduction into the realm of national and constitutional identity if anything demonstrates the need for semantic and conceptual clarification. First of all, the very notion of identity needs to be explored. Then, attention must be given to drawing a distinction, if indeed one exists at all, between the concepts of national identity and constitutional identity. Finally, for the purposes of the study, I introduce the notions of 'diversity' and 'differentiation'.

2.1 Identity

'Identity' from the Latin word 'idem' (= the same) is, as we have seen from the outset, a highly controversial term. Since – as Armin von Bogdandy postulates – its use is often crypto-normative, and it oscillates between the 'is' and the 'ought', between the descriptive and the normative, the term's

[45] von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1430.

recent popularity and the exponential growth in its recurrence in academic writings did anything but dispel the blur surrounding it.[46] This blur, however, is not limited to the academic use; the entry to 'identity' in the Cambridge Dictionary of Philosophy concludes with the following demur: 'But it seems likely that our everyday talk of identity has a richness and ambiguity that escapes formal characterization'.[47]

Determining the plain meaning of 'identity' is far from an easy task: In the Collins English dictionary, the word 'identity' is listed with nine different senses of which one corresponds to an informal use.[48] The remaining senses

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[46] von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 160.

[47] Robert Audi (ed), *The Cambridge Dictionary of Philosophy* (Cambridge University Press 1995) at 359.

[48] See the website http://www.collinsdictionary.com/dictionary/english/identity (last checked 7 November 2014). The current definition has not been modified since the dictionary's third edition published in 1991. The word 'identity' is thus defined as follows:

1. the state of having unique identifying characteristics held by no other person or thing
2. the individual characteristics by which a person or thing is recognized
3. Also called: numerical identity. the property of being one and the same individual⇒ his loss of memory did not affect his identity
4. Also called: qualitative identity. the state of being the same in nature, quality, etc⇒ they were linked by the identity of their tastes
5. the state of being the same as a person or thing described or claimed⇒ the identity of the stolen goods has not yet been established
6. identification of oneself as⇒ moving to London destroyed his Welsh identity
7. (logic)
    1. that relation that holds only between any entity and itself
    2. an assertion that that relation holds, as *Cicero is Tully*
8. (mathematics)
    1. an equation that is valid for all values of its variables, as in $(x – y)(x + y) = x^2 – y^2$. Often denoted by the symbol ≡

may be broadly divided into objectivist and subjectivist meanings, related to approaches based either in the realm of philosophy or in that of psychology and social sciences.

In philosophy, and specifically in the field of logic, 'identity' refers to the relationship each thing bears simply to itself.[49] Informally, the identity of *a* and *b* implies, and is implied by, their sharing all their properties.[50] Bunnin and Yu postulate that 'identity' has been interpreted in two ways: 'identity as the singleness over time and as sameness amid difference.'[51] While identity as singleness over time amounts to sameness amid change, identity as sameness amid diversity raises the question how to determine that one thing is itself and can be distinguished from other things.[52] Both understandings of identity are connected since distinguishing sameness over time necessarily implies distinguishing one thing from another.[53]

Armin von Bogdandy describes, as he calls it, this 'elder objectivist branch' of the meaning of 'identity' in very similar terms. The author circumscribes this objectivist conception as focusing on unity and comparison, thereby

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2. Also called: identity element. a member of a set that when operating on another member, *x,* produces that member *x:* the identity for multiplication of numbers is 1 since *x*.1 = 1. *x* = *x* […

9. (Australian & New Zealand, informal) a well-known person, esp in a specified locality; figure (esp in the phrase **an old identity**)

[49] Joachim Ritter and Karlfried Gründer, *Historisches Wörterbuch der Philosophie*, vol. 4 (Schwabe & Co 1976) at 144; Audi, *The Cambridge Dictionary of Philosophy* at 358. The distinction is to be made between 'identity proper', which is also called numerical identity, and 'exact similarity', which also receives the denomination of qualitative identity (Audi at 358; Ritter and Gründer at 145).

[50] Audi, *The Cambridge Dictionary of Philosophy* at 358.

[51] Nicholas Bunnin and Jiyuan Yu, *The Blackwell dictionary of Western philosophy* (Blackwell 2004) at 325.

[52] Bunnin and Yu, *The Blackwell dictionary of Western philosophy* at 325.

[53] Bunnin and Yu, *The Blackwell dictionary of Western philosophy* at 325.

implying the assertion of sameness and difference by focusing on the features of an object or person, which are perceived as essential from an external perspective.[54] This understanding of 'identity' would apply, for instance, to 'identity checks' performed by the police and underlie questions such as whether the Federal Republic was *identical* to the German *Reich* after World War II.[55]

This objectivist branch of meaning is commonly[56] contrasted with a more recent subjectivist branch of meaning, which is deemed responsible for 'identity' gaining momentum over the past decades.[57] This subjectivist conception of 'identity' finds its origins in Sigmund Freud's works,[58] which in turn were an inspiration for Erik H. Erikson's 'psychosocial identity'.[59]

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[54] von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 161; the author defended the same position a few years later jointly with Stephan Schill, see Armin von Bogdandy and Stephan Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 701, at 712; von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1428.

[55] von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 161. On the German Federal Constitutional Court's case law on this matter see *infra* Chapter 6.

[56] Ritter and Gründer introduced two separate entries for the word 'identity', the first one (*Identität*) is dedicated to the meaning that 'identity' acquires in the fields of logic and metaphysics whereas the second (*Identität, Ich-Identität*) deals with the meaning in psychology and social sciences. Ritter and Gründer, *Historisches Wörterbuch der Philosophie* at 144 –151.

[57] von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 162.

[58] Ritter and Gründer, *Historisches Wörterbuch der Philosophie* at 148; von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 162.

[59] Erikson refers to the reception of Freudian motives in social aspects of identity formation and expressly cites Freud's address to an 'inner identity'. Erik H. Erikson,

For Erikson, 'identity' is a 'multifaceted notion formed by the interrelations of individuals with their surroundings'.[60] In this sense, his 'psychosocial identity' combines subjective and objective, individual and social characteristics.[61] Erikson conceives 'identity' as implying a sense of sameness and continuity as an individual, but also adds that 'what underlies such a subjective sense, however, can be recognized by others, even when it is not especially conscious, or indeed self-conscious […]', i.e. an objective sense.[62]

In this sense, von Bogdandy and Schill note the subjectivist meaning of identity rather than on the assertion on sameness and difference from an external perspective '[…] focuses on inner attitudes. Identity here is a product of spiritual and mental processes that express an affiliation, a belonging to something. 'National identity' then refers to a collective mental process of citizens.'[63]

If the purpose of my study entails contextualising and giving substance to the so-called national identity clause as enshrined in Article 4(2) TEU, I will need to decide on which of the two dimensions of 'identity' – the objectivist or the subjectivist – I will base my analysis. Von Bogdandy and Schill have argued convincingly that Article 4(2) TEU refers two both

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'Identity, psychosocial' in David L. Sills (ed), *International Encyclopedia of the social sciences*, vol. 7 (Reprint. Macmillan and Free Press 1972) at 61.

[60] Gerda Reith, 'Identity' in Jonathan Michie (ed), *Reader's guide to the social sciences*, vol. 1 (Fitzroy Dearborn 2001) at 768.

[61] Sigmund Freud's influence comes into play in relation to the social aspects of identity formation. For a growing person's development of a 'mature psychosocial identity', Erikson presupposes the existence of a 'community of people whose traditional values become significant to the growing person.' Erikson, 'Identity, psychosocial' at 61.

[62] Erikson, 'Identity, psychosocial' at 61.

[63] von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1428 (footnotes omitted).

branches of meaning: While the objectivist tradition becomes visible from the listing of elements of identity mentioned in the subordinate clause of the first sentence of Article 4(2) TEU, Article 4(2) would at the same time require, for reasons of democratic legitimacy, the protection of mechanisms that involve the identification of a Member State's citizens with their State and thus lead to the subjectivist dimension of identity being encompassed.[64]

For my study I will adopt this understanding of Article 4(2) TEU and thus 'jump' between the subjectivist and objectivist meaning of 'identity'. The subjectivist dimension of 'identity' in Article 4(2) TEU makes it necessary to take into account the self-image that citizens of a specific Member State determine for themselves. For this purpose, that is in order to identify elements of belonging valued by citizens via their representatives, I will proceed – as will be explained in section 5 of this Introduction – to an analysis of specific parliamentary debates on the European integration process in various Member States.

What elements should be considered relevant when analysing the parliamentary debates in relation to the subjective dimension of identity? Arnd Uhle defines the scope of the term 'identity' as encompassing the features or rather the 'idea content' on the basis of which individuals, communities, groups, and even nations determine their self-concept.[65] If 'identity' refers to a community of persons, it includes those commonalities that shape the self-concept of that community as well as the differences regarding the self-image of other communities. Uhle argues that 'identity'

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[64] von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1428 et seq.

[65] Uhle, *Freiheitlicher Verfassungsstaat und kulturelle Identität* at 8.

therefore comprises both integration by way of self-location and exclusion by way of differentiation.[66]

I will seek to identity such features in the debates held in the parliaments of the Member States on specific issues of European integration. I will also attempt to do so based on positions adopted during a number of IGCs.

2.2 National and constitutional identity

So, once it is established what understanding of identity I will adopt for the purpose of this study, one further clarification needs to be made: the distinction between *national identity* and *constitutional identity*. They are not the same and yet interrelated. 'Constitutional identity' is, as Michel Rosenfeld states, an essentially contested concept as there is no agreement over what it means or refers to.[67] Indeed, a part from Rosenfeld's own conception of constitutional identity emerging in a context of a dialectical dynamic progress that is constantly weaving together both sameness and selfhood,[68] also that of Gary Jacobsohn, who understands constitutional identity as 'a dialogical or transactional operation in which all elements, including identity itself, are at least potentially modifiable through their engagement with one another.'[69] Michel Troper's understanding of (French) constitutional identity is based on the extraction of structural

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[66] Uhle, *Freiheitlicher Verfassungsstaat und kulturelle Identität* at 8. He further distinguishes between static and dynamic identity features, the former designating those features that, once acquired, are maintained over time and when recognised as commonalities are defended even in face of their loss of significance; and the latter meaning those features that are perpetually subject to review, development and change (at 10).

[67] Rosenfeld, 'Constitutional Identity' at 756.

[68] Rosenfeld, 'Constitutional Identity' at 758.

[69] Gary Jeffrey Jacobsohn, 'Constitutional identity' (2006) 68 The Review of Politics 361, at 395.

principles. According to Troper, such structural principles have run through, if not every French Constitution, then at least through the Republican ones, and are to be deemed 'constitutive' as they define the French constitution rather than the French nation or culture.[70]

National identity, on the other hand, is conceived as distinct but related to modern constitutional identity. It ought to be distinguished from nationalism, i.e. the political principle holding that the political and national unit should be congruent.[71] For Troper, national identity appears to be a concept overarching constitutional identity.[72] Conversely, Rosenfeld argues that one may conceive the identity of a certain nation without referring to its constitution, hence their distinctiveness, yet he stresses that both are related since both are constructed and originated by Benedict Anderson's 'imagined communities'.[73]

For the purpose of the present study, I will not adopt a specific understanding of constitutional identity. The provision of EU law I analyse sets out the Union's duty to respect the Member States' national identities inherent to their fundamental constitutional structures. Limiting myself to a determined understanding of 'constitutional identity' would signify limiting my field of study beyond the broader wording of the provision that is the object of the study. Bearing in mind that national and constitutional identity are conceptually different and that I will – putting aside the analysis of the German and Spanish constitutional courts in Chapter 6, where I indeed refer mostly to the concept of constitutional identity – deal with

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[70] Troper, 'Identité constitutionnelle' at 130.

[71] Ernest Gellner, *Nations and Nationalism* (Cornell University Press 2008) at 1.

[72] Troper, 'Identité constitutionnelle' at 123.

[73] Rosenfeld, 'Constitutional Identity' at 758. For Anderson's seminal work on nationalism, see Benedict Anderson, *Imagined Communities* (revised ed. Verso 2006).

elements of national identity and constitutional identity indistinctively, I will use the notions of national identity, constitutional identity and national constitutional identity interchangeably.[74]

2.3 Identity, diversity and differentiation

Finally, for the purpose of contextualising Article 4(2) TEU, and as I will detail in the following sections, I will not merely focus on the provision itself but rather attempt to address it in a broader context of treaty provisions and other instruments either directed at, or having the consequence of, accommodating diversity in the European integration process. This diversity may not always concern elements or features of the Member States that are in themselves 'identity relevant', but rather may just provide an instrument for Member States to maintain or enact divergent rules in a certain context. In this sense, I will limit my study to the starker and more clearly defined exemptions for particular Member States such as the opt-out and opt-in protocols, but will also attempt to include the less clearly defined and more general forms of differentiation[75] such as the subsidiarity principle for instance. I therefore adopt a broad approach towards phenomena of differentiation under EU law; I will not 'differentiate differentiation'[76] and thus not followone of the multiple approaches which

[74] This is also the approach followed by Alejandro Saiz Arnaiz, 'Identité nationale et droit de l'Union européenne dans la jurisprudence constitutionnelle espagnole' in Laurence Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Pédone 2011) at 108; Bon, 'La identidad nacional o constitucional, una nueva noción jurídica' at 168.

[75] For a study focusing on such forms, particularly the principles of proportionality and subsidiarity, see Gráinne de Búrca, 'Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity' in Bruno de Witte and others (eds), *The Many Faces of Differentiation in EU law*, 2001.

[76] de Búrca, 'Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity' at 132.

have proliferated over the past years in their attempt to label the way in which 'differentiation' is expressed in the context of the EU integration process.[77]

Lastly, since the present study does not exclusively focus on the preservation of elements of national identity which may result in or require of differentiation, but also looks at the preservation of elements such as language and culture of which the existence of differences among each other has a status and a quality on its own: diversity. This makes some considerations and clarifications on the notion 'diversity' necessary.

According to the Collins English dictionary, the word 'diversity' in its first sense means 'the state or quality of being different or varied'.[78] In the present study, I will use 'diversity' according to that sense. I will not pick sides on whether 'diversity' generally speaking is something good – whether intrinsically or for the attainment of some external objective.Nevertheless, I agree with Sacha Garben in that there are forms of diversity such as cultural diversity that should be protected from excessive centralisation,[79] and even democratic consideration would require this.[80]

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[77] For a classification of these labels, see Alexander C-G. Stubb, 'A Categorization of Differentiated Integration' (1996) 34 Journal of Common Market Studies 283–295.

[78] Definition taken from the dictionary's website: http://www.collinsdictionary.com/dictionary/english/identity (last checked 13 December 2014).

[79] Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' [2014] Oxford Journal of Legal Studies 1, at 1.

[80] Craig Calhoun, 'Nationalism and Civil Society: Democracy, Diversity and Self-determination' (1993) 8 International Sociology 387, at 406.

Furthermore, diversity (and particularly its preservation) in the context of the European integration process must be treated with caution. As Toggenburg points out, 'diversity' is in such context a Janus-headed notion. The provisions of EU law bolstering or protecting diversity may be read as pointing at a 'diversity' *between* the Member States and therefore reinforcing their national identities 'against' the EU or at a 'diversity' *within* the Member States and therefore reinforcing intra-state minorities 'against' the Member States.[81] I will attempt to bear this in mind throughout this study.

3. Scope and objectives

The primary objective of the present work is to contextualise the so-called national constitutional identity clause enshrined in current Article 4(2) TEU, which stipulates that:

> *'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.'*

A first reading of this provision leads to the following cursory insights. Firstly, although commonly referred to as the 'constitutional identity clause', Article 4(2) TEU does not explicitly mention the Member States' *constitutional identities*. Instead it calls on the Union to respect the Member States' *national identities, inherent in their fundamental structures,*

[81] Gabriel N. Toggenburg, 'The Debate on European Values and the Case of Cultural Diversity,' 2004, European Diversity and Autonomy Papers at 16 et seq.

political and constitutional, inclusive of regional and local self-government.

Secondly, Article 4(2) TEU does not limit itself to referring to the respect for national identities, but also refers to two further Union obligations, namely the duty to respect the equality of the Member States and the duty to respect their essential state functions. Within such list of Union duties, the respect for the national constitutional identity could either constitute a duty among other related, but yet distinct, Union duties. Alternatively, the respect for national constitutional identity could represent a superordinate notion conceptually encompassing the two other duties. The first option seems to be the appropriate variant. Article 4(2) TEU contains a 'three-dimensional right to respect',[82] the dimensions of equality of the Member States and of their essential state functions being intrinsically linked to the concept of – both external and internal – sovereignty. In the case of the 'essential state functions', the analysis of preparatory works demonstrates that 'they do not form part of the notion of 'national identities' but rather depict the very 'identity as a State' as opposed to the 'constitutional identity' protected under Article 4(2) sentence 1 TEU'.[83] The examples listed for the essential state functions, i.e. *ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security*, closely follow the wording of former Article 33 TEU (Nice version), which set out in relation to Title VI TEU on police and judicial cooperation in criminal matters, that it would *not affect the exercise of the responsibilities*

[82] Hermann-Josef Blanke, 'Article 4. [The Relations Between the EU and the Member States]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): a commentary* (Springer 2013) at 189.

[83] With further references, Blanke, 'Article 4. [The Relations Between the EU and the Member States]' at 228 (footnotes omitted).

incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.[84]

With the terms 'national constitutional identity', 'equality of the Member States' and 'essential state functions', Article 4(2) TEU thus encompasses three distinct – albeit related – concepts. Since sovereignty plays – as we will see in Part I – a major role in the construction of the identity narrative, it is not surprising that state attributes that are likely to be relevant for both State identity and State sovereignty have been united in one and the same treaty provision. Nevertheless, in the view of the above, this thematic closeness does not necessarily denote that all of these are elements or attributes of constitutional identity. For the purposes of my research, 'essential state functions' and 'equality among States' will be left aside[85] and only considered peripherally where they acquire special relevance as regards 'national constitutional identity', for instance in the framework of the post-sovereignty narrative. The analysis will be centred on Member States' *national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*.

4. Methodology and structure

To achieve the goal of affording meaning to the Member States' constitutional identities of Article 4(2) TEU, I will firstly proceed by analysing how and why 'identity' entered the political discourse in the context of European integration. I will firstly proceed by contextualising

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[84] Blanke, 'Article 4. [The Relations Between the EU and the Member States]' at 228.

[85] In particular, the provisions of the areas of freedom, security and justice including judicial and police cooperation will not be treated. On this, and more particularly, the relationship Article 4(2) TEU bears with criminal law, see González Pascual, 'Criminal Law as an Essential Function of the State: Last Line of Resistance?' .

the vague and ambiguous concept of national (constitutional identity) throughout a series of treaty-revision processes. An analysis of the Maastricht treaty revision in particular allows for national (constitutional) identity to be linked with two other vague and ambiguous concepts that – as argued elsewhere – [86] prove to be interconnected: sovereignty and subsidiarity.

Both subsidiarity and sovereignty have been linked in many different ways with 'identity'. Subsidiarity, for instance, has been considered of similar functionality as identity,[87] while sovereignty has been perceived as being congruent with it.[88] Untangling these concepts in order to determine their

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[86] This view has already been expressed in an article co-authored with Alejandro Saiz Arnaiz, in which we briefly sketch the narrative shift from sovereignty to identity and – *en passant* – refer to the similarities between the emergence of the identity concept and the debate involving the subsidiarity principle, c.f. Saiz Arnaiz and Alcoberro Llivina, 'Introduction Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty'.

[87] In EU law, subsidiarity was linked to the respect for national identities from the moment of their incorporation in the Maastricht Treaty. The respect for national identity has been tagged as one of the various an expressions of the subsidiarity principle contained in the Maastricht Treaty, Koen Lenaerts and Patrick van Ypersele, 'Le principe de subsidiarité et son contexte: étude de l'article 3 B du Traité CE' (1994) 1-2 Cahiers de Droit européen 3, at 11. More recently, Vandenbruwaene distinguished 'constitutional subsidiarity' under which would operate Article 4(2) TEU, which enshrines the Lisbon version of the national identity clause, and 'legislative subsidiarity'. See, Werner Vandenbruwaene, 'The Judicial Enforcement of Subsidiarity. The comparative quest for an appropriate standard' in Patricia Popelier and others (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013). See also the recent and very elaborate reflexions on the relationship between identity and subsidiarity under EU law, cf. Barbara Guastaferro, 'Reframing subsidiarity inquiry from an "EU Value-Added" to an "EU Nonencroachment" test?: Some Insights From National Parliaments Reasoned Opinion?,' 2013; eadem 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' .

[88] Mattias Wendel speaks of identity as a partial surrogate of sovereignty: Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht: Verfassungsrechtliche*

respective functionalities and scopes under EU law also entails analysing the circumstances in which these concepts entered into the field of EU integration, be it through positive law or political discourse. By reconstructing the relationship of these concepts in this field, I provide a basis for deducing what space might be left to identity.

My analysis starts with the preparatory works and negotiations to the Maastricht Treaty and concludes with the treaty revision, which incorporated the identity clause in its current wording, namely the Lisbon Treaty revision. Why start with the Maastricht Treaty? For two reasons: Firstly, it appears convenient since prior to Maastricht, the Treaties lacked a provision referring to the Member States' national identities. It is only with Maastricht that a provision setting out the Union's duty to respect the Member States' national identities, viz. Article F(1), found its way into the Treaties for the first time. Secondly, the year 1992 represents a defining moment in the history of European integration or constitutionalism. In his 1999 essay on European integration, Weiler identified the Maastricht treaty revision – or rather the public reaction to it – as the most important

Integrationsnormen auf Staats- und Unionsebene im Vergleich (Mohr Siebeck 2011) at 574. In a similar vein, Armin von Bogdandy notes that from the 1970s onwards, identity has become a key term when it comes to both the relationship with citizens as well as foreign politics, degrading sovereignty from an overarching, leading concept to collateral issues of international law. In his view, the Brunner Urteil on the Maastricht Treaty expresses concerns over the loss of German identity rather than German sovereignty, von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 164–165. But it is not only the relationship between identity and sovereignty that has been a matter of debate; the relationship between sovereignty and subsidiarity, especially in the European Union, has similarly come under scrutiny, see Paul D. Marquardt, 'Subsidiarity and Sovereignty in the European Union' (1994) 18 Fordham International Law Journal 616–640. Marquard also links subsidiarity to national identity by stating at 627 et seq that '[s]ubsidiarity thus made the transition from an obscure and awkwardly named principle of social theory to a front-line weapon of the battle in defense of national identity.'

constitutional event in the history of the European Union.[89] A transformative moment, triggering the first deep-rooted debate among a public 'more shocked to discover what was already in place than what was being proposed'.[90] Pursuing a different argument, Martinico postulated that 1992 marked a turning point in the narrative of European integration. In his words, it acquired a ''constructivist' flavour embodied by the attempt at making European integration an order (τ α ξ ι ς , constructed order) understood as the product of a political design (constructivism)'.[91] This effort finds its expressions in the different mechanisms that were introduced into EU law to highjack the *acquis communautaire*.[92] Secondly, Martinico unveils the introduction of these mechanisms as the Member States' reaction to the activism of the Court of Justice.[93] Both Weiler's and Martinico's analyses identifying the year 1992's pivotal character provide a valuable justification for starting my analysis with the Maastricht Treaty revision. Another powerful argument for doing so is to be found in Bruno de Witte's understanding of the Maastricht Treaty revision, which marks the starting point of what he coins 'a semi-permanent treaty revision process'.[94] Here, de Witte emphasises not only the tight sequence of treaty

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[89] Joseph H. H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) at 3–9.

[90] Weiler, *The Constitution of Europe* at 8.

[91] Martinico, *The tangled Complexity of the EU Constitutional Process* at 78.

[92] Here Martinico refers to Deirdre Curtin's seminal work, 'The constitutional structure of the Union: A Europe of bits and pieces' (1993) 30 Common Market Law Review 17–69; cited by Martinico, *The tangled Complexity of the EU Constitutional Process* at 78–79.

[93] Martinico, *The tangled Complexity of the EU Constitutional Process* at 79.

[94] Bruno de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process' in Paul Beaumont and others (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002).

revision processes, each of which was anticipated by the previous revision, but also the role of the IGC as the closest thing that comes to a constitutional conversation.[95] He refers to Neil Walker's distinction between judicial conversations and political conversations, whereby the former involve the Court of Justice and the national courts and the latter describe the IGC within the European institutions.[96] While rejecting the concept of judicial conversations, de Witte shows how much of a conversation has been underway in the *dense and highly regulated pattern of an IGC.*[97] This finding not only provides me with another powerful argument to justify starting my analysis with the Maastricht Treaty revision, it also points to its methodology.

Indeed, I do not attempt to limit myself methodologically to the exegesis of the pertinent European case law or the review of the 'constitutional' texts – the treaties – of the Union, but rather seek also to include interactions between political actors and their influence on the evolution of certain concepts in EU law. In this regard, I attempt to capture some of the *constitutional conversations* de Witte had in mind. My approach is still centred on the analysis of legal materials – primary and secondary EU law, as well as case law – but seeks not to omit the political matrix that produced them. However, my approach does not, strictly speaking, amount to one of 'law *and* politics': it is far more modest. In this sense it attempts, albeit

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[95] de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process' at 39 et seq.

[96] Neil Walker, 'Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000); quoted by de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process' at 40 .

[97] de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process' at 41–42.

centred on the analysis of legal materials, to take into account relationships between the adoption of legal materials and the actions of political actors, as well as the narratives of the political actors as regards identity, sovereignty, and subsidiarity.

This approach hopefully permits me to avoid falling into the trap of which Joseph Weiler fervently warns hearkening back to Martin Shapiro's words, i.e. the risk of fixation, as an early archaeologist would do, when assembling a collection of pottery, on their design oblivious to their context or living matrix.[98] I attempt to proceed in the manner of a *modern archaeologist*[99] and reconstruct what the 'pots' contained rather than limiting myself to deduce their usage by their design while hoping to *stumble on the occasional serendipitous discovery*.[100] Analysing the positions and influence European political actors had at the intersection of norms and norm-making at an early stage of the emergence and interconnection of the debated concepts, the adoption of the Maastricht Treaty, appears in line with this approach.

My analysis is structured in three parts. I dedicate Part I to providing explanations for the genesis of a new discourse revolving around 'identity' and 'diversity' in the context of European integration around the time of the Maastricht treaty revision. My analysis is twofold: A first chapter includes a review of the influences of political actors at the time of the emergence of the identity debate and is centred on the positions of the 'main players' in

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[98] Joseph H. H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) at 14, 15; Martin Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 Southern California Law Review 537, at 537 et seq.

[99] Shapiro, 'Comparative Law and Comparative Politics' at 539.

[100] Shapiro, 'Comparative Law and Comparative Politics' at 538.

EU integration:[101] The European Commission, the European Parliament, and, of course, the Member States (whether in an independent capacity or in their role as members of the Council). In a second chapter, I will review the debates over the ratification of the Maastricht Treaty in the Member States' parliaments.

In Part II of this study, I will proceed by contextualising the Union's duty to respect its Member States' national identities through the lenses of the drafters of the different versions of current Article 4(2) TEU as well as exploring the provisions and instruments aimed at preserving diversity or national particularities as incorporated in the course of the various treaty revisions. This permits me to delimit certain areas that the treaty-makers have deemed particularly important in terms of preserving national particularities and which could thus be established as identity-relevant. Marking out those areas can provide some interpretative guidance for those national or European operators who are required to apply Article 4(2) TEU, especially the Court of Justice.

In Part III, I deal with the courts' view on constitutional identity. On the one hand, I analyse the Member State constitutional courts' concept of constitutional identity, and on the other, I examine the post-Lisbon case law of the CJEU on Article 4(2) TEU.

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[101] Thus not referring – at least not systematically and in detail – to certain participants coined by Bruno de Witte as the hidden players or 'ghosts' at the IGC table, i.e. participants that constrained the national negotiators without formally being part of the negotiations: the opposition parties of most Member States, sub-state governments, domestic public opinion, certain constitutional courts, and finally, as a non-domestic hidden player, the European Court of Justice, de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process' at 48–49.

As mentioned above, my approach involves thoroughly analysing the drafting history of the 'national identity clause' alongside the various treaty revisions. Here, it is important to bear in mind what Liisberg critically assesses in his study of Article 53 of the Charter of Fundamental Rights of the European Union (CFREU): the debatable legal significance of preparatory works when it comes to treaty interpretation.[102] The truth is that in the field of public international law preparatory work is both the most commonly used and the most controversial of the different interpretative means.[103] The preparatory work to a treaty, which is commonly referred to in its French version as *travaux préparatoires*,[104] is generally greeted with scepticism as a means of treaty interpretation since it is usually regarded as incomplete or ambiguous[105] and thus as misleading or confusing.[106] '*Travaux préparatoires* consist of the written record of negotiation preceding the conclusion of a treaty' and encompass, among other documents, 'memoranda, minutes of conferences, and drafts of the treaty under negotiation'.[107] Caution and prudence as regards their use as a means

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[102] Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?,' 2001, Jean Monnet Working Paper at 19 et seq.

[103] Oliver Dörr, 'Article 32 Supplementary means of interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) para 2.

[104] Dörr, 'Article 32 Supplementary means of interpretation' 2.

[105] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) at 142.

[106] Martin Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' (1991) 14 Boston College International and Comparative Law Review 111, at 112; Dörr, 'Article 32 Supplementary means of interpretation' 2.

[107] Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' 112 (footnote omitted).

to treaty interpretation has been advised[108] since the agreements are often reached between heads of state during private corridor discussions and thus never appear in the negotiation record.[109] Furthermore, the preparatory works may include obsolete negotiation positions – views drafters may have advanced during the negotiations but abandoned before the adoption of the final treaty version – and may thus be misleading as to the intentions of the signatories.[110]

The Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT) as a primary contemporary source of law on the interpretation of treaties adopts a rather textualist approach to treaty interpretation[111] and admits preparatory work only as a supplementary means,[112] subsidiary to the recourse to the primary sources of interpretation listed in Article 31, i.e. the

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[108] Sinclair, *The Vienna Convention on the Law of Treaties* at 142.

[109] Sinclair, *The Vienna Convention on the Law of Treaties* at 142; Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' at 113.

[110] Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' at 112 et seq.

[111] Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' at 116 et seq. Also Oliver Dörr, 'Article 31 General rule of interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) para 3.

[112] Article 32 VCLT, headed 'Supplementary means of interpretation', reads as follows:

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

treaty, the agreements made in connection with the conclusion of the treaty, subsequent agreements and practices, and relevant rules of international law. [113]

Georges Abi-Saab describes the handling of the principles of interpretation through Articles 31 and 32 VCLT as being perceived – and followed – as a rigid sequence of autonomous steps, each of which ought to be addressed and exhausted before moving on to the next one.[114] The sequence entails starting with the 'hard core' of the operation – the *text* to be interpreted – before moving on, if need be, to *context*, which consists of the structure and other provisions of the instrument, and then to the *object and purpose* of

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[113] Article 31 VCLT: 'General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.'

[114] Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation' in Malgosia Fitzmaurice and others (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Brill 2010) at 104.

the instrument insofar as these can be fathomed from its provisions.[115] And only if these steps of *internal inference* have failed to clarify the point at issue, could the interpreter resort to *external inference*, i.e. subsequent practices and, lastly, preparatory works.[116]

This logic also implies a certain hierarchy between *travaux préparatoires* and the remaining elements of treaty interpretation referred to by the VCLT; an implication, which in turn has led to the prevailing view among commentators that the VCLT contains a presumption against preparatory works or is even *hostile* to them.[117]

Yet, in a very recent study, Mortenson has very convincingly rebutted this interpretation of the VCLT entrenching a categorical prejudice against the use of preparatory works *precisely* based on the *travaux préparatoires* to the Convention. His analysis reveals that the drafters of the VCLT had not envisioned a rigid hierarchy of sources and were far less averse to the recourse to preparatory works as such, but rather tried to secure their place 'as a regular, central, and indeed crucial component of treaty interpretation'.[118]

If these very insights should encourage us to revisit our conventional understanding of the legal significance of preparatory works under public international law, there is all the more reason to do so in the case of EU law. Even though *travaux préparatoires* have previously played a very limited

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[115] Abi-Saab, 'The Appellate Body and Treaty Interpretation' at 104.

[116] Abi-Saab, 'The Appellate Body and Treaty Interpretation' at 105.

[117] With further references Julian Davis Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 The American Journal of International Law 780, at 782.

[118] Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' at 781, 820 et seq.

role in the case law of the European Court of Justice,[119] and the amendments and minutes of the discussions during the IGC are generally not made public, one must acknowledge that these traditional objections to giving weight to *preparatory works* are gradually being invalidated.

Firstly, as regards the lack of transparency surrounding the legislative history of EU law, the truth is that transparency in relation to the drafting of both primary and secondary law has increased over the last decades.[120] With respect to primary law, documents concerning treaty revisions have, ever since the Amsterdam Treaty, increasingly been made public. This trend towards openness and transparency found its apotheosis in the Convention method followed to draft the Charter of Fundamental Rights and the Draft Treaty establishing a Constitution for Europe.[121] In the case of the Lisbon Treaty revision, even though the Member States reverted to the classical IGC model, the agreed treaty text borrows heavily from the

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[119] Nial Fennelly, 'Legal Interpretation at the European Court of Justice Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal 656, at 666; Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' at 19 et seq, with further references to case law from the Court of Justice; for an analysis of the use of preparatory works by the International Court of Justice and the contradictions in its hermeneutic rhetoric, see Ris, 'Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties' .

[120] To that matter, Liisberg draws a distinction between *travaux préparatoires* to primary and secondary law, arguing that since the Amsterdam treaty revision, the Council's results of votes and explanations of votes as well as statements in minutes are to be made public whenever it acts in its legislative role. Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' at 19. on the Court's use of preparatory work including Commission proposals that had not yet been adopted or rejected, see Fennelly, 'Legal Interpretation at the European Court of Justice Legal Interpretation at the European Court of Justice' at 666 with further case-law references.

[121] Yet, both drafting processes have been criticised for their failure to provide the transparency sought after, see *infra* at n 589 and n 744, respectively.

Draft Treaty establishing a Constitution for Europe, its ill-fated predecessor. Thus, conclusions drawn from the analysis of the *travaux préparatoires* especially in the framework of the Convention may very well be applicable to the agreements reached in Lisbon. I take this into account by devoting an important part of the analysis of the identity clause's drafting history to reviewing the works of the Convention that elaborated the Draft Treaty in order to flesh out what kind of motivation underlay the clause's first major re-writing/reformulation.

Secondly, one might argue that the Court has already abandoned its reluctance to use preparatory works as a method of interpreting primary law. It has recently used such preparatory works when rendering a judgment in a case with highly political – and economical – implications for the whole Eurozone. Indeed, it was in the *Pringle* case that the Court, in following a dialectical approach intertwining grammatical and teleological interpretation, determined the meaning of the 'no bail-out clause' in current Article 125 TFEU. This teleological approach is anything but special since it constitutes the characteristic element in the Court's interpretative method.[122] It is the use of the preparatory works to the Maastricht Treaty revision leading to the incorporation of Article 104b TEC – the predecessor of the provision under scrutiny – that may be deemed remarkable. The Court's reasoning rests on the explanations to a draft treaty drawn up by the European Commission when it affirms that in order to have regard to the objective pursued by Article 125 TFEU

[122] Following Fenelly's account, however, the Court does not usually refer to that approach with the word 'teleological', but prefers considering 'the spirit, the general scheme and the wording' – language which, as the author insists, is very similar to the formulation used in *van Gend en Loos*. Fenelly adds that this formulation was later supplemented by 'the system and objectives of the Treaty' and, more recently, 'context'. See, Fennelly, 'Legal Interpretation at the European Court of Justice Legal Interpretation at the European Court of Justice' at 664 et seq.

> *'it must be recalled that the origin of the prohibition stated in Article 125 TFEU is to be found in Article 104b of the EC Treaty (which became Article 103 EC), which was inserted in the EC Treaty by the Treaty of Maastricht. It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, Bulletin of the European Communities, Supplement 2/91, pp. 24 and 54).'*[123]

The Court had therefore followed the Opinion of Advocate General Juliane Kokott arguing for the recourse to preparatory work as *supplementary guides for interpretation* in order to contrast the *findings on the basis of wording and scheme* of the provision under scrutiny with its *spirit and purpose*.[124] It is interesting that the Court did so omitting Kokott's considerations that the motives for the changes the draft article underwent during the IGC nevertheless remain conjectures.[125] The Court of Justice has therefore used preparatory work to the Maastricht treaty to clarify the scope

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[123] Judgment of the Court (Full Court) of 27 November 2012, Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and The Attorney General, *nyr*, at paras. 134 and 135.

[124] Opinion of Advocate General Juliane Kokott delivered on 26 October 2012 in Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and The Attorney General, at paras. 126 and 127.

[125] AG Kokott stated that '[i]n the course of negotiations between the Member States on the Maastricht Treaty the prohibition was extended to its present form, as it first appears in a proposal by the Netherlands Presidency of the Council. In particular, the addition of a prohibition on assuming liability for commitments is said to stem from a proposal by the German government. In any event however there are no publicly accessible sources for that proposal, its precise motives and in particular how it was understood within the Intergovernmental Conference of the Member States.' Opinion of AG Kokott delivered on 26 October 2012 in Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and The Attorney General, at para. 120 (footnotes omitted).

of a provision of the current TFEU in order to save the European Stability Mechanism. The Court's interpretative blend of text, background purpose and teleology has not remained unnoticed[126] – and indeed was rather welcomed – [127] by scholars.

Thus, bearing in mind the caveats that the use of preparatory works in treaty interpretation necessarily implies,[128] these two recent developments in EU law provide me with solid justification to draw upon *travaux préparatoires* in order to clarify the scope of Article 4(2) TEU.

Moreover, the benefits of an historical analysis focussed on the *travaux préparatoires* are twofold: Firstly, combing through the *constitutional conversations* of the IGC and the deliberations at the Convention(s) allows me to reconstruct what the framers of the treaties and the democratically elected representatives of the Member States' citizens sought to preserve. Secondly, if we take into account the flaws in the constitutional courts' democratic legitimacy, it appears interesting to flesh out the vision of the democratically elected representatives on these matters to then contrast it with the reasoned views of the *Hüter der Verfassung*.

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[126] Mattias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT reference' (2014) 10 European Constitutional Law Review 263, at 299; Martin Nettesheim, 'Europarechtskonformität des Europäischen Stabilitätsmechanismus' (2013) 66 Neue Juristische Wochenschrift 14, at 15 et seq.

[127] Paul Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 Maastricht Journal of European and Comparative Law 3, at 3 et seq. Not entirely convinced by the Court's reasoning, Nettesheim, 'Europarechtskonformität des Europäischen Stabilitätsmechanismus' at 15 et seq.

[128] Richard K. Gardiner, *Treaty interpretation* (paperback. Oxford University Press 2010) at 324

Part III is devoted to the courts' stances on constitutional identity. The case law of the constitutional courts of the Member States on identity represents a field that has already been extensively explored and documented by academia in recent years. The position of the German Federal Constitutional Court in particular has been the subject of numerous debates among scholars and practitioners of constitutional and EU law. Therefore, it seems appropriate to gather a selection of positions on national (constitutional) identity expressed by emblematic courts, since their voices have great impact on the EU integration process and their decisions (might) determine which subject-matters or fields they deem to be inalienable to their respective state. The same applies to another major player of EU integration, namely the Court of Justice of the European Union. Its stance on what functions and scope Article 4(2) TEU should be afforded will be also touched upon. In this case, I will proceed to an exegesis of its post-Lisbon rulings referring to Article 4(2) TEU, some of them already considered *leading cases on constitutional identity*.

PART I THE GENESIS OF A NEW DISCOURSE OF ‘IDENTITY’ AND ‘DIVERSITY’

Chapter 1 The European Players' Stances on Identity and Diversity prior to the Maastricht Revision

Identity, sovereignty and subsidiarity may all be considered 'emotive'[129] subjects. They imply or connote fundamental aspects of state survival in an ever more interconnected world in which each one of the aforementioned concepts plays a different, yet crucial, role.

As we have already seen, 'identity' has been qualified as a *Plastikwort*[130] or as an empty cliché (*Worthülse*). We are told that we have reached the Age of Identity[131] and yet are still running around in circles in our attempts to determine what meaning identity – whether national or constitutional – encompasses, even more so as a concept of EU law.

And if we move on from identity to subsidiarity, we face a concept that has been nearly omnipresent in the discourse on European integration over the past decades, starting with the Maastricht Treaty revision. This extensive recourse to subsidiarity has, furthermore, spilled over from the European Union sphere into the realms of the Council of Europe. In fact, the calls for the European Court of Human Rights (ECtHR) to pay due regard to the

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[129] Craig and De Búrca put it as follows with respect to subsidiarity: 'Subsidiarity has always been an emotive subject, ever since its introduction in the Maastricht Treaty', Paul Craig and Gráinne De Búrca, *EU law: text, cases, and materials* (Oxford University Press 2011) at 99.

[130] Pörksen, *Plastikwörter* .

[131] Gopal Balakrishnan, 'The Age of Identity?' (2000) 16 New Left Review 130–142.

principle of subsidiarity and to the doctrine of the margin of appreciation – yet another 'interrelated concept' –[132] had become louder and louder over the past years, coinciding with unprecedented criticism over the Court's alleged judicial activism.[133] Such calls finally found their reflection in the Brighton Declaration on the future of the ECtHR of April 2012[134] as well as in Protocol No. 15[135] to the European Convention on Human Rights (ECHR), which introduces an express reference to both subsidiarity and margin of appreciation in the Preamble of the Convention. For Robert Spano, these developments not only 'create a strong incentive for the ECtHR to develop a robust and coherent concept of subsidiarity', but they also support his claim that 'the next phase in the life of the Strasbourg Court might be defined as the *age of subsidiarity*, a phase that will be manifested

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[132] Spano describes the margin of appreciation doctrine as an interrelated concept to that of subsidiarity, Robert Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' [2014] Human Rights Law Review 1, at 4.

[133] Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' at 2; Michael O'Boyle, 'The Future of the European Court of Human Rights' (2011) 12 German Law Journal 1862, at 1862.

[134] In recital 12 point (a) the Conference '[w]elcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments'; High Level Conference on the Future of the European Court of Human Rights Brighton Declaration of 19 and 20 April 2012, available at http://hub.coe.int/20120419-brighton-declaration (last checked 27 August 2014).

[135] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms adopted by the Parliamentary Assembly of the Council of Europe on 24 June 2013 sets forth in its first article: 'At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,'.'

by the Court's engagement with empowering the Member States to truly 'bring rights home' [...]'.[136]

We have thus not only reached the age of identity but also that of subsidiarity. This trend, which affects both the European Union and the Council of Europe, may be read as increasing calls to preserve Member States' diversity – or perhaps sovereignty – and has found its way into the European integration narrative around the time of the Maastricht treaty revision. My work is therefore cut out for me: whether plastic words or fundamental concepts – the relationship between identity, sovereignty and subsidiarity needs to be untangled in order to adequately contextualise the national constitutional identity clause and to provide the bases for interpretative canons that go beyond the readings of Europeanised *contralimiti* or qualified primacy. To conclude this task, I attempt to carve out the concerns that led the different actors in EU integration to promote (or to refrain from promoting) the above mentioned concepts starting with the Maastricht Treaty revision, which witnessed the incorporation of the 'national identity clause' into the Treaties. But was national identity protection really absent from EU law up until then?

However, before directly moving on to the Maastricht revision, it appears necessary to address why and how 'identity' entered the discourse of European integration. Identity in terms of 'European identity' had already been accommodated in the 1970s,[137] but what about 'national identity'? It has been argued[138] that the prolific recourse to 'national identity' responded

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[136] Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity' at 5.

[137] See *infra* at n 212.

[138] See Saiz Arnaiz and Alcoberro Llivina, 'Introduction Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty' ; Millet, 'From Sovereignty to Constitutional Identity An Anthropological

to the decline of a discourse based on State sovereignty and thus permitted Member States to push an intergovernmentalist agenda while paying a lip-service to a Eurofederalist narrative.[139] This is, as we will see, partly a valid explanation for the emergence of an 'identity narrative'. But as I shall argue, this is so only in part; it does not provide an explanation for why Community institutions such as the European Commission and the European Parliament also increasingly incorporated the notions of diversity and identity into their narratives. In a recent study,[140] Michael Burgess untangled four strands of federalism whose impact on the narrative of European integration is especially meaningful for the emergence of the 'identity narrative'. These four strands of federalism are, as Burgess claims, 'the mainly political, corporatist identity which derives from both Roman Catholic social theory and Protestant reformism [which] begins with the German Calvinist intellectual, Johannes Althusius [as well as] the much later and very different secular anarchist-socialist intellectual […] most closely associated with the French philosopher, Pierre-Joseph Proudhon'[141] as well 'personalism – sometimes referred to as integral federalism – [which] first emerged in France during the 1930s'.[142] I will build on Burgess' findings, which I will detail in the next sections while also

Inquiry in the Birth and Evolution of Legal Narratives' ; Wendel, *Permeabilität im europäischen Verfassungsrecht: Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* at 574; von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 164–165.

[139] Ian Ward, 'The European Constitution and the Nation State. Review of 'The European Rescue of the Nation-State' by A. Milward' (1996) 16 Oxford Journal of Legal Studies 161, at 169.

[140] Michael Burgess, *Federalism and European Union: the building of Europe, 1950-2000* (Routledge 2000)

[141] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 10 (footnotes omitted).

[142] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 11.

resorting to social anthropologist Douglas R. Holmes' concept of '*surrogate discourse of power*'[143] as an analytical tool to frame the emergence of the identity narrative. For that purpose, I give a brief account of the positions these actors adopted on identity and diversity preservation before the formal opening of the IGCs.

1. The incorporation of a surrogate discourse of power

When gathering documentation on the positions taken by the different actors in European integration on the need to protect the national diversities of the Member States, initial findings indicate that all major European players assumed a stance on the *quid* of the question.[144] The selection of the actors whose positions I flesh out – European Parliament, Council, and Commission – is not intended to be indicative of the deepness of impact they had on the subsequent treaty revisions. In fact, as Moravcsik argues, in the power struggle that finally led to the enactment of the Single European Act (SEA), the European Parliament proved precisely that it was

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[143] Douglas R. Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* (Princeton University Press 2000).

[144] I present the positions of these actors – embodied *inter alia* in resolutions, communications – as if these emanated from one single person. This means, of course, oversimplifying complex decision-making processes in which singular, emblematic leaders may have been decisive. I attempt to bear this circumstance in mind and do justice to the important role such leaders have played in that context, especially when giving an account of the positions of European Parliament and Commission. These considerations do not, however, purport to establish links of causality between the interventions of skilful supranational leaders and the passing of treaty reforms, as Moravcsik convincingly argues for Delors' part in the swift approval of the SEA, Andrew Moravcsik, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community' (1991) 45 International Organization 46, at 46 et seq.

unable to exert significant pressure on the direction of the treaty revision.[145] But even though the Parliament may not have been able to assert its agenda in such way as to see its proposals for treaty amendments reflected in the SEA, it nevertheless contributed towards incorporating a federalist narrative attentive to national and regional diversities. This narrative is embedded into what social anthropologist Douglas R. Holmes terms 'surrogate discourses of power', i.e. discourses,

> *'which, though neither official doctrines nor policies of the EU, have nonetheless defined its organizational makeup and its technocratic practice, and most centrally, its wider societal premises'.*[146]

Of the two *surrogate discourses of power* identified by Holmes in his study – French social modernism and Catholic social doctrine –,[147] it is chiefly the latter that would serve as a surrogate discourse on federalism, and which thus permits me to contextualise the emergence of the identity narrative

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[145] In his 1991 seminal study Moravcsik rejected supranational institutionalism as a model explaining European integration. He did so, among other reasons, arguing that this model incorrectly stressed the role of EC institutions, particularly the Parliament. Moravcsik dissented by accounting for how, after the Fontainebleau European Council of 25 and 26 June 1984, 'government representatives, abetted by the Commission, deliberately excluded representatives of the Parliament from decisive forums', and how the Parliament's 'Draft Treaty Establishing European Union' was rejected from the outset and negotiations were started instead with a French government draft. The author concluded that '[f]rom that moment on, key decision makers ignored the maximalist agenda. […] The Parliament members' continuous protests against the emasculation of the draft treaty and their exclusion from the 'real participation' in the discussions were ignored.' Moravcsik, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community' at 45. While I share Moravcsik's assessment of the role of the European Parliament, I disagree with his downplay of the role of other institutions such as the Commission. Burgess provides powerful arguments in this regard; Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 180–181.

[146] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 25.

[147] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 25.

incorporated by key actors of European integration into their discourse. I will not, however, limit the surrogate discourse of power to the recourse to Catholic social doctrine by those European actors, but will extend it to the four strands of federalism identified by Burgess. I understand that choosing with the different strains of federalism a superordinate concept over that of Catholic social theory allows me to provide more compelling explanations for the motivations of actors such as Altiero Spinelli. Since, as we will see and Holmes himself admits at least as regards personalism[148] and Proudhonian federalism with respect to social Catholicism,[149] all four strands of federalism share elemental features in their perception or conception of *the world that is rather societal than state-based*.[150] Most importantly as regards an emerging discourse based on identity preservation in the arena of European integration, they all recognise the value of diversity.[151]

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[148] I use 'personalism' exclusively to designate the movement developed in France as a result of the neo-scholastic tradition by French philosophers and theologians Emmanuel Mounier, Étienne Gilson, and Jacques Maritain, who viewed God as an infinite person and contrast with us finite persons and who valued the autonomy of the person as supreme. As Audi and Bunnin and Yu point out under the entry 'personalism' in their respective dictionaries, there is prevalent use of the term 'personalism' designating a version of personal idealism from the late nineteenth century developed in the United States. Audi, *The Cambridge Dictionary of Philosophy* at 575; Bunnin and Yu, *The Blackwell dictionary of Western philosophy* 513.

[149] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* chap. 3.

[150] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 39.

[151] On Subsidiarity, and identity and diversity preservation, c.f. George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331, at 341, 342. Bermann highlights subsidiarity as a means to preserve (social and cultural) identity, *idem* at 341.

1.1 The four strands of federalism: from Althusius over Proudhon to embracing Personalism and the Catholic social doctrine

In his study on federalism and the building of Europe, Burgess illustrates how difficult it is to completely disengage theological from political federalism in the sixteenth and seventeenth centuries. He sets out the first 'fully developed, systematic articulation of modern federal political philosophy' in Johannes Althusius's *Politica Methodice Digesta* from 1603.[152] His conception of the polity as a compound political organisation was composed of both private and public associations, whereby the former comprised, among others, groups, families and voluntary corporations and the latter corresponded to territorial units ranging from the local community to the national state. This view was embedded in an essentially organic conception of society whose structures were delineated by the principles of corporatism and subsidiarity.[153]

In his work *Du Principe fédératif et de la nécessité de reconstituer le Parti de la Révolution* from 1863, Pierre-Joseph Proudhon's conception of the relationship between state and society proved to bear many similarities with that of Althusius. Both shared an organic view of a multi-layered society beginning with the individual and gradually encompassing families, groups, and larger local communities where power was to be divided and located as close as possible to the level of the problems to be solved.[154]

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[152] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 7.

[153] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 7.

[154] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 10; yet, as emphasised by Kinsky, '[p]ower should be everywhere, even at the centre.' Ferdinand Kinsky, 'Personalism and Federalism' (1979) 9 Publius 131, at 153.

It is, however, the understanding of human beings as both social and moral persons, as 'whole persons' whose autonomy and liberty were achieved not by isolation from, but rather through, interaction with other human beings, that provides a convincing explanation for why Personalism first emerged in France in the 1930s. The latter seeks, very much in line with the Proudhonian conception of the human being, to restore man as a 'whole person', closely in touch with society and himself.[155] In this vein, Personalism seeks to restore the dialectical tensions of man confronted with the world, his neighbour, society and destiny.[156] Personalists conceive of man as inserted in several communities, groups and associations, whose mutual relationships also consist of tensions and conflicts.[157] This pluralistic reality deserves respect and requires to be structured, which leads to federalism and its objective of balancing unity and diversity.[158] Again, the view of the world is rather societal than state-based, and one 'which makes for a peculiar brand of federalism and a peculiar kind of federalist'.[159]

Catholic social theory, which existed to defend both the spiritual and material interests of the church, emerged with the birth of industrial societies in the nineteenth century and was spelled out in a series of papal encyclicals, notably the 1891 *Rerum Novarum* and the 1931 *Quadragesimo*

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[155] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 10, 11, and 39.

[156] Kinsky, 'Personalism and Federalism' at 150.

[157] Kinsky, 'Personalism and Federalism' at 151.

[158] Kinsky, 'Personalism and Federalism' at 151.

[159] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 172.

Anno.[160] Although said encyclicals did not formally address federalism, they gave ecclesiastical authority to a peculiar organic conception of society, rooted in pluralism and subsidiarity.[161] Social Catholicism carries extraordinary weight in the history of European integration; the founding fathers Schumann, Adenauer and De Gasperi were 'exemplary Catholics'[162] and it was not before long that it became a driving force in European integration.[163] As regards the assumptions Catholic social doctrine makes in relation to the preservation of diversity, Holmes gives us the following account:

> *'The Catholic discourse is preoccupied with shifting patterns of interdependence encompassing virtually all groups in society. Its interventions are oriented toward sustaining dynamic bases of solidarity expressed in reciprocating ties of aid and stewardship. The peculiar power of Catholic social doctrine derives, however, as much from its activist outlook as its principled forbearance. The activist dimension of Catholic engagement with society is counterbalanced with a notable commitment to restraint. The autonomy and the 'active agency groups' are to be preserved and protected, thus requiring explicit limitations on governmental limitations on governmental intervention, particularly as exercised by the state. This endows the Catholic discourse with what appears a conservative dynamic that fundamentally distinguishes it from the interventionist premises of French social modernism. To read this Catholic* ***commitment to restraint*** *as conservative, however, is misleading because it may in fact constitute the* ***most radical elements*** *of Catholic political economy. Restraint operates in a*

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[160] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 11.

[161] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 11.

[162] Holmes also refers to the circumstance that the six foreign ministers who signed the ECSC were all Christian democrats, Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 205, n 7.

[163] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 47.

> *paradoxical way in this framework, since by preserving the autonomy of various groups Catholic political practice in effect* ***sustains diversity****. This commitment to pluralism in turn promotes ongoing societal differentiation and advancement of a 'common good'.*[164]

Holmes then concludes that

> *'[t]his approach also accounts for a deep suspicion within the Catholic movement of the unbridled operation of capitalist markets and, in the notable case of Emmanuel Mounier, misgivings about the influence of the liberal state. Both were understood to debase 'moral diversity' and 'spiritual autonomy' through the advance of pervasive materialism and insensate rationalism. The Catholic doctrine that has come to encompass this* ***broad-based commitment to diversity and restraint is known as the principle of subsidiarity****.'* [165]

Catholic social doctrine thus implies a certain restraint exercised by public power on the autonomy of certain groups which in turn leads in practice to the preservation of diversity – or national and subnational identities. This restraint is embodied by the application of the subsidiarity principle (thereby exhibiting certain ties with federalist movements) and, as we will see, runs through the discourse of the different European actors like a golden thread.

1.2 Spinelli, Giscard D'Estaing and Colombo: *crocodiles* in the European Parliament

In the 1980s, the European Parliament witnessed a core of senior politicians who, notwithstanding their apparent conventionalism, harboured

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[164] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 48.

[165] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 48.

'surprisingly subversive convictions',[166] and who, based on their own identification with European integration's historic mission, set the agenda for a federal Europe. Indeed, MEP Altiero Spinelli was among these venerable politicians who started to push this agenda in 1980[167] (after having contributed to radicalising members of the European Parliament against the Council as a result of a struggle with the Community budget[168]) through the foundation of the *Crocodile Club*, an informal cross-party group of MEPs named after the restaurant in which the members met.[169] One of the successes of this group was the creation of a full parliamentary committee entrusted with the task of drawing up a constitution to present to the Member States. It is this Committee on Institutional Affairs of heterogeneous composition that prepared, under the auspices of Spinelli, a

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[166] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 38 et seq.

[167] And even before then, as Jacques Delors highlights when referring to the 1975 Commission Report on European Union upon which Spinelli, then Commissioner, appears to have had major influence and which contains a first express reference to subsidiarity as a principle governing the division of competences between the Union and its Member States (Commission of the European Communities, Report on European Union, COM (75) 400 final, 25 June 1975, Bulletin of the European Communities, Supplement 5/75, at 10 et seq.); c.f. Jacques Delors, 'The Principle of Subsidiarity: Contribution to the Debate' (European Institute of Public Administration 1991) at 8; also acknowledging the role played by Spinelli in the Commission's initiative: Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 107–110 who claims that '[Spinelli's] influence and inspiration lay behind the Commission report' (at 107).

[168] John Pinder, 'Altiero Spinelli's European Federal Odyssey' (2007) 42 The International Spectator 571, at 579 et seq.

[169] Paolo Ponzano, 'The 'Spinelli Treaty' of February 1984: The Start of the Process of Constitutionalizing the EU' in Andrew Glencross and Alexandre H. Trechsel (eds), *EU Federalism and Constitutionalism: The Legacy of Altiero Spinelli* (Lexington Books 2010) at 5; Pinder, 'Altiero Spinelli's European Federal Odyssey' at 581; for a brief account of the first meetings, see also Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 140.

draft Constitution for a future European Union.[170] This draft was subsequently approved by the European Parliament in February 1984 as Resolution adopting the Draft Treaty establishing the European Union (the so-called Spinelli plan),[171] an ambitious, fully-fledged reform treaty. However ambitious it was, the Spinelli plan failed to live up to its drafter's expectations since, despite the insistence of members of the European Parliament on its national ratification, the Member States ultimately refrained from endorsing it.[172] Its contributions to European integration nevertheless extend far beyond this set-back: as well as the Spinelli draft leading to the adoption of the Single European Act,[173] it also planted – with the principle of subsidiarity – the seed of the Catholic social doctrine in the narrative of the European integration process.[174] And above all, the

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[170] Pinder, 'Altiero Spinelli's European Federal Odyssey' at 581 et seq.

[171] Resolution of 14 February 1984 on the draft Treaty establishing the European Union (OJ C 77, 19.3.1984, at 53, rapporteur: Altiero Spinelli, Doc. 1-1200/83).

[172] See *supra* at n 145.

[173] It similarly influenced the position of the European Parliament on the Maastricht Treaty, as evidenced by express references thereto in a number of working documents (e.g. Committee for Institutional Affairs, Second Working Document on the Draft Constitution for the European Union, rapporteur E. Colombo, PE 139.264,19 March 1990, at 4) and resolutions (e.g. Resolution of the European Parliament from 9 July 1990 on the subsidiarity principle, at 14). For a relatively recent, brief study on which of the innovative proposals of the Spinelli draft have been acknowledged in successive Treaties, c.f. Paolo Ponzano, 'The 'Spinelli' Treaty of February 1984' (2007) XX The Federalist Debate (available online at http://www.federalist-debate.org/index.php/component/k2/item/282-the-spinelli-treaty-of-february-1984, last checked 3 September 2014).

[174] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 54 et seq. As we will see, numerous resolutions of EC institutions would build upon the Spinelli draft as regards the subsidiarity principle. The European Parliament resolutions preceding the IGCs leading to Maastricht do so (see below at n 188), but also the Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union

Crocodile Club, which had brought the Draft Treaty into being, outlived its creature and would before long bare its teeth.

Starting to trace the emergence of a surrogate discourse based on identity and diversity preservation in the text of the Draft Treaty, it suffices to say that it is the Draft Treaty as a whole, including its preamble, which is indicative of such discourse. Indeed, while the Preamble to the TEEC only mentioned differences between (regions of) the Member States when alluding to their anxiousness 'to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions', i.e. differences of an economic nature,[175] the Preamble

(COM(90)600) where it is stated that '[t]his common-sense principle [subsidiarity] should be written into the Treaty, as suggested by Parliament in its draft Treaty on European Union.' (at 23).

[175] The narrative underlying the Preamble of the Rome Treaty is replete with references to harmonisation and unification, either positively by reference to unity and solidarity or negatively by reference to the abolition of differences:

'(…) RESOLVED to ensure the economic and social progress of their countries by common action to ***eliminate the barriers*** which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,

RECOGNISING that ***the removal of existing obstacles*** calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to ***strengthen the unity*** of their economies and to ensure ***their harmonious*** development by ***reducing the differences*** existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to ***the progressive abolition of restrictions*** on international trade,

INTENDING to confirm the ***solidarity which binds Europe and the overseas countries*** and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

to the Spinelli draft moved on to solemnly declare in its sixth recital that the Member States were '[d]etermined to increase solidarity between the peoples of Europe, while respecting their historical identity, their dignity and their freedom within the framework of freely accepted common institutions'. Comparing the conception of unity and diversity that both preambles express, one must acknowledge that the TEEC Preamble conceives diversity in economic terms and thus as something that needed to be evened out. This implies a predominance of the idea of unity, which has recently been underlined by Leonard Besselink when tracing back the narrative from 'Union to Diversity' throughout the Preambles of EU treaties and Charter.[176] By contrast, the Preamble of the Spinelli draft moves away from this strong accent on unity and on the elimination of differences between Member States to emphasise the need to preserve the existing diversity rooted in the European peoples' historical identity, very much in line with the preservation of diversity flowing from the commitment to restraint inherent to the Catholic social doctrine.

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon ***the other peoples of Europe who share their ideal to join in their efforts***, (…)' (emphasis added).

[176] Leonard F. M. Besselink, 'Does EU Law Recognise Legal Limits to Integration? Accommodating Diversity and its Limits' in Thomas Giegerich and others (eds), *The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos 2014) at 60. Conversely, Toggenburg strikes a different balance from the insistence on social and economic cohesion. He notes that, even though at first glance the Community's policy of economic and social cohesion could be looked at as a policy of economic homogenisation rather than cultural differentiation since it aims at the annulment of regional disparities, economic emancipation offers and strengthens possibilities to preserve regional identities. Accordingly, the reduction of differences between regions by means of economic emancipation bears the potential for more diversity, Gabriel N. Toggenburg, ''Unity in Diversity': Searching for the Regional Dimension in the Context of a Somewhat Foggy Constitutional Credo' in Roberto Toniatti and others (eds), *An Ever More Complex Union* (Nomos 2004) at 33.

Less than ten years later, the Preamble to the Maastricht Treaty would refer to the desire 'to deepen the solidarity between their peoples while respecting their history, their culture and their traditions', a clear-cut inspiration from the Preamble to the Spinelli draft, and thus a 'counter-balancing' that leads to a recalibration of the relation between unity and diversity.[177] One important observation has to be made, namely the reference to the 'peoples of Europe', which bears a different meaning than the reference to the 'Member States' later made by Article F of the Maastricht Treaty as well as by the Preamble to the Charter of Fundamental Rights. While the former relies on an idea of diversity that transcends the borders of the nation state and thus relates to integral federalism, the latter tends to confine the existence of diversity to the existing nation states.[178]

Apart from the reference in its preamble to the respect for the diversities of the peoples of Europe, the 1984 Draft Treaty establishing the European Union features a key principle 'which had been part and parcel of Catholic social doctrine for centuries and had permeated the post-war ranks of the Christian Democratic parties throughout Europe', viz. the principle of

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[177] Besselink, 'Does EU Law Recognise Legal Limits to Integration? Accommodating Diversity and its Limits' at 60. He attributes this political recalibration to the 'awareness of a new historical situation' i.e. the fall of the Wall. This may have been the case, but overlooks that the inspiration for this recital dates from 1984, a time where the end of the divided Europe was still science fiction.

[178] Some commentators have pointed to the manner in which the *Bundesverfassungsgericht* had begun, starting with its Maastricht judgment, to rephrase the 'peoples of Europe' into 'European nations' and 'peoples of Europe organised in States' which characterised themselves by a common tongue, spirit, etc., i.e. by a certain homogeneity, Rolf Grawert, 'Homogenität, Identität, Souveränität. Positionen jurisdiktioneller Begriffsdogmatik' (2012) 51 Der Staat 189, at 190 et seq. This – highly polemic – idea of homogeneity has been intrinsically connected with the concept of constitutional identity by representatives of the German *Staatslehre*, as will be discussed later on.

subsidiarity.[179] Its inclusion into the Draft appears to have been achieved *despite* Spinelli's indifference for the term itself. Indeed, as Burgess relates, British Conservative MEP Christopher Jackson claimed personal responsibility for the principle's incorporation in the Draft, and Spinelli only agreed to include it on the insistence of the Christian Democrats.[180] In this sense, the tenth recital of the Preamble, which spells out that *in accordance with the principle of subsidiarity* the common institutions would only be entrusted with those powers required to complete successfully the tasks they may carry out more satisfactorily than the Member States acting independently, also converted the Spinelli draft into the first EP resolution expressly referring to the subsidiarity principle as governing the delimitation of competences.[181] Article 12(2) develops the principle when constraining the Union to 'only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers'. Including the subsidiarity principle in these terms 'marked the first time that the Catholic nomenclature had been employed as a pivotal

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[179] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 143.

[180] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 143 and 230.

[181] As mentioned above the principle of subsidiarity was already referred to by the Commission in the 1975 Commission-report on European Union, see *supra* at n 167. Furthermore, the coeval Tindemans Report reflects, as Holmes argues based on a personal interview with the Leo Tindemans in 1991, an implicit use of 'subsidiarity'. C.f. European Union Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities, Supplement 1/76 of 29 December 1975; Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 51 et seq.

formula for conceptualising European federalism'.[182] The Single European Act would not entirely follow this lead and limit itself to include a subsidiarity criterion in Article 130r TEEC on the environment.

The two aforementioned expressions of the commitment to restraint inherent in social Catholicism – respect of historical and cultural identities of the peoples of Europe and the introduction of the subsidiarity principle as a general competence rule – would resurface during the preparations to the Maastricht Treaty. The reports drawn up by Emilio Colombo and Valéry Giscard d'Estaing on behalf of the Committee for Institutional Affairs in 1990 are particularly indicative of a vision of the European Union as a federal[183] polity based on the respect of diversity. Furthermore, these reports illustrate what has been described by one commentator as the greatest achievement of Altiero Spinelli, that is the 'engineering of a broad and enduring coalition committed to union and embracing virtually all political groups in the Parliament […] establish[ing] political union – within a federal structure mediated by subsidiarity – as the paramount agenda for the Parliament as a whole.'[184]

The Parliamentary Committee for Institutional Affairs, created under Spinelli's auspices and focused on theorising on constitutional issues within

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[182] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 54 citing Spinelli 1983, at 210. Holmes, however, fails to acknowledge that the 1975 Commission Report on European Union preceded the Spinelli draft in proposing in very similar terms the use of subsidiarity as the cornerstone to the delineation of the architecture of a future European Union, see *supra* at n 167.

[183] C.f. Recital 8 of the Preamble to the Draft presented by Colombo in his Second Interim Report on behalf of the Committee for Institutional Affairs on the constitutional basis of European Union, rapporteur E. Colombo, PE 144.344/def 12 November 1990.

[184] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 54.

the Parliament,[185] had charged MEP Emilio Colombo with producing a report on a draft Constitution for the European Union. Colombo's work flowed into the Parliament resolutions of 22 November 1990 on the intergovernmental conferences in the context of the European Parliament's strategy for a European Union[186] and of 12 December 1990 on the constitutional basis of a European Union (Parliament Draft Constitution)[187] appear strongly impregnated by the spirit of the Spinelli draft.[188] Indeed, the latter lays out in recital 7 of the Preamble to the draft Constitution it draws up – in almost identical terms as its 1984 predecessor – that 'the Union shall fulfil the aspiration of the democratic peoples of Europe to forge ever-closer links in awareness of their common destiny; it shall develop the solidarity that binds them, help preserve their historical identity, their freedom and their dignity, in the framework of freely

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[185] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 54.

[186] European Parliament resolution of 22 November 1990 on the intergovernmental conferences in the context of the European Parliament's strategy for European Union, Minutes of 22 November 1990, Part II, Item 6(a).

[187] Resolution of the European Parliament of 12 December 1990 on the constitutional basis of European Union OJ C 19, 28.1.1991, p. 65, Doc. A3-301/90.

[188] The Parliament explicitly holds in recital M(3) of the Resolution of 12 December 1990 (c.f. *supra* at n 187) that basis for the draft Constitution for the European Union would be the 1984 Spinelli Draft. Further examples of this inspiration are to be found in the various interim versions of the Colombo report: Committee for Institutional Affairs, Second Working Document on the Draft Constitution for the European Union, rapporteur E. Colombo, PE 139.264, 19 March 1990, includes an explicit reference to the Preamble and Article 12 of the 1984 Draft at II(c) on page 4 when referring to the 'constitutional principles' of the Union and to the fact that one of these should comprise a criterion for the allocation of competences respecting the internal structures of the Member States; Interim Report on behalf of the Committee for Institutional Affairs on the European Parliament's guidelines for a draft constitution for the European Union, rapporteur: Emilio Colombo, Doc. A3-165/90, 9 July 1990, II(c) p.4.

accepted common laws and institutions designed to achieve progress and peace'.[189]

Furthermore, when it comes to the preservation of diversity, the Parliament Draft Constitution sketches a Union committed to restraint when exercising the competences on educational, cultural, and scientific matters bestowed upon it. In this vein, these concurrent competences on educational, cultural, and scientific matters are exercisable 'in accordance with the principle of subsidiarity; moreover [the Union] shall comply with the principle of full respect for national, regional and local differences'.[190] This provision anticipates two identity-relevant accomplishments of the Maastricht Treaty. First of all, it puts an end to 'the formal political decision […] to separate the economic and the cultural spheres'[191] by conceding to the Union (non-exclusive) competences in the fields of culture and education. Secondly, since this substantive choice to expressly include culture and education in the sphere of European integration was likely to affect the cultural identity of the Member States, the exercise of Union competences in these fields was framed by the Union's duty to respect the principle of subsidiarity and national und subnational diversity.[192] This concern for the Union's respect

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[189] C.f. Recital 7 of the Draft presented by Colombo in his Second Interim Report on behalf of the Committee for Institutional Affairs on the constitutional basis of European Union, rapporteur E. Colombo, PE 144.344/def 12 November 1990.

[190] C.f. Article 62 of the Draft presented by Colombo in his Second Interim Report on behalf of the Committee for Institutional Affairs on the constitutional basis of European Union, rapporteur E. Colombo, PE 144.344/def 12 November 1990.

[191] This is how Bruno de Witte described the situation before the Maastricht revision. Bruno de Witte, 'The impact of European Community rules on linguistic policies of the Member States' in Florian Coulmas (ed), *A Language Policy for the European Community. Prospects and Quanderies* (Mouton de Gruyter 1991) at 164.

[192] The fear of jeopardising autonomy in cultural and educational matters by expanding Community competences to those areas has been voiced by Jacques Delors, who also

of national and regional identity in the fields of culture and education when exercising its competences would subsequently be addressed by the Maastricht treaty revision.[193]

Furthermore, the language of the provision does not leave much room for doubt as to the drafter's intention to impose a clear-cut obligation on the Union, since its respect of national or local differences when exercising competences in cultural, scientific or educational matters was qualified with the term 'full'. Strong words that do nothing but emphasise that the preservation of national or local diversity was considered primarily for the spheres of culture, research and education as well as expressly linked to the

identifies the *correct* use of subsidiarity as the remedy hereto, cf. Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 11.del

[193] More precisely by what would become Articles 126 and 128 TEC on education and culture, see *infra* at 154 et seq. It is true that the TEEC already contained references to education in its facet of vocational training. Article 128 TEEC gave the Council, acting on the proposal from the Commission, after consulting the Economic and Social Committee, 'the power to lay down general rules for implementing a common vocational training policy capable of contributing to the harmonious development both of national economies and of the common market.' Jo Shaw, 'Education and the Law in the European Community' (1992) 21 Journal of Law and Education 415, at 417 (quotations marks omitted). Shaw assesses how the Community's educational policy evolved from the intergovernmental to the supranational, as well as examines the impact of the European Court of Justice's case law on that evolution. Nevertheless, regardless of how 'extensive and purposive' the Court's interpretation of Article 128 TEEC appears to have been, this interpretation was unable to hide the 'purely secondary nature' of Community competence in the field of education; 'Education and the Law in the European Community' at 434, 442. She thus concludes that 'it is still true that where the Community takes the lead by legislating to bring about educational change, it imposes obligations of cooperation and not of action on the Member States. Vocational training policies remain national matters, as is reflected in their diversity.' Shaw, 'Education and the Law in the European Community' at 442. As we will see, although the Maastricht Treaty incorporated a concrete legal base not only for vocational training, but also in the fields of education and culture, Community action would be limited to the same supporting and supplementing role. Those matters remained within national confines.

subsidiarity principle. Guided by the Spinelli and Colombo drafts for a Constitution as endorsed by the European Parliament, concerns over the Member States' identities largely revolved around granting them leeway to preserve – wholly in line with the Catholic social doctrine –[194] their cultural diversity[195] and – in federal terminology –[196] their dignity.

Moving on from Colombo to Giscard d'Estaing and thus from the draft constitutions to the principle of subsidiarity, it suffices to say that although

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[194] Or with integral federalism, as argued by Kinsky, 'Personalism and Federalism' at 154.

[195] Caroline Brossat insists on the importance of the Maastricht Treaty's framers' choice to retain the plural 'cultures' instead of the singular 'culture'. This choice is in her eyes anything but innocent and hides a political agenda; Caroline Brossat, *La culture européenne: définitions et enjeux* (Bruylant 1999) at 2. In the same vein, Luuk Van Middelaar understands Article 128 of the Maastricht Treaty as an acknowledgment of the fact that there is no such thing as a single culture in the Europe since its wording avoids the expression 'European culture' and instead acknowledges the existence of national and regional cultures. Thus, while affirming distinct cultural identities, the Maastricht Treaty negates a single European culture and thus puts an end to the quest for a European identity based on cultural policies, a quest that had been fiercely advocated by the Commission and the Parliament, see Luuk van Middelaar, *Le passage à l'Europe: Histoire d'un commencement* (Gallimard 2012) at 355.

[196] C.f. Justice Kennedy quoting James Madison when delivering the opinion of the Court in Alden v. Maine 527 U.S. 706 (1999): 'The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.' The Federalist No. 39 (J. Madison). [...] The States thus retain 'a residuary and inviolable sovereignty.' The Federalist No. 39. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty. [...] The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.' Taken from Richard E Levy, 'Comparative Constitutional Law Federalism in the United States,' 2012, Trento University Spring Teaching Materials 2012 at 81 et seq.

EP resolutions[197] dedicated to the elaboration of the principle do not mention the respect or preservation of national or state differences as an objective of the subsidiarity principle, the report on subsidiarity drafted by Giscard d'Estaing on behalf the Committee for Institutional Affairs shows that concerns over respecting the Member States' 'state personality' certainly have played a role in the debate on that principle. In this vein, working documents and interim reports on the principle of subsidiarity – especially the explanatory memoranda thereto – hint at a conception of subsidiarity serving as a means to preserve the Member States' personality. When Giscard D'Estaing thus claims that the 'political Union rests on the principles of democracy and respect of the personality of the Member States',[198] he specifies that this respect stems from both European federalism and the TEEC treaty objectives. Yet he also admits that the guarantee of respect of Member States' diversity, their personality, their rights and interests, which he places at the core of the European project, implies the guarantee of respect for the allocation of competences between the Union and the Member States.[199]

Giscard D'Estaing's report is indicative of the increasing usage of subsidiarity in the context of European integration that had loomed over the

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[197] C.f. Resolution on the Principle of Subsidiarity of 21 November, 1990, 1990 O.J. (C 324) at B(1); see also European Parliament Committee on Institutional Affairs, Draft Report on the Principle of Subsidiarity, rapporteur V. Giscard D'Estaing, 12 September 1990, at B(1).

[198] Interim Report on the Principle of Subsidiarity, rapporteur V. Giscard D'Estaing, Eur. Parl. Doc. A3–163/90/B (4 July 1990), Introduction to the explanatory memorandum.

[199] And vice versa. See Interim Report on the Principle of Subsidiarity, rapporteur V. Giscard D'Estaing, Eur. Parl. Doc. A3–163/90/B (4 July 1990), Introduction to the explanatory memorandum and at para. III(1).

political discourse at least since the Spinelli plan.[200] This increasing recourse to a concept whose primary, negative implication is that a larger entity should not intervene in what a smaller one can do for itself[201] revealed in the eyes of some commentators[202] concerns over European integration jeopardising the Member States' autonomy through the arrogation of competences.[203] This threat led Giscard D'Estaing to consider the incorporation into the future treaty of a non-exhaustive list of competences that would remain with the Member States.[204]

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[200] See *supra* at n 182.

[201] Ken Endo, 'The Art of Retreat: A Use of Subsidiarity by Jacques Delors 1992-93' (1998) 48 Hokkaido Law Review 394, at 394.

[202] Burgess argues that the principle constituted an answer to those critics who feared that the Union was to become a centralised leviathan and that it gradually surfaced in the public mind as a principle that is relevant to the limits rather than the possibilities of European integration, see Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 144 and 224. The allocation of competences between the EU and its Member States – especially when perceived as a 'competence creep' towards the EU – has remained a major source of concern. 'Subsidiarity' resurfaces periodically in the competence debate as the last bulwark against the EU's presumably centralising force. Yet, Craig and de Búrca warn of understanding the 'competence problem' as a mere result of some unwanted arrogation of power by the EU inflicted on the Member States, but rather as 'the result of symbiotic interactions of actors at different levels' including the Member States and the European Parliament. Craig and De Búrca, *EU law: text, cases, and materials* at 74.

[203] Interim Report on the Principle of Subsidiarity, rapporteur V. Giscard D'Estaing, Eur. Parl. Doc. A3–163/90/B (4 July 1990), Introduction to the explanatory memorandum and para. I.

[204] Interim Report on the Principle of Subsidiarity, rapporteur V. Giscard D'Estaing, Eur. Parl. Doc. A3–163/90/B (4 July 1990), Introduction to the explanatory memorandum and at para. II(3). A solution to the dreaded competence-creeping that resurfaced during the Convention charged with the Drafting of the Treaty establishing a Constitution for Europe, see Chapter 5, section 2.1 Article I-5 CT: from national to constitutional identity

Giscard D'Estaing's narrative fits into the requirements of Catholic social doctrine. It also stems from federalism; the reference to it is explicit. Giscard conceives subsidiarity as a means to preserve the State as such, using expressions such as 'personality', 'rights and interests' – very much in line with the abundance of the expression 'dignity' in the Colombo report and the *rationale* underlying the Spinelli draft. Interestingly, he does not speak of preserving state 'sovereignty'. Even though 'identity', 'personality', 'sovereignty' or 'dignity' have been used as synonyms and therefore might at the time have been considered interchangeable, the truth is that a choice of words is never innocent, and may thus reveal hidden goals or agendas.[205]

Thus, before the holding of the IGCs that witnessed the maturation of Article F(1) TEU, an evolution in the narrative on the preservation of what makes a State *a* (certain) State – either fundamentally in terms of *Staatlichkeit* or relatively in terms of (state) singularities – had already emerged in the discourse amongst prominent EP members.[206] And interestingly, through the explanatory memoranda as well as through the resolutions on both the constitutional bases of the future Union and the inclusion of the principle of subsidiarity, the terms 'dignity', 'historical and cultural differences', 'personality' and 'state rights and interests' emerge as

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[205] Luuk van Middelaar beautifully reflects on the three words 'integration', 'cooperation' and 'construction – all three of them used to refer to Europe – and the different vision of Europe they convey. He analyses how all three are connected to three different types of narrative: he deems 'integration' to be somewhat linked to functionalist narrative on the 'Europe des Bureaux' led by experts in economics or political science, while 'cooperation' refers to the 'Europe des États' (a narrative owned by historians and experts in international relations) and 'construction' dominates the narrative of the 'Europe des Citoyens', *en vogue* amongst intellectuals, writers, and above all amongst lawyers. van Middelaar, *Le passage à l'Europe: Histoire d'un commencement* at 27 et seq.

[206] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 54.

a narrative that avoids the term 'sovereignty'.[207] This certainly does not imply that the defence of State sovereignty had ceased to play an important role in the context of European integration, as we will see in the following section.[208] While the sovereignty rhetoric did not fit in the discourse based on social Catholicism advocated as we have seen from a number of prominent EP members, the Euro-federalist rhetoric, by contrast, very much did. As we will see in the following section, this Euro-federalist narrative also had its supporters among a number of Member State government representatives, and their discourse embracing subsidiarity and diversity proved to be more than, as it has been argued, mere lip service to European ideology.[209]

1.3 Thatcher *versus* Santer: National and European identity at the Council

The year 1990 was a year of events with great geopolitical implications: German reunification and the beginning of the end of the USSR, only to cite the most emblematic ones. Europe took centre stage, both as actor and spectator, while these events shook up established Cold War power relations.[210]

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[207] See *supra* at n 138.

[208] Moravcsik, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community' at 49.

[209] This is the thesis defended by Ward, 'The European Constitution and the Nation State. Review of 'The European Rescue of the Nation-State' by A. Milward' at 169.

[210] In this sense it has been argued that the Maastricht Treaty essentially constituted a response by the EC and its Member States to German reunification and the end of Cold War and thus an 'exercise of high politics, with the primary motivations of the key players being broad considerations of national security'; Michael J. Baun, 'The Maastricht Treaty as High Politics: Germany, France, and European Integration' (1995)

In that year, the European Council held four meetings. While the first summit in Dublin in April 1990 had an extraordinary agenda addressing events that were on the verge of catalysing the rupture of the USSR, the remaining three 1990 Council meetings were held in order to convene IGCs on political and on economic and monetary union and were thus dedicated to the agenda those conferences were to follow.

Even though the conclusions of the extraordinary Council meeting held in Dublin on 28 April 1990[211] did not deal with the preservation of 'national identities', they are nevertheless of major relevance for another, supranational kind of identity. Indeed, rather than putting forward national singularities of the European nations – national identities –, the Conclusions open with a reference to the 'common heritage and culture' the Member States share with the peoples of Central and Eastern Europe. This reference to what could be called a common European identity[212] may be understood

110 Political Science Quarterly 605–624; for an overview on the different reasons given by scholars on why the Maastricht Treaty was adopted -e.g. the neo-functionalist approach- see Finn Laursen, 'The Treaty of Maastricht' in Erik Jones and others (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 130–132.

[211] Special Meeting of the European Council, Dublin, 28 April 1990, Bulletin of the European Communities, No. 4/1990, Presidency Conclusions.

[212] The quest for a European identity was launched in 1973 and culminated at the Copenhagen European Summit of 14 and 15 December 1973 ('Declaration on European Identity', Bulletin of the European Communities, No. 12/1973), where the Heads of State or Government of the nine Member States of the (then already enlarged) European Economic Community affirmed their determination to introduce the concept of European identity into their common foreign relations, a determination they would reiterate in the 1978 the Copenhagen European Council statement (Bulletin of the European Communities, No. 3/1978). What ultimately triggered the 'Declaration on European identity' is disputed. While Gfeller argues, drawing on a wide range of French and US archives, that this determination was mainly based on French elites' and foreign policy makers' efforts to position Europe as a significant other in its relationship with the United States (France's relationship with America thus acting as a catalyst in European identity creation), Niethammer points to the discovery 'European identity' in

as a far from subtle hint at the peoples of the Soviet Union to continue on their path of secession, since they were promised a new home in the bosom of the European family with whom they shared fundamental cultural aspects.[213]

While the existence of a common European identity as a commitment to standby the peoples of Eastern and Central Europe would be highlighted at every Council meeting during these tumultuous times, the following Dublin Council on 25 and 26 June shifted the focus from that common identity to the preservation of 'national identities'.

The June Dublin Council was held with a view to setting an agenda for the forthcoming Intergovernmental Conferences. With respect to the IGC on

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the dwindling cold war, and van Middelaar focuses on the 1973 accession of the United Kingdom. Cf. Aurélie Élisa Gfeller, 'Imagining European Identity: French Elites and the American Challenge in the Pompidou–Nixon Era' (2010) 19 Contemporary European History 133; Niethammer, *Kollektive Identität. Heimlichen Quellen einer unheimliche Konjunktur* at 23 et seq; van Middelaar, *Le passage à l'Europe: Histoire d'un commencement* at 349 et seq. What seems to be largely undisputed is that the construction of a European identity acquires a certain defensive twist. This result is rather unsurprising, since identity awareness, let alone identity construction, is considered to be far from neutral. Reflecting on the relationship between identity awareness and the feeling of being threatened, Sadurski denotes that '*[t]he reflection about our collective identity is not a neutral academic task. Just as for our* individual *identity we do not usually reflect upon it unless we feel threatened or wish to assert our distinctiveness from others, for* collective *identity we have practical reasons for such reflections.*' Wojciech Sadurski, 'European Constitutional Identity,' 2006, Legal Studies Research Paper at 20 et seq. In the same vein, Wilfried Loth, 'Europäische Identität in historischer Perspektive,' 2002 at 5 et seq. Loth suggests that the 'we-feeling', which as he states collective identity building entails, always includes a moment of dissociation from other groups which in turn fosters the homogenisation of one's own group. The resulting self-image of the group often, but not necessarily, implies negative judgments on other groups.

[213] At this Special Meeting of the European Council in Dublin, the Heads of State were acknowledging events that shortly preceded the Dublin Council: only a few weeks before, on 11 March 1990, Lithuania had become the first Soviet Republic to declare unilaterally its independence from the Union.

Political Union, as stated in the Conclusions,[214] the Member States' Foreign Ministers were charged with preparing said agenda. For this purpose, they had already been advised during the previous Dublin Council 'to carry out a detailed examination of the need for possible treaty changes and prepare proposals for the European Council'.[215] The results of these examinations, written contributions and suggestions were compiled and annexed to the Conclusions (Annex I) and were to serve as preparatory work, together with contributions from national governments and the Commission, in order to 'define the necessary framework for transforming relations as a whole among the Member States into a European Union invested with the necessary means of action'.[216]

That Annex I, under point 2(c), sets forth the Foreign Ministers' stances on what questions should be considered with regard to the general principles by which the future Union was to be governed. Interestingly, at that stage, there were merely two recorded preoccupations and they concerned both 'national identity' and subsidiarity:

> *- in the context of ensuring respect of national identies [sic] and fundamental institutions: how best to reflect what is not implied by Political Union,*

[214] Presidency Conclusions Dublin European Council, 25–26 June 1990, Bull. EC 6 - 1990, at Point I (3).

[215] Presidency Conclusions Dublin European Council, 25–26 June 1990, Bull. EC 6 - 1990; Annex I, Introduction.

[216] Presidency Conclusions Dublin European Council, 25–26 June 1990, Bull. EC 6 - 1990, Annex I, Introduction.

> *- in the context of the application of the principle of subsidiarity: how to define it in such a way as to guarantee its operational effectiveness*[217]

These two questions – how to articulate national identities and Political Union and how to guarantee the effectiveness of the subsidiarity principle – remained at the top of the pre-IGC agenda, as the conclusions of the Rome Council held on 27 and 28 October indicate. Indeed, the European Council, while confirming the intention to progressively transform the Community into a European Union by developing its political dimension, insisted that such European Union was to '*evolve with due regard being paid to national identities and to the principle of subsidiarity, which will allow a distinction to be made between matters which fall within the Union's jurisdiction and those which must remain within national jurisdiction*'.[218] In this sense, identity and subsidiarity were conceived – just as they had been successively by Spinelli and Colombo – as essential means to determine which competences were to be allocated to the Union and which were to remain with the Member States.[219]

Yet, less than two months later, when the Heads of Government gathered again in Rome, 'identity' seemed to have disappeared – at least at first glance – from the radar of European leaders, while subsidiarity was referenced as a principle whose importance was recognised not only when considering the extension of Union competence but also in the

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[217] Presidency Conclusions Dublin European Council, 25-26 June 1990, Bull. EC 6 - 1990, Annex I, Point II(c).

[218] Presidency Conclusions Rome European Council, 27-28 October 1990, Council Doc. SN 304/2/90, at point I(1).

[219] A function that would not be assigned to the national identity clause in Article F(1), but which would again be associated with the identity clause during the Convention on the future of Europe, see Chapter 5, section 2.1 Article I-5 CT: from national to constitutional identity

implementation of Union policies.[220] And still, even though the term 'identity' was not expressly mentioned in the Council Conclusions, references were made to the preservation of national particularities. Indeed, on the eve of the opening of the IGCs, the incorporation of policy areas into the Community sphere that *a priori* transcended the mere economic objectives assigned by the Treaty of Rome needed to be framed with visible red lines in order to let sleeping dogs lie. These red lines involved ensuring that national particularities in the cultural and social spheres would be shielded. In this vein, the concerns 'for safeguarding the diversity of the European heritage and promoting cultural exchanges and education' were addressed when dealing with the extension of the Community's competences.[221] It is at that same place where the European Council reiterates the importance of the subsidiarity principle. In addition to the cultural and educational fields, a second reference to the preservation of national singularities is made when discussing the social dimension and more precisely the implementation of the Social Charter. Here, the European Council insists on the 'need to respect the different customs and traditions of the Member States' in that area.[222] Thus, the fact that the

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[220] Presidency Conclusions of the European Council in Rome, 14-15 December 1990, Part I, Council Doc. SN 424/1/90.

[221] Presidency Conclusions of the European Council in Rome, 14-15 December 1990, Part I, Council Doc. SN 424/1/90, at point 4, p. 8. This is very much in line with the positions of several Member States. C.f., *inter alia*, the Dutch government's 1st memorandum 'Possible Steps Towards European Political Union' of May 1990. Reproduced in Richard Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* (Longman Group 1993) at 133. Also enlightening on this issue is the Memorandum of the Danish government of October 1990. Reproduced in Finn Laursen and Sophie Vanhoonacker (eds), *The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Community* (Martinus Nijhoff Publishers 1992) at 299.

[222] Presidency Conclusions of the European Council in Rome, 14-15 December 1990, Part I, Council Doc. SN 424/1/90, at 13. A decade later, the respect for national

explicit reference to the preservation of 'national identities' had not made the cut into the Rome Council conclusions does not mean that identity preservation had vanished from the European integration agenda. Quite the contrary, it had been embedded in the new narrative combining furthering European integration with the necessary restraint allowing for the preservation of diversity at national or subnational level.

Therefore, the Council's use of national identity preservation fits into the Catholic social discourse just as it occurred with the Parliament resolutions analysed in the preceding section. There is, however, also another finality of national identity preservation that has accompanied the above mentioned Council meetings. Other than towards sustaining diversity of different groups at diverse levels, the recourse to the idea of identity preservation has been employed to convey that state sovereignty and national interests would not be jeopardised by the ongoing integration process. The simultaneity and distinct ideological foundation of both identity preservation discourses are best exemplified when contrasting reflections made by two Council members, Jacques Santer and Margaret Thatcher, on European integration. I selected the views of the former expressed at the March 1991 Jacques Delors Colloquium on subsidiarity and the declarations of the latter at the press conferences on the occasion of the 1990 Council meetings. Although the circumstances surrounding both declarations are thus not strictly akin, they are close enough to permit us to appreciate the distinct rationales underlying each of them.

The British Prime Minister's discourse followed a persistent intergovernmentalist approach, one that emphasised voluntary cooperation between sovereign States and insisted on the preservation of national

practices in the field of social rights would lead to lively debates among the members of the Convention drafting the Charter of Fundamental Rights of the European Union, c.f. *infra* Chapter 4, section 2.2.2 Chanting the mantra of 'national laws or practices'.

identities.[223] Margaret Thatcher had already affirmed at a press conference following the Dublin I Council that 'the term 'political union' raised fears and anxieties among many people, that it would involve a loss of national identity and national institutions'.[224] On the occasion of the Dublin II Council, she sharpened this discourse by declaring the respect for national identities and institutions 'a concern'.[225] In her brief statement, she mentioned national identities no less than three times.[226] And first and foremost, she vaunted that the concern regarding the respect for national identities had been taken on board.[227] The preservation of national identity that Thatcher defends partly replaces the recourse to the concept of state sovereignty as a bulwark against the creation of a federal Europe.

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[223] Anne Rigaux, 'Présentation générale' in Vlad Constantinesco and others (eds), *Traité sur l'Union européenne (signé à Maastricht le 7 février 1992) Commentaire article par article* (Ed Economica 1995) at 7, 8.

[224] Margaret Thatcher, Press Conference after Dublin European Council on 28 April 1990, available at http://www.margaretthatcher.org/document/108074 (last checked on 7 November 2013).

[225] Margaret Thatcher, Press Conference after Dublin European Council on 26 June 1990, available at http://www.margaretthatcher.org/document/108132 (last checked on 7 November 2013).

[226] Margaret Thatcher, Press Conference after Dublin European Council on 26 June 1990, available at http://www.margaretthatcher.org/document/108132 (last checked on 7 November 2013). She is aware of the bad press that the invocation of 'national identity' entails. This is particularly reflected in her pointed remark on Germany's and France's national identity narrative, whose hypocrisy she criticises in the following terms: 'My hesitations on political union, not merely hesitations but expressed in one point after another which they have agreed with, are ones which have been upheld. And if I might say so, no-one is a greater example of national identity than Chancellor Kohl and President Mitterrand, no-one are better examples of the knowledge of their own national identity than both France and Germany.'

[227] Margaret Thatcher, Press Conference after Dublin European Council on 26 June 1990, available at http://www.margaretthatcher.org/document/108132 (last checked on 7 November 2013).

When one reads these lines in the light of the reflections Jacques Santer, at the time Prime Minister of Luxembourg and avowedly pertaining to the sphere of social Catholicism,[228] would make a few months later, already in his capacity as President-in-office of the Council,[229] on the principle of subsidiarity, it becomes apparent that he embeds identity preservation in a discourse quite different to that of Thatcher.

Drawing on the different outcomes the application of the subsidiarity principle may have in his view (i.e. although it is typically used in favour of lower levels of power, it may just as well lead to the strengthening of power centrally),[230] Santer concludes his intervention as follows:

> '*A more systematic use of the subsidiarity principle could thus enable the Community to develop and extend its jurisdiction in fields where national policies are not achieving satisfactory results. But at the same time it would give States the freedom to act and organise themselves according to their own aspirations. The principle of subsidiarity would thus allow countries and regions to safeguard within the Community their own identity, their character, their*

[228] Jacques Santer has been very active in Catholic youth movements (c.f. Santer's short biography from Centre Virtuel de la Connaissance sur l'Europe (CVCE), available online at http://www.cvce.eu/content/publication/2011/1/17/b837e5e1-5034-4ea9-b256-d8d4d7063f26/publishable_en.pdf (last checked 23 September 2014). As Derek Heart points out, Santer, in his role as leader of the Christian democratic Chrëschlech Sozial Vollekspartei and Prime Minister, placed strong emphasis on the social dimension of government politics. Pertaining to the party's social wing, he appears to have been a strong supporter of Jacques Delors' White Paper on social policy, whose principles he implemented in Luxembourg during his mandate as Prime Minister. Derek Heart, 'Luxembourg' (1994) 13 Electoral Studies 349, at 350.

[229] Even though he specified that the views expressed were his own personal opinions. Jacques Santer, 'Some Reflections on the Principle of Subsidiarity' (European Institute of Public Administration 1991) at 19.

[230] Santer, 'Some Reflections on the Principle of Subsidiarity' at 19.

> *specific economic, social and cultural nature, and to preserve this extraordinary and rich diversity which is Europe's greatest asset.'*[231]

His references to the *social doctrine of the Catholic Church*[232] and to Emmanuel Mounier's personalism[233] are explicit.

The use of 'national identity' by both speakers could not be more different: in Thatcher's narrative, identity protection accompanies her insistence on the preservation of sovereignty and national interest. This intergovernmentalist view was to be found in stark contrast with Santer's discourse grounded in the Catholic social doctrine which embraces the European Union with a federal vocation.[234] While Thatcher uses 'national identity' as a surrogate for sovereignty, Santer uses it in the framework of a greater surrogate discourse of power, that of the social Catholicism.

In addition to assuming a surrogate discourse of power, the Council Conclusions of the June and December meetings in Dublin and Rome reveal a position of the Member States that produces somewhat paradoxical results when it comes to identity preservation: while the Member States were emphasising the red lines the Union should not cross in certain identity-relevant fields such as culture, education and social policies by calling for the respect of national identity as well as of subsidiarity, they planned at the same time to entrust that same Union with competence in precisely those fields.[235] The reasons behind what appears to be an ambivalent stance on

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[231] Santer, 'Some Reflections on the Principle of Subsidiarity' at 30.

[232] Santer, 'Some Reflections on the Principle of Subsidiarity' at 28.

[233] Santer, 'Some Reflections on the Principle of Subsidiarity' at 20.

[234] As regards federalism and subsidiarity, c.f. Santer, 'Some Reflections on the Principle of Subsidiarity' at 20.

[235] This situation evidences the conflicting positions on the nature of the 'competence-problem' in the Union. Indeed, as Paul Craig notes, many commentators understood the

identity preservation will be addressed in the following sections. At the present stage of the study, however, it is already possible for us to draw certain conclusions as to what future treaty provisions were intended to safeguard the protection of identity from the very outset. Paradoxically, besides the future national identity clause and the principle of subsidiarity, it appears that the legal bases *conferring* competences upon the Union in identity-relevant fields were considered from the outset, and, in addition to granting such competences, simultaneously served the purpose of ring-fencing certain aspects of national identity against the (legitimate) action of the Union.

1.4 The *Delors* Commission

While the positions taken up by the Council reflect the concerns of the Member States, represented by their Heads of State and Government, the Commission of the European Communities was expected to do anything but that. Indeed, the Commission was conceived as an independent body charged with serving the general interest of the Community[236] and had to

shift in power to the Union as 'some unwarranted arrogation of the EU institutions to the state rights', Paul Craig, 'Competence: clarity, conferral, containment and consideration' (2004) 29 European Law Review 323, at 324. This 'oversimplistic view' focuses on the expansive interpretation of existing treaty provisions – either legislatively or judicially –, especially the teleological interpretation of the residual competence clause, but fails to acknowledge that the Member States consciously decided to grant the Union ever more competences through the successive treaty reforms, which were extensively negotiated within the corresponding IGCs. Craig argues convincingly that this circumstance implies that the Union wielding competence in ever more policy areas may hardly be regarded as illegitimate.

[236] Article 157(2) TEEC started by establishing that '[t]he members of the Commission shall perform their duties in the general interest of the Community with complete independence. In the performance of their duties, they shall not seek or accept instructions from any Government or other body. They shall refrain from any action incompatible with the character of their duties. Each Member State undertakes to

embrace its double role as a *motor of integration* on one side and a *Community watchdog* on the other.[237] The Commission's position on national identity preservation in the context of European integration could therefore be expected to take quite a different direction than that expressed by the Council.

Before turning to the Opinion issued by the Commission in October 1990 on the proposal for amendment of the TEC with a view to political union,[238] some considerations on the Commission president appear to be appropriate. At that time, the Commission was presided over by Jacques Delors, one of the more charismatic European leaders, who left his mark on his office. As for now, we still refer to the Commission he presided over as the 'Delors Commission' and, indeed, he had 'his' Commission firmly in his grip. Hence, Delors's stances on European integration – even those he labelled as his personal views – were undoubtedly conditioning the Commission's position. To fully grasp the facets of his interventions on diversity and subsidiarity, a brief outline of his formative experience and resulting political ideology appears helpful.

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respect this character and not to seek to influence the members of the Commission in the performance of their duties. […]'.

[237] Terminology by Hans-W. Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press 2005) at 103 et seq.

[238] Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union (COM(90)600).

Delors has been perceived by many as a passionate champion of subsidiarity,[239] but also caricaturised as a grey bureaucrat.[240] In his biography of Delors, Charles Grant describes him from the outset as 'riddled with contradictions which he cannot always reconcile. He is a socialist trade unionist who once worked for a Gaullist prime minister and describes himself as a closet Christian democrat. He is a practising Roman Catholic who takes moral stances and claims not to be ambitious; yet he is a crafty political tactician who enjoys power and has held the commission in an iron grip. He is a patriotic Frenchman with a vision of a unified Europe'.[241] These internal contradictions are what makes Delors resemble, yet at the same time profoundly distinguish himself from, politicians like Spinelli or Monnet. As Burgess sums up, '[l]ike Spinelli but unlike Monnet Delors came from the Catholic Left and derived his federalism from this source and his personalism from Mounier. Spinelli too came from the Left in Italy but had rejected Catholicism.'[242] In fact, Catholicism, and notably his involvement in the modernisation of the Catholic labour movement in France in the 19550s and 1960s, were crucial to Delors's formative experience. This experience contributed to deepening his understanding of both social Catholicism and personalism.[243]

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[239] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 39; see also Endo, 'The Art of Retreat: A Use of Subsidiarity by Jacques Delors 1992-93' ; Grant refers to the 'cynics' who saw in this championing mere opportunism, Charles Grant, *Delors. Inside the House that Jacques Built* (Nicholas Brealey Publishing 1994) at 218.

[240] Grant, *Delors. Inside the House that Jacques Built* at 2.

[241] Grant, *Delors. Inside the House that Jacques Built* at 2 et seq.

[242] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 174.

[243] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 39.

Delors had become a personalist in the 1950s and remained one over the years. Emmanuel Mounier's work, which he constantly reread, had a huge influence on him personally and on left-wing Catholics in general.[244] Delors's own definition of personalism sees '[t]he individual […] as a person, and not only an individual, a person who cannot be reduced to other people, and that this person cannot live without participating in communities which bind him to people.'[245] By contrast, Catholic social doctrine, as defined by Delors, stipulates that '[o]ne must apply solidarity at all levels, to your neighbour and those you are close to, but also at the national and international levels.'[246] Both personalism – which, according to Delors, remained his principal analytical tool for understanding life and people –[247] and social Catholicism are not only important for their crucial role in Delors's formative experience, they also find their way into his political ideology and the way he expresses it. Indeed, Delors's view of Europe is more societal than state-based and like Mounier he treats political ideas as moral questions.[248] As a consequence, he did not construe Europe as a 'huge state-like leviathan based in Brussels' and, as Burgess claims, the political dimension of his personalist assumptions required federal values and institutions allowing for participation down to the grass-roots of

[244] Grant, *Delors. Inside the House that Jacques Built* at 12, 14; Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 171; Santer, 'Some Reflections on the Principle of Subsidiarity' at 22.

[245] Interview with Delors on 19 May 1993, cited in Grant, *Delors. Inside the House that Jacques Built* at 12.

[246] Interview with Delors on 19 May 1993, cited in Grant, *Delors. Inside the House that Jacques Built* at 238.

[247] Grant, *Delors. Inside the House that Jacques Built* at 14.

[248] Grant, *Delors. Inside the House that Jacques Built* at 14.

society.[249] In Delors's words, the virtue of federalism entails 'allow[ing] people to live together, while retaining their diversity, because the division of powers is clear'.[250]

When defining 'subsidiarity', Delors's argumentation is twofold: on the one hand, he advocates that the higher unit ought to act with restraint in order to preserve diversities inherent in the lower units; he assigns, on the other hand, a 'paternal interest' to that higher unit to put the lower units in a position which permits their citizens to thrive. His definitions of subsidiarity, according to Grant, sometimes resemble his descriptions of personalism as he tends 'to make his favourite ideas – subsidiarity, personalism, federalism, the European model of society – sound like different manifestations of the same underlying principle'.[251] Indeed, if we analyse two different speeches that Jacques Delors held in 1989 and 1991, it becomes visible as to how the narrative he deployed is replete with variations of these ideas, and consequently also contains multiple references to diversity and identity preservation. In this two-year time period, Delors 'was riding high',[252] his vision of a political union had

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[249] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 172.

[250] Grant, *Delors. Inside the House that Jacques Built* at 219.

[251] Grant, *Delors. Inside the House that Jacques Built* at 219.

[252] Endo, 'The Art of Retreat: A Use of Subsidiarity by Jacques Delors 1992-93' at 393. As Grant and Middelaar both agree, Delors's self-confidence was boosted to such a point that he appeared to believe he had wings. Grant, *Delors. Inside the House that Jacques Built* at 134. His speech before the European Parliament on 17 January 1990 calling for a federalist Union almost turned into Delors's very own *Icarus* moment. Only Helmut Kohl's support cushioned his fall. C.f. van Middelaar, *Le passage à l'Europe: Histoire d'un commencement* at 288 et seq.

gathered momentum, and he openly referred to a European federation in public interventions.[253]

When Delors, in his speech of 30 November 1989 at the Centre for European Studies, addresses the question of how to govern Europe, one of his central imperatives equates to respecting national or subnational diversities:

> *'Le respect des diversités qui n'est pas une simple tolérance passive des différences, mais reconnaissance active de la multiplicité des usages, traditions, systèmes propres d'organisation propres aux différents pôles nationaux ou régionaux qui composent le réseau interactif de la Communauté.'*[254]

Two years later, at the European Institute for Public Administration, Delors would pursue that same thought when reflecting on the subsidiarity principle serving as an excuse for 'creeping intergovernmentalism':[255] on the one hand, once Member States have agreed to relinquish part of their *sovereignty* by attributing competences to the Community, such division of competences must be respected, also by the Member States.[256] On the other hand, Delors emphasises that

> *'the Community should acknowledge the* ***complete freedom of the Member States to determine their internal structures and the***

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[253] Grant, *Delors. Inside the House that Jacques Built* at 134 et seq.

[254] Speech by Jacques Delors 'La dynamique de la construction européenne' at the Colloquium of the 'Centre for European Studies', Brussels, 30 November 1989, Jacques Delors, *Le nouveau concert européen* (Odile Jacob 1992) at 157.

[255] Terminology from Juliet Lodge cited in Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 144.

[256] Speech by Jacques Delors at the Jacques Delors Colloquium of the 'European Institute for Public Administration', Maastricht, 21 March 1991, Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 12.

> ***number of borders of the regions*** *in particular. It is on this basis that we should endeavour to define the procedures needed for the regions to be associated with Community life. This should be a central topic of the Intergovernmental Conference on Political Union'.*[257]

Apart from advocating respect for the Member States' internal structures, Delors's main focus when it comes to the preservation of diversities is on the fields of culture and education. Indeed, he addresses directly the concerns over granting the Community new competences in these areas by implying that this should not entail a threat to the autonomy of the Member States in cultural or educational matters.[258]

For Delors, preservation of diversities among the different groups and units that make up society goes hand in hand with the application of the principle of subsidiarity. In his view, the realisation of a European polity therefore depends on 'taking into full account the respect for diversities and the implementation of decentralisation, in the same spirit as subsidiarity'.[259] And as already mentioned previously, Delors's definitions of subsidiarity exemplify the profound influence personalist thought had on him. For him, subsidiarity comes from a moral requirement to respect the dignity and responsibility of the persons making up a society, which in turn is organised in groups and not broken down into individuals. Subsidiarity in Delors's personalist view does not only rest on the basic tenet that a higher authority is obliged to exercise restraint when a lower unit is in a position to act, it

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[257] Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 12 (emphasis added).

[258] Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 11; on the necessity of the development of the cultures of Europe and the importance of the audiovisual sector in this regard, c.f. already his speech of 30 November 1989 in Delors, *Le nouveau concert européen* at 156.

[259] Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 18.

also requires such higher authority 'to act vis-à-vis this person or this group to see that it is given the means to achieve its ends.'[260] The respect for the dignity and responsibility of a person, a group, or a territorial unit by a higher authority thus rests on a dialectical relationship in which obligations to show restraint coexist with obligations to act.

Delors's stances on diversity preservation appear to be reflected in the Opinion issued by the Commission in October 1990 on the proposal for amendment of the TEC with a view to political union.[261] When defining the approach that it planned to defend at the upcoming IGCs, the Commission addressed, among other points, the issue of competences and considered culture to be one of the fields where an extension of Community powers – of which the Commission approved – was not to impinge on the cultural autonomy of the Member States or regions:

> *'In line with the principle of subsidiarity, cultural affairs should continue to be a matter for the Member States and the regions. It would be a good idea, however, to include an article on the cultural dimension of Community activities.'*[262]

The Delors Commission was thus very attentive to the preservation of diversities throughout the Union and considered the application of the subsidiarity principle a means to it. The Commission, however, also hints at the fact that bemoaning the Community's incapacity to take into account national traditions – in particular due to the lack of involvement of national

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[260] Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 9.

[261] Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union (COM(90)600).

[262] Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union (COM(90)600) at 23.

parliaments in EU decision-making – may amount to a somewhat unfair critique. In this sense, the Commission insists that national governments are closely involved in EU decision-making, particularly where decisions are taken by the Council since the Member States' own governments are in a position to safeguard their *national traditions*.[263]

Hence, the Commission shared a strong interest for preserving national and subnational identities by the exercise of restraint –particularly embodied in the principle of subsidiarity – by the EC institutions.[264] Apart from this commitment to restraint, however, subsidiarity also implies an obligation for the institutions at Community level to act so as to provide for the conditions required for the different units making up European society to thrive. The influence of personalism and Catholic social doctrine in the statements of Commission President Delors and those of the Commission is palpable. Diversity and identity preservation appear as a true concern and acquire a federalist taste.

The second line of argument followed by the Commission as regards Member States' concerns over the EC encroaching upon national identities, however, has little to do with ideological positions. When the Commission

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[263] 'In the case of assessing the use made of powers transferred to the Community, it should not be forgotten that in the Community system it is national governments, sitting in the Council, that take the major decisions. Since national governments are accountable to national parliaments, it is for them to involve elected representatives in Community affairs in a manner which respects *national traditions*' (italics added), Commission opinion of 21 October 1990 on the proposal for amendment of the treaty establishing the European Economic Community with a view to political union. COM 90) 600 final, at 8 and 9.

[264] This restraint needs, however, to be exercised not only by the Commission –widely blamed for any failure to comply with the exigencies of subsidiarity due to its power of initiative – but also by the Council when amending Commission proposals. C.f., among others, Commission Communication to the Council and the European Parliament 'The principle of subsidiarity', SEC(92) 1990 final, Brussels, 27 October 1992, at 22.

addresses those fears by pointing to the Member States' own ability to preserve those traditions from within the Council, it is at pains to demonstrate the Council's potential for preserving national provisions in rather the same way it had previously shed light on the Council's own unwillingness to comply with subsidiarity.[265] Since major decisions were – and would be in the future – voted on in the Council where Member States were given the opportunity to raise their concerns over potential threats to national identity through their representatives, allegations that 'invasive' Commission proposals were irremediably encroaching upon national traditions were rebuffed.

2. Conclusions

A closer look at the stances of the European Parliament, Council and Commission on 'national identities', subsidiarity and the convenience of their inclusion in the Treaty on European Union, which was on the verge of being discussed, reveals that all three institutions have referred to those concepts in official documents. The analysis of these positions through the lens of the surrogate of power permits me to draw the following conclusions.

Firstly, by identifying specific strands of federalism as a surrogate discourse of power, I was able to contextualise the emergence of the identity narrative as incorporated by key actors of European integration into their political discourse. This contextualisation in turn permitted me to rebut the general assumption that the fact that the identity narrative, which had emerged in the European context in relation to the construction of a common European

[265] See above at n 264. Also Delors, 'The Principle of Subsidiarity: Contribution to the Debate' at 10.

identity,[266] gathered momentum around the time of the Maastricht Treaty was essentially fuelled by Member States eager to preserve their sovereignty and who – in the face of the decline of the sovereignty narrative – switched to the identity discourse.

This sovereignist view is true for certain Member States, and becomes particularly visible in Margaret Thatcher's indistinct use of 'national interest' and 'national identity'. But as my account illustrates, this is not true for other Member States, mainly those with strong federalist or Christian Democrat traditions, and most certainly not for Community institutions such as the Parliament and the Commission. Led by charismatic leaders who had endorsed a discourse avowing federal tenets, these institutions brought a narrative of identity and diversity protection to the centre stage, which was based on the subsidiarity principle as its pivotal concept. Unlike in the case of Thatcher's use of 'national identity', sovereignty and its decline did not trigger this 'federalist' kind of identity narrative. Since the narrative of whichever of the four strands of federalism I discussed above was based on a societal rather than state-based view of the world, sovereignty simply did not play that much of a role in that world view. This is interesting since the outcome of this narrative – identity protection through subsidiarity – is the same as the outcome of the calls for preserving the Member States' identities from the rather sovereignist perspective of certain Member States convened in the Council.

Secondly, the references to cultural identity, education,[267] subsidiarity as well as to national customs and traditions in the field of social policies are

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[266] Millet, 'The Respect for National Constitutional Identity in the European Legal Space' at 260.

[267] Concerns over education as an element of a nation's culture or cultural identity had already surfaced in the context of European integration before the preparations to the Maastricht Treaty. As evident in the Conclusions of the Council and the ministers for

indicative of the Member States' concerns over Community intrusion in certain 'identity sensitive' fields. In this regard, certain Member States seem to have been particularly concerned with maintaining traditions and diversities, especially when it comes to culture and language. Hence, when the Dutch,[268] Danish[269] and Portuguese[270] governments submitted memoranda for the European project prior to the IGC, the calls for including a European chapter on culture were always accompanied by the condition that cultural and linguistic diversity were to be safeguarded. Here, once again, these hopes appear to be pinned on the subsidiarity principle, as

education meeting within the Council of 14 December 1989 on technical and vocational education and initial training, the promotion of closer cooperation in these areas was to be subject to 'respecting the individuality of each country'. Official Journal C 027, 06/02/1990, at 004-006.

[268] The Dutch government's 1st memorandum 'Possible Steps Towards European Political Union' of May 1990 is quite restrictive when it comes to considering culture as a new policy area. It determines that 'care must be taken to ensure that Community regulations do not harm the pluralist nature of the societies which make up the Community', meaning that 'where cultural policy is concerned, an independent Community policy would not appear to be justified, since priority in this field must be given to the objective of pluralism.' Reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 133.

[269] On new policies, the Memorandum of the Danish government of October 1990 dictates that as regards cultural policies 'a chapter should be drawn up for the Treaty concerning cultural co-operation with the Community and with third countries. The primary aim should be to promote cross-border cultural exchanges. Such a process should be based on respect for the specific nature and potential of individual cultures and should allow for cultural aid resources to be managed along national cultural lines'. Reproduced in Laursen and Vanhoonacker, *The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Community* at 299.

[270] Strikingly, the Memorandum from the Portuguese Delegation on Political Union with a view to the Intergovernmental Conference of 30 November 1990 begins by promoting, as a pre-condition for progress towards Political Union, the 'respect [of] national identities and diversity'. Reproduced in Laursen and Vanhoonacker, *The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Community* at 304.

evidenced by the Memorandum of the Belgian government of 20 March 1990, calling for the subsidiarity principle to be 'supplemented by more precise details of respective powers in sensitive areas in which national traditions frequently differ.'[271]

[271] Reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 123.

Chapter 2 The Member States' Positions on 'Identity' during the National Processes for the Ratification of the Maastricht Treaty

The political will to protect national identity and diversity finds its reflection in the Maastricht Treaty provisions and its annexed declarations and protocols, but also in the national debates over its ratification where concerns over identity preservation were expressed quite differently. Depending on the Member State, the reference to elements of national identity has had a different impact on the various parliamentary debates on the treaty ratification. In some instances, it has even been completely absent from them.

But before plunging into the rhetoric deployed by members of parliament and governments of every *couleur* to convince either their fellow representatives or their constituents of the necessity to adopt or reject the Maastricht Treaty, the question is: Why would their stance on identity matter to my analysis? Have I not already shed some light on what the *framers* intended with the inclusion of Article F(1) and the like? Why would it matter what words the constituents were fed by their representatives and governments during the national ratification processes? Especially given, as Paul W. Kahn puts it, that '[i]nstitutions that rest on electoral politics do not represent the popular sovereign. Rather, they express popular opinion, which is always an aggregation of individual opinions limited by current circumstances. Electoral politics produces Rousseau's will of all […]'.[272]

[272] Paul W. Kahn, 'The Question of Sovereignty' (2004) 40 Stanford Journal of International Law 259, at 271.

Against the background of the secrecy surrounding the IGCs and their lack of transparency, the need for public justification of the secretly negotiated treaty text only arose at the stage of the parliamentary ratification processes.[273] And it is precisely this process of parliamentary public justification that would impact on popular opinion, together with fears and hopes driven by the circumstances to which Kahn refers and which shrouded the ratification of the Maastricht Treaty. It is also what triggered the first true public debate about the scope and depth of European integration, both threatening and exhilarating a moment in European integration history.[274] Both European popular opinion and the parliamentary debates were shaped by events that had a Europe-wide impact. While only a few hundred kilometres away from the external frontier of the Community, the Balkans – once again converted into the continent's powder-keg – had become the arena of the first war fought in Europe after the Second World War; xenophobic riots in Saxony – and thus on Community territory – the *Hoyerswerda riots* shocked Germany and its European neighbours in September 1991.[275] Once again, nationalism in its vilest form was looming large. Moreover, some Member States had a more

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[273] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 160.

[274] Weiler, *The Constitution of Europe* at 4.

[275] In September 1991 in Hoyerswerda, a town in eastern Germany, neo-Nazi youth gangs besieged a hostel housing mainly foreigners for nearly a week while police forces were unable to contain the violence. In the end, the foreigners had to be evacuated in the middle of the night and brought to an army base to guarantee their safety. Images of cheering Hoyerswerda residents broadcast on national television proclaiming their town a 'foreigner-free' zone made the global community shiver over growing xenophobia in a freshly united Germany. For the impact on the international scene, see Stephen Kinzer's 'A Wave of Attacks On Foreigners Stirs Shock in Germany,' October 1, 1991 New York Times article. The Hoyerswerda riots are far from forgotten, even more than 20 years later they still hit the headlines, see the piece Andrea Thomas recently wrote for the Wall Street Journal 'Arrival of Migrants Worries German Town of Hoyerswerda,' January 29, 2014.

complex relationship with nationalism than others. Particularly in Germany –still in the process of expiating past deeds – nationalism was a taboo usually conveniently circumnavigated in public debates by political leaders. Those events would inevitably have a certain impact – albeit of varying intensity – on the parliamentary debates on the ratification of the Treaty revision.

Yet, it would be another incident that would shatter the idyllic world of European integration: Denmark's rejection of the Maastricht Treaty. The Danes' 'no' to the Maastricht Treaty appears to have been motivated first and foremost by the fear of losing their national identity.[276] This did not go unnoticed by the governments of the remaining eleven Member States and certainly not by the public eye. In this sense, the debates during the ratification processes were of unequal intensity across the different Member States. The debates that were held after the Danish rejection were clearly influenced by it. After all, Danish fears could potentially transformed into the fears of one's own citizens.[277] And although the outcome of the 1992 Danish referendum made the Maastricht Treaty hit rock bottom, the Danes voted again only one year later, this time saying 'yes'. I will thus dedicate a section to the Danish case, which gained visibility precisely through the Danes' initial rejection of the Maastricht Treaty, to then address the

[276] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 159.

[277] In addition to the governments' concerns over the Danish attitude being passed on to their own members of parliament or constituents, Denmark's insistence on formal or legally binding amendments to the revision treaty also caused serious headaches. C.f. Preoccupations expressed in 'Europe after Maastricht: Interim Report', first report of the Foreign Affairs Select Committee of Session 1992/93 (HC 642 1992/93) and ordered to be printed on 4 November 1992, at p. vi. Taken from *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), vol. 15 United Kingdom at 159.

concepts I am aiming to untangle – subsidiarity, sovereignty,[278] and identity – by analysing how they have been treated not only by the different Member States, but also by the different political and constitutional actors involved in the national ratification debate.

1. The Danish 'national compromise' and the Edinburgh summit decision

By the time of that second referendum, the Maastricht Treaty had been supplemented by the agreement reached at the European Council held in Edinburgh on 11-12 December 1992. Indeed, in the aftermath of the Danish 'no' to Maastricht on 30 October 1992, after dramatic negotiations, the Danish government submitted a statement drawn up by the opposition in the *Folketing.* This statement, which Denmark forwarded to its 11 partners and which became known as the 'national compromise', interpreted the Danish 'no' as a rejection of a United States of Europe but not as a rejection of Denmark's membership to the EC.[279]

As to issues of 'common interest', it advocated, *inter alia*, a clearer division of competences between the Member States and the Union, explicitly referring to 'health policy, national cultural policy and the content and structure of education'. The statement also pleaded for limiting, to the

[278] Sovereignty – and its possible loss – was a major subject of parliamentary debate in France. EU citizenship in particular, which involved granting full suffrage to EU residents in French municipal elections as well as in the elections to the European Parliament, was heavily questioned as jeopardising popular sovereignty. *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), vol. 7 & 8 France I &II.

[279] Finn Laursen, 'Denmark and the ratification of the Maastricht Treaty' in Finn Laursen and Sophie Vanhoonacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications* (Martinus Nijhoff Publishers 1994) at 71.

greatest extent possible, EU regulation of the Danish labour market where *the application of the subsidiarity principle* should allow for 'tak[ing] greater account of different traditions and forms of organisation of the individual Member States'.[280] It clearly follows from this Danish account of the 'common issues' in European *cooperation* that the preservation of Danish identity-relevant matters, i.e. its fundamental structures, such as culture, education, healthcare and social security system as well as the organisation of the state, was perceived by Danish politicians as their constituents' major concern over the Maastricht Treaty. With respect to the particular national interests that Denmark purports to impose on its partners by way of the 'national compromise', it suffices to say that the premise to these impositions appears to lie in the independence of the Danish state 'in the sense defined in the Danish Constitution and applied by the institutions – Parliament, government, courts and monarchy – rooted in the constitutions'.[281]

This 'national compromise' did not lead to an amendment of the treaty text, but nevertheless found itself reflected in the Conclusions of the Edinburgh Council summit held on 11-12 December 1992. Indeed, upon the Danish 'no', the Twelve had promptly declared that the door to Denmark's participation in the EU should not be shut, while at the same time explicitly

[280] See the statement 'Denmark in Europe' of October 1992. Reproduced as Annex VIII in Finn Laursen and Sophie Vanhoonhacker (eds), *The ratification of the Maastricht Treaty. Issues, Debates and Future Implications.* (Martinus Nijhoff Publishers 1994) at 507.

[281] See the statement 'Denmark in Europe' of October 1992. Reproduced as Annex VIII in Laursen and Vanhoonhacker, *The ratification of the Maastricht Treaty. Issues, Debates and Future Implications.* at 505–509.

ruling out any renegotiation of the text of the Treaty.[282] The solution to this Danish dilemma consisted in a compromise: the Heads of State and Government adopted a Decision concerning certain problems raised by Denmark concerning the Treaty on European Union, while at the same time Denmark issued a unilateral declaration to be associated to the Danish Act of Ratification of the TEU, both documents annexed to the Edinburgh presidency conclusions.[283] The decision of the Heads of State took into account the concerns Denmark had expressed earlier in its 'national compromise'.[284] Denmark's unilateral declaration addressed the concept of citizenship of the Union – emphasising that it was complementary to national citizenship and did not confer any rights to obtain Danish citizenship – as well as the cooperation in the fields of Justice and Home

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[282] Statements by the twelve foreign ministers following the Danish Referendum, 4 June 1992. Text reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 490.

[283] 'Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union', Annex 1 of the Conclusions of the Presidency, Edinburgh, 12 December 1992 and 'Unilateral Declarations of Denmark, to be associated to the Danish Act of Ratification of the Treaty on European Union and of which the eleven other Member States will take cognizance', Annex 3 of the Conclusions of the Presidency, Edinburgh, 12 December 1992.

[284] Mainly concerning the defence policy dimension, the third stage of the EMU, EU citizenship, cooperation in the fields of justice and home affairs, openness and transparency in the Community's decision-making process, the effective application of the principle of subsidiarity and – albeit in yet another separate document – the prerogative of the Member States to maintain or introduce more stringent protection measures in the fields of social policy, consumer protection and environmental protection. 'Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union', Annex 1 of the Conclusions of the Presidency, Edinburgh, 12 December 1992 and 'Declaration of the European Council on social policy, consumers, environment, distribution of income', Annex 2 of the Conclusions of the Presidency, Edinburgh, 12 December 1992.

Affairs (JHA).[285] For the Council, agreeing on those texts meant creating 'the basis for the Community to develop together on the basis of the Maastricht Treaty, while respecting, as the Treaty does, the *identity and diversity of Member States*'.[286] Transmitting the idea that the Union did not constitute a threat to national identity and diversity was thus perceived by the Heads of State as essential for achieving the ratification process.

The political evidence is clear, but the legal value of the instruments not so much. As Millet notes, the legal qualification of the Edinburgh declarations on and by Denmark constitute – even now – a rather delicate endeavour since they have been included in a *sui generis* instrument.[287] Either way, it should be noted that in terms of content, they add very little since they assume positions already conceded by the protocols and declarations to the Maastricht Treaty.[288]

Yet, the Edinburgh Council – and its conclusions – would have a major impact on the parliamentary debates of those national ratification processes that had not yet been seen through at the time, particularly when it came to the debate on subsidiarity since the Council conclusions were supplemented

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[285] 'Unilateral Declarations of Denmark, to be associated to the Danish Act of Ratification of the Treaty on European Union and of which the eleven other Member States will take cognizance', Annex 3 of the Conclusions of the Presidency, Edinburgh, 12 December 1992.

[286] Conclusions of the Presidency, Edinburgh, 12 December 1992, Part A, at 4 (emphasis added).

[287] Opinions ranging from 'true reservation' to interpretative or even reiterative declarations, c.f. Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 266; with further references.

[288] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 266.

by a guideline aimed at clarifying the application of the subsidiarity principle.[289]

2. Subsidiarity ad nauseam*: a British obsession*

Referring to subsidiarity, the word that dominated the debate over Maastricht,[290] it suffices to say that there is probably no concept that has served so many differently orientated political discourses. As I have suggested above, this trend was already set prior to the IGC when the reference to subsidiarity served actors in favour of deepening European integration – irrespective of their federal or centralist vocation – mainly embodied by the European Parliament and the Commission; actors opposed to furthering integration, such as several Member States; as well as subnational actors that felt their competences were threatened by both the Community and the Member States, mainly regions of federally organised Member States.[291] In all cases, the concept of subsidiarity has been used,

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[289] 'Overall Approach to the Application by the council of the subsidiarity principle and Article 3b of the Treaty on European Union', Annex 1 to Part A of the Conclusions of the Presidency, Edinburgh, 12 December 1992.

[290] For many the word that *saved* Maastricht, c.f. Deborah Z. Cass, 'The word that saved Maastricht? The principle of subsidiarity and the division of powers within the European Community' (1992) 29 Common Market Law Review 1107–1136. In MP Garnier's words: '[t]he whole philosophy of the Maastricht Treaty is to be found in Article 3(b)'; Minutes of evidence 21 April 1993, Second Report of the Foreign Affairs Select Committee. Taken from *Ratification of the Treaty on European Union: Preparations*, vol. 15, op cit. at n 277, at 476.

[291] This distinct use of terms such as federal, decentralised, and subsidiary had already been commented on at that time. Indeed, the Foreign Affairs Committee of the House of Commons, in its Second Report 'Europe After Maastricht' of 4 March 1992, called upon the House to bear in mind, *inter alia*, that '[t]here are strong pressures outside the UK for the development of a federal Europe. These must be balanced against signs of concern about undue centralisation and loss of local control identified by the Committee in both France and Germany. For many on the continent, 'federal' is understood to mean 'decentralised'.' Taken from *Ratification of the Treaty on European Union:*

and sometimes abused, for the most diverse aims and purposes: it has been envisioned as a means to impede further centralisation of powers towards Brussels, to protect and preserve sovereignty as well as to foster the Union's federalisation while preserving national cultures and identities.[292]

Preparations, vol. 15, op cit. at n 277, at 15. Apparently conscious of disagreeing on the concept, Gerd Walter, Minister for Federal and European Affairs of the German Federal State of Schleswig-Holstein exclamated during the debate on the Act on the Treaty on European Union in the Bundesrat: 'Mr Major does not want more democracy. Nor, by the way, does he want subsidiarity as understood by the German *Länder*'. (my translation) BR -1. Durchgang 25.09.1992 - BR-Plenarprotokoll 646, pp. 419B - 439A, at 435 (D), available at http://pdok.bundestag.de/extrakt/ba/WP12/955/95555.html (last checked 11 January 2014).

[292] E.g. the Belgian Senate, where it is affirmed that the Member States preserve to a certain extent their identity thanks to the subsidiarity principle, rapporteurs Mr De Backer and Mr Henneuse, Rapport fait au nom de la Commission des relations extérieures, Projet de loi portant sur l'Union européenne, de 17 Protocoles et de l'Acte final avec 33 Déclarations, faits à Maastricht le 7 février 1992, *Sénat de Belgique*, session de 1992-1993, 20 October 1992, at 41. Also available in *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), v. 2 Belgique II, at 869. In Italy, rapporteur Orsini describes subsidiarity as a refutation of the anti-European discourse of a centralist Union jeopardising national peculiarities and local autonomy. He then links subsidiarity to Article F and to the Member States' national identities.; Relazione della 3ª Commissione permanente (affair esteri, emigrazione), Senato della Repubblica, comunicata alla Presidenza il 15 settembre 1992 sul disegno di legge ratifica ed esecuzione del trattato sull'Unione europea con 17 Protocolli allegati e con atto finale che contiene 33 dichiarazioni, fatto a Maastricht il 7 febbraio 1992; at 7. Also available in *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), v. 10 Italia I, at 129. In Luxembourg, emphasis is placed on the two barriers that the Maastricht Treaty erects to prevent potential excesses in the Union's actions: Article 3-bis, subsidiarity, and Article F, respect for national identities; see Exposé des motifs au Projet de loi portant approbation du Traité sur l'Union Européenne et de l'Acte final, signés à Maastricht, le 7 février 1992, Chambre des députés, session ordinaire 1991-1992, 9 March 1992, at 9. Also reproduced in *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), v. 12 Luxembourg, at 75.

The reference to subsidiarity has been fairly frequent in the parliamentary debates of Germany, Ireland,[293] and particularly of the UK. The extent to which subsidiarity was discussed by the British is best exemplified by the intervention of Mr David Howell, chair of the House of Commons Foreign Affairs Committee, on 18 March 1993, i.e. after the Birmingham and Edinburgh decisions on subsidiarity that sought to clarify its application, during the examination of EC Commissioner Sir Leon Brittan. Howell goes so far as saying that subsidiarity has been discussed – at least in that Committee – *ad nauseam*.[294] These are strong words, but they are by no means an exaggeration, since in the UK parliamentary debate references to subsidiarity are countless. The British parliamentary debate shows a large consensus over the necessity to introduce the principle into the Treaty as well as over its function, which involved putting a deadlock on Brussels's allegedly expansive action.

The main concern uttered by British MPs as well as witnesses heard by the Foreign Affairs Committee in relation to the subsidiarity principle relates to doubts over its suitability to perform its deadlock function. What is (or should be) the definition of subsidiarity; who is (or should be) authorised to issue such definition – the ECJ or the Member States; and how does one guarantee its effectiveness are the key questions on the subsidiarity principle that are constantly posed. In fact, a recurrent question, raised in one form or another at every hearing of the Foreign Affairs Committee,

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[293] In the case of Ireland, 31 direct references to the word 'subsidiarity' were counted. C.f. *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), Vol. 9 Ireland.

[294] David Howell, House of Commons Foreign Affairs Committee, examination of RT Hon Sir Leon Brittan, 18 March 1993, 'Europe After Maastricht' Minutes of evidence, taken from *Ratification of the Treaty on European Union: Preparations*, vol. 15, op cit. at n 277, at 438.

concerns the definition of the subsidiarity principle or more precisely the lack of a definition.

Moreover, the only references to national identity – whether direct or termed as national traditions – are actually linked to the subsidiarity principle. One example is where Secretary of State for Foreign Affairs, Douglas Hurd, declares before the Committee that 'shooting of wild birds' constitutes one of the matters to which subsidiarity should apply on grounds that it represents 'a matter for national governments acting in the light of national traditions and national feelings.'[295] In the same vein, Mr Hurd ascribes the endeavour to reach an agreement on what the word subsidiarity means to ordinary people/in plain English to an anxiety he refers to as 'national identity'.[296]

The connection between subsidiarity and national identity is thus, at least in the British debate, a functional one. The protection of national identity is intended to play along with the functioning of the subsidiarity principle, i.e. when identity is at stake, action should lie with the Member States and not to the EU. Hence, the effective application of the subsidiarity principle constitutes a means to preserve spheres or pockets of national identity.

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[295] Foreign Affairs Committee Minutes of evidence from the hearing of 12 October 1992. *Ratification of the Treaty on European Union: Preparations*, vol. 15, op cit. at n 277, at 170.

[296] Foreign Affairs Committee Minutes of evidence from the hearing of 12 October 1992. *Ratification of the Treaty on European Union: Preparations*, vol. 15, op cit. at n 277, at 177.

3. Identity lovers: Germany and the idea of Heimat

When one carefully reads the parliamentary debates on the ratification of the Maastricht Treaty in each Member State, one is likely to be struck by the predominance of certain concepts or terms in the debates of specific Member States, as with the subsidiarity principle in the British case. But while the subsidiarity principle has been – to a certain extent – present in all the Member States' deliberations and therefore at least the concerns over the concept appear to have crossed borders, this has not been the case for other notions, such as that of 'national identity'. Whereas concerns over 'national identity' and fears of a possible loss of identity have been strongly referenced in Germany,[297] Luxembourg[298] and Ireland,[299] they did not play a significant role in other Member States. And even in the Member States where national identity *did matter* in the parliamentary debates, the frequency of reference proved to be quite unequal. One Member State stands out as an absolute identity-lover: the Federal Republic of Germany. Indeed, if one is patient enough to scour through the German parliamentary

[297] *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), Vol. 4 Deutschland.

[298] *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293.

[299] In the case of Luxembourg, the public eye was especially concerned with the creation of EU citizenship conferring upon EU foreigners full suffrage in municipal elections and elections to the EP. There was a vague fear that could be summarised as follows: 'will European citizenship not result in the Luxembourg people losing their identity? Will the Luxembourg people be able to continue to speak their own language, i.e. Letzeburgesh? […]'; Alexis Pauly, 'Luxembourg and the Ratifiction of the Maastricht Treaty' in Finn Laursen and Sophie Vanhoonhacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications*, 1994 at 203.

debate on the Act on the Treaty of 7 February 1992 on European Union[300] for explicit references to national identity, one ends up with a final count of 55 references, of which 41 featured in the debates in the *Bundestag*. In Germany, national identity[301] – and its preservation – constitutes *the* leitmotif of the debate over the Maastricht Treaty. As a matter of fact, politicians of every *couleur* and of both upper and lower house addressed in lengthy interventions concerns over the impact of European integration on German identity. Moreover, the debate on national identity coincided with a public debate on both growing nationalism[302] and a *gesamtdeutsche*

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[300] Gesetz zum Vertrag vom 7. Februar 1992 über die Europäische Union vom 28. Dezember 1992 (BGBl. 1992 II p. 1251).

[301] One could even argue that 'identity' as collective identity and thus not limited to national identity was *en vogue* in Germany around the time of the Maastricht treaty revision. The fact that the introduction of a new Article 20b BL – reading as follows: 'Der Staat achtet die Identität der ethnischen, kulturellen und sprachlichen Minderheiten' (The State shall respect the identity of ethnic, cultural, and linguistic minorities) – had been considered by the Joint Constitutional Commission, albeit without achieving the necessary majority to be passed, is illustrated by the final report of 5 November 1993, see Gemeinsame Verfassungskommission, 'BT-Drucksache 12/6000 Bericht der Gemeinsamen Verfassungskommission,' 1993 at 71 et seq. For a thorough study of the works of the Joint Commission on the issue of minority rights and protection, see Harald Ermisch, *Minderheitenschutz ins Grundgesetz?: die politische Diskussion über den Schutz ethnischer Minderheiten in der BRD im Rahmen der Beratungen der Gemeinsamen Verfassungskommission von Bundestag und Bundesrat* (LIT Verlag 2000); also Dietrich Murswiek, 'Schutz der Minderheiten in Deutschland' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. X (3rd edn, C.F. Müller Juristischer Verlag 2012) at 292 et seq.

[302] Growing nationalism is a euphemism, if one recalls the series of atrocious crimes against foreigners, notably asylum seekers, perpetrated by German citizens on German soil – Hoyerswerda in September 1991, Rostock-Lichtenhagen in August 1992, Mölln in November 1992 and Solingen in May 1993. See again for an international perspective on these events the New York Times article by Kinzer, 'A Wave of Attacks On Foreigners Stirs Shock in Germany' . Habermas would connect the underlying events of both debates in his Paris Lecture on the asylum debate in 1993 when arguing that normative deficits of the unification process, the collision of distinctive mentalities

identity.[303] Nationalism and national identity are closely connected in the German debate. But while nationalism still atoned for Germany starting two world wars, national identity was awarded a homely, cosy, by all means positive, connotation by linking it to yet another emblematic German idea: *Heimat*.[304] In this vein, German politicians[305] put forward the allegiance or

characterising East and West produced a tense situation in which the unexpected outbreak of right-wing violence proves explosive. He criticised the lack of moral outrage in the reactions from the political centre of the population, government and political leaders for not being motivated by concerns for the victims or the de-civilisation of society but rather by concerns over the reputation of Germany. That the love for one's country should not be exposed to disgrace constituted the real crime following this perception. Jürgen Habermas and Michael Haller, *The Past as Future* (Max Pensky (ed), Max Pensky tr, Polity Press 1994) at 121 et seq.

[303] Thomas Blank, 'Wer sind die Deutschen? Nationalismus, Patriotismus, Identität-Ergebnisse einer empirischen Längschnittstudie' (1997) 13 Aus Politik und Zeitgeschichte 38–47; Jürgen Habermas, 'Der DM-Nationalismus,' 1990; Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 157, 158; especially since the German reunification.

[304] Heimat constitutes a crucial concept in German identity building and recovering, as Celia Applegate points out in her seminal work: Celia Applegate, *A Nation of Provincials: The German Idea of Heimat*, 1990. On the difficulty of finding a foreign-language equivalent to Heimat, she admits that Heimat may mean in its simplest sense homeland or hometown. But translating it that way would prove rather limiting '[f]or the term *Heimat* carries a burden of reference and implication that is not adequately conveyed by the translation of homeland or hometown. For almost two centuries, Heimat has been at the center of a German moral – and by extension political – discourse about place, belonging, and identity.' Applegate, *A Nation of Provincials: The German Idea of Heimat* at 4.

[305] Chancellor Helmut Kohl himself emphasises the importance of Heimat when referring to national identity, a notion that, in his words, is distinct to the German language and not translatable to other languages; Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT –Plenarprotokoll 12/126, pp. 10809B-10890C, at 10823D-10831C. Also available in *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), Vol. 4 Deutschland, at 376. The commonly accepted – also among scholars – thesis that Heimat is not translatable has been criticised by Peter Blickle. He states that 'Heimat is not untranslatable. It is correct that neither English nor French have equivalencies for Heimat, but many Slavic languages do'; Peter

a sense of belonging to the *Heimat* felt by individuals deeply rooted in their German (national, regional, or local) culture, traditions, and language. This identity package needed to be preserved as a whole and, just as it succeeded in the British debate, the subsidiarity principle is presented as a reasonable means to achieve this goal.

The use of national identity in the German debate may be differentiated on the grounds of different types of arguments aimed at defending the necessity to carry on the ratification process. To begin with, *all* political factions addressed their constituents' fears of a possible loss of their identity due to a deepening of European integration. But while PDS[306] MP Hans Modrow insistently warned of the threat of an imminent modification of Germany's *Staatlichkeit*, the increasing fear of losing cultural and regional identity, as well as the ineptness of the subsidiarity principle to legitimise the relinquishment of German statehood, the ulterior motive being the rejection of the Treaty,[307] all other factions addressing their constituents' fears followed the opposite agenda, that is the assent to the Treaty. In the eyes of the latter, the Maastricht Treaty, far from putting identities at risk, actually contributes to their preservation.[308] Precisely *because* of the

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Blickle, *Heimat: A Critical Theory of the German Idea of Homeland* (reprint. Camden House 2004) at 2.

[306] Party of Democratic Socialism (*Partei des Demokratischen Sozialismus*, PDS) legal successor to the Socialist Unity Party of Germany (SED) of the German Democratic Republic.

[307] Hans Modrow (PDS), Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT –Plenarprotokoll 12/126, pp. 10809B-10890C, at 10819C-10821D. Also available in *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), Vol. 4 Deutschland, at 360.

[308] E.g.: Chancellor Helmut Kohl (CDU), Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT – Plenarprotokoll 12/126, pp. 10809B-10890C, at 10823D-10831C. Also available in *Ratification of the Treaty*

Maastricht Treaty's innovative inclusion of Article F, national identities are bound to be safeguarded.[309]

Secondly, federalism and national identity are skilfully intertwined. To grasp this line of argument, it is imperative that one has an understanding of how deeply ingrained the commitment of the German political class was to cooperative federalism, at least at that time. Douglas H. Holmes captures this commitment as follows:

> '*From my own experience at the [European] Parliament, I found this notion of cooperative federalism deeply ingrained in the political values and ethics of* virtually *all German politicians I encountered,*

on European Union: Preparations, vol. 4, op. cit. at n 297, at 376; Günther Verheugen (SPD) Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT – Plenarprotokoll 12/126, pp. 10809B-10890C, at 10831C-10835A. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 380: Dieter Schloten (SPD), Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT – Plenarprotokoll 12/126, pp. 10809B-10890C, at 10856C-10857D. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, Ulrich Irmer (FDP), Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT – Plenarprotokoll 12/126, pp. 10809B-10890C, at 10817A-10819C. Heidemarie Wieczorek-Zeul (SPD) notes that the 'discussions over Maastricht have shown that people are afraid of losing their own cultural and social identity', Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT – Plenarprotokoll 12/126, pp. 10809B-10890C, at 10813A-10817A. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 362 (my translation).

[309] Ursula Seiler Albring, Staatsminister, Foreign Affairs Office, First debate in the *Bundesrat* on the Act on the Treaty of 7 February 1992 on European Union, 25.09.1992, BR Plenarprotokoll 646, pp. 419B-439A, at 437B; Peter Kittelmann (CDU/CSU) interjects that 'we [the Germans] have our own interests, our tradition, our culture, which Europe does not want to take away from us but rather guarantee', Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT –Plenarprotokoll 12/126, pp. 10809B-10890C, at 10816B. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 360.

> *regardless of political party. Moreover, they equated these values and ethics explicitly with a subtle rendering of the concept of subsidiarity. I found it somewhat ironic that the German Social Democrats whom I encountered seemed, if anything, more enamored with the concept than their Christian Democrat compatriots. The successful apparition of the principle of subsidiarity in the case of German federalism has endowed the concept with a broad-based legitimacy among those seeking a federal Europe.*'[310]

Hence, national identity and the (possibly) federal structure of the Union are presented as though they had entered into a relationship of reciprocity or mutual reinforcement. This is implied by the legislator in the explanatory memorandum to the Act on the Treaty of 7 February 1992 on European Union, where it claims in relation to Article F that through the respect for national identities it is the actually the Union's federal vocation that is underscored.[311] Klaus Kinkel, German Minister for Foreign Affairs, set straight during the Act's first debate in the Bundestag that a federal structure would reconcile the already attained deepening of the Community with the desire to preserve national identity.[312] Theodor Waigel, German Finance Minister, dramatically refers to European citizens' fears of 'an erosion of national identities as well as of the sacrifice of national interests on the altar of European integration.'[313] But he promptly offers a remedy

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[310] Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, Neofascism* at 205.

[311] Drucksache 500/1992, 14/8/92. Also reproduced in: *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 89.

[312] Klaus Kinkel (FDP), First debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union, 8/10/92, BT – Plenarprotokoll 12/110, pp. 9314D-9394A. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 271.

[313] Theodor Waigel (CSU), First debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union, 8/10/92, BT – Plenarprotokoll 12/110, pp. 9314D-

to prevent this threat from materialising: the 'European House' ought to be built on the foundations of federalism and subsidiarity. This way, European unity would not curtail the Member States' national identities.[314] In this mutual reinforcement between national identity and federalism,[315] Germany's very own federal structure provides the defenders of the Treaty with an additional argument. Concepts such as the subsidiarity principle are praised as reliable homespun remedies whose efficacy – if effectively put into practice – would allow for preserving national identity at EU level.[316]

Thirdly, as insinuated above, national identity is detached from gruesome nationalism[317] and infused with near to picturesque values and

9394A, at 9319D-9324D. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 277.

[314] Theodor Waigel (CSU), First debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union, 8/10/92, BT –Plenarprotokoll 12/110, pp. 9314D-9394A. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 277, 278.

[315] Max Streibl, Bavaria's Prime Minister, speaks of an 'enforcement of federalism fostering diversity and identity', Second debate in the *Bundesrat* on the Act on the Treaty of 7 February 1992 on European Union, 18.12.1992, BR Plenarprotokoll 650, pp. 638B-654A, at 640.

[316] Helmut Kohl claims '[w]e want unity in diversity following a constitutional understanding and principle that have also largely determined the history of our Federal Republic'; Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT –Plenarprotokoll 12/126, pp. 10809B-10890C. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 376 (my translation). Peter Conradi (SPD) elevates the subsidiarity principle to a basic pillar of the German democracy. First debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union, 8/10/92, BT –Plenarprotokoll 12/110, pp. 9314D-9394A. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293at 340, 341.

[317] C.f. Where Foreign Affairs Minister Klaus Kinkel states that the 'concept [of national identity] has occupied with great success the place of old-fashioned narrow-minded nationalistic power and interest politics. The consciousness over one's own nationality grows in importance in Europe after the end of the East-West confrontation.

connotations. Following such an approach based on the idea of locality and provincialism, MP Rita Süssmuth, for instance, argues that 'people accrue from certain areas, from regions that engender a particular breed of people [*Menschenschlag*], a landscape, own products, and cultural traditions all of which ought to be supported, preserved and reinforced'.[318] In the same vein, Chancellor Helmut Kohl dedicates a plethora of words to the importance of rooting a united Europe in the 'Heimatregionen', in national identity, culture and traditions of the Member States.[319] However, these numerous recourses to the Heimat rhetoric as well as their frequent regional connotations in the context of preserving national identity are not that surprising if one considers how Celia Applegate concluded her seminal work on *Heimat* published in 1990: 'And as Germans, more than any other people in Europe, continue to question the sources of their national identity, in newspapers and public speeches, in films and literature, and now in renewed discussions of the future of East and West, the problem of local diversity and the promise of *Heimat* will continue to shape their answers'.[320]

[…] A healthy national consciousness is something positive. European consciousness ought to build on a deep-rooted feeling of national identity'; First debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union, 8/10/92, BT –Plenarprotokoll 12/110, pp. 9314D-9394A, at 9319D-9324D. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 271.

[318] MP Rita Süssmuth (CDU), First debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union, 8/10/92, BT –Plenarprotokoll 12/110, pp. 9314D-9394A, at 9330B-9333C. *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 287 (my translation).

[319] Helmut Kohl, Second debate in the *Bundestag* on the Act on the Treaty of 7 February 1992 on European Union; BT –Plenarprotokoll 12/126, pp. 10809B-10890C. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 4, op. cit. at n 297, at 376.

[320] Applegate, *A Nation of Provincials: The German Idea of Heimat* at 246.

4. Culture and language

Cultural identity in the sense of traditions rooted in locality has been understood by many German politicians as an ingredient of national identity. And even though the concept of cultural identity lacks sharp contours[321] and what might be understood as conforming to a country's cultural identity differs from one Member State to the next, the fear of loss of precisely that misty concept of 'cultural identity' has played a major role in various Member States' debates on the ratification of the Maastricht Treaty.[322] Yet it was in the Belgian debate where cultural diversity featured most prominently.[323] The concern over European integration encroaching on the Member States' cultural diversity had been already aired prior to and during the IGC, as evidenced by the Belgian Chamber of Representatives' resolutions from 22 and 23 November 1990 and from 27 June 1991. The resolutions consider that while a specific section on culture is to be incorporated in the revised treaty in order to foster Europe's cultural influence, it is necessary to respect and protect diversity of cultures and languages of the peoples of the Community.[324] The Belgian parliamentary

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[321] Uhle, *Freiheitlicher Verfassungsstaat und kulturelle Identität* .

[322] In Greece, for instance, Kostas Koliopoulos claims that 'there was support for the Treaty's provisions on cooperation in the cultural field as it allowed members to retain their cultural identities, rather than losing them. Kostas Koliopoulos, 'Greece and the Ratification of the Maastricht Treaty' in Finn Laursen and Sophie Vanhoonhacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications* (Martinus Nijhoff Publishers 1994) at 120.

[323] Sophie Vanhoonhacker, 'Belgium and the Ratification of the Maastricht Treaty' in Finn Laursen and Sophie Vanhoonhacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications* (Martinus Nijhoff Publishers 1994) at 51.

[324] Resolution of the *Chambre des Représentants de la Belgique* on the Intergovernmental Conferences on European Union and Economic and Monetary

debates reflect how little concern – at least ostensibly – there was in relation to Article F(1). But they also show that cultural diversity, education, and language were well and truly on the Belgians' minds. In their 'Rapport sur la politique sociale européenne, la citoyenneté européenne et les nouvelles politiques' for the *Chambre des Représentants de Belgique*, rapporteurs Ms de T'Serclaes and Mr Van Outrive underscore that when it comes to culture and education, 'cultural diversity and richness of the peoples of the Community ought to be respected and protected, especially at the linguistic level'.[325] In this vein, it was particularly favourably looked upon that the Maastricht Treaty left the content of education, its organisation, as well as its cultural and linguistic diversity to fall under the Member States' responsibility and that it preserved national and regional diversity of the Member States' cultures.[326] The Belgian Senate's assessment of the Maastricht Treaty's potential for preserving cultural diversity is quite similar. Indeed, concerns over Maastricht being a menace to, or implying a loss of, cultural identity or sovereignty are broadly addressed and ultimately

Union. Reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 324.

[325] Rapporteurs Ms de T'Serclaes and Mr Van Outrive, Rapport sur la politique sociale européenne, la citoyenneté européenne et les nouvelles politiques', évaluation du Traité de Maastricht, *Chambre des Représentants de Belgique*, session extraordinaire 1991-1992, 18 May 1992, at 69. Also available in *Ratification of the Treaty on European Union: Preparations* (Office for Official Publications of the European Communities 1996), vol. 1 Belgique I, at 78.

[326] Rapporteurs Mr Van der Maelen, Mr Van Diederen, Ms Lizin, Mr De Deker and Mr Van Peel, Rapport fait au nom de la Commission des relations extérieures, Projet de loi portant sur l'Union européenne, de 17 Protocoles et de l'Acte final avec 33 Déclarations, faits à Maastricht le 7 février 1992, *Chambre des Représentants de Belgique*, session extraordinaire 1991-1992, 9 July 1992, at 11. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 1 (1), op. cit. at n 325, at 399.

rebutted.[327] Cultural and linguistic diversity constituted a *leitmotif* of the Belgian parliamentary ratification debate.

Language as a defining element of collective identity notably also became an issue during the Danish 1992 referendum debate.[328] An internal Commission document addressing the possibility of reducing the influence of small Member States, including a lesser use of their languages, had apparently been leaked and was used by Danish movements against the Maastricht Treaty. Jacques Delors's fulgurous and angry denial of the existence of both the document and the rumoured plans came on 11 May 1992.[329] National languages and the fear of their possible depreciation were on the Danes' minds.

This was also the case in Luxembourg and France. In Luxembourg PM Mr Jacques Santer answered in the negative the question as to whether granting a limited right to vote to EU residents would entail Luxembourg losing *its soul* arguing that the sense of belonging to the Luxembourg nation was based rather on definable elements such as *language* as well as on less palpable elements such as a certain way of thinking and living together and the awareness of being part of a community sharing the same history. In his view, said elements represented constitutive and essential components of

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[327] Discussion générale, Rapport fait au nom de la Commission des relations extérieures, Projet de loi portant sur l'Union européenne, de 17 Protocoles et de l'Acte final avec 33 Déclarations, faits à Maastricht le 7 février 1992, *Sénat de Belgique*, session de 1992-1993, 20 October 1992, at 64-67. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 2 (2), op. cit. at n 292, at 892-895.

[328] Laursen, 'Denmark and the ratification of the Maastricht Treaty' at 69.

[329] Laursen refers to a document named 'A Strategy for Enlargement: Preliminary Report of the Study Group on Enlargement', Brussels 14 November 1991, in 'Denmark and the ratification of the Maastricht Treaty' at 69.

the Luxembourg nation.[330] In the French case, it suffices to say that on the occasion of the amendment of the French Constitution in connection with the ratification of the Maastricht Treaty, there was a proposal to introduce into the French Constitution a national identity clause mirroring Article F(1), an amendment that was, however, ultimately rejected.[331] Moreover, that same constitutional revision led to the proclamation of the French language as the (only) language of the Republic, a principle that was included very prominently in Article 2 of the French Constitution.[332]

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[330] Jacques Santer, Déclaration du Gouvernement sur la procédure de ratification du Traité de Maastricht, Chambre des Députés, 46éme séance, 22 April 1992, at 2234. Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 12, op. cit. at n 292, at 241.

[331] The amendment presented by Ms Nicole Catala involved introducing before Article 88-1 of the French Constitution an Article reading as follows: 'La France adhère á l'Union européenne. Cette Union est conforme aux principes de la démocratie. Elle respecte les principes fondamentaux du Droit et l'ordre juridique constitutionnel français.

L'Union européenne respecte l'identité nationale de la France. Elle ne dispose que des pouvoirs indispensables à l'exercice des compétences qui lui sont explicitement attribuées par le traité sur l'Union européenne. Son action ne peut excéder l'exercice des compétences strictement nécessaires pour l'application des dispositions de ce traité.' *Ratification of the Treaty on European Union: Preparations*, vol 8 (2), op. cit. at n 278 , at 652.

[332] Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, "Introduction Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty" in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013), 1-15, at 7. Language being one of the crucial elements of *national identity*, Le Pourthiet insists that the constitutionalisation of this principle proves a certain continuity in France's protection of French as the only official language, Anne-Marie Le Pourhiet, 'Les symboles identitaires dans la Constitution de 1958' in Bertrand Mathieu (ed), *1958-2008 Cinquantième anniversaire de la Constitution française* (Dalloz 2008) at 134–136.

5. Abortion versus Irishness

The Irish parliamentary debate on the ratification of the Maastricht Treaty reflects a concern that was absent from the debates in other Member States; the debate was intrinsically linked to the abortion issue. As the government itself admitted, the inclusion of Protocol 17, whose original aim was to raise the support for the Maastricht Treaty, backfired since far from excluding the abortion issue from the debate on the Treaty it actually led to it being placed right in its centre.[333] Particularly after the Danish 'no', all eyes were on Ireland[334] and abortion was on everyone's mind. In the parliamentary debate, the word 'abortion' was uttered no fewer than 47 times.[335] The question of a constituent asking her MP *whether Maastricht was the Dutch word for abortion* shows how heated and extensive the debate had proved on this topic – both inside and outside the parliament.[336]

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[333] Minister for Industry and Commerce, Mr O'Malley, declared before the *Dáil* that '[l]ong before yesterday the referendum on European Union was a source of some confusion and difficulty here at home. Not only is the issue of European Union — to do with Economic and Monetary Union and Political Union — extremely complex and far-reaching in itself, but we had the added complication of the entanglement of our own abortion controversy and the ill-fated Protocol No. 17, which sought to deal with that issue but which became especially complicated as a result of the judgment in the "X" case.' Parliamentary Debates Dáil Éireann, European Union Treaty: Statements, 3 June 1992, at 1372. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293at 45.

[334] Christa van Wijnbergen, 'Ireland and the Ratification of the Maastricht Treaty' in Finn Laursen and Sophie Vanhoonhacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications* (Martinus Nijhoff Publishers 1994) at 187.

[335] C-f. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293.

[336] Mr Wallace, debate in the Daíl on the Eleventh Amendment of the Constitution Bill, 1992, Second Stage (Resumed), 7 May 1992; cited by van Wijnbergen, 'Ireland and the Ratification of the Maastricht Treaty' at 183.

Abortion had always been a thorny issue for a people on whose national identity Catholicism had had a formative influence. As Paulette Kurzer highlights, the Catholic faith united the Irish people against dominant Protestantism. Also, the Roman Catholic Church was associated with Irish nationalism and was closely involved in political mobilisation since it was the only institution with nationwide structures.[337] This dominant position of the Catholic Church – its influence on public opinion, healthcare and education – was reflected by the strong attachment to religious values of the Irish people. In a 1990 survey, only a couple of years prior to Maastricht, Irish citizens scored far above fellow Europeans in terms of adherence to traditional Christian beliefs. Moreover, Irish Catholics turned out to be far more attached to traditional orthodox beliefs than Catholics in other countries.[338] Without venturing further than necessary into the many facets of Irish identity,[339] it appears interesting from the point of view of national constitutional identity to underscore the Catholic and patriarchal essence from which the Irish Constitution is drawn. Apart from Article 40(3)(3) on the right to life of the unborn and the equal right to life of the mother, which embodies both religious and patriarchal views on abortion,the Preamble[340]

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[337] Paulette Kurzer, 'Domestric Politics vs. the European Union: Alcohol, Abortion and Drug Policy,' 1997 at 6; Paulette Kurzer, *Markets and Moral Regulation: Cultural Change in the European Union* (Cambridge University Press 2001) at 148.

[338] Kurzer cites the survey published by Michael P. Hornsby-Smith and Christopher T. Whelan, 'Religious and moral values' in Christopher T. Whelan (ed), *Values and social change in Ireland* (Gill & Macmillan 1994); see Kurzer, 'Domestric Politics vs. the European Union: Alcohol, Abortion and Drug Policy' at 6–7; Kurzer, *Markets and Moral Regulation: Cultural Change in the European Union* at 148 et seq.

[339] For an overview of these multiple facets, see Brian Graham (ed), *In Search of Ireland: a cultural geography* (Routledge 1997).

[340] '*In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,*
We, the people of Éire,

sets out that the Constitution is adopted in the 'Name of the Most Holy Trinity'. [341]Furthermore, Article 40(6)(1) requires blasphemy to be prohibited,[342] while Article 41 headed 'The Family' states that the family is the fundamental unit group of society and a moral institution which possesses inalienable and imprescriptible rights that are antecedent and superior to all positive law. In this context Article 41(2), clearly based on a stereotyped view of the role of women in Irish society,[343] states that 'the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved' and that '[t]he State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
Do hereby adopt, enact, and give to ourselves this Constitution.'

[341] Mark Tushnet, reflecting on identity formation, asks 'Who are 'the people of Ireland' who have 'give[n] themselves' the still-operative 1937 Constitution?'; see Mark Tushnet, 'How do constitutions constitute constitutional identity?' (2011) 8 International Journal of Constitutional Law 671, at 671.

[342] '*The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law*.'

[343]Irish Human Rights Commission, 'Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women in respect of Ireland's Combined 4th and 5th Periodic Reports,' 2005 at 10 et seq. The Commission highlights the sexist and male-oriented language of the Irish Constitution and recommends various amendments especially as regards Articles 40(1), 40(3)(3), and 41(2).

duties in the home.' These provisions, although currently under revision,[344] have not been amended so far and are still part of the Irish Constitution as referred above.

This patriarchal, Catholic identity 'is also constructed through reliance on ideas of homogeneity and localism, where membership of a local community and conformity to its norms and values is held to be essential to a sense of national belonging. The urban/rural distinction is a key site where social and political tensions are articulated, rather than social class, as in Britain.'[345]

Yet, as Lisa Smyth argues, this collective identity suffered a deep crisis as a result of the 1992 "X" case,[346] i.e. the Irish Supreme Court ruling on the injunction pending on a fourteen-year-old rape victim, prohibiting her from travelling abroad to receive an abortion.[347] Smyth considered the ways in which Irish discourses on national identity and abortion were constructed through the media coverage of the X case. She came to the conclusion that the different actors positioned themselves in favour of or against abortion

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[344] By a Resolution of the Houses of the *Oireachtas* of July, 2012 the Constitutional Convention has been given the task to consider, *inter alia*, the amendment to the clause on the role of women in the home and encouraging greater participation of women in public life, increasing the participation of women in politics, and the removal of the offence of blasphemy from the Irish Constitution. On 27 January 2014, the Convention published its Sixth Report recommending that the offense of blasphemy in the Irish Constitution be removed and replaced with a new general provision to include incitement to religious hatred. See Convention on the Constitution, 'Sixth Report of the Convention on the Constitution The removal of the offence of blasphemy from the Constitution,' 2014.

[345] Lisa Smyth, 'Narratives of Irishness and the Problem of Abortion: The X Case 1992' (1998) 60 Feminist Review 61, at 72.

[346] Smyth, 'Narratives of Irishness and the Problem of Abortion: The X Case 1992' at 68 et seq.

[347] See below at n 505.

by constructing a 'we' in relation to the barbaric other – either the 'rest of Europe' or one's own State. Indeed, the cruelty of the X case had eroded the previously established hegemony of the pro-life movements, who condemned the barbaric Europeans, in favour of liberal positions since the Irish State was suddenly viewed as the barbaric other.[348]

These tensions, to which Irish collective identity was exposed in the aftermath of the X case, are also reflected in the parliamentary debates on the Maastricht Treaty. It becomes palpable how much the government feared that the abortion issue could become decisive with respect to the entire revision treaty. In this regard, the Minister of State at the Department of Agriculture and Food, Mr Hyland, was eager to clarify that the Maastricht Treaty was 'about economic and monetary Union […] not surrender [of] national identity or interfere[ing] with Christian ethos'.[349] The Irish debate illustrates a strong preoccupation with the loss of Irish identity, also coined *Irishness*,[350] which appeared to be linked to the

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[348] Smyth, 'Narratives of Irishness and the Problem of Abortion: The X Case 1992' 68, 69.

[349] Mr Hyland, Deputy to the Dáil, 420 Daíl Debates, Cols 1993-1996, European Union Statements, 9 June 1992, 2029-2076, at 2037. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293, at 100.

[350] In Ms Flaherty's, Deputy to the Dáil, words: 'I see that as a process that adds to my Irishness rather than diminishing it in any way. It gives me a wider arena in which to present the unique qualities that make me Irish and that make the Irish identity important and special, and it acknowledges and respects the cultures of many other countries.' C.f. 420 Daíl Debates, Cols 1993-1996, European Union Statements, 9 June 1992, 2029-2076, at 2061. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293, at 113. Deputy to the Daíl, Mr Lanigan, finds similar words: 'Some people fear that we might lose our Irish identity if we were part of an integrated Europe. I do not feel threatened by joining an integrated Europe. I do not think my Irishness will be threatened, rather it will be strengthened and in a fully integrated Europe our Irishness will work, in a positive way.' C.f. 420 Daíl Debates, Cols 1993-1996, European Union Statements, 5 June 1992, at 141. Also available in

preservation of Christian values. Catholicism and Irishness versus Protocol 17 and the X case configured Ireland's very own Gordian knot in the Maastricht question. The Taoiseach's only option was to attempt a clear cut through it by affirming that '[t]he European Union does not mean abortion. The problems that have arisen must be dealt with in our own domestic law. Our European partners have no desire to become involved, under the principle of subsidiarity which is set out explicitly in a new article of the Treaty. Social and moral legislation is a question entirely for ourselves.'[351] Once again, subsidiarity was presented as the remedy for the preservation of national identity. In the Irish case, the events of 1992 entailed a shift in that identity. The cruelty of the X case resulted in the Irish no longer viewing the European 'others' as barbaric, but instead prompting them to perceive their own State's practices as barbaric. Irishness perhaps still opposed abortion, but not at any price.

6. Conclusions

In light of the above, it suffices to say that when it comes to national identity and the Maastricht treaty revision, one must distinguish between the positions of Member State governments or government officials during the IGCs and those defended during the subsequent internal parliamentary debates. While – maybe apart from the British insistence –[352] national

Ratification of the Treaty on European Union: Preparations vol. 9, op. cit. at 293, at 162.

[351] Albert Reynolds, Taoiseach, 420 Daíl Debates, Cols 1993-1996, European Union Statements, 9 June 1992, at 1937. Also available in *Ratification of the Treaty on European Union: Preparations* vol. 9, op. cit. at 293, at 64.

[352] In this case, Thatcher's insistence on national identity was shared by her successor. C.f. John Major's UK Presidency Conference on 'Europe and the World After 1992 held at the Queen Elizabeth II Conference Centre on Monday 7 September 1992 where he praised the benefits of nationalism and national identity. While acknowledging the creation of the Community as a response to the destructive side of nationalism in

identity or its preservation had in no way constituted a bone of contention during the preparation and negotiation of the Maastricht Treaty, the Danish 'no' to the Treaty moved identity protection to the centre stage. The Edinburgh Council conclusions show that it was the Danes' vote in the referendum that put all eyes on identity protection. Suddenly, national pride, diversity and national sovereignty were in the limelight,[353] although in certain Member States – such as Germany – 'national identity' already represented such an omnipresent category that it is likely to have fuelled the debate anyway.

Subsidiarity, on the other hand, was strongly referenced all throughout the treaty preparation and negotiation as well as during the ratification processes. It was alternatively presented as the silver bullet against an overzealous Commission and a centralising Union or as the promise of further federalisation. Definitely, it was understood as a means to preserve national identity.

Western Europe, he also suggested that the founding fathers underestimated the citizens' attachment to national identity and pride. Bordering ethnicism, he puts special emphasis on the instincts that are rooted in blood. Instincts which would have been forged over thousands of years notwithstanding the mixing of e.g. English and Celtic blood with Roman, Viking, Saxon, and Norman blood. John Major, 'Europe and the World' (1992) nr. 1799 Agence Europe Documents 1–7.

[353] As shown in the speech by Sir Leon Brittan to the European University Institute - Florence, 11 June 1992, 'Subsidiarity in the Constitution of the EC' (1992) nr. 1786 Agence Europe Documents 1–7. In this connection and regarding the parliamentary debate in Germany, Herdegen emphasised the importance of the proceedings before the German Federal Constitutional Court against the ratification act: 'The proceedings before the Constitutional Court in Karlsruhe have been widely conceived as a kind of substitute for a public debate on the monetary union before parliamentary approval. The large consensus within Parliament did not allow for a profound discussion of Maastricht's implications, of the quality the political class of France and of other Member States has offered to its citizens.' Matthias Herdegen, 'Maastricht and the German Constitutional court: Constitutional restraints for an 'ever closer union'' (1994) 31 Common Market Law Review 235, at 249.

The intensity of public and parliamentary debates depended primarily on which national actors were involved in the national treaty ratification. Those Member States that either voluntarily asked, or were obliged by their constitutional laws to ask, their people to accept the treaty revision via referendum offered a rather intense debate[354] as compared to those Member State where only parliaments were involved. But even among the Member States where no referendum was held, the debates were of unequal intensity.[355] Likewise, the reference to national identity elements has carried varying degrees of weight[356] in the different parliamentary debates on the treaty ratification. In some instances, it is even completely absent from them. In others, the notions of *Irishness*, *Heimat*, culture, or language have starred opposite the Maastricht Treaty.

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[354] This was the case in Denmark, Ireland and France.

[355] Den Hartog compares the feeble debate –both inside and outside the political arena- in the Netherlands with the heated parliamentary debates in Germany and the UK. Arthur den Hartog, "The Netherlands and the Ratification of the Maastricht Treaty" in Finn Laursen and Sophie Vanhoonhacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications* (Martinus Nijhoff Publishers 1994). In the cases of Belgium, Spain, Greece, and the Netherlands the ratification process has been described as especially smooth. C.f. Vanhoonhacker, 'Belgium and the Ratification of the Maastricht Treaty' ; Koliopoulos, 'Greece and the Ratification of the Maastricht Treaty' ; Alberto Gil Ibáñez, 'Spain and the Ratification of the Maastricht Treaty' in Finn Laursen and Sophie Vanhoonhacker (eds), *The Ratification of the Maastricht Treaty. Issues, Debates and Future Implications* (Martinus Nijhoff Publishers 1994).

[356] In Greece, for instance, concerns over a potential loss of national identity appear to have been raised primarily by the Greek Communist Party, Koliopoulos, 'Greece and the Ratification of the Maastricht Treaty'.

CONCLUSIONS TO PART I: UNTANGLING IDENTITY, SOVEREIGNTY AND SUBSIDIARITY

As regards the three categories I have attempted to untangle in this first Chapter, *i.e*. sovereignty, subsidiarity, and identity, the Maastricht treaty revision – and the debates surrounding it – shows that 'national identity', as had succeeded with subsidiarity, allowed us to construe discourses based on quite different motivations. On the one hand, 'national identity' was used by certain actors, e.g. Margaret Thatcher, as a surrogate to 'sovereignty' or 'national interest'. On the other hand, it was incorporated by a number of European politicians into a surrogate discourse of power based on the preservation of diversity. In this discourse, 'subsidiarity' played a major role since it constituted the pivotal concept – both morally and technically – around which it was construed. In both cases, the use of 'identity' had the advantage of avoiding a notion that either did not really matter – since the concept was non-essential to the underlying personalist/federalist inspiration – or had ceased to provide a meaningful basis for invocations of national interest in the context of European integration. Here the recourse to national identity comes in handy to both positions and has in this respect replaced the sovereignty narrative. The European Union appeared to have shunned 'sovereignty' since the Treaties consistently avoided, and currently still avoid, expressly mentioning it: the Maastricht Treaty does not contain any reference to sovereignty or statehood.[357] And yet, while it

[357] References to 'sovereignty' did not make it into the treaty text. The only explicit reference is made in the adjunct Danish Declaration on Article K.14 of the Treaty on European Union. According to this Declaration, the Danish ratification of Council decisions on visas, asylum or immigration in the case of *a transfer of sovereignty* as defined in the Danish constitution, required either a majority of five sixths in the *Folketing* or both a majority in the *Folketing* and a majority of voters in a referendum.

became silent on sovereignty, the identity narrative made its incursion into EU law. Article F(1) at European level and the subsequent wave of constitutionalising the participation in the EU at national level[358] are an indication of the Member States' urge to protect their very essence at a time when resorting to the traditional sovereignty narrative was no longer perceived as effective. And how could it? With Maastricht nothing less than *compétences régaliennes* were either transferred to EU level or withdrawn from the Member States' sole responsibility. Simultaneously, the Court of Justice was handing down judgments causing the Member States to re-consider their attitude of *benign neglect*[359] towards the former, an attitude which had dominated many decades of European integration. And yet, in spite of these developments, the Member States wished for further European integration. But the sovereignty narrative had ceased to be of any use in defending the preservation of elements they deemed essential. A remark from Belgian Vice-Premier and Minister of Foreign Affairs. Willy Claes, during the ratification of the Maastricht Treaty summarises this dilemma of nomenclature quite accurately: 'What does Belgian sovereignty mean? It is already non-existent in the fields of monetary and defence politics.'[360]

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[358] Monica Claes, 'Constitucionalizando Europa desde su fuente. Las 'cláusulas europeas' en las Constituciones nacionales: evolución y tipología' in Marta Cartabia and others (eds), *Constitución europea y constituciones nacionales* (Tirant lo Blanch 2005).

[359] Eric Stein, 'Lawyers , Judges , and the Making of a Transnational Constitution' (1981) 75 The American Journal of International Law 1–27.

[360] Willy Claes, Discussion générale, Rapport fait au nom de la Commission des relations extérieures, Projet de loi portant sur l'Union européenne, de 17 Protocoles et de l'Acte final avec 33 Déclarations, faits à Maastricht le 7 février 1992, *Sénat de Belgique*, session de 1992-1993, 20 October 1992, at 67 (the translation is mine). Also available in *Ratification of the Treaty on European Union: Preparations*, vol. 2 (2), op. cit. at n 292, at 895.

PART II IDENTITY PROTECTION THROUGH THE TREATIES

Chapter 3 The Genesis of the National Identity Clause: Maastricht

1. Formal absence from the Treaties until Maastricht

While it is true that an explicit reference to 'national identity' was –at least formally – absent from the TEEC until the 1993 revision, that is for almost 40 years, it is equally true that this formal absence did not automatically preclude Community law from implicitly protecting the Member States' national identities prior to the Maastricht revision. This is what Advocate General Maduro claims in his Opinion delivered in the Michaniki case[361] where he states that the respect for the national identity of the Member States has been – and is – present in the European integration process since its very inception. And this is also what Giscard D'Estaing suggests as early as in 1990 in his Interim Report on behalf of the Committee for Institutional Affairs of the European Parliament on the subsidiarity principle by stating that the European construction, due to its very own nature, respects the diversities of its Member States, 'their personality, their rights and interests'.[362] As a matter of fact, the will of the drafters – of each of the

[361] As AG Miguel Poiares Maduro emphasises in his Opinion delivered on 8 October 2008 in Case C-213/07 *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Others*, *ECR* [2008] I-09999. Cf. with a reference to R. Schuman, Saiz Arnaiz, 'Identité nationale et droit de l'Union européenne dans la jurisprudence constitutionnelle espagnole' at 101.

[362] He links this respect of national diversities, an inherent element of the then Communities, to the nature of European federalism and the philosophy originating from the Treaties, see Valéry Giscard d'Estaing 'Interim Report on the Principle of

three Community treaties – to keep the Member States' identities unaffected by the Community-building transpires through various principles and regulations of Community law. Particularly the principles of sincere cooperation and of equality between Member States, the latter finding its expression in the Communities' language regime, demonstrate that there was an early preoccupation with protecting Member State identities. Furthermore, in the case of the four fundamental economic freedoms, restrictions by the Member States were admitted *ab initio* where overriding reasons of general interest were at stake. The drafters of the TEEC thus guaranteed that under certain circumstances specific national particularities could subsist notwithstanding the encumbrance upon the common market they entailed.

1.1 The Communities' language regime as an expression of the equality between Member States

As mentioned above, the very nature of the European integration process, based on treaties ratified by sovereign States that by no means expressed their will to relinquish their statehood, makes it difficult to conceive that national identities or diversities received little respect over a period of 40 years. On one hand, it might simply not have seemed necessary in the early phase of European integration to carve into the Treaties a protection that was taken for granted. On the other hand, at least one of the elements essential to national identity was debated among and protected by the Member States at the earliest stages of the Communities' life: language.[363]

Subsidiarity on behalf of the Committee for Institutional Affairs' European Parliament session documents, Doc. A3-163/90/Part B, 4/7/1990, at 2.

[363] From the outset of the Community, language – or more precisely the different languages spoken in the Member States – has been the 'most visible mark of their diversity'. This is at least the view taken by Coulmas in relation to the 12 members of the EEC, c.f. Florian Coulmas, 'European integration and the idea of national language'

Indeed, as Jean Monnet recalls, on 23 July 1952 the Six of the European Coal and Steel Community (ECSC) met in Paris in order to take some essential decisions for which the governmental approval was needed. These decisions concerned among others the location of the institutions and the languages of the ECSC.[364] In the end, the six foreign ministers on 24 July 1952 adopted a Protocol on the language regime of the ECSC,[365] which conferred the status of official and working languages upon Dutch, French, German and Italian. This approach meant that, despite Article 100 of the Treaty of Paris *de facto* establishing French as the only authentic treaty language,[366] all official languages of the Member States were maintained at ECSC level.

A few years later, in 1957, the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom), the Rome treaties, were signed. Both were as silent on the matter of the language regime as had been the ECSC Treaty.[367] Yet, despite this lack of express determination of a language regime for the two Communities, both treaties adopted significant

in Florian Coulmas (ed), *A Language Policy for the European Community. Prospects and Quanderies* (Mouton de Gruyter 1991) at 1.

[364] Jean Monnet, *Mémoires* (Fayard 1976) at 432–434.

[365] The rules concerning language regime set forth by this protocol were taken over for the EEC and Euratom language regimes, c.f. Direction Générale de la Traduction de la Commission européenne (ed), *La traduction à la Commission: 1958-2010* (Commission européene 2009), Études sur la traduction et le multilinguisme at 10.

[366] Article 100 ECSC reads: 'Le présent traité, rédigé en un seul exemplaire, sera déposé dans les archives du gouvernement de la République française, qui en remettra une copie certifiée conforme à chacun des gouvernements des autres États signataires. En foi de quoi les plénipotentiaires soussignés ont apposé leurs signatures au bas du présent traité et l'ont revêtu de leurs sceaux.'

[367] Antoni Milian-Massana, 'Le principe d'égalité des langues au sein des institutions de l'Union européene et dans le droit communautaire, mythe ou réalité?' (2002) 38 Revista de Llengua i Dret 47, at 50 et seq.

innovations in this regard. Indeed, as Milian i Massana denotes, the treaties significantly diverged from the example set by Article 100 CECA, since they added to the equivalent provisions – Articles 248 TEEC and 225 Euratom Treaty – the proviso that the treaties were not only drawn up in one single copy, but also in the German, French, Italian and Dutch languages. Furthermore, the TEEC and the Euratom Treaty imposed – in their Articles 217 and 190, respectively – the unanimity rule on their respective Councils when determining the language regime of their institutions.[368]

And indeed, on 15 April 1958, the EEC Council and the Euratom Council adopted – by unanimous decision, as required – their first ever Regulations: *Regulation No 1 determining the languages to be used by the European Economic Community*[369] and *Regulation No 1 determining the languages to be used by the European Atomic Energy Community*.[370] Again, as had occurred with the ECSC, both official and working languages of the institutions corresponded to the official languages of the Member States.[371]

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[368] Milian-Massana, 'Le principe d'égalité des langues au sein des institutions de l'Union européene et dans le droit communautaire, mythe ou réalité?' at 51.

[369] OJ 17, 6.10.1958, p. 385/58.

[370] OJ 17, 6.10.1958, p. 401/58.

[371] Although Luxembourgish is today an official language in Luxembourg, it did not have any status at all up until the 1984 constitutional reform declaring Lëtzeburgesch national language and placing it alongside French and German as one of Luxembourg's three official languages. Today, the non-recognition of Lëtzeburgesch constitutes the only exception to the criterion that those languages enjoying official status in the entire territory of a Member State or before its central institutions acquire the status of official language of the EU. C.f. Antoni Milian-Massana, 'Languages that are official in part of the territory of the Member States' in Xabier Arzoz (ed), *Respecting Linguistic Diversity in the European Union* (John Benjamins Publishing Company 2008) at 192 et seq. A second exception to said criterion, the non-recognition of Irish as an official language (which only acquired the status of 'language of the Treaties' upon Ireland's accession) ended as of 1 January 2007 with Council Regulation (EC) 920/2005 of 13

This indicates that the ECSC Protocol influenced the language regimes of the institutions of the two other Communities.[372] Prestige considerations and national pride appear to have been at work in determining that the Communities were to grant all Member State official languages equal status.[373] While this choice hints at 'the willingness to accommodate national desires and to accord national languages a privileged status',[374] it also introduces a novel principle as regards the language regime of international organisations, that of the equality of languages.[375] Indeed, if one compares the linguistic regime of the Community institutions with that of other international organisations, a significant difference lies in the fact that generally only a small number of languages are established as official or working languages for the institutions of an international organisation, whereas in the case of the Communities all Member State official languages are afforded such status.[376] In the case of the Council of Europe, for

June 2005 amending Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Regulation 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations. C.f. Milian-Massana, 'Languages that are official in part of the territory of the Member States' at 194 et seq.

[372] Milian-Massana, 'Le principe d'égalité des langues au sein des institutions de l'Union européene et dans le droit communautaire, mythe ou réalité?' at 50.

[373] Coulmas, 'European integration and the idea of national language' at 5.

[374] Coulmas, 'European integration and the idea of national language' at 5.

[375] Milian-Massana, 'Le principe d'égalité des langues au sein des institutions de l'Union européene et dans le droit communautaire, mythe ou réalité?' at 49; Iñigo Urrutia and Iñaki Lasagabaster, 'Language Rights as a General Principle of Community Law' (2008) 8 German Law Journal 479, at 479; Direction Générale de la Traduction de la Commission européenne, *La traduction à la Commission: 1958-2010* at 9.

[376] Further examples of the language regimes of international organisations can be found in Theodor Schilling, 'Language Rights in the European Union' (2008) 9 German Law Journal 1219, at 1223 et seq; Coulmas, 'European integration and the idea of national language' at 5.

instance, whose foundation preceded the inception of the ECSC by only a couple of years, the official languages were limited to English and French.[377] Accordingly, under the Statute of the Council of Europe, five of the original ten Member States did not see any official language of theirs granted the status of official language of the organisation. This divergence between the language regime of the Communities and those of other coeval international organisations may attest the intention – of the Member States' representatives sitting in the Council – to set the Communities apart from the traditional communicative parameters of international organisations, thus elevating them to more than a mere international organisation.[378] Quite apart from the potential aspirations to convert the Communities into a distinctive international organisation, an imperative reason for placing all official Member State languages on an equal footing may be found in the distinct, *supranational* nature of the Communities.[379] The direct applicability of Community law regulations requires the addressees to be able to understand the texts published in the Official Journal; the principle of legal certainty and the prohibition of arbitrary actions would otherwise be violated.[380] Indeed, considerations of accountability[381] seem to have motivated the choice of a multi-linguistic approach covering all official languages of the Community territory. Indeed, analysis of the work of the

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[377] Article 12 of the Statute of the Council of Europe, London 5 May 1949.

[378] Peter A. Kraus, *A Union of diversity: language, identity and polity-building in Europe* (Cambridge University Press 2008) at 114 et seq.

[379] Milian-Massana, 'Le principe d'égalité des langues au sein des institutions de l'Union européene et dans le droit communautaire, mythe ou réalité?' at 50.

[380] Urrutia and Lasagabaster, 'Language Rights as a General Principle of Community Law' at 482; Milian-Massana, 'Le principe d'égalité des langues au sein des institutions de l'Union européene et dans le droit communautaire, mythe ou réalité?' at 53, the author argues on the same grounds that the principles of equality and no discrimination would be jeopardised if the multi-linguistic approach was not followed.

[381] Coulmas, 'European integration and the idea of national language' at 5 et seq.

ECSC Interim Commission has revealed that there were two opposing positions on the matter of the language regime of the institutions: while the French delegation considered that in order to ensure 'legal coherence', the link between the treaty language and the language of the legal acts issued by the Community institutions needed to be maintained – and since the only authentic language of the Treaty of Paris was French, this would have been the official language –, the German delegation dissented arguing that this 'legal coherence' was intimately linked with considerations of general interest, i.e. the protection of the rights of the potential addressees of the legal acts, which meant that authentic versions for all official languages needed to be released.[382] The language regime chosen for the Community institutions opts for the German approach and thus favours multi-linguistic legislation over the French 'legal coherence'.[383]

In addition to protecting the rights of the addressees of Community legislation and the principles of legal certainty and security, the approach followed by the ECSC Protocol on the language regime as well as the EEC and Euratom Regulations No 1/58 establishes – as mentioned above – the principle of equality between Member State languages. This principle may be understood as a corollary of the principle of equality of the Member States, which in turn is rooted in the public international law principle of sovereign equality of States, and finds its expression in a number of symbolic regulations, such as the order of the Presidency of the Council.[384]

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[382] References to the 'Rapports de la Commission des juristes à la Commission intérimaire de la CECA du 1er juin 1951 (CEAB 2 n° 16) et de juillet 1952 (CEAB 2 n° 17)' taken from: Direction Générale de la Traduction de la Commission européenne, *La traduction à la Commission: 1958-2010* at 9.

[383] Direction Générale de la Traduction de la Commission européenne, *La traduction à la Commission: 1958-2010* at 9 et seq.

[384] Until 1995, when an amendment by the Maastricht Treaty came into force, Article 146 TEEC set forth: 'The Council shall be composed of representatives of the Member

In spite of the numerous regulations from which the principle of language equality – or at any rate the principle of equality among Member States – is to be inferred, the Treaties did not contain any express reference to the equality of the Member States until the Lisbon treaty revision. Yet, the national identity clause, i.e. the Union's duty to respect its Member States' national identities – enshrined in Article F(1) TEU and later renumbered as Article 6(3) TEU by the Amsterdam Treaty –, has been interpreted as implicitly referring to the principle of equality of the Member States.[385] This interpretation of the identity clause revealed itself as quite a hunch if one considers that current Article 4(2) TEU now opens with the words '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities [...]'.[386]

The official languages of the Member States – and therewith an element of their national identity – were thus secured on an equal footing from the very inception of the Communities. The drafters were aware of the distinct nature of the community they were calling into being as compared to other coeval international organisations and therefore consequently opted for a distinct language regime, which measured up to the exigencies posed by this distinctiveness while at the same time guaranteeing the preservation of

States. Each Government shall delegate to it one of its members. The office of President shall be exercised for a term of six months by each member of the Council in rotation according to the alphabetical order of the Member States.' For the determination of the alphabetical order, the name of each Member State was spelled in *its own language*, c.f. Coulmas, 'European integration and the idea of national language' at 5.

[385] Jan Wouters, 'Constitutional Limits of Differentiation: the Principle of Equality' in Bruno de Witte and others (eds), *The Many Faces of Differentiation in EU law* (Intersentia 2001) at 315.

[386] The wording of current Article 4(2) TEU has been taken over from the Treaty establishing a Constitution for Europe almost without modification. For the inclusion of the reference to the principle of equality between the Member States, see *infra* at n 867.

the State languages at Community level. Oddly enough, the resulting principle of language equality is currently mentioned – in the shape of the general principle of equality of Member States – in the same breath as the Union's respect for the Member States' national identities in Article 4(2) TEU. Thus, even before the inclusion of an explicit reference to the Union's duty to respect its Member States' national identities, elements hereof – such as the State language – were already protected through the language regime and through the (unwritten)[387] principle of equality among the Member States.

1.2 The Community's (unwritten) duty of sincere cooperation

In addition, it has been also argued that the 'national identity clause' as set out in Article F(1) Maastricht Treaty may be considered an expression of the Community's duty of sincere cooperation.[388] Just as it succeeded with the principle of equality of the Member States – and unlike the Member

[387] Although the principle was not featured expressly in the Treaties until the Lisbon treaty revision, it builds on the sovereign equality of States and thus on one of the oldest ideas of contemporary public international law. In this sense, starting with the ECSC Treaty any treaty conclusion in the framework of the European integration process was based on that principle. C.f. Blanke, 'Article 4. [The Relations Between the EU and the Member States]' 12. Jan Wouters argued that notwithstanding the lack of explicit recognition in the treaties, the case law of the European Court of Justice indicated that the principle of equality among the Member States could serve as a constitutional principle. In particular, he refers to Joined Cases C-63/90 and C-67/90, Portugal and Spain v Council [1992] ECR I-5073, paras 36-37 and 44, where in his words 'the Court stresses that, since their accession, Portugal and Spain are in an equal position as other Member States under existing Community legislation, that they are entitled to participate as Member States in the allocation of new fishing possibilities and 'may put forward their claims on the same footing as all the other Member States' when the system for the distribution of catch quotas among Member States is reviewed'; Wouters, 'Constitutional Limits of Differentiation: the Principle of Equality' at n 65.

[388] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 167–168.

States' duty of sincere cooperation – the Community's duty of sincere cooperation was not explicitly mentioned by the Treaties until the Lisbon treaty revision. The Community's duty of sincere cooperation represents the other side of the coin of the Member States' duty of sincere cooperation, which, as Klamert has recently postulated, has been a constant element in European integration history[389] and part of the treaty texts since the ECSC Treaty. Even the wording of the relevant provisions – Article 86 ECSC, Article 5 EEC, and Article 10 TEU (Nice version) – appears to have changed little throughout the different treaty revisions.[390] The Lisbon Treaty codified the reciprocity of loyalty obligations, the Union's duty of sincere cooperation was incorporated into current Article 4(3) TEU based on what had been established by the Court of Justice.[391] But even before its express incorporation into primary law, the Union's unwritten duty of sincere cooperation was already understood as a generic expression of the duty to act with consideration and treat the Member States with respect insofar as the Union's objectives allowed for it.[392] Now, with the Lisbon Treaty revision incorporating the Union's duty into Article 4(3) TEU, immediately preceded by Article 4(2) TEU enshrining the principle of equality of the Member States and the Union's duty of respect for its Member States' national identities, this understanding undoubtedly prevails. As a matter of fact, a recent commentary on the TEU perceives the Union's duty of sincere cooperation as an obligation requiring the Union's institutions, bodies and offices 'to respect the fundamental interests of the

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[389] Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) at 9.

[390] Klamert, *The Principle of Loyalty in EU Law* at 9; the systematic context the loyalty clause is placed in today, however has changed quite considerably.

[391] Case 230/81, Luxembourg v Parliament (ECJ 10 February 1983) para 37; Blanke, 'Article 4. [The Relations Between the EU and the Member States]' 86.

[392] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 195.

Member States, which comprise in particular the respect for the *equality of the Member States* and their *national identities*'.[393]

1.3 Derogations from the fundamental market freedoms

The establishment of a common market among the EEC Member States as spelled out by the Rome Treaty in its Article 2 constituted the treaty's fundamental objective. In order to achieve this goal, free movement of goods, persons, services and capital needed to be ensured. Yet, from the outset the TEEC itself provided express grounds for Member States to derogate from those freedoms for reasons connected with wider public interests such as public health and public policy.[394] These treaty-based exceptions, which have been supplemented by the Court of Justice's development of public interest or mandatory requirements, are not only, as Catherine Barnard convincingly argues, illustrative of a 'social market' tradition where state intervention in the markets is accepted and expected in order to secure social values which are seen as a public good in their own right,[395] they also allow for a certain degree of diversity in the form of specific interests or values of the Member States.

In this sense, Article 36 TEEC (now Article 36 TFEU) set forth in its first sentence a list of grounds for derogating from the principle of free movement of goods:

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[393] Blanke, 'Article 4. [The Relations Between the EU and the Member States]' 88 (emphasis added).

[394] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2013) at 26.

[395] Barnard, *The Substantive Law of the EU: The Four Freedoms* at 26.

> *'The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property.'*

Similarly, Article 48(3) TEEC (now Article 45(3) TFEU) established that the principle free movement of workers might be *'subject to limitations justified by reasons of public order, public safety and public health*', and the same general derogations were laid down by Article 56(1) TEEC (now Article 52(1) TFEU) for the freedom of establishment and for the freedom to provide services by cross-reference by Article 66 TEEC (now Article 62 TFEU). Those express grounds of derogation were supplemented by the Court of Justice to include 'public interest' requirements.[396]

Under the TEEC the Member States were thus given the possibility to preserve and enact national measures serving important interests. These national interests were allowed to take precedence over fundamental market freedom. However, the margin available to the Member States for the accommodation of such interests is restricted. Said interests were (and remain to this day) limited to those recognised in the Treaty or by the Court of Justice and their successful application is subject to a number of constraints, most notably a proportionality test.[397] This means that even though Member States enjoy a wide margin of discretion to determine in accordance with their own set of values what constitutes, for instance,

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[396] Barnard, *The Substantive Law of the EU: The Four Freedoms* at 496.

[397] Barnard, *The Substantive Law of the EU: The Four Freedoms* at 154 et seq.

public morality in their own country,[398] it is ultimately for the Court of Justice to decide whether the Member State's claim is successful.

1.4 Conclusions

Without further venturing into the initial years of Community-making, it suffices to say that elements of national identity or means to protect it were, perhaps rather unsurprisingly, implicitly present in the Treaties from the Union's very beginnings. Express derogations from fundamental market freedoms provided scope for the accommodation of national values and interests. The fact that in the *Omega* case[399] the protection of fundamental rights, more precisely the German understanding of human dignity, was raised and treated as a public policy derogation is indicative hereof.[400] The existence of a willingness to protect the Member States' national identities from the very outset becomes particularly visible with respect to the Communities' linguistic regime.

The one element of national identity that could have been impaired at this early stage of integration was ring-fenced at European level from the moment of the inception of the Communities. Furthermore, in current Article 4 TEU, the Union's duty to respect Member State national identities is actually flanked by the principle of equality of the Member States (Article 4(2) first sentence) and by the principle of sincere cooperation (Article 4(3)). Without seeking to anticipate an interpretation of the provision based

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[398] Barnard, *The Substantive Law of the EU: The Four Freedoms* at 155.

[399] ECJ Case C-36/02 [2004] ECR I-9609.

[400] For an analysis of the case from the perspective of public-policy derogations and legal persons, see Barnard, *The Substantive Law of the EU: The Four Freedoms* at 509 et seq.

on the scheme of the treaty, one may read this spatial adjacency as a substantive proximity.

2. Inclusion in the Maastricht Treaty

The Maastricht Treaty enshrined the Union's duty to respect its Member States' national identities in the treaties by dedicating to such duty a paragraph of its own among the Treaty's general provisions. Said duty was set forth in Article F(1) in the following terms: '*The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy*'.

The introduction of this 'national identity clause' at Maastricht has to be envisioned in the context of the most radical transformation the Communities had undergone since their inception, leading to nothing less than the founding of the European Union. Against the background of such dramatic changes as laying down the completion of the Economic and Monetary Union or creating a Common Foreign and Security Policy pillar and a Justice and Home Affairs pillar, it is far from surprising that the provision providing the Union's respect for its Member States' national identity did not cause the furore other provisions did. In this sense, the attention arrested by the subsidiarity principle, *presented as the fulcrum of the new European Constitution*,[401] by far outshone that attracted by the identity clause.

Against this background and with a view to undertaking the following analysis of Article F(1) TEU's drafting history, a brief preliminary remark is required: when analysing the predecessor of a provision that is currently the subject matter of heated debates, it is tempting to read, with hindsight,

[401] In Ian Ward terms, 'The European Constitution and the Nation State. Review of 'The European Rescue of the Nation-State' by A. Milward' at 164.

more into the drafting history of that provision than actually existed. I have already addressed in the introduction the hazards inherent with the use of *travaux préparatoires* as a means of interpretation. In addition to bearing in mind those general weaknesses of *travaux*, I have also endeavoured to avoid amplifying artificially the importance that the treaty drafters had at that time attached to the concept of national identity and to its incorporation into the treaty. And yet, without purporting to discern in retrospect a debate taking centre stage that was actually rather of secondary importance, one has to acknowledge the numerous references to identity protection in the framework of European integration, both before and during the Maastricht treaty revision. As we will see, 'identity' did matter back then – first and foremost in terms of European foreign and defence identity, but also in terms of national identity.

Thus, for the purpose of distilling the intentions of the treaty-makers when drafting the 'national identity clause' as well as the motivations that may have led the negotiators at the IGC to push for its inclusion in the Treaty, I draw from the preparatory works to the Maastricht treaty revision. Since the debates during the IGC were not made public, a deplorable circumstance,[402] I focus on those *travaux préparatoires* that were either made accessible to the general public through Official Journals and press conferences or leaked, such as government memoranda and the like, in order to determine the drafters' intentions behind the inclusion of the identity clause. And if the 'why' is impossible to gauge, then at any rate I attempt to ascertain on whose behalf – or maybe under whose pressure – Article F(1) entered the Maastricht Treaty. In addition, I place the incorporation of Article F(1) as a general provision dealing with identity protection in the context of further provisions also addressing the

[402] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 160 et seq.

preservation of (national) differences having been included within the Maastricht Treaty. This permits me to contextualise the respect for national identity in a broader framework of differentiation.

Once the road map to the IGCs on political as well as on economic and monetary union had been established, the reform treaty then had to be drafted and agreed upon. This occurred under the successive presidencies of first Luxembourg and then the Netherlands, and involved dealing with the complications of two sets of IGCs held simultaneously – one on political union and one on economic and monetary union.

The main difficulty in assessing the IGC negotiations – and thus the reasons behind the inclusion of the duty to respect the Member States' national identities in the treaty resulting from such negotiations – lies in the fact that the meetings were – as always – held in closed sessions of which there are no transcripts. Due to this secrecy, we are doomed to make assumptions about the motivations that led to the inclusion of the identity clause.[403]

Findings from the previous sections of this chapter concerning the preparatory works and the 1990 Council meetings point towards the existence of strong interests – albeit based on radically different motivations – of several institutions and one Member State in particular, the United Kingdom, to address the question of identity preservation in the future treaty on European Union. Indeed, the United Kingdom, supported by Denmark and Greece,[404] appears to have been the driving force in this matter, reviving the 'national identities' that had been omitted by the Rome II conclusions. In this sense, and leaving aside the IGC on the economic

[403] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 160; Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 209.

[404] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 210, with further references.

and monetary union, it must be emphasised that the IGCs on political union produced four draft texts, two under the Luxembourg and two under the Dutch presidency. Solemnly launched at the Rome Council in December 1990, the IGCs were concluded approximately one year later at the 9-10 December 1991 European Council in Maastricht. Maastricht would also become the place where the Treaty on European Union would be signed a few weeks later, on 7 February 1992, by the Foreign and Finance Ministers.

The preservation and respect of national diversity would, as the debates prior to the IGC had already foreshadowed, find their way into the Maastricht Treaty: First and foremost, most evidently in the form of Article F, prominently carved into no less than the *Common Provisions* of the Treaty, but also in the form of Article 3b, consecrating the subsidiarity principle as well as through the qualifications made to the new policy fields. In this vein, Article 126 (on education making the Community's contribution to quality education subject to fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems *and their cultural and linguistic diversity*) and Article 128 (on culture calling for the Community's contribution to the flowering to of the cultures of the Member States while *respecting their national and regional diversity*) are particularly noteworthy.

In addition to assessing the suitability of these provisions as means to preserve national differences, I will also dedicate a section to a novel practice – at least in respect to European integration –[405] of which certain Member States availed themselves to preserve defined areas of the integration process: the inclusion of protocols and declarations. In this

[405] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 44.

regard, Maastricht laid the foundations of, as Deirdre Curtin critically termed it, a *Union of bits and pieces*.[406] In this Union of bits and pieces, the Member States' craving for protecting their identities from what may be perceived as excessive harmonisation would grow slowly but steadily until reaching the importance it bears today. But the first step on the long road of identity protection undoubtedly took the form of the inclusion of Article F into the Maastricht Treaty: a new concept in EU law was born, the national identity of the Member States. Whether this concept would be doomed to remain essentially of a declaratory, political nature,[407] or eventually rise to become a fundamental right of the Member States,[408] this was, at least at the time the Maastricht Treaty was signed, far from settled.

2.1 National Identity: Article F(1) TEU

Even though, all four versions of the draft treaty provided for the Union's duty to respect the Member States' national identities, the wording of the Article enshrining the duty in question underwent various changes during the negotiations.

The final version of Article F as included in the Maastricht Treaty reads as follows:

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[406] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces'.

[407] Jan Wouters, 'National Constitutions and the European Union' (2000) 27 Legal Issues of Economic Integration 25, at 38. The author refers to the 'national identity clause' performing essentially a *political function*, reaching out both to the Member States hostile towards a federal vocation of the Union and to the Member States whose system of decision-making appears to be fairly decentralised.

[408] C.f. Jean-Denis Mouton, 'Vers la reconnaissance de droits fondamentaux aux États dans le système communautaire?' in *Les dynamiques du droit européen en début de siècle: Études en l'honneur de Jean-Claude Gautron* (Pédone 2004) at 463–477.

Article F

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Thus, Article F comes across as a quite heterogeneous provision, one that encompasses very different commitments of the Union. This combination appears somewhat odd – at least at first sight – and has been perceived, rather unflatteringly, as a *fourre-tout*.[409] In this sense, for reasons of substance – and brevity –, I will dedicate my analysis to the first two paragraphs of Article F TEU.

As regards Article F's first paragraph, its wording was derived from the second Luxembourg draft or non-paper[410] and remained unchanged until

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[409] Denys Simon, 'Article F' in Vlad Constantinesco and others (eds), *Traité sur l'Union européenne (signé à Maastricht le 7 février 1992) Commentaire article par article* (Ed Economica 1995) at 81.

[410] At least in the French language version. While in the English version the four draft texts referred to the Union or Community duty to 'have due regard' to the Member States' national identities and it was only in the final treaty text that this duty was worded as 'respect', the French-language versions referred throughout to the French word 'respect' either as a noun or as a verb. C.f. Luxembourg Presidency 'Non-paper' Draft articles with a view to achieving political union, 12 April 1991, reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 267.The French language version of the draft is available online at

the final Maastricht version.[411] Interestingly, in its first version from 17 April 1991 – as Article D(1) of the first draft treaty prepared by the Luxembourg presidency – it did not limit itself to referring to the Union as the addressee of the provision, but also determined that the Union was bound to have *due regard to the national identity of the Member States and their constitutional systems based on democratic principles when exercising its powers*.[412]

It is this first Luxembourg draft that calls on the Union not only to have due regard to the Member States' national identities but also to *their*

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http://www.cvce.eu/obj/projet_de_traite_sur_l_union_de_la_presidence_luxembourgeoise_luxembourg_18_juin_1991-fr-dbebd2a6-a860-4915-8edf-0a228ecde976.html (last checked 8 November 2013) as well as in Agence Europe, Documents Europe nº 1722/1723 of 5 June 1991.

The use of the word 'respect' is, at least retrospectively, an interesting one since apparently the Drafters of the Charter of Fundamental Rights sought to differentiate the Charter's rights from its principles by using the 'verb 'respect' in relationship to the effectiveness of rights and the verb 'observe' in relation to that of principles.' Opinion of Advocate General Cruz Villalón delivered on 18 July 2012 in Case C-176/12 Association de médiation sociale v Union locale des syndicates CGT, Hichem Laboubi, et al., available online at ww.curia.eu, at 46.

As regards the term 'identity', Millet argues that choosing 'identity' over 'sovereignty' has to be considered a deliberate choice, embodying the will to avoid a notion that had been widely discredited during the 20th century, see Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 211 et seq.

[411] Taking into account the modification proposed by the first Dutch draft to substitute the 'Union' by the 'Community'. This amendment responded to the Dutch approach to abandon the term 'European Union' except in the title of the treaty and to use the term 'European Community' throughout, R. CORBETT, *The Treaty of Maastricht, From Conception to Ratification: A Comprehensive Guide*, Longham Group UK Limited, Essex 1993, at 38. C.f. Dutch Presidency Draft Treaty 'Towards European Union', 24 September 1991, reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* 329 et seq; also reproduced in Agence Europe, Documents Nº 1733/1734 3 October 1991.

[412] Text reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 267 et seq.

constitutional systems. It thus introduces, at least conceptually, what nowadays would be termed the duty to respect the constitutional identity and therefore might come the closest to the (intended) scope of our current Article 4(2) TEU.

The reference to the Union's duty to have due regard to the national identities of its Member States *and their constitutional systems in the exercise of its powers* subsequently disappeared.[413] And yet, decades later – as we will see –, the debate[414] about *telos* and scope of current Article 4(2) TEU would once again revolve around the exercise and delimitation

[413] As early as 1991, Bruno de Witte noted the importance of this reference to the constitutions 'as main repository of national identity', especially since, in his view, this reference could bear the potential of rendering legally relevant the 'fairly vague notion of national identity'. He attempts to explain the deletion of the reference from the Draft Treaty as resulting from the incorporation of voting rights for EU citizens in local elections elsewhere in the Draft Treaty. These voting rights could have been perceived – as indeed they were in several Member States – as contrary to constitutional traditions rooted in national identity. Conflict avoidance could thus have constituted the reason for striking the reference to the Member States' constitutional systems from the 'identity clause', c.f. Bruno de Witte, 'Community Law and National Constitutional Values' (1991) 18 Legal Issues of European Integration 1, at 20.

[414] Indeed during the debates of the Constitutional Convention leading to the Draft Treaty establishing a Constitution for Europe the purpose of the (then enhanced) identity clause appeared to ensure that the 'EU respects certain central competences of the Member States', c.f. von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1426; Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 282 points out that the first draft of the identity clause by the Convention's Working Group V read as follows: 'When exercising its competences, the Union shall respect the national identities of their Member States, their constitutional and political structures including regional and local self-government and the legal status of churches and religious bodies.' The first draft of the 'constitutional identity clause' thus recovered the competential flavour the first draft of the 'national identity clause' had already featured.

of the Union's competences and most certainly around the nature of the constitutional structures that were to be protected.

What in my view denotes a first – maybe not conceptual but at least semantic – connection between *national identities* and *constitutional texts*, i.e. the different phrasings the first paragraph of Article F went through, has not received much attention in the current debate on *national constitutional identity* – oddly enough bearing in mind Bruno de Witte's early considerations on the matter.[415]

So far in the current debate, a connection between national and constitutional identity had only been made in relation to the second paragraph of Article F. Millet points out that the first version of Article F(2) included in the Luxembourg non-paper[416] should engage our interest.[417] Whereas Article F(2) in its first Luxembourg version – there numbered D(2) – referred to the respect of those fundamental rights and freedoms 'recognised in the constitutions and laws of the Member States and in the Convention for the Protection of Human Rights and Fundamental Freedoms', the final version of Article F(2) only referred to the Union's duty to respect the fundamental rights as guaranteed by the ECHR, thus dropping the reference to the constitutions and laws of the Member States.

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[415] Leaving aside Arzoz, who in fact does take into account this change of wording in the drafting history of Article F(1), Xabier Arzoz, 'The protection of linguistic diversity through Article 22 of the Charter of Fundamental Rights' in Xabier Arzoz (ed), *Respecting Linguistic Diversity in the European Union* (John Benjamins Publishing Company 2008) at 151.

[416] Text reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 267 et seq.

[417] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 212 et seq.

Millet understands this first formulation as an intent to approximate identity – mentioned in the first paragraph of Article D – and national constitutions. In his view, Article D(2) of the first Luxembourg draft might be seen as a reference, albeit not one to the *notion*, but rather to the *concept* of constitutional identity.[418] In my view, however, two observations must be made. Firstly, the reference to the constitutions and laws of the Member States was dropped during the process of the IGC, and the final version of Article F(2) limited itself to mentioning the ECHR and common constitutional traditions as sources of fundamental rights the Union was to respect as general principles of Community law. Secondly, Millet overlooks the fact that – if we attached importance to the evolution of the wording of the treaty text throughout its genesis – Article D(1) featured a much more significant connection between national and constitutional identity than Article D(2) ever did, since it enshrined both constitutional systems and national identities of the Member States in one single provision.

Thus, the inclusion of the respect for national identities in Article F might very well have constituted a response to certain Member States' fears produced by the f-word (federalism)[419] or to their concerns over creeping 'de-statification' – *Entstaatlichung* – coupled with the strengthening of regional identities, since both could be inferred from the different draft versions of the reform treaty.[420] In this regard, Burgess argues that 'Article F sought *inter alia* to slay the mythical dragon which threatened Milward's

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[418] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 211 et seq.

[419] Burgess refers to the 'merry dance in semantics as [the British government] persisted with its refusal to allow the 'F-word' to be incorporated even in the draft for discussion' in *Federalism and European Union: the building of Europe, 1950-2000* at 206.

[420] Hilf, 'Europäische Union und nationale Identität der Mitgliedstaaten' at 161, 162.

nation state […] tilting at windmills this was the intergovernmental version of Euro-speak'.[421]

As the case may be, if fear had induced the inclusion of the respect for national identity in the TEU, one would imagine that, just as had occurred with the subsidiarity principle, guaranteeing its effectiveness and enforceability would have been a priority. However, Article F's effectiveness was considerably affected by the lack of jurisdiction of the Court of Justice. Indeed, Article L of the Maastricht Treaty excluded, among many other provisions, the Common Provisions (to which Article F also belonged) from the Court's scrutiny. This exclusion was deeply lamented, mostly by scholars,[422] and may be explained precisely by the heterogeneous nature of the commitments inscribed in Article F. Since Article F(2) laid down the respect for fundamental rights and freedoms, Member States were very reluctant to pass the gavel to the judges sitting in Luxembourg over such a thorny issue as rights and freedoms can be.[423] And

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[421] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 208.

[422] C.f. Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 20, 21; Ole Due, 'The Impact of the Amsterdam Treaty upon the Court of Justice' (1998) 22 Fordham International Law Journal 848, at S50; Wouters, 'National Constitutions and the European Union' at 40; particularly harsh critique – *fundamental rights which are not fundamental* – by Phillippe Allot, 'Epilogue: Europe and the dream of reason' in Joseph H. H. Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press 2003) at 217.

[423] As British MP Mr Desmond Swayne's oral question of 28 October 1997 illustrates: '*May I refer the Minister to article F.2 of the European treaty on European Union and the decision taken at Amsterdam to amend article L of the Maastricht treaty, which makes article F.2 fully justiciable by the European Court of Justice? Was it really Her Majesty's Government's intention that criminal law passed in this House would be subject to the jurisdiction of unelected judges in Brussels?*' in the Commons Hansard Debates text for Tuesday 28 October 1997, Columns 704 and 705, also available online at:

even though Article F(1) enshrined a commitment to respect the national identities of the Member States, and thus in theory a bulwark against the Union's alleged expansive action, it is dubious that said Member States would have eagerly endorsed the Court of Justice having an interpretative authority over *their* identities: Article F(1) had from its beginnings the potential of being a double-edged sword.

On the other hand, this lack of justiciability did not automatically convert Article F(1) into a mere declaration of intention (*Grundsatzerklärung*). As Wouters usefully points out, despite the provision's legal scope remaining unclear – and this would not change for so long as it was excluded from judicial scrutiny –, the Court of Justice had used the 'respect for national identity' as an interpretative given.[424] Article F(1) thus became a interpretative aid for the Court of Justice, which is, although not yet a *concrete legal yardstick* for the validity of Community acts, at least more than a mere political statement of good intentions.[425]

2.2 Subsidiarity: Article 3b TEC

As illustrated in Part I, 'subsidiarity' had dominated the debate on the treaty revision. The principle had rallied opposing factions such as federalists favouring a furthering of integration as well as those fervently opposed to it.[426] In this sense, John Major affirmed at the launch of the British EC

http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo971028/debtext/71028-05.htm (last checked 9 December 2013).

[424] Wouters, 'National Constitutions and the European Union' at 40. Wouters refers to the ECJ judgment ECJ 2.7.1996, Case C-473/93 Commission v Luxembourg [1996] I-03207.

[425] Wouters, 'National Constitutions and the European Union' at 40.

[426] Laursen, 'The Treaty of Maastricht' at 125.

Presidency in 1992 that he was looking at 'the way ahead to entrench subsidiarity as a way of life in the Community'.[427]

The principle found its way into the Treaties in different forms or expressions. While Article A TEU incorporated the softer formulation of subsidiarity, i.e. the reference to decision-making as close as possible to the citizens, Article 3b TEC contained what De Búrca has called its 'hard *legal* core […] - the binding, enforceable and justiciable expression of the principle within primary EC law.'[428] Article 3b TEC sought to define both the circumstances in which it was preferable for action to be taken by the Communities rather than by the Member States as well as – if Community action was called for – the intensity of such action.

Article 3b

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

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[427] See the article in the British newspaper The Independent: Annika Savill and Anthony Bevins, 'Major acclaims subsidiarity: British EC presidency launched with stress on sovereignty - Labour cools on referendum,' July 2, 1992. The article was subheaded 'BRITAIN launched its presidency of the European Community yesterday by vowing to make the much-vaunted concept of subsidiarity 'a way of life''.

[428] Gráinne de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam,' 1999, Harvard Jean Monnet Working Paper at 36.

The definition clarifies that the subsidiarity principle is only to be applied within the sphere of competences that are non-exclusive to the Community. Except for this general statement, the wording of the provision has been criticised as a textual failure.[429] The fact that the first clarifications of the provision came, through the Edinburgh Council conclusions[430] and a Commission Communication,[431] before the complete ratification of the Maastricht Treaty is illustrative of how great a need there was for such textual clarifications.[432]

2.3 Culture and education: Articles 128 and 126 TEC

Among the new policies that entered the Community sphere with the Maastricht Treaty, Articles 126 and 128 TEC setting out policies in the cultural and educational fields are the most interesting in terms of diversity preservation.[433] As I suggested in the first Chapter, it appears somewhat odd at first glance that the same Member States that during the IGCs insisted on establishing the red lines that the Union was not to cross in certain identity-

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[429] Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) at 178.

[430] 'Overall Approach to the Application by the council of the subsidiarity principle and Article 3b of the Treaty on European Union', Annex 1 to Part A of the Conclusions of the Presidency, Edinburgh, 12 December 1992.

[431] Commission Communication to the Council and the European Parliament 'The principle of subsidiarity', SEC(92) 1990 final, Brussels, 27 October 1992.

[432] On these clarifications as well as the Interinstitutional Agreement of 25 October 1993 on the procedures for implementing the principle of subsidiarity (OJ C 329, 6.12.1993, p. 135) see Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) at 250 et seq.

[433] Closely connected to Article 126 TEC on education is Article 127 TEC on vocational training. I will, however, not address it in detail since it does include the reference to diversity.

relevant fields such as culture, education and social policies handed over the keys to these policy fields to that sane Union.[434]

As Gisella Gori's account of the institutionalisation of Articles 126 and 127 TEC demonstrates, the Member States did not intend to *give up control* over those competencies, but rather they aimed to *retake control* over them.[435] Gori presents education and vocational training competencies as outcomes of judicial policy-making.[436] In this sense, she illustrates how, prior to the Maastricht treaty revision, the Court of Justice, in interaction with individuals, had fostered the evolution of education and vocational training competence under the cover of the internal market.[437] This case law had the parallel effect of providing the Community with a legal background on which to build educational policies, something which prompted the Commission to legislate on that matter and Member States to turn to the Court of Justice to contest the Commission's legitimacy to do so.[438] It was against a backdrop of defeats in the judicial evolution process of Community competence on education and training that the Member States looked at consolidation as a way of reaffirming their vision of the education and training policies and of preventing their further uncontrolled evolution under the cover of the internal market.[439] With regard to the Court of Justice, this meant overruling the existing case law by way of a treaty

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[434] See above at n 235.

[435] Gisella Gori, *Towards an EU Right to Education* (Kluwer Law International 2001) at 2.

[436] Gori, *Towards an EU Right to Education* at 3.

[437] For analysis of this case law, Gori, *Towards an EU Right to Education* at 24 et seq.

[438] Gisella Gori, 'Article 151' in Vlad Constantinesco and others (eds), *Traités d'Amsterdam et de Nice. Commentaire article par article* (Ed Economica 2007) at 44 et seq.

[439] Gori, *Towards an EU Right to Education* at 68.

amendment.[440] The wording of the resulting Article 126(1) TEC reflects the Member States' concerns over containing Community action in the field of education and makes it clear that such action was to be limited to encouraging co-operation between Member States and, if necessary, supporting and supplementing their action in the specific areas and that such action could not under any circumstances interfere with the Member States' responsibility for content and organisation of education as well as their cultural and linguistic diversity.[441]

Strikingly, when it comes to competences in the cultural field, Evangelia Psychogiopoulou gives a very similar account[442] of how the Community through market integration was effectively operating a '*de facto* cultural policy long before it had the competence to do so, promoting a cultural rationale within a basically economic setting.'[443] Just as had occurred in the case of educational policies, the Member States sought to contain

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[440] Gori, *Towards an EU Right to Education* at 68.

[441] Article 126(1) TEC read as follows: *'The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.'*

[442] Although the judicial evolution of both fields – education and culture – had the same starting point with the *Casagrande* judgment (ECJ, Case 9/74, *Casagrande v Landeshaupstadt München*, *ECR* [1974] 773) it differed in that the court of Justice appeared to have not remained totally blind to the Member States' arguments based on the preservation or promotion of culture and made an extensive use of its mandatory requirements. See Evangelia Psychogiopoulou, *Integration of Cultural Considerations in European Union Law and Policies*, 2008 at 580.

[443] Evangelia Psychogiopoulou, 'The Cultural Mainstreaming Clause of Article 151 (4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?' (2006) 12 European Law Journal 575, at 581.

Community action in the cultural field by attributing to the Community well delimited cultural powers.[444]

Against this background it does not come as a surprise that the Article 128 TEC on culture received a very similar wording as Article 126 TEC: Its second paragraph limited Community action to fostering co-operation between Member States and supporting and supplementing acts. The first paragraph of Article 128TEC is, despite having content similar to Article 126(1) TEC, drafted in a more emblematical way::

> *'The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'.*

Due to the explicit reference to the Community's respect of the Member States' national (and regional) diversities, Article 128 TEC and Article F(1) TEU have been linked to one another from their very inception. In this sense, 'cultural diversity' has been deemed to be the rationale underlying both legal provisions.[445] It appears to have been the Belgian delegation that insisted on the respect of national and regional, cultural diversities.[446] As

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[444] Psychogiopoulou, *Integration of Cultural Considerations in European Union Law and Policies* at 582.

[445] Armin von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' (2008) 19 European Journal of International Law 241, at 241. He also refers to Article 22 of the EU Charter of Fundamental Rights and to the Union's motto: 'Unity in Diversity'.

[446] Projet de loi portant approbation du Traité sur l'Union européenne, de 17 protocoles et de l'Acte final avec 33 Déclarations, faits à Maastricht, le 7 février 1992, exposé des motifs, at III.7.3, Chambre des Représentants de Belgique 26 May 1992; also available in *Ratification of the Treaty on European Union: Preparations*, vol. 1 (1) (Office for Official Publications of the European Communities 1996) at 189. Notwithstanding the Belgian efforts, the preservation of national diversities in the field of cultural policies

we have seen, cultural (and linguistic) diversity also constitutes a red-line in the educational field.

So what do we exactly mean when we refer to 'cultural diversity'? I introduced the first Chapter with general reflections on identity ranging from conceptual history to semantics and relied heavily on Pörksen's concept of *plastic words.*[447] I concluded that we had reached – at times in an uncanny fashion – the age of identity, where identity politics and identity claims constantly coincide. Culture – and more recently cultural diversity – shares a similar fate. As Armin von Bogdandy notes, cultural diversity *is being used in a variety of different contexts with various and vague meanings and not always obvious intentions.*[448]

When dealing with culture or cultural diversity, one must bear in mind that 'culture' is an essentially contested concept of which there is a great variety of definitions.[449] One must also consider, asDelia Ferri points out when analysing the concept of culture, that the currently prevalent acceptation of culture, referring to the ideas, customs, and social behaviour of a particular

appears to have been a major concern for other Member States, notably the Netherlands and Denmark, as their memoranda for the IGC on Political Union illustrate. C.f. Dutch government's 1st memorandum 'Possible Steps Towards European Political Union' of May 1990, reproduced in Corbett, *The Treaty of Maastricht: From Conception to Ratification. A Comprehensive Guide* at 133; Memorandum of the Danish government of October 1990, reproduced in Laursen and Vanhoonacker, *The Intergovernmental Conference on Political Union. Institutional Reforms, New Policies and International Identity of the European Community* at 299.

[447] See above n 8.

[448] von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' at 244.

[449] See for that matter Alfred Louis Kroeber and Clyde Kluckhohn, *Culture: a critical review of concepts and definitions* (vintage ed. Vintage Books 1963) .

people or society, constitutes a rather recent linguistic acquisition.[450] In fact, it appears that up until less than 200 years ago, the term *culture* still exclusively bore the meaning of an activity linked to the activities of tilling and cultivating land, the acceptation was thus merely agrarian. The meaning gradually evolved to include the cultivation of things other than land, i.e. the soul and the spirit, to then encompass, as an anthropological concept, the folk-spirit and the transmission of the folkways.[451]

Anthropology is probably the one discipline that has most contributed to the theorisation of the concept of culture.[452] The anthropological concept of culture adopted in recent legal studies is deeply linked to diversity and may be described as a permanent process of transformation due to the actions of individuals, embedded in a determined community of persons.[453] In this vein, cultures are no longer perceived as separate, bounded and internally uniform, but as overlapping, interactive and internally negotiated.[454] And nonetheless, as Ilenia Ruggiu notes, despite this evolution in the conception of cultures, even in anthropology, culture remains an essentially 'contested concept'.[455] As a matter of fact,

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[450] Delia Ferri, *La costituzione culturale dell'Unione Europea* (CEDAM 2008) at 26 et seq.

[451] C.f. the references to 18th century dictionaries, both French and Spanish, as well as further bibliographic references contained in Ferri, *La costituzione culturale dell'Unione Europea* at 26 et seq.

[452] Ilenia Ruggiu, *Il giudice antropologo. Costituzione e tecniche di composizione dei conflitti multiculturali* (FrancoAngeli 2012) at 148.

[453] Ferri, *La costituzione culturale dell'Unione Europea* at 26 et seq.

[454] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity (The Seeley Lectures)* (Cambridge University Press 1995) at 9–10.

[455] Ruggiu, *Il giudice antropologo. Costituzione e tecniche di composizione dei conflitti multiculturali* at 148 et seq.

anthropologists' struggle with defining the concept finds its reflection in legal language where no unitary concept of culture is to be found.[456]

Either way, it appears to be accepted that the entry of 'culture' into the legal arena is rather recent[457] and, at the same time, twofold:[458] culture has been permeating both national and international legal instruments at an increasing rate since the 1980s. At national level, contemporary constitutionalism adapted its language to the cultural trend set mainly in the Canadian constitutional discourse.[459] This is reflected by the fact that numerous constitutions of the last generation, approved from the 1980s onwards, have enshrined cultural dimensions that go further than the classical protection of the religious or linguistic dimension.[460] If we

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[456] Ruggiu, *Il giudice antropologo. Costituzione e tecniche di composizione dei conflitti multiculturali* at 148 et seq.

[457] Ferri, *La costituzione culturale dell'Unione Europea* at 26 et seq; Ruggiu, *Il giudice antropologo. Costituzione e tecniche di composizione dei conflitti multiculturali* at 148 et seq; von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship'.

[458] Threefold, if we were to consider EU law separately, as does, for instance, Armin von Bogdandy in his recent study: 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship'.

[459] The Canadian discourse on cultural diversity is also of major relevance due to its catalysing influence on communitarism, c.f. von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' , referring to the seminal works of Kymlicka, Tully and Taylor, at 244.

[460] C.f. the detailed textual study of hundreds of constitutions conducted by Ruggiu, *Il giudice antropologo. Costituzione e tecniche di composizione dei conflitti multiculturali* at 217 et seq. She also identifies in that context 'diverse Costituzioni riconoscono a tutti i cittadini il diritto a partecipare alla "vita culturale della nazione", o dichiarano di proteggere la cultura della nazione nelle diverse forme in cui si manifesta: patrimonio culturale, arte, scienza e via enumerando. Queste Costituzioni sono classificabili come "Costituzioni identitarie" in quanto proteggono aspetti della

considered the Treaties to be a constitutional foundation of the Union, the 1992 Maastricht Treaty did not constitute an exception to this trend.

At international level, the principles, instruments and institutions protecting or promoting cultural diversity, summarised by certain authors as the 'international law of cultural diversity',[461] have similarly proliferated over the previous decades. The Framework Convention for the Protection of National Minorities or the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions constitute examples hereof. Yet, in terms of preserving national cultures, what continues to stand out among these instruments of international law is the classical institution of national sovereignty, which like a *cheese-cover* overarches national cultures and preserves them from outside influence or uniformisation.[462] The sovereign State as a unit appears to remain – at least under international law – the relevant sphere for preservation of culture, i.e. cultural diversity is predominantly set to be preserved among states and not inside them. [463]

identità e cultura nazionale', at 219. Armin von Bogdandy highlights federal constitutions referring to 'diversity' as well as constitutions, especially those in South America, protecting the pluralistic composition of society, c.f.: von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship'.

[461] Without, however, implying the existence of a proper field of law, c.f. von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' at 242.

[462] von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' at 251 et seq.

[463] The premise of the sovereign state as the natural sphere where national cultures thrive and prosper seems also to form the basis of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Paris on 20 October

So how does our Article 128(1) TEC tie in with this context? First of all, and irrespective of the above, it must be kept in mind that in the context of Article 128 'culture' or 'cultural diversity' are technical legal terms and not terms of cultural theory and therefore ought to be interpreted restrictively.[464] It is equally true that, although Article 128(1) TEC not only includes the Community's respect for the Member States' national but also for their regional cultures, it is nevertheless addressed to the Member States. In this vein, Evangelia Psychogiopoulou admits that '[o]ne could be tempted therefore to argue that the main purpose of the cultural provisions of the EC Treaty is not to establish a 'common' cultural policy but to bring to the forefront Community efforts rooted in the protection and promotion of Member States' diverse cultural systems.'[465] When it comes to culture, all essential elements remain the sole responsibility of the Member States. In this sense, Article 128 TEC implies that the Community – when acting

2005 with the support of the European Community and also most of its Member States, and which came into force on 18 March 2007. According to Article 1(h) of the UNESCO Convention, its objectives are *inter alia* 'to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory'. Advocate General Sharpston rightly points out that Article 2(2) declares sovereignty to be one of its guiding principles when stating that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.' Opinion of AG Kokott delivered on 4 September 2008 Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA*), *ECR* [2009] I-01407, paras 13-16 (legal framework). At para. 17 she also quotes Article 5(1) of the UNESCO Convention according to which the Parties, 'in conformity with the Charter of the United Nations, the principles of international law and universally recognised human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions'.

[464] Hans Michael Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' (2007) 8 German Law Journal 563, at 572.

[465] Psychogiopoulou, 'The Cultural Mainstreaming Clause of Article 151 (4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?' at 583.

– is required to strictly follow their directions, and much like in the educational field,[466] cultural diversity is construed as an obstacle to a harmonised European culture. If we pictured Toggenburg's Janus-headed notion of cultural diversity to which I have referred in the Introduction,[467] the interpretation of Article 128 TEC that is proposed would correspond to the understanding of diversity *between* the Member States and hence *against* harmonisation.

It is therefore rather unsurprising that the Maastricht Treaty's provision on culture has been traditionally read, *inter alia*, as a reflection of Article F(1) TEU,[468] or as a special embodiment of the subsidiarity principle.[469] However we might qualify the connection between Articles F(1) TEU and 128 TEC, be it in terms of specialty or in terms of analogousness, what appears of significance is *prima facie* the mere existence of a connection. Secondly, both provisions rely on concepts that mutually create or influence each other: Cultural diversity leads to identity formation;[470] (national) identity manifests itself in cultural expressions.[471] Delia Ferri sums it up in

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[466] Frédérique Lafay, 'Article 128' in Vlad Constantinesco and others (eds), *Traité sur l'Union européenne (signé à Maastricht le 7 février 1992) Commentaire article par article* (Ed Economica 1995) at 368.

[467] See above at n 81.

[468] Simon, 'Article F' at 89.

[469] Which itself is manifested in Article F(1). Lenaerts and van Ypersele, 'Le principe de subsidiarité et son contexte: étude de l'article 3 B du Traité CE' at 7, 10–11.

[470] von Bogdandy, 'The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity - Elements of a Beautiful Friendship' at 246.

[471] The discussion about the relationship between culture (and language) and national and subnational identities gained special relevance in relation to the Charter of

a deliberately circular way: the respect for national identities includes *ipso facto* the respect for cultural expressions through which the identities manifest themselves, and thus respect for national identities includes the protection of the Member States' cultural traditions.[472]

2.4 Opening Pandora's Box of differentiation: the Protocols

Through the Maastricht Treaty, provisions aimed at the preservation of national diversity found their way into the text of the Treaties. What is more, as Deirdre Curtin pointed out and I mention above, the Maastricht Treaty appears to have resulted in diversity flowing right into the very structure of the Treaties, laying the foundations for a *Union of bits and pieces.*[473] Indeed, in the eyes of many, the Maastricht Treaty's distinct feature was the inclusion of a large number of protocols and declarations that were annexed to the Treaties and the Final Act. These protocols and declarations had been drawn up by specific Member States either individually or acting as a group and sought – to speak broadly – to bring about a determined application of (or departure from) EU law. Thus, with the Maastricht treaty revision, the Masters of the Treaties were not committing solely to provisions listed in the text of the Treaty, but also to provisions contained in instruments that in spite of being annexed to the Treaties were separate from them: protocols and declarations. Indeed, and without even taking into account the Edinburgh Council decision, which singularly dealt with the Danish case, the Maastricht Treaty ended up complemented by no fewer than 17 protocols. Furthermore, the

Fundamental Rights of the EU, more precisely its Preamble and Article 22, c.f. *infra* Chapter 4 2.1 National (constitutional) Identity in the Charter.

[472] Ferri, *La costituzione culturale dell'Unione Europea* at 77.

[473] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' .

Conferences of the Representatives of the Governments of the Member States attached 33 declarations on the most diverse matters to the Final Act.

Besides the obvious element of dispersion that this elevated number of attached instruments implied, it was also perceived as prone to jeopardising the uniform application of EU law. The introduction of a number of these protocols has been interpreted by Giuseppe Martinico as responding to various Member States' intentions to curtail the ECJ, perceived as an activist court in certain cases decided not long before the Maastricht revision. In Martinico's view, the inclusion of said protocols represents the starting point of a crescendo that, as it happens, finds its 'apex' precisely in Article 4(2) TEU Lisbon version.[474]

2.4.1 Legal value of protocols and declarations

So how could such protocols be linked to the protection of national (constitutional) identity? In order to assess this question, we firstly need to ascertain what legal value the protocols and declarations possess to then analyse to what extent they substantively aim to protect the Member States' national identity. Indeed, scholars and practitioners were suddenly faced with different instruments – treaty text, protocols and declarations –, each with an unclear legal status, which have continued to fuel heated debates to the present day.[475] Under EU law, protocols, even though formally separated from the body of the treaty, are deemed to have the same legal

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[474] Giuseppe Martinico, 'What lies behind Article 4(2) TEU?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) at 93; Martinico, *The tangled Complexity of the EU Constitutional Process* at 89 et seq.

[475] C.f. Yves Petit, 'Article R' in Vlad Constantinesco and others (eds), *Traité sur l'Union européenne (signé à Maastricht le 7 février 1992) Commentaire article par article* (Ed Economica 1995) at 919 et seq; Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 255 et seq.

status as the treaty itself.[476] The physical separation does not constitute an obstacle to that effect. Indeed, if we turn our attention to the Vienna Convention on the Law of Treaties, we see that its Article 2(1) allows for a treaty to be embodied in more than one instrument, irrespective of the designation of such instruments, provided that they are related. In the case of EU law, Article 239 TEC (Maastricht version) determines that the protocols annexed to the TEC by the common accord of the Member States form an integral part thereof. They are thus considered to belong *to the body of the Treaty itself with all consequences that this entails in terms of judicial protection and legal effects*.[477]

Declarations, by contrast, are not explicitly mentioned in Article 239. Nor are they annexed to the treaties themselves, but rather to the Final Acts of the IGC. They are granted political or moral force.[478] In an analysis centred on declarations on fundamental state structures or identity-relevant matters, Millet carves out the purely interpretative force that they bear.[479] In the event of a conflict between treaty text and declaration, the European Court of Justice would be required to take into account the declaration when striking the balance between the respect of EU law and whatever the Member State may have sought to protect when issuing the declaration. Yet,

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[476] C.f. Petit, 'Article R' at 920.

[477] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 54.

[478] Petit, 'Article R' at 923; Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 261.

[479] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 261 et seq.

the balance would most likely be struck in favour of the former, and the *effet utile* would prevail.[480]

Declarations may be bi- or multilateral, but also unilateral, statements, a trait that approximates them to 'reservations'.[481] Yet, for unilateral statements, as Article 2(1)(d) of the Vienna Convention on the Law of Treaties determines, in order to qualify as reservations, they have 'to purport to exclude or modify the legal effect of certain provisions in their application to the State' issuing such unilateral statements. This requirement/definition does not seem to fit in with the limited political or interpretative force declarations deploy in EU law. With the exception of one type of declaration, e.g. the declaration made by Denmark in the aftermath of the 'no' to Maastricht – to which I will return later –,such exception, if at all, fitting into the 'reservation scheme' established in international law, declarations are not equatable to reservations under international law.

Regardless of the fact that declarations and protocols are not equatable to reservations under international law, one could ask why we attach such importance to the inclusion of the protocols in the Maastricht Treaty. This is so, first of all, because this practice –not so much due to its magnitude as due to the characteristics of the protocols – defies the telos of Article 239 TEC. Curtin emphasises that what she calls the 'Original Protocols', i.e. protocols annexed to the constituent treaties, were drawn up in order to avoid excessively cluttering the body of the Treaty by blending substantive

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[480] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 263.

[481] C.f. Petit, 'Article R' at 923.

provisions with others of only limited geographical significance.[482] Secondly, if one shares the premise that uniform application of EU law is critical for the continued existence of the EU,[483] forms of acute 'protocolitis' such as in the case at hand may potentially have a disintegrating effect on the EU. In her seminal article, Curtin asks herself in this sense whether the *acquis communautaire* has not been 'high-jacked' with regard to certain protocols which lay down outright derogations for individual Member States from the prevailing *acquis communautaire* as well as with regard to the Social Policy Agreement.[484]

2.4.2 Protocolitis: *identity preservation by immobilising the ECJ*

This 'acute protocolitis' is also relevant in terms of identity preservation for two reasons. Firstly, it entails a drastic change in EU treaty revision practice, which reflects at least certain Member States' concerns over excluding various areas of their national interest from the European integration process. Secondly, the Member States' new found love for protocols is also substantively tied in with concerns over preserving traits of their national identity. As we will see, among those protocols aimed at protecting a special national interest, one protocol stands out since the protection it sought to provide for a national interest led to the ring-fencing

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[482] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 45.

[483] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 46.

[484] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 46.

of a substantive provision of a Member State's constitution: the 'Grogan Protocol', which dealt with the Irish abortion issue.

So what special national interests were the Member States so eager to protect by annexing protocols to the treaty (or treaties)?[485] Of the 17 protocols, five more or less directly concern national interests, which in the eyes of certain Member States were jeopardised by the Maastricht Treaty. These national interests are of a diverse nature, ranging from economic and monetary concerns to a singular understanding of fundamental rights protection, and are covered by the Danish Second Home Protocol, the Barber Protocol, the Grogan Protocol, the EMU opt-out, and the Social Policy Agreement.

2.4.2.1 Danish Second Homes and Barber

While Protocol No. 1 on the acquisition of property in Denmark, the 'Danish Second Home Protocol', sought to protect Danish legislation prohibiting the acquisition of a second home on Danish soil by nationals of other Member States and thereby introduced a permanent (and not merely

[485] While 16 out of 17 protocols were annexed to the TEC, Protocol 17 – the Irish abortion protocol – was annexed to both TEC and TEU. This decision to annex Protocol 17 to both treaties has attracted much attention among commentators. Indeed, annexing protocols (merely) to the TEC made sense since Article 239 *TEC* specifically determined that protocols attached to it would form an integral part of it, as we have seen above. The TEU, by contrast, lacks a similar provision, which makes the decision to annex Protocol 17 in spite of it and in addition to its annexation to the TEC appear like a symbolical gesture underscoring the importance that Ireland attaches to the protection of the life of the unborn. The choice is *surprising* in Millet's words, all the more so if we consider that the Protocol, renumbered as 35 in the current version, is attached to the TEU, the TFEU, ***and the Euratom Treaty.*** Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 272. Already in this vein: Petit, 'Article R' at 923.

transitional)[486] derogation from the principle of non-discrimination on grounds of nationality and from several fundamental freedoms,[487] Protocol No. 2 concerning Article 119 TEC, the 'Barber Protocol', intended to preserve the special interests of British and Dutch pension funds. Unlike the 'Danish Second Home Protocol', the 'Barber Protocol' did not make any reference to national legislation, but rather to the Court of Justice's judgment in Douglas Harvey Barber v Guardian Royal Exchange Assurance Group,[488] which was given an authoritative interpretation in order to contain the retroactive effects of the judgment.[489] In an issue concerning the application of equal treatment to pension schemes, the possible retroactivity of the Court's judgment was to be ruled out by declaring that '[f]or the purposes of Article 119 [TEC], benefits under occupational social security schemes shall not be considered as remuneration if […] they are attributable to periods of employment prior to 17 May 1990 […]'. The imposition of this interpretation of Article 119 TEC constitutes a warning-shot fired across the bows at the Court of Justice, which had yet to resolve pending preliminary references on the matter.[490]

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[486] The derogation bears at least the potential of permanence. This is evident from the fact that Protocol No. 1, now renumbered as Protocol No. 32, has survived the treaty revisions of the past 20 years.

[487] Curtin also refers to the Greek intent to pass a similar protocol, Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 46,47.

[488] ECJ 17.5.1990, C-262/88 Douglas Harvey Barber v Guardian Royal Exchange Assurance Group [1990] I-01889.

[489] Martinico, *The tangled Complexity of the EU Constitutional Process* at 81.

[490] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 46.

2.4.2.2 EMU opt-out and Social Policy Agreement

The EMU opt-out and the Social Policy Agreement may similarly be considered 'special interest protocols'. While Protocol N. 10 on the transition to the third stage of Economic and Monetary Union, the EMU opt-out, provides the UK with the option of not performing the transition to the third stage of the EMU and thus of permanently opting out from the latter, the Social Policy Agreement contains the agreement between all the Member States other than the UK to implement the Social Charter endorsed by the EC in 1989. As Curtin points out, the text of the Social Policy Agreement was – in line with the draft treaties and the debates during the IGC[491] – originally meant to integrate the TEEC but was 'outsourced' due to the UK's resistance.[492]

In the case of both protocols, the UK departs from the common path of the Member States. But whereas in the first case, the UK's deviance leads to its relegation to the outland of the treaties – the protocols –, in the second case, it was capable of turning its deviant position into the norm and relegate the remaining Member States to the protocols. Either way, the UK has succeeded in achieving its goal of remaining within the Union on its own terms, protecting its national interests.[493]

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[491] As my account of the 1990 Rome Council conclusions on p. 72 demonstrates, the social dimension and more precisely the implementation of the Social Charter constituted a thorny issue when it came to the 'need to respect the different customs and traditions of the Member States' in that area. Presidency Conclusions of the European Council in Rome, 14-15 December 1990, Part I, Council Doc. SN 424/1/90, at p. 13.

[492] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 52, 53.

[493] In Ian Ward's view, the UK becoming infamous for its antagonism towards the EU was rather unfortunate. He points out that the rest of the Member States were equally

2.4.2.3 Grogan

Last, but not least, Protocol No. 17, annexed to the Treaty on European Union and to the Treaties establishing the European Communities,[494] the 'Grogan Protocol', explicitly ring-fenced an Irish constitutional provision protecting the life of the unborn. This Protocol followed the ECJ's judgment in the Grogan case, a preliminary reference from the Irish High Court, where the Luxembourg Court held that abortion constituted a service within the meaning of the Treaty of Rome.[495] Even though the Court failed to address the validity of Ireland's ban on information regarding the availability of abortion services abroad,[496] the mere assumption of abortion being a service under Community law had some serious implications, at least in the eyes of the Irish government and the politically powerful pro-life movements,[497] viz. the right of Irish women to travel abroad to get an abortion or to receive information in Ireland on abortion services abroad.

Since the Grogan case was decided in October 1991, Protocol No. 17 was presumably – since the Irish government acted secretively – pushed at the

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defending their specific national interests but that the UK, unlike other Member States, failed to pay lip-service to European integration. Ward, 'The European Constitution and the Nation State. Review of 'The European Rescue of the Nation-State' by A. Milward' at 169.

[494] On the symbolic value attaching this protocol to both treaties, see above n 485.

[495] ECJ 4.10.1991, C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others [1991] I-04685.

[496] For a critical comment on the judgment, see Cathleen M Colvin, 'Society for the Protection of Unborn Children and the Free Movement of Services in the European Community Society for the Protection of Unborn Children (Ireland) Ltd v Grogan: Irish Abortion Law and the Free Movement of Services in the European Community' (1991) 15 Fordham International Law Journal 476–526.

[497] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 48.

Maastricht meeting in December 1991.[498] Attempting to placate 'pro-life' interest groups, the government insisted on the inclusion of the Protocol aimed at offering an *extra-guarantee*[499] that EU law would not override the Irish constitutional protection of the *nasciturus* and thereby hoped to avoid campaigns against the Maastricht Treaty motivated by such concerns. As we will see, the Irish government ultimately had to backpedal on this issue.

Still, what constitutional provision did the Irish government attempt to protect from European integration? Protocol No. 17 expressly determined that '[n]othing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40(3)(3) of the Constitution of Ireland.'

The constitutional provision at hand, namely the third sub-section of Article 40(3) of the Irish Constitution, inserted in 1983 following a national referendum ratifying the Eighth Amendment, read as follows '[t]he 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.' This somewhat ambiguous wording was interpreted by the Irish Supreme Court, in favour of the right of the *nasciturus*, as providing rigid prohibitions not only against abortion, but also against information regarding abortion.[500] It is for this reason that Protocol No. 17 does not limit itself to citing the

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[498] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 48.

[499] van Wijnbergen, 'Ireland and the Ratification of the Maastricht Treaty' at 183.

[500] Colvin, 'Society for the Protection of Unborn Children and the Free Movement of Services in the European Community Society for the Protection of Unborn Children (Ireland) Ltd v Grogan: Irish Abortion Law and the Free Movement of Services in the European Community' at 491.

constitutional provision, but rather broadens the reference to *its [Article 40(3)(3)] application in Ireland*. By selecting this wording, the Irish government sought to uphold the restrictive interpretation of the Irish Supreme Court, which forced the right to freedom of expression to yield to the right of life of the unborn.[501] Not only the constitutional provision, but also its interpretation by the highest national interpretative authority was to be made bulletproof against EU law. Curtin raised serious concerns over the possible precedent effect the Irish Protocol might have had since it 'implie[d] that it is possible for individual Member States to plead and obtain a 'ring-fence' of unlimited duration around, *inter alia*, specific national *constitutional* provisions.'[502] To her, this meant opening Pandora's Box of disintegration.[503]

Yet, the Irish government's secretive inclusion of Protocol No. 17 collided with the anger expressed by a section of the Irish population over giving in to pro-life interest groups without conducting a public debate, and with the deep fear that women in Ireland were going to be deprived of their right to travel abroad to obtain abortion services as a result of the protocol.[504] This fear was further fuelled by the Irish Supreme Court's judgment handed

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[501] Colvin, 'Society for the Protection of Unborn Children and the Free Movement of Services in the European Community Society for the Protection of Unborn Children (Ireland) Ltd v Grogan: Irish Abortion Law and the Free Movement of Services in the European Community' at 497. She refers to the 1988 Irish Supreme Court ruling Attorney General ex rel. Society for the Protection of Unborn Children v. Open Door Counselling.

[502] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 49.

[503] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 49.

[504] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 48.

down in February 1992 concerning the injunction pending on a 14-year old girl, pregnant as a result of alleged rape, prohibiting her from travelling to the UK to receive an abortion. In its judgment, the Court refused to hear arguments about EC law, and ruled that a woman's right to travel to receive an abortion abroad could be restricted in cases where there was no serious risk of suicide.[505] This judgment caused such public consternation and debate that the Irish government came to fear that its move in the abortion issue might backfire and actually lead to lessening public support for the Maastricht Treaty than broadening it. Consequently, the Irish government attempted to amend Protocol No. 17, a solution that was rejected by the other Member States, who feared that touching the treaty would open the door to further pleas for amendments. Ireland failed to persuade the remaining Member States to do anything other than to approve, at a regular Council meeting, a solemn declaration clarifying that Protocol No. 17 limited neither the freedom to travel between Member States nor the freedom to obtain information relating to services lawfully available in other Member States.[506]

When it comes to the Member States' efforts leading to the introduction of the above mentioned protocols, Martinico usefully notes that these efforts may be seen as an intent to put 'an immobilising device' on the Court of Justice.[507] Indeed, both the Barber and the Grogan protocols are easily

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[505] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 48. Attorney General v. X [1992] IR 1.

[506] At the Council meeting of 2 May 1992 in Guimaraes, Portugal. The Member States further approved a declaration setting forth that in the event of Ireland revising Article 40(3)(3) of its constitution, an opportunity would be provided to revise Protocol No. 17. The interrelations between constitutional and EU law could not be more tangled. .

[507] Martinico, 'What lies behind Article 4(2) TEU?' at 93; Martinico, *The tangled Complexity of the EU Constitutional Process* at 89 et seq.

identifiable as reactions to prior judgments handed down by the Court.[508] But the Danish Second Home Protocol also seems to have been a response to two ECJ judgments, Cowan v Trésor Public[509] and Commission v Greece,[510] since the latter held that national restrictions on the acquisition and enjoyment of rights in immovable property by nationals of other Members States were contrary to the Rome Treaty. [511]

2.5 Conclusions

The preceding sections have all dealt with provisions – whether introduced directly into the treaty text or annexed to it – that followed an intention to preserve national identity either directly referring to it or referring to its shared (culture, education) or distinctive (abortion) elements. The inclusion of these provisions as well as of means – notably the subsidiarity principle – to preserve them reflects the existence of a strong political will to contain the action of the Commission or to put an immobilising device on the Court of Justice.

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[508] Curtin, 'The constitutional structure of the Union: A Europe of bits and pieces' at 46.

[509] ECJ 2.2.1989, C-186/87 Ian William Cowan v Trésor public [1989] 00195.

[510] ECJ 30.5.1989, C-305/87 Commission of the European Communities v Hellenic Republic [1989] 041461. This may also account for the Greek intent to jump on the Danish bandwagon by introducing a similar protocol on property acquisition. See above at n 487.

[511] Martinico, *The tangled Complexity of the EU Constitutional Process* at 79.

3. Conclusions: Maastricht or the fine line between unity and diversity

Maastricht simultaneously saw the introduction into primary law of policy fields where the preservation of national differences was vehemently defended by the Member States throughout both the treaty-making and treaty ratification processes, as well as the incorporation of tools designed to preserve them. While taking a leap of faith in the direction of further political, economic and monetary integration, the Maastricht Treaty simultaneously gives consideration to Member States' concerns over what could be summarised in general terms as a loss of their national identity, where language, culture, education, religion, and social policies were given specific room.

The tools that the Treaty itself provided, either to all Member States or only to some of them, in order to safeguard these identity-relevant fields followed two distinct patterns. On the one hand, general safeguards such as the subsidiarity principle and the national identity clause were introduced. On the other hand, EU action was, on a case-by-case basis, either restricted in these identity-relevant policy fields, one legal base at a time, – either by prohibiting harmonisation or by requiring unanimity in the Council – or it was potentially excluded through the annexation of protocols and declarations, thereby gloomily presaging the Union's disintegration. The deepening of integration in Maastricht thus relies on the dialectics of unification and differentiation.[512] 'Unity in diversity' was, years before becoming the Union's motto,[513] already its underlying *rationale*. And yet,

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[512] Simon, 'Article F' ; at 89.

[513] This was not until the year 2000. On the legal value of the motto 'United in Diversity' see Toggenburg, ''Unity in Diversity': Searching for the Regional Dimension in the Context of a Somewhat Foggy Constitutional Credo' at 27–29.

the Pandora's Box of disintegration remained closed – or at least we might think so given that 20 years have passed without any sign of the prophecy materialising. This may be partly because the traditional understanding of the European Union as a one-way street towards ever greater integration has proved questionable,[514] i.e. a differentiated integration process with moments of stasis does not necessarily entail the collapse of the EU, and partly because the mechanisms designed to preserve national differences fleshed out by the Maastricht Treaty failed to be effective or at least effective enough to entail disintegration. As Millet usefully notes, the inclusion of unilateral declarations revealed itself as being a poor mechanism for protecting national identity.[515] Similarly, leaving Article F(1) outside the Court's jurisdiction and thus condemning it to the status of an interpretative rule or a legitimate aim[516] suggests that it was not conceived as an absolute prohibition hindering further integration. Finally, subsidiarity, even though its judicial enforceability was proved, failed to meet the major expectations it had created.[517] The future would show that the specific safety railings[518] – exclusion of harmonisation in, for instance, the fields of culture, education, and vocational training – and their interplay with broadly framed internal market and residual competences would cause just as much of a headache as the effectiveness of the generic safety rail

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[514] Martinico, *The tangled Complexity of the EU Constitutional Process* at xi; quoting M. Turk.

[515] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 265.

[516] E.g. ECJ judgment ECJ 2.7.1996, Case C-473/93 Commission v Luxembourg [1996] I-03207.

[517] de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' at 41 et seq.

[518] The distinction between specific and generic safety rails is taken from Lenaerts and van Ypersele, 'Le principe de subsidiarité et son contexte: étude de l'article 3 B du Traité CE' at 7.

embodied in Article 3b. Through Maastricht, identity and diversity flowed into primary law. Moreover, the introduction of mechanisms to protect these reflects the existence of a political will to preserve them.

Chapter 4 Consolidating Identity Protection: Amsterdam, Nice, and the Charter

After this extended analysis of the Maastricht Treaty's contributions to the preservation of the Member States' national identity, I ought, for the sake of completeness, briefly refer to the contributions of the Treaties of Amsterdam[519] and Nice[520] as well as of the Charter of Fundamental Rights of the European Union.[521] I will treat the Amsterdam and Nice treaty revisions jointly out of convenience since they did nothing, in my view, aside from consolidating the trend set in Maastricht. The Charter, however, deserves separate treatment for several reasons. Firstly, when it was initially proclaimed at the Nice Summit, it was not awarded binding legal effects. It is because of this peculiar legal status, which the Charter held up until the entry into force of the Lisbon Treaty, that it appears advisable to introduce the Charter's contributions to the respect for national identity and diversity separately from the Amsterdam and Nice treaty revisions. Secondly, it was conceived from its beginnings as a fundamental rights catalogue and as such, even if it had been granted legally binding effects, e.g. by way of

[519] For an overall assessment of the Amsterdam Treaty, *i.a.*, Philippe Manin, 'The Treaty of Amsterdam' (1998) 4 Columbia Journal of European Law 1–26; on the IGC and their results, c.f. Franklin Dehousse, 'The IGC Process and Results' in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999).

[520] For an overall assessment of the Nice Treaty, see Mads Andenas and John A. Usher (eds), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform* (Hart Publishing 2003); Alberta M. Sbragia, 'The Treaty of Nice' in Erik Jones and others (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012).

[521] Conclusions of the Presidency, Nice December 7-9, 2000; Charter of Fundamental Rights of the European Union, OJ C-3647, 18 December 2000.

incorporation into the treaties, this would not have led to an overhaul of the treaty texts, as treaty revisions (typically) do.

1. Amsterdam and Nice

Neither the Amsterdam nor the Nice treaty revisions may be considered as having had a major impact on the national identity clause. The Amsterdam revision led to the truncation of Article F as well as to its renumbering as Article 6(3) TEU, while the Nice treaty revision left the provision untouched.

So when it comes to the protection of national identity, since, apart from renumbering and a – very – minor change in wording, Article F remained essentially untouched, I will focus on addressing the new provisions and techniques that were introduced into the treaties to preserve national diversity, and on examining to what extent the existing ones remained unchanged or were modified.

1.1 Article F(1) becomes Article 6(3) TEU. Nothing new under the sun?

Besides the introduction of flexibility through the mechanism of enhanced cooperation, which I will address in the next section, one of the major innovations of first the Amsterdam and then the Nice treaty revision was to put the spotlight on fundamental rights. While the contribution of the Nice revision coincided with the ratification of the Charter of Fundamental Rights, Amsterdam witnessed the ascension of fundamental rights from *general* principles to *founding* principles.[522]

[522] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 215.

Moreover, and linked to the relationship between fundamental rights and respect for national identities from a systematic point of view, it suffices to say that the Amsterdam Treaty consummates an inversion of the order of prominence this relationship was afforded by the Maastricht Treaty in Article F. Indeed, Article F's second paragraph referring to the fundamental rights as guaranteed by the ECHR and resulting from the Member States' common constitutional traditions, which in the Maastricht Treaty followed the Union's duty to respect the Member States' national identities that was then prominently enshrined in the first paragraph, received – after renumbering – the privilege of occupying the second paragraph of Article 6 TEU, while the national identities were relegated to its third paragraph.

What is more, respect for fundamental rights – now a founding principle of the Union – was given paramount importance by its inclusion in the first paragraph of Article 6 TEU. When it comes to the Union's duty to respect the Member States' national identities, the proclamation of the founding principles in new Article 6(1) TEU – the 'central achievement of the common provisions' –[523] paired with the inverted order of former Articles F(1) and F(2) also allows us for the first time to speculate about limits inherent to the treaties – *vertragsimmanente Schranken* – in the application of Article 6(3) TEU. Indeed, 'although not expressly provided for, it would appear that the Union's obligation […] to respect the national identities of its Member States must be subordinated to the requirement that Member States respect the principles set out in the new Article 6(1) TEU. An argument that a particular policy which was incompatible with those

[523] Laurence W. Gormley, 'Reflections on the Architecture of the European Union after the Treaty of Amsterdam' in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999) at 59.

principles formed part of the expression of a national identity would thus get the short shrift it deserved.'[524]

This major attention given to fundamental rights protection also becomes visible through the *juristic reinforcement of Article 6 TEU*:[525] the introduction of mechanisms opening the door to sanctioning Member States in breach of the principles protected by Article 6(1) TEU, i.e. Article 7 TEU. The respect of these principles is also set out in Article 49 TEU as a condition for candidate countries to join the EU. With Amsterdam, the framers appear at last to have chosen to take rights seriously. Even one of the major critiques uttered in academic circles regarding Article L of the Maastricht Treaty curtailing the Court's jurisdiction in fundamental rights issues had been – although not entirely satisfactorily –[526] addressed: Article 46 TEU granted the Court of Justice jurisdiction over the fundamental rights issues contemplated by Article 6(2) TEU.[527]

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[524] Gormley, 'Reflections on the Architecture of the European Union after the Treaty of Amsterdam' at 60.

[525] Ian Ward, 'Amsterdam and the Continuing Search for Community' in David O´Keeffe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999) at 42.

[526] Since only Article 6(2) but not Article 6 (1) entered the Court's jurisdiction, c.f. Denys Simon, 'Article 6' in Vlad Constantinesco and others (eds), *Traités d'Amsterdam et de Nice. Commentaire article par article* (Ed Economica 2007) at 36–37.

[527] Still leaving the Union's duty to respect the Member States' national identity outside of the scope of the Court's scrutiny. Such duty remained unenforceable before the Court. Commenting on the Court's jurisdiction, Arnull states that 'provisions introduced at Amsterdam seem liable to induce the Court to rule on disputes of a quintessentially political nature.' These provisos are, in his view, the 'founding principles of the Union, closer co-operation or flexibility, and subsidiarity.' Anthony Arnull, 'Taming the Beast? The Treaty of Amsterdam and the Court of Justice' in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999) at 112 et seq.

The Amsterdam Treaty's major commitment to fundamental rights protection may also provide an explanation for the only change in wording that Article F(1) underwent on its way to becoming Article 6(3) TEU, namely the deletion of the reference to the democratic systems of government. Indeed, the major commitment to the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law as well as the introduction of mechanisms aimed at preventing their possible breach[528] appears to be a plausible explanation for the reference to the *democratic systems of government* being perceived as superfluous and thus worthy of being dropped.[529]

This assumption is further corroborated by positions adopted by certain Member States before the 1996 IGC in connection with the future of Article F(1). Indeed, the Spanish government stressed as early as March 1995 that there was a 'need to further specify the concept of 'democratic principles', referred to in Article F(1) as the foundation of the Union, for eventualities such as a change of regime or violation of those principles.'[530] In view of the above, the change of wording of the national identity clause as effected by the Amsterdam Treaty does not appear to have been motivated by concerns over separating national identity from the adherence to democratic principles but rather by concerns over elevating the Members States'

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[528] Even though criticism was voiced with regard to the expected effectiveness of these sanction mechanisms. C.f. on Article 7 TEU: 'Hell will freeze over before a Member State suffers any serious loss of rights. But it is worth noting that the Union was inclined to assign a quasi-judicial context to Article 6, even if it will, almost certainly, prove to be vacuous.' Ward, 'Amsterdam and the Continuing Search for Community' at 42.

[529] Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 216.

[530] Document of 2 March 1995: 'The 1996 Intergovernmental Conference: starting points for a discussion' in 'White Paper on the 1996 Intergovernmental Conference Volume II Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference,' 1996.

adherence to those principles to a higher level aimed at impeding thereby possible regressions into non-democratic regimes. Thus, the amendment of the national identity clause as a result of the Amsterdam Treaty did not affect the scope it was afforded by the Maastricht Treaty. Not even in jurisdictional terms since new Article 46 TEU – albeit conferring upon the Court jurisdiction over Article 6(2) TEU – refrained from doing so in the case of Article 6(3) TEU.

1.2 Differentiation through Enhanced Co-operation: the subsidiarity-*ersatz*

Entering the 'multidimensional Europe of differentiated integration'[531] the Amsterdam Treaty introduced, in the form of new Articles 43 to 45 TEU, provisions that allowed Member States to establish under certain conditions closer co-operation between one another making use of the institutions, procedures, and mechanisms of the TEU and TEEC. By contrast, the Amsterdam and Nice revisions did not alter the treaty provisions with respect to subsidiarity. On the occasion of the Amsterdam revision, a matter of political agreement in the Council – the conclusions of the 1992 Edinburgh Council on the application of the subsidiarity principle – was elevated to treaty level status[532] since these conclusions were annexed as the 'Protocol on the application of the principles of subsidiarity and proportionality' to the TEC. The Protocol leads, in Schütze's words, to a constitutionalisation of the clarifications[533] made in the wake of the

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[531] Neil Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 European Law Journal 355, at 356.

[532] Gormley, 'Reflections on the Architecture of the European Union after the Treaty of Amsterdam' at 69.

[533] Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* at 251.

Maastricht Treaty to which it stays true: Just as did the Edinburgh conclusions, the Protocol does not focus on the legal definition of subsidiarity, but offers guidelines as to what kind of action should be taken.[534] And just as the Edinburgh conclusions, it blurred the distinction between subsidiarity and proportionality.[535] Yet, and despite the fact that subsidiarity still constituted an essentially polemic concept, the discussion surrounding it became a whole lot quieter. The central post-Maastricht issue was the forthcoming major enlargement and the Amsterdam Treaty was perceived as an opportunity to reshape the Union before that event.[536] Closer co-operation (with Nice – and thus hereinafter – termed 'enhanced cooperation') was one of the elements deemed central[537] to allowing for a smooth functioning of an enlarged Union. It bore the promise to grant the Union the ability to facilitate a further deepening of integration to coincide with the simultaneous widening of the Union.

Flexibility and differentiation, albeit initially limited to the first and third pillars, thus entered the Treaties, and caused a major stir in academic circles.[538] The novel mechanism of enhanced cooperation – termed closer

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[534] Craig and De Búrca, *EU law: text, cases, and materials* at 168.

[535] de Búrca, 'Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity' at 135 et seq. Craig and De Búrca, *EU law: text, cases, and materials* at 168.

[536] Commission Opinion 'Reinforcing Political union and Preparing for Enlargement', Brussels 28.02.1996, COM (96) 90 final.

[537] Stephen Weatherill, ''If I'd wanted you to understand I would have explained it better': What is the Purpose of the Provisions on Closer Co-operation introduced by the Treaty of Amsterdam?' in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999) at 22.

[538] Among others, Stephen Weatherill, "'If I'd Wanted You to Understand I Would Have Explained It Better': What Is the Purpose of the Provisions on Closer Co-Operation Introduced by the Treaty of Amsterdam?" in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999); Bruno

co-operation up until the Nice revision – bears the potential of permitting both the 'ins' and the 'outs'[539] to preserve their national differences in a specific field and thus joins our 'compendium' of treaty provisions that allow for a Member State's identity to be preserved in keeping with the subsidiarity principle. Indeed, when assessing the provisions on enhanced co-operation that the Amsterdam Treaty had introduced into EU law, Stephen Weatherill concluded that 'closer co-operation under the Amsterdam Treaty has much in common with subsidiarity under the Maastricht Treaty. The parallel use of the undefined areas of exclusive Community competence, from which the application of both notions is excluded, provides a semantic hint of a broader phenomenon of delicate evasion of precision. […] Both closer co-operation and subsidiarity are expressions of political mood about directions taken and to be taken by the Union'.[540]

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de Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law*, vol 2001 (2001); Jo Shaw, "Enhancing Cooperation After Nice: Will the Treaty Do the Trick?" in Mads Andenas and John A Usher (eds), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform* (Hart Publishing 2003).

[539] The 'ins' refer to those Member States acceding to the cooperation and the 'outs' to those refusing to participate in it.

[540] Weatherill, ''If I'd wanted you to understand I would have explained it better': What is the Purpose of the Provisions on Closer Co-operation introduced by the Treaty of Amsterdam?' at 37,38. Jo Shaw similarly states that '[i]nterestingly, flexibility seems to share many commonalities that that other rather plastic concept, subsidiarity. Like subsidiarity it can be made to mean most things to most people, depending upon the way in which it is understood and those aspects which are given most emphasis. Substantively, it offers a mechanism for choosing the appropriate frame of reference for political and legal arrangements. In that context, it seems to be a way of satisfying the varying expectations and needs of both the Member States and EU institutions thereby balancing various 'public' interests, as well as other 'private' stakeholders such as citizens, businesses, and organisations. These expectations arise at a number of different levels, including the supranational, the national, and the subnational. Overall, it is a way of balancing the dynamism of an integration process against the diffusion effects which derive from the very success of an integration project which involves

1.3 Language

As we have seen, the Member States – whether in their constellation of the 'Six'[541] or the 'Twelve'–have always been anxious about the preservation of their languages within the Community's language regime. With the 1996 IGC and the then fifteen Member States facing enlargement towards both East and South, carrying with it the potential to increase drastically the number of the Union's official languages, concerns over the protection of one's own language suddenly acquired a sense of particular importance. Emphasis was placed on the equality of the Member States' languages,[542]

already a much larger number of participants than its original conception of the 'Six'. Likewise, subsidiarity can be seen simultaneously as meaning both 'more' or 'less', as well as stronger and weaker 'Europe', depending on whether it is given the 'sovereignty' or the 'federalism' 'spin'. It has been used by different political actors to buy off both the German *Länder* and the strongly Euro-sceptic wing of the British Conservative party, even though the two groups have markedly different perceptions of the interests which need to be protected.' Shaw, 'Enhancing Cooperation After Nice: will the Treaty do the trick?' at 245, 246.

[541] As regards the CECA, EEC and Euratom language regimes, see *infra* at pp. 129 et seq.

[542] The governments of Belgium, Luxembourg and the Netherlands stressed the need to 'retain the existing principle of equality of all the Community languages and promote cultural diversity in the Union in the development of the common policies' in their common memorandum adopted on 7 March. In that same memorandum, more precisely in the Communication of March 1996 'From Madrid to Turin: the Netherlands' priorities for the 1996 IGC', the Dutch government emphasises this claim by stating that 'all the *Community languages* should have equal status'. Likewise, the Italian government calls for the 'principle of the *equality of all the Union's working languages* [to be adhered to scrupulously] at all levels of the EU' in its position on the IGC for the revision of the Treaties of 18 March 1996.Portugal 'lays the highest importance on preserving […] guaranteed equality of status for all its [the Union's] national languages', in 'Portugal and the IGC for the revision of the Treaty on European Union' Foreign Ministry document, March 1996. Finally, the Spanish position, as exemplified by the document 'Elements for a Spanish position at the 1996 Intergovernmental Conference' of 28 March 1996, endorses 'the principle of scrupulous respect for the equal treatment by the institutions of all the Union's *working languages*'. All these

a mooted reduction in the number of the working languages was opposed,[543] as was switching the language regime from unanimity to qualified majority in the Council.[544] While certain Member States underscored the general importance of linguistic diversity as an element of identity or cultural diversity, others more specifically addressed the different fate official languages and working languages would meet in an enlarged Union. In this vein, the German *Bundesrat* took the stance that the regulation of official languages should not be altered with a view to future accession, while the regulation of working languages should be modified in the light of the working capacities of the institutions – i.e. reduced – without, of course, affecting the use of the German language.[545] Spain went

positions are set forth in the 'White Paper on the 1996 Intergovernmental Conference Volume II Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference' .

[543] Indeed, the Portuguese government 'opposes any reduction in the number of working languages, in the interests of preserving the cultural diversity of Europe and the principle of equality between Member States', in 'Portugal and the IGC for the revision of the Treaty on European Union' Foreign Ministry document, March 1996. The Irish government goes even further, articulating in its 'White Paper on Foreign Policy: External challenges and opportunities' of 26 March 1996, its desire to see 'on the *language regime* […] an appropriate increase in the use of Irish (Gaelic)'. All these positions are set forth in the 'White Paper on the 1996 Intergovernmental Conference Volume II Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference' .

[544] For instance, the Belgian government, in its policy paper addressed to the Belgian Parliament on the 1996 IGC, calls for an extension of qualified majority voting in the Council, while specifying that 'unanimity should only be required to amend the Treaty, the language system, and accession'. The Dutch government already defended a similar position in its 'Fourth memorandum of 12 July 1995 on the institutional reform of the European Union' considering the 'use of languages' one of those 'decisions of a constitutional nature'. All these positions are set forth in the 'White Paper on the 1996 Intergovernmental Conference Volume II Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference' .

[545] Decision of the *Bundesrat* of 15 December 1995, Br. Drucksache 667/95, at 12. As regards the German language and the potential of the Charter to protect its prevalence,

so far as to insist on the entrenchment of Spanish as one of the Union's working languages 'since it [was] quite obviously a major international language'.[546] In any case, the call for safeguarding the Union's multilingual approach, which had been a part of the Communities from their very beginnings, had become louder. The Union's language regime was associated with cultural diversity and national and cultural identity,[547] but also significantly with the (sovereign) equality of the Member States.[548]

see Peter J. Tettinger, 'Die Charta der Grundrechte der Europäischen Union' [2001] Neue Juristische Wochenschrift 1010, at 1012.

[546] Document of 2 March 1995: 'The 1996 Intergovernmental Conference: starting points for a discussion' in 'White Paper on the 1996 Intergovernmental Conference Volume II Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference' .

[547] The Benelux and the Greek positions as shown respectively in the common memorandum adopted on 7 March and the Conclusions of the inter-ministerial committee of the Greek government (Athens, 7 June 1995) are indicative hereof. The Benelux position reveals that '[u]nanimity should only be required to amend the Treaty, the language system and accession', while Greece claims from the outset that '[a] basic goal for a country like Greece is the *safeguarding and strengthening of the cultural identity of Europe*, by means of the safeguarding and strengthening of the cultural and linguistic identity of each Member State.' All these positions are laid out in the 'White Paper on the 1996 Intergovernmental Conference Volume II Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference' .

[548] When it comes to equality among the Member States' official languages, the Amsterdam Treaty represented a marked step forward with its Article 2(11) granting citizens the right to communicate with EU institutions in any of the 'languages of the Treaty', *de facto* granting the Irish language the status of an official language – a status which, as noted above at n 364, Irish had lacked. C.f. Milian-Massana, 'Languages that are official in part of the territory of the Member States' at 197.

1.4 More about culture, religion, and *animal slaughtering*

When it comes to culture, one of the new community policies that Maastricht had seen premier in Article 128 TEC (now renumbered as Article 151 TEC), the amendments introduced in Amsterdam were far from ground-breaking. Yet, they are worth mentioning since they are in line with the Member States' protective attitude already displayed during the Maastricht Treaty negotiation and ratification. Firstly, an amendment particularly worthy of mention is one that, although tabled, was not implemented: It had been proposed that the decision-making procedure in the Council be changed from unanimity to qualified-majority voting.[549] It appears that the Member States remained very much interested in blocking actions that could 'have subtle but emotionally significant effects on the expression of their national identity'.[550]

Secondly, the only change to Article 151 TEC implemented by the Amsterdam and Nice treaty revisions was to emphasise the Union's respect for cultural diversity. In fact, the fourth paragraph, which instructed the

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[549] C.f. Gori, 'Article 151' at 557. Interestingly, the European Forum for Arts and Heritage justified the proposed change in the following terms: 'At present culture is one of the areas in which a single state can exercise a veto on any action or proposal since all decisions have to be unanimous. While this may quite properly allow member states to block actions which would have subtle but emotionally significant effects on the expression of their national identity, it also has a more destructive potential. It allows cultural action - indeed the entire budget for cultural programmes - to become the hostage of any government wishing to manipulate Council for reasons that have nothing to do with culture'. General Assembly of the European Forum for the Arts and Heritage (EFAH/FEAP), 'Article 128 of the Treaty of Maastricht. Suggestions for revision at the 1996 Intergovernmental Conference,' 1995.

[550] General Assembly of the European Forum for the Arts and Heritage (EFAH/FEAP), 'Article 128 of the Treaty of Maastricht. Suggestions for revision at the 1996 Intergovernmental Conference'

Union to 'take cultural aspects into account in its action under other provisions of this Treaty', was supplemented with the clarification 'in particular in order to respect and to promote the diversity of its cultures'. The Union's duty to take into account cultural aspects for the purpose of preservation and promotion of its cultural diversity thereby acquired a horizontal dimension and became a requirement imposed on the EU legislator.[551] It has been argued that in view of the lack of a true legislative competence in the cultural field, such duty could only be read as 'a *renvoi* to national culture'.[552] The extent of the Union's respect for national cultures would then ultimately depend on the interpretation of the formula 'to take into account'.[553]

Apart from this amendment to Article 151(4) TEC, cultural diversity also entered the Treaties by the way of protocols and declarations. In this regard, Franklin Dehousse comments on how at the beginning of the 1996 IGC, the negotiators held 'noble speeches' about the need to avoid the proliferation of protocols and declarations – and ended up doing the contrary.[554] In this sense, the Protocol on protection and welfare of animals – apparently a

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[551] Psychogiopoulou, 'The Cultural Mainstreaming Clause of Article 151 (4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?' at 584.

[552] Christoph U. Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing' [2000] European Review of Private Law 153, at 164. Apparently disagreeing: Psychogiopoulou, 'The Cultural Mainstreaming Clause of Article 151 (4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?' at 584.

[553] Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing' at 164.

[554] Dehousse coins this abuse of protocols very graphically the 'Christmas-tree-approach', see 'The IGC Process and Results' at 98.

British demand –[555] required the Community and its Member States to pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to *religious rites, cultural traditions and regional heritage* when implementing the Community's agriculture, transport, internal market and research policies.

The subject of animal protection was not entirely new to primary EU law since a declaration on such matter had already been annexed to the Final Act at the time of the Maastricht Treaty revision. However, the wording of that Declaration No 24 on the Protection of animals merely set forth that the IGC called upon 'the European Parliament, the Council and the Commission, as well as the Member States, when drafting and implementing Community legislation on the common agricultural policy, transport, the internal market and research, to pay full regard to the welfare requirements of animals.' Thus, whereas the 1992 Declaration made no mention of limitations to the Community's and Member States' duty to pay full regard to the welfare of animals in certain policy fields, the 1997 Protocol very much did so.

Regardless of whether animal welfare was actually enhanced by the introduction of the protocol, this definitely was the case with respect to diversity preservation: protocol status – with the corresponding legal effects that this entailed – was afforded to a Community duty to respect Member State legislation or customs based on religious, cultural or folkloric considerations in the field of animal welfare. This sets the stage for introducing exceptions or limitations to rules relating to animal welfare.[556]

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[555] Dehousse, 'The IGC Process and Results' at 98.

[556] Conversely, some authors have argued that the reference to the Community's duty to respect national provisions or customs relating to *religious rites, cultural traditions*

Discussions during the legislative process appear to suggest that one of the draftsmen's main concerns in formulating this qualification was bullfighting,[557] a circumstance that would explain the reference to regional heritage. Cultural and religious practices were granted an exception to the common rules set by the Community. In the case of bullfighting, which appears to have motivated the admission of national rules or customs notwithstanding their being contrary to the welfare of animals, we are confronted with a practice considered a cultural or sporting event that is afforded the status of *national heritage* in at least one Member State, viz. Spain[558]. For Spain, adopting the protocol on animal welfare on the above mentioned terms meant protecting deeply enrooted cultural practices

and regional heritage was not to be considered as establishing an exception to the duty to pay full regard to animal welfare, c.f. Tara Camm and David Bowles, 'Animal welfare and the Treaty of Rome - A legal analysis of the Protocol on animal welfare and welfare standards in the European Union' (2000) 12 Journal of Environmental Law 197. I have to disagree. While it is true that even before the entry into force of the Amsterdam Treaty Community legislation had already introduced religiously motivated derogations from stunning animals before slaughtering them (Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, O.J. L 340, 31/12/1993), post-Amsterdam legislation fully assumes the protocol's content, including the limitations it provides for. In this vein, the successor to the 1993 slaughtering Directive does not limit itself to religious rites when granting exceptions to certain slaughtering rules, but rather exempts *a priori* animals killed in *cultural and sporting events* from the scope of the regulation (vid. Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ L 303, 18/11/2009, Article 1). The regulation explicitly refers in recitals 15 and 16 to the protocol on animal welfare as justification for this exemption.

[557] Camm and Bowles, 'Animal welfare and the Treaty of Rome - A legal analysis of the Protocol on animal welfare and welfare standards in the European Union'

[558] See the recent legislative developments in Spain: Ley 18/2013, de 12 de noviembre, para la regulación de la Tauromaquia como patrimonio cultural. Article 2 states that bullfighting forms part of Spain's cultural heritage and Article 3 sets forth the authorities' duty to protect and promote bullfighting in accordance with Article 46 of the Spanish Constitution (guaranteeing the protection and promotion of Spain's cultural, historical and artistic heritage).

against an emerging common European value: animal welfare. The EU legislator also began tapping the full potential of the protocol on animal welfare as regards the possible exceptions it provides for.[559] Ring-fencing cultural practices in a protocol has in this case proved itself effective from the perspective of preserving cultural practices that may or may not be a part of a Member State's national identity.

Equally eye-catching – since the Treaties do not provide the Union with a mandate for policies in religious matters, nor do they confer any legal competence over church and religion –[560] is the inclusion of Declaration 11 on the status of churches and non-confessional organisations. This lays down the Union's respect of the status under national law of churches and religious associations or communities in the Member States as well as of philosophical and non-confessional organisations.

The inclusion of this declaration was in response to the heated debate that was conducted in Germany on the danger of the Europeanisation of the

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[559] See Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, OJ L 303, 18/11/2009, especially recitals 15, 16 and 18 as well as Articles 1 and 3(4) establishing exceptions to the applicability of the regulation to cultural and sporting events and derogations from stunning for slaughtering following religious rites, respectively. Or Regulation (EC) No 1007/2009 of the European Parliament and the Council of 16 September 2009 on trade in seal products, OJ L 286, 31/10/2009, which notes in recital 14 that '[t]he fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed'.

[560] Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 563.

German law on churches.[561] Its wording is based on the joint position issued by German Catholic and Protestant Churches[562] and the position of the *Bundesrat*,[563] both issued with a view to the 1996 IGC and expressly requiring protection of the status of the churches in EU primary law. If we consider the particular status and protection religious corporations receive in Germany, it is not surprising that the possible effects of European integration were observed with suspicion. In Germany, the relationship between state and church is of a special nature. Article 187 of the Weimar Constitution categorised religious associations as corporations of public law and granted them the prerogative to manage their own affairs within the limits of general law. Special prerogatives for these corporations notably include the ability to collect taxes, but also to impose specific obligations of loyalty on their employees and require church membership. These practices find their constitutional justification precisely in the freedom of churches to structure their own organisation and administration according to their own religious dictates.[564] Since the German *Grundgesetz* incorporates these regulations, they currently still enjoy constitutional status.

In light of the above, the claim of the two major German churches to the protection of their status under EU primary law is quite comprehensible. It

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[561] See Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 563.

[562] Kirchenamt der Evangelischen Kirche in Deutschland and Sekretariat der Deutschen Bischofskonferenz (eds), *Zum Verhältnis von Staat und Kirche im Blick auf die Europäische Union. Gemeinsame Stellungnahme zu Fragen des europäischen Einigungsprozesses*, 1995.

[563] Deutscher Bundesrat, 'Drucksache 667/95 Entschließung des Bundesrates 'Forderungen der Länder zur Regierungskonferenz 1996'' (1995).

[564] Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 573.

is interesting how both the churches and the German *Bundesrat* linked that protection to the Union's respect for the Member States' national identities. The *Bundesrat* goes so far as to recommend complementing Article F(1) with the following phrase: 'The European Union respects the constitutional status of religious associations in the Member States as an expression of their identity and their cultures as well as a part of the common cultural heritage'.[565] The final text of the declaration refrains from mentioning national identities and common cultural heritage – already referenced in Articles 6(3) TEU and 151 TEC – while extending its scope to philosophical and non-confessional organisations.[566] In addition to this edulcorated wording, the provision failed to make it into the treaty text and only acquired the status of a declaration with the legal consequences this entails.[567]

While – at least at this stage – it does not seem helpful to unravel whether religious identity is or should be considered a part of national identity,[568] it

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[565] Deutscher Bundesrat, 'Drucksache 667/95 Entschließung des Bundesrates 'Forderungen der Länder zur Regierungskonferenz 1996'' at 18 (my translation).This would remain an utmost German concern throughout the following treaty revisions, see below at n 810.

[566] This nuance with respect to the initial proposal appeared to respond to British and French pressures. C.f. Anne Rigaux, 'Protocoles et déclarations annexés au Traité d'Amsterdam' in Vlad Constantinesco and others (eds), *Traités d'Amsterdam et de Nice. Commentaire article par article* (Ed Economica 2007).

[567] No binding legal force derives from the declaration. Heinig insists on the interpretative function and the political significance of the declaration, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 570. Similarly, Rigaux, 'Protocoles et déclarations annexés au Traité d'Amsterdam' with further references of dissenting opinions.

[568] Thüsing favours treating the relationship between church and state as an element of national identity, with further references: Gregor Thüsing, *Kirchliches Arbeitsrecht: Rechtsprechung und Diskussionsstand im Schnittpunkt von staatlichem Arbeitsrecht und kirchlichem Dienstrecht* (Mohr Siebeck 2006) at 222. More sceptical as regards

suffices to say that Declaration 11 on the status of churches and non-confessional organisations reflects the *rationale* of a provision on a subject-matter – the relationship between the state and the church – that is both emotionally disruptive and deeply rooted in the culture of the different Member States where it receives highly divergent treatment. Such diverse treatment ranges from state church to laicism, and all of them fall under the umbrella of Declaration 11. Diversity had thus once again entered primary law through the backdoor.

1.5 Social dimension

For the sake of completeness, it appears important to mention -even if only briefly – the changes to social policies that were introduced by the Treaties of Amsterdam and Nice. The Treaty of Amsterdam marked the end of the British social opt-out and the incorporation of the content of Protocol 14 of the Maastricht Treaty on social policy in the EC as Title XI into the TEC. Although the United Kingdom's return to the common fore of social policies undoubtedly resulted in a reduction of the divergences introduced in Maastricht since it restored the unity and coherence of the former,[569] new Article 136 TEC – former Article 1 of the Protocol on social policies – emphasises once again that the Community and the Member States, in order to meet their objectives in the field of social policies, 'shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.' Furthermore, Article 137 TEC – laying down legal bases for Community action in labour-related

this approach Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 570; also with further references.

[569] Alain Pilette, 'L'Europe sociale' in Giuliano Amato and others (eds), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) at 687.

fields – excludes sensible concepts and rights (viz. Article 137(6) TEC: pay, the right of association, the right to strike or the right to impose lock-outs); explicitly recognises the Member States' right to maintain or introduce more stringent protective measures (Article 137(5) TEC); and lists a large number of areas where unanimity is required.[570] Beyond Title XI TEC, the Amsterdam Treaty also saw the introduction of a provision dealing with a concept that would trigger lively debates on the socio-economic model of the Union during both upcoming Conventions – the Charter Convention and the Constitutional Convention: the Services of General Economic Interest (SGEIs). In the bold words of the Commission, Article 16 TEC[571] recognised 'the fundamental character of the values underpinning such services and the need for the Community to take into account their function in devising and implementing all its policies, placing it among the Principles of the Treaty',[572] but as Erika Szyszcak notes[573] the final text was a compromise embodying the tension between the application of

[570] Article 137(3) TEC refers to social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6; conditions of employment for third-country nationals legally residing in Community territory; financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund.

[571] Article 16 TEC provides 'Without prejudice to Article 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions, which enable them to fulfil their missions.'

[572] European Commission, Services of General Interest in Europe, Brussels, 20.9.2000 COM (2000) 580 final, at 5.

[573] Erika Szyszczak, 'Article 36 Access to Services of General Economic Interest' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) para 36.15.

internal market and competition rules and the protection of national public services. The significance of the provision – and thus its potential – continues to be hotly debated to the present day.[574] As regards the social dimension, the Amsterdam Treaty revision thus accentuated unity and common values since it ended the British social opt-out, while at the same time consolidating diversity by maintaining space for national particularities in the Treaty's social title and by reinforcing SGEIs, often reflecting a national understanding of public services, against the logics of the internal market and common competition rules.

2. The Charter

As we have seen, the Treaty of Nice did not introduce any modifications as regards the identity clause. This does not imply, however, that things went smoothly throughout the revision process; the Nice summit that led to its adoption was not only the longest in European integration history,[575] this being evidence of the importance accorded to institutional reforms preceding the major enlargement of the EU, it also witnessed a solemn proclamation by the European Parliament, the Council of Ministers and the European Commission in the Charter of Fundamental Rights of the European Union.[576] This instrument proclaims in its preamble that 'the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions

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[574] For a very detailed overview of the state of the debate -at least back in 2007- , Malcolm Ross, 'Promoting solidarity: from Public Services to a European model of competion?' (2007) 44 Common Market Law Review 1057, at 1071 et seq, with further references.

[575] Sbragia, 'The Treaty of Nice' at 149.

[576] Conclusions of the Presidency, Nice December 7-9, 2000; Charter of Fundamental Rights of the European Union, OJ C-3647, 18 December 2000.

of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels' and in Article 22 that 'the Union shall respect cultural, religious and linguistic diversity'. So, not only did the Charter's incorporation into EU law represent a major innovation in terms of the protection of fundamental rights, it also contains provisions that, both explicitly and implicitly, point towards Member States' identity and diversity protection.

The Charter finds its origins in Cologne, where during the European Council of June 1999 the decision had been taken to consolidate the fundamental rights applicable at Union level, thereby making them more evident,[577] as well as in Tampere, where composition and working methods of the body bound to elaborate it were set.[578] This body, which gave itself the name 'Convention',[579] took up work on the Charter in December 1999 in Brussels under the auspices of former German *Bundespräsident* Roman

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[577] Cologne European Council 3 - 4 June 1999 Conclusions of the Presidency, especially Annex IV.

[578] Tampere European Council 15-16 October 1999 Conclusions of the Presidency.

[579] Peter Altmaier, alternate Convention member for the *German Bundestag*, give emphasise to the importance of this decision, which was taken by a large majority as early as the second meeting, since it was taken against the hopes of some Member States, voiced during the Cologne Council, that sticking with the denomination 'body' would temper the significance of its work. Peter Altmaier, 'Die Charta der Grundrechte der Europäischen Union' (2001) 16 Zeitschrift für Gesetzgebung 195, at 197. Gráinne de Búrca emphasises the instigating role of Roman Herzog with regard to this decision as well as the 'certain constitutional overtones' it implied, c.f. Gráinne de Búrca, 'The drafting of the European Charter of fundamental rights' (2001) 26 European Law Review 126, at 133. Lord Goldsmith, however, offers an explanation likely to come across as quite sobering to misty-eyed integrationists: 'The body renamed itself 'the Convention', perhaps to evoke historical precedent or perhaps simply to avoid Francophone members the embarrassment of having to wear a badge saying 'enceinte', the official French name for the 'Body'. Lord Goldsmith, 'A Charter Of Rights, Freedoms And Principles' (2001) 38 Common Market Law Review 1201, at 1208.

Herzog.[580] He formed a drafting group jointly with vice-chairs Braibant, Jannsson, and Méndez de Vigo and Commissioner Antonio Vittorino – charged with devising a working plan and other preparatory works –, which took the name of 'Praesidium', while the work on specific subjects and categories of rights was delegated to working parties.[581] Roman Herzog played an active role in the drafting of the Charter and specifically in surmounting a number of controversial issues. The Explanations to the Charter,[582] for instance, find their origins in a compromise effected by Herzog to allay British fears of producing a fundamental rights catalogue that would exceed the wording – and thereby also the limitations – of the ECHR. Indeed, the UK firmly advocated copying the wording of the ECHR primarily because this would also result in the numerous national reservations contained therein being taken over. UK government representative Lord Goldsmith's opposition was finally abandoned as a result of Herzog's initiative to introduce clarifications – statements of reasons in Herzog's terms – partly based on Goldsmith's observations. These statements of reasons also clarified limitations to rights.[583] On the basis of Herzog's statements of reasons and upon the request of the

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[580] Hans-Christian Krüger, 'The European Union Charter of Fundamental Rights and the European Convention on Human Rights: An Overview' in Steve Peers and Angela Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) at xvii.

[581] de Búrca, 'The drafting of the European Charter of fundamental rights' at 133.

[582] CHARTE 4473/00 CONVENT 49, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, 11 October 2000.

[583] CHARTE 4371/00 CONVENT 38, Contribution from the former President of the Federal Republic of Germany, Roman Herzog, relating to Articles 1 to 7, Brussels, 15 June 2000.

Praesidium, Jean Paul Jacqué[584] went on to identify the sources of the different Charter provisions[585] and prepared short explanations to each article.[586] These Explanations were not subject to debate[587] and were not accorded any legal value.[588] Herzog's initiative had led to a compromise being reached with the UK representatives, yet the Explanations to the Charter based on this compromise would be far from exempt from controversies, as we will see throughout the following sections.

The working methods of the Convention differed sizably from the proceedings of the IGCs: Although the 'body' was only integrated by institutional representatives from national and European level, it was notably the predominance of parliamentary representatives and the degree of openness and transparency reached through making both hearings and documents submitted thereto accessible to the public that made this drafting

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[584] Jean Paul Jacqué – at that time director of the Council Legal Service – headed the General Secretariat of the Council, which itself was directing the Secretariat of the Convention, Jean-Claude Piris, *The Lisbon Treaty: a legal and political analysis* (Cambridge University Press 2010) at 148.

[585] Martin Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos 2011) para 47 a.

[586] C.f. Susanne Baer, 'Grundrechtecharta ante portas' [2000] Zeitschrift für Rechtspolitik 361, at 363; Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 197.

[587] Apart from the lists of the explanations to Article 52(3) CFREU, c.f. Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze' 47a.

[588] As the words introducing the Explanations set forth: 'These explanations have been prepared at the instigation of the Praesidium. They have no legal value and are simply intended to clarify the provisions of the Charter.' CHARTE 4473/00 CONVENT 49, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, 11 October 2000.

process considerably different from prior treaty revisions.[589] And yet the Convention spawned specific practices that were both reminiscent of the secretive character of the IGCs for their closed nature and novel since they led to the separating lines between Member States – at times – being overarched. Indeed, the Convention members, in addition to the official meetings, began to hold informal meetings in accordance with their membership of one of the big political 'families', i.e. the European Social Democrats or the European Centrists, leading at times to compromises that overlapped national interests.[590] These overlapping compromises did little, however, to eliminate the national categories of thinking,[591] which had a discernable impact on the drafting, as we will see in the following sections.

As regards the legal status of the Charter, even though – or precisely because – the Cologne Council had not settled this question and merely charged the Convention with producing a draft that was to be proclaimed by the Council, EP, and Commission,[592] it was on Herzog's instigation that the drafting process was steered so as to produce a text 'as if' to be incorporated in the treaties, leaving the ultimate decision on this matter to

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[589] de Búrca, 'The drafting of the European Charter of fundamental rights' at 131 et seq. She notes that some of the NGOs who had sought access to the drafting process had commented positively on the degree of openness and transparency. Yet, despite this appearance of inclusiveness and deliberation – to a certain degree – with civil society, De Búrca illustrates that it was in practice the Praesidium who exerted most influence on the drafting process, 'The drafting of the European Charter of fundamental rights' at 133.

[590] Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 197; 209.

[591] Altmaier refers to 'nationale Denkkategorien' in 'Die Charta der Grundrechte der Europäischen Union' at 199.

[592] Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 205.

the European Council.[593] In the eyes of the Commission, this 'as if' approach became especially visible in the fact that, in spite of their controversial nature, consensus was reached on the so-called horizontal clauses, i.e. clauses dealing with the Charter's relationship with the treaties, whose inclusion would have been superfluous in the case of drafting a mere political declaration.[594] As mentioned above, a compromise was ultimately reached[595] and the Charter was, despite being solemnly proclaimed in Nice, not incorporated in the treaties until the Lisbon treaty revision.

The Member States' defiance in terms of granting the Charter treaty status or otherwise legally binding effects reflects, in Paolo Carozza's words, 'the consensus that the Charter be contained and not allowed to disrupt the constitutional balance between the Union and the Member States'.[596] The fact that the Charter resided, as he notes, 'in an uncomfortably ambiguous space between the common aspirations of a continent and the persistent pull of national difference and particularity' is also reflected by the simultaneous references to unity and diversity.[597] While the Preamble invokes a common future, common values and a shared spiritual and moral

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[593] COM/2000/0644 final, Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, recital.

[594] COM/2000/0644 final, Communication from the Commission on the legal nature of the Charter of fundamental rights of the European Union, recital 8.

[595] As Piet Eeckhout observes: 'Like much else in and about the Charter, the solemn proclamation exercise was a compromise, in this case between those in favour of full integration in the Treaties - what one might term incorporation - and those opposed to making the Charter binding in any form whatsoever.' Piet Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' (2002) 39 Common Market Law Review 945, at 947.

[596] Paolo Carozza, 'The Member States' in Steve Peers and Angela Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) at 41.

[597] Carozza, 'The Member States' at 35.

heritage for the ever closer Union between the peoples of Europe, it sets forth in the same breath the respect for the diversity of their cultures and traditions as well as the respect for the Member States' *national identities* and recalls the application of the subsidiarity principle.[598] The appearance of the 'religious issue' and its settlement in the Preamble are also indicative of a balancing act between different national perceptions of the relationship between church and state. The *antinomy* between unity and diversity is maintained throughout the Charter's substantive rights:[599] The aspiration for diversity manifests itself particularly in Article 22 on the Union's duty to respect cultural, religious and linguistic diversity, as well as throughout the limits to the Charter, either in the form of general, horizontal provisions or in the form of recurring special caveats making the exercise of a right or the granting of a principle dependent upon 'national laws and practices'.

Yet, this tension between unity and diversity is only illustrative of what had become the bone of contention of European integration politics: the competence issue. Hotly debated points such as the inclusion of social and economic rights – which the drafters had been instructed by the Cologne Council to take into consideration – and more generally of rights regulating matters over which the Union was not competent as well as questions on the scope and application of, and limits to, the Charter shared one common underlying preoccupation, namely the extension of the Union's competences by way of provisions of the Charter. This debate on the appropriateness of including rights devoid of any relationship with the competences attributed to the Union drew some harsh criticism from academia. Jean Paul Jacqué, for instance, shows little understanding for the debate on the correspondence between the rights afforded by the Charter

[598] Recitals 3 and 5.

[599] Carozza, 'The Member States' at 35 et seq.

and the competences attributed to the Union. In his opinion, the entire debate was based on a misapprehension that a number of Convention members were labouring under: that an absolute correspondence between rights and Union competences had to be reached. According to such understanding, making reference to rights in fields that did not fall within Union competences bore the risk of creating new Union competences that had not been granted under the Treaties.[600] This conception of an absolute correspondence between rights and competences misses what Lord Goldsmith terms the 'risk of touching fundamental rights by a side wind', that is when an EU institution is exercising competences in another area.'[601] Jacqué speaks of a vision based upon 'une méconnaissance complète tant des règles communautaires que des droits fondamentaux' since legislation affecting, for instance, religious freedom does not necessarily have to have been passed on grounds of competence in religious matters; it may just as well have been passed on grounds of fiscal competence and nevertheless have an impact on religious freedom.[602] In the end, the position advocating the inclusion of rights solely in fields where the Union was attributed competences did not prevail within the Convention, where, as Rubio Llorente notes, [603] the vast majority favoured an all-encompassing Charter. Yet – unfounded or not – this concern over creeping competences constitutes the underlying rationale for all the provisions I analyse below.

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[600] Jean Paul Jacqué, 'La protection des droits fondamentaux dans l'Union européenne après Lisbonne' (2008) 26 L'Europe des Libertés 2, at 2.

[601] Lord Goldsmith, 'A Charter Of Rights, Freedoms And Principles' at 1207.

[602] Jacqué, 'La protection des droits fondamentaux dans l'Union européenne après Lisbonne' at 5. For a similar assessment, see Altmaier's critique of the position defending the principle of parallelism of competences and rights protection, Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 202 et seq.

[603] Francisco Rubio Llorente, 'A Charter of dubious utility' (2003) 1 International Journal of Constitutional Law 405–426

Having in mind the aforesaid, I will briefly touch upon the provisions reaffirming national identity, cultural, linguistic diversity as well as the horizontal clauses and special caveats permitting diversity preservation, all reflecting both the concern over creeping competences and the trend of coupling unity and diversity set in Maastricht and consolidated throughout the Amsterdam and Nice revisions.[604]

2.1 National (constitutional) Identity in the Charter

As mentioned above, the Preamble of the Charter refers in its third recital to the Union's contribution 'to the preservation of […] common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels' as well as to the Union's pursuit of promoting balanced and sustainable development and its guarantee of the fundamental economic freedoms.

Furthermore, the second recital of the Preamble embodies the controversy between those advocating the inclusion of a reference to God, Christianity, or more broadly to a religious heritage and those more inclined towards referencing the EU's humanist or philosophical pedigree. This dispute was solved in a way pointing at the identity protection of one of the Member States: Germany.

Religion also played a role in Article 22 CFREU in terms of religious diversity. Said provision enshrines the Union's duty to respect cultural, religious and linguistic diversity and, as the Explanations to the Charter illustrate, was inspired by Article 6 TEU, which featured at the time of the drafting of the Charter the 'national identity clause'.

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[604] See *supra* Chapter 4.

As we will see in the following section, the relationship between the Charter and the national identity clause is somewhat intertwined. While the *former* 'national identity clause' (Article 6(3)TEU (Nice version)) appears to have provided the inspiration for Article 22 CFREU, Recital No. 3 of the Preamble seems to have inspired the wording of the *current* identity clause (Article 4(2) TEU).

2.1.1 Recital No 3 of the Preamble: An inspiration for future Article I-5(1) CT?

When reading Recital No 3 of the Preamble to the Charter, one is struck by the similarity its words bear with (parts of) our current Article 4(2) TEU. The recital refers to the Member States' organisation of their public authorities at national, regional and local levels. The first draft of the Preamble presented by the Praesidium even referred to the *constitutional* organisation of the Member States at those three levels.[605] The reference to the *constitutional* nature of the state organisation disappeared from the second draft,[606] apparently on such trivial grounds as linguistic and style editing.[607] Apart from this and a few other linguistic adjustments as well as

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[605] At least in the German-language version 'Die Union trägt zur Entwicklung dieser gemeinsamen Werte bei und achtet dabei die Vielfalt der Kulturen und Traditionen der Völker Europas und die nationale Identität der Mitgliedsstaaten sowie deren verfassungsmäßigen Aufbau auf nationaler, regionaler, und lokaler Ebene.' Draft presented by the Praesidium (CHARTE 4400/00 CONVENT 43) of 14 July 2000, reproduced in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) at 51 et seq.

[606] CONVENT 47, 14 September 2000, reproduced in Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union* at 55 et seq.

[607] As reported by Jürgen Meyer, representative of the German *Bundestag*, Jürgen Meyer, 'Präambel' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) para 23.

the additional reference to sustainable development and the market freedoms, the wording of the third recital was left untouched.

It suffices to say that the Preamble's main legal function is that of a means of interpretation, to be considered particularly in the framework of the teleological interpretation of individual Charter provisions in line with the objectives enounced in the Preamble.[608] The drafters therefore never intended to confer upon the Union a duty to respect the diversity of cultures and traditions as well as its Member States' national identities and state organisation with concrete legal effects. But the political message is clear: the endeavour for unity is subject to the respect of the Member States' particularities. The fact that cultural diversity, national identity and state organisation are referred to in one single breath indicates that the drafters conceived them as being related. Culture is often understood as constitutive of national identity[609] and state organisation, also at regional and local levels, as an element of national identity.[610] Recital No 3 of the Charter appears, if not as a predecessor, at least as a source of inspiration for Article I-5(1) of the failed Constitutional Treaty.[611] Furthermore, while this shows that the current debate over the respect for the Member States' national identities may be a particularly lively one, it is not a new one. Indeed, the

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[608] Meyer, 'Präambel' 6.

[609] With further references, Meyer, 'Präambel' 40.

[610] Meyer brings out another possible facet of the Union's duty to respect its Member States' organisation, its grandfathering (*Bestandsschutz*) function for Member States lacking regional or local structures i.e. its function of also respecting the choice of Member States such as the UK, which have decided against local autonomy, Meyer, 'Präambel' 40.

[611] The fact that Peter Altmaier would repeat the wording as a Convention member in the European Convention and as a member of Working Group V on Complementary Competences, where he submitted a draft of future Article I-5(1) CT (see *infra* Chapter 5), is certainly more than a mere coincidence.

respect for national identities was already described at the time of the drafting of the Charter as a *Leitgedanke* of EU primary law and deliberately linked to the Preamble of the TEU[612] and Article 6(3) TEU.[613]

2.1.2 Christianity versus Laicism: Identity revealed?

While the inclusion of the reference to the Union's duty to respect national identities and their state organisation was essentially uncontroversial, other subject-matters led to 'highly emotional debates'[614] among the Convention members. Particularly the question whether the Preamble should include a reference to Europe's religious heritage led to the first major controversy among Convention members. Indeed, what would be dubbed the 'religiöse Frage'[615] and would fuel lively debates during the upcoming constitutional Convention, which first emerged at the time of the drafting of the Charter's preamble. The Convention divided members into between those[616] calling for an explicit reference to Europe's Christian-occidental roots and those[617]

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[612] The Preamble of the TEU has referred, since the Maastricht Treaty, to the Member States' desire to 'deepen the solidarity between their peoples while respecting their history, their culture and their traditions'. See above at p. 57.

[613] Jürgen Meyer, 'Präambel' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (1st edn, Nomos 2003) para 39.

[614] Meyer, 'Präambel' 32.

[615] I.e. the 'religious issue', Meyer, 'Präambel' 18.

[616] Essentially Altmaier, representative of the German *Bundestag*, and EP representatives van Dam (NL) and Berthu (F); Meyer, 'Präambel' 18.

[617] EP representative Van den Burg (NL) and Loncle (F) for the French *Assemblée nationale*, Meyer, 'Präambel' 18. It is interesting to see that this controversy overarched national division lines and instead regrouped the Convention members following their political families' stances on the conflict at domestic level. Indeed, the advocates of including a reference to Europe's Christian heritage were members of the German

wary of the exclusionary effect such a reference could entail. Up until the penultimate draft of the Charter, the second recital of the Preamble referred to the Union's 'cultural, humanist and religious heritage'. Yet, on 25 September 2000 the Praesidium presented amendments to the version submitted by the Legal Linguistic Working Party including a modification of the above mentioned passage, which led to replacing 'Taking inspiration from its cultural, humanist and religious heritage, the Union is founded on the indivisible, universal principles of human dignity, […]' with '*Conscious of its spiritual and moral heritage*, the Union is founded on the indivisible, universal *values* of human dignity….'.[618] French government representative Braibant explained at the corresponding plenary session that the inclusion of a reference to the religious heritage would have proved completely unacceptable for a number of Member States; in the case of France, he adduced the aggravating circumstance of conflicting constitutional provisions.[619]

The term 'religieux' – and its equivalents in the other language versions – was removed from the text of the Preamble and replaced with the term 'spirituel'. In the German-language version, however, 'spirituel' was not translated as 'geistig', but rather 'geistig-*religiös*'. This *Sonderweg* had been arranged by German EP representative Friedrichs from the European People's Party – European Democrats group, who upon coming to know

Christian Democrats and of the EP political groups 'Union for Europe of the Nations (*UEN*)' and 'Europe of Democracies and Diversities (*EDD*)' respectively, while the opponents included the French Socialist Party and the Party of European Socialists.

[618] CHARTE 4470/1/00 REV 1 ADD 1, CONVENT 47, Draft Charter of Fundamental Rights of the European Union Addendum to the version of the complete text of the Charter finalised by the Legal Linguistic Working Party: Proposals from the Praesidium following the meetings of the four component parts of the Convention, Brussels, 25 September 2000.

[619] Meyer, 'Präambel' 25 with further references. The French Constitution avows to laicism in its Article 2.

the deletion of the term 'religious' from the preamble had actively promoted the inclusion of a different German language version that incorporates this term among his political faction.[620] Although the irony of semantic diversity in the field of differentiated integration has been studied in the context of the Amsterdam treaty revision,[621] it suffices to say that the deliberate deviation from the initially proposed standard translation exemplifies in a very intriguing manner differentiation and diversity in the context of European integration.

Regardless of the interpretative consequences this divergent translation may entail, a question that remains unclear,[622] the intensity of emotional reactions this subject had triggered among the Convention members is proof of the symbolic value that the Union's commitment to Christianity or laicism held. The fact that this controversy reflected the positions of pan-European political families – socialists versus Christian democrats and conservatives – rather than cross-party Member State positions indicates that the 'religious issue' did not constitute a clash of one specific Member State's national identity against another, but a question that was subject to fundamentally opposing views *inside* various Member States. Yet, the only language version that (re-)introduced the term 'religiös' in the Charter Preamble was the German one. This German insistence on the Union's Christian heritage is reminiscent of the insistence on the Union's respect for the state-church relations, which had led to the Amsterdam declaration

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[620] Meyer, 'Präambel' 25.

[621] Stubb, 'A Categorization of Differentiated Integration' ; for a study moving beyond the 'metaphorical description' of differentiated integration based on empirical analysis, Frank Schimmelfennig and Thomas Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) 52 Journal of Common Market Studies 354–370.

[622] Meyer, 'Präambel' 32 with further references.

on the status of churches and non-confessional organisations a few years earlier. Other than for sharing the German insistence that led to their incorporation, both texts – Recital No 2 of the Preamble of the Charter and the Amsterdam Declaration on the status of churches – have been linked to each other for being conceived as expressions of the Union's duty of neutrality in religious matters.[623]

2.1.3 Cultural, religious and linguistic identity: Article 22 CFREU as an extension of Article 6(3) TEU?

Ever since the adoption of the Charter, Article 22 CFREU has been repeatedly associated with Article 6(3) TEU.[624] As a matter of fact, the national identity clause has been considered a source of (or inspiration for) Article 22 CFREU, but also as a general formulation of the latter.

Article 22 CFREU enshrining the Union's duty to respect cultural, religious and linguistic diversity, a provision that had not been considered by the Praesidium's first listing of rights, had been incorporated at the eleventh hour, only two weeks before the works of the Convention were to be

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[623] Meyer, 'Präambel' 32.

[624] C.f. In 2003, Sven Hölscheidt considered former Article 6(3) TEU the main directive for Article 22 CFREU; see 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (1st edn, Nomos 2003) para 2; in contrast in the 2011 edition -after the entry en force of the Lisbon Treaty- he qualified its succesor, Article 4(2) TEU, as a 'weak' directive if compared to Articles 2(2) and 3(3) TEU; 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2011 para 2; c.f. also Arzoz, 'The protection of linguistic diversity through Article 22 of the Charter of Fundamental Rights' at 151.

concluded.[625] Notwithstanding Article 22 CFREU's late incorporation, the lack of consideration of the Praesidium's first listing for minority rights had been lamented as early as the second meeting of the Convention[626] and a first proposal for including a right to cultural and linguistic diversity may be traced back to a contribution from the NGO 'European Bureau for Lesser Used Languages' submitted only a couple of months later, but rejected.[627] The subject matter, however, remained on the radar and, in spite of the Praesidium's neglect, a considerable number of very diverse proposals and amendments addressing the issue of minority protection, ranging from the inclusion of a non-discrimination clause protecting ethnic religious and linguistic minorities to the combination of the respect for *national* and *regional identities*, were tabled.[628] In the end, the Praesidium gave in and included the provision setting forth, under the heading cultural, religious and linguistic diversity, that [t]he Union shall respect cultural, religious and linguistic diversity'.[629] Even though the provision thus does not mention

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[625] Xabier Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' (2012) 43 Revista española de Derecho europeo 185, at 191; Hölscheidt, 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' 8.

[626] With further references to the interventions of Convention members, Hölscheidt, 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' 8.

[627] Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' 191; Iñigo Urrutia and Iñaki Lasagabaster, 'Language Rights and Community Law' (2008) 12 European Integration online Papers 1, at 7.

[628] For further details and precise references of the amendments see Arzoz, 'The protection of linguistic diversity through Article 22 of the Charter of Fundamental Rights' at 149 et seq; Hölscheidt, 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' 9–11.

[629] CHARTE 4470/00 CONVENT 47, Complete text of the Charter proposed by the Praesidium following the meeting held from 11 to 13 September 2000 and based on CHARTE 4422/00 CONVENT 45, Brussels, 14 September2000.

the term 'minority' – despite the insistence of the Convention –,[630] Article 22 CFREU ought to be understood as a synthesis of the contrary positions on minority protection expressed during the Convention addressing both those in favour of a sophisticated system of minority protection and those categorically opposed to the inclusion of such a provision.[631] So, although not explicitly mentioned by Article 22 CFREU, the protection – at least to some extent – of 'the vital needs of minorities'[632] is to be considered the *telos* of the provision. This underlying aim, in addition to the explicit reference to diversity, points far more to the protection of diversity beyond the Member States' frontiers, i.e. *subnational* and *transnational* identity protection, than towards the protection of diversity among States, i.e. *national* cultural, religious and linguistic identities. What is more, the Explanations[633] to Article 22 CFREU appear at first sight to deepen the already existing ambiguities when relating the sources on which the provision is based or from which it drew inspiration. Indeed, they refer to Articles 6 TEU and 151(1) and (4) TEC as well as to the Declaration No 11 on the status of churches and non-confessional organisations. This amounts,

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[630] While Hölscheidt expresses his surprise that the persistence of the Convention did not lead to a more explicit minority protection in the Charter in 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' 16; Eckhard Pache deplores this missed opportunity, see Eckhard Pache, 'Die Europäische Grundrechtscharta- ein Rückschritt für den Grundrechtsschutz in Europa?' (2001) 36 Europarecht 475, at 481.

[631] Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' 194.

[632] Arzoz, 'The protection of linguistic diversity through Article 22 of the Charter of Fundamental Rights' at 150.

[633] Since the explanations to Article 22 CFREU explicitly refer to Article 6 TEU, CHARTE 4473/00 CONVENT 49, Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, 11 October 2000, at 23.

as we will see, to a reference to both national identity and (cultural and religious) diversity.

The first reference is to Article 6 TEU and, even though the provision is cited as a whole, it is safe to assert that it is in fact towards the national identities of the Member States that the Explanations are directed.[634] The second reference is to paragraphs (1) and (4) of Article 151 TEC. In this case, the source of inspiration expressly mentions 'cultural diversity'. But as I have argued above, Article 151 conceives the Member State as the roof under which diverse cultures may thrive and prosper since both its wording (Article 151(1) TEC refers to 'the cultures of the Member States' and to the Union's respect of 'their *national* and regional diversity') and the restrictiveness of its legal base are indicative hereof. The third source of inspiration for Article 22 CFREU was, according to the Explanations to the Charter, the Amsterdam declaration on the status of churches and non-confessional organisations. Again, although this declaration is aimed at protecting diversity of statutes that churches may be granted under the laws of the Member States, the diversity is dependent on the (legislative) choices of the Member States.

Finally, in addition to the sources of inspiration that have been cited by the Explanations, it is worth mentioning a notable omission. Indeed, as Arzoz[635] usefully denotes, the absence of a reference to Article 149(1) TEC on education is striking since this provision expressly mentions the Member States' 'cultural and linguistic diversity' and thus represented – at least at the time of the drafting of the Charter – the closest wording of all treaty

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[634] Since the updated version of the Explanations to the Charter refer solely to current Article 4(2) TEU.

[635] Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' at 197.

provisions to that of Article 22 CFREU. One cannot, however, share his view that the reason behind such omission might have been the desire to avoid making reference to an excessively 'state-centred' provision as compared to Article 151 TEC.[636] In my opinion, both provisions are 'state-centred', even though the Amsterdam amendment to Article 151(4) TEC[637] did inject a dash of supranational diversity (through the reference to the *Union's* diversity of cultures). The Explanations' omission of a source containing an explicit[638] reference to linguistic diversity may equally have responded to the concerns of some Member States over the status of minority languages in their respective territories.

In my view, therefore, the Explanations point towards an understanding of cultural, linguistic and religious diversity dependent upon the framework set by the Member States. And although Rubio Llorente claims that the identification of sources in the Explanations to the Charter appears to have served to justify the drafters' decisions rather than to actually explain them,[639] in the case of Article 22 CFREU, the choice of sources illustrates the strong implication that cultural, religious and linguistic diversity was not meant to bypass the Member States' authority on what diversity should

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[636] Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' at 197.

[637] See Chapter 4, section 1.4 More about culture, religion, and animal slaughtering.

[638] Explicit because linguistic diversity is often perceived or conceived as a qualified expression of cultural diversity and may thus be understood as having been implicitly referred to by the mention of Article 151(1) and (4) TEC. C.f. Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' at 201.

[639] Rubio Llorente, 'A Charter of dubious utility'

encompass on their territories.[640] Moreover, the Explanations to the Charter should be considered more than just 'certified travaux préparatoires' and instead be given the status 'manifestation of the authentic interpretation' of the Charter, as Koen Lenaerts argues.[641]

To sum up, the Explanations reflect the antagonistic positions on minority protection defended during the Convention and they convert Article 22 CFREU into an illustration of the recurrent ambivalences of European integration,[642] or as Ladenburger deplores, into a 'laconic statement of principle'.[643] This provision should therefore be interpreted in the context of the diversity of the Member States' *national identities*, rather than that of minority rights.[644] As Arzoz himself admits,[645] and we will see later,[646] recent case law of the CJEU corroborates this interpretation.

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[640] Especially since, unlike in the case of Article 51(1)CFREU, it is the Union, and not the Member States, that is the 'Normaddressat'; Hölscheidt, 'Artikel 22 Vielfalt der Kulturen, Religionen und Sprachen' 17a, with further references.

[641] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375–403; Jacqué, 'La protection des droits fondamentaux dans l'Union européenne après Lisbonne' ; Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze'

[642] Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' at 225.

[643] Clemens Ladenburger, 'Report from the European Union Institutions,' 2012 at 5.

[644] Contrary view: Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' at 203 et seq.

[645] Arzoz, 'El respeto de la diversidad lingüistica a través del art. 22 de la Carta de Derechos Fundamentales de la Unión Europea' at 202.

[646] See Chapter 7.

2.2 Incorporating caveats to stem the competence creep?

As mentioned above, concerns over the possibility of the Charter fuelling the competence creep had loomed large in the forefront of the Convention. The competence issue had become *the* bone of contention[647] of European integration politics. The so-called horizontal clauses governing scope, application and level of protection of the Charter are to a great extent evidence hereof. The same applies to the recurrent reference to 'national laws or practices' that the drafters incorporated into a significant number of rights, freedoms and principles.

2.2.1 Much ado about the horizontal clauses

Among the General Provisions enshrined in Chapter VII of the Charter, the two of particular interest in terms of Member States' concerns over creeping competences and safeguarding a national understanding of a fundamental rights protection are Articles 51 and 53 CFREU, both because of their drafting history and because of their wording. For the purposes of the present analysis, Article 52 CFREU determining in general terms the scope of the rights of the Charter is of special importance due to its nature as a general limitation clause and its relationship with the special caveats referring to 'national laws and traditions or practices' studied in the following section.

Article 51 CFREU, headed 'Scope', provides:

> *'1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of*

[647] 'Zankapfel' in Ruffert's words, c.f. Matthias Ruffert, 'Schlüsselfragen der Europäischen Verfassung der Zukunft. Grundrechte – Institutionen – Kompetenzen – Ratifizierung' (2004) 39 Europarecht 165, at 187.

> *subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*
>
> *2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'*

While the first paragraph of Article 51 CFREU 'is an umbrella provision proscribing the entities that are bound by the Charter',[648] its second paragraph confirms that the Charter may not have the effect of extending the competences which the Treaties confer on the Union. The drafting history of the provision is quite sinuous, the number of modifications and proposals for amendments quite considerable.[649] Yet, precisely for this reason, I will abstain from tracing 'the convoluted path taken by what might seem like a fairly innocuous 'horizontal provision''[650] in a detailed manner. Moreover, throughout the numerous modifications the provision's underlying rationale – i.e. 'codification of the ECJ's case law, coupled with a desire to limit the effects of the Charter on Member States'[651] – appears to have remained the same. The main question rested on how closely potential acts of Member States needed to be linked to EU law in order for the former to be bound by the Charter. The different shifts in language led

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[648] Angela Ward, 'Article 51 Scope' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) para 51.02.

[649] For a detailed account, c.f. de Búrca, 'The drafting of the European Charter of fundamental rights' at 136 et seq; Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' at 954 et seq; Martin Borowsky, 'Artikel 51 Anwendungsbereich' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) para 2 et seq.

[650] de Búrca, 'The drafting of the European Charter of fundamental rights' at 137.

[651] Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' at 956.

the provision's wording to oscillate between more restrictive and broader formulations as regards the solidity of this link[652] to finally come to a stop at the term 'implementing'. The meaning of 'implementation of EU law' in this context remains controversial[653] and since it is the key to the application of the Charter to actions of the Member States, it represents the first step towards the issue of how a specific understanding or level in a national system of fundamental rights protection may relate to that of the Charter, an issue addressed through Article 53 CFREU[654] and which will be discussed below. Bearing in mind that the scope of application of the Charter will also delimitate the potential frictions between the level of protection of the Charter rights and that of the Member States' fundamental rights, the determination of those situations in which Member States are implementing EU law is particularly important as regards the Member States' concerns over preserving their national understanding of fundamental rights, an understanding that they might conceive as a part of their national identity. In Gráinne de Búrca's view, the tortuous legislative history of the provision, bound to determine the scope of application of the Charter, is illustrative of an 'emerging reluctance' of the Member States to

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[652] de Búrca, 'The drafting of the European Charter of fundamental rights' at 137.

[653] See Koen Lenaerts analysis of what situations may be covered. The derogation situation appears to give rise to particular controversy. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' Daniel Sarmiento's recent study includes the CJEU 'twin judgments' Melloni and Akerberg Fransson of 26 February 2013, 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 Common Market Law Review 1267–1304.

[654] On the meaning of Article 53 CFREU and its relationship with the national identity clause in its Lisbon version, Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter' .

commit to the observance of the Charter beyond cases most closely linked to EU law.[655]

As regards the reference made by Article 51(1) CFREU to the Union's due regard for the subsidiarity principle, this was seemingly included merely to emphasise that the application of the Charter would increase Union competences, thus laying the foundation for – and at the same time seeking to reinforce – the protective clause provided for in Article 51(2) CFREU.[656] The reference to the principle of subsidiarity is in line with the general aspiration of the Convention to preserve national traditions and particularities from excessive harmonisation, an ambition that runs through the Charter like a golden thread.[657]

But concerns over the Charter leading or contributing to the loss of Member State competences, the infamous competence creep, do not only stand out through the intricate formulation of the first paragraph of Article 51 CFREU, they also underlie its second paragraph.[658] Indeed, from the very beginning of the works of the Convention, the Praesidium sought to dispel these preoccupations by proposing a protective clause drafted by Roman Herzog. This clause was to become Article 51(2) CFREU and remained practically unchanged throughout its drafting history,[659] the reactions it received, however, were rather mixed. While Altmaier – admittedly a Convention member – welcomes Article 51(2) CFREU, which he perceives

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[655] de Búrca, 'The drafting of the European Charter of fundamental rights' at 137.

[656] Borowsky, 'Artikel 51 Anwendungsbereich' 22.

[657] Borowsky, 'Artikel 51 Anwendungsbereich' 23.

[658] Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 201.

[659] Borowsky, 'Artikel 51 Anwendungsbereich' 14 et seq.

as an endorsement of the principle of conferral,[660] Badinter describes it as a 'morceau de bravoure', which he criticises for repeating the same litany three times in three parts of the same phrase, only to affirm that the Charter does not constitute a list of new Union competences.[661]

Since I will briefly address Article 52(1) CFREU in the next section when analysing the repeated references to national laws and traditions or practices introduced in a number of substantive Charter provisions, it should suffice to say that Article 52 CFREU,[662] headed the 'Scope of guaranteed rights',

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[660] He endorses the view that the rights enshrined in the Charter neither create nor increase Union competences. What is more, he takes the view that at least the classical 'Freiheits- und Abwehrrechte' have a rather restrictive effect on competences, since the institutions and bodies of the Union are bound to respect them when enacting and implementing secondary legislation, Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 201 et seq. Robert Badinter has expressed a similar view, advocating the incorporation of the Charter as a means of actually limiting union competences by obliging bodies and institutions to comply with fundamental rights. Robert Badinter, 'La Charte des droits fondamentaux à la lumière de la Convention sur l'avenir de l'Europe' in Luigi Condorelli and others (eds), *Libertés, Justice, Tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan (Volume I)* (Bruylant 2004) at 149.

[661] Badinter, 'La Charte des droits fondamentaux à la lumière de la Convention sur l'avenir de l'Europe' at 149.

[662] Article 52 CFREU set forth that '1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said

consists of three paragraphs. The first of these determines the conditions that restrictions to the Charter rights need to fulfil in order to be lawful, while the second paragraph refers to the scope and limits of those rights already recognised by the Treaties and its third relates to the meaning and scope of those Charter rights corresponding to ECHR rights.

Article 53 CFREU, on the other hand, has proved to bear the potential of profoundly affecting national fundamental rights and thereby possibly also the Member States' national identities. While at first glance the provision appears quite innocuous[663] in this regard, time has shown that this is anything but the case.[664] However, since my present objective is merely to trace the protection of national identity or particularities in the drafting of the Charter, I will deal with the relationship between Article 53 CFREU and the current version of the national identity clause at a later stage.

As with Article 51(1) CFREU, whose wording during the drafting process had oscillated between restricting and broadening the scope of application of the Charter, the genesis of Article 53 CFREU was anything but straightforward. In his very detailed account of the drafting process – peppered with the highly valuable background information provided by officials closely involved in this process – Liisberg views the drafting

Convention. This provision shall not prevent Union law providing more extensive protection

[663] Martin Borowsky, 'Artikel 53 Schutzniveau' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) para 1.

[664] See the contributions on this subject matter, e.g. Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter' ; Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' ; Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' .

history of Article 53 CFREU as a 'fumbling approach'.[665] At the beginning of the drafting process, the provision was merely conceived as a means to clarify the relationship between Charter and ECHR,[666] but then 'was gradually, almost organically, transformed into an entirely different creature, bearing close resemblance to Article 53 ECHR, but with marked differences and many interpretive questions left to ponder',[667] and ultimately cast in the following terms:

> *'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.'*

The language 'and by the Member States' constitutions' added a layer of complexity to the Charter's level of protection[668] that was initially not envisaged by the Convention members, who merely had in mind a provision dealing with the Charter-ECHR relationship. It finds its origins in a proposal of the Praesidium –itself acknowledging Europe-wide concerns over the Charter watering down higher-level fundamental right protection

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[665] Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' at 18.

[666] Borowsky, 'Artikel 53 Schutzniveau' 2; Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' at 18.

[667] Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' at 18.

[668] As Bruno de Witte puts it: 'The most difficult and widely discussed question of interpretation raised by Article 53 concerns the last six words of the Article […]', Bruno de Witte, 'Article 53 Level of Protection' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) para 53.12.

provided by national systems –[669] including among a number of draft horizontal clauses a provision setting forth that '[n]o provision of this Charter may be interpreted as restricting the scope of the rights guaranteed by Union law, the law of the Member States, international law and international conventions ratified by the Member States, including the European Convention on Human Rights as interpreted by the case law of the European Court of Human Rights.'[670]

The reference to the case law of the ECtHR in particular led to lively debates among the Convention members. One proposal involved deleting this reference while replacing the 'law of the Member States' with the 'constitutional law of the Member States'. This suggestion by the Greek government representative Papadimitriou was taken up and modified by the Praesidium to the 'Constitutions of the Member States', while at the same time deleting the reference to the case law of the ECtHR.[671]

In addition, the words 'in their respective fields of application' were simultaneously inserted. As Bruno de Witte emphasises, both references – that to the Member States' constitutions and that to the fields of application – ought to be read in conjunction with one another.[672] A legal conflict outside the field of application of EU law but coming under the scope of national law does not pose any problems, since Article 53 CFREU codifies the evident rule that in such event, national constitutional law will apply to the conflict in question. The problem arises when such conflicts fall within

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[669] Borowsky cites resolutions of both the European Parliament of 16 March 2000 and the *Bundesrat* raising this issue, for references see Borowsky, 'Artikel 53 Schutzniveau' 2.

[670] CHARTE 4235/00 CONVENT 27, Brussels, 18 April2000.

[671] Borowsky, 'Artikel 53 Schutzniveau' 4 et seq.

[672] de Witte, 'Article 53 Level of Protection' 53.12.

both fields of application – Charter and Member State law – and the level of protection afforded by national constitutional law proves higher than that provided by the Charter. Here, the literal wording of Article 53 CFREU appears to support an interpretation that would imply leaving it to the national courts to apply national constitutional law granting a higher level of protection as regards the corresponding Charter right.[673]

Thus, following such literal interpretation, Article 53 CFREU would allow Member States to make their national identity – if enshrined in their domestic fundamental rights – prevail over the corresponding – less protective – Charter right. However, if we consider the drafting history of the provision, at least the teleological interpretation takes a completely different direction. Indeed, as Liisberg reports in his detailed account, even though the official report of the Convention lacks any indication on whose instigation and for what reason the reference to the 'respective fields of application' had been incorporated, sources closely involved in the drafting process would have revealed that the intention behind that modification was none other than to rule out any doubt as to the supremacy of Community law over national constitutions.[674] Various statements issued by the Commission, also closely involved in the drafting process, support this hypothesis.It expressly welcomed the provision as a means to prevent the Charter from restricting or adversely affecting fundamental rights as

[673] de Witte, 'Article 53 Level of Protection' 53.12, this is what a literal reading would lead to, but de Witte rightly warns that this was what was to be expected 'in principle' and subsequently refers to the CJEU judgment Case C-399/11 Stefano Melloni v Ministerio Fiscal of 26 February 2013 restricting that solution to the cases where the application of national standards do not compromise the Charter as interpreted by the Court as well as the primacy, unity and effectiveness of EU law (para 53.23).

[674] Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?' (2001) 38 Common Market Law Review 1171, at 1176 et seq.

recognised by laws and agreements in force in the Union, and, above all, emphasised that this rendered superfluous any constitutional amendments enacted by the Member States with a view to giving effect to the Charter provisions.[675]

So, as Liisberg argues, the political aim of this provision was to guarantee that there would be no need for constitutional amendments by the Member States[676] and the function of regulating the relationship between the Charter and the ECHR was long forgotten.[677] The inclusion of the reference to the 'fields of application', on the contrary, appears to respond to the Commission's will to ensure the supremacy of the Charter, i.e. by not providing for any exception whatsoever to the principle of primacy of EU law.[678]

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[675] Liisberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?' at 1180 et seq; with references to CHARTE 477/00 CONTRIB 328, Brussels, 30 September 2000 and to COM (2000) 644 final of 11 October 2000.

[676] Liisberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?' at 1181.

[677] Liisberg refers to the explanations accompanying the penultimate draft from the Praesidium and to the fact that the listing of those rights of the Charter corresponding to those guaranteed by the ECHR was attached to current Article 52(3) CFREU and not – as would have been expected from a provision that seeks to clarify the relationship between Charter and ECHR rights – to current Article 53 CFREU. This is yet another powerful indication that Article 53 CFREU was not (or no longer) conceived as a provision dealing with that relationship. Liisberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?' at 1180.

[678] Liisberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?' at 1182; de Witte, 'Article 53 Level of Protection' 53.21; contrary to that interpretation Ruffert, 'Schlüsselfragen der Europäischen Verfassung der Zukunft. Grundrechte – Institutionen – Kompetenzen – Ratifizierung' at 174, who expresses the view that Article 53 CFREU recognises primacy to domestic fundamental rights granting a higher level of protection over corresponding Charter rights.

So, the first conclusion to be drawn from this attempt to contextualise Article 53 CFREU may be simply that, in spite of espousing a language markedly protective of the Member States' constitutions, at least from the point of view of its drafting history, it proves difficult to argue that this protective aim constituted the *telos* of the provision. Thus, in the case of Article 53 CFREU, teleological and literal interpretations of the provision lead to different results and fuel, as we will see later, conflicts involving the Charter and fundamental rights of the Member States.

The conflictive potential of a provision with such a tortuous drafting history led to mixed reactions among scholars. Ricardo Alonso, for instance, was particularly critical of Article 53 Charter. In his view, it implied introducing into the EU legal order a provision drafted on the model of Article 53 ECHR, a provision admissible in the realms of international treaties that seek to complement national fundamental right protection, but not for what is perceived as an autonomous legal order.[679]

And while Fontanelli deemed that the safeguards provided for in the Charter's General Provisions would hardly suffice to contain the expansive force of competences,[680] Ruffert, while admitting that a harmonising effect produced by fundamental rights would be hard to avoid, takes the view that, contrary to the harmonisation of fundamental rights in the Union, these provisions are, assuming they are 'correct[ly] appli[ed]',[681]at least capable

[679] Ricardo Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union,' 2002, Jean Monnet Working Paper 4/02; Rubio Llorente, 'A Charter of dubious utility'

[680] Filippo Fontanelli, 'The European Union's Charter of Fundamental Rights two years later' (2011) 3 Perspectives on Federalism 22, at 27.

[681] Here, Ruffert's use of the phrase 'correct application' is most certainly meant to signify 'restrictive application' in terms of scope of application of the Charter.

of hindering the Court of Justice in its aggressive pursuit of harmonisation.[682]

2.2.2 Chanting the mantra of 'national laws or practices'

Apart from the horizontal clauses limiting the Charter's field of application as well as the limitations and level of application of the Charter rights, there are substantive Charter provisions whose language could potentially give the Member States leeway in granting fundamental rights in accordance with their national rules.

Indeed, the drafters incorporated a reference to national laws and practices into various substantive provisions. The repetitive nature of that reference led Braibant to condescendingly coin it a '*refrain*'.[683] It is true that the link between the right or principle in question on the one hand and national laws or national laws *and* practices on the other was chanted like a mantra throughout almost a dozen Charter provisions. It features in Articles 9, 10(2), 14(3) and 16 of Title II headed *Freedoms* as well as in Articles 27, 28, 30, 34, 35 and 36 of Title IV enshrining *Solidarity* provisions. The wording differs slightly from case to case, thus leading to the freedom or principle being granted 'in the conditions provided for', 'in accordance with', 'in accordance with the rules laid down by' or 'provided for in' *national laws (and practices).*

In the cases of Articles 9, 10(2) and 14(3) CFREU, which respectively set forth the rights to marry and to found a family, the right to conscientiously

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[682] Ruffert, 'Schlüsselfragen der Europäischen Verfassung der Zukunft. Grundrechte – Institutionen – Kompetenzen – Ratifizierung' at 176.

[683] Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze' 16.

object, freedom to found educational establishments as well as the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions – casually speaking, the three freedoms lacking corresponding EU competence in primary law –,[684] the sole reference is to national *laws*.

Conversely, Article 16 CFREU which also guarantees a freedom, i.e. the freedom to conduct a business, refers to *Community law* as well as to national laws *and practices*. This is also the case with Articles 27, 28, 30, 34, 35 and 36 CFREU – enshrining workers' right to information and consultation within the undertaking, the right of collective bargaining and action, protection in the event of unjustified dismissal, social security and social assistance, health care as well as access to services of general economic interest –, where the *refrain* consistently refers to *Community law*[685] as well as to national laws *and practices*. When consulting the sources that the Explanations to the Charter provide for each of these provisions, one notices that a number of these provisions[686] draw their inspiration from provisions of the revised European Social Charter or the Community Charter on the rights of workers, explicitly making the Parties' or Member States' obligation subject to 'arrangements applying in each country'[687] or 'national legislation and practice'.[688] Here the drafters could

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[684] Norbert Bernsdorff, 'Artikel 9 Recht, eine Ehe einzugehen und eine Familie zu gründen' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (3rd edn, Nomos 2011) para 12.

[685] Except for Article 36 CFREU, which instead of mentioning Community law referred to the TEC.

[686] Specifically Articles 27, 28 and 34 CFREU.

[687] E.g. Point 10 Community Charter on the rights of workers on which, among other provisions, Article 34(1) CFREU is based according to the Explanations to the Charter.

[688] E.g. Article 21 of the revised European Social Charter on which the Explanations to the Charter state Article 27 CFREU is based among other provisions.

simply have taken over the reference to national laws and practices from the texts that inspired the corresponding Charter provisions. However, the fact that the texts on which Articles 30, 35 and 26 CFREU were based according to the Explanations to the Charter do not include any reference to national legislation or practices somewhat weakens the soundness of the assumption that the *refrain* made its entrance into nearly all of the provisions under the Solidarity title by sheer copy-pasting from the primary sources.

Yet, the variations of the mantra chanting the link of the rights and principles to national laws might prove helpful in terms of shedding some light on its – still essentially disputed –[689] meaning. One interpretation of the meaning of the *refrain* is that it affords the legislator absolute freedom to regulate the right or principle in question[690] thus permitting a fairly effective protection of national identity inherent to each Member State's own understanding thereof – or in Lord Goldsmith's words '[emphasising] the need to respect national differences and that it is not for the Union to impose rights in this area except through recognised treaty procedures.'[691]

Other doctrinal positions perceive the refrain as a limitation, and although, as Steve Peers notes, it does not expressly refer to limits, it could

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[689] For a state of the debate, albeit focused on the Solidarity Title, see Florian Rödl, 'The labour constitution of the European Union' in Raúl Letelier and Agustín José Menéndez (eds), *The Sinews of European Peace (ARENA Report No 7/09)* (ARENA Centre for European Studies University of Oslo 2009) at 385.

[690] Rubio Llorente, 'A Charter of dubious utility' ; Pache, 'Die Europäische Grundrechtscharta- ein Rückschritt für den Grundrechtsschutz in Europa?' ; Lord Goldsmith, 'A Charter Of Rights, Freedoms And Principles' ; Thomas Schmitz, 'Die EU-Grundrechtscharta aus grundrechtsdogmatischer und geundrechtstheoretischer Sicht' (2001) 56 Juristenzeitung 833–843

[691] Lord Goldsmith, 'A Charter Of Rights, Freedoms And Principles' at 1213.

nonetheless be understood as such,[692] i.e. a *Schrankenregelung*, a regulation limiting the right or principle. This regulation is seen either as a specific limitation on the right, which must itself comply with the conditions laid down by Article 52 CFREU[693] (the general limitation clauses in such case functioning as limitations to the limitation: *Schranken-Schranken*),[694] or as a limiting regulation, which competes with the general

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[692] Steve Peers, 'Taking Rights Away? Limitations and Derogations' in Steve Peers and Angela Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing 2004) at 153.

[693] Generally, this would be Article 52(1) CFREU; if the rights were to be based on the Treaties, Article 52(2) CFREU would set conditions and limits; and if the rights were to correspond to the ECHR, Article 52(3) CFREU would apply. In this sense, Article 9 CFREU would be governed by Article 52(3) CFREU, and Article 10(2) by Article 52(1) CFREU; Article 14(3) has different sources so that the freedom to found educational establishments would be limited by 52(1) while the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions would find its limits in Article 52(3) CFREU (c.f. Norbert Bernsdorff, 'Artikel 14 Recht auf Bildung' in Jürgen Meyer [ed], *Kommentar zur Charta der Grundrechte der Europäischen Union* [Nomos 2011] para 21). It proves more difficult to establish which of the provisions at stake are subject to the limitations of Article 52(2) CFREU since the Explanations to the Charter do not always expressly state that rights for which they establish a link to EU law – at times even citing to a specific treaty provision – 'are based on the Treaty or that any part of Article 52 applies'; c.f. Peers, 'Taking Rights Away? Limitations and Derogations' 155. If one adopted a broad understanding of 'based on the Treaties', i.e. also including rights whose explanations solely refer to primary (or even secondary EU law), Articles 16, 27, 34, 35 and 36 CFREU could similarly fall under Article 52(2) instead of Article 52(1), Peers, 'Taking Rights Away? Limitations and Derogations' at 155 et seq. Since, in order to decide on the meaning of the reference to national laws and practices, the concrete limitations by which any of the freedoms and principles in question would be governed are negligible, it is not necessary for present purposes to adopt a position on the matter.

[694] Norbert Bernsdorff, 'Artikel 10 Gedanken-, Gewissens-, und Religionsfreiheit' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos 2011); Bernsdorff, 'Artikel 14 Recht auf Bildung' 21; Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze' 46c; Catherine Barnard, 'Article 28 Right of Collective Bargaining and Action' in Steve Peers and others (eds), *The EU*

limiting provisions enshrined in Article 52 CFREU in terms of a 'higher standard' approach.[695] In accordance with such approach, only the limitation entailing the superior protection of the right or principle in question should be applied. In either scenario painted by the positions interpreting the *refrain* as a limitation, the Member States would be granted a certain margin when it comes to shaping the freedoms or principles featuring the proviso. Indeed, in the case of reading the relationship between the *refrains* and Article 52 CFREU as a 'doppelte Schranke' or 'Schranke-Schranke', a particular, national limitation on the right or principle could subsist whenever it complied with the corresponding part of the general limitation clause laid down in Article 52 CFREU. Conversely, in the case of assuming the scenario of the 'competing limitations', the national limitation would only apply if as a result of its application the standard of protection of the right or principle at stake would be higher than upon applying the corresponding general clause of Article 52 CFREU.

Thus in terms of identity protection, all mentioned interpretations of the proviso referring to national laws (and practices) lead to a certain margin being afforded to the Member States when configuring the rights and principles in question. It is only in the case of the first position that this margin would go as far as conceding *carte blanche* to the national legislator (or to whatever institution was to determine the national practices).

Yet, this solution would go far beyond the intention pursued by the drafters when incorporating the reference to national laws (and national laws and practices as the case may be). As Rödl notes, rather than attempting to codify rights as empty normative shells, the Convention members were

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Charter of Fundamental Rights. A Commentary (Hart Publishing 2014) para 28.57 et seq.

[695] Peers, 'Taking Rights Away? Limitations and Derogations' at 160 et seq; Rödl, 'The labour constitution of the European Union' at 386.

wary of keeping intact the existing division of competences when considering the inclusion of such reference.[696] Furthermore, this interpretation as a reiteration of the preservation of competences would also be fitting if one consults the Explanations to the Charter, since these lack any indication that the *refrain* was expected to follow any aim other than that of clarifying competences, much less one that would limit the provisions' normative substance.[697] This is also in line with Clemens Ladenburger's account of the drafting history of the Charter, which sets the starting point for the inclusion of the refrain in the discussions on Articles 9 – the right to marry and found a family – and 28 – the right to collective bargaining and action – CFREU.[698] The Praesidium appears to have incorporated into these two articles language referring to national laws taken over from Article 12 ECHR and Articles 21 and 22 ESC to appease the opposition of some Convention members, who had gone so far as to question the authority of the Convention to codify these rights due to the lack of EU competences in these fields.[699] It appears that this logic of inserting a reference to national laws whenever the Union lacked of competences in the respective matters was lost in the following negotiations

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[696] Rödl, 'The labour constitution of the European Union' at 387. He cites to the Convention's proposal for social rights CHARTE 4192/00 CONVENT 18, Brussels, 27 March 2000, since the explanations to the Freedom of association, rights of collective bargaining and collective action provide, *inter alia*, that '*[t]he addition of a reference to national legislation is necessary because*, pursuant to Article 137(6) of the TEC, *the Community does not have competence with regard to the right to strike in Member States*. In this respect, therefore, it must recognise the national legislation in force' (emphasis added).

[697] Rödl, 'The labour constitution of the European Union' at 387.

[698] Clemens Ladenburger, 'Fundamental Rights and Citizenship of the Union' in Giuliano Amato and others (eds), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) at 334.

[699] Ladenburger, 'Fundamental Rights and Citizenship of the Union' at 335.

on the solidarity chapter, and Ladenburger reports that the only logic followed thereafter entailed giving in to the strong pressure exerted by those Convention members and including the *refrain* in whatever provisions it was deemed necessary. Accepting the 'weakening' of the social chapter was later compensated by the inclusion of a reference to 'national laws and practices' in Article 16 CFREU enshrining the freedom to conduct a business, again running counter to all logic.[700]

In a similar vein, Dimitris Triantafyllou concluded not long after the solemn proclamation of the Charter that the reference to national laws could 'be explained by the traditional lack of competence at European level in these fields, according to the separation of powers as between the EU, the EC and the Member States which the Charter has had to respect (Article 51(2)) following the mandate given to its authors'.[701] In his view, the word 'national' therefore only acquires a declaratory meaning.[702]

It suffices to say that the drafting history of each provision referring to 'national laws' and 'national laws and practices' supports the notion that the matters those provisions dealt with were, above all, uncovering the widening chasms of what Altmaier termed 'national categories of

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[700] Ladenburger, 'Fundamental Rights and Citizenship of the Union' at 335.

[701] Dimitris Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' (2002) 39 Common Market Law Review 53, at 56. For a similar position, also drawing upon the Explications, see Jacqué, 'La protection des droits fondamentaux dans l'Union européenne après Lisbonne' at 6.

[702] Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' at 56. He rightly notes the inconsistencies that this implies, since matters falling within the ambit of some of the provisions containing the *refrain*, although not by themselves covered by EU competences, were – already at that time – gradually coming under the scope of European integration. He cites the example of Article 9 CFREU protecting the right to found a family and the family-related provisions entering EU law via the Title on Justice and Home Affairs (at 56).

thought'.[703] Article 9 CFREU enshrining the rights to marry and to found a family constitutes a sound example hereof,[704] since the debate among the Convention members centred on what definitional power Member States would retain as regards the concepts of marriage and family.[705]

Similarly controversial – to say the least – was the inclusion of social and economic rights in the Charter, a question that monopolised the debates throughout the Convention from the very first plenary session.[706] There was stark opposition between those favouring the inclusion of social rights in the Charter as a token of the Union embracing the social dimension of the integration process – mainly the Parliament, the Commission and some Member States – and those completely opposed to their incorporation on grounds that they did not consider those rights fundamental or a matter for the Union.[707] The final compromise – enshrined in Title IV headed Solidarity – may be described as one of the most controversial, if not the most controversial, title of the entire Charter,[708] something reflected in the

[703] In Altmaier's words: 'nationale Denkkategorien', Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 199.

[704] Altmaier, 'Die Charta der Grundrechte der Europäischen Union' at 199.

[705] Tettinger, 'Die Charta der Grundrechte der Europäischen Union' ; Bernsdorff, 'Artikel 9 Recht, eine Ehe einzugehen und eine Familie zu gründen'

[706] Guy Braibant, 'De la Convention européenne des Droits de l'Homme à la Charte des Droits fondamentaux de l'Union européenne' in Luigi Condorelli and others (eds), *Libertés, Justice, Tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan (Volume I)* (Bruylant 2004) at 329.

[707] 'Editorial Comments: The EU Charter of Fundamental Rights still under discussion' (2001) 38 Common Market Law Review 1, at 3.

[708] Eibe Riedel, 'Vorbemerkungen vor Titel IV' in Jürgen Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos 2011) para 1.

wording of certain provisions.[709] The Solidarity title has been heavily criticised particularly by those who deplore its feeble normative content.[710] The abundant references to 'national laws and practices' with which the drafters had embellished nearly all the provisions of that title have raised interpretative questions as well as drawn criticism in academic circles. While the recurrent references to *national laws* could be quite easily interpreted as being in line with the general limitation clause enshrined in Article 52(1) CFREU, thereby making any limitations on the Charter rights conditional upon them 'being provided for by law', the reference to *national practices* was prone to give rise to uncertainties.[711] Were the limitations referring to 'national practices' in conflict with the conditions on limitations laid down in Article 52(1) CFREU? Laurence Burgorgue-Larsen argues that this is not the case.[712] She emphasises that the general limitation clause should not be interpreted restrictively as referring to 'law' in a formal sense. Imposing such a restriction on the Union would not be supported by European and national case law and furthermore would lead to an excessive rigidity. In her eyes, the very incorporation of the references

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[709] Pache, 'Die Europäische Grundrechtscharta- ein Rückschritt für den Grundrechtsschutz in Europa?' at 481.

[710] Pache, 'Die Europäische Grundrechtscharta- ein Rückschritt für den Grundrechtsschutz in Europa?' at 481; François Rigaux, 'Conclusions' in Jean-Yves Carlier and Olivier De Schutter (eds), *La Charte des droits fondamentaux de l'Union européenne* (Bruylant 2002) at 256; Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' .

[711] Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' at 61 et seq.

[712] Laurence Burgorgue-Larsen, 'Article II-112' in Laurence Burgorgue-Larsen and others (eds), *Traité établssant une Constitution pour l'Europe (Tome 2)* (Bruylant 2005) at 667 et seq.

to national laws and practices may be perceived as implicitly permitting such an interpretation of Article 52(1) CFREU.[713]

This technique of referring to 'national practices' would in cases such as Article 28 CFREU (enshrining the right to collective bargaining and action) lead to collective negotiation[714] and notice or balloting rules[715] being taken into consideration. Yet, while Laurence Burgorgue-Larsen welcomes an interpretation veering away from the formal understanding of the 'law', the reference to national laws and practices has also been criticised.[716] In particular, the granting of leeway not only to the national legislator but arguably also to the executive,[717] as well as the refusal to give the Charter's social provisions some teeth[718] has drawn criticism. If one adds the distinction between rights and principles, which is fundamental when it comes to the Solidarity title, the social and economic rights enshrined in the

[713] Burgorgue-Larsen, 'Article II-112' at 668.

[714] Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' at 61. He objects that '[i]t might be understandable in the case of collective negotiations guaranteed by Article 28 which are founded on self-regulation. Nevertheless, the reference to 'practices' also leaves the Administration free to set the substantive conditions for spending in the social field through mere circulars. […] This is confirmed by the terms corresponding to 'national laws' concerning social action in other linguistic versions. Indeed, the German and the French versions do not refer to laws, but to a wider notion of regulatory instruments ('Rechtsvorschriften', '1égislations nationales).'

[715] Barnard, 'Article 28 Right of Collective Bargaining and Action' 28.57 et seq.

[716] Rigaux, 'Conclusions' at 254; Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' at 61 et seq.

[717] Triantafyllou, 'The European Charter of Fundamental Rights and the 'rule of law': resriticting fundamental rights by reference' at 61 et seq.

[718] Rigaux, 'Conclusions' at 254.

Charter of *Fundamental rights* of the Union inevitably beg the question: Are they rights? Are they fundamental?[719]

2.3 Conclusions

From the outset, and despite the heartfelt asseverations that the Charter would neither create new nor expand existing Union competences, it was clear that theCharter of Fundamental Rights bore the potential to have serious implications for the Member States' national constitutional identity reaching far beyond the incorporation of identity-relevant policy areas by the preceding treaty revisions. First of all, the Charter enshrines fundamental rights, which at national level are commonly expressed in constitutional texts. Thus, from the very outset an encroachment of Charter provisions on national law is much more likely to concern national constitutional law than in the case of treaty provisions. Secondly, fundamental rights are intricately linked to *a specific social, political, economic, historical, and cultural background*.[720] Even though human rights may be by nature universal and all Member States may have – at last – agreed on one single catalogue of rights, their scope and their limits, this agreement is unlikely to cover every situation of conflicting rights and values.[721]

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[719] Niilo Jääskinen, 'Fundamental Social Rights in the Charter-Are They Rights? Are They Fundamental?' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014).

[720] Catherine J. Van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' (2012) 31 Yearbook of European Law 128, at 148.

[721] Van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' at 148.

This potential for constitutional conflict is reflected in the numerous *formulaic compromises* struck by the Convention members: the lack of binding effects of a Charter that was nevertheless solemnly proclaimed; the deviant translation of the word 'spiritual' in the German language version; and the inclusion of social rights (or principles?) watered-down by a perseverative refrain; and the horizontal clauses.

Finally, as regards to identity and diversity protection in EU law, the Charter uses a language that is very close to that used by the drafters of the Treaty establishing a Constitution for Europe in relation with the national constitutional identity clause. The Charter Preamble already mentioned national identity and state organisation in one breath long before the Treaty on European Union would do so. Where diversity was enshrined in the Charter, the Explanations made it very clear that the provision concerned was to be read in connection with the national identity clause.

3. Conclusions

The Amsterdam and Nice revisions may not represent milestones of the European integration process as did the Maastricht treaty revision – both were somewhat criticised for their shortcomings,[722] Amsterdam being largely remembered for its 'leftovers'[723] and Nice for its difficult

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[722] When assessing both treaty revisions, Craig and De Búrca point out that if we measure what these achieved – *against the benchmark of prior aspirations* –, the overall appraisal is negative. Particularly in relation to the Amsterdam Treaty, see Craig and De Búrca, *EU law: text, cases, and materials* at 19.

[723] Since the Amsterdam revision did not lead to the expected resolution of the institutional problems the upcoming enlargement would pose, a number of Member States ensured that a 'Protocol on the institutions of enlargement of the European Union was agreed upon during the IGC. This Protocol received the unflattering nickname of 'Amsterdam Leftovers'; see Piris, *The Lisbon Treaty: a legal and political analysis* at 10.

ratification –,[724] but their impact is far from negligible either. They are in line with the trend set by the Maastricht Treaty in terms of preserving national differences while at the same time deepening integration. Maintaining Article F(1) in the TEU is only one example hereof; the introduction of provisions – or the reinforcement of existing ones – in the fields where the Member States had already expressed their concerns over preserving their particularities at the time of the Maastricht revision constitutes a powerful argument to suggest that the Amsterdam and Nice revisions did nothing but follow the trend towards differentiation set in Maastricht.[725] They did so with the new instrument of enhanced cooperation, which in Stephen Weatherill's words 'fits within a broader Post-Single European Act narrative. Expansion of the EC's competence coupled to the rise of qualified majority voting in Council has been accompanied by subtle exertion of control by the Member States over the way in which that competence is exercised, in particular its constitutional impact on residual national competence in the field'.[726]

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[724] The Irish people rejected the Treaty of Nice in a first referendum. This led to the adoption of declarations on the area of defence ensuring Ireland's policy of neutrality by not requiring participation in EU military actions. The second referendum held in October 2002 produced a positive result. See Sbragia, 'The Treaty of Nice' at 159 et seq; Piris, *The Lisbon Treaty: a legal and political analysis* at 9; Richard Sinnott, 'Attitudes and behaviour of the Irish electorate in the referendum on the Treaty of Nice - Results of a survey of public opinion carried out for the European Commission Representation in Ireland,' 2001.

[725] In this sense, I disagree slightly with Millet's understanding of the Amsterdam revision of Article F TEU. He deems Article 6 TEU (Amsterdam version) as proof of the will to accentuate the common ground, to homogenise, rather than to differentiate. Millet, 'L'Union européenne et l'identité constitutionnelle des États membres' at 214 et seq.

[726] Weatherill, ''If I'd wanted you to understand I would have explained it better': What is the Purpose of the Provisions on Closer Co-operation introduced by the Treaty of Amsterdam?' at 36.

This trend, which couples unity with diversity, is also reflected in the way different policy fields were discussed during the IGC. Some of these fields had already been contentious issues in Maastricht, whilst some of them only made their appearance in the arena of EU integration with Amsterdam and Nice. Among the new fields is that of fundamental rights, which was paid tribute in Amsterdam and which would take centre stage with the Charter of Fundamental Rights of the European Union, which, as we have seen, contains numerous provisions that address the preservation of national differences in the field of fundamental rights protection. The Charter also incorporates the language of identity and diversity through its preamble, its Article 22, and the through recurring references to the national laws and practices. And when it comes to the fields of culture, education, and social policies, it suffices to say that, even though the amendments to the TEC reflect the concerns over keeping the Community tamed in that regard, the attention those fields received under Amsterdam and Nice was only seemingly fewer than under Maastricht.[727] Cultural diversity was given due consideration in the form of protocols and declarations, and the language regime was maintained. However, the concerns over effectively guaranteeing the negative delimitations which the legal bases of those policy areas had set for Community actions would have to wait until the next treaty revision to receive full attention.[728] Overriding functional

[727] Although as we have seen, there was an insistence upon amending Article 151(4) TEC on promoting cultural diversity.

[728] And yet, especially with respect to the German *Länder*, concerns over competence delimitation had already played a role during the 1996 IGC, see Jürgen Schwarze, 'Kompetenzverteilung in der eurpäischen Union und föderales Gleichgewicht. Zu den Forderungen der deutschen Bundesländer im Hinblick auf die Regierungskonferenz 1996' [1995] Deutsches Verwaltungsblatt 1265–1269. In a recent study, Anke John focuses on the *Länder*'s preoccupations over European integration eroding their competences in the 1980s prior to the SEA, which amounted to a conflict between *Bund* and *Länder*, and the remedies that German participatory federalism (*Beteiligungsföderalismus)* presented. The harsh critique the 1984 Draft Constitutional

powers permitting the Community to meddle in the Member States' 'reserved domains' would – as we will see in Chapter 5 – run like a golden thread through the upcoming European Convention. In the case of the Charter of Fundamental Rights, the recognition of cultural rights had a complicated starting point. The drafters were given the difficult task to aspire to sufficiently guaranteeing artistic creation at European level, while at the same time adequately delimiting the cultural competences between the Union and its Member States as well as preserving national cultural identities.[729] Article 22 CFREU embodies such difficult compromise.

Conversely, in the case of linguistic diversity and the Union's language regime, the Member States increasingly expressed their preoccupations about maintaining the language regime. Whereas during the Maastricht ratifications, linguistic diversity was essentially a Belgian concern, in Amsterdam – with the upcoming enlargement and the incorporation of numerous new languages – it was addressed by the governments of more than half of the Member States.

Moreover, one category that had been absent from the Treaties[730] has since found its way into them – albeit admittedly through the backdoor: religious

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Treaty received in the *Bundesrat* for not being sufficiently far-reaching when it came to the subsidiarity principle and its enforcement are proof of the early emergence of the competence-creep issue in the public debate. C.f. Anke John, 'Konzeptionen für eine EG-Reform: Der europäische Verfassungsdiskurs in der Bundesrepublik 1981-1986' in Mareike König and Matthias Schulz (eds), *Die Bundesrepublik Deutschland und die europäische Einigung 1949-2000: Politische Akteure, gesellschaftliche Kräfte und internationale Erfahrungen. Festschrift für Wolf D. Gruner zum 60. Geburtstag* (Franz Steiner Verlag 2004) at 569–572.

[729] Peter Häberle and Hèctor López Bofill, *Poesía y derecho constitucional: una conversación* (Fundació Carles Pi i Sunyer d'Estudis Autonòmics i Locals 2004) at 73.

[730] If we were to consider the Irish Protocol 17 to the Maastricht Treaty as an intent to protect the expression of religious identity, one could argue that an implicit reference to that category was already present since the Maastricht treaty revision.

diversity. Introducing into EU law itself a declaration on the Union's respect of the status that Member States decide to confer upon their churches or non-confessional organisations constitutes a novelty as well as the expression of a caveat by certain Member States and their religious organisations.

This leads me to the following remark: Particularly in the field of religious diversity, the post-Maastricht Union also set the trend for the protection of national differences in EU secondary law. In fact, there are numerous clauses in EU secondary law either establishing uniform exceptions to certain provisions or allowing for the Member States to adapt them to the peculiarities of their law on churches,[731] e.g. in employment law directives to allow for exceptions in working times or regarding loyalty oaths, in animal protection directives to permit kosher butchering, in data protection to allow religiously based organisations to circumvent specific prohibitions, or in EU media law, when forbidding the interruption by commercial advertisements of the broadcast of church services.[732]

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[731] Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 564. A complete and updated overview of the existing legislation in Gerhard Robbers (ed), *Religion-Related Norms in European Union Law*, 2001 updated in 2013 and available online at http://www.uni-trier.de/index.php?id=7531.

[732] Heinig, 'Law on Churches and Religion in the European Legal Area – Through German Glasses' at 564, 565 (footnotes are omitted). Heinig refers, *inter alia*, to the following secondary legislation: Article 17(1) lit. c) Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, O.J. L 299, 18/11/2003, at 9; Article 4(2) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J.L 303, 02/12/2000, which reads 'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or

While the treaty revisions in Amsterdam and Nice marked a consolidation of identity preservation, the Charter set the trend of the language of identity.

belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' *constitutional provisions and principles*, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

Chapter 5 From National to Constitutional Identity: The Constitutional Treaty and the Lisbon Revision

1. Introduction

While the Maastricht Treaty had (at least formally) introduced the Union's duty to respect the Member States' national identities into EU law, the Amsterdam and Nice treaty revisions barely touched the provision enshrining that duty.

It would not be until the ill-fated Treaty establishing a Constitution for Europe (hereinafter the Constitutional Treaty or CT)[733] that the identity clause would be in for a major overhaul. Even though the Constitutional Treaty never came into force due to its rejection by both the French and Dutch referenda, the analysis of its genesis and content remains very much relevant for the present study since the subsequent Lisbon Treaty draws heavily upon its ill-fated predecessor. It therefore appears necessary to focus our attention on the genesis of the Constitutional Treaty, since it is with this Treaty that the amendment of the national identity clause was intended in the first place, thereby taking the leap from national to constitutional identity. Furthermore, as Barbara Guastaferro suggests in a recent study,[734] the *travaux préparatoires* to the Treaty establishing a Constitution for Europe are far more than merely a helpful source when attempting to clarify whether the national constitutional identity clause was intended to qualify the primacy of EU law or to 'assimilate the notion of

[733] OJ 2004/C 310/01.

[734] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' .

national identities with that of national competences';[735] as we will in the following sections, they are in fact truly essential to this attempt.

2. The Constitutional Treaty

The preceding treaty revisions in Amsterdam and Nice had failed to provide much needed answers to institutional questions in the light of the ambitious enlargement agenda. The declaration on the future of the Union annexed to the Treaty of Nice had – in line with the tradition of the semi-permanent treaty revision process –[736] already called for the convening of an IGC in 2004 in order to resolve, *inter alia*, four fundamental questions: how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity; the status of the Charter of Fundamental Rights of the European Union; a simplification of the Treaties with a view to making them clearer and better understood; as well as the role of national parliaments. As Franz C. Mayer usefully notes, 'this meant invoking subsidiarity as a principle for attributing competences, not exercising them (Article 5 TEC), implying that there [was] a competence imbalance between the EU and Member States.'[737] Indeed, the competence debate in the framework of the upcoming Convention, within which – as we will see in the following sections – the revision of the national identity clause was engendered, would be centred on both major transparency in the exercise of competences and adjustments in the allocation of competences. It

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[735] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 271.

[736] See above at n 94.

[737] Franz C. Mayer, 'Competences-reloaded? The vertical division of powers and the new European constitution' [2005] International Journal of Constitutional Law 493–515

appears to have been the German government who pushed for the inclusion of the issue of the division of competences upon the pressure of the *Länder*, who feared that a lack of clarity in the division of competences could ultimately lead to a creeping increase in the powers of EU institutions to their detriment.[738] Particularly the existence of provisions such as the residual competence of Article 308 TEC[739] was criticised on grounds of having often served the Council in eroding national responsibilities.[740] Apart from the alleged abuse of Article 308 TEC, it was the concern over scant protection by Article 5 TEC for State rights, also potentially resulting in an ever-increasing shift of competences from the Member States to the EU, that was in Paul Craig's words the rationale for including the issue of competence in the post-Nice agenda.[741] In this spirit, the challenge of

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[738] Piris, *The Lisbon Treaty: a legal and political analysis* ; Mayer, 'Competences-reloaded? The vertical division of powers and the new European constitution'

[739] Article 308 TEC reads: 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

[740] With further references to the positions of the Prime Ministers of several German *Länder* on this issue, see Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Kluwer Law International 2009) at 215.

[741] Paul Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford University Press 2013) at 156. He is especially critical of this prevailing perception that this shift in power towards the EU responds to the 'somewhat unwanted arrogation of power by the EU to the detriment of States' as a result of the insufficient protection provided by Article 5 TEC. In Craig's eyes, this would be an 'over-simplistic view' that overlooks the fact that EU competence has resulted from 'the symbiotic interaction of four variables: Member State choice as the scope of EU competence, as expressed in Treaty revisions; Member State, and since the Single European Act 1986 (SEA), European Parliament acceptance of legislation that has fleshed out the Treaty articles; the jurisprudence of the Community courts; and decisions taken by the institutions as to how interpret, deploy, and prioritize the power accorded to the EU' (footnote omitted).

competence division was subsequently targeted by the 'Declaration on the future of the Union' issued by the European Council in Laeken in 2001. In this declaration, the European Council also announced its decision to 'convene a Convention composed of the main parties involved in the debate on the future of the Union [in order] to consider the key issues arising for the Union's future development and try to identify the various possible reasons'.[742]

The European Convention is worthy of a few lines, not only because of its role in the drafting of the extended identity clause, which I will analyse in greater depth in a subsequent section, but also because it represented a singular trans-European event marking a transformation of the dynamics of the IGC-dominated treaty-reform processes.[743] The Convention went far beyond its initial task of setting the bases for an institutional reform as considered by the Laeken Declaration. Seventeen months of work and discussions – beginning with its first meeting on 28 February 2002 – culminated in a draft Constitution, which was delivered in July 2003 and itself provided the starting point for the IGC opening in October 2003.

With its composition, the European Convention achieved the goal set in Laeken to involve the main political actors in the debate on the future of the Union. Indeed, under Chairman Valéry Giscard d'Estaing and Vice-Chairmen Giuliano Amato and Jean Luc Dehaene, its 105 members included representatives of both the Heads of State and national parliaments

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[742] Presidency conclusions - Laeken, 14 and 15 December 2001.

[743] Guy Milton and Jacques Keller-Noëllet, 'The immediate origins of the European Constitution' in Giuliano Amato and others (eds), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) at 40 et seq. Indeed, the European Convention prompted many to dream of the American antecedent in Philadelphia, Florence Deloche-Gaudez, 'La Convention européenne sur l'avenir de l'Europe: Ruptures et continuités' in Giuliano Amato and others (eds), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) at 47.

of Member States and candidate countries, as well as representatives of the European Parliament and the European Commission. In addition, the Economic and Social Committee, the Committee of the Regions, the Social Partners, and the European Ombudsman took part in the Convention's works by sending observers.[744] But who did these Convention members speak for? This is an important question since I analyse their interventions as preparatory work. Kimmo Kiljunen – representative of the Finnish Parliament – reflected upon this question in the following terms:

> *'So how unique was the Convention? Whom did it represent? It consisted of representatives appointed by governments, national parliaments, the European Parliament and the Commission. However, the members did not have the authority to speak for their respective member states, governments or background entities. We were members without a mandate. Legally, we did not represent the bodies that had appointed us, since our opinions or decisions were not binding on those bodies. […] In practice, though, things were rather different. There was no doubt that Convention members did actually represent their countries. Preparation for Convention meetings did not take place in a vacuum; there was careful consultation at home. The further the Convention progressed, the*

[744] Yet, critiques have been voiced precisely with regard to the composition of the Convention. Since in the course of the Convention government representatives were replaced by Foreign Affairs ministers (e.g. the cases of Joschka Fischer and Dominique de Villepin) and the presence of ministerial personnel grew continually, the Convention in the end resembled the Nice IGC in that both were overcrowded with ministry officials with limited leeway in decision-making. Ironically, the political blockades overshadowing the Nice IGC have been ascribed precisely to that circumstance, c.f. Franz C. Mayer, 'Macht und Gegenmacht in der Europäischen Verfassung. Zur Arbeit des europäischen Verfassungskonvents' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 59, at 64; speaking of the 'grave constitutional sin' committed by the 'European governmental collective' through the inconsistency of the use of a constitutional rhetoric to conceptualise the Convention and its 'intergovernmentalisation' in practice, Agustín José Menéndez, 'Defensa (moderada) de la Sentencia Lisboa del Tribunal Constitucional alemán' [2010] El Crónista del Estado Social y Democrático de Derecho 32, at 34 et seq.

> *more clearly the national dimension began to emerge in the performances of the members.'*[745]

As we will see, the relevance of the national dimension is anything but negligible, even – or rather precisely – when it comes to the gestation of the revised identity clause.

After a first 'listening phase', which mainly entailed conferring a voice upon civil society, the Convention entered a 'working phase' during which the different visions were discussed with a view to drafting, in a 'final phase', an articulated text.[746] Eleven Working Groups were set up to prepare the debate on specific subjects, namely the role of the principle of subsidiarity, the future of the European Charter of Fundamental Rights, the legal personality of the Union, the role of national parliaments, complementary powers, economic governance, external action, defence, the simplification of procedures and instruments, the area of freedom, security and justice, and social Europe.

For the purposes of the present study, it is Working Group V on complementary competences that is of special relevance. The extension of the 'identity clause', Article I-5 of the Constitutional Treaty, was first proposed by the chair of said Working Group, Mr Henning Christophersen, which led it to be consistently referred to as the 'Christophersen clause' in

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[745] Kimmo Kiljunen, *The European Constitution in the Making* (Centre for European Policy Studies 2004) at 49; this fiction of not speaking for the body that appointed the Convention members is best illustrated by the presentation of Joschka Fischer to the Convention. An anecdote Kiljunen sums up as follows:'Giscard d'Estaing reminded us of this in November 2002, when he first recognised a new member of the Convention: 'Mr Joschka Fischer, not German Foreign Minister Fischer'.

[746] Data taken from http://europa.eu/scadplus/european_convention/introduction_en.htm (last checked 2 April 2014).

the Convention's working documents.[747] The analysis of the extended version of Article 6(3) TEU in terms of the division of competences appears necessary both to infer from a historical perspective the intended scope flowing from the *travaux préparatoires* of the Convention, and to provide a justification for situating Article I-5(1) CT (and by extension Article 4(2) TEU) in the context of competence norms, i.e. for reading the 'Respect for National Identities as Respect for Member States' Competences'.[748] Although one of the reasons for departing from the IGC method was to overcome the lack of transparency that accompanied the IGCs, the following analysis simply reveals what Franz C. Mayer had already deplored a decade earlier: since the key texts were largely circulated 'underhand' by the Secretariat of the Convention, one was at the most able to observe and retrace the Convention works by consulting the – sheer endless amount of – published documents.[749] But transparency lies precisely within this 'flood of paperwork' – Mayer quotes the over 1000 amendments tabled to the Draft to the first 16 Articles of the Constitutional Treaty as an example hereof.[750] As a result, I have focused on the Convention works targeting the national identity clause while treating more succinctly the other identity-relevant provisions I identify as having been incorporated or modified by the Constitutional Treaty, i.e. preamble and

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[747] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 271; von Bogdandy and Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' at 1426.

[748] This is the thesis defended by Barbara Guastaferro in 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' especially at 271.

[749] Mayer, 'Macht und Gegenmacht in der Europäischen Verfassung. Zur Arbeit des europäischen Verfassungskonvents' at 65.

[750] Mayer, 'Macht und Gegenmacht in der Europäischen Verfassung. Zur Arbeit des europäischen Verfassungskonvents' at 65.

Charter provisions as well as the incorporation of the Protocol on animal welfare and Declaration No. 11 on the status of churches into the treaty text.

2.1 Article I-5 CT: from national to constitutional identity

As a result of the European Convention, the wording of Article 6(3) TEU, which soberly referred to the Union's duty to respect the Member States' national identities, was extended. Indeed, the national identity clause was incorporated into the first section of Article I-5 CT, labelled as 'Relations between the Union and the Member States', and read as follows:

> *'The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.'*[751]

If we compare this formulation with the final text agreed upon during the IGC under Irish Presidency, the differences are minimal:

> '*The Union shall respect the equality of Member States before the Constitution 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*

[751] CONV 850/03, Draft Treaty establishing a Constitution for Europe, Brussels, 18 July 2003.

State, maintaining law and order and safeguarding national security.'[752]

Aside from purely editorial deletions,[753] the only differences consist of the substitution of 'internal security' by '*national* security'[754] and the addition of the reference to the equality of Member States, which was carried out during the IGC under the Irish Presidency.[755] The wording of Article I-5 (1) CT was thus already polished by the time of the finalisation of the European Convention. But, as we will see in the following sections, it is not only the wording, but also the localisation of Article I-5(1) CT in the treaty text that are of major importance when analysing the extension of Article 6(3) TEU through the lenses of the delimitation of competences between the Union and the Member States. This link to the competence delimitation is all the more relevant since, as mentioned above, Article I-5(1) CT was conceived under the mandate of Working Group V, the working group on complementary competences.

2.1.1 Working Group V: Shaping the Christophersen clause

In the spirit of the Laeken Declaration and of achieving a clearer delimitation of competences between the EU and the Member States, Working Group V was to focus on the issue of the 'complementary competences', i.e. the competences covering policy areas where the EU's

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[752] CIG 87/1/04 REV 1, Treaty establishing a Constitution for Europe, Brussels, 13 October 2004.

[753] CIG 79/04, IGC 2003− Presidency proposal following the Ministerial meeting on 24 May 2004, Brussels, 10 June 2004.

[754] See *infra* at n 873.

[755] Jacques Ziller, *The European Constitution* (Kluwer Law International 2005) at 34.

action is limited to supporting, supplementing and coordinating the Member States' actions and where it may not interfere with the legislative activity of the latter. Complementary competences largely correspond to the new policy areas added to the Treaties from the Maastricht revision onwards and are 'examples of the tendency to replace the functional method of attribution of competencies […] by the substantive allocation of competencies'.[756] Legal bases of these concrete policy areas often exclude harmonisation measures and spell out precisely the type of action to which the EU ought to be confined. And since the principle of conferral permits the Union to act only upon competence conferred by the Treaties, establishing explicit limits to EU competence in the legal bases of certain policy fields would *a priori* involve safeguarding these fields from excessive EU action. However, what could have worked out perfectly to avoid unwarranted EU intervention in fields where the Member States' will was to explicitly limit this possible intervention failed to do so in practice. Indeed, the equation of the principle of conferral and limited legal bases in non-exclusive EU competences resulting in ring-fencing specific policy fields against EU action did not hold true. This was due to the presence of a special variable in the Treaties, which bore the ability to bypass the limits established in the concrete legal bases: the two general – or objective-related –[757] competence clauses, viz. Article 95 TEC[758] (now Article 114

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[756] Henning Christophersen, CONV 75/02, Mandate of the working group on Complementary competencies, Brussels, 31 May 2002, at 3.

[757] Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* chap. 6.

[758] In the Nice consolidated version, Article 95 TEC comprised ten paragraphs.The first paragraph read: 'By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by

TFEU) applying to the internal market and Article 308 TEC (now Article 352 TFEU), the residual competence clause. Invoking the internal market or further treaty objectives, the Union could adopt secondary legislation that covered subject-matters falling within the scope of policy fields whose legal bases would precisely have excluded EU legislation. In particular, the (allegedly) excessively broad interpretation of the two general competence clauses by the Parliament and the Council had raised the concerns of the Member States over the 'competence creep'.[759] Thus, the EU's use of broadly framed functional powers had increasingly been accused of leading to the very limits set by the complementary competences being overridden. Resolving this issue, considered by one commentator as the greatest vertical challenge to the competence of the Member States,[760] constituted one of the questions the Working Group had to address.[761] In order to tackle this issue,

law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' The following nine paragraphs, meanwhile, excluded certain fields such as fiscal policy from the scope of the provision and introduced various safeguards as to the maintenance or future introduction of national measures.

[759] Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* at 178.

[760] Gerard Conway, 'Articles Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 14 German Law Journal 966, at 966.

[761] Cf. Henning Christophersen, CONV 75/02, Mandate of the working group on Complementary competencies, Brussels, 31 May 2002. In order to produce some data on the question of (ab)use of residual competence, Sweden's government representative, Lena Hjelm-Wallén, presented a note dealing with EU legislation passed on grounds of Article 308 TEC. This note consisted of a survey conducted by the Swedish Institute for European Policy which showed that although Article 308 TEC had been regularly used in the past as a legal basis for Community legislation, its use had decreased from the adoption of the SEA with new Article 95 TEC, which only required a qualified majority in the Council. In terms of substantive policy fields, a general decrease in the use of Article 308 TEC was also to be observed, with the notable exception of the field of institutional and financial matters where it actually increased – unsurprisingly – from the time of the adoption of the Maastricht Treaty onwards. Cf.

Working Group V decided to start by providing a definition of the concept of 'complementary competences' to then establish a list of policy areas covered by them. Additionally, public concern over excessive interference by the EU in areas of complementary competences, including 'the perceptions that national sovereignty is being eroded beyond what is needed to address issues of common concern',[762] was to be attended to by considering possible further negative delimitations of Community competence as well as potential restrictions on the use of Article 308 TEC.[763]

When defining the 'complementary competences', the Group drew both upon the Praesidium's 'description of the current delimitation of competences between the EU and the Member States'[764] and also upon a European Parliament report, the so-called *Lamassoure Report*.[765] The task

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Lena Hjelm-Wallén, Working Document 19, Working Group V, Note: 'The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308TEC', Brussels, 3 September 2002.

[762] Henning Christophersen, CONV 75/02, Mandate of the working group on Complementary competencies, Brussels, 31 May 2002, at 4.

[763] Henning Christophersen, CONV 75/02, Mandate of the working group on Complementary competencies, Brussels, 31 May 2002.

[764] Note from the Praesidium, 'Description of the current delimitation of competences between the EU and the Member States', CONV 17/02, Brussels, 28 March 2002.

[765] European Parliament (Committee on Constitutional Affairs), Report on the division of competences between the European Union and the Member States, rapporteur: Alain Lamassoure, A5-0133/2002, 24 March 2002. The Report proposes a distinction between three types of competence: firstly, the competences exercised as a matter of principle by the States – spelling out that, where the Treaty says nothing, legislative competence remains with the Member States, as well as that certain areas, *by their very nature*, fall within national jurisdiction, such as fiscal policy and the *territorial organisation* of the country; secondly, the competences allocated to the Union – referred to as the 'Union's own competences' where the Member States intervention ought to be in line with the conditions and limits set by the Union; and, thirdly, shared competences – covering three types of areas, *those in which the Union lays down*

of defining, clarifying, and delimitating the competences between the EU and its Member States gave rise to heated debates during the meetings of the Working Group, starting with the thorny issue of the nomenclature – the question of *what's in a name* could not simply be shrugged off that easily:[766] the final report contained the recommendation to rename 'complementary competence' as 'supporting measures', for it appeared to denote more accurately the 'essence of the relationship between the Member States and the Union and the limited intensity of the measures which the Union may adopt'.[767]

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*general rules, those in which it intervenes only in a complementary or a supplementary fashion, and those in which it coordinates national policie*s (at pages 10-23). It is interesting how the Lamassoure report refers to the territorial organisation of the Member States as being expressed in constitutional provisions, which are *at the heart of national identity and sovereignty* (at page 23).

[766] As demonstrated, for instance, by Working Group member Peter Altmaier's explanations to his first draft competence chapter, Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002, at 9 . Yet, in the first plenary debate on the Group's report, many members criticised the new name for being confusing since it failed to make clear that it referred to certain 'areas' in which the Union was empowered to act, c.f. CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 12. The question of whether to refer to 'complementary competences' or 'supporting action/measures' remained contentious throughout the whole Convention as show for instance the interventions during the additional plenary debate of 5 March 2003, see CONV 624/03, Summary report on the additional plenary session – Brussels 5 March 2003, Brussels, 17 March 2003, at 7.

[767] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 1 *et seq*. As the report also notes in this context, the debate revealed that the representatives of several Member States had found the use of the term 'competence' in the concept of 'complementary competence' misleading and advocated referring to Union measures in fields 'where Member States are fully competent'; at 1. The differences of opinion of the Working Group members as to the denomination of the concept of 'complementary competences' are also visible from the transcripts of the meetings. The Summary of the meeting of Working Group V on 7 October 2002, CONV 347/02, Brussels, 16 October 2002, stated at page 2 that while some members 'supported the term "assisting measures" (*mesures d'assistance*) proposed by the

These ‘supporting measures’ were defined as those covering ‘Treaty provisions giving authority to the Union to adopt certain measures of low intensity with respect to policies which continue to be the responsibility of the Member States, and where the Member States have not transferred their legislative competence to the Union’.[768] Thus, in the case of the existence of an interest shared between Union and Members States, the Union would be enabled to assist and supplement the national policies by, among others, supplying financial support, administrative cooperation, and through pilot projects.[769] Furthermore, on the question of the policy fields covered by supporting measures, Working Group V settled on the following subject-matters: employment, education, culture, public health, trans-European networks, industry, and research and development.[770]

In its Final Report, Working Group V also considered principles it deemed applicable to the exercise of Union competence, mainly focusing on the ‘principle of allocated powers’ and on ‘respecting the national identity of the Member States’.[771] As to the respect for the Member States’ national

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Chairman, […] others argued in favour of expressions such as "complementary measures" or "complementary actions" (*mesures complémentaires* or *actions complémentaires*) or even "supporting measures" (*mesures d'appui*).’

[768] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 3.

[769] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 4.

[770] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 3. The policy areas of customs cooperation, consumer protection, development cooperation as well as economic cooperation, which had been initially analysed by Working Group V in Working Document 1, Brussels, 4 July 2002, and whose selection responded to the criteria set out in CONV 47/02 and CONV 75/02, were thereby discarded.

[771] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 9 et seq.

identities, the Final Report reflects the broad support that the idea of further elaborating the 'fundamental principle' contained in Article 6(3) TEU had received. This further elaboration was intended to provide 'added transparency of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence', thereby addressing 'the main concerns expressed in the Working Group and elsewhere of safeguarding the role and importance of the Member States in the Treaty while at the same time allowing the necessary margin of flexibility.'[772] The change of wording of Article 6(3) TEU recommended by Working Group V thus represents more than an accidental by-product of the Constitutional Treaty; its significance consequently exceeds the significance of the change in wording that occurred under the Amsterdam treaty revision. Against the background of the 'competence creep', the Working Group also recommended what the essential elements of national identity should include: 'fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces'.[773]

In order to understand how the Working Group came to consider those elements as essential for the revised 'identity-clause', as well as what led it to view the extension of Article 6(3) TEU into Article I-5(1) CT as the remedy for concerns over competence delimitation, it appears necessary to focus on the interventions of certain members of the Working Group,

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[772] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 10 et seq.

[773] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 12.

especially the Chair Henning Christophersen, and to examine the positions of Member States and European Parliament representatives as opposed to that of the European Commission. As noted above, whilst the representatives did not speak for the bodies that appointed them in strict legal terms, in practice they did exactly that. What is more, it appears that the 'national dimension' had quite some weight in the decision-making of the Convention members.[774] In particular, the position of EP representative Joachim Wuermeling displays, as we will see, either a strong allegiance to, or – to say the least – striking similarities with, the position of the German Bundestag representative.

2.1.1.1 Christophersen's proposal

In fact, it was in the early stages of Working Group V's activity that Henning Christophersen conceived the idea of using the national identity clause of Article 6(3) TEU for the purpose of mitigating the reportedly invasive effects that EU action based on functional powers was having in practice on the Member States' responsibilities in areas where the impact of such action was, at least in theory, limited by the mandate of the corresponding legal bases.

Indeed, in an Option paper highlighting the limits of EU competence, Christophersen introduces to his fellow working group members four different models of competence delimitation that could clarify 'EU competence vis-à-vis Member States' competence in a way likely to be understood by the citizens': the Community model, the Union model, the Constitutional model, and the Political model.[775] These models were to

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[774] Kiljunen, *The European Constitution in the Making* at 49.

[775] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 1 et seq.

serve the purpose of clarification, without giving the *erroneous* impression that the Member States derive their competences from the Treaties, and without losing the necessary flexibility inherent to the EU competence system. In Christophersen's view, one of the avenues for facilitating citizens' understanding of the essence of the principles underlying the competence delimitation could also entail 'referring to the rights and competences remaining with the Member States'.[776] This idea of referring to certain competences that are granted special protection in order to allay public fears of expansive EU action in certain policy fields falling within the Member States' core responsibility, runs like a golden thread through all four models listed by the Chair.

The 'Community model' would involve a negative delimitation of competence specifying – where needed – article by article in the Treaties the Member States' rights and powers to be protected, thus merely expanding the existing system of negative delimitation. However, Christophersen contends that it is precisely the existing system that is hard to understand and thus proposes either systematising 'the negative definitions of competence in a limited number of categories' or alternatively focusing 'on certain important national competences' delimitation vis-à-vis Union competence'.[777]

In contrast, the 'Union model', as Christophersen labels the second model he describes, would rely on Article 6(3) TEU, stipulating that 'the Union 'shall respect the national identities of its Member States'.'[778] He proposes

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[776] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 2.

[777] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 2.

[778] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 2.

to expand this provision 'by adding language to the effect that the national identity of the Member States includes the constitutional and political structure of the Member States, including regional and local subdivisions, administration and enforcement where not exceptionally otherwise provided in the Treaties, State/church relations, policy with regard to distribution of income and maintaining or improving social welfare benefits, the sole right to impose personal taxes, etc.'[779] In the eyes of the Chair of Working Group V, adopting this model would conform to the exigencies of referring to matters of public concern while at the same time ensuring the flexibility of the system. This model would present the additional advantages of being already rooted in the Treaties and of being easily expandable to further issues on citizens' minds.[780]

Adopting a 'Constitutional model' would imply including new provisions on the protection of Member States' competences in the introductory part of the Treaty and declaring explicitly that competences not transferred to the Union remained with the Member States. Christophersen additionally considers the possibility of introducing a non-exhaustive list of relevant areas of national competence, such as the Member States' *constitutional and political structures* as well as provisions on the delimitation of the Union's functional competence as regards the reserved areas of Member State competence.[781] On the utility of this model, however, he points out

[779] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 2.

[780] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 3.

[781] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 3.

that the wrongful impression that the Member States derived their competences from the Union should be avoided.[782]

Finally, a 'Political model', which would comprise adopting a political declaration on the reserved areas of Member State competence and which would have the advantage of not requiring cumbersome amendments of the Treaties. This declaration could assume two different shapes: It could either correspond to the concept embodied in the 'Constitutional model' but vested in a political declaration instead of integrating the introductory provisions of the treaty text, or it could consist of a Charter of Member States' rights, a solemn declaration – akin to the Charter of Fundamental Rights – 'aimed at clarifying for the citizens the scope of national competence.'[783] The use of plain language could afford necessary clarity and explanation and thus meet the exigency of providing transparency in the delimitation of competences between the EU and the Member States.

The Chair's proposal of these four different models, whose adoption he deemed capable of contributing, to a greater or lesser extent, to both the clarification of the competence system and containment of the criticised competence creep towards the EU, did not go unnoticed. The proposed revision of Article 6(3) TEU instantly caught the attention of Member States' representatives (both government and national parliament representatives) and the Commission.

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[782] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 3.

[783] Henning Christophersen, Working Document 5, Working Group V, Option paper: Highlighting the Limits of EU Competence, Brussels, 11 July 2002, at 3.

2.1.1.2 The European Parliament

The proposal was also taken into consideration by Mr Joachim Wuermeling, representing the European Parliament, when submitting a draft competence chapter to the Working Group.[784] Mixing Christophersen's Union and Constitutional models, he proposes to introduce the treaty's chapter on competences by a general section consisting of three articles. The first of those articles included three principles: powers not conferred upon the EU by the Treaties would remain within the Member States, the exercise of competences would require due respect of the principles of subsidiarity and proportionality, and the enforcement of EU law would be the Member States' responsibility. The second article (Article B) established the three categories of competences – 'the responsibilities of the Union', 'shared responsibilities', and 'complementary measures' – while Article C (conveniently headed the 'Christophersen clause') incorporated the Chair's proposal, albeit shortened to the Union's respect of 'the national identities of its Member States, the constitutional and political structure, the regional and local responsibilities and the status of the churches and charity organisations'.[785] Wuermeling is especially wary of converting this revised national identity clause into a list of the Member States' 'important competences', stating that such a list could run the risk of being perceived as a 'negative catalogue' – an idea that had been 'broadly rejected by the Convention'.[786]

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[784] Joachim Wuermeling, Working Document 6, Working Group V, Note Complementary competences as part of EU competences, Brussels, 12 July 2002.

[785] Joachim Wuermeling, Working Document 6, Working Group V, Note Complementary competences as part of EU competences, Brussels, 12 July 2002, at 1 -2.

[786] Joachim Wuermeling, Working Document 24, Working Group V, Paper on the question-paper distributed by Mr Christophersen, Brussels, 16 September 2002, at 4.

2.1.1.3 The Member States

When it came to the Member States' representatives in Working Group V, there was broad agreement on the necessity of tackling the alleged 'competence creep', but there was no consensus on how this problem should be approached or resolved. David Heathcoat-Amory for the UK advocated the adoption of a tripartite competence-division – exclusive EU competences, shared competences, and exclusive Member State competences, where EU action is restricted to a liaising role – while abolishing functional powers as such.[787] Nevertheless, the inclusion of the Christophersen clause as such did not receive any opposition from the Member State representatives and was included by Working Group member Peter Altmaier right away in his first provisional draft of a general competence chapter.[788]

The draft of a competence chapter for the future Constitutional Treaty circulated by the German Bundestag representative had the advantage of dealing with all competence-related questions in one place of the treaty instead of having to rely on many different provisions scattered throughout the treaty text.[789] It started with a first article, a political statement, explaining to citizens briefly and in plain language the competencies and responsibilities of the Union. The second article included twelve general provisions on the exercise of competences ranging from the principle of

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[787] David Heathcoat-Amory, Working Document 14, Working Group V, Note 'Complementary Competences - The Way Forward', Brussels, 7 August 2002, at 1.

[788] Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002.

[789] Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002, at 5.

conferral to the Christophersen clause.[790] The expansion of Article 6(3) TEU would, in Altmaier's eyes, act as 'an additional safeguard for the Member States with regard to the effects, the exercise of functional powers could have on their internal structures and national competencies'.[791] Unlike UK representative David Heathcoat-Amory, Altmaier does not sketch a Union deprived of its functional powers. Instead of charging

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[790] 'Article 2 (General provisions on the exercise of competencies)

(1) Principle of the attribution of competencies and presumed Member States's [sic] competencies in case of doubt

(2) Competence-categories

(3) Principle of subsidiarity

(4) Principle of proportionality

(5) Priority-clause

(6) Hierarchy of instruments

(7) Principle of primacy of EU-law

(8) Hierarchy of methods and scale of intervention

(9) Obligation to give reasons for choice of instruments and methods

(10) Principle of national implementation and execution

(11) Flexibility-clause

(12) Christopherson [sic] -clause (based upon Article 6.3. EU-Treaty):

"*The Union shall respect the national identities of the Member States, their constitutional and political structures including regional and local subdivisions, State/church-relations...*"

(13) The above mentioned principles shall apply to every action of the Union, compulsory or non-compulsory, in conformity with the specific provisions laid down in article 3.' Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002, at 4-5 (footnote omitted).

[791] Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002, at 15.

against the concept of functional powers, he underlines how they have, in his view, worked in 'the common interest of everybody'.[792] Instead of abolishing the functional powers, he seeks to thwart the negative impact EU action based on functional powers could have in the areas listed in the Christophersen clause and thereby contribute to improving the acceptance of this category of powers. In addition to the Christophersen clause, he also proposes a 'priority clause' prohibiting the use of functional powers in sectorial policy fields.[793] For Altmaier, this is fundamental in order to reduce the negative side-effects of the use of functional powers. To this effect, he insists on including the Christophersen clause in the competence chapter[794] and not in the introductory part of the treaty text as the representative of the Commission suggested.[795] He intends for the clause to transcend the mere value of a political declaration, and to deploy full legal effects obliging the EU legislator to respect it when legislating and the Court of Justice to consider it when reviewing EU legal acts.[796] He also suggests restricting the content of the clause to national identities,

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[792] Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002, at 15.

[793] Peter Altmaier, Working Document 9, Working Group V, Note on 'the division of competencies between the Union and the Member States', Brussels, 15 July 2002, at 12.

[794] Peter Altmaier, Working Document 20, Working Group V, Note 'The Division of Competencies between the Union and the Member States' (revised version), Brussels, 4 September 2002, at 12.

[795] Peter Altmaier, Working Document 20, Working Group V, Note 'The Division of Competencies between the Union and the Member States' (revised version), Brussels, 4 September 2002, at 4.

[796] Peter Altmaier, Working Document 20, Working Group V, Note 'The Division of Competencies between the Union and the Member States' (revised version), Brussels, 4 September 2002, at 12.

constitutional and political structures (including regional and self-government) and to the legal status of churches and religious bodies in the terms of the Declaration 11 to the Amsterdam Treaty.[797]

2.1.1.4 The Commission

The European Commission's stance on a possible revision and extension of the national identity clause contained in Article 6(3) TEU differs substantially from the visions expressed by the Member State and European Parliament representatives.[798] In this sense, the Commission's representative recommends refraining from turning a revised national identity clause into a provision regulating the exercise of EU competence. This different approach to the Christophersen clause matches the Commission's perception on the appropriateness of the allegations of a 'competence creep'.

Indeed, unsurprisingly, the European Commission did not share the understanding that the Community erodes Member State competences by adopting measures that exceed the conferred powers.[799] It did, however,

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[797] In Altmaier's revised competence scheme, the Christophersen clause now read 'When exercising it's [sic] competences, the Union shall respect the national identities of the Member States, their constitutional and political structures including regional and local self-government and the legal status of churches and religious bodies. Peter Altmaier, Working Document 20, Working Group V, Note 'The Division of Competencies between the Union and the Member States' (revised version), Brussels, 4 September 2002, at 12.

[798] See especially Working Document 16, Working Group V, Comments from the Commission's representative in response to Mr Altmaier's note on the distribution of competencies, 3 September 2002; and Paolo Ponzano, Working Document 26, Working Group V, Note from Commission's representative 'Combining clarity and flexibility in the European Union's system of competencies', Brussels, 30 September 2002.

[799] Working Document 7 Working Group V, Note from the European Commission on 'The European Union's complementary powers: scope and limits, Brussels, 29 July 2002.

acknowledge the fact that, as a consequence of the realisation of the fundamental market freedoms, Community action may sporadically interfere with the Member States' legislative competences in areas of supporting action. Although the Commission admits that such instances exist, it nevertheless deems EU action necessary to prevent these freedoms from being emptied of their substance and emphasises that the Court of Justice has already devised a satisfactory approach when assessing conflicts regarding objective-related measures in fields of sectorial competences: the 'centre of gravity' approach.[800] For the Commission, national competences are thus not strictly speaking being eroded, but rather the Member States are obliged to exercise them in conformity with the internal market objectives. But the Commission does not only adduce the Court's centre of gravity case law as evidence of existing safeguards of national responsibilities, it further insists that the treaties, far from conferring upon the EU carte blanche when it comes to the implementation of the fundamental market freedoms, on the contrary spell out a number of those safeguards: the possibility for Member States to establish restrictions on fundamental freedoms on grounds of public order, public security, public health or further imperative reasons of overriding public interest; the general principles of conferred powers, subsidiarity, and proportionality

[800] 'It should be stressed that while it does interfere with the Member States' capacity to act in areas covered by the Union's complementary powers, the Community action in question has nothing to do with the exercise of its complementary powers. The main and dominating purpose of such action — its 'centre of gravity', to use an expression common in the case law of the Court of Justice with regard to compliance with the legal bases of the Treaty— concerns the establishment of the internal market and not education or public health policies' (footnote omitted). Working Document 7 Working Group V, Note from the European Commission on 'The European Union's complementary powers: scope and limits, Brussels, 29 July 2002, at 7.

enshrined in Article 5 TEC; the specific conditions provided for by Article 95 TEC; the prohibition of harmonisation in specific policy fields.[801]

The Commission thus fervently defends the objective-related or functional powers as being fundamental and necessary to the achievement of the Union's goals and deems the existing safeguards set in the treaties and in the case law of the Court of Justice as sufficient to avoid excessive EU intervention in fields where its competence is limited. In this vein, it does not appear surprising that Altmaier's proposal of a 'priority clause' consistently giving preference to subject-related competences over objective-related competences was utterly rejected. Once again, the Court's centre of gravity approach was deemed sufficient to render the introduction of such a clause superfluous.[802]

Yet the 'priority clause' was not the only competence-related provision proposed by Member State representatives that met with rejection. The Christophersen clause was similarly criticised by the Commission. In the case of the revised national identity clause, it was the location of the clause that was an anathema. Indeed, the Commission refused to understand this provision as a competence norm and pleaded for it to be moved from the competence chapter to the first, general part of the Treaty. Rather than limiting the exercise of competences attributed to the Union, the

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[801] Working Document 7 Working Group V, Note from the European Commission on 'The European Union's complementary powers: scope and limits, Brussels, 29 July 2002, at 7.

[802] Working Document 16, Working Group V, Comments from the Commission's representative in response to Mr Altmaier's note on the distribution of competencies, Brussels, 3 September 2002, at 2 et seq.

Christophersen clause would be bound to constitute a 'general interpretative means'.[803]

This understanding of revised Article 6(3) TEU as an interpretative means unrelated to the exercise of competences is contrary to the views of both the Member State and the EP representatives, having expressly located the revised identity clause in the competence chapter and attached to it legal effects in the exercise of competences. For the Commission's representative Mr Ponzano, in contrast, the Christophersen clause was to constitute a fundamental principle, located in the first part of the Treaty alongside the fundamental rights, and governing the 'relations between the Union and the Member States, and particularly the fundamental mutual obligations. Specifically, these provisions should set out the obligation for the Union to respect the identity of the Member States and their regions, as well as their sovereignty in relation to all powers and areas of responsibility which are not allocated by the Treaty to the Union. This must obviously not lead to the limitation of the scope and exercise of the competencies allocated to the Union to take account of the specific requirements of each Member State, for this would jeopardise the distribution of competencies established by the Treaty.'[804]

2.1.1.5 Conclusions

In the end, by September 2002, the general debate among the members of Working Group V had already led to consensus as to the inclusion of a new,

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[803] Working Document 16, Working Group V, Comments from the Commission's representative in response to Mr Altmaier's note on the distribution of competencies, Brussels, 3 September 2002, at 4.

[804] Paolo Ponzano, Working Document 26, Working Group V, Note from Commission's representative 'Combining clarity and flexibility in the European Union's system of competencies', Brussels, 30 September 2002, at 5.

specific competence chapter and of the Christophersen clause, thus opting for the 'Union model' over the remaining models presented to them by the Chair. However, when it came to the choice of what elements were to be included in this clause, reaching an agreement proved to be far more complicated.[805] The broad range of views ranged from leaving Article 6(3) TEU untouched – as expressed by Italy's representative Francesco Speroni –,[806] and Altmaier's and Wuermeling's proposals focusing on the constitutional structure, regional and local self-government as well as on the state-church relations,[807] to Christophersen's round-up – floated in the last meeting of Working Group V – considering elements such as 'language, national citizenship, military service, the educational systems, the welfare-systems including the public health systems, the system for personal taxation, the right of abortion.'[808]

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[805] CONV 251/02, Summary of the meeting on 6 September 2002, Working Group V, Brussels, 9 September 2002, at 3.

[806] Francesco Speroni, Working Document 25, Working Group V, Answers to the President's priorities issues, Brussels, 23 September 2002.

[807] Cf. Joachim Wuermeling, Working Document 6, Working Group V, Note Complementary competences as part of EU competences, Brussels, 12 July 2002, at 1 -2.(n 785) Peter Altmaier, Working Document 20, Working Group V, Note 'The Division of Competencies between the Union and the Member States' (revised version), Brussels, 4 September 2002, at 12. (n 797).

[808] Henning Christophersen, Working Document 28, Working Group V, Paper on priority issues regarding complementary competence (circulated at the last meeting of WG V on 6 September 2002), Brussels, 24 September 2002, at 5. The right to abortion had been brought up at an early stage by Michael Frendo – the Maltese national parliament representative – when defending the soundness of opposing a list of exclusive Member State competences against the Union's exclusive competences. As an area integrating the latter, Frendo puts forward abortion as an example. C.f. Michael Frendo, Working Document 8, Working Group V, Note on Classification of Competences and Interpretation by the ECJ, Brussels, 15 July 2002, at 3.

In the end, the Group agreed on identifying two areas of *core national responsibilities* – fundamental structures and essential functions of a Member State, and basic public policy choices and social values of a Member State – [809] among the very diverse features rounded up by the Chair by the time of the last meeting. Of these two distinct categories of elements, only the former – fundamental state structures and essential state functions – were intended to be expressly referred to by the identity clause. While the Final Report does provide us with an explanation for the decision not to mention elements of the category of basic public policy choices and social values in the clause, it unfortunately does not do so for the classification into the two categories as such. The criteria followed in order to justify the selection of the various features and their later classification into two categories remain a mystery. The classification appears somewhat arbitrary since, on the one hand, the relation between state and churches, in the eyes of the Working Group an element of the fundamental structures and essential functions of the Member States, could just as well have been conceived as a basic public policy choice in the same line with the educational system and the healthcare system. On the other hand, certain basic public policy choices such as the imposition and collection of taxes may be understood as an essential state function. The classification thus seems to respond rather to political motives beyond scientific criteria. For instance, viewing state-church relations as an essential state function is

[809] The Working Group defined the *Fundamental structures and essential functions of a Member State* as encompassing '(a) political and constitutional structure, including regional and local self-government; (b) national citizenship; (c) territory; (d) the legal status of churches and religious societies; (e) national defence and the organisation of armed forces; (g) choice of languages'. The *Basic public policy choices and social values of a Member State* on the other hand were to include '(a) policy for distribution of income; (b) imposition and collection of personal taxes; (c) system of social welfare benefits; (d) educational system; (e) public health care system; (f) cultural preservation and development; (g) compulsory military or community service'. Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 11.

likely to have been induced by the German representatives in the Working Group to satisfy an utmost German concern. Both Joachim Wuermeling and Peter Altmaier called for its inclusion in the identity clause.[810] Furthermore, the impact of EU integration on the constitutional position of churches in the state had been a German preoccupation, which had been repeatedly voiced both at national and European level ever since the 1996 IGC and had consequently made it into the Amsterdam Treaty as annexed Declaration 11.[811]

While no specific explanation is provided as to why certain elements have been classified as fundamental state structures and others as basic public policy choices and social values, the Final Report of Woking Group V does indicate why the latter category would not need to be expressly mentioned in the identity clause. It appears that the Group's decision on the definition of and fields covered by the supporting measures[812] as well as the projected use of the objective-related powers would have rendered a specific mention

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[810] Cf. Joachim Wuermeling, Working Document 6, Working Group V, Note Complementary competences as part of EU competences, Brussels, 12 July 2002, at 1 -2 (n 785); Peter Altmaier, Working Document 20, Working Group V, Note 'The Division of Competencies between the Union and the Member States' (revised version), Brussels, 4 September 2002, at 12 (n 797). Wuermeling himself makes this point when he states, in his assessment of the Constitutional Treaty's treatment of the competence order, that in addition to the protection of national identity, the autonomy of the churches and the respect for regional and local autonomy had for the first time been guaranteed in Article I-5(1), thus satisfying an utmost German concern, c.f. 'Neben dem Schutz der nationalen Identität wurde erstmals die Autonomie der Kirchen sowie die Achtung der regionalen und kommunalen Selbstverwaltung garantiert (Art. I-5 Abs. 1). ***Damit entspricht der Vertrag einem deutschen Kernanliegen***.'(emphasis added) Joachim Wuermeling, 'Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents' (2004) 39 Europarecht 216, at 224.

[811] C.f. n 561 et seq.

[812] As mentioned above at n 770, employment, education, culture, public health, trans-European networks, industry, and research and development were the policy areas Working Group V had settled upon as supporting measures.

of basic public policy choices unnecessary.[813] In other words, the elements of basic public policy choices and social values – namely the policy for distribution of income; the imposition and collection of personal taxes; the system of social welfare benefits; the educational system; the public healthcare system; the cultural preservation and development; and compulsory military or community service – would already be sufficiently protected since national legislation concerned with these themes could be merely affected, as opposed to being completely superseded, by subject-related supporting measures while at the same time the use of the objective-related powers would be restricted.[814]

This reasoning as well as the resulting final recommendation (consisting of 'making Article 6(3) TEU more transparent by clarifying that the essential elements of national identity include[d], among others, fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces'[815]) reflect the Working Group's understanding that the elements enshrined in the identity clause did not necessarily need to be features protected at constitutional level, *i.e.* to constitute elements of *constitutional identity*. The Member States' *political and constitutional structure* was only one among many other elements that the Christophersen clause aimed to protect as a part of their national

[813] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 11.

[814] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 12 and 14 et seq.

[815] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 12.

identity. Furthermore, the political and constitutional structure had only emerged in relation to regional and local autonomy, to which it is expressly related in the final recommendation.[816] Here again Altmaier's and Wuermeling's proposals appear to reflect the German position,[817] more precisely the German *Länder*'s preoccupations aired prior to the Laeken Council to which I referred above.[818]

As regards the legal effects the Christophersen clause should display, the final recommendation indicates that the Member States' position prevailed over the Commission's suggestion, i.e. limiting the clause to an interpretative means. These legal effects would nevertheless not amount to relieving the Member States of their duty to respect the treaty provisions. In this vein, the Working Group insists that it did not conceive the extended provision on the respect for the Member States' national identities as *a derogation clause*. Indeed, it was not the Working Group's intention for the clause to 'constitute a definition of Member State competence, thereby wrongly conveying the message that it is the Union that grants competence to the Member States', or to suggest 'that Union action may never impact on these fields'.[819]

The final recommendations also bear witness to Working Group V awakening to the necessity of guaranteeing the respect of the national identity clause. The Court of Justice is brought into the debate as a possible guardian of the Christophersen clause, the final report proposing to grant

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[816] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 12.

[817] In Wuermeling's words, an utmost German concern, c.f. supra at n 810.

[818] C.f. *supra* at n 728 and n 738.

[819] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 11.

the Court jurisdiction over the clause.[820] So, in the end, it was agreed that the revised 'identity clause' was to be included into a novel competence chapter, and bound to be nothing less than a fundamental principle affecting the exercise of Union competence and enforceable before the Court of Justice, albeit without amounting to a derogation clause capable of excluding entire areas from EU action.

The Commission's position that the competence creep was a problem of intensity rather than one of scope of EU action, and thus the ensuing recommendation to convert the Christophersen clause into an interpretative means located in the first part of the treaty, failed to garner sufficient support among the members of Working Group V. In the end, the problem of the intensity of EU action found its entrance into the final report by reproduction of a scheme of intensity of EU action submitted at an earlier stage by the Commission.This scheme established a hierarchy of intensity between the different forms of legislative and non-legislative EU action.[821] Clearly, however, this solution was not considered by the majority of the members of Working Group V to be sufficient to curb or mitigate what were perceived as negative side effects of EU action in areas deemed to fall within the Member States' core responsibilities.

2.1.2 The Plenary sessions

Almost simultaneously with the presentation of Working Group V's final recommendations, Giscard d'Estaing presented the structure of the

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[820] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 11.

[821] Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 13.

constitutional treaty at the plenary session on 28 October 2002.[822] This outline was dubbed the 'skeleton'[823] and followed the aim of illustrating the possible articulation of a treaty without prejudging the result of the Convention's debates.[824] It also contained summary descriptions of certain treaty articles of what was called the Treaty establishing a Constitution for Europe. In Part One of the Treaty under the heading 'Constitutional structure', Article 1 defines the Union in the following terms:

> *'- Decision to establish [an entity called the European Community, European Union, United States of Europe, United Europe].*
>
> *- A Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competences on a federal basis.*
>
> *- Recognition of the diversity of the Union.*
>
> *- A Union open to all European States which share the same values and commit themselves to promote them jointly.'*[825]

So here it was again, the explosive mélange between federalism and identity that had paved the road to Maastricht a decade earlier.[826] Finnish representative Kiljunen witnessed the 'spectre of federalism' lurking in and ascribed the ensuing – very diverse – reactions of the Convention members

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[822] CONV 369/02, Cover note from the Praesidium to the Convention, Preliminary draft Constitutional Treaty, Brussels, 28 October 2002.

[823] Kiljunen, *The European Constitution in the Making* at 55.

[824] As established by CONV 369/02, Cover note from the Praesidium to the Convention, Preliminary draft Constitutional Treaty, Brussels, 28 October 2002, at 2.

[825] CONV 369/02, Cover note from the Praesidium to the Convention, Preliminary draft Constitutional Treaty, Brussels, 28 October 2002, at 8.

[826] See above n 224.

to the distinctive political traditions and meanings that 'federalism' receives on both sides of the Channel.[827]

The plenary session during which the report by Working Group V was debated for the first time took place less than a couple of weeks after the publication of the 'skeleton'. As Joachim Wuermeling – both member of the Working Group and speaker at the session – relates[828] and the summary report of the sessions illustrates,[829] the reactions of the Convention Members to the report were anything but positive. Only the creation of a separate competence chapter was exempted from critique.[830] The Christophersen clause 'met with reservations from a large number of speakers',[831] mainly because it was perceived as the introduction of a catalogue of Member State competences – an idea which had already been ruled out previously. Maintaining the more general wording of Article 6(3) TEU was defended as the better alternative.[832] Neither Henning Christophersen's initial clarification that '[t]he Group's proposed wording […] for the principle of respect for national identity (which included a list

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[827] Kiljunen, *The European Constitution in the Making* at 18. On the versatile use of the concepts of federalism and subsidiarity prior to and during the Maastricht Treaty ratification, see above chapters 2 and 3. The same applies to 'enhanced cooperation' as noted by Jo Shaw, see above at n 540.

[828] Wuermeling, 'Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents' at 221.

[829] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 10 et seq.

[830] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 12.

[831] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 13.

[832] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 13.

of examples) did not seek to alter the scope of these principles [i.e. the principle of allocated powers and the 'principle' of national identity], but solely to make them clearer for citizens', nor his reply to the plenum emphasising that through the introduction of the words 'among others' before the list of elements of identity the Group had precisely aimed to underscore the indicative and non-exhaustive nature of the list,[833] were able to calm the troubled waters. In the end, Jean-Luc Dehaene was forced to close the debate since the plenary session had shown that a large majority of members did not agree with the approach adopted in the report.[834] The members of Working Group V were quite surprised by the negative reception of their work. Since measures such as the exclusion of harmonising measures in particular were criticised as being too far-reaching, Joachim Wuermeling noted that it appeared that Working Group V had been integrated by all those Convention members advocating a more restrictive interpretation of competences.[835]

Finally Dehaene determined 'that the Praesidium would subsequently consider the matter in the light of the various points arising from the debate'.[836] And that it did: The Praesidium fleshed out this 'skeleton' by drafting the Articles of Part I of the Constitutional Treaty. By February 2003, a draft of the first 16 articles was circulated among the Convention members. The Unions' respect for the Member States' national identities

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[833] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 11and 13, respectively.

[834] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 14.

[835] Wuermeling, 'Kalamität Kompetenz: Zur Abgrenzung der Zuständigkeiten in dem Verfassungsentwurf des EU-Konvents' at 221.

[836] CONV 400/02, Summary report of the plenary session – Brussels, 7 and 8 November 2002, Brussels 13 November, at 14.

was granted considerable prominence since two out of the 16 provisions were devoted to this matter: Fleshing out controversial Article 1 CT, now headed the 'establishment of the Union', the reference to the Union's 'federal basis' was maintained while the Union's duty to respect the Member States' national identities was reinforced by simply transcribing the wording of Article 6(3) TEU.[837] A second provision – expanding the respect for national identities expressed in Article 1(2) – was to be found in Article 9(6) of the draft, which stated that '[t]he Union shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level.'

This Article 9(6) had been included, in line with the recommendations of Working Group V, in a specific competence chapter, namely Title III of the Treaty. Article 9 set forth the rules for the application of the principles enshrined in Article 8, while the remaining provisions of this title, comprising Articles 8 to 16, laid down the fundamental principles governing the limits and exercise of competences,[838] the categories of

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[837] CONV 528/03, Note from Praesidium to Convention, Draft of Articles 1 – 16 of the Constitutional Treaty, Brussels, 6 February 2003:

'Article 1: Establishment of the Union.

1. Reflecting the will of the peoples of Europe to build a common future, this Constitution establishes a Union [entitled…], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis.

2. The Union shall respect the national identities of its Member States.

3. The Union shall be open to all European States whose peoples share the same values, respect them and are committed to promoting them together.'

[838] Article 8 of the draft lists as fundamental the principles of conferral, subsidiarity, proportionality and of loyal cooperation. It also states explicitly that in accordance with

competences,[839] and a flexibility clause – which presented the particularities of being subjected to the subsidiarity monitoring procedure and of not allowing for harmonisation measures where the Treaty excluded harmonisation.

The Praesidium had thus followed the recommendation of Working Group V to conceive the national identity clause as a norm regulating the exercise of competence by the Union; the draft identity clause in Article 9(6) featured also some – but not all – of the elements that the final version of the Christophersen clause contained. As a matter of fact, it was considerably shorter than the clause proposed by Working Group V and made no mention of the Member States' 'choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces'[840] but referred only to fundamental political and constitutional structures, essential state functions and local and regional self-government. Yet, Article 9(6) undoubtedly responds to the exigencies set forth by Working Group V not only by the inclusion of the

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the principle of conferral, competences not conferred upon the Union remain within the Member States. CONV 528/03, Note from Praesidium to Convention, Draft of Articles 1 – 16 of the Constitutional Treaty, Brussels, 6 February 2003.

[839] Articles 10 to 15 of the draft list the categories of competences distinguishing exclusive and shared competences as well as supporting action. As stated in the explanatory note, the common foreign and security policy and the coordination of the Member States' economic policies are treated separately 'in order to reflect the specific nature of the Union's competences in those areas.' CONV 528/03, Note from Praesidium to Convention, Draft of Articles 1 – 16 of the Constitutional Treaty, Annex II, Brussels, 6 February 2003, at 16. In this aspect, the draft is in line with the Lamassoure report, which distinguished certain shared powers where the Union has either a complementary role to play (i.e. supporting action) and where the Union is required to coordinate the Member States' policies. Cf. Lamassoure report, see above n 765, at 20 et seq.

[840] C.f. Final Report of Working Group V, CONV 375/1/02 REV 1, Brussels, 4 November 2002, at 12.

Christophersen clause as a rule for the exercise of competences in a specific competence chapter, but also because it was, as stated in the explanatory note, designed to have concrete legal effects. Indeed, the Praesidium specified that 'Article 9(6) then lists certain features of national identity which more specifically require respect in the legal sense when the Union is exercising its competences.'[841]

The importance of the Union's duty to respect the Member States' national identities is further exemplified by its additional inclusion in Article 1(2) of the draft. As indicated in the explanatory note to the draft, the reference to the respect for national identities at such a prominent place – in the first treaty article – responded to 'its fundamental political importance'.[842] Unlike Article 9(6), Article 1(2) of the draft CT was thus intended as a political statement and not as a provision entailing legal consequences. The reprise of Article 6(3) TEU as Article 1(2) of the draft CT as a political statement corresponded to the Commission's conception of the identity clause as an interpretative means as had been expressed by Commission representative Ponzano during the meetings of Working Group V.[843]

The 16 first draft articles were presented by the Chairman of the Convention, Giscard D'Estaing, on behalf of the Praesidium at the plenary session on 6 February 2003. Giscard D'Estaing invited the Convention members to submit their comments and proposed amendments with a view

[841] CONV 528/03, Note from Praesidium to Convention, Draft of Articles 1 – 16 of the Constitutional Treaty, Annex II, Brussels, 6 February 2003, at 11.

[842] CONV 528/03, Note from Praesidium to Convention, Draft of Articles 1 – 16 of the Constitutional Treaty, Annex II, Brussels, 6 February 2003, at 11.

[843] C.f. supra at n804.

to the forthcoming debate on the draft,[844] an invitation that led to the Secretariat to being flooded with no fewer than 1,040 written responses in the period of ten days.[845] The debates at the plenary sessions were correspondingly lively and the Praesidium's proposal on the Union's duty to respect its Member States' national identities 'perplexed the Convention.'[846] As is evident from the reactions to draft Articles 1 to 16 of the Constitutional Treaty as well as from the debates at the plenary sessions, the wording of Article 9(6) and of Article 1(2), as well as the fact of their duplication, were contentious matters among the Convention members.

In relation to Article 1(2) ('The Union shall respect the national identities of its Member States'), of a total of 104 tabled amendments, the bulk of the Convention members' written reactions expressed the request to 'make clear […] that national identity comprises as appropriate, the Constitutional 'structures'/organisation of public authorities at local and regional level/selection of languages/local autonomy/status of churches'.[847] Modifying draft Article 1(2) in this manner would bring its wording closer to draft Article 9(6), but first and foremost to the proposed draft of Working Group V's Christophersen clause. Further amendments endorsed by a significant number of Convention members related to the inclusion of the

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[844] CONV 548/03, Summary report on the plenary session – Brussels, 6 and 7 February-, Brussels, 13 February 2003, at 1.

[845] Kiljunen, *The European Constitution in the Making* at 58.

[846] Frank Piodi, *A Study of the Proceedings in the European Convention accompanied by Archive Documents* (European Parliament- Directorate General for the Presidency-Archive and Documentation Centre 2007) at 44.

[847] CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 8. Various observers backed that position, including Josef Chabert for the Committee of Regions, who unsurprisingly insisted on the inclusion of a reference to the Member States' 'cultural and linguistic diversity and the principle of local and regional autonomy'.

respect of sovereignty as well as the insistence on cultural diversity.[848] Various written requests also expressed concerns over the lack of clarity of the concept of national identity[849] as well as the need to merge Article 1(2) with Article 9(6).[850] Furthermore, a first request to incorporate the principle of equality among the Member States was formulated.[851] Draft Article 9(6) received less critique, yet the proposed amendments were just as wide-ranging as those concerning draft Article 1(2), ranging from the removal of the reference to the Member States' national identities[852] to the deletion of the paragraph as a whole.[853] Some amendments targeted similar features of national identity, the absence of which had already been criticised in connection with draft Article 1(2), namely the missing reference to

[848] CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 8.

[849] Amendments 1(2)/19 Einem; 1(2)/20 Kiljunen + Vanhanen; 1(2)/21 Cushanen; 1(2)/22 Olesky; 1(2)/23 Tilikainen +Peltomäki; 1(2)/26 Costa + 3 Portuguese members of the Convention; 1(2)/28 Lequiller; 1(2)/29 Kuneva; 1(2)/35Bonde + 8 members of the Convention; 1(2)/36 Wittbrodt + Fogler; 1(2)/38 Cristina; 1(2)/42 Serracino-Inglott +Iguanez. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 8 to 11.

[850] Amendments 1(2)/2 Lamassoure; 1(2)/34 Frendo + 2 Maltese members of the Convention; 1(2)/40 Katiforis; CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 8 to 11.

[851] Amendment 1(2)/33 Queiró. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 10.

[852] Amendments concerning paragraph 6: respecting national identities; Duff and others, Paciotti and Spini. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 79.

[853] Amendments concerning paragraph 6: respecting national identities; Kiljunen and Vanhanen. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 79.

languages, the status of churches and non-denominational organisations[854] and to sovereignty.[855] Furthermore, the respect for cultural, linguistic and territorial diversity,[856] for the principle of subsidiarity in cultural and ethical matters,[857] as well as for the Member States' responsibilities for the maintenance of law and order and for national security.[858]

The perplexity over what was perceived as a duplicity of provisions rather than the emphasis as a political statement, viz. draft Article 1(2), of a principle governing the exercise of competences, viz. draft Article 9(6), led the Convention members to agree during the additional plenary sessions structured around draft Articles 8 and 9 to enshrine the respect for national identity in one single article.[859]

The recognition by the Constitutional Treaty of the local and regional dimensions of the Member States – in terms of their *regional and local*

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[854] Amendments concerning paragraph 6: respecting national identities; Brok and others, Heathcot-Armory, Kaufmann. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 79.

[855] Amendments concerning paragraph 6: respecting national identities; Lord Tomlinson, Muscardini, Hain. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 79.

[856] Amendments concerning paragraph 6: respecting national identities; McAvan, Figel. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 79.

[857] Amendments concerning paragraph 6: respecting national identities; Figel. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 79.

[858] Amendments concerning paragraph 6: respecting national identities; Hain. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 80.

[859] CONV 624/03, Summary report on the additional plenary session – Brussels 5 March 2003, Brussels, 17 March 2003, at 4.

authorities – constituted yet another focal point of the debate at the plenary sessions. The insistence on introducing such a reference, going further than the existing reference to the public administration at local and regional level in draft Article 9(6), had already become evident during the discussion on the regional and local dimension, where the proposal of Working Group V to include regional and local self-government among the essential features of national identity had been expressly welcomed[860] and the necessity of enhancing the existing reference to the Union's duty to respect regional and local autonomy – i.e. the reference in the preamble of the Charter of Fundamental Rights – by including it in the opening articles of the Constitution had been underlined.[861] The Praesidium's reaction to these requests was to propose including a reference to regional and local authorities in Article 9(6),[862] a proposal that was welcomed during the additional plenary debates.[863]

In the end, the final draft of (the first two parts of) the Constitutional Treaty submitted to the European Council on 20 June 2003 would reflect these multiple reactions, first and foremost the plea for merging draft Articles

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[860] CONV 518/03, Cover note from Praesidium to Convention on regional and local dimension in Europe, Brussels, 29 January 2003, Annex at 5.

[861] CONV 518/03, Cover note from Praesidium to Convention on regional and local dimension in Europe, Brussels, 29 January 2003, Annex at 4.

[862] CONV 548/03, Summary report on the plenary session – Brussels, 6 and 7 February-, Brussels, 13 February 2003, at 9. Some members of the Convention went further and called for an additional reference to '*regional identity* and or linguistic diversity, and even to minority rights.' See idem at 9. The reference to regional identity was also requested by Convention Member Rupel as amendment 37 to draft Article 1(2), c.f. CONV 571/03 REV1, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, Brussels, 26 February 2003, Annex 1 at 10.

[863] See the reference to Mr Amato's conclusions in CONV 624/03, Summary report on the additional plenary session – Brussels 5 March 2003, Brussels, 17 March 2003, at 4.

1(2) and 9(6), but also the insistence on emphasising the respect for cultural and linguistic diversity in the treaty text.

Indeed, in the final draft[864] the Union's duty to respect its Member States' national identities in the extended version advocated by Working Group V had vanished from the competence chapter and had been merged with former draft Article 1(2), now the first paragraph of Article I-5 headed the 'Relations between the Union and the Member States'. This first paragraph stated that '[t]he Union shall respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional, including for regional and local self government. It shall respect their essential State functions, including for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.' So, the call for eliminating the duplicity of draft Articles 1(2) and 9(6) had been heard. And even though none of the Convention members had expressed in their written reactions that draft Article 9(6) should disappear because of its nature as a competence norm, in the end, the solution that was agreed upon comes very close to the Commission's position during the debate in Working Group V: The national identity clause as a provision governing the relations between the Union and the Member States located in the first part of treaty text. And yet, it is not possible to infer from the consulted summaries of the plenary sessions or from the amendment sheets that the Convention members wished to exclude Article 1-5(1)'s legal effects on the Union's exercise of competences.

As regards the wording of Article I-5(1) which was finally agreed, again the critiques of the Convention members were taken into account with only

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[864] CONV 724/03, Annex: Draft Constitution, Volume I - Revised text of Part One, Brussels, 26 May 2003.

few exceptions. Regional and local self-government as well as a reference to the Union's respect for territorial integrity and the maintenance of law and order and national security had been added. By contrast, the pleas for featuring the elements comprising the Member States' national identities, the relations between state and churches as well as the respect for cultural and linguistic diversity seemingly fell on deaf ears, at least at first sight, since none of them were incorporated into Article I-5(1). At first sight, since, as we will see, they were included in the treaty text, perhaps not as explicitly declared elements of the Member States' national identities, but in any case in separate treaty provisions whose importance was likely to have satisfied the party proposing said amendments.

On the one hand, the Union's duty to respect the status of churches and non-confessional organisations as determined by the Member States went on to be enshrined in Title VI on the Democratic Life of the Union and more precisely in its Article I-51 under the heading 'Status of churches and non-confessional organisations'.[865] As we will see in the following sections, the wording of the article corresponded, with a minor addendum, to that of Declaration No. 16 to the Amsterdam Treaty to which the German Convention members in particular had referred repeatedly.

The respect for cultural and linguistic diversity on the other hand was incorporated into Article I-3(3) of the final draft as nothing less than an objective of the Union. The provision declared the Union's duty to 'respect

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[865] Article 1-51 read as follows: '1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.'

its rich cultural and linguistic diversity, and [to] ensure that Europe's cultural heritage is safeguarded and enhanced'. This admittedly does not constitute a complete innovation when compared to the first draft of Articles 1 to 16, since those had already included a reference to the respect for cultural (but not linguistic) diversity in the third paragraph of draft Article 3, the Union's objectives. Yet this reference was confined to the Union's objective of constituting the area of freedom, security and justice, i.e. the Union's respect for cultural diversity did not constitute an objective *per se*, but merely a condition to the manner in which this objective is pursued. In this sense, the inclusion of the Union's respect for cultural and *linguistic* diversity as a stand-alone objective of the Union – which I analyse in the following sections – was likely to satisfy the requests voiced by a number of Convention members.

2.1.3 The IGC

With the official conclusion of the Convention's work on 18 July 2003, at which point the final draft of the Constitutional Treaty was handed over to the Italian Presidency of the European Union, the next step in the treaty revision process called for the governments of the Member States to approve the text. To this end, an IGC was convened at the extraordinary Council in Rome on 4 October 2003.

The draft that had resulted from the work of the Convention was not received with full satisfaction by the delegations of the Member States and thus was used as a basis for re-negotiating questions that were still contentious. Article I-5, whilst not in any way constituting one of those contentious issues, nevertheless saw its wording modified in the course of the negotiations. This was chiefly the result of intervention by a group of legal experts on the treaty text. Indeed, alongside the meetings of the national delegations with a view to reaching consensus on disputed issues,

the entire text was subject to a process of re-editing, both from a linguistic and legal point of view. This task of verification and re-editing was entrusted to such group of legal experts.[866] The document that the working party of legal experts used as a basis was the final draft of the Constitutional Treaty with legal and editorial comments by the Council Legal Service.[867] The Council Legal Service had suggested deleting Article I-10 titled 'Union Law'. While Article I-10(1) on the primacy of EU law was to constitute a separate Article I-5a, Article I-10(2) on the application of EU law by the Member States was to integrate the second paragraph of Article I-5 dealing with loyal cooperation, since this was deemed to be a 'more appropriate' location.[868] Building on that new wording of Article I-5(2), which now included both the principle of loyal cooperation and the Member States' duties in the application of EU law, the Presidency proposed adding a first sentence to that paragraph setting out that 'Member States shall be treated equally in the application of Union law.'[869]

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[866] This group of legal experts consisted of representatives from the Member States, the Commission and Parliament and observers from the three candidate countries and chaired by Mr Piris, Director-General of the Council Legal Service. C.f. Letter from Mr Piris, Director-General of the Council Legal Service to the Permanent Representatives to the European Union and the Heads of Mission of the Accession States and the Candidate Countries on Organisation of the work of the IGC Working Party of Legal Experts, Brussels, 29 September 2003. Available at http://europa.eu/scadplus/cig2004/negociations1_en.htm#EXPERTS (last checked 8 July 2014).

[867] CIG 4/2003, IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document, Brussels, 6 October 2003.

[868] CIG 4/2003, IGC 2003 – Editorial and legal comments on the draft Treaty establishing a Constitution for Europe – Basic document, Brussels, 6 October 2003, at 37.

[869] CIG 60/03 ADD 1, IGC 2003- Intergovernmental Conference (12-13 December 2003) ADDENDUM 1 to the Presidency proposal, Brussels, 9 December 2003, Annex 2.

This reference to the equality of the Member States in the application of EU law was later, under the Irish Presidency, moved to the first paragraph of Article I-5 and slightly edited into the following Union duty (emphasis added):

> ***'The Union shall respect the equality of Member States before the Constitution as well*** *as 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 those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.'*[870]

This version of Article I-5(1) was already very close to that which was finally agreed upon, subject only to minor linguistic corrections[871] as well as to the substitution of internal security by national security, which was ultimately introduced in the provisional consolidated version[872] by June 2004 – the rounding up of the definitive wording thus coinciding with the rounding up of the treaty text as a whole.[873]

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[870] CIG 73/04, IGC 2003 – Meeting of Focal Points (Dublin, 4 May 2004) working document, Brussels, 29 April 2004, Annex 2.

[871] CIG 79/04, IGC 2003 − Presidency proposal following the Ministerial meeting on 24 May 2004, Brussels, 10 June 2004.

[872] CIG 86/04, 2003/2004 IGC – Provisional consolidated version of the draft Treaty establishing a Constitution for Europe, Brussels, 25 June 2004.

[873] It suffices to say that the substitution of internal by national security had been requested by the UK and the Netherlands as early as November 2003 in the context of the Working Party of Legal Experts re-editing the draft, c.f. CIG 43/03, IGC 2003 – Issues to be dealt with by the Legal Experts group (new mandate), Brussels, 4 November 2003, at 2.

2.1.4 Conclusions

What do the preparatory works to the Constitutional Treaty reveal to us with regard to the intended scope and legal effects of Article I-5(1) CT?

Firstly, the *travaux préparatoires* to Article I-5(1) CT strongly suggest that the 'national constitutional identity clause' was neither conceived of as a negative competence catalogue nor as a derogation clause. The application of the primacy principle was not to be rendered moot. The intended purpose of the provision was rather to counteract the impact that the Community's use of functional powers had on certain policy fields of the Member States that these perceived as identity-relevant.

Secondly, according to the preparatory works, Article I-5(1) CT was never intended to limit itself to protecting the Member States' national identities enshrined in *constitutional provisions*. Indeed, the reference to 'political and constitutional structures' was never discussed as a limiting factor to the scope of the provision. What is more, in the Final Report of Working Group V such reference was only made in relation to local and regional autonomy. It appears from the preparations to the Constitutional Treaty that the 'national constitutional identity clause' was not meant to be so *constitutional* after all.

2.2. More provisions accommodating national diverseness: same old same old?

In accordance with the aim of contextualising the identity clause among the treaty provisions safeguarding, in one way or another, the protection of national diverseness, the Constitutional Treaty provides us with a number of provisions that warrant at least a few lines after this detailed account of the drafting history of Article I-5(1) CT. Such provisions concern cultural,

linguistic and religious diversity, as well as national laws and practices in relation to a number of Charter rights – in essence, those rights containing the famous *refrain* treated in the previous chapter. As we will see, these provisions all constitute new incorporations to the treaty text, yet they merely echo former efforts of identity protection, albeit strengthening the latter by being enacted at *constitutional* level.

2.2.1 National identities, cultural, linguistic and religious diversity

The tension between unity and diversity becomes particularly palpable when reading the first provisions of the Constitutional Treaty as well as its preamble whose wording had led to passionate debates among the Convention members. In the preamble, both diversity as well as national identity are built upon as foundations of the Union. Cultural and linguistic diversity, as we have mentioned above, made its entrance as an objective of the Union while the Declaration on the Status of Churches and the Protocol on Animal Welfare, both protecting religious diversity, were elevated to the treaty text. And 'Unity in Diversity' overcame its role of unofficial *leitmotiv* of EU integration by being knighted as one of the Union's symbols.

2.2.1.1 Unity in diversity

The wording of the preamble preceding the Constitutional Treaty 'recalls, among other things, Europe's cultural, religious and humanist inheritance, and invokes the desire of the peoples of Europe to transcend their ancient divisions in order to forge a common destiny, while remaining proud of their national identities and history'[874] and therefore embodies a double

[874] Taken from the EU website http://europa.eu/scadplus/constitution/objectives_en.htm (last checked on 2 August 2014).

compromise: one on the foundations of European identity and one on the degree of unity to be reached. The compromise on the foundations of European identity echoed the debates on the incorporation of a reference to God or Christianity that had been witnessed by the previous Convention. The compromise between those in favour of such a reference and the traditionally opposing position of those preferring a reference to Europe's humanist heritage was reached by mentioning on an equal footing both religious and humanist heritance in the first recital of the preamble,[875] wording that, while coming closer to the German-language version of the Preamble to the EU Charter of Fundamental Rights, avoided a reference to one particular religion. This solution was perceived as less exclusionary and offered a compromise on the recurring 'religiöse Frage'.[876]

In the third recital of the preamble, the reference to the 'desire of the peoples of Europe to deepen the solidarity between each other while respecting their history, their culture and their traditions' that had been a part of the Preamble to the Treaty on European Union since Maastricht had morphed into the conviction 'that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny'. The reference to history, culture and traditions had been replaced by national identities and history. The 'ever closer union' adumbrated in that same phrase was concretised in the following preamble recital as 'United in diversity', which the Constitutional Treaty declared in its Article

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[875] Madeleine Heyward, 'What Constitutes Europe?: Religion , Law and Identity in the Draft Constitution for the European Union' (2005) 1 Hanse Law Review (HanseLR) 227–235

[876] C.f. section 2.1.2 Christianity versus Laicism: Identity revealed?; Heyward, 'What Constitutes Europe?: Religion , Law and Identity in the Draft Constitution for the European Union'

I-8 one of the symbols of the Union, its motto. As Besselink notes, this choice in wording accentuates 'the move from unity forwards towards the recognition of the value of diversity' already set in motion by the drafters of the Preamble of the Maastricht Treaty.[877]

The respect for cultural and linguistic diversity on the other hand had been incorporated into Article I-3(3) as nothing less than a stand-alone objective of the Union. The provision declared the Union's duty to 'respect its rich cultural and linguistic diversity, and [to] ensure that Europe's cultural heritage is safeguarded and enhanced'. This wording appears closest to the Preamble of the Charter of Fundamental Rights,[878] which – for what it is worth – had been evoked during the plenary session on regional and local dimension as a reference for the inclusion of respect for regional and local autonomy into the treaty text.[879] In fact, the only reference to the cultural diversity of the Union (and not to that of the Member States) had been added with the Amsterdam Treaty revision to Article 151(4) TEC on culture.

2.2.1.2 Churches and religious rituals

Declaration No 11 to the Amsterdam Treaty, establishing the Union's duty to respect the status of Churches and non-confessional organisations in national law, as well as the Protocol on animal welfare, setting out the

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[877] Besselink, 'Does EU Law Recognise Legal Limits to Integration? Accommodating Diversity and its Limits' at 61.

[878] Recital no. 3 of the Preamble of the Charter of Fundamental Rights of the European Union reads as follows: 'The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local level; […]'.C.f. supra section 2.1.1 Recital No 3 of the Preamble: An inspiration for future Article I-5(1) CT?.

[879] C.f. supra at n 861.

Community's and the Member States' duty to pay -full regard to the welfare requirements of animals were both elevated to treaty text level.

As regards Declaration No 11, the two paragraphs integrating it were transposed almost word for word[880] into Article I-52 (1) and (2) CT. Furthermore, a third sentence was added (I-52(3) CT) recognising churches' and organisations' identity and specific contribution, and proposing to maintain an open, transparent and regular dialogue with them.[881] Article I-52 was not included until May 2003 in the draft Constitutional Treaty. This late inclusion, and particularly the addition of paragraph 3, seemingly responded to the intensive lobbying by religious groups contributing to the European Convention.[882] As Vaughne Miller reports, the 'Vatican 'noted with satisfaction' although it regretted the absence of reference to Christianity in the Preamble.'[883] In this sense, Article I-52 may be perceived as the compromise solution to the 'Christianity issue'.[884]

The Protocol on animal welfare, on the other hand, was transcribed into Article III-121 of Part III (The Policies and Functioning of the Union) of the Constitutional Treaty. The wording of the provision did not suffer

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[880] On the differences, Meyer, 'Präambel' 32.

[881] '*Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations'.*

[882] Vaughne Miller, 'The Treaty Establishing a Constitution for Europe : Part I,' 2004 at 71.

[883] Miller, 'The Treaty Establishing a Constitution for Europe : Part I' at 71 (footnote omitted).

[884] Miller, 'The Treaty Establishing a Constitution for Europe : Part I' at 71; for a more detailed analysis of Article I-52(3) CT as well as of the perspectives on dialogue promised by the provision, see Michal Rynkowski, 'Remarks on Art. I-52 of the Constitutional Treaty: New Aspects of the European Ecclesiastical Law ?' (2005) 6 German Law Journal 1719–1729.

drastic changes either; it merely acknowledged the expansion that EU policies had experienced from the Amsterdam Treaty onwards and was thus extended to space policies. If we recall the important exceptions and derogations to the (common) value of animal welfare that were already afforded by the Community legislator invoking the Amsterdam protocol,[885] which de facto excepts practices such as bullfighting from the scope of EU rules on the welfare of animals at the time of killing, the transposition of the Protocol into the treaty text denotes the increased emphasis on both the value of animal welfare and the potential limits based on particularities of a cultural or religious nature. Since the rites or practices to be respected are those laid down in legislative or administrative provisions and customs of the Member States, their religious and cultural particularities are afforded stronger protection against the potential mandates of EU-based animal welfare regulations.

2.2.2 Conditioning a 'social Europe'

While the incorporation of a reference to Europe's Christian roots was dealt with as an issue pointing at the Union's past – notwithstanding its obvious projection on the future –, the debate on social rights and certain concepts, such as the services of general economic interest, unearthed a more fundamental debate about the socio-economic model of the Union. In other words, this was a debate revolving around the Union's future direction.[886] It is thus anything but surprising that during the drafting of the Constitutional Treaty, the social dimension of European integration – which, as mentioned in the first chapter, had been a matter of debate at least

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[885] See supra at n 559.

[886] Alexander Winterstein, 'The Internal Market and Services of General Economic Interest' in Giuliano Amato and others (eds), *Genèse et destinée de la Constitution européenne* (Bruylant 2007) at 648.

since Maastricht – resurfaced with great intensity. As a result of this debate, provisions relating to the social dimension of the Union that may be viewed as seeking to protect national particularities were either introduced in the Treaty or were amended in such a way as to accentuate the preservation of national practices. In this vein, the horizontal provisions of the Charter of Fundamental Rights (to which I dedicated a few sections of the previous chapter) were amended under the auspices of the constitutional Convention. These amendments exemplify, as we will see, the insistence on ring-fencing a national understanding of social and economic rights free from any harmonisation pressure imposed by the Union.

The amendment of Article 16 TEC on services of general economic interest that had been introduced with the Amsterdam Treaty revision reflects, in a similar way, concerns over the preservation of national diversity while forging the Union's social dimension. Article 16 TEC – Article III-122 under the Constitutional Treaty –, which required that the Union and the Member States ensure that SGEIs operate on the basis of certain principles and conditions, was placed among the provisions of general application of Part III on the Policies and Functioning of the Union of the Constitutional Treaty. But what is more, the provision was amended in such way as to include a reference to Article I-5 CT among the treaty provisions already mentioned by its predecessor. In addition, the mandate of Article III-122 CT was expressly conditioned upon the distribution of competences between the Union and the Member States.

2.2.2.1 Vamping up the Charter (Article II-112 CT)

The two major issues relating to the Charter which the Convention had to address were its incorporation into the Treaties and the Union's accession to the ECHR. Working Group II under the chairmanship of Commissioner Antonio Vittorino succeeded in producing a mutually agreed report on both

issues[887] leaving to the plenary the task of determining where exactly in the treaty text the Charter was to be incorporated. More importantly, as regards the protection of Member States' standards of fundamental rights, some significant changes were made to Article 52 CFREU (Article II-112 CT) upon the Working Group's final recommendations to redraft the horizontal clauses in order to confirm and clarify certain key elements of the consensus that had been reached during the drafting of the Charter.[888] This provision had become the linchpin of the aspirations to make the Charter legally binding: its modification had to both overcome the remaining objections of certain Member States[889] and maintain the spirit of the consensus reached in 2000.

Dealing with the Charter-sceptics[890] meant taking up the debate on the relationship between Charter rights and competences, which had influenced the drafting of the Charter a couple of years earlier. In this vein, by recommending an amendment to Article 51 (1) CFREU (Article II-111(1) CT) *in fine*, the Working Group decided to clarify once again that positive obligations to promote or secure Charter rights could only arise from existing EU competences exercised in line with the subsidiarity principle.[891]

Similarly controversial during the first Convention, the issue of the application of the Charter resurfaced during the Constitutional Convention and led to the amendment of Article 52(2) CFREU (Article II-112(3) CT)

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[887] CONV 354/02, Brussels, 22 October 2002.

[888] Ladenburger, 'Fundamental Rights and Citizenship of the Union' at 314.

[889] Giuliano Amato and Jacques Ziller, *The European Constitution: Cases and Materials in EU and Member States' Law* (Edward Elgar 2007) at 115.

[890] As Ladenburger calls those opposed to the legally binding character of the Charter, 'Fundamental Rights and Citizenship of the Union' at 320.

[891] Ladenburger, 'Fundamental Rights and Citizenship of the Union' at 322.

through additional language. Such new language provided that the Charter did not extend the field of application of EU law beyond the powers of the Union.[892] Article 52 CFREU (Article II-112) is the Charter provision that underwent the most significant changes since the proclamation of the Charter.[893] Working Group II not only managed to add no less than three paragraphs[894] to Article 52 CFREU, it also seized the opportunity to rebaptise the Article from 'Scope of Guaranteed Rights' to 'Scope and Interpretation of Rights and Principles'.[895] This change of heading is telling with regard to what Laurence Burgorgue-Larsen terms the 'paradoxe référentiel' and the 'paradoxe social'.[896] She views the inclusion of paragraph 6 (providing that '[f]ull account shall be taken of national laws and practices as specified in this Charter') as an example of the abuse of overabundant references (paradoxe référentiel) and the inclusion of paragraph 5 (introducing a distinction between rights and principles) as merely affording social rights minimal justiciability (paradoxe social).

Article 52(6) CFREU has been described unflatteringly as a 'fear clause',[897] a superfluous provision with merely declaratory character[898] – in short a

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[892] Ladenburger, 'Fundamental Rights and Citizenship of the Union' at 325.

[893] Burgorgue-Larsen, 'Article II-112' at 661.

[894] Paragraphs 4, 5 and 6 – paragraph 7 was added during the IGC, see supra.

[895] Burgorgue-Larsen, 'Article II-112' at 678.

[896] Burgorgue-Larsen, 'Article II-112' at 680 et seq. Badinter speaks of the clause implying a political value that proves inversely proportional to its legal consequences, see Badinter, 'La Charte des droits fondamentaux à la lumière de la Convention sur l'avenir de l'Europe' at 150.

[897] *Angstklausel:* Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze' 46b.

[898] Jörg Pietsch, 'Die Grundrechtecharta im Verfassungskonvent' [2003] Zeitschrift für Rechtspolitik 1–4; Burgorgue-Larsen, 'Article II-112'

provision seeking to calm the minds of those Member States fearing a loss of competences.[899]

2.2.2.2 *National* concerns over Services of *General* Economic Interest (Article III-122 CT)

The treaty provision dealing with services of general economic interest, Article III-122 CT, grew considerably in its final version as compared to its predecessor Article 16 TEC. The provision now provided that:

> *'Without prejudice to Articles **I-5**, III-166, III-167 and III-238, and given the place occupied by services of general economic interest as services **to which all in the Union attribute value** as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, **in particular economic and financial conditions**, which enable them to fulfil their missions. **European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services**.' (changes against Article 16 TEC in bold)*

Before giving a brief account of the drafting of this provision, it suffices to say that its innovative value is the specific legal base set out in the second sentence.[900] For the first time, a non-exclusive legislative competence is conferred upon the Union permitting European laws to be adopted – in the

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[899] Borowsky, 'Artikel 52 Tragweite und Auslegung der Rechte und Grundsätze' 46d.

[900] Winterstein, 'The Internal Market and Services of General Economic Interest' at 656 et seq; Pierre Bauby, 'From Rome to Lisbon: SGI's in Primary Law' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press 2011) at 31; Szyszczak, 'Article 36 Access to Services of General Economic Interest' 36.17 et seq.

jargon of the Constitutional Treaty – in accordance with the co-decision procedure between Council and Parliament.[901]

The issue of the SGEIs and thus also the re-drafting of Article 16 TEC were in particular addressed by the Working Group on 'Social Europe'. The debate and proposals mirrored the above-mentioned tensions between those who advocated further shielding certain sectors from the brutal force of liberalism and those pleading for open markets and free competition. The Praesidium did not pick sides and suggested a merely technical re-drafting of Article 16 TEC.[902] Yet, at the very end of the Convention, on 27 June 2007, the proposal to create a specific legal base for SGEIs was formally submitted by the Praesidium.[903] The amendments introduced by the IGC revealed that the solution reached under the Convention had not left everyone satisfied. Indeed, exhibiting continuity in their general disagreement on this provision during the Convention works, certain delegations requested the deletion of the new legal base, while others advocated that it be preserved subject to the introduction of qualifications.[904] One of these delegations, namely the Austrian, suggested including 'a reference to the central role of local and regional authorities in providing these services', a proposal according to which 'Article III-122

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[901] Szyszczak, 'Article 36 Access to Services of General Economic Interest' 36.18.

[902] Winterstein, 'The Internal Market and Services of General Economic Interest' at 648 et seq.

[903] Winterstein, 'The Internal Market and Services of General Economic Interest' at 650. He reports that the following plenary debate on 4 July 2003if anything proved the lack of cosensus that governed the inclusion of the new legal base. For some it did not go far enough since the SGEIs were still subject to the competition rules, while others criticised it for overthrowing the existing distribution of competences (footnotes omitted).

[904] CIG 37/03, IGC 2003 – Non-institutional issues; including amendments in the economic and financial field, Brussels, 24 October 2003, at 4.

should also be without prejudice to Article I-5 (i.e. respecting structures of regional and local self-government).'[905] This suggestion was taken over by the Presidency and submitted to the IGC,[906] producing a provision explicitly made subject to Article I-5 CT. The Christophersen clause had thus proved useful in ensuring that Union legislation would not impinge upon the Member States' understanding of providing SGEIs to their citizens.

In this sense, Article III-122 CT mirrors the preoccupations of both those Member States wary of shielding the particularities of their regulation of SGEIs against EU secondary law and those concerned that the introduction of a new legal base could entail further competence creeping. Adding to the legal base the qualification that secondary legislation in this field would not affect the Member States' competences is very telling of the latter preoccupation.

Assuming Article III-122 CT is read in conjunction with Article 36 CFREU – enshrining access to SGEIs –, it is necessary to make a number of observations. Firstly, from a glance at the mere wording of both provisions, it is quite evident that both are the result of a hard-fought compromise between the opposing visions for a socio-economic model of the Union mentioned earlier. Based on the Explanations to the Charter, Article 36 CFREU does not afford a subjective right to access to SGEIs but rather sets out a principle which the Union must respect in the exercise of its competences in matters impacting on such services, especially competition

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[905] Winterstein, 'The Internal Market and Services of General Economic Interest' at 652.

[906] CIG 60/03, IGC 2003-Intergovernmental Conference (12-13 December 2003) ADDENDUM 1 to the Presidency proposal, Brussels, 9 December 2003, Annex 39. On the further amendments approved during the IGC to Article III-122 CT, see Winterstein, 'The Internal Market and Services of General Economic Interest' at 651 et seq.

and internal market.[907] The Member States enjoy a wide margin in the field of SGEIs, the logic behind the provision being that the former regulate such services in accordance with their *national laws and practices* as set forth by the *refrain* – and upon which the Union may not impinge in the exercise of its competences. National regulations governing SGEIs are shielded from the liberalising force of EU internal market or free competition rules.[908] The same reasoning applies to Article III-122, all the more so if we consider that before the ratification of the Lisbon Treaty, the Commission announced that it would refrain from using the new legal base,[909]thus avoiding possible frictions with the Member States.

2.3 Conclusions

The drafting of the Constitutional Treaty has not only witnessed the reincarnation of Article 6(3) TEU in Article I-5(1) CT, it has also provided the setting for the entry of a narrative of 'identity' and 'diversity' into EU primary law. National identities have not only entered the preamble to the Constitutional Treaty but also made their way from the General Provisions, where they resided until then, to the regulation of the SGEIs. And when it came to the Charter, full account was to be taken *of national laws and practices*.

The same applies to 'diversity', which not only became the motto of the Union but with Article I-3(3) CT also part of its objectives. The Union was now required to respect its cultural and linguistic diversity. Moreover, with

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[907] Manuel López Escudero, 'Artículo 36. Acceso a los servicios de interés económico general' in Araceli Mangas Martín (ed), *Carta de los Derechos Fundamentales de la Unión Europea. Comentario artículo por artículo* (Fundación BBVA 2008).

[908] López Escudero, 'Artículo 36. Acceso a los servicios de interés económico general' .

[909] Szyszczak, 'Article 36 Access to Services of General Economic Interest' 36.19.

the *constitutionalisation* of Declaration No 11 to the Amsterdam Treaty, establishing the Union's duty to respect the status of churches and non-confessional organisations, as well as of the Protocol on animal welfare, religious and cultural diversity in particular gained in recognition. In both cases, however, the diversity is dependent on the Member State.[910] As with Article 22 CFREU and the cultural competence, it is a diversity over which essentially the Member States have the last word.

3. The Lisbon Treaty

Following a period for reflection, clarification and discussion that had lasted for over two years,[911] on 13 December of 2007, the Heads of State and Government of the Member States signed the Treaty amending the

[910] Tawhida Ahmed, 'The Treaty of Lisbon and beyond: the evolution of EU minority protection?' [2013] European Law Review 30, at 47 et seq.

[911] C.f. Jean-Claude Juncker's declaration of 17 June 2005, 'Secondly, we have taken note with regret – with a heavy heart as I said the other day – of the French and Dutch rejection of the draft Constitutional Treaty. The questions and issues raised during the debates in the Netherlands and France, and in other countries too, and the fears expressed, mean that we cannot continue as if nothing had happened. This leads us to think that a *period for reflection, clarification and discussion* is called for both in the countries which have ratified the Treaty and in those which have still to do so. During this period, changes should be seen in all these countries in the European Union's institutions, the Commission, the European Parliament, the Council and the Member States, civil society, management and labour, national parliaments, political parties and other players.', available at http://www.eu2005.lu/en/actualites/communiques/2005/06/16jclj-ratif/index.html (last checked 4 August 2014). For an assessment of the reflection period: Nicolás Mariscal Berastegui, 'De la ratificación fallida de la Constitución al Tratado de Lisboa' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa. La salida de la crísis constitucional* (Iustel 2008); Anna Niemann, Sonja Ana Luise Schröder, and Meredith Catherine Tunick (eds), 'Recovering from the Constitutional Failure. An Analysis of the EU Reflection Period,' June 2008, ZEI Discussion Papers.

Treaty on European Union and the Treaty establishing the European Community, more commonly known as the Lisbon Treaty.

It appears to have been the result of the interplay of various factors[912] that permitted the Lisbon Treaty to overcome the *impasse* into which the negative referenda on the Constitutional Treaty in France and the Netherlands had manoeuvred the European project. It was the result of a swift and technical IGC, which stuck to the mandate afforded to it by the June 2007 European Council, and may be classified as a *simplified complex treaty*.[913] Although numerous elements of progress that had been reached through the failed Constitutional Treaty were maintained, the slightest allusion to anything potentially of a *constitutional* nature was expunged from the treaty.

As we will see, the Lisbon Treaty proceeds to incorporate protective reflexes of the Member States against an irreversible process of unification. Article 4(2) TEU, which now enshrines the identity clause, is an example hereof. Yet this is by no means the only evidence[914] of what some consider

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[912] Essentially the strong political legitimacy of the Constitutional Treaty, its contributions reflecting existing social claims, the weight of the ratifications of the Treaty, the mediation skills of the German presidency coupled with finding a French solution to the 'French problem', c.f. Francisco Aldecoa Luzarraga, 'El Tratado de Lisboa como salida al laberinto constitucional' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa. La salida de la crísis constitucional* (Iustel 2008) at 45 et seq.

[913] José Martín y Pérez de Nanclares, 'Prólogo' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa. La salida de la crísis constitucional* (Iustel 2008) at 23.

[914] For more examples hereof, Amparo Alcoceba Gallego, 'El Tratado de Lisboa: ¿menos Europa, más Estado?' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa. La salida de la crísis constitucional* (Iustel 2008).

the stubborn obsession of implanting the national or state dimension into the treaty.[915]

3.1 Article 4(2) TEU (finally)

The Christophersen clause that had been the subject of such lively debates during the Convention found, under the Lisbon Treaty revision, its way into the fourth article of the TEU, a provision headed 'the Relations between the EU and the Member States' which reads as follows:

> *'1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.*
>
> *2. 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.*
>
> *3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

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[915] José Martín y Pérez de Nanclares, 'La nueva regulación del régimen de competencias en el Tratado de Lisboa: especial referencia al control del principio de subsidiariedad' in José Martín y Pérez de Nanclares (ed), *El Tratado de Lisboa. La salida de la crísis constitucional* (Iustel 2008) at 279.

> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'*

The wording of the national identity clause – now enshrined in Article 4(2) TEU – has been taken over from the Constitutional Treaty almost without any modification. The only difference between Article I-5(1) CT and Article 4(2) TEU lies in an additional third sentence emphasising that '[i]n particular, national security remains the sole responsibility of each Member State'. The sentence had been added during the 2007 IGC[916] and is indicative of the Member States' obsession with leaving no doubt that certain areas were taboo to EU action, since the Union's respect for the Member States safeguarding national security was already an element of Article I-5(1) CT.

Apart from this addition to the second paragraph of Article 4 TEU, the Lisbon Treaty revision also led to the provision on the relationship between the Union and its Member States undergoing a change as a whole. Indeed, comparing Article I-5 CT and Article 4 TEU, it appears that a first paragraph, which was absent from Article I-5(1), was inserted into the provision as Article 4(1) TEU, namely the presumption of competence in favour of the Member States. The first paragraph thus refers to the principles on the distribution and limits of competences laid down in Article 5 TEU and confirms that the residual powers – those not conferred upon the Union – remain with the Member States.

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[916] von Bogdandy and Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs' at 710.

This is a principle characteristic of federal constitutions, but which made its way into the EU Treaties for the first time [917] and which strengthens the Member States' 'State consciousness', their being the Masters of the Treaties.[918] Interestingly, as Barbara Guastaferro notes, when looking at the amendment implemented with the 2007 IGC through the glasses of the Convention debate, the Treaty of Lisbon strengthens a proposal that Mr Christophersen himself had identified as one of the four models providing a solution to the competence creep problem.[919] She then pursues the notion that according to such reading, Article 4 TEU would provide 'two solutions to the same problem: paragraph 1 endorses Mr Christophersen's *Constitutional Model*, i.e. the idea to introduce a provision enshrining 'the principle of presumed Member States' competence': paragraph 2 endorses Mr Christophersen's *Union Model*, i.e. the idea of expanding the identity clause so to clarify what are the core responsibilities of the Member States to be protected'.[920] She thus perceives the national (constitutional) identity clause as enshrined in Article 4(2) TEU as the type of provision Working Group V had envisaged against the opposition of the Commission: a general rule on the exercise of competences protecting certain core responsibilities of the Member States.[921]

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[917] Blanke, 'Article 4. [The Relations Between the EU and the Member States]' 5.

[918] Blanke, 'Article 4. [The Relations Between the EU and the Member States]' 6.

[919] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 288 et seq.

[920] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 289.

[921] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' 289.

3.2 The reflexes of re-nationalisation

If 'subsidiarity' was the word that had saved Maastricht, the words that may be regarded as having saved Lisbon are above all those of which the Constitutional Treaty had been purged, i.e. those bearing the slightest relationship with *anything constitutional*. And yet apparently this expiatory cleanse of the treaty text was not deemed sufficient to calm the troubled waters of European integration. The negative result of the Irish referendum, which according to the Eurobarometer poll was intimately linked to the fear of loss of 'national identity'[922] is indicative of this circumstance and so are also the reflexes of re-nationalisation to be found in the Lisbon treaty.

There are a number of modifications as regards the Constitutional Treaty introduced by the Lisbon Treaty that may be construed as such reflexes of re-nationalisation. Some of these modifications were deemed to be of a symbolic nature – in the fashion of the elimination of constitutional language –, whilst others were afforded full legal effects.

Among these innovations introduced by the Lisbon Treaty, one that is particularly worthy of mention is the banishment of the principle of primacy from the treaty text. The principle, which was enshrined in Article I-6 CT, was relegated to Declaration No 17 concerning primacy. Even though the Declaration confirms the assumption of the CJEU's settled case law on primacy, thus suggesting that the Member States did not intend to challenge the status quo, the fact that an explicit reference to the primacy principle in the treaty text manifestly provoked feelings of unease is illustrative of a certain distrust towards the CJEU.

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[922] Youri Devuyst, 'The Constitutional and Lisbon Treaties' in Erik Jones and others (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) at 165.

Furthermore, in relation to the thorny issues of competences, at least two innovations introduced by the Lisbon Treaty are indicative of the Member States' concerns over the 'competence creep'. The first of these innovations clearly bears witness to the Member States' will to 'bring competences home': With the Lisbon Treaty revision, the Treaty on European Union explicitly contemplates in its Article 48(2) TEU the possibility for the Member States not only to *increase* but also to *reduce* EU competences.[923] The second innovation in the field of competences concerns the principle of subsidiarity. The Constitutional Treaty had already contemplated the inclusion of a new Protocol No. 1 on the role of national parliaments in the European Union and had proceeded to an overhaul of the Amsterdam Protocol No. 2 on the application of the principles of subsidiarity and proportionality, which enabled the national parliaments to participate in reviewing the conformity of EU legislative proposals with the subsidiarity principle. The Lisbon Treaty strengthened the national parliaments' role in this so-called 'Early Warning System' (EWS).[924]

Furthermore, in the fields of social policies and fundamental rights, two protocols that were annexed to the Lisbon Treaty are worth mentioning. Firstly, the regulation of the Services of General Economic Interest that had already whipped up national concerns during the drafting of Article 36 CFRUE and the redrafting of Article 16 TEC (Article III-122 CT) had not forfeited any of its potential for controversies. As already mentioned, in an effort to dissipate Member State concerns, the Commission had even announced before the ratification of the Lisbon Treaty that it would refrain

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[923] Alcoceba Gallego, 'El Tratado de Lisboa: ¿menos Europa, más Estado?' at 92 et seq.

[924] Martín y Pérez de Nanclares, 'La nueva regulación del régimen de competencias en el Tratado de Lisboa: especial referencia al control del principio de subsidiariedad' at 278 et seq. For a detailed analysis of the Early Warning System, see Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional theory and empirical reality* (Routledge 2012).

from using the new legal base enshrined in Article 14 TFEU.[925] It appears that this was not sufficient to put the Member States at ease since in spite of these efforts, Protocol No. 26[926] on Services of General Interest was annexed to the Treaties. The protocol clarifies that Article 14 TFEU is based on shared values between the Union and the Member States including, among others, the 'essential role and the wide discretion of national, regional and local authorities' in the field of SGEIs.[927]

Finally, at the very end of the IGC, the United Kingdom, afterwards joined by Poland, requested a protocol on the application of the Charter to be annexed to the Treaties. [928] The resulting text, Protocol No. 30 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom, far from *clarifying* the application of the Charter in these two

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[925] Szyszczak, 'Article 36 Access to Services of General Economic Interest' 36.19..

[926] See on Protocol No. 26, Bauby, 'From Rome to Lisbon: SGI's in Primary Law' at 32 and Szyszczak, 'Article 36 Access to Services of General Economic Interest' 36.20 et seq.

[927] Article 1 of Protocol No. 26 reads as follows: 'The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.'

[928] Piris, *The Lisbon Treaty: a legal and political analysis* at 160.

Member States,[929] cast serious doubt on whether it constituted an 'opt-out' that removed the binding effect of the Charter in relation to Poland and the UK.[930] This is a thorny question, which even five years after the entry in force of the Lisbon Treaty remains controversial.[931] According to Vojtech Belling's account, British and Polish motivations for requesting the adoption of Protocol No. 30 were of a different kind: Whereas the British position reflected concerns over a Court of Justice being overzealous in the application of the Charter and the possible impact this might have in the sphere of social rights, the Polish position arose from doubts on the possible implications of the Charter on value-sensitive issues, such as same-sex marriage.[932]

4. Conclusions

It has been argued that even though substantively the Lisbon Treaty may have incorporated many elements of the failed Constitutional Treaty, its narrative points towards the Member States' concerns over a more State-less Europe.[933] This is true when it comes to national constitutional identity clauses insofar as the only difference between Article I-5(1) CT and Article

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[929] Recital No 8 of the preamble to Protocol No. 26 states that this, i.e. clarification of the application of the Charter, was what the UK and Poland wished to accomplish with the Protocol.

[930] Piris, *The Lisbon Treaty: a legal and political analysis* para at 160 et seq.

[931] See, for example, the recent editorial in connection with a judgment of the High Court of England and Wales referring to the effects of Protocol No. 30, Panos Koutrakos, 'Does the United Kingdom have a general opt out from the EU Charter of Fundamental Rights?' [2014] European law review 1–2.

[932] Vojtech Belling, 'Supranational Fundamental Rights or Primacy of Sovereignty?' (2012) 18 European Law Journal 251, at 256 et seq.

[933] Alcoceba Gallego, 'El Tratado de Lisboa: ¿menos Europa, más Estado?' .

4(2) TEU lies in an additional third sentence emphasising that '[i]n particular, national security remains the sole responsibility of each Member State'. It is also true for the various manifestations of reflexes of re-nationalisation that I have explored. What stands out among these manifestations is the strengthening of the role of the national parliaments in the Early Warning System. The procedure under the EWS has been repeatedly used to by national (regional) parliaments to admonish encroachments by EU legislative proposals upon the national identity of the Member State concerned.[934]

[934] For a detailed study of cases, see Guastaferro, 'Coupling national identity with subsidiarity concerns in national parliaments' reasoned opinions' .

CONCLUSIONS TO PART II: SPEAKING THE LANGUAGE OF IDENTITY

The survey of the treaty revisions that have witnessd the birth and growth of the 'identity clause' permits us to reach the following conclusions as regards the contextualisation of Article 4(2) TEU.

First of all, when it comes to scope and objectives of the 'identity clause', there have been significant changes throughout the different treaty revisions, the breaking point being the drafting of Article I-5(1) CT, where the clause was afforded a whole new purpose. While Article F(1) TEU appears to have been incorporated into the Maastricht Treaty out of concerns over the loss of statehood or out of opposition to the reference to the federal nature of the Union that was supposed to be included in the Treaty, the deletion of the reference to the *democratic systems of government* on the occasion of the Amsterdam revision seems to have responded to editorial considerations – being perceived as superfluous and thus worthy of being dropped due to the TEU's major commitment to the principles of liberty, democracy, respect for human rights and fundamental freedoms. In Nice, the Member States' national identities found their way into Recital No 3 of the Preamble to the Charter of Fundamental Rights. Here, the reference to national identities acquired a more constitutional flavour since it included the Member States' organisation of their public authorities at national, regional and local levels.

The revised national identity clause in the Constitutional Treaty would incorporate the reference to the Member States' local and regional self-government. Article I-5(1) CT would also respond to a whole new purpose as compared to its predecessor; a survey of the preparatory works leaves no doubt that the intended purpose of the provision was to counteract the impact that the Community's use of functional powers had on certain policy

fields of the Member States that the latter perceived as being identity-relevant. The clause was not intended as Europeanised counter-limit. The Lisbon Treaty revision did not challenge this underlying purpose.

Secondly, I have identified specific treaty provisions or mechanisms that were either linked to national identity by reference or provided for the preservation of diversity among the Member States and followed their evolution throughout the treaty revisions. This exercise permitted me to identify two interesting processes. The first corresponds to the Member States' pulling the emergency brake on the Commission and Court of Justice, by the inclusion of Protocols – a reaction of Member States concerned by the ECJ's adverse case law – and of new competences for the Union in order to regain control over the corresponding policy fields. As Piet Eeckhout puts it, '[t]he negotiation of the Maastricht Treaty itself was a delicate balancing act between expansion and limitation (or even contraction), in particular as regards amendments to the EC Treaty: subsidiarity was introduced, and many of the provisions on so-called new competences in effect merely codified existing practice and aimed to ringfence that by excluding harmonization of laws.' [935]

The second process describes the flowing of a 'language of identity' into EU primary law. A process which reached its peak with the Constitutional Treaty where national identities were not only protected in Article I-5(1) CT, but also figured prominently in the preamble to the Constitutional Treaty *and* were to be taken into account when it came to the regulation of the SGEIs.

[935] Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' at 981.

PART III WHAT THE COURTS SAY ON IDENTITY

Chapter 6 The Member States' Constitutional Courts

A number of constitutional courts of the EU Member States have so far made reference to either their national constitutional identity or the national constitutional identity clause enshrined first in the failed Constitutional Treaty and then in the Lisbon Treaty. With currently 28 Member States in the European Union, a thorough study of the stances of national constitutional courts on that subject would require the analysis of the case law of the constitutional or supreme courts of every Member State. Since such an analysis would be excessively lengthy, I have selected key decisions from two constitutional courts, namely the German *Bundesverfassungsgericht* and the Spanish *Tribunal Constitucional*, thereby allowing me to examine different ways of dealing with national constitutional identity.

Why Germany and Spain? There are various reasons behind this selection: First of all, the existence in both jurisdictions of decisions dealing with 'constitutional identity'; the recent recourse to the preliminary ruling procedure by both Courts; and, most importantly, the fact that the responses both Courts offer differ from each other, thus providing us with two different perspectives of constitutional courts on 'constitutional identity'.

1. The Bundesverfassungsgericht

Germany has always had a difficult relationship with its national identity. After Nazi-Deutschland feelings of national identity had ceased to be taken as a matter of course[936] and up until the resolution of the *Deutsche Frage*,

[936] Christian Graf von Krockow, 'Die fehlende Selbstverständlichkeit' in Werner Weidenfeld (ed), *Die Identität der Deutschen* (Bundeszentrale für politische Bildung

the question on what it meant to be German always included the question as to whether the term *German* was limited to the Federal Republic of Germany or whether it also included the German Democratic Republic.[937] The division of Germany also gave rise to the legal debate on the continuity of the German *Reich*, a debate in which the *Bundesverfassungsgericht* resorted – for the first time – to the terminology of identity (in its objectivist meaning)[938] by asking whether the Federal Republic was *identical* to the German *Reich*.[939] And if we move to constitutional identity, things do not get easier, especially for German jurists. The constitutional identity concept in German *Staatslehre* is often traced back to the Republic of Weimar and

1983); Armin von Bogdandy refers to that the crimes committed by Nazi- Germany as well as the subsequent division of the German nation into two hostile states has weakened, undermined, and destroyed many traditional contents of German identity, von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' at 163. See also the results of the 'Fachtagung der Bundeszentrale für politische Bildung' published in *Die Frage nach der deutschen Identität* (Bundeszentrale für Politische Bildung 1985).

[937] C.f. Werner Weidenfeld (ed), *Die Identität der Deutschen* (Bundeszentrale für politische Bildung 1983), the collection essentially deals with the impact of the existence of two Germanies on the 'Identity of the Germans'; Weidenfeld sketches the importance of that question from the very outset, see Werner Weidenfeld, 'Einführung' in Werner Weidenfeld (ed), *Die Identität der Deutschen* (Bundeszentrale für politische Bildung 1983) at 10 et seq.

[938] See *supra* at pp 16 et seq.

[939] BVerfG, 2 BvF 1/73, 31.7.1973, BVerfGE 36, 15 et seq. The Constitutional Court established, however, that such identity was only partial in terms of territory, inaugurating, as Doehring states, the notion of 'Teilidentität' (partial identity), Doehring, 'Die nationale 'Identität' der Mitgliedstaaten der Europäischen Union' at 264. For a critique of the Court's reasoning, see Rudolf Bernhardt, 'Die deutsche Teilung und der Status Gesamtdeutschlands' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 1 (C.F. Müller Juristischer Verlag 1987) at 336 et seq.

more specifically to Carl Schmitt and his 1928 '*Verfassungslehre*'.[940] Schmitt's spirit – or spectre – has been a regular guest in the German debate on European integration, sovereignty and identity, as Ingolf Pernice argues in his critical assessment of the *Bundesverfassungsgericht*'s Maastricht judgment.[941] So, from the very outset, it suffices to say that the subject of *identity*, whether it be *national* or *constitutional*, is a rather thorny issue for Germans and perhaps even more so for German jurists.

The numerous implications of the concept of constitutional identity in German *Staatslehre* provide, at least to some extent, an explanation for the uproar[942] caused by the German Constitutional Court's Lisbon ruling[943] and its allegedly defensive posture towards the European integration project. Although the rather recent *Lissabon-Urteil* constitutes the *Bundesverfassungsgericht*'s most prominent claim to the preservation of the identity of the German constitution, the Court is in the unique position among its fellow EU constitutional courts of being able to look back on 40 years of case law on identity preservation in the framework of European integration. Indeed, it was as early as in 1974 that the German Federal Constitutional Court made a first reference in the *Solange I* decision to the existence of an identity of the *Grundgesetz* by referring to the fundamental

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[940] See Franz C. Mayer, 'L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande' in Laurence Burgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Pedone 2011) at 77.

[941] Ingolf Pernice, 'Carl Schmitt, Rudolf Smend und die europäische Integration' (1995) 120 Archiv des öffentlichen Rechts 100–120.

[942] References see below at n 985.

[943] BVerfG, 2 BvE 2/08, 30.06.2009, *Lisbon*, *BVerfGE* 123, 267; official English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (last checked 26 October 2014).

structures of the German Constitution on which its *identity* relies.[944] This reference proves somewhat surprising since, as Franz C. Mayer emphasises, the *Grundgesetz* does not happen to mention such identity.[945] Mayer also suggests that the motivations behind the incorporation of this concept in the Court's narrative reside in the idea of defence and protection of the German constitution.[946] It seems to be more than a mere coincidence that the concept of identity appeared – and, as we will see, flourished – in the realm of cases dealing with European integration, which bore the potential to threaten that identity.

In addition, one must bear in mind that particularly in the context of European integration, the Federal Constitutional Court also appears as a political actor pursuing both institutional and substantive interests.[947] While the Court seeks to institutionally maintain the pivotal status it enjoys domestically as well as its influence in the European order,[948] it also pursues a substantive interest in preserving the high level of fundamental

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[944] BVerfG, BvL 52/71, 29.5.1971, *Solange I*, BVerfGE 37, 271, at 279*;* English translation: *Decisions of the Bundesverfassungsgericht (Federal Constitutional Court) Federal Republic of Germany*, vol. I/1 (Nomos 1992) at 270 et seq.

[945] Mayer, 'L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande' at 63.

[946] Mayer, 'L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande' at 63.

[947] Mehrdad Payandeh, 'Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9, at 32.

[948] On the irruption of domestic and international actors in a space occupied by the Federal Constitutional Court and the case law indicative hereof, see Maribel González Pascual, *El Tribunal Constitucional alemán en la construcción del espacio europeo de los derechos* (Civitas Thomson Reuters 2010) chap. 2 (at 67 et seq). See also Weiler's critique of 'a misplaced Institutionalego and a silly status complex' in J.H.H. Weiler, 'Editorial: Judicial Ego' (2011) 9 International Journal of Constitutional Law 1–4.

rights protection under the German Basic Law.[949] This provides an explanation for the fact that the Federal Constitutional Court's relationship with the European Court of Justice has revealed itself as anything but an easy one.

Given that the *Bundesverfassungsgericht* may be led by interests beyond the guardianship of the Basic Law when handing down decisions in the context of European integration, I will examine the Court's (changing) understanding of identity by analysing its key decisions on this matter. Most of these key decisions share the common feature that they proclaim the willingness of the Court to review the compatibility of legal acts of EU institutions with the German constitution. While *Solange I* inaugurated the possibility of a fundamental rights review, Maastricht saw the emergence of the concept of a *derailing act*[950] entailing an *ultra vires* review, and finally *Lisbon* gave birth to the identity review. As Payandeh[951] convincingly argues, all three kinds of review share a similar coming into existence and further development – and I shall come back to this circumstance at a later stage –, which indicates a connection between them. Furthermore, their scope of review seems to overlap at times –particularly in terms of considering the core of fundamental rights as part of constitutional identity.

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[949] Payandeh, 'Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice' at 32 et seq.

[950] This translation of the concept 'ausbrechender Rechtsakt' was taken fromChristian Tomuschat, 'The Defence of National Identity by the German Constitutional Court' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration*, 2013 at 210.

[951] Payandeh, 'Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice' et 28 et seq.

Nevertheless, for reasons of space and clarity, I will focus on the development of the concept of constitutional identity by the *Bundesverfassungsgericht*. For this purpose, I will divide the analysis into three sections, arguing that the Court's understanding of the concept of constitutional identity underwent three significant changes: In its first *embryonic* form, constitutional identity encompasses basic parts of the Constitution, essentially fundamental rights, thereby rendering it difficult to bypass formal constitutional amendment procedures in the context of European integration. In a second step, the Court establishes a link between the German 'eternity clause' and the concept of constitutional identity making it resistant to constitutional amendments. Finally, in a last step (as for now), it traces a neat distinction between a German constitutional identity and the concept enshrined in Article 4(2) TEU, arguing that a review performed by the Court of Justice would only be admissible for the latter, but not for the former.

1.1 Embryonic identity: Resistance to constitutional mutations (Solange I and II)

The *Bundesverfassungsgericht*'s saga on constitutional identity finds its origins, as suggested earlier, in the *Solange I* judgment. This decision was rendered on 29 May 1974 in relation to a *fairly trivial issue*[952] but also in a context in which the German Constitutional Court was under the impression that the ECJ was only interested in the proper functioning of the common market whereas fundamental rights lacked protection at Community level. In its decision, the Court dealt precisely with the question whether fundamental rights of the German Constitution could be invoked against

[952] As Tomuschat refers to the circumstances of the case, i.e. forfeiture of a deposit an exporter had been required to lodge, in 'The Defence of National Identity by the German Constitutional Court' at 208.

secondary Community law. The answer (namely that fundamental rights under the German Constitution could be invoked before the *Bundesverfassungsgericht* against secondary Community law *so long as* the Community lacked a codified catalogue of fundamental rights, the substance of which was reliably and unambiguously fixed for the future in a manner comparable to that of the *Grundgesetz*) was given in an *angry* tone but was generally welcomed as a wake-up call conveying the urgent message of inadequate fundamental rights protection at EEC level.[953]

It is in this decision, in an *obiter dictum* founded on Article 24(1) of the *Grundgesetz* (or the Basic Law or 'BL'), the 'integration-clause', that the Court introduces for the first time the notion of identity of the Constitution in the following terms:

> *'Article 24 of the Basic Law deals with the transfer of sovereign power to interstate institutions. This cannot be taken literally. Like every constitutional provision of a similar functional nature, Article 24 of the Basic Law must be understood and construed in the overall context of the whole Basic Law. That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law.'*[954]

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[953] Again, in Tomuschat's words, who asks himself whether an institution can be *angry*, Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 208.

[954] BVerfG, BvL 52/71, 29.5.1971, *Solange I*, BVerfGE 37, 271 (at 279): '*Art. 24 GG spricht von der Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen. Das kann nicht wörtlich genommen werden. Art. 24 GG muß wie jede Verfassungsbestimmung ähnlich grundsätzlicher Art im Kontext der Gesamtverfassung verstanden und ausgelegt werden. Das heißt, er eröffnet nicht den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung, nämlich durch die Gesetzgebung der zwischenstaatlichen Einrichtung zu ändern.*' The English translation of the passage is taken from Donald P. Kommers and Russell A. Miller, *The Constitutional jurisprudence of the Federal Republic of Germany* (Duke University Press 2012) at 326 et seq.

Subsequently the Court defines the part dedicated to the protection of fundamental rights as an essential element of this basic structure of the German Constitution that may not be relinquished. Article 24 BL only permits these essential elements to be qualified under certain limited conditions.[955]

Three conclusions may be drawn from the Court's reasoning on constitutional identity. Firstly, as Tomuschat usefully notes, 'although the decision was framed in broad terms, talking generally about the identity of the Basic Law as the constitution of the Federal Republic of Germany, it was essentially confined to human rights as the main component of that identity.'[956] Secondly, the Court conceives 'constitutional identity' as some kind of superior constitutional law serving the purpose of defending the German constitutional order against the exigencies posed by the primacy of Community law.[957] Thirdly, this defence of the basic structures of the Constitution is directed primarily against transfers of sovereign powers that could affect the identity of the Constitution *without a formal constitutional amendment having taken place.* Even though the Court speaks of the fundamental rights catalogue as an essential element of the structure of the Constitution that may not be *relinquished* (*unaufgebbar*), it does not

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[955] BVerfG, BvL 52/71, 29.5.1971, *Solange I*, BVerfGE 37, 271 (at 280): '*Ein unaufgebbares, zur Verfassungsstruktur des Grundgesetzes gehörendes Essentiale der geltenden Verfassung der Bundesrepublik Deutschland ist der Grundrechtsteil des Grundgesetzes. Ihn zu relativieren, gestattet Art. 24 GG nicht vorbehaltlos.*'

[956] Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 208.

[957] Mayer, 'L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande' at 65.

foreclose constitutional amendments in this matter. Constitutional identity has not yet been equated to the eternity clause.[958]

Twelve years later, in its *Solange II* judgment,[959] known for revering the presumption regarding the lack of fundamental rights protection at Community level, the Court would reaffirm the conception of constitutional identity outlined in *Solange I*:

> *'The power conferred by Article 24(1) of the Basic Law, however, is not without limits under constitutional law. The provision does not confer the authority to surrender, by way of ceding sovereign powers to international institutions, the identity of the prevailing constitutional order of the Federal Republic. This identity consists of the Basic Law's framework, that is, its very structure. This limit applies in particular to legislative instruments of the international institution, which, perhaps as a result of a corresponding interpretation or development of the underlying treaty law, would undermine essential, structural parts of the Basic Law.'*[960]

The Court, however, continues this reasoning and adds:

> *'The constitution's essence, which cannot be disposed of by an Article 24 transfer of sovereign power, includes the basic framework of the constitutional order in force and the legal principles*

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[958] Or to be more precise Article 79(3) BL has not yet been declared applicable to Article 24(1) BL, and the Court has not yet erected the eternity clause as a barrier to European integration. The reference to basic structures is a rather broad one. SeeLerche, 'Europäische Staatlichkeit und die Identität des Grundgesetzes' at 138 with further refences to divergent positions among German academics.

[959] BVerfG, 2 BvR 197/83, 22.10.1986, *Solange II*, BVerfGE 73, 339; English translation: *Decisions of the Bundesverfassungsgericht (Federal Constitutional Court) Federal Republic of Germany*, vol. I/2 (Nomos 1992) at 613 et seq..

[960] BVerfG, 2 BvR 197/83, 22.10.1986, *Solange II*, BVerfGE 73, 339, at 375. English translation taken from Kommers and Miller, *The Constitutional jurisprudence of the Federal Republic of Germany* at 329.

> *underlying the Basic Law's fundamental rights guarantees. Subject to some conditions, Article 24(1) of the Basic Law permits these legal principles to be guaranteed according to their context. If sovereign power is transferred to an international institution pursuant to Article 24(1), and if that international institution has the power to encroach upon the essential content of the fundamental rights recognised by the Basic Law, then it is necessary that the international institution ensure the substance and effectiveness of those rights in a form and scope essentially similar to the unconditional protection they enjoy under the Basic Law.'*[961]

Tomuschat again emphasises that the Court, notwithstanding a wide focus of scrutiny, essentially reduced the constitutional identity to fundamental rights.[962] Mayer, on the other hand, notes that the reasoning as regards constitutional identity and its justification do not appear logical throughout. Indeed, the commentator points out that the Court holds on one hand that constitutional identity implies unique elements of its constitutional order whilst on the other appearing to accept that these unique elements of German constitutional identity may as well be protected at Community level, a circumstance that renders these elements not so unique after all.[963]

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[961] BVerfG, 2 BvR 197/83, 22.10.1986, *Solange II*, BVerfGE 73, 339, at 375. English translation taken from Kommers and Miller, *The Constitutional jurisprudence of the Federal Republic of Germany* at 329.

[962] Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 208.

[963] Mayer, 'L'identité constitutionnelle dans la jurisprudence constitutionnelle allemande' at 66.

1.2 Eternal identity: Resistance to constitutional amendments (Maastricht and Lisbon)

In light of the abundant references to 'national identity' during the debate over the ratification of the Maastricht Treaty in Germany – be it in parliament or on the streets –[964] as well as the incorporation of the national identity clause into EU law, one would have expected the *Bundesverfassungsgericht* to seize the opportunity to further elaborate its concept of identity of the Constitution that it had inaugurated two decades earlier[965] when being called upon to decide on the constitutional complaints lodged against the German Act of 28 December 1992 on the Treaty of 7 February 1992 on European Union and the Act of 21 December 1992 amending the Constitution.[966] Yet, the Court refrains from throwing the concept of constitutional identity back into the debate: It does not elaborate on, or indeed even mention, this concept. Despite this, the Maastricht-*Urteil* remains relevant when it comes to national constitutional identity.

First of all, the Court specifies limits to Germany's participation in the European integration process by declaring such participation subject to Article 79(3) BL. It thereby distinguishes between limits to the transfer of competences through treaty amendments, on the one hand, and barriers to the effects of EU secondary law, on the other – a distinction it had failed to make in the earlier *Solange I* and *Solange II* rulings, which were rendered

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[964] For an empirical study on nationalism, national identity, and patriotism see Blank, 'Wer sind die Deutschen? Nationalismus, Patriotismus, Identität- Ergebnisse einer empirischen Längschnittstudie' .

[965] See *supra* at n 944.

[966] BVerfG, 2 BvR 2134, 2159/92, 12.10.1993, *Maastricht*, *BVerfGE* 89, 155¸ English translation printed in (1994) 1 *Common Market Law Reports*, 57 et seq.

under Article 24 BL.[967] It also reiterates the idea of a superior, integration-proof constitutional law, which it now associates, albeit without terming it 'constitutional identity', with Article 79 BL.[968] Equating the limits to the transfer of competences with the limits to amendments to the *Grundgesetz* was to be expected since the new Article 23(1) BL,[969] on whose constitutionality the Court was called to decide, included an express reference to Article 79(3) BL.

In order to give an account of the reasoning of the German Constitutional Court when establishing the limits to European integration, a brief reference to the boundaries of Article 23(1) BL appears necessary. The provision, commonly referred to as the *Europa-Artikel*, superseded Article 24 BL in European Union matters and constitutes a 'structure-securing clause'[970]

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[967] Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' (2013) 14 German Law Journal 75, at 81.

[968] BVerfG, 2 BvR 2134, 2159/92, 12.10.1993, *Maastricht*, *BVerfGE* 89, at 179.

[969] Article 23(1) BL reads: 'With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.' Translation taken from Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' at 79.

[970] In the words of the Joint Constitutional Commission 'Struktursicherungsklausel', Gemeinsame Verfassungskommission, 'BT-Drucksache 12/6000 Bericht der Gemeinsamen Verfassungskommission' at 20 et seq. On the effects of the German 'Struktursicherungsklausel', see Manfred Zuleeg, 'Die Aufteilung der Hoheitsgewalt zwischen der Europäischen Union und ihren Mitgliedstaaten aus der Sicht der deutschen Verfassung,' 1998, FCE at 7 et seq. For a European perspective on clauses such as Article 23(1) BL, see Pernice who identifies 'Struktursicherungsklauseln' in

conditioning Germany's participation in the EU upon the Union's commitment to democratic, social and federal principles, to the rule of law, to subsidiarity and to a certain level of fundamental rights protection. It also codified some of the principles that had been spelled out by the *Bundesverfassungsgericht* in its earlier rulings,[971] such as the requirements as to the fundamental rights protection at Union level set forth in the *Solange* decisions.

Limits in addition to those spelled out in the first two sentences of Article 23(1) BL also include those stated in the provision's third sentence by cross-referencing the second and third paragraphs of Article 79 BL.[972] While the requirements encapsulated in Article 23(1)(1) BL are to be promoted for the EU, Article 23(1)(3) BL is aimed at securing the structural principles of the *Grundgesetz* set forth in the eternity clause, implying that these limits assume a 'German meaning'.[973] The eternity clause in turn refers to the inadmissibility of constitutional amendments affecting the division of the *Bund* into *Länder* as well as those affecting the principles laid down in Articles 1 and 20 BL, i.e. the guarantee of human dignity, the rule of law and democracy, as well as the social state and federal state principles.

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various Member States and argues that the interactions between these clauses and the common values enshrined in Article 2 TEU constitute a system of reciprocal constitutional stabilisation (*System wechselseitiger Verfassungsstabilisierung*), see Pernice, 'Der Schutz nationaler Identität in der Europäischen Union' at 203 et seq.

[971] Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' at 82.

[972] Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' at 76.

[973] Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' at 92.

These limits spelled out in Article 23(1)(3) BL are pivotal in the Federal Constitutional Court's reasoning on the conformity of new Article 23(1) BL with the electoral guarantees laid down in Article 38 BL: since Article 23(1)(3) BL applies the same limits to the transfer of sovereign powers to the EU as those applying to the amendment of the Constitution, this conditionality precludes the existence of a conflict between the democratic content protected by Article 38 BL and Article 23(1) BL.[974]

Furthermore, the lengthy considerations of the democratic legitimacy of the Union served as the basis for the Court's conception for defending the notion of constitutional identity developed in its Lisbon ruling.[975] The transfer of powers to the Union may not deprive the German *Bundestag*, upon which the German people confer democratic legitimacy, of tasks and powers of a 'substantial weight'.[976] This statement is preceded by one of the most controversial passages of the decision in which the Court justifies the States' need to retain sufficient areas of significant responsibility of their own. It is in these areas that a people needs to express itself in order to give legal expression to those matters that tie that people together under conditions of relative spiritual, social and political homogeneity.[977] The *Bundesverfassungsgericht* received harsh criticism for invoking the

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[974] BVerfG, 2 BvR 2134, 2159/92, 12.10.1993, *Maastricht*, *BVerfGE* 89, at 179.

[975] Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 209 et seq.

[976] BVerfG, 2 BvR 2134, 2159/92, 12.10.1993, *Maastricht*, *BVerfGE* 89, at 186.

[977] 'Die Staaten bedürfen hinreichend bedeutsamer eigener Aufgabenfelder, auf denen sich das jeweilige Staatsvolk in einem von ihm legitimierten und gesteuerten Prozeß politischer Willensbildung entfalten und artikulieren kann, um so dem, was es - relativ homogen - geistig, sozial und politisch verbindet *(vgl. hierzu H. Heller, Politische Demokratie und soziale Homogenität, Gesammelte Schriften, 2. Band, 1971, S. 421 [427 ff.])*, rechtlichen Ausdruck zu geben.' BVerfG, 2 BvR 2134, 2159/92, 12.10.1993, *Maastricht*, *BVerfGE* 89, at 186.

Schmittian idea of homogeneity of the people,[978] and above all, as Weiler exclaims, for choosing '[…] Hermann Heller, Socialist, Anti-fascist, Jew, critic of Schmitt, as the only authority for the proposition of homogeneity of Volk',[979] very likely an intentional misquotation to avoid this passage being linked to Schmitt's controversial homogeneity.[980] This idea of requiring the *Bundestag* to retain own responsibilities and competences of substantial political importance paired with the necessity of the German State being left sufficient space for its own citizens to shape their living conditions in certain areas, i.e. to retain, to a certain extent, specific competences, would be further developed in the subsequent *Lisbon* ruling where these reserved areas were further detailed.

But when it comes to identity preservation, the Karlsruhe Court did not limit itself to setting the bases for its conception for the defence of German constitutional identity. It also uses the newly incorporated Article F(1) TEU enshrining the Union's duty to respect its Member States' national

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[978] Pernice, 'Carl Schmitt, Rudolf Smend und die europäische Integration' at 103 et seq; Joseph H. H. Weiler, 'The State 'über alles' Demos, Telos and the German Maastricht Decision,' 1995, Jean Monnet Working Papers.

[979] Weiler continues and asks if that reference does 'not suggest a certain concern to find, shall we say, a Kosher seal of approval for this late Twentieth Century version, albeit anemic and racially neutral, of what in far away times fed the slogan of Blood (Volk) and Soil (Staat)?' Weiler, 'The State 'über alles' Demos, Telos and the German Maastricht Decision' .

[980] As suggested by Weiler in 'The State 'über alles' Demos, Telos and the German Maastricht Decision' ; for a very detailed analysis see Pernice, 'Carl Schmitt, Rudolf Smend und die europäische Integration' especially at 103 et seq; Armin von Bogdandy states on this matter that 'Heller disregards the integration function of substantial homogeneity. The factors for integration and identity (e.g., common language, history, and culture), which the Federal Constitutional Court considers as decisive, and on which it refers to Heller, are considered by Heller as phenomena of the past', see Armin von Bogdandy, 'The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe' (2005) 3 International Journal of Constitutional Law 295–315.

identities, which it interprets as a substitute for the Union's duty to respect its Member States' sovereignty. Indeed, the Court rules out the creation of a European state by underscoring that 'the Union Treaty takes account of the independence and sovereignty of the member-states, since it obliges the Union to respect the national identities of its member-states (Article F(1) of the Union Treaty)'.[981] Germany thus preserves its sovereignty, as demonstrated by the incorporation of Article F(1) into the TEU.

So the Maastricht decision's contribution to the jurisprudential construction of a German constitutional identity entailed determining that Article 23(1)(3) BL read in conjunction with Article 79(3) BL provided an integration-proof core and that in order to guarantee the democratic principle, competences should remain with the German State, thereby enabling the German people to shape their living conditions in determined areas. The Lisbon decision[982] would build on these lines of reasoning and convert the defence of Germany's 'constitutional identity' into its new watchword[983] in the realm of European integration. Or as Jo Eric Kushal

[981] English translation of BVerfG, 12.10.1993, *BVerfGE* vol. 89 printed in (1994) 1 *Common Market Law Reports*, 57 et seq, at 90.

[982] BVerfG, 2 BvE 2/08, 30.06.2009, *Lisbon*, *BVerfGE* 123, 267; official English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (last checked 26 October 2014).

[983] A word count shows that the word 'Identität' appears far more than 'Souveränität' in the text of the judgment (38 to 24 references). However, Murkens's calculation taking the root 'souverän' leads to 49 hits, see Jo Eric Khushal Murkens, 'Identity trumps integration: the Lisbon Treaty in the German Federal Constitutional Court' (2009) 48 Der Staat 517, at 520. The author stresses that the root 'souverän' was absent from Solange I and II and only marginally referenced in the Maastricht decision.

Murkens interprets the tenor of the Court's judgment: 'identity trumps integration'.[984]

If Karlsruhe's verdict over the Maastricht revision had caused major turmoil among legal scholars, its findings on the constitutionality of the Lisbon Treaty provoked a veritable uproar.[985] Since the circumstances of

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[984] Murkens, 'Identity trumps integration: the Lisbon Treaty in the German Federal Constitutional Court' at 523.

[985] The Lisbon judgment received mixed reviews, many of which were extremely critical. For negative reactions see, *inter alia*, Roland Bieber, 'An Association of Sovereign States' (2009) 5 European Constitutional Law Review 391–406; Christian Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen …' [2009] Zeitschrift für europarechtliche Studien 559–582; Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland !"' (2009) 10 German Law Journal 1241–1258; Jo Eric Khushal Murkens, 'Bundesverfassungsgericht (2 BvE 2/08): 'We want our identity back' - the revival of national sovereignty in the German Federal Constitutional Court's decision on the Lisbon Treaty' [2010] Public Law 1–17; Daniel Thym, 'Europäische Integration im Schatten souveräner Staatlichkeit : Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts' (2009) 48 Der Staat 559–586; Christian Tomuschat, 'Lisbon – Terminal of the European Integration Process ? The Judgment of the German Constitutional Court of 30 June 2009' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 251–282; Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 210 et seq.

The avalanche of negative reactions unleashed by the judgment was such that the Judge rapporteur of the case, Udo di Fabio, himself confronted – in his words – the defamations of the Second Senate stating that the latter was a hiding place for narrow-minded nationalists, fierce advocates of reverting to intellectual positions of the 19th century; Udo di Fabio, 'El mandato respecto a la integración europea y sus límites' (2012) 43 Revista española de derecho europeo 9–23. For positive reactions to the Lisbon judgment, see Klaus Ferdinand Gärditz and Christian Hillgruber, 'Volkssouveränität und Demokratie ernst genommen - Zum Lissabon-Urteil des BVerfG' [2009] Juristenzeitung 872–880; Frank Schorkopf, 'The European Union as An Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German Law Journal 1219–1240; Bernd Schünemann, 'Spät kommt ihr, doch ihr kommt: Glosse eines Strafrechtlers zur Lissabon-Entscheidung des BVerfG' (2009) 8 Zeitschrift für Internationale Strafrechtsdogmatik 393–396; Menéndez, 'Defensa (moderada) de la Sentencia Lisboa del Tribunal Constitucional alemán' .

the case are well known, I will limit myself to giving an account of the Court's findings on constitutional identity and whether they are in line with its prior case law.

The Court, in line with its previous pronouncements, conceptualises 'identity' as the identity of the *Grundgesetz* and not as the identity of the German nation.[986] The main innovation of the Lisbon ruling in terms of identity protection is that the Court finally crosses the Rubicon by *expressly* linking the concept of constitutional identity with the eternity clause.[987] The *Bundesverfassungsgericht* declares that '[t]he empowerment to embark on European integration permits a different shaping of political opinion-forming than the one determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inviolable constitutional identity (Article 79(3) of the Basic Law).'[988]

But just as in the Maastricht decision, the transfer of competences towards the Union is conditioned upon further limits:

> *'It is true that the Basic Law grants the legislature powers to engage in a far-reaching transfer of sovereign powers to the European Union. However, the powers are granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability*

[986] Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 211.

[987] BVerfG, 30.06.2009, English translation from the Court's website, at paras 216, 218, 219, 235, 240, 332, 339, 364.

[988] BVerfG, 30.06.2009, English translation from the Court's website, at para 219.

> *to politically and socially shape living conditions on their own responsibility.'*[989]

However, the Court then goes further than in Maastricht by – in what some commentators have dubbed *an unnecessary theory of necessary state functions* – defining five areas in which the State must retain sufficient competences: Criminal law (substantive and procedural), war and peace, public expenditures and taxation, welfare, and culture and religion.[990] The Court's listing of what it terms *essential areas of democratic formative action* has been understood as a 'detailing of the constitutional identity'[991],

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[989] BVerfG, 30.06.2009, English translation from the Court's website, at para 226.

[990] Halberstam and Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' at 1249 et seq. The Court stated the following: 'The European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.' BVerfG, 30.06.2009, English translation from the Court's website, at para 249.

[991] Walter, 'Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive' at 182.

the 'second variant of the identity review'[992] or as 'identity-relevant areas of regulation'[993] and has been received rather critically.[994] The critiques were differently motivated, although mainly centred on the Court's lack of justification of the areas it had selected.[995] Against this background, the selection has been seen as *a post-hoc argument in support of a preordained result*.[996] Various commentators have criticised the link between criminal law and culture.[997] In addition to repeating the *Kulturargument* in the field

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[992] Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen …' at 570.

[993] Gärditz and Hillgruber, 'Volkssouveränität und Demokratie ernst genommen - Zum Lissabon-Urteil des BVerfG' at 879.

[994] A notable exception to the generalised critique is the position defended by Gärditz and Hillgruber, 'Volkssouveränität und Demokratie ernst genommen - Zum Lissabon-Urteil des BVerfG' at 879 et seq. For a more detailed study of the different fields, see Hèctor López Bofill, 'What is not Constitutional Pluralism in the EU: National Constitutional Identiy in the German Lisbon Judgment' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

[995] Halberstam and Möllers ask: 'But is there any theory or argument behind this list? We find none in the opinion. The Court merely refers to its own imagination of past sovereignty. The opinion asserts that 'seit jeher', 'since ever', the state has fulfilled these tasks as an expression of its sovereignty.' See Halberstam and Möllers, 'The German Constitutional Court says "Ja zu Deutschland !"' at 1250. In the same vein, see Martin Böse, 'Die Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts' (2010) 2 Zeitschrift für Internationale Strafrechtsdogmatik 76, at 81. Ulrich Everling describes the selection as astonishing, see Ulrich Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte - Anmerkungen zum Urteil des Bundesverfassungsgerichts vom 30. Juni 2009 über den Vertrag von Lissabon' [2010] Europarecht 91, at 100.

[996] Halberstam and Möllers, 'The German Constitutional Court says "Ja zu Deutschland !"' at 1250.

[997] Frank Meyer, 'Die Lissabon-Entscheidung des BVerfG und das Strafrecht' (2009) 29 Neue Zeitschrift für Strafrecht 657, at 662; Böse, 'Die Entscheidung des

of criminal law, the Court's focus on 'culture, history, and language' has also been criticised more generally since it reflect its conception of democracy in static terms based on a nation's commonalities,[998] a view that, as we have seen, had already drawn much criticism onthe Maastricht decision. Criticism has also been levelled at the possible petrification of the European integration process by requiring that the Member States retain sufficient (Calliess asks how much is sufficient)[999] space in such wide-spread policy areas.[1000]

German constitutional identity thus encompasses the Basic Law's immutable core, protected by the eternity clause, which makes such identity integration-proof. Furthermore, certain areas deemed essential to the shaping of living conditions relying on cultural, historical and linguistic perceptions are also barred from the integration process.

When it comes to the preservation of German constitutional identity, however, the Court goes further still.It also awards that identity a special level of protection. Unsurprisingly, the *Bundesverfassungsgericht* confers

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Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts' at 81.

[998] Murkens, 'Identity trumps integration: the Lisbon Treaty in the German Federal Constitutional Court' at 521.

[999] Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen …' at 570.

[1000] Such petrification would result from the breadth of the listed areas. Everling suggests that only the internal market would remain, although even the market impinges on many of the identity-relevant areas. See Everling, 'Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte - Anmerkungen zum Urteil des Bundesverfassungsgerichts vom 30. Juni 2009 über den Vertrag von Lissabon' at 100. In the same vein, Calliess reflects on the fact that EU acts guaranteeing the enjoyment of the fundamental freedoms are likely to encroach on these areas. Calliess, 'Das Ringen des Zweiten Senats mit der Europäischen Union: Über das Ziel hinausgeschossen …' at 570 et seq.

upon itself the monopoly for reviewing the 'identity compatibility' of EU acts, albeit insinuating that the CJEU would be involved in that procedure. What was not to be expected, however, was the Court's explicit suggestion to the German legislature that the latter create a new, special procedure 'to safeguard the obligation of German bodies not to apply in individual cases in Germany legal instruments of the European Union […] that violate constitutional identity'.[1001]

Finally, notwithstanding the warning tone underlying the Court's willingness to undertake such identity review, it also reveals a conciliatory attitude towards the EU institutions based on the principle of the Basic Law's openness towards European law (*Europarechtsfreundlichkeit*).[1002] It is interesting that the Karlsruhe Court resorts to newly minted Article 4(2) TEU in this context. The guarantee of German constitutional identity review and that of the constitutional identity clause under EU law are presented as two sides of the same coin since they 'go hand in hand in the European legal area.'[1003]

1.3 German identity: Resistance to a review by the CJEU (OMT reference)

Only one year after handing down the Lisbon judgment, the German Federal Constitutional Court poured oil on troubled waters with its *Honeywell* decision. In that ruling, it set a high benchmark for establishing

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[1001] BVerfG, 30.06.2009, English translation from the Court's website, at para 241. As Tomuschat suggests, the Court may have intended to stimulate such proceedings by way of its invitation to the legislature, 'The Defence of National Identity by the German Constitutional Court' at 213.

[1002] BVerfG, 30.06.2009, English translation from the Court's website, at para 240.

[1003] BVerfG, 30.06.2009, English translation from the Court's website, at para 240.

an *ultra vires* act by requiring a manifest breach leading to a shift in the structure of the competences between Member States and the Union,[1004] it also made its *ultra-vires* control – and implicitly its identity control – subject to a prior preliminary ruling request.[1005] The *Bundesverfassungsgericht* established a space for judicial leeway by awarding the CJEU a right to err.[1006]

This decision may be read as part of the Constitutional Court's efforts to induce (a certain kind of) cooperation with the CJEU by a carrot-and-stick approach: A decision issuing an ultimatum or establishing red lines would be followed by one shying away from the consequences of applying the criteria of the former.[1007]

After the carrot with *Honeywell* came the stick with the *Bundesverfassungsgericht*'s first ever preliminary reference, the *OMT reference*.[1008] As Wendel points out, this reference ought to be read in the

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[1004] Matthias Mahlmann, 'The Politics of Constitutional Identity and its Legal Frame — the Ultra Vires Decision of the German Federal Constitutional Court' (2010) 11 German Law Journal 1407, at 1410. BVerfG, 2 BvR 2661/06, 6.7.2010, *Honeywell*, BVerfGE 126, 286, official English translation available at http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html (last checked 26 October 2014), para. 61.

[1005] BVerfG, 2 BvR 2661/06, 6.7.2010, *Honeywell*, BVerfGE 126, 286, official English translation available at http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html (last checked 26 October 2014), para. 60 (citing the Lisbon decision).

[1006] BVerfG, 2 BvR 2661/06, 6.7.2010, *Honeywell*, BVerfGE 126, 286, official English translation available at http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html (last checked 26 October 2014), para. 66.

[1007] Weiler, 'Editorial: Judicial Ego' at 2.

[1008] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at

context of the efforts and measures deployed to overcome the current financial crisis that have led to an increasing shift towards intergovernmental decision-making to the detriment of democratic decision-making.[1009] Against this backdrop, Wendel goes on, it does not come as a surprise that the principle of democracy is at the core of the Court's case law on the Euro crisis.[1010]

As we have seen in the previous sections, since the democratic principle itself also lies at the heart of the *Bundesverfassungsgericht*'s conception of constitutional identity and would be violated if the *Bundestag* were to relinquish its parliamentary budget responsibility,[1011] it was to be expected that the Court would (have to) seize the opportunity to substantiate the identity review.[1012]

Leaving aside the question that the German Federal Constitutional Court poses by way of the preliminary reference, that is whether the Court of Justice shares its interpretation that the so-called Outright Monetary Transactions (OMT) programme of the European Central Bank violates EU

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http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014).

[1009] Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT reference' at 265 et seq.

[1010] Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT reference' at 266.

[1011] BVerfG, 2 BvR 987/10, 7.9.2011, *Greece/EFSF*, official English translation available at http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710en.html (last checked 26 October 2014), para 121.

[1012] All the more so if we apply the categories construed by Payandeh to describe the Court's creation and development of different types of review of EU legal acts – proclamation, substantiation and consolidation, see Payandeh, 'Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice' at 28 et seq.

primary law, as well as the reasoning behind it,[1013] and focusing instead on the substantiation of the identity review, it suffices to say the reference constitutes an innovation as compared to the view expressed in the Lisbon judgment. In its *Lissabon Urteil*, the German Constitutional Court had signalled its willingness to perform its identity review following the 'principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*)'.[1014] The statement made in that context, namely that 'the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area',[1015] acquired quite a different flavour with the *OMT* reference. Although the *Bundesverfassungsgericht* undertakes to seek the Court of Justice's interpretation of the questioned EU act by way of a preliminary reference, it also very clearly proclaims its own monopoly to 'determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core'.[1016]

More importantly, apart from redefining, in the context of an identity review, the respective competences of two courts engaged in a 'cooperative

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[1013] For an in-depth analysis of the reference and its context, see Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT reference' ; Miguel Azpitarte Sánchez, 'Los confines de la democracia y la solidaridad. A propósito de las decisiones del Tribunal Constitucional Federal Alemán de 14 de enero y de 18 de marzo de 2014, que enjuician el marco jurídico-supranacional de las políticas de rescate' (2014) 101 Revista Española de Derecho Constitucional 301–336.

[1014] BVerfG, 30.06.2009, English translation from the Court's website, at para 240.

[1015] BVerfG, 30.06.2009, English translation from the Court's website, at para 240.

[1016] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014), para 27.

relationship', the German Court now draws a clear distinction between the concept of German constitutional identity of its own creation and that of the Member States' national (constitutional) identities enshrined in Article 4(2) TEU.

Firstly, the Constitutional Court argues that the concept of 'national identity' as enshrined in Article 4(2) TEU – and interpreted by the Court of Justice –[1017] is broader than that of 'constitutional identity' protected by Article 79(3) BL.[1018]

Secondly, the Karlsruhe Court derives this conceptual distinction from the incompatibility of the Court of Justice's interpretation to date of Article 4(2) TEU with its own interpretation of Article 79(3) BL. While the principles protected via Article 79(3) BL may not be balanced against other legal interests, the Court of Justice treats the elements protected by the first sentence of Article 4(2) TEU as a ''legitimate aim' which must be taken into account when legitimate interests are balanced against the rights conferred by Union law'.[1019]

To illustrate the incompatibility of the jurisprudential treatment of identity in Article 79(3) BL and of identity in Article 4(2) TEU, the German Constitutional Court relies on the 'Article 4(2) leading cases' decided by

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[1017] Reference is made to the *Sayn-Wittgenstein* case: ECJ 22.12.2010 C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECR I-13693.

[1018] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014), para 29.

[1019] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014), para 29.

the Court of Justice since the entry into force of the Lisbon Treaty, but also cites the pre-Lisbon 'identity case law' thus exemplifying a certain continuity in the treatment of 'national identity' as a legitimate aim by the Court of Justice.[1020]

The prohibition on weighing up the various interests protected by the eternity clause prompted the Federal Constitutional Court to conclude that the identity review it had created in the Lisbon Judgment was 'fundamentally different from the review under Article 4(2) TEU by the Court of Justice of the European Union'.[1021] This fundamental difference also motivated the *Bundesverfassungsgericht* to reiterate that the protection

[1020] 'This is based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond (cf. ECJ, Judgment of 22 December 2010, Case C 208/09, *Sayn-Wittgenstein*, ECR 2010 p. I – 13693, n. 83 – "Law on the Abolition of the Nobility" as an element of national identity). On this basis, the Court of Justice of the European Union treats the protection of national identity, which is required according to Art. 4 sec. 2 sentence 1 TEU, as a "legitimate aim" which must be taken into account when legitimate interests are balanced against the rights conferred by Union law (cf. ECJ, Judgment of 2 July 1996, Case C-473/93, *Commission v Luxembourg*, ECR 1996, p. I-3207 n. 35; Judgment of 14 October 2004, Case C-36/02, *Omega*, ECR 2004, p. I-9609, n. 23 et seq.; Judgment of 22 December 2010, Case C-208/09, ECR 2010 p. I-13693, n. 83; Judgment of 12 May 2011, Case C-391/09, *Runevic-Vardyn and Wardyn*, ECR 2011, p. I-3787, n. 84 et seq.; Judgment of 24 May 2011, Case C-51/08, Commission v Luxembourg, ECR 2011, p. I-4231, n. 124; Judgment of 16 April 2013, Case. C-202/11, Las, ECR 2013, p. I-0000, n. 26, 27).' BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014), para 29.

[1021] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014), para 29.

of the identity of the Basic Law constitutes a task falling exclusively within its sphere of responsibility.[1022]

2. The Tribunal Constitucional

Unlike the *Bundesverfassungsgericht*, the Spanish Constitutional Court had not referred to a distinctively Spanish constitutional identity until the review of the Constitutional Treaty in 2004. Indeed, Spain's accession to the European Communities in 1986 did not automatically entail a grand entrance of its Constitutional Court in the European judicial arena. Almost twenty years would pass by before the *Tribunal Constitucional* would assume a more prominent position in matters of EU law.[1023] Although it had been given the opportunity to scrutinise the Maastricht Treaty revision in 1992 and handed down a decision resulting in the first ever constitutional amendment in the history of Spain's young democracy,[1024] this decision did not quite attract the same level of attention that other Member States' constitutional courts had drawn with their rulings on the Maastricht Treaty. Among the Court's decisions dealing with the EU integration process, the two that have faced particular scrutiny are its Declaration 1/2004 on the compatibility of certain provisions of the Constitutional Treaty with the

[1022] BVerfG, 2 BvR 2728/13, 14.1.2014, *OMT-reference*, nyr, official English translation available at http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html (last checked 26 October 2014), para 29.

[1023] For a very detailed study of the first decades of Spanish constitutional case law dealing with EC/EU law, see Luis María Díez-Picazo, 'El derecho comunitario en la jurisprudencia constitucional española' (1998) 54 Revista española de derecho constitucional 255–272.

[1024] TC (Full Court) Declaration 1/1992, of 1 July 1992 (BOE No 177 of 24 July 1992).

Spanish Constitution[1025] and its preliminary reference to the CJEU in the Melloni case.[1026] While the former ruling had earned the Spanish Constitutional Court its place within a 'broad jurisprudential movement' where fellow constitutional courts had already distinguished themselves for proclaiming 'constitutional added-values',[1027] the latter succeeded in putting an end to what Aida Torres had criticised as the *Tribunal Constitucional*'s 'autism towards EU law'.[1028]

More importantly, both decisions are also relevant in terms of constitutional identity preservation, albeit for different reasons. While in Decision 1/2004 the Court spells out the much commented distinction between primacy and supremacy as well as limits to the integration process, the preliminary ruling it sought from the Court of Justice illustrates a conception of the protection of the constitution's core content that is quite different to that put forward by the German Constitutional Court.

[1025] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), English translation from the Court available at http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/DTC122004en.aspx (last checked 5 November 2014) all subsequent references are made to the English translation.

[1026] TC Court Order, 9.6.2011, ATC 86/2011.

[1027] Laurence Burgorgue-Larsen, 'La déclaration du 13 décembre 2004 (DTC n° 1/2004): un Solange II à l'espagnole' (2005) 18 Cahiers du Conseil constitutionnel 154, at 154.

[1028] Aida Torres Pérez, 'Euroorden y conflictos constitucionales: A propósito de la STC 199/2009, de 28-9-2009' (2010) 35 Revista española de Derecho europeo 441, at 467.

2.1 Emerging limits to EC law (‘*Fresh meat*’ and *Maastricht*)

In the late 1980s, the *Tribunal Constitucional* inaugurated a line of case law which has been identified by a segment of Spanish scholarship[1029] as a mirroring[1030] of the principle, spelled out by the Court of Justice, stipulating that ‘*each Member State is free to delegate powers to its domestic authorities as it sees fit and to implement directives by means of measures adopted by regional or local authorities.*[1031]

As Zelaia Garagarza argues, the Spanish Constitutional Court adopted a similar position to that of the Court of Justice, which amounted to the affirmation that EC law was unable to modify Spain’s internal territorial structure.[1032] By way of the judgment 252/1988 in the case *Comercio de carnes frescas*, finding against the Spanish central government and the *Generalitat* of Catalonia in a conflict as to who held the competence to

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[1029] Maite Zelaia Garagarza, ‘The Spanish State Structure and EU Law: The View of the Spanish Constitutional Court’ in Elke Cloots and others (eds), *Federalism in The European Union* (Hart Publishing 2012) at 386; Rafael Bustos Gisbert, ‘La ejecución del derecho comunitario por el gobierno central’ [2003] Revista Vasca de Administración Pública 163, at 178 et seq; Pablo Pérez Tremps, ‘Unidad del ordenamiento y derecho comunitario’ [2003] Revista Vasca de Administración Pública 123, at 131 et seq.

[1030] As a matter of fact, in one of its judgments forming part of the line of case law I will analyse in this section, the Spanish Constitutional Court expressly refers to the principle of institutional autonomy: STC 80/1993, de 8 de marzo de 1993 (para 3)

[1031] With the important proviso that *‘[t]hat [internal] division of powers does not, however, release it [the Member State] from the obligation to ensure that the provisions of the directive are properly implemented in national law.’* Judgment of the Court of 28 February 1991. Commission v Federal Republic of Germany. Case C-131/88. *ECR 1991 I-00825 (at para 71)*

[1032] Zelaia Garagarza, ‘The Spanish State Structure and EU Law: The View of the Spanish Constitutional Court’ at 386.

execute the implementation of secondary EC law, the Court declared that the domestic rules governing the delimitation of competences would be exclusively applicable and that such internal order of competences could not be modified by an 'international connection'.[1033] Pablo Pérez Tremps distinguishes two kinds of arguments on which the Court relies, one being based upon Spanish laws according to which the competence to modify the internal order of competences had not been transferred to the Communities; and the other based specifically on the Community order and the Luxembourg case law on institutional autonomy mentioned above.[1034] Although the body of case law inaugurated by Judgment 252/1988 has mainly been commented upon for the principles it spells out in relation to the controversies surrounding the effects of European integration on the distribution of competences between the Spanish central state and the autonomous communities,[1035] the key focus of my study in this regard is the underlying idea of the incapacity of EC law to modify the internal order of competences as provided by the Spanish Constitution (SC), a competence

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[1033] STC 252/1988, de 20 de diciembre de 1988, BOE No 11 of 13 January 1989. The Court states at para 2: 'Son, en consecuencia, las reglas internas de delimitación competencial las que en todo caso han de fundamentar la respuesta a los conflictos de competencia planteados entre el Estado y las Comunidades Autónomas, las cuales, por esta misma razón, tampoco podrán considerar ampliado su propio ámbito competencial en virtud de una conexión internacional.'

[1034] Pérez Tremps, 'Unidad del ordenamiento y derecho comunitario' at 131.

[1035] See Bustos Gisbert, 'La ejecución del derecho comunitario por el gobierno central' ; Pérez Tremps, 'Unidad del ordenamiento y derecho comunitario' at 127 et seq. On the impact of European integration on the Spanish regions in terms of the reception and execution of EU law, but also in terms of participation at EU level, see Maribel González Pascual, *Las Comunidades autónomas en la Unión Europea: condicionantes, evolución y perspectivas de futuro* (Institut d'Estudis Autonòmics 2013); Andrés Boix Palop, Maribel González Pascual, Daniel Sarmiento, and Maite Zelaia Garagarza, *Las Comunidades Autónomas y la Unión Europea* (Santiago Muñoz Machado (ed), Academia Europea de Ciencias y Artes 2013); Rafael Bustos Gisbert, *Relaciones internacionales y comunidades autónomas* (Centro de Estudios Constitucionales 1996).

reserved to the amendment procedures foreseen in that same Constitution.[1036] This idea was further developed in subsequent judgments all handed down in disputes over the division of competences between the Spanish central government and *Comunidades autónomas.*[1037] In this vein, and in keeping with its previous case law, the Constitutional Court declared in paragraph 9 of the grounds of Judgment 236/91 in the '*control metrológico*' case[1038] that the implementation of secondary Community law by domestic legislation must necessarily follow the constitutional criteria for the distribution of powers between the State and the Autonomous Communities, but then went further by explicitly stating that there could not be any alteration of said criteria by any means other than the appropriate channels, that is by way of a formal constitutional amendment.[1039] The

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[1036] Pablo Pérez Tremps, 'National Identity in Soanish Constitutional Case Law' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) at 272.

[1037] STC 76/1991, de 11 de abril de 1991 (para 3); STC 115/1991, de 23 de mayo de 1991 (para 1); STC 236/1991, de 12 de diciembre de 1991 (para 9); STC 79/1992, de 28 de mayo de 1992 (para 1); STC 117/1992, de 16 de septiembre de 1992 (para 2); STC 80/1993, de 8 de marzo de 1993 (para 3).

[1038] 'Pues bien, así perfilados los términos de esta controversia constitucional, debe señalarse que la traslación de la normativa comunitaria derivada al derecho interno ha de seguir necesariamente los criterios constitucionales y estatutarios de reparto de competencias entre el Estado y las Comunidades Autónomas, criterios que, de no procederse a su revisión por los cauces correspondientes (art. 95.1 de la Constitución), no resultan alterados ni por el ingreso de España en la CEE ni por la promulgación de normas comunitarias; la cesión del ejercicio de competencias en favor de organismos comunitarios no implica que las autoridades nacionales dejen de estar sometidas, en cuanto poderes públicos, a la Constitución y al resto del ordenamiento jurídico, como establece el art. 9.1 de la Norma fundamental [SSTC 252/1988, fundamento jurídico 2; 64/1991, fundamento jurídico 4.b); 76/1991, fundamento jurídico 3; 115/1991, fundamento jurídico 1].'

[1039] The Court refers to the procedure provided for by Article 95(1) SC which stipulates: 'The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.'

Tribunal Constitucional has held that the rule of law principle enshrined in Article 9(1) SC impedes that the transfer of competences to Community institutions may result in Spanish state authorities no longer being subject to its Constitution or legal order.[1040]

The Spanish Constitutional Court would follow this train of thought in its Declaration 1/1992 on the compatibility of Article 8 B(1) TEEC with Article 13(2) SC.[1041] Indeed, the Court sets forth that

> *'Spanish public authorities are no less subject to the Constitution when they act in international or supernatural relations than when they exercise their domestic powers, and this is what Article 95 seeks to preserve, being a precept whose guarantee functions must not be contradicted or diminished by the provisions of Article 93.'*[1042]

In order to give an accurate account of the reasoning of the Spanish Constitutional Court when imposing limits on European integration, it is

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[1040] STC 236/1991, de 12 de diciembre de 1991 (para 9).

[1041] The Court refrained from scrutinising the entirety of the Maastricht Treaty and its compatibility with the Spanish Constitution. The very limited scope of review is illustrated by the limited application of the Spanish government. Since only the state government or legislatures are entitled to start proceedings for the prior constitutional review of an international treaty enshrined in Article 95(2) SC, the *Tribunal Constitucional* declared itself incompetent to examine *sua sponte* provisions other than those submitted for review, TC (Full Court) Declaration 1/1992, of 1 July 1992 (BOE No 177 of 24 July 1992), at para 1. In this sense, Antonio López Castillo has been very critical of the attitude of those bodies that have the legal standing to initiate proceedings under Article 95(2) SC, especially the (in his words) 'neglectful' approach of the Spanish government in both of the prior constitutional reviews of EU treaties. Antonio López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en espera de reformas. A propósito de la DTC 1/2004, de 13 de diciembre' in Antonio López Castillo and others (eds), *Constitución española y Constitución europea* (Centro de Estudios Políticos y Constitucionales 2005) at 15.

[1042] TC (Full Court) Declaration 1/1992, of 1 July 1992 (BOE No 177 of 24 July 1992).at para 4.

necessary to refer briefly to the scope and boundaries of Article 93 SC. The provision stipulates that

> '*By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested.*'[1043]

As López Castillo points out, Article 93 SC is to the Spanish Constitution what Article 24 BL was to the German Basic Law[1044] before the amendment of Article 23 BL, i.e. the clause permitting the participation of Spain in international organisations such as the European Communities as well as the transfer of sovereign rights thereto. At the time of the ratification of the Maastricht Treaty, Spanish academia was divided over the scope and boundaries of Article 93 SC.[1045] Some scholars, notably Aracelí Mangas Martín, perceived the provision as having bypassed the procedures for constitutional amendments set forth in Title X SC[1046] when Spain acceded

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[1043] Translation taken from the website of the Spanish Constitutional Court: http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx#I1 (last checked 11 November 2014).

[1044] López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en espera de reformas. A propósito de la DTC 1/2004, de 13 de diciembre' at 22.

[1045] With further references Laurence Burgorgue-Larsen, *L'Espagne et la Communauté Européenne: l'Etat des Autonomies et le processus d'integration européenne* (Editions de l'Université de Bruxelles 1995) at 37 et seq.

[1046] Of particular relevance are Articles 167 and 168 SC setting forth the constitutional amendment procedures. While Article 167 SC determines the procedure for general amendments, Article 168 SC establishes an 'aggravated' procedure requiring a 2/3 majority in both houses, the holding of general elections and, subsequently, of a referendum for amendments to the totality of the Constitution as well as to basic state principles, fundamental rights and the monarchy (Preliminary Title, Chapter Two,

to the Communities.[1047] The resulting implicit constitutional amendment – the accession to the Communities would have implied a modification of the constitutional distribution of central and regional competences[1048] – had also been defended on other grounds.[1049]

With its Declaration 1/1992, the *Tribunal Constitucional* realised a joint interpretation of Articles 93 and 95 SC that led to deny Article 93 SC the status of *lex specialis*[1050] to the formal constitutional amendment procedures:

> *'To the contrary, an interpretation must be sought to reconcile both constitutional provisions [i.e. Article 93 and 95 SC], which supposes affirming on the one hand that constitutional provisions cannot be contradicted without an express constitutional amendment (in the terms set forth in Title X) while also recognizing, on the other hand, that organic laws may authorize the ratification of treaties that, as already indicated, transfer or attribute to international*

Section 1 of Title I, and Title II SC). For a more detailed examination of the requirements for constitutional amendments in Spain, see Víctor Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* (Hart Publishing 2013) at 55 et seq.

[1047] Araceli Mangas Martín, *Derecho comunitario europeo y derecho español* (2nd edn, Tecnos 1987) at 30.

[1048] Mangas Martín, *Derecho comunitario europeo y derecho español* at 30 et seq.

[1049] Rodríguez-Zapata had put forward the argument that since Article 95 SC conceived the possibility of an international treaty amending the Spanish Constitution, Article 93 SC bore the potential of bypassing the simple amendment procedure enshrined in Article 167 SC (but not the aggravated procedure set forth in Article 168 SC); Jorge Rodríguez-Zapata y Pérez, 'Derecho internacional y sistema de fuentes del derecho: La Constitución española' in *La Constitución española y las fuentes del derecho*, vol. 3 (Instituto de Estudios Fiscales 1979) at 1764. This position was strongly criticised for lacking consistency by Francisco Rubio Llorente, judge of the Court that handed down Declaration 1/1992, Francisco Rubio Llorente, 'La Constitución española y el Tratado de Maastricht' (1992) 36 Revista Española de Derecho Constitucional 253, at 259.

[1050] Burgorgue-Larsen, *L'Espagne et la Communauté Européenne: l'Etat des Autonomies et le processus d'integration européenne* at 38.

> *organizations the exercise of constitutional powers, thus adjusting the scope of application but not the literal expression of the provisions that create and organize those powers. This is undoubtedly an effect that the Constitution envisioned and, as such, is legitimate, but this is unrelated to the effect of a direct textual contradiction between the Constitution and one or several provisions of a treaty. The hypothesis that a treaty may contravene the Constitution has been definitively excluded by Article 95.'*[1051]

The Court's solution, that is limiting Article 93 SC to a merely 'organic-procedural' rule incapable of setting any substantive limits to European integration has received convincing critiques,[1052] and would be revisited a little over a decade later on the occasion of the review of the Constitutional Treaty.

If we compare the analysed case law of the *Tribunal Constitucional* with the early identity case law of the *Bundesverfassungsgericht*, many similarities become visible, but also one major difference.

The Spanish Constitutional Court declared, in both the 'carnes frescas' case law and the Declaration 1/1992, that the procedure enshrined in Article 93 SC does not open the door to bypass the amendment procedures set forth in the Constitution. This is what the German Constitutional Court had claimed

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[1051] TC (Full Court) Declaration 1/1992, of 1 July 1992 (BOE No 177 of 24 July 1992).at para 4.

[1052] Aracelí Mangas Martín argues that the Court failed to conceive Article 93 SC as what it is, namely a provision that continuously governs Spain's membership to the Communities and hence implies the acceptance of the full effects of Community law in the Spanish legal order; Araceli Mangas Martín, 'La Declaración del Tribunal Constitucional sobre el artículo 13.2 de la Constitución: una reforma constitucional innecesaria o insuficiente' (Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales 1992) at 391 et seq. Sharing this critique Burgorgue-Larsen, *L'Espagne et la Communauté Européenne: l'Etat des Autonomies et le processus d'integration européenne* at 44 et seq; with further references.

two decades earlier in its *Solange I* Judgment on Article 24 BL: *'That is, it does not open the way to amending the basic structure of the Basic Law, which forms the basis of its identity, without a formal amendment to the Basic Law.'*[1053]

There is, however, a major difference between the Spanish and German pronouncements: While the German Constitutional Court refers from the outset to an identity of the Basic Law, to its basic structures, the Spanish Constitutional Court speaks generally of contradictions to the constitutional text and does not introduce the idea of a core content of the Spanish Constitution, of its identity.[1054]

2.2 Implicit identity (*Declaration 1/2004*)

The *Tribunal Constitucional* issued a second declaration on the compatibility with the Spanish Constitution of those provisions of an EU revision challenged by the Spanish government on the occasion of the upcoming ratification of the Constitutional Treaty. As Luis Gordillo points out, here the *Tribunal Constitucional* seized the opportunity to benefit from 'the advantages of being last' and assumed some of the positions defended

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[1053] BVerfG, *Solange I*, see above at n 954.

[1054] Interestingly, however, Alejandro Saiz Arnaiz points out that this was exactly the position defended by the Spanish Council of State in an advisory opinion to the Spanish government on the constitutional implications of the ratification of the Maastricht Treaty from June 1991. In this sense, only the provisions of the Spanish Constitution for whose amendment the special amendment procedure of Article 168 SC is prescribed would be shielded from their informal modification entailed by the consequences of Spain's participation in the EU. For more details and further references, see Saiz Arnaiz, 'Identité nationale et droit de l'Union européenne dans la jurisprudence constitutionnelle espagnole' at 113. The position of the Council of State is also in line with the position of Rodriguez- Zapata to which I have referred earlier (at n 1049), which is not surprising since at the time of the 1991 advisory opinion, Rodriguez-Zapata was a jurist at the Council, see Rubio Llorente, 'La Constitución española y el Tratado de Maastricht' at 259.

by other, notably the German and Italian, constitutional courts on the limits to EU integration.[1055]

The Spanish Constitutional Court was thus required to certify 'the existence or inexistence of contradiction between the Spanish Constitution and Articles I-6, II-111 and II-112 of the Constitutional Treaty', and furthermore to 'give its opinion on the sufficiency of Art. 93 CE to make way for the integration of the Treaty into internal legislation or, where applicable, concerning the pertinent procedure of constitutional review to adapt the Constitution to the Treaty prior to its integration'.[1056]

Regarding the boundaries of Article 93 SC, the Court would overrule its prior case law, which attributed to the provision a mere 'organic procedural precept (STC 28/1991, of 14 February, FJ 4, and DTC 1/1992, FJ 4) which enables the attribution of the exercise of competences derived from the Constitution to international institutions or organizations.'[1057] With its Declaration 1/2004, the Court claims Article 93 SC to be more than a mere procedural rule by arguing

> *'that Art. 93 CE operates as a door through which the Constitution itself allows the entry of other legislations into our constitutional system through the transfer of the exercise of competences. Consequently, Art. 93 CE is given a substantive or material dimension which must not be ignored.'*[1058]

[1055] Luis I. Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law* (Hart Publishing 2012) at 33 et seq.

[1056] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005)

[1057] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), para. 2.

[1058] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), para. 2.

This substantive dimension permits the Court to read material limits into Article 93 SC. Since the provision – just as Article 24 BL at the time of the *Solange* saga – does not explicitly refer to any limitations, the limits to the transfer of competences to the EU and the integration of EU secondary law into the Spanish legal order are in the *Tribunal Constitucional*'s understanding *implicit* ones. In this sense, Alejandro Saiz Arnaiz speaks of an interpretation of Article 93 SC that went from *explicitly procedural* to *implicitly material*.[1059]

These *implicit* limits set by Article 93 SC are defined by the Spanish Constitutional Court in rather general terms:

> *'Said interpretation must be based on the recognition of the fact that the operation of the transfer of the exercise of competences to the European Union and the consequent integration of Community legislation into our own impose unavoidable limits to the sovereign faculties of the State, acceptable only when European legislation is compatible with the* ***fundamental principles of the social and democratic State*** *of Law established by the national Constitution. Consequently, the constitutional transfer enabled by Art. 93 CE is subject to material limits imposed on the transfer itself. Said material limits, not expressly included in the constitutional precept, but which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the* ***sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our***

[1059] Alejandro Saiz Arnaiz, 'De primacía, supremacía y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 de diciembre de 2004 y el Tratado por el que se establece una Constitución para Europa' in Antonio López Castillo and others (eds), *Constitución española y Constitución europea* (Centro de Estudios Políticos y Constitucionales 2005) at 58.

> ***Constitution, where the fundamental rights acquire their own substantive nature*** *(Art. 10.1 CE) […].'*[1060]

The Court thus refers to the sovereignty of the State (twice!), the fundamental principles of the social and democratic State and more generally to the basic constitutional structures and to the system of fundamental principles and values set forth in the Spanish Constitution. In relation to this constitutional system of principles and values, the Court mentions the substantive nature of fundamental rights.

Furthermore, if in the future EU legislation were to be 'irreconcilable' with the Spanish Constitution and the 'ordinary channels' – likely the remedies before the CJEU – were exhausted, the Spanish Constitutional Court reserves itself the right to intervene and enforce the constitutional limits:

> *'In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise.'*[1061]

The Court refers from the outset to the possible 'irreconcilableness' of EU legislation and Spanish Constitution as an 'unlikely' event and emphasises

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[1060] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), para. 2.

[1061] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), para. 4.

that since the Constitutional Treaty sets forth the Member States' right to withdraw from the Union, this eventuality could be avoided.[1062]

The Court's declared intention to act as a last resort for preserving state sovereignty and constitutional supremacy as well as the listing of implicit substantive limits derived from the Spanish Constitution and their relationship to both the concept of constitutional identity and the case law of the German Constitutional Court render necessary a couple of considerations.

First of all, there is no explicit reference to the notion of identity of the Spanish Constitution; at least to that extent, Declaration 1/2004 is consistent with prior constitutional case law. The only reference to the notion of identity is made in relation to the compatibility of the principle of primacy of EU law with the Spanish Constitution. Here, Article I-5(1) CT is referred to as a provision qualifying the primacy of EU law insofar as this provision involves the respect for the identity of the Member States.

> *'The first point to highlight for the correct interpretation of the proclaimed primacy and the framework in which it is developed is that the Treaty which lays down a Constitution for Europe is based on the respect for the identity of the states involved therein and their basic constitutional structures, and it is founded on the values that are to be found in the base of the constitutions of said states.'*[1063]

However, the implicit limits to European integration set by Article 93 SC are referred to in terms highly similar to the content of the 'identity clause'

[1062] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), para. 4.

[1063] TC (Full Court) Declaration 1/2004, of 13 December 2004 (BOE No 3 of 4 January 2005), para. 3.

under EU law – i.e. reference to underlying *values* and *basic constitutional structures*.

Secondly, the Court's definition of these limits has been criticised for its generality.[1064] Since – putting aside the reference to Article 10(1) SC on the substantive nature of fundamental rights – the limits spelled out by the Court are not tied to a specific constitutional provision, it is rather unclear on what grounds the Court has identified precisely these principles and values and no other. For that purpose, Saiz Arnaiz considers the possibility that the selection criterion of the Court was based on the duality of amendment procedures set forth in the Spanish Constitution.[1065] As mentioned above,[1066] if a constitutional amendment purports to reform the Constitution as a whole or if it purports to affect specific parts of the constitutional text, i.e. the general amendment procedure of Article 167 SC is barred and a more burdensome procedure set forth in Article 168 SC is to be followed. The provisions that are thereby ring-fenced against what could be understood as a 'frivolous' amendment – basic state principles, fundamental rights and the monarchy (Preliminary Title, Chapter Two, Section 1 of Title I, and Title II SC) – and thus were conceived as a fundamental core by the constituent power,[1067] are in general terms those referred to by the Constitutional Court in Declaration 1/2004.[1068] If the

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[1064] Saiz Arnaiz, 'De primacía, supremacía y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13 de diciembre de 2004 y el Tratado por el que se establece una Constitución para Europa' at 57.

[1065] Saiz Arnaiz, 'Identité nationale et droit de l'Union européenne dans la jurisprudence constitutionnelle espagnole' at 120.

[1066] See above at n 1046.

[1067] This would be what Constance Grewe calls the 'procedural conception' of constitutional identity, Grewe, 'Methods of Identification of National Constitutional Identity' at 42 et seq.

[1068] The most notable omission being a reference to the Spanish monarchy.

limits to European integration set by the Spanish Constitutional Court were those spelled out in Article 168 SC, they would, in practice, closely correspond to those of the German '*Ewigkeitsgarantie*' since the procedural burdens for the amendment under Article 168 SC are exceptionally high.

2.3 Neglected identity (*Melloni reference*)

When the Spanish Constitutional Court decided on 9 June 2011 to ask the CJEU for a preliminary ruling in a case regarding the execution of a European arrest warrant (EAW),[1069] it had the opportunity to further substantiate the limits to European integration which, it had claimed, were derived from the Spanish Constitution.

In the case at hand, Mr Melloni, an Italian citizen, had been condemned *in absentia* by Italian courts to serve a ten-year prison sentence for bankruptcy fraud. Although Mr Melloni had not attended the trial in person, he had been represented during all stages of the criminal proceedings by lawyers of his own choice. Upon his detention by the Spanish police on Spanish soil, the competent court – the *Audiencia Nacional* – decided to execute the EAW pending on him by surrendering him to the Italian authorities.

It is against this decision of the *Audiencia Nacional* that Mr Melloni filed an individual complaint – *recurso de amparo* – before the Spanish Constitutional Court claiming that his right to a fair trial with full guarantees (Article 24(2) SC) would be violated by the surrender since he had been convicted *in absentia*. With this claim Mr Melloni relied on settled case law of the Spanish Constitutional Court holding that the extradition of a person convicted *in absentia* constituted an indirect violation of the right

[1069] TC Court Order, 9.6.2011, ATC 86/2011.

to a fair trial. This line of case law was later extended to the execution of an EAW.[1070]

The Spanish Constitutional Court stayed proceedings and referred on 9 June 2011 three questions to the CJEU via the preliminary ruling procedure. While two questions dealt with the interpretation and validity of the Article 4a(1) Framework Decision 2002/584/JHA measured against Articles 47 and 48(2) CFREU,[1071] the third enquired as to the interpretation of Article 53 CFREU.[1072]

[1070] On this issue, see the detailed account by Aida Torres Pérez, 'Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' (2012) 8 European Constitutional Law Review 105, at 108 et seq.

[1071] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). OJ L 190, 18.7.2002.

[1072] The questions referred to the CJEU were the following: '1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?

2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter, and from the rights of defence guaranteed under Article 48(2) of the Charter?

3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts

On 26 February 2013, the CJEU gave its eagerly awaited answer to the preliminary request,[1073] and on 23 February 2014 the Spanish Constitutional Court finally resolved the pending *recurso de amparo*.[1074]

The *Melloni* case has triggered many reactions in academic circles and has been extensively commented on.[1075] This major interest may be explained by the fact that the case constituted the first preliminary reference by the Spanish Constitutional Court but also to the case dealing with divergences in the standards of protection of fundamental rights and requiring some

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or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?'

[1073] ECJ, Judgment, 26.2.2013 Case 399/11, *Melloni*, [2013] *ECR* I – 0000.

[1074] STC 26/2014, 13 February 2014.

[1075] See, *inter alia*, Leonard F. M. Besselink, 'The parameters of Constitutional conflict after Melloni' [2014] European law review 531–552; Nik de Boer, 'Addressing rights divergences under the Charter: Melloni -- Case C-399/11, Stefano Melloni v. Ministerio Fiscal, Judgment of the Court (Grand Chamber) of 26 February 2013' (2013) 50 Common Market Law Review 1083–1103; Édouard Dubout, 'Le niveau de protection des droits fondamentaux dans l'Union européenne: unitarisme constitutif versus pluralisme constitutionnel - Réflexions autour de l'arrêt Melloni' (2013) 49 Cahiers de droit europeen 293–317; Jan-Herman Reestman and Leonard F. M. Besselink, 'After Åkerberg Fransson and Melloni' (2013) 9 European Constitutional Law Review 169–175; E. van Rijckevorsel, 'Droits fondamentaux (arrêt 'Akerberg Fransson'; arrêt 'Stefano Melloni c. Ministerio Fiscal')' [2013] Revue du droit de l'Union Européenne 175–187; Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308–331; Juan Ignacio Ugartemendía Eceizabarrena and Santiago Ripol Carulla, 'La Euroorden ante la tutela de los Derechos Fundamentales. Algunas cuestiones de soberanía iusfundamental. (A propósito de la STJ Melloni, de 26 de febrero de 2013, C-399/11)' [2013] Revista española de derecho europeo 151–197; Maartje de Visser, 'Dealing with Divergences in Fundamental Rights Standards: Case C-399/11 'Stefano Melloni v. Ministerio Fiscal', Judgment (Grand Chamber) of 26 February 2013, not yet reported' (2013) 20 Maastricht journal of European and comparative law 576–588.

answers from the CJEU as regards the scope of the controversial Article 53 CFREU.[1076]

As important as the relationship or intersection between Articles 4(2) TEU and 53 CFREU is,[1077] I will focus on the Spanish Constitutional Court's attitude towards the protection of what it might perceive as 'constitutional identity'. For this purpose, a brief introduction in the *Tribunal Constitucional*'s case law on the scope of the right to a fair trial as enshrined in Article 24(2) SC in the context of trials *in absentia* appears essential.

According to Maribel González Pascual's account, by judgment of 30 March 2000, the Spanish Constitutional Court had considered the possibility of the violation of a fundamental right by foreign public authorities being imputed to Spanish state authorities.[1078] For the purpose of construing these 'indirect violations', the Court added a further layer of content to the scope of fundamental rights: In addition to the 'essential content' – the core of the right – and the 'normal content',[1079] there would be an 'absolute content', which would consequently constitute the core of the essential content. When appraising the conduct of foreign public authorities, the Court will only find a violation of a fundamental right where

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[1076] On the controversies surrounding horizontal clauses, see above Chapter 4, section 2.2.1 Much ado about the horizontal clauses.

[1077] Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter' .

[1078] Maribel González Pascual, 'Mutual Recognition and Fundamental Constitutional Rights. The First Preliminary Reference of the Spanish Constitutional Court' in Monica Claes and others (eds), *Constitutional Conversations in Europe Actors, Topics and Procedures* (Intersentia 2012) at 165.

[1079] For an account of the debate on the 'essential content' of fundamental rights in Spanish scholarship, see Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* at 247 et seq.

there has been a violation of this 'absolute content'.[1080] The Court derives the 'absolute content' of a fundamental right from human dignity and from the standards set in human rights treaties.

In the case of the right to a fair trial enshrined in Article 24(2) SC, the Court established that the right to participate in the oral trial and the right to one's own defence are part of this 'absolute content'.[1081] This absolute content of the right to a fair trial was indirectly violated by Spanish state authorities surrendering a person – whether in the context of an extradition or in the execution of an EAW – who had been convicted *in absentia* if that surrender was not conditioned upon the possibility to apply for a retrial.[1082] This amounts to affording a higher level of protection than the ECtHR, since the Strasbourg Court does not necessarily require a retrial to fulfil the guarantees of the ECHR.[1083]

In the context of the EAW, Article 4a(1) of the Framework Decision 2002/584/JHA as amended by Framework Decision 2009/299/JHA[1084]

[1080] González Pascual, 'Mutual Recognition and Fundamental Constitutional Rights. The First Preliminary Reference of the Spanish Constitutional Court' at 165.

[1081] Torres Pérez, 'Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' at 108.

[1082] Torres Pérez, 'Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011' at 108.

[1083] González Pascual, 'Mutual Recognition and Fundamental Constitutional Rights. The First Preliminary Reference of the Spanish Constitutional Court' at 168.

[1084] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009.

provides, with regard to convictions *in absentia*, that the executing judicial authority may refuse to execute the EAW, unless it is stated in the latter that the person to be surrendered had been either summoned in person or otherwise informed of the scheduled trial, or being aware of the scheduled trial, had appointed a lawyer. The Framework Decision does not contemplate conditioning the execution of an EAW on the holding of a retrial. As we have seen, such a stipulation is fundamental to Article 24(2) SC as interpreted by the Spanish Constitutional Court, which requires that such surrenders be made subject to the possibility to apply for a retrial so as not to constitute an 'indirect violation' of the 'absolute content' of the right to a fair trial.

Accordingly, there was a possible conflict between a provision of EU law and the 'absolute content' of a fundamental right enshrined in the Spanish Constitution. The contradiction could be avoided firstly if the CJEU interpreted Article 4a(1) of the Framework Decision 2002/584/JHA as permitting national authorities to condition the execution of an EAW upon the conviction in question being open to review – thus interpreting the provision in line with the requirements of the 'absolute content of Article 24(2) SC'. Secondly, in the event that the CJEU denied conditioning the surrender on the possibility of a retrial, there would not be any contradiction between EU law and national constitutional law if the CJEU declared Article 4a(1) of the Framework Decision 2002/584/JHA invalid for violating the right to a defence and fair trial enshrined in Articles 47 and 48(2) CFREU. To come to this conclusion, the CJEU would need to interpret the Charter rights in line with Article 24(2) SC. Finally, if the Court of Justice came to affirm the validity of Article 4a(1) of the Framework Decision 2002/584/JHA, thus affording the right to a fair trial enshrined in the Charter weaker protection than that afforded by the Spanish Constitution, an interpretation of Article 53 CFREU as allowing a Member State to grant a higher level of protection than the protection under EU law

could avoid the incompatibility between Article 4a(1) of the Framework Decision 2002/584/JHA and Article 24(2) SC. These are the interpretative solutions offered by the *Tribunal Constitucional* to the Court of Justice in order to avoid a conflict between EU law and the 'absolute content' of a fundamental right.

In light of the limits set out in Declaration 1/2004 – where a strong emphasis was placed on the fundamental rights enshrined in the Spanish Constitution and the national constitutional identity clause –, it is noteworthy that the Spanish Constitutional Court does not rely at any point on Article 4(2) TEU to claim respect for the 'absolute content' of Article 24(2) SC.[1085] In his Opinion on the preliminary reference in the *Melloni* case, Advocate General Yves Bot sees himself compelled to clarify this circumstance in the following terms:

> *'I do not overlook the fact that the European Union is required, as Article 4(2) TEU provides, to respect the national identity of the Member States, 'inherent in their fundamental structures, political and constitutional'. I also note that the preamble to the Charter points out that, in its action, the European Union must respect the national identities of the Member States.*
>
> *A Member State which considers that a provision of secondary law adversely affects its national identity may therefore challenge it on the basis of Article 4(2) TEU.*

[1085] Aida Torres Pérez highlights that following Declaration 1/2004 '[t]he core of constitutional rights might integrate this notion. Thus, the Constitutional Court might have relied on this provision to claim for respect for the constitutional understanding of fundamental rights. However, the notion of constitutional identity does not seem to have had any explanatory force, and Article 4(2) TEU is not even mentioned.' See Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter' at 121 et seq (footnotes omitted).

> *However, we are not faced with such a situation in the present case. The proceedings before both the Tribunal Constitucional and the Court of Justice persuade me that the determination of the scope of the right to a fair trial and of the rights of the defence in the case of judgments rendered in absentia does not affect the national identity of the Kingdom of Spain.'*[1086]

AG Yves Bot justifies his refusal to consider the level of protection provided by Article 24(2) SC as part of Spain's constitutional identity specifically by reference to the fact that Spanish government representatives had at the hearing in Luxembourg stated that the presence of the defendant at her trial was not covered by that identity. Furthermore, Bot also refers to the fact that the determination of the 'absolute content' of Article 24(2) SC had been contested within the Spanish Constitutional Court:

> *'Apart from the fact that the determination of what constitutes the 'essence' of the right to defend oneself remains contested before the Tribunal Constitucional, the Kingdom of Spain itself stated, at the hearing, relying inter alia on the exceptions in Spanish law to the holding of a retrial following a judgment rendered in absentia, that the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain.*
>
> *Moreover, in my view, a concept demanding protection for a fundamental right must not be confused with an attack on the national identity or, more specifically, the constitutional identity of a Member State. The present case does indeed concern a fundamental right protected by the Spanish Constitution, the importance of which*

[1086] Opinion of AG Yves Bot, 2.10.2012, Case 399/11, *Melloni*, [2013] *ECR* I - 0000, at paras 138-140 (footnotes omitted).

> *cannot be underestimated, but that does not mean that the application of Article 4(2) TEU must be envisaged here.'*[1087]

Putting aside the question about the soundness of AG Bot's conception of Article 4(2) TEU and the lack of a reference to this question by the Court of Justice,[1088] and focusing on the Spanish Constitutional Court upholding what it had identified as the 'absolute content' of a fundamental right, it is evident that either the protected right or its level of protection were not deemed fundamental enough to be upheld as a part of constitutional identity. This is, as mentioned before, somewhat unsettling since the Court had conceptualised the 'absolute content' as the 'core of the core' of a fundamental right and had determined this absolute content of the right to a fair trial on the basis of human dignity and international human rights treaties.

By way of its judgment of 26 February 2013,[1089] the Court of Justice answered the Spanish Constitutional Court's questions as follows: Article 4a(1) of the Framework Decision was not interpreted as permitting, and Articles 47 and 48(2) CFREU were not interpreted as requiring, the possibility of review of the judgment as a condition to execute EAWs in cases of convictions *in absentia*. Furthermore, Article 53 CFREU was interpreted 'as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on

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[1087] Opinion of AG Yves Bot, 2.10.2012, Case 399/11, *Melloni*, [2013] *ECR* I - 0000, at paras 141-142 (footnotes omitted).

[1088] For a view supportive of AG Bot's stance and deploring the CJEU's silence, see Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 318.

[1089] ECJ, Judgment, 26.2.2013 Case 399/11, *Melloni*, [2013] *ECR* I – 0000.

the right to a fair trial and the rights of the defence guaranteed by its constitution.'[1090]

One year after the preliminary ruling, the Spanish Constitutional Court handed down the final judgment in the *Melloni* case [1091] where it had the opportunity to engage in the arguments offered by the Luxembourg Court. This opportunity, however, was neglected and the line of argumentation underlying a judgment counting with no fewer than three concurring opinions was described as *disturbing*.[1092]

Even though the Spanish Constitutional Court's judgment is by no means an act of rebellion since it complies with the guidelines of the Court of Justice and proceeds to an overruling of its jurisprudence on the absolute content of Article 24(2) SC, it may nevertheless be understood as containing an implicit *warning signal.*[1093]

This is so because the Spanish Constitutional Court begins its argumentation by stating that it needs to 'complete the response given in the Judgment of the European Court of Justice delivered in the *Melloni* case, with the criteria laid down in […] Declaration […] 1/2004, of 13 December'.[1094] It is not entirely clear what the Court understands by 'completing' and since it refrains from offering us the motives for the need to do so, we may only infer them from the overall tone of the judgment.

First of all, the Court reiterates what it had set forth in Declaration 1/2004, i.e. the existence of implicit constitutional limits as well as its willingness

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[1090] ECJ, Judgment, 26.2.2013 Case 399/11, *Melloni*, [2013] *ECR* I – 0000.

[1091] Constitutional Court Judgment 26/2014, of 13 February 2014.

[1092] Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 319.

[1093] Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 320.

[1094] Constitutional Court Judgment 26/2014, of 13 February 2014, at para 3.

to operate as a last resort in case of an irreconcilable contradiction between EU legislation and the Spanish Constitution.[1095] This reiteration of the *contralimiti* is accompanied by silence on the CJEU's interpretation of Article 53 CFREU. This is surprising since the *Tribunal Constitucional* had in Declaration 1/2004, apart from spelling out the *contralimiti*, also proposed an interpretation of said horizontal provision as a minimum protection clause.[1096] Aida Torres Pérez draws the following conclusions from an approach that comes across as somewhat inconsistent:

> *'In Melloni, the Constitutional Court did not elaborate on how the references to Declaration 1/2004 were supposed to 'complete' the preliminary ruling rendered by the CJEU. We might infer that the Court is conveying that, even though it will in this case overrule the constitutional interpretation of the right to a fair trial, thereby lowering the standard of constitutional protection, the Constitutional Court remains the ultimate guardian of the Constitution and constitutional rights. This power could be activated in case of an irreconcilable clash between the Constitution and EU law. The judgment thus contains an implicit warning signal.'*[1097]

The Spanish Constitutional Court proceeds, furthermore, to overrule its doctrine on the indirect infringement of Article 24(2) SC by stating that a conviction in absentia does not constitute an infringement of the absolute contents of the fundamental right to a fair trial, even if there no possibility to apply for a retrial, where the absence has been voluntarily and unambiguously decided by a defendant who was duly summoned, and has been effectively defended by an appointed lawyer.[1098]

[1095] See previous section.

[1096] Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 320.

[1097] Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 320.

[1098] Constitutional Court Judgment 26/2014, of 13 February 2014, at para 4.

The Court, however, does not rely on the CJEU's preliminary ruling to justify this overruling, but rather presents its argumentation as if it had come to this result on its own motion, the CJEU ruling and the Charter being perceived merely as hermeneutic criteria.[1099]

From the perspective of constitutional identity preservation, the *Melloni* saga proves unsettling. If the Spanish Constitutional Court had sacrificed part of its constitutional identity on the altar of European integration, it had failed to apply its own guidelines set forth in Declaration 1/2004. Since the Court, however, presents the overruling of its interpretation of Article 24(2) SC as a result of a hermeneutic exercise realised on its own motion with the CJEU as a casual onlooker, it would not have needed to threaten with the limits set out in Declaration 1/2004. Could it be that the Spanish Constitutional Court, praised not long ago for its *manifestly integrationist disposition*,[1100] for being if not a *cooperative* then at least a *non-conflictive actor*,[1101] had switched to a *defensive attitude*[1102] towards European integration?

3. Conclusions

When comparing the 'identity case law' of the German and Spanish constitutional courts, one is able to identify similar evolutions but also to pinpoint differences. Since the Spanish Constitutional Court had – in

[1099] Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 322.

[1100] López Castillo, 'La Unión Europea 'en constitución' y la Constitución estatal en espera de reformas. A propósito de la DTC 1/2004, de 13 de diciembre' at 26.

[1101] Saiz Arnaiz, 'Identité nationale et droit de l'Union européenne dans la jurisprudence constitutionnelle espagnole' at 111.

[1102] Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' at 323.

Gordillo's terms –[1103] 'the advantage of being last', some parallels between the two courts' jurisprudences may stem from the influence of the German Constitutional Court's judgments. *A fortiori* in a field where the German Constitutional Court has developed a well-established body of case law such as 'constitutional identity'. In this sense, the *Bundesverfassungsgericht's* judgments have a significant impact on both the European integration process[1104] and other Member States' constitutional courts, particularly in the matter of constitutional identity.[1105] And yet, it is striking how the case law on the limits to European integration underwent very similar phases: emerging limits established at first for a specific constitutional matter (fundamental rights in the German and territorial structure in the Spanish case), consolidation of a core content of values and principles (eternity clause in the German and core content meintioned in Declaration 1/2004 in the Spanish case), and finally a possible confrontation (German *OMT reference* and Spanish judgment in *Melloni*).

The differences, however, are not negligible either. The main difference lies in the fact that the German Constitutional Court's treatment of the concept of a German constitutional identity prior to the drafting of Article I-5(1) CT

[1103] See above at 1055.

[1104] Martinico speaks of the progressive constitutionalisation of EC law, manifested by ECJ judgments such as *Nold*, *Stauder*, and finally *Omega*, that was triggered by the Solange I judgment, Giuseppe Martinico, 'A Matter of Coherence in the Multilevel Legal System: Are the 'Lions' Still 'Under the Throne'?,' 2008, Jean Monnet Working Paper 16/08 at 27.

[1105] See, for instance, Joël Rideau, 'The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German model'' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

led to the emergence of a 'constitutional identity narrative'[1106] among European constitutional courts. As Tomuschat points out, this may explain why the German Constitutional Court throughout its case law conceptualised constitutional identity as the identity of the Basic Law and not as 'national identity'.[1107]

Secondly, since the Spanish Constitution lacks an equivalent to the German eternity clause, and its Article 93 SC did not undergo a revision similar to that of Germany's *Europa-Artikel*, constitutional limits to the integration process cannot, by definition, be anything other than implicit.

Thirdly, while the Spanish Constitutional Court has broadly referred to the constitutional system of principles and values as limits to Spain's participation in the European integration process, the German Constitutional Court has referred in much narrower terms to a need to preserve *essential areas of democratic formative action*, which have been understood as a 'detailing of the constitutional identity'. The latter detailed conception bears a high potential for conflicts with EU acts.[1108] If the two constitutional courts maintain a broad conception of their respective constitutional identities based on democracy, rule of law, social state and fundamental rights, such conflicts are in turn less likely to arise, as Saiz

[1106] Millet, 'The Respect for National Constitutional Identity in the European Legal Space' at 259 et seq.

[1107] See *supra* at n. 986.

[1108] Walter, 'Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive' at 192.

Arnaiz[1109] and Tomuschat[1110] respectively point out, referring to the Union's commitment to the values enshrined in Article 2 TEU.

[1109] Saiz Arnaiz, 'Identité nationale et droit de l'Union européenne dans la jurisprudence constitutionnelle espagnole' at 121.

[1110] Tomuschat, 'The Defence of National Identity by the German Constitutional Court' at 206.

Chapter 7 The Court of Justice of the European Union

This Chapter is dedicated to making a first assessment of the post-Lisbon case law on the national constitutional identity clause enshrined in Article 4(2) TEU. As mentioned above, upon the entry into force of the Lisbon Treaty, the protection of the identity clause fell under the jurisdiction of the CJEU, a circumstance that opened the door to more 'identity' case law. Actors involved in EU litigation took notice of the existence of what in Laurence Burgorgue-Larsen's words could be a *new universal contentious 'trump card'*[1111] and started to rely extensively on the argument of identity preservation in proceedings before the CJEU.[1112]

While in certain cases the reliance on Article 4(2) TEU merely reflects the concerned Member State's attempt at striking it lucky,[1113] other cases are presented as identity cases based on legitimate expectations fuelled by the existence of encouraging Advocate General Opinions in similar cases or

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[1111] Laurence Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013) at 304.

[1112] See, for a systematic analysis, Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' .

[1113] Or the referring court, as occurred in the recent prliminary ruling request by an Italian court in Joined Cases C-58/13 and C-59/13, *Angelo Alberto Torresi (C-58/13) and Pierfrancesco Torresi (C-59/13) v Consiglio dell'Ordine degli Avvocati di Macerata*, *nyr*. The referring court asked for both interpretation and validity of Article 3 of Directive 98/5, concerning the right to practise the profession of lawyer in another Member State under the professional title obtained in the home Member State, in light of Article 4(2) TEU. The Article 4(2) TEU argument was rejected categorically by both AG nils Wahl and the Court in unusaully harsh terms.

what Sarmiento calls 'silent judgments', i.e. judgments in which the Court of Justice employs the preliminary reference procedure in the context of constitutional conflicts and either renders no solution to the question posed or – whilst deciding specific points of law – leaves the concrete answer to the reference to the referring court.[1114]

In order to establish whether Article 4(2) TEU has modified the Court of Justice's approach to the respect of the Member States' national identities, I will proceed in the following manner: I firstly present on the basis of the Opinions of Advocate Generals the manner in which the Court of Justice treated the Member States' identities prior to the entry in force of the Lisbon Treaty. I will then analyse the post-Lisbon case law on Article 4(2) TEU to examine whether it merely reproduces pre-Lisbon schemata or whether the revised provision adds anything new.

1. Advocates General framing the identity clause

As we will see, the Court of Justice of the European Union has already handed down several judgments and court orders in which it refers to Article 4(2) TEU and which have been critically scrutinised by the academic world. Yet the pronouncements that caused the most stir in academia and contributed towards triggering a debate on what kind of judicial protection the Member States' national identity ought to receive were not those made by the Court of Justice. It was the work of a handful of Advocates General – true 'identity lovers' in Laurence Burgorgue-

[1114] Daniel Sarmiento, 'The Silent Lamb and the Deaf Wolves' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) at 292. In addition to the above mentioned variants of silent judgments – the variants of *complete* and *partial silence* –, Sarmiento also identifies a third one, which he terms 'unheard cases'.

Larsen's words –[1115] that put Article 4(2) TEU on centre stage. This included, in particular, the Opinion of Miguel Poiares Maduro in the *Michaniki* case, which was the first time reference was made to Article 4(2) TEU and which, even though the Lisbon Treaty was not yet in force at the time, put forward proposals on the scope and interpretation of that provision based on the existing ECJ case law as early as in 2008.The Opinion continues to be discussed to the present day.[1116]

Firstly, he traces the Union's duty to respect the Member States' national identities back to the outset of the integration process,[1117] and then clarifies that the Court's own case law supports his thesis that such respect can constitute a legitimate interest which can, in principle, justify a derogation from obligations under EU law.Finally, he reiterates the findings of *Internationale Handelsgesellschaft* to qualify such respect insofar as it could not amount to 'an absolute obligation to defer to all national constitutional rules'.[1118]

As regards his exegesis on identity case law, Advocate General Poiares Maduro distinguishes two lines of case law of the Court of Justice on the Union's duty to respect its Member States' national identities, summarising them as follows:

[1115] Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' at 284.

[1116] See on this Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 290 et seq.

[1117] Opinion of AG Poiares Maduro delivered on 8 October 2008 in Case C-213/07 *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Others*, *ECR* [2008] I-09999, para 31.

[1118] Opinion of AG Poiares Maduro delivered on 8 October 2008 in Case C-213/07 *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Others*, *ECR* [2008] I-09999, para 33 .

> *1. There are cases where the Member States may explicitly rely on their national identity as a legitimate and independent ground of derogation.*[1119]
>
> *2. There are cases where the 'preservation of national constitutional identity can also enable a Member State to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement'.*[1120]

Barbara Guastaferro adds to these two lines of case law a third one inaugurated by AG Juliane Kokott in *UTECA* and which could be considered, if not as an independent line of cases, then as a subcase of the Poiares Maduro's independent ground of justification cases:

> *3. There are cases where 'the respect for national identities was regarded as 'a legitimate objective' by itself, although enshrining other values protected by the Treaty, such as cultural and linguistic diversity.'*[1121]

According to Guastaferro's 2012 account, the Article 4(2) TEU cases handed down by the Court of Justice up until that date all fall within these

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[1119] Opinion of AG Poiares Maduro delivered on 8 October 2008 in Case C-213/07 *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Others*, *ECR* [2008] I-09999, para 32 . He refers to the Judgment of the Court of 2 July 1996, Case C-473/93, *Commission v Grand Duchy of Luxembourg*. *ECR* [1996] I-0320, para 35 .

[1120] Opinion of AG Poiares Maduro delivered on 8 October 2008 in Case C-213/07 *Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Others*, *ECR* [2008] I-09999, para 32 . Here he refers to Judgment of the Court (First Chamber) of 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, *ECR* [2004] I-9609 .

[1121] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 291. She refers to the Opinion of AG Kokott delivered on 4 September 2008 Case C-222/07 *Unión de Televisiones Comerciales Asociadas* (UTECA), *ECR* [2009] I-01407, para 93.

three categories. To ascertain whether this is affirmation is (still) true, I dedicate the following section to the CJEU's post-Lisbon identity case law.

2. The CJEU's case law on Article 4(2) TEU

To date, there are elevenjudgments, ten from the Court of Justice[1122] and one from the General Court,[1123] as well as two court orders,[1124] that explicitly refer to the revised identity clause enshrined in Article 4(2) TEU.

[1122] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693 ; Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787 ; Judgment of the Court (Grand Chamber) of 24 May 2011, Case C-51/08, *Commission v Luxembourg*, *ECR* [2011] I-04231 ; Judgment of the Court (Second Chamber) of 1 March 2012, Case-C-393/10, *Dermod Patrick O'Brien v Ministry of Justice*¸ published in the electronic Reports of Cases , Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr* ; Judgment of the Court (Fifth Chamber) of 24 October 2013, *European Commission v Kingdom of Spain*, Case C-151/12, *nyr* ; Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr* ; Judgment of the Court (Second Chamber) of 3 September 2014, *European Commission v Kingdom of Spain*, Case C-127/12, *nyr*. In the case of the Judgment of the Court (Grand Chamber) of 17 July 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr* , the reference is to the Member States' 'constitutional structures' (at para 28), but it is clear from the Opinion of AG Bot in that case that the Court actually refers to Article 4(2) TEU.Finally, there is Judgment of the Court (Grand Chamber) of 17 July 2014, Joined cases C-58/13 and C-59/13, *Angelo Alberto Torresi (C-58/13) and Pierfrancesco Torresi (C-59/13) v Consiglio dell'Ordine degli Avvocati di Macerata*, *nyr*.

[1123] Judgment of the General Court (Eighth Chamber) of 12 May 2011, Joined cases T-267/08 and T-279/08, Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v. European Commission, *ECR* [2011] II-01999.

[1124] Order of the Court (Sixth Chamber) of 1 October 2010, Case C-3/10, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, *ECR* [2010] I-00121, Order of the Gerneral Court (Eighth Chamber) of 6 March 2012, Case T-453/10, *Northern Ireland*

In order to provide a picture of the Court of Justice's approach to the 'identity clause', I have classified the Article 4(2) TEU cases thematically into four categories: Language protection, social policies, state structure, and finally the *Sayn-Wittgenstein* case, which constitutes a category on its own somewhere between fundamental rights (principle of equality) and state form. I will contrast all cases with pre-Lisbon case law, which will enable me to assess whether the incorporation of Article 4(2) TEU has caused the Court of Justice to give the Member States' identity a different treatment than before the treaty revision. I will examine, based on the latest case law of the Court, the soundness of the statement that the protection of the Member States' identity has merely undergone cosmetic changes.[1125] Finally, the exegesis of the CJEU's post-Lisbon case law will allow me to ascertain whether the Court's interpretation of Article 4(2) TEU is in conformity with the will of the treaty drafters.

2.1 Fundamental Rights – Sayn-Wittgenstein

This section is dedicated to Case 208/09 *Sayn-Wittgenstein*, the first post-Lisbon identity case, where the Austrian prohibition of nobility titles clashed with a citizen's exercise of her freedoms under Article 21 TFEU. This apparently very local conflict involving specific national legislation on nobility titles is, however, embedded in a much broader context where the Member States' distinct conception of the principle of equality plays a fundamental role. As Besselink points out, such conception determines the nature of the polity concerned and is related to particular historical experiences, especially those involving forms of monarchy and

Department of Agriculture and Rural Development v Commission, 6.3.2012, published in the electronic Reports of Cases.

[1125] Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' at 297.

aristocracy.[1126] These (distinct) historical political experiences led to very distinct manners in which the principle of equality is cast among the EU Member States.[1127] It is in this broader context that the conflict involving Austria's constitutional understanding of the principle of equality and of the status of *hereditary* titles ought to be read.

This necessitates a brief account of the facts of the case. Possibly because the *Sayn-Wittgenstein* case bore the potential to make it – in addition to the European Courts Report – into the yellow press,[1128] its circumstances are well-known: The applicant in the main proceedings, Ms Ilonka Sayn-Wittgenstein, is an Austrian national, who had been adopted in 1991 when she was in her late 40s by a German national bearing the surname Fürst von Sayn Wittgenstein in Germany under German law.On the formalisation of the adoption, the German District Court of Worbis issued a decision specifying that the applicant had acquired the surname of her adoptive father as her name at birth, in the form 'Fürstin von Sayn-Wittgenstein'. The applicant used, and was later also registered in Austria under, that surname. Both German and Austrian authorities issued official documents (namely, a German driving licence and an Austrian passport respectively) to the applicant on which her surname was entered as 'Fürstin von Sayn-Wittgenstein'. In 2007, however, the Head of Government of the Province of Vienna informed the applicant of his intention to correct the surname in

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[1126] Leonard F. M. Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' (2012) 49 Common Market Law Review 671, at 671.

[1127] For examples hereof see Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' at 671 et seq.

[1128] As Laurence Burgorgue-Larsen ironises in 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' at 289.

the register of civil status to 'Sayn-Wittgenstein'. While German regulations on the abolition of nobility titles treats such titles as a part of the surname and permits its variation following the sex of the person, Austrian law – following a decision of the Austrian Constitutional Court – precludes Austrian citizens from bearing titles of nobility, including those of foreign origin. Furthermore, it disallowed surnames to be formed according to different rules for males and females.

Since Ms. Sayn-Wittgenstein lived and worked in Germany, the referring Court asked, in essence, whether Article 21 TFEU precluded the Austrian authorities' refusal to recognise the applicant's surname acquired by adoption in another Member State where that surname included a title of nobility, something contrary to Austrian constitutional law.

The Court of Justice took the view that the correction of the applicant's surname is liable to cause serious inconvenience to her and hence constitutes a restriction on the freedoms conferred by Article 21 TFEU. It then proceeded to ascertain the existence of a justification for such restriction and for this purpose considered the observations submitted by Member State governments as well as by the Commission. The Austrian, Czech, Italian, Lithuanian and Slovak governments[1129] concurred with the Commission[1130] in that the Austrian constitutional rules on the abolition of

[1129] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, paras 73-79.

[1130] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 80.

nobility titles should be considered a justification for the restriction. Indeed, the Commission explicitly referred to these rules as 'national identity'.[1131]

The Court of Justice first accepts that 'in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of national identity, may be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognised under European Union law'[1132] and then interprets the reliance of the Austrian government on this law as a recourse to public policy.[1133]

The reasoning following that statement in paragraphs 86 to 91 is a reproduction of the Court's findings in *Omega*: Public policy derogations may not be determined unilaterally by the Member States and may only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society. Similar to the Court's pronouncements in *Omega*, it was held to be irrelevant that the concept of public policy may vary from one Member State to the next, and just as in *Omega*, this concept is presented as a general principle of law that the EU legal system seeks to safeguard. In *Omega*, this was human dignity,[1134] whereas in *Sayn-*

[1131] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 80.

[1132] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 83.

[1133] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 84.

[1134] '[T]he Community legal order undeniably strives to ensure respect for human dignity as a general principle of law.' Judgment of the Court (First Chamber) of 14

Wittgenstein this is the principle of equal treatment.[1135] The Court of Justice then reiterates the requirement of proportionality set forth in *Omega* to finally refer to Article 4(2) TEU in the following terms:

> *'It must also be noted that, in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.'*[1136]

What then follows is the *thinnest*[1137] possible proportionality test:

> *'In the present case, it does not appear disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such a rank. By refusing to recognise the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them.'*[1138]

October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, *ECR* [2004] I-9609, para 34.

[1135] 'The European Union legal system undeniably seeks to ensure the observance of the principle of equal treatment as a general principle of law.' Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 89.

[1136] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 92

[1137] Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' at 692.

[1138] Judgment of the Court (Second Chamber) of 22 December 2010, Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 93.

As pointed out by Besselink,[1139] the proportionality test conducted by the Court merely entailed positing that the conception underlying the restrictive measure did not need to be shared by all Member States, and asserting that the duty enshrined in Article 4(2) TEU also covered the respect for the status of the State as a Republic. The Court refrained from reflecting on whether there were alternative, less restrictive means at the disposition of the Court or on the considerations of AG Sharpston on the circumstance that the applicant had borne a certain surname during a 15-year period.[1140] Most certainly, the Court did not do 'what it usually does in cases involving restrictions of free movement',[1141] and its proportionality test proved even thinner than the one carried out in *Omega*.[1142]

The Court's solution to the *Sayn-Wittgenstein* case fits in with the second line of cases handed down by the Court of Justice on constitutional identity identified by AG Poiares Maduro in *Michaniki* and to which I have referred in the first section of the present chapter, i.e. where the Court endorses a Member State's own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement.

[1139] Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' at 683.

[1140] Opinion of AG Sharpston delivered on 14 October 2010 in Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, *ECR* [2010] I-13693, para 67.

[1141] Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' at 683.

[1142] In the *Omega* case, the Court had at least asserted that 'by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.' Judgment of the Court (First Chamber) of 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, *ECR* [2004] I-9609, para 39.

2.2 Language protection cases

As we have seen in previous chapters, the protection of the Member States' national languages as a part of their identity has been at the centre of the European integration process from its very inception. It is thus rather unsurprising that – now that it had been placed under the Court of Justice's scrutiny – the Union's duty to respect its Member States' identities also plays a central role in the protection of language and linguistic diversity before the Court of Justice.

Even though in both cases the preservation of a national language is at stake, the reasoning is somewhat different – primarily because in linguistic diversity cases, the main accent is put on the EU principle of multilinguism. There are two cases (which I will not address further, since they are pre-Lisbon) involving this principle in which former Article 6(3) TEU was invoked and where again the role of Advocate Generals Poiares Maduro and Kokott has been crucial.[1143]

Finally, a further case that I will not examine in detail is one involving *identity subversion* that rather than *identity protection*. This case, in which the Italian *Tribunal di Bolzano* sought to apply provisions of EU law *to overcome fundamental principles of its own national Constitution*,[1144] nonetheless requires a brief commentary. The case does not deal with language protection at national level or linguistic diversity at EU level, but rather represents the (failed) attempt by an Italian court to have the Court

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[1143] Opinion of AG Poiares Maduro delivered on 16 December 2004, Case C-160/03 *Kingdom of Spain v Eurojust, ECR* [2005] I-02077; Opinion of AG Kokott delivered on 21 June 2012, Case C-566/10 P, *Italian Republic v European Commission*, published in the electronic Reports of Cases.

[1144] Giuseppe Bianco and Giuseppe Martinico, 'The Poisoned Chalice: An Italian view on the Kamberaj case,' 2013, Working Papers on European Law and Regional Integration at 8.

of Justice adjudicate on a provision having constitutional status concerning linguistic diversity at (sub)national level, namely the Presidential Decree of 31 August 1972. This provision concerns the special status laid down for the Trentino-South Tyrol region and grants specific conditions of autonomy of the Autonomous Province of Bolzano on account of the specific composition of its population, which is divided into three linguistic groups (Italian-, German- and Ladin-speaking).[1145] As Bianco and Martinico point out, in the Italian legal order, this decree occupies a status even higher than constitutional status since it develops Article 6 of the Italian Constitution, which sets forth the State's duty to protect linguistic minorities. This principle constitutes one of the fundamental principles of the Italian Constitution and as such forms part of the famous counter-limits developed by the Italian Constitutional Court.[1146] Since the principle of the protection of linguistic minorities bore no relevance for the main proceedings, the Court of Justice declared that the Italian court was in fact seeking to obtain an advisory opinion on a general question, and regarded the question relating to that principle inadmissible.[1147]

There are three 'language cases' involving a claim based on Article 4(2) TEU that have been decided by the Court of Justice to date: Case C-391/09

[1145] In a nutshell: By means of a preliminary reference, the Italian court – without, however, explicitly referring to Article 4(2) TEU – attempts to ascertain whether the principle of primacy of EU law precluded the application of a provision developing a fundamental principle of the constitutional system of the Member State concerned. See Judgment of the Court (Grand Chamber) of 24 April 2012. Case C-571/10, *Kamberaj*, ECR [2012] I – 00000.

[1146] Bianco and Martinico, 'The Poisoned Chalice: An Italian view on the Kamberaj case' at 8.

[1147] Judgment of the Court (Grand Chamber) of 24 April 2012. Case C-571/10, *Kamberaj, ECR* [2012] I – 00000, paras 45 - 46.

Runevič-Vardyn and Wardyn,[1148] Case C-51/08 *Commisison v Luxembourg*,[1149] and Case C-202/11, *Las*.[1150] In all three cases, an infringement of a fundamental market freedom was contemplated; in all three cases, the protection of an official language was put forward in order to justify a derogation; and in all three cases, the Court of Justice explicitly referred to the protection of a national language as a part of the Member States' identity within the meaning of Article 4(2) TEU. So far, so good. The outcomes of the three cases, however, were uneven. While in the *Runevič-Vardyn and Wardyn* case the Court of Justice left considerable leeway to the referring court when assessing whether the measure under scrutiny could constitute an obstacle to a fundamental freedom, and if this was the case, whether such measure was proportionate.In the two latter cases, the measures under scrutiny did not pass the Court's proportionality test. As we will see, these outcomes are in line with previous case law, and the innovations brought by the revised and extended formulation of Article 4(2) TEU as well as the Court's new jurisdiction over it therefore proved rather limited.

2.2.1 Language protection as a subterfuge: the Luxembourg déjà vu

I will start with Case C-51/08, technically a pre-Lisbon case since the infringement procedure was initiated before the treaty revision came into

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[1148] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787.

[1149] Judgment of the Court (Grand Chamber) of 24 May 2011, Case C-51/08, *Commission v Luxembourg*, *ECR* [2011] I-04231.

[1150] Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr*.

force, where the Grand Duchy of Luxembourg relied – albeit subsidiarily – on the national identity clause (then Article 6(3) TEU), more precisely on the need to ensure the protection of the Luxembourgish language, in order to justify confining the profession of notary to its own nationals.

In the case at hand, the Commission sought a declaration from the Court of Justice that the Grand Duchy of Luxembourg had failed to fulfil its obligations under ex Article 43 TEC (Article 49 TFEU) and the first paragraph of ex Article 45 TEC (Article 51 TFEU) by limiting access to the profession of notary exclusively to nationals, as well as those obligations arising from Directive 2005/36/EC on the recognition of professional qualifications by not applying that Directive to the profession of notary.

The fundamental question for the purpose of ascertaining if Luxembourg's nationality clause on the profession of notaries was compatible with the freedom of establishment required determining whether the activities carried out by a notary were connected to the exercise of official authority and thus fell under the exception provided by the first paragraph of Article 51 TFEU.

In this sense, the Grand Duchy of Luxembourg held that the professional activities of a notary bore such a connection to the exercise of public authority, an argument which was not followed by the Court of Justice, which merely recognised that notarial activities pursue objectives in the public interest, a fact that in turn constituted an overriding reason in the public interest capable of justifying restrictions of Article 49 TFEU.[1151]

For the purpose of justifying the existence of a nationality clause for the profession of notary, the Grand Duchy of Luxembourg had relied – as

[1151] Judgment of the Court (Grand Chamber) of 24 May 2011, Case C-51/08, *Commission v Luxembourg*, *ECR* [2011] I-04231, para 97.

mentioned above, subsidiarily to the defence based on the exercise of public authority – on the need to ensure the use of the Luxemburgish language in the performance of the activities of notaries, so as to ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of *ex* Article 6(3) TEU.[1152]

The Court, while acknowledging the legitimate interest of Article 4(2) TEU, nevertheless found the nationality clause not to be proportional:

> *'While the preservation of the national identities of the Member States is a legitimate aim respected by the legal order of the European Union, as is indeed acknowledged by Article 4(2) TEU, the interest pleaded by the Grand Duchy can, however, be effectively safeguarded otherwise than by a general exclusion of nationals of the other Member States (see, to that effect, Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, paragraph 35).'*[1153]

As Laurence Burgorgue-Larsen points out,[1154] these lines present striking similarities to those of a judgment handed down in 1996 – also in an infringement procedure brought by the Commission against the Grand Duchy of Luxembourg for maintaining a nationality requirement as regards access to civil servants' or public employees' posts in various public sectors – to which the Court refers in its 2011 judgment:

> *'Whilst the preservation of the Member States' national identities is a legitimate aim respected by the* ***Community*** *legal order (as is indeed acknowledged in Article* ***F(1)*** *of the Treaty on European*

[1152] Judgment of the Court (Grand Chamber) of 24 May 2011, Case C-51/08, *Commission v Luxembourg*, *ECR* [2011] I-04231, para 72.

[1153] Judgment of the Court (Grand Chamber) of 24 May 2011, Case C-51/08, *Commission v Luxembourg*, *ECR* [2011] I-04231, para 124.

[1154] Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' at 297.

> *Union), the interest pleaded by the Grand Duchy can**, even in such particularly sensitive areas as education, still** be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States.*'[1155] (changes against para 124 of the 2011 judgment in Case C-51/08 in bold)

While the recourse to the national identity clause by the Luxembourgish government was based in both cases on the preservation or transmission of traditions,[1156] the Luxembourgish language as an exigency of national identity was only invoked in Case C-51/08. Language protection comes across as an excuse to maintain the nationality requirement for notaries, and the fact that the argument was raised in the alternative in case the 'public authority' argument were to fail seems to further corroborate that it was nothing more than a long shot. The Court's reasoning remains the same, however: Luxembourg's identity may be safeguarded by less restrictive means than the exclusion of other Member States' nationals. Reading Case C-51/08 having regard to Case C-473/93 gives us a strong sense of a déjà vu.

2.2.2 Language protection versus personal identity: Runevič-Vardyn and Wardyn

The next 'language protection' case decided by the Court of Justice contained an interesting mix of national and personal identities as well as of official and minority languages. In Case C-391/09, a Lithuanian court, the First District Court of the City of Vilnius, made a reference for a

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[1155] Judgment of the Court of 2 July 1996, Case C-473/93, *Commission v Grand Duchy of Luxembourg*, *ECR* [1996] I-0320, para 35.

[1156] In Case C-473/93 Luxembourg defended the nationality requirement with regard toteachers as serving to '*to transmit traditional values*'(para 32) and in Case C-51/08 as serving to '*ensure respect for the history, culture, tradition and national identity of Luxembourg*' (para 72).

preliminary ruling in the context of proceedings between, on the one hand, Malgožata Runevič-Vardyn and her husband Łukasz Paweł Wardyn, and, on the other, the Vilnius Civil Registry Division, following the latter's refusal to amend the forenames and surnames of the interested parties as they appear on the certificates of civil status which it issued to them.

The controversies arose from the Lithuanian spelling rules that do not include certain characters from the Roman alphabet (such as the letter 'W') and no diacritical marks, which in turn form part of the Polish language. Even though the outcome of the case is well-known, the case's intricate facts deserve to be reproduced at least briefly. Ms Malgožata Runevič-Vardyn (the first applicant), a Lithuanian national of Polish ethnic origin, married Łukasz Paweł Wardyn (the second applicant) of Polish nationality after working in Poland for some time. Several official documents issued by Lithuanian authorities to the applicants (Ms Runevič-Vardyn's birth certificate, the couple's marriage certificate) feature the names or surnames spelled in a way that does not follow Polish spelling rules – as mentioned above, the first applicant, despite not being of Polish nationality, belongs to the Polish minority group in Lithuania – and even when it does so (at least partly), the spelling proves inconsistent since on the marriage certificate, the couple's surname is spelled differently for each spouse. The applicants requested that the Vilnius Civil Registry Division change the names and surnames on the birth and marriage certificates on the following grounds:Firstly, Ms Runevič-Vardyn submitted that her name and surname in her Lithuanian birth certificate did not correspond with the Polish spelling those names were intended to follow. Secondly, both applicants complained that in the marriage certificate issued by the Vilnius Civil Registry Division, 'Łukasz Paweł Wardyn' is transcribed as 'Lukasz Pawel Wardyn', whilst his wife's name is entered as 'Malgožata Runevič-Vardyn'. In other words: Characters of the Roman alphabet but no diacritical marks were used in the husband's case, while only Lithuanian

characters were included in the wife's case. Upon the Vilnius Civil Registry Division's refusal to carry out the requested modifications, the applicants brought an action before the referring court. With its preliminary reference, the Lithuanian court asked, in essence, whether Articles 18 and 21 TFEU as well as Article 2(2)(b) of Directive 2000/43[1157] preclude the Lithuanian authorities from refusing to carry out the requested changes in the official documents.

After discarding the applicability of Directive 2000/43[1158] and confirming that of Article 21 TFEU,[1159] the Court of Justice went on to verify the existence of a restriction on freedom of movement. Of all the refused modifications, however, the Court only recognises the refusal of the couple's request to change on the marriage certificate the letter 'V' into a 'W', and the husband's surname to his wife's maiden name, as liable to cause inconvenience.[1160] Yet, whether or not such inconvenience at administrative, professional and private levels may be considered serious enough to constitute a restriction within the meaning of Article 21 TFEU is left to the national court to decide.[1161] The Court of Justice contemplates

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[1157] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180.

[1158] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 48.

[1159] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 64.

[1160] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 74.

[1161] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 78.

Article 4(2) TEU in the event that the First District Court of the City of Vilnius were to establish that the different spelling of the couple's surnames did indeed constitute a restriction on the freedom of movement. Several government submissions had defended the legitimacy of the protection of a Member State's official language in order to safeguard national unity and preserve social cohesion.[1162] The Lithuanian government in particular had asserted the constitutional protection granted to the Lithuanian language – Article 14 of the Lithuanian Constitution provides that the state language is Lithuanian and Lithuanian constitutional case law recognises the obligation to enter a Lithuanian's forename and surname on a passport in accordance with Lithuanian spelling rules in order not to undermine the constitutional status of that language –[1163] and that such protection preserves nothing less than 'the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities'.[1164]

The Court of Justice first reiterated its findings from *Groener*[1165] by holding that EU law does not preclude the adoption of a policy for the protection and promotion of a language of a Member State which is both the national

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[1162] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 84.

[1163] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, paras 7 and 27.

[1164] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 84.

[1165] Judgment of the Court of 28 November 1989, Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, *ECR* [1989] 3967.

language and the first official language,[1166] and then expressly referred to Article 4(2) TEU:

> *'According to the fourth subparagraph of Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) EU provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language.'*[1167]

The Court of Justice infers from these provisions that the protection of the national language constitutes, in principle, a *legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence*.[1168] As such, it is not granted unconditional prevalence over EU law, rather it will be taken into account when weighed against the rights conferred by EU law[1169] and it does not exempt the restrictive measure, i.e. the Lithuanian authorities' refusal to change the spelling on the marriage certificate from 'Runevič-Vardyn' to 'Runevič-Wardyn', from being proportional.[1170] Whereas AG Jääskinen comes to the conclusion that the

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[1166] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 85.

[1167] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 86.

[1168] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 87.

[1169] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 87.

[1170] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 88.

measure is neither adequate nor necessary,[1171] the Court of Justice prefers again to leave it to the referring court to strike a fair balance between the interests in issue, i.e. the protection of the Lithuanian language and traditions on the one side and the couple's right to private and family life, on the other.[1172]

Despite its deferential approach, the Court of Justice seems to favour carrying out this weighing exercise to the detriment of language protection, since by insisting on AG Jääskinen's argument that Lithuanian authorities already permit nationals from other Member States to have their names and surnames spelled in official documents using characters which do not exist in the national language, it seems to suggest that applying the same to Lithuanian nationals would be the right thing for the referring court to decide.

Does this approach constitute an innovation as against pre-Lisbon case law? In principle, no. Again, there is a continuity with previous case law, namely the *Groener* case to which the Court of Justice itself refers in its judgment, that has not gone unnoticed by academia.[1173] In *Groener*, the Irish government had held that its language policy had been designed to 'maintain but also to promote the use of Irish as a means of expressing

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[1171] Opinion of AG Jääskinen in Case C-391/09 delivered on 16 December 2011, at para 101.

[1172] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 91.

[1173] Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' at 288; Allan F. Tatham, 'Comment on Maria Isabel González Pascual's Methods of Interpreting Competence Norms: Judicial Allocation of Powers in a Comparative Perspective' (2013) 14 German Law Journal 1523, at 1536.

national identity and culture'[1174] and the Court had found that such policy was not precluded by Community law insofar as its implementation would not encroach upon a fundamental freedom, hence be proportional and not discriminate against nationals of other Member States.[1175]

The only contribution of Article 4(2) TEU appears to be the very deferential approach – a 'hands-off approach' –[1176] the Court takes when carrying out the proportionality test. The fact that, contrary to the criterion followed by AG Jääskinen and in spite of that criterion seeming to match that of the Court, the Court of Justice leaves this exercise to the national court may be interpreted as a first sign that Article 4(2) TEU may enhance a legitimate interest when weighed against other rights or interests under EU law.

Finally, the Court's judgment in *Runevič-Vardyn* also helps to shed some light on the interpretation of Article 22 CFREU, which I touched upon in Chapter 4. Since the Court mentions this provision in the same breath as Article 4(2) TEU in support of the legitimacy of Lithuania's protective measure of a national language, instead of mentioning it in connection with Ms Runevič-Vardyn's belonging to a linguistic minority in Lithuania, indicates that Article 22 CFREU should therefore be interpreted in the

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[1174] Judgment of the Court of 28 November 1989, Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee, ECR* [1989] 3967, para 18.

[1175] Judgment of the Court of 28 November 1989, Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee, ECR* [1989] 3967, para 19.

[1176] Hanneke van Eijken, 'Case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybes administracija and Others, Judgment of the Court (Second Chamber) of 12 May 2011, nyr' (2012) 49 Common Market Law Review 809, at 826.

context of the diversity of the Member States' *national identities*, rather than that of minority rights or subnational identities.

2.2.3 Taking it from the public to the private domain: Las

The third 'language protection case' so far in which the Court of Justice has resorted to Article 4(2) TEU is case C-201/11 *Las*. The case involved a preliminary ruling request from the *Arbeidsrechtbank te Antwerpen*, the Antwerp Labour Court, which essentially asked whether Article 45 TFEU precluded the 1973 Flemish Decree on the use of languages obliging undertakings in Belgium's Dutch-speaking region (i.e. Flanders) from drafting the employment contracts when hiring a worker in Dutch, on pain of nullity.

As Elke Cloots's account of the background and legislative history of the 1973 Flemish Decree on the use of languages (hereinafter 'Flemish Language Decree') demonstrates, that decree has to be read in the context of Article 129 of the Belgian Constitution,[1177] which had been incorporated into the Constitution in 1970 and which devolved French and Dutch legislatures the power to rule by decree on the use of language in the administration, public education and employer-employee relations. This devolution appears to have accommodated 'the aspirations of the Flemish people for a 'Dutchification' of important domains of public life' traditionally monopolised by francophone Belgians.[1178] Language protection and promotion were the chief objectives pursued by the Flemish Language Decree. Although preparatory works indicate that, besides

[1177] Elke Cloots, 'Respecting linguistic identity within the EU's internal market: Las' (2014) 51 Common Market Law Review 623, at 625.

[1178] Cloots, 'Respecting linguistic identity within the EU's internal market: Las' at 626.

language promotion, the Flemish legislature was also moved by the social aim of ensuring that (Dutch-speaking) workers understood the conditions of their employment contracts, the main purpose it pursued was to ensure that Dutch rather than French would become 'the language of economic life in Flanders'.[1179] In the context of employer-employee relations, this Flemish Language Decree provided that documents intended for staff were to be drafted in Dutch on pain of nullity.

The controversy in the case at hand arose precisely from an employment relationship between a Dutch national resident in the Netherlands, Mr Anton Las, and his employer PSA Antwerp, a company established in the Belgian city of Antwerp but belonging to a multinational group based in Singapore. The employment contract on the basis of which Mr Las had been hired was drafted in the English language. After five years, PSA Antwerp dismissed him with immediate effect and paid him the compensation prescribed in the employment contract. Mr Las, however, contested the validity of this contract on grounds that it contravened the Flemish Language Decree and claimed the compensation foreseen by Belgian Labour Law, which was significantly higher than that stipulated in the employment contract. Since his former employer refused to comply with Mr Las's demands, the latter brought an action before the Antwerp Labour Court.

While Mr Las claimed that the employment contract was null and void because it infringed the provisions of the Flemish Language Decree, PSA Antwerp asserted that said decree could not be applied to situations in which a worker exercised his or her right of freedom of movement, since

[1179] Cloots, 'Respecting linguistic identity within the EU's internal market: Las' at 626.

the decree would constitute an obstacle to that freedom incapable of being justified by overriding reasons of general interest.[1180]

The Court of Justice found that the Flemish Language Decree did indeed constitute a restriction of Article 45 TFEU on the basis that it was liable to have a dissuasive effect on non-Dutch-speaking employees.[1181] The Court then copies and pastes paragraphs 85 and 86 from its *Runevič-Vardyn* judgment, stating that EU law does not preclude 'the adoption of a policy for the protection and promotion of one or more official languages of a Member State'[1182] and that the Union must, based on Article 3(3) TEU and Article 22 CFREU, respect its cultural and linguistic diversity and, based on Article 4(2) TEU, its Member States' national identity, 'which includes protection of the official language or languages of those States'.[1183] The only difference as compared to the previous judgment is that the reference to 'the language of a Member State *which is both the national language and the first official language*'[1184] and to the Member States' national identity,

[1180] Opinion of AG Jääskinen delivered on 12 July 2012 in Case C-202/11, *Anton Las v PSA Antwerp NV*, para 17.

[1181] Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr*, para 22.

[1182] Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr*, para 25.

[1183] Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr*, para 26.

[1184] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 85 (emphasis added).

'*which includes protection of a State's official language*'[1185] had to be adapted to Belgium's multiliniguistic reality.

However, the Court also found that this legitimate interest view failed to satisfy the requirements of the proportionality principle, since in the Court's view, there were less restrictive means available to secure the objectives pursued by the Flemish Language Decree. [1186]

As Elke Cloots suggests, this judgment is innovative for at least two reasons: Firstly, the Court confirms the possibility of invoking Article 45 TFEU to the detriment of the worker.[1187] Secondly, and more importantly for it is relevant to the scope of Article 4(2) TEU, the Court also explicitly accepted the imposition by Member States of the use of a local language on private communications.[1188]

2.3 Social policy cases

There is a third group of 'constitutional identity cases', which have accrued in the context of social policies, more precisely in the context of issues of worker protection that arise as a result of non-standard forms of work.[1189]

[1185] Judgment of the Court (Second Chamber) of 12 May 2011, Case C-391/09, *Malgožata Runevic-Vardyn and Lukasz Pawel Wardyn* v. *Vilniaus miesto savivaldybes administracija and Others*, *ECR* [2011] I-03787, para 86 (emphasis added).

[1186] Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr*, para 32.

[1187] Judgment of the Court (Grand Chamber) of 16 April 2013, Case C-202/11, *Anton Las v PSA Antwerp NV*, *nyr*, para 18. On this, see Cloots, 'Respecting linguistic identity within the EU's internal market: Las' at 632 et seq.

[1188] Cloots, 'Respecting linguistic identity within the EU's internal market: Las' at 634 et seq.

[1189] On the protection atypical workers are afforded under EU law, Steve Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU Law?' (2013) 32 Yearbook of European Law 30–56.

Two out of the three measures[1190] concerning 'atypical' workers adopted by the EU legislature gave rise to Article 4(2) TEU case law: The framework agreement on fixed-term work[1191] resulted in the court order in the *Affatato* case[1192] and the framework agreement on part-time work[1193] led to the judgment in the *O'Brien* case.[1194]

2.3.1 Fixed-time work: Affatato

In the *Affatato* case, the Italian *Tribunale di Rossano* in essence asked the Court of Justice by means of a preliminary reference for an interpretation of Clause 5 of the framework agreement on fixed-term work, a provision on *curbing* the 'abuse' of 'successive' fixed-term work contracts.[1195] In the main proceedings, Mr Franco Affatato had brought an action against his employer, the Azienda Sanitaria Provinciale di Cosenza, seeking the

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[1190] The third measure being Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work on temporary agency work, OJ 5.12.2008 L327/9. On this, see Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU Law?' at 32 et seq.

[1191] Framework Agreement on fixed-term work concluded on 18 March 1999, which is attached as an annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, at 43).

[1192] Order of the Court (Sixth Chamber) of 1 October 2010, Case C-3/10, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, *ECR* [2010] I-00121.

[1193] Framework Agreement on part-time work concluded on 6 June 1997, which appears in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10).

[1194] Judgment of the Court (Second Chamber) of 1 March 2012, Case C-393/10, *Dermod Patrick O'Brien v Ministry of Justice*¸ published in the electronic Reports of Cases.

[1195] Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU Law?' at 32.

conversion of fixed-term contracts to a contract of unlimited duration before the referring court. The latter referred no fewer than 16 questions regarding the interpretation of the Framework Agreement – the 14th of which enquired as to whether the directive containing the Framework Agreement was operated towards the Italian Republic since in the referring court's view it contravened Italy's fundamental political and constitutional structures and the essential functions within the meaning of Article 4(2) TEU. As Barbara Guastaferro points out, it is precisely this question that makes this preliminary ruling request so interesting: The referring court questions the legality of an EU legal act for encroaching upon Article 4(2) TEU, 'thus impliedly asking the ECJ to use the identity clause as a ground of review of the legality of an EU act'.[1196]

Under Italian law, more precisely under Article 36(5) of Legislative Decree No 165/2001 laying down general rules concerning the organisation of employment in public administration, the conversion of a fixed-term contract to a contract of unlimited duration is prohibited in the event of abuse resulting from the use of such successive fixed-term employment contracts by a public sector employer. The referring court appears to deem such regulation of the public sector as a part of the fundamental political and constitutional structures or the essential functions of the Italian Republic.

The Court of Justice holds that Clause 5 of the Framework Agreement is, as such, in no way liable to affect the fundamental political and constitutional structures or the essential functions of the Member State concerned within the meaning of Article 4(2) TEU, since it does not preclude national legislation, such as that in Article 36(5) of Legislative

[1196] Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 302.

Decree No 165/2001.[1197] Furthermore, the Court of Justice left it to the *Tribunale di Rossano* to assess to what extent the relevant provisions of domestic law are adequate for the prevention and, as necessary, penalisation of the public administration's abuse of successive fixed-term employment contracts.[1198]

The *Affatato* case ought to be read in the context of two very similar cases, Case C-53/04 *Marruso* and *Sardino* and Case C-180/04 *Vassallo*, where the *Tribunale di Genova* had requested a preliminary ruling from the Court of Justice on whether, *inter alia*, Clause 5 of the Framework Agreement precluded the existence of legislation differentiating between public and private employers, prohibiting the conversion of fixed-term contracts to a contract of unlimited duration in the event of abuse resulting from the use of such successive fixed-term contracts where the employer belongs to the public sector. The domestic provision enshrining such prohibition was Article 36(2) of Legislative Decree No 165/2001, the literal predecessor of Article 36(5) of the same decree that was the subject matter of the preliminary reference in *Affatato*.

The *Tribunale di Genova* added that the Italian Constitutional Court had declared that the first sentence of Article 36(2) of Legislative Decree No 165/2001 was consistent with the constitutional principles of equality and good administration enshrined in Articles 3 and 97 respectively of the Italian Constitution. In the view of the Constitutional Court, the difference in treatment between private sector and public sector employees was

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[1197] Order of the Court (Sixth Chamber) of 1 October 2010, Case C-3/10, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, *ECR* [2010] I-00121, para 41.

[1198] Order of the Court (Sixth Chamber) of 1 October 2010, Case C-3/10, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, *ECR* [2010] I-00121, para 50.

justified pursuant to the fundamental principle that access to posts in public authorities is by way of competitive examination.[1199]

The Advocate General, Miguel Poiares Maduro, rephrased the potential conflict between ex Article 36(2) of the Legislative Decree 165/2001 and the obligations arising from Clause 5 of the Framework Agreement as a *conflict of a constitutional nature*.[1200] When analysing the value of the *constitutional* justification, put forward by the referring court and supported by the Italian Government, for the different treatment afforded to employees of the public sector, the Advocate General took a deferential attitude towards the domestic courts and alludes directly to the constitutional identity of the Member States:

> *'Doubtless the national authorities, in particular the constitutional courts, should be given the responsibility to define the nature of the specific national features that could justify such a difference in treatment. Those authorities are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect [footnote-reference to Article 6(3) TEU].'*[1201]

This recognition of the domestic courts' position to assess what configures a specific constitutional identity is followed by the affirmation that

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[1199] See Judgment of the Court (Second Chamber) of 7 September 2006, Case C-53/04, *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, *ECR* [2006] I-07213, para 16 and Judgment of the Court (Second Chamber) of 7 September 2006, Case C-180/04, *Andrea Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, *ECR* [2006] I-07251, para 21.

[1200] Opinion of AG Poiares Maduro delivered on 20 September 2005 in Case C-53/04 *Marruso and Sardino* and Case C-180/04 *Vassallo*, para 8**.**

[1201] Opinion of AG Poiares Maduro delivered on 20 September 2005 in Case C-53/04 *Marruso and Sardino* and Case C-180/04 *Vassallo*, para 40.

reviewing of whether such assessment complies with the rights and interests of EU law nevertheless corresponds to the Court of Justice.[1202] The Advocate General then proceeded to validate the Italian Constitutional Court's intention to protect, as a legitimate purpose, the constitutional rule that access to public posts is, in principle, gained through competition, and leaves it to the referring court to assess compliance with the proportionality principle.[1203]

The Court of Justice follows the recommendations of Advocate General Poiares Maduro in stating that the Italian legislation differentiating between public and private sector employees is in principle not precluded by the framework agreement, albeit without employing his lengthy considerations on Italian constitutional case law and without making any reference to ex Article 6(3) TEU or Italy's constitutional identity.

Against this background, the reference to Article 4(2) TEU by the *Tribunale di Rossano* in the *Affatato* case proves comprehensible. The reference in *Affato* concerned essentially the same national and EU legal rules as the reference in *Marruso, Sardino* and *Vassallo*, with the same constitutional objectives supported by the same constitutional case law at stake. And since in the latter case Advocate General Poiares Maduro had linked – albeit very generally – the constitutional objective to the Member States' constitutional identity, the reference from the *Tribunale di Rossano* seeking to clarify such link is understandable.

The Court of Justice's answer in *Affatato* tallies with its findings in *Marruso, Sardino* and *Vassallo*: The framework agreement generally does

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[1202] Opinion of AG Poiares Maduro delivered on 20 September 2005 in Case C-53/04 *Marruso and Sardino* and Case C-180/04 *Vassallo*, para 40.

[1203] Opinion of AG Poiares Maduro delivered on 20 September 2005 in Case C-53/04 *Marruso and Sardino* and Case C-180/04 *Vassallo*, paras 42-45.

not preclude the national legislation at stake since it does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration, nor does it prescribe the precise conditions under which fixed-term employment contracts may be used; it gives Member States a margin of discretion.[1204] The Court of Justice leaves it to the referring court to determine to what extent the legislation at stake is adequate in order to prevent abuse of successive fixed-term contracts. Since the *Tribunale di Rossano* had explicitly asked the Court of Justice to assess whether Italy's constitutional identity could clash with the obligations resulting from the Framework Agreement, it received the answer that where the Framework Agreement did not preclude the national legislation at stake, there could be hardly any effect on Italy's constitutional identity. The Court's reasoning is, however, essentially the same as in *Marruso*; Article 4(2) TEU adds little more than the varnish of constitutional identity which had already covered AG Poiares Maduro's Opinion from 2005.

2.3.2 Part-time work: O'Brien

In Case C-393/10 *O'Brien*, the controversy leading to the preliminary reference also concerned the application of a framework agreement on atypical workers, in this case the Framework Agreement on part-time work, to a specific sector, the judiciary. By means of a reference for a preliminary ruling, the Supreme Court of the United Kingdom sought an answer from the Court of Justice as whether it was for national law to determine whether

[1204] Order of the Court (Sixth Chamber) of 1 October 2010, Case C-3/10, *Franco Affatato v Azienda Sanitaria Provinciale di Cosenza*, *ECR* [2010] I-00121, para 38; c.f. Judgment of the Court (Second Chamber) of 7 September 2006, Case C-53/04, *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, *ECR* [2006] I-07213, para 47.

judges were to be considered workers within the meaning of the Framework Agreement on part-time work and, if so, whether it was permissible for national law to introduce a difference in treatment between full-time and part-time judges as regards their retirement pensions. In the main proceedings, Mr O'Brien, who had served as a part-time judge for more than 20 years, had relied on provisions of the Framework Agreement to request a retirement pension calculated as a proportion pro rata temporis of that to which a full-time judge would be entitled.

The reference to Article 4(2) TEU was in this case made neither by the referring court nor by the government of the Member State concerned, but rather appears in the observations submitted by another Member State's government. The Latvian government argued that the application of EU law to the judiciary was liable to compromise judicial independence. The Court of Justice dismissed the argument categorically:

> *'Those findings are not called into question by the Latvian Government's argument that the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU. It must be held that the application, with respect to part-time judges remunerated on a daily fee-paid basis, of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment, which constitutes one of the objectives of those acts, and to protect them against discrimination as compared with full-time workers.'*[1205]

That said, the Court of Justice left it to the Member States to define the concept of workers under the Framework Agreement, on the condition of

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[1205] Judgment of the Court (Second Chamber) of 1 March 2012, Case-C-393/10, *Dermod Patrick O'Brien v Ministry of Justice*¸ published in the electronic Reports of Cases, para 49.

not arbitrarily excluding a category of persons by that definition.[1206] It further left it to the national judge to determine whether the difference in treatment between part-time and full-time judges is justified by objective reasons.[1207] The *Affatato* and *O'Brien* cases illustrate how, in the field of social policies, the effective implementation of EU instruments aimed at protecting atypical workers from discrimination bears the potential of encroaching upon national (constitutional) regulations of the working relations in certain sectors.

2.4 State structure and internal division of competences

The last category of cases concerns judgments handed down in cases where the territorial structure or the internal division of competences has been invoked either to curb procedural rules at EU level or derogate from EU fundamental freedoms or obligations provided for by secondary EU law. Especially in relation to these situations, we are torn between the Court of Justice's reiteration of the institutional autonomy of the Member States and the impossibility to put forward provisions of national law to justify a failure to fulfil the obligations under EU law.

[1206] Judgment of the Court (Second Chamber) of 1 March 2012, Case-C-393/10, *Dermod Patrick O'Brien v Ministry of Justice*¸ published in the electronic Reports of Cases, para 51.

[1207] Judgment of the Court (Second Chamber) of 1 March 2012, Case-C-393/10, *Dermod Patrick O'Brien v Ministry of Justice*¸ published in the electronic Reports of Cases, para 67.

2.4.1 The attempt at privateering rules of procedure

In a move described by Laurence Burgorgue-Larsen as a new strategy, a recourse to a new contentious trump card,[1208] Article 4(2) TEU has been invoked by sub-state entities seeking the annulment of Commission decisions in the context of State aid and EU financing of expenditure.

In the context of a procedure reviewing State aid, in Joined Cases T-267/08 and T-279/08, the applicants, the French *Région Nord-Pas-de-Calais* and the *Communauté d'agglomération du Douaisis*, had granted advances to a French based manufacturer of railway rolling-stock, which had been declared State aid incompatible with the common market by the Commission, who ordered its recovery by the French Republic, with interest, from the beneficiary.

The French region of Nord-Pas-de-Calais based its claim for annulment of the Commission decision, *inter alia*, on a violation of France's constitutional identity. By not directly addressing the region's own elected representatives during the formal investigation procedure, the Commission was alleged to have infringed, among other principles, the principle of self-government of the territorial communities – *collectivités territoriales* – provided for in Article 72 of the French Constitution, that is French constitutional identity.[1209]

[1208] Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a few naive Thoughts on Constitutional Identity in the Case-law of the Judge of the European Union' at 295.

[1209] GC (Eighth Chamber) Judgment in Joined cases T-267/08 and T-279/08, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v. European Commission*, 12.5.2011, *ECR* [2011] II-01999, at paras 61 and 62.

The General Court rejected this grievance in a categorical way by referring to the settled case law denying infra-state authorities the same procedural rights as a Member State in procedures reviewing state aid:

> *'In addition, as regards the […] allegation relating to respect for the constitutional identity of the Member States, it is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate (Case C-88/03 Portugal v Commission [2006] ECR I-7115, paragraph 58, and Joined Cases C-428/06 to C-434/06 Unión General de Trabajadores de la Rioja and Others v Juntas Generales del Territorio Histórico de Vizcaya [2008] ECR I-6747, paragraph 48). However, under the procedure for reviewing State aid, the role of interested parties other than the Member State concerned is confined to that outlined in paragraph 74 above.'*[1210]

In Case T-453/10,[1211] the *Northern Ireland Department of Agriculture and Rural Development* sought the annulment of a Commission decision excluding expenditure incurred by the UK and Northern Ireland from EU financing. The applicant relied, with express reference to Article 4(2) TEU, on British constitutional identity – in this case, the devolution of powers – to justify its standing on grounds of being a devolved administration and, in consequence, the admissibility of its application.

[1210] GC (Eighth Chamber) Judgment in Joined cases T-267/08 and T-279/08, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis v. European Commission*, 12.5.2011, *ECR* [2011] II-01999, para 88 (emphasis added).

[1211] GC (Eighth Chamber) Order in Case T-453/10, *Northern Ireland Department of Agriculture and Rural Development v Commission*, 6.3.2012, published in the electronic Reports of Cases.

> *'According to the applicant, it would be consistent with the European Union's respect for the national identity of the United Kingdom, including its regional self-government (Article 4(2) TEU) for the Court to find that its application is admissible. Such a finding would also accord with common sense, since the applicant, which bears the burden of disallowances under the constitutional system within which it operates, would be able to challenge such disallowances. The ability to bring such a challenge should not, therefore, be the prerogative of a central government with no obvious financial interest and no obvious incentive to do so.'* [1212]

The General Court rejected the argument and declared the action inadmissible. In an approach similar to that it had taken in the *Région Nord Pas-de-Calais* case, the Court acknowledged the role Union law confers upon infra-state entities – here it is the principle of institutional autonomy of the Member States that is referred to -[1213] but accorded precedence to its settled case law providing that for the purpose of Article 263 TFEU regional entities may not be treated as Member States.[1214] The Court concluded that

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[1212] GC (Eighth Chamber) Order in Case T-453/10, *Northern Ireland Department of Agriculture and Rural Development v Commission*, 6.3.2012, published in the electronic Reports of Cases, para 31.

[1213] GC (Eighth Chamber) Order in Case T-453/10, *Northern Ireland Department of Agriculture and Rural Development v Commission*, 6.3.2012, published in the electronic Reports of Cases, para 37.

[1214] See para. 36 '*Moreover, it should be noted that the Court has already held that an action by a local or regional entity cannot be treated in the same way as an action by a Member State, the term Member State within the meaning of Article 263 TFEU referring only to government authorities of the Member States. That term cannot include the governments of regions or other local authorities within Member States without undermining the institutional balance provided for by the Treaty (see Case C-417/04 P Regione Siciliana v Commission [2006] ECR I-3881, paragraph 21 and the case-law cited), irrespective of the powers they may have (order in Case C-180/97 Regione Toscana v Commission [1997] ECR I-5245, paragraph 6).*' GC (Eighth Chamber) Order in Case T-453/10, *Northern Ireland Department of Agriculture and*

> *'[…] it cannot be accepted that the action based on the applicant's argument claiming that the European Union has an obligation of respect for the national identity of the United Kingdom, including its regional self-government, is admissible, since such an obligation does not in any way impinge on the Treaty provisions on judicial remedies. It follows that no incompatibility with Article 4(2) TEU can be established.'*[1215]

The outcomes of both cases as well as the reasoning of the Court are indicative of the fact that the revision of the national identity clause by the Lisbon Treaty has not in any way modified the CJEU's settled case law on the procedural implication of infra-state entities under EU law.

2.4.2 The pretence of the internal division of competences

A second set of cases originating in Germany and Spain deal with the impact that the internal division of competences may have on the Member States' obligations under EU law.

2.4.2.1 The *Spanish* cases

The 'Spanish' cases, C-151/12 and C-127/12, both stem from actions by which the Commission sought to declare Spain's failure to fulfil its obligations under EU law. In both cases, the Kingdom of Spain puts forward the Union's duty to respect the Member States' national identities to elude being declared in failure of fulfilling its obligations under EU law.

Rural Development v Commission, 6.3.2012, published in the electronic Reports of Cases.

[1215] GC (Eighth Chamber) Order in Case T-453/10, *Northern Ireland Department of Agriculture and Rural Development v Commission*, 6.3.2012, published in the electronic Reports of Cases, para 38.

In Case C-151/12 the Court of Justice declared that Spain had failed to fulfil its obligations under EU law,[1216] more precisely under the EU Water Framework Directive,[1217] with whose obligations the Kingdom of Spain had already been declared in breach in the course of two previous infringement procedures.[1218] In both prior infringement procedures, the Spanish government had – unsuccessfully – asserted the internal division of competences,[1219] an argument that would not prove much more successful in Case C-151/12. Here, the Commission alleged Spain's failure to transpose the provisions of Directive 2000/60/EC concerning the intracommunal river basins situated outside Catalonia, since it claimed that the decrees Spain had passed in the matter only applied to intercommunal river basins.[1220] The Spanish government submitted that the supplementing

[1216] Judgment of the Court (Fifth Chamber) of 24 October 2013, European Commission v Kingdom of Spain, Case C-151/12, *nyr*.

[1217] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327, 22.12.2000, 1–73.

[1218] See on this Francesc Xavier Pons Rafols, 'El Tribunal de Justicia y la supletoriedad del Derecho estatal como garantía del cumplimiento autonómico del Derecho de la Unión Europea' (2014) 18 Revista de Derecho Comunitario Europeo 131, at 134 et seq.

[1219] Pons Rafols, 'El Tribunal de Justicia y la supletoriedad del Derecho estatal como garantía del cumplimiento autonómico del Derecho de la Unión Europea' at 135.

[1220] Following the legal context established by the Court of Justice, '[f]or the purposes of water management, Spanish legislation distinguishes between two categories of river basin, that is to say, between 'intercommunal' river basins which designate the waters flowing through more than one Autonomous Community and in respect of which only the State may legislate, and 'intracommunal' river basins in which all of the waters concerned are situated within an individual Autonomous Community and in respect of which the Autonomous Communities have legislative competence.' Judgment of the Court (Fifth Chamber) of 24 October 2013, European Commission v Kingdom of Spain, Case C-151/12, *nyr*, para 11.

clause in Article 149(3) SC[1221] ensured the transposition of the obligations under Directive 2000/60 into national law, claiming that it provided, under certain circumstances, the subsidiary application of the national legislation, i.e. of the two aforementioned decrees.[1222] In addition to this argument based on a constitutional provision, the Spanish government asserted that the Commission disregarding *inter alia* Article 4(2) TEU sought to stipulate the manner in which the transposition of the Directive was to be achieved in Spain.[1223]

The Court of Justice rejected both arguments. The subsidiary application of the decrees based on Article 149(3) SC was deemed inappropriate to ensure the transposition of the obligations under the Directive based on the *Tribunal Constitucional*'s own case law:

> *'in accordance with the case-law of the Tribunal Constitucional (Constitutional Court), which the Kingdom of Spain cites in its observations, Article 149(3) of the Constitution does not appear to permit the application of national rules in a supplementing manner in the absence of legislation by the Autonomous Communities, but only to fill identified gaps. It is appropriate to add that, at the hearing, the Kingdom of Spain confirmed that, in the present case, the Autonomous Communities, with the exception of the Autonomous Community of Catalonia, have not exercised their legislative powers. In those circumstances, the application of the supplementing clause*

[1221] On Article 149(3) SC in this context, see Pons Rafols, 'El Tribunal de Justicia y la supletoriedad del Derecho estatal como garantía del cumplimiento autonómico del Derecho de la Unión Europea' at 138 et seq.

[1222] Judgment of the Court (Fifth Chamber) of 24 October 2013, European Commission v Kingdom of Spain, Case C-151/12, *nyr*, para 23.

[1223] Judgment of the Court (Fifth Chamber) of 24 October 2013, European Commission v Kingdom of Spain, Case C-151/12, *nyr*, para 23.

> *in the present case would not be appropriate as regards the intracommunal river basins outside Catalonia.*[1224]

The complaint of a breach of Article 4(2) TEU due to the Commission stipulating the manner in which the transposition of the Directive was to be achieved is rebutted by the Court of Justice by the mere statement that this complaint was based on a misreading of the Commission's application, which neither stated nor suggested to the Court the manner of the transposition.[1225]

Interestingly, in her Opinion delivered on 30 May 2013, AG Kokott engages much more with Spain's complaint of a possible breach of Article 4(2) TEU than the Court did subsequently. She first states that from the outset it is not precluded that EU law may, in federal or decentralised systems, be transposed through the subsidiary application of national rules whenever such subsidiary application is beyond question, a requirement which, in her opinion, is not satisfied by Spanish law.[1226] She then insinuates that the acceptance of the Spanish government's argument on the subsidiary application of national legislation could result in an impairment of Spanish constitutional identity:

> *'Quite the contrary, to accept the subsidiary application of national law as transposing a directive would entail a failure to respect the reservations expressed in Spanish constitutional law in relation to this method. It would not acknowledge sufficiently the legislative*

[1224] Judgment of the Court (Fifth Chamber) of 24 October 2013, European Commission v Kingdom of Spain, Case C-151/12, *nyr*, para 35.

[1225] Judgment of the Court (Fifth Chamber) of 24 October 2013, European Commission v Kingdom of Spain, Case C-151/12, *nyr*, para 37.

[1226] Opinion of AG Kokott delivered on 30 May 2013 in Case 151/12, para 34.

> *responsibility associated with the legislative competence accorded to the Autonomous Communities.'*[1227]

In the judgment handed down in Case C-127/12, the Court of Justice has dealt in similar terms with Spain's identity claim based on the internal division of competences.[1228] In this case, the Commission had applied to the Court of Justice for a declaration establishing Spain's failure to comply with its obligations under Articles 21 TFEU and 63 TFEU as well as the respective provisions of the EEA Agreement because of the different fiscal treatment it awarded to inheritances and donations based on the criterion of residency in Spain. Again, the central issue was the division of competences between the central state and the Autonomous Communities. By Article 48 of the Spanish Law 22/2009 of 18 December the Autonomous Communities were granted broad legislative competences regarding the regulation of the inheritance and gift tax, including reductions. The legislation of the Autonomous Communities – and thus the corresponding reductions – are only applicable in the case of an exclusive connection with the territory of these Communities. This results in such legislation not being applicable where in cases of successions or donations either the heir, the donee or the descedant do not reside on Spanish territory or the immovable property forming the object of the succession or donation is located outside of Spain. In these cases, it is the state legislation which applies. The resulting difference in treatment could in the eyes of the Commission result in an unjustified restriction on fundamental market freedoms.

The Spanish government once again relied on the Union's duty to respect the national identity of its Member States enshrined in Article 4(2) TEU.

[1227] Opinion of AG Kokott delivered on 30 May 2013 in Case-151/12, para 35.

[1228] Judgment of the Court (Second Chamber) of 3 September 2014, European Commission v Kingdom of Spain, Case C-127/12, *nyr*.

However, it did not claim that Spain's constitutional identity could justify a derogation from fundamental market freedoms; it went further by claiming that Article 4(2) TEU resulted in the Court of Justice's lack of competence to adjudicate on the exercise of fiscal competences in the Spanish constitutional order.[1229]

The Court of Justice rejected this argument by clarifying that the infringement proceedings do not purport to question the division of competences between the State and the Autonomous Communities let alone the attribution to the latter of competences in matters of taxation of inheritances and gifts.[1230]

Spain's strategy of relying on Article 4(2) TEU and the Union's duty to respect the division of competences enshrined in its Constitution as a defence in infringement proceedings was thus rather unsuccessful. This was to be expected, bearing in mind the Court's restrictive approach to Member State defences in infringement procedures.[1231]

2.4.2.2 The *German cases*

The 'German cases' of claims regarding the internal division of competences relying on Article 4(2) TEU did not originate from infringement proceedings but rather in the context of preliminary ruling proceedings. In Joined Cases C-473/13 and C-514/13,[1232] the *Bundesgerichtshof* and the *Landgericht München I* essentially asked the

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[1229] Judgment of the Court (Second Chamber) of 3 September 2014, European Commission v Kingdom of Spain, Case C-127/12, *nyr*, para 42.

[1230] Judgment of the Court (Second Chamber) of 3 September 2014, European Commission v Kingdom of Spain, Case C-127/12, *nyr*, para 62.

[1231] Stine Andersen, *The enforcement of EU law: the role of the European Commission* (Oxford University Press 2012) at 57 et seq.

[1232] See Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*.

Court of Justice to clarify the conditions in which Member States must detain third-country nationals awaiting removal under Directive 2008/115/EC. The focus was placed on the interpretation of Article 16(1) of said Directive and its imposition on the Member States of the requirement that as a general rule detention must take place in a specialised facility with appropriate living conditions and that, where such detention must exceptionally take place in a prison, the Member State must ensure the separation of that detained person from ordinary prisoners. Yet, in Germany the majority of the *Länder* do not have such specialised detention facilities, with the result that third-country nationals awaiting removal are detained in prisons instead. Since in accordance with Articles 83 and 84 BL, it is for the *Länder* to carry out detentions of illegally residing third-country nationals for the purpose of their removal, the questions referred to the Court of Justice bore a link to the federal structure of the German State. In this vein, the referring courts essentially enquired whether a third-country national awaiting removal could be detained in prison on the ground that the *Land* responsible for carrying out his detention lacked specialised facilities.

Both the German government and the referring courts rely on Article 4(2) TEU. The referring courts enquired whether the federal structure of Germany may legitimately be relied upon under Article 16(1) of Directive 2008/115/EC pointing out that, 'under Article 4(2) TEU, the Union must respect the federal structure of the Member States'.[1233]

While the referring courts leave it to the Court of Justice to decide what role Article 4(2) TEU should play in the context of the obligations under Article 16(1) Directive 2008/115/EC, the German government maintains that

[1233] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 121.

refusing to allow a *Land* to place migrants awaiting their removal in a prison within its purview on the ground that there are specialised detention facilities elsewhere in the national territory would amount to an encroachment upon that *Land*'s constitutionally enshrined administrative sovereignty.[1234]

> *'In its observations, the German Government recalls that Article 4(2) TEU in fact requires the legislature of the Union to respect the national identity of Member States inherent in their fundamental political and constitutional structures, as regards local and regional autonomy included. Therefore, it considers that, under the division of competences organised by the Basic Law, the Länder should be free to determine whether, and to what extent, they must create and manage specialised detention facilities, having regard to their size, their geographical situation and the number of persons detained for the purpose of removal and should also be free to decide, where appropriate, whether to establish administrative cooperation with other Länder.'*[1235]

Against this background, the German government argues that the exception from the general prohibition of detaining third-country nationals awaiting removal in prisons provided for in Article 16(1) Directive 2008/115/EC must be interpreted so as to respect the division of powers established by the institutional rules of the State.[1236]

Advocate General Yves Bot disagrees with this view on the grounds of what he refers to as 'two essential principles of the case law of the Court'. Firstly,

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[1234] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 122.

[1235] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 122.

[1236] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 123.

he argues that the Court of Justice has consistently held that a Member State may not invoke national provisions or practices stemming from its federal organisation to justify a failure to fulfil its obligations under a directive.[1237] Secondly, he recalls that Member States may not apply rules, even of criminal law, capable of jeopardising the attainment of the objectives of a directive and thereby deprive it of its effectiveness.[1238]

As AG Kokott did in Case C-151/12 when giving an interpretation of Article 149(3) SC contrary to that of the Spanish government, AG Bot then went on to analyse whether the administrative sovereignty of the *Länder* lacking specialised detention facilities could be compromised if these were obliged to cooperate to that effect with other *Länder* and came to the conclusion that it is precisely the German Constitution that establishes in its Article 35(1) the mutual legal and administrative assistance and that this does not compromise the *Länder*'s administrative sovereignty.[1239] The Advocate General thus rejected the notion that the federal structure of Germany precluded the placing of third-country nationals awaiting removal in specialised detention facilities in cases where the competent *Land* lacks such a detention facility.[1240] Despite omitting express references to both Article 4(2) TEU and to Article 35(1) BL, the Court of Justice comes to that same conclusion by, somewhat laconically, stating that:

[1237] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, paras 141-143.

[1238] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 145.

[1239] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 146.

[1240] Opinion of AG Yves Bot of 30 April 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 150.

> *'It must be held that the obligation, laid down in the first sentence of Article 16(1) of Directive 2008/115, requiring detention to take place as a rule in specialised detention facilities is imposed upon the Member States as such, and not upon the Member States according to their respective administrative or constitutional structures.'*[1241]

Hence in this case, Article 4(2) TEU being absent from the judgment, it appears that the provision has had little weight in the reasoning of the Court. The Union's duty to respect its Member States' national identity, however, met a different fate in Case C-156/13[1242] where the Court of Justice was called upon to decide on a preliminary ruling request by the German *Bundesgerichtshof*. This case arose in the context of the – if not somewhat maze-like – definitely substantial[1243] European gambling case law.In accordance with Articles 70 and 72 BL, legislation on games of chance falls within the competence of the *Länder*.The *Länder* had adopted a state treaty on games of chance (*Glücksspielstaatsvertrag*) in 2008, which they amended in 2012. The 2012 state treaty was ratified by all the *Länder* except for Schleswig-Holstein, which had since adopted more liberal legislation providing that the organisation and facilitation of public games of chance via the internet was no longer prohibited. As a result, until February 2013 – the time at which Schleswig-Holstein repealed its legislation to join the 2012 state treaty – the organisation and facilitation of public games of chance via the internet was, in principle, prohibited in all

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[1241] Judgment of the Court (Grand Chamber) of 17 July 2014 in Joined Cases C-473/13 and C-514/13, *Bero* and *Pham*, *nyr*, para 28.

[1242] Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr*.

[1243] Maurits ter Haar, 'The Winner Wetten-Case: on Gambling Monopolies, the Transitional Application of Restrictive Legislation and the Very Essence of Union Law' (2010) 17 The Columbia Journal of European Law Online 41, at 46.

the *Länder* with the exception of Schleswig-Holstein where these were permitted.

The proceedings that led to the preliminary reference by the *Bundesgerichtshof* involved Westdeutsche Lotterie GmbH & Co. OHG, the public lottery company in North Rhine-Westphalia on the one hand, and on the other Digibet Ltd, a company registered in Gibraltar, which offers, for remuneration, games of chance and sports betting in Germany via the internet, as well as Mr Albers, managing director of the latter.

The German public lottery company took the view that the services offered by Digibet Ltd were anti-competitive in that they infringed certain rules applicable to games of chance. This view was corroborated at first instance by the *Landgericht Köln*, which ordered by judgment Digibet Ltd and Mr Albers to cease offering the possibility of playing games of chance for money via the internet to persons in Germany.

After an unsuccessful appeal at second instance, Digibet Ltd and Mr Albers turned to the *Bundesgerichtshof* seeking the dismissal of Westdeutsche Lotterie GmbH & Co. OHG's action in its entirety. In the view of the *Bundesgerichtshof* the different legal position in one *Land* as compared with the others could result in the restrictions on the marketing and advertising of games of chance on the internet in the other *Länder*, which in turn could amount to an infringement of the freedom to provide services enshrined in Article 56 TFEU.

From the outset, the *Bundesgerichtshof* deemed questionable whether reviewing the coherency of the different configurations of gambling legislation in Germany would not be precluded for it being a manifestation

of its federal structure.[1244] The Court relies for this purpose on the point of view of Michael Pagenkopf who himself invokes Article 4(2) TEU against the possibility of such review.[1245] Yet, the *Bundesgerichtshof* also asserts that this question has so far not received a clear answer from the Court of Justice: The findings in Case C-46/08 *Carmen Media Group* would speak against exempting the review of the configuration of German gambling legislation since in that case the Court of Justice had held that:

> *'As for the fact that the various games of chance concerned are partially within the competence of the Länder and partially within the competence of the federal State, it should be recalled that, according to consistent case-law, a Member State may not rely on provisions, practices or situations of its internal legal order in order to justify non-compliance with its obligations under EU law. The internal allocation of competences within a Member State, such as between central, regional or local authorities, cannot, for example, release that Member State from its obligation to fulfil those obligations (see to that effect, in particular, Case C-417/99 Commission v Spain [2001] ECR I-6015, paragraph 37).'*[1246]

The Court of Justice inferred then from this settled case law that

> *'whilst EU law does not preclude an internal allocation of competences whereby certain games of chance are a matter for the Länder and others for the federal authority, […] in the full measure to which compliance with that obligation [not to infringe Article 49 EC] requires it, those various authorities are bound, for that*

[1244] *Bundesgerichtshof* court order of the first chamber in civil matters of 24 January 2013, I ZR 171/10, at para 19.

[1245] Martin Pagenkopf, 'Der neue Glücksspielstaatsvertrag – Neue Ufer, alte Gewässer' (2012) 65 Neue Juristische Wochenschrift 2918, at 2923 et seq.

[1246] ECJ (Grand Chamber) 8 September 2010, C-46/08, *Carmen Media Group Ltd*, ECR [2010] I-08149, para 69.

> *purpose, to coordinate the exercise of their respective competences.'*[1247]

In the proceedings in Case C-156/13, the company Digibet Ltd and Mr Albers, with the support of the Maltese government, relied on said fragments of the Court's judgment in *Carmen Media Group* as well as on the much cited *Winner Wetten* case,[1248] more precisely on its paragraph 61 where the Court had confirmed its holding from *Internationale Handelsgesellschaft* that '[r]ules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law',[1249] to argue against the relevance of Germany's federal structure for the assessment of an impairment of the freedom to provide services.

The Court of Justice does not share this point of view. It recalled its findings from Case C-428/07 *Horvath* according to which 'when provisions of the Treaties or of regulations confer powers or impose obligations upon the Member States for the purposes of the implementation of EU law, the question of how the exercise of such powers and the fulfilment of such

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[1247] ECJ (Grand Chamber) 8 September 2010, C-46/08, *Carmen Media Group Ltd*, ECR [2010] I-08149, para 70.

[1248] Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr*, paras 28 and 29.

[1249] ECJ (Grand Chamber) 8 September 2010, C-46/08, *Winner Wetten GmbH*, ECR [2010] I-08115, para 61. In that case, the confirmation of *Internationale Handelsgesellschaft* amounted to nothing less than imposing on the *Verwaltungsgericht Köln* to disregard a prior decision of the *Bundesverfassungsgericht* for the sake of unity and effectiveness of EU law, see Thomas Beukers, 'Case C-409/06, Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim, Judgment of the Court (Grand Chamber) of 8 September 2010, not yet reported' (2011) 48 Common Market Law Review 1985, at 1990.

obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State'. [1250]

Then the Court explicitly refers to Article 4(2) TEU by affirming that '[i]n the present case, the division of competences between the *Länder* cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government'.[1251]

In order to prevent the invocation of the findings in *Horvath* (i.e. that it is solely a matter for the constitutional system of each Member State to decide upon entrusting specific national bodies the implementation of EU law), and of Article 4(2) TEU awarding protection to the internal division of competences from being read as implying an overruling or a contradiction of the findings in Case C-46/08 *Carmen Media Group*, the Court clarified how in its view this case was different from the case at hand. The Court argued that in the present case it was confronted with an issue regarding the horizontal relationship between the *Länder* having their own legislative powers within a Member State having a federal structure and not – as in *Carmen Media Group* – with an issue of the relationship and possible duty of vertical coordination between the authorities of a *Land* and the federal authorities.[1252]

[1250] Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr*, para 33.

[1251] Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr*, para 34.

[1252] Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr*, para 35.

It appears, however, that the fact that Germany's division of competences benefits from the protection of Article 4(2) TEU does not suffice in itself to satisfy the requirements of proportionality for restrictions of the freedom to provide services:The Court added that even if one would assume that Schleswig-Holstein's more liberal gambling legislation might damage the consistency of the gambling legislation as a whole, such damage was limited *ratione temporis* (13 months) and *ratione loci* (Schleswig-Holstein).[1253] The Court further concluded that it cannot be inferred from the findings in *Carmen Media Group* and *Winner Wetten GmbH* that all remaining 15 *Länder* should have been obliged to adopt the more liberal regulation in force only in one *Land* for a limited period of time.

This judgment is interesting for various reasons: First of all, it expressly affirms that the internal division of competences benefits from the protection of Article 4(2) TEU. However, this – at first glance – innovative affirmation amounts merely to an aesthetical overhaul of the principle of institutional autonomy of the Member States. The Union's respect for the internal allocation of powers does not afford the Member States *carte blanche* to elude their obligations under EU law. It does not appear to release the Member States from their obligations to fulfil their obligations under EU law since the Court indicates, in addition to declaring the internal division of competences falling in the scope of Article 4(2) TEU, that the temporary co-existence of two legal regimes for gambling practices in Germany was incapable of significantly damaging the consistency of German gambling legislation.

Secondly, and here there is an innovation, the Court distinguishes between vertical (between federation and federated states) and horizontal (among

[1253] Judgment of the Court (Third Chamber) of 12 June 2014, *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, *nyr*, para 36.

federated states) division of competences in a federal state such as Germany. If we consider the different cases handed down by the Court of Justice – *Carmen Media Group*, *Bero* and *Pham*, and *Digibet Ltd*– we are able to draw the following picture of the Court's consideration of the internal division of competences: Where circumstances relating to the vertical division of powers between *Bund* and *Länder* may lead to the failure to fulfil obligations under EU law (*Carmen Media Group*) federated and federal authorities may be required jointly to fulfil the obligations imposed on the Federal Republic of Germany. In such a case, those various authorities are bound, for that purpose, *to coordinate the exercise of their respective competences*.[1254] If, by contrast, we are confronted with a case where the horizontal division of competences – the relationship among federated entities – is crucial for the fulfilment of obligations under EU law, this duty of coordination between *Länder* is only imposed in cases of non-legislative competences (*Bero* and *Pham*) but not in the case of legislative competences (*Digibet Ltd*). It is only in the latter that the Court of Justice has explicitly declared that the internal division of competences is awarded protection under Article 4(2) TEU.

3. Conclusions

So if we take into consideration the post-Lisbon CJEU case law involving claims based on Article 4(2) TEU, it becomes clear that the entry into force of the Lisbon Treaty has not led to significant changes as regards prior case law. The cases fit into the three categories extracted from the Opinions of the Advocates General and hence into pre-Lisbon based case law categories. The outcomes of the analysed cases in which the identity argument leads the Court of Justice to validate a national measure

[1254] ECJ (Grand Chamber) 8 September 2010, C-46/08, *Carmen Media Group Ltd*, ECR [2010] I-08149, para 70.

restricting a fundamental freedom (or having the potential to do so) – *Sayn-Wittgenstein*, *Runevič-Vardyn*, and *Digibet* – would is very likely to have been the same under the prior Article 6(3) TEU.

If the Court of Justice then does not attach to Article 4(2) TEU, and thus the Member States' *constitutional* identity protection, any added value other than common-or-garden grounds for the derogation from market freedoms, would this not lead to such identities being trivialised? Are we in a situation where, in Besselink's words, '[t]he EU respects the constitutional identities of the Member States but only if the ECJ finds that this identity is in accordance with substantive EU law'?[1255] As Besselink himself admits, such reasoning would leave Article 4(2) TEU with little to no legal meaning.[1256]

If we see past the similarities with cases handed down before the entry into force of the Lisbon Treaty, one may, however, also recognise a changed approach of the Court when Article 4(2) TEU is at play. The *de facto* inexisting proportionality test in *Sayn-Wittgenstein*, the 'hands-off approach' in *Runevič-Vardyn*, the recognition of the horizontal division of powers in *Digibet*, are all indicative of a more deferential approach[1257] to Article 4(2) TEU claims. What is more, such an approach, as Monica Claes points out, permits the Court of Justice 'to take control over the possible

[1255] Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' at 683.

[1256] Besselink, 'Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr.' at 683.

[1257] C.f. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' at 309.

conflict, while often leaving room for the national court to come to the final decision, which will involve a balancing of the interests involved.'[1258]

Furthermore, even though the CJEU has remained true to its preference for validating claims of national cultural identity over the more political form of it,[1259] its recognition in the *Digibet* case of the horizontal division of competences, i.e. between the German *Länder* having their own legislative powers within a Member State having a federal structure constitutes a first example of the recognition of a division of competences in terms of Article 4(2) TEU (admittedly in a case in which the restriction on market freedom was very limited).

In two of the more recent cases of Member States or national courts invoking the internal division of competences or the federal structure, the joint cases *Bero* and *Pham* and the Case C-151/12 *Commission v Spain,* the Advocates General assigned to the cases *corrected* the governments' and courts' interpretation of national constitutional law, only to conclude in *Bero* and *Pham* that a systematic interpretation of the German Basic Law proved that Article 4(2) TEU was not impinged upon, and in C-151/12 that interpreting the Spanish Constitution as submitted by the Spanish government would actually encroach upon Spain's division of competences. This could be seen as an effort made by the Advocates General to enter into a dialogue on what is encompassed by a Member State's constitutional identity rather than merely witnessing the national actors, courts or governments, laconically invoking Article 4(2) TEU.

[1258] Claes, 'National Identity: Trump Card or up for Negotiation' at 130.

[1259] Claes, 'National Identity: Trump Card or up for Negotiation' at 130.

CONCLUSIONS TO PART III

At least with respect to the two selected constititutional courts, this study has confirmed the assumption, as noted from the outset,[1260] of the coexistence of two concepts of 'constitutional identity of the Member States' – that of certain Member States' national courts and that of the Court of Justice – according to which the Member States' constitutional courts have employed 'identity' in an absolute manner, designating core constitutional values and preserving them against the EU integration process, whilst the Court of Justice has used the notion of 'identity' in a relative manner, perceiving the Member States' identities as interests that may compete with a plurality of categories. As we have seen in Chapter 6, this fundamental distinction between the two concepts of constitutional identity was also explicitly highlighted by the German Constitutional Court itself on the occasion of its *OMT* reference. And although this distinction has been presented as an innovation in the Federal Constitutional Court's construction of the identity of the Basic Law,[1261] it was already present in the Lisbon judgment and thus not truly a surprise. Indeed, as remarked by Cantaro in a case note on the *Lissabon-Urteil*, the *Bundesverfassungsgericht* had made it very clear that the identity of the Basic Law would resist integration[1262] and thus already distinguished it from the Union's duty enshrined in Article 4(2) TEU.

[1260] See above p. 8.

[1261] See Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT reference' at 284 et seq.

[1262] Antonio Cantaro, 'Democracia e identidad constitucional después de la 'Lissabon Urteil'. La integración 'protegida'' (2010) 13 Revista de derecho constitucional europeo 121, at 143 (the translation into English is mine).

It is somewhat ironic that the *Bundesverfassungsgericht* moved away from techniques of hidden dialogue[1263] with a preliminary reference in a matter that has conflict written all over it. The German Constitutional Court has nevertheless confirmed its readiness to formally engage in a discourse with the CJEU, an attitude at which recent case law – *Honeywell* – had already hinted. This case also bears the potential of having both courts, the Court of Justice and the German Constitutional Court, make pronouncements on both concepts of constitutional identity. The outcome seems unclear.

[1263] Using the term coined by Giuseppe Martinico who by 'hidden dialogue' referred to 'unorthodox avenues of judicial communication, that is, methods of judicial communication other than the preliminary ruling procedure […]. Giuseppe Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue'' (2010) 21 King's Law Journal 257, at 258.

GENERAL CONCLUSIONS

The main goal of this study entailed contextualising Article 4(2) TEU in order to provide some guidance for its interpretation. In order to achieve this aim, I divided the analysis into three parts.

In the first part, I analysed the positions of the EU actors on identity and diversity around the time of the Maastricht treaty revision as well as the treatment that 'identity' received during the national ratification processes. I attempted to ascertain the motivations behind an increasing referencing of 'identities' by European and national actors and I also sought to map what fields or values were linked to national identity by the national legislatures. This exercise has permitted me to reach the following conclusions:

Firstly, I was able to identify two different, albeit connected, uses of the identity narrative. Firstly, the term 'national identity' has been used to replace the (dated) rhetoric of sovereignty. Doubts cast over the explanatory potential of the concept of sovereignty in the context of European integration may account for the sudden identity boom. Insofar as this development merely represents a shift in the narrative – an expression of certain Member States' concerns over de-statification –, which in earlier times would have appealed to sovereignty, it does not provide us with any clarity as to what the Member States' national identities may comprise substantively. When Margaret Thatcher, for instance, referred repeatedly to the preservation of Member States' national identity during the 1990 Dublin Council, this could be translated as the preservation of 'what is left of the sovereignty of the Member States'.[1264] So, this shift from sovereignty to

[1264] This becomes particularly evident in her speech on occasion of the Dublin Council on 28 April 1990 where she declared that 'the term 'political union' raised fears and

identity describes the shift from a concept that appears to have reached its descriptive limits in the European legal order – at least in its interpretation as being indivisible and not transferable – to another concept that has not yet been rendered obsolete by the European integration process and which due to its semantic properties is capable of evoking all kinds of (positively) connoted acceptations in the public eye.[1265] This first detected use of the notion of national identity thus constitutes an interesting shift in the European discourse but does not add much in terms of substantive content. What is more, the shift from sovereignty to identity may perhaps explain the incorporation of Article F(1) in the Maastricht Treaty but it fails to provide an explanation for the increasing use of the notion of national identity by actors that had no interest in a sovereignist agenda, such as the Commission or the European Parliament.

Here, it is where I build on Holmes's surrogate discourse of power and argue that a narrative drawing on different strands of federalism helped incorporate concepts such as subsidiarity into the legal and political languge of the European arena. Pivotal to this discourse of power was the concept of subsidiarity, which with the greater entity's commitment to self-restraint bore the promise to guarantee diversity and hence the Member Sates' or region's identities. In this vein, where reference was made to 'national identities' in the context of this narrative, 'identity' was not a surrogate to 'sovereignty' or a substitute to 'national interest', but rather designated a federalist value in line with the protection of pluralism. It could not relate

anxieties among many people, that it would involve a loss of national identity and national institutions. I suggested that we should proceed by setting out what we do not mean when we speak of political union, that we do not mean giving up our separate Heads of State or our national parliaments or legal systems or our defence through NATO or many other things. […] After all, in the ultimate, war or peace is a sovereign decision.' See above at n 224.

[1265] See *supra* the concept of 'plastic words' at n 7.

to 'sovereignty' since 'sovereignty' was not crucial to the European federalist tradition. Indeed, as Burgess points out, neither Althusius nor Proudhon construed sovereignty as particularly problematic since they did not accept Bodin's notion of indivisible sovereignty.[1266] Since these strands of federalism also shared a societal, rather than state-based, world view,[1267] sovereignty was of second order. Connecting identity, diversity and subsidiarity through this federalist narrative permits me to better understand the positions of both EU and national actors who championed subsidiarity, diversity and identity alike.

When it comes to the national ratification debates of the Maastricht Treaty, a survey of the parliamentary debates allowed me to identify specific values, concerns and, more generally, policy areas that were linked to national identity during the parliamentary debates to the ratification of the Maastricht Treaty. These categories were identified on the basis of the Member States' own positions – whether expressed by their governments or in national parliaments. Here, the use of national identity was markedly closer to what we would intuitively associate with elements of a nation's cultural identity: Language and culture, in particular, constituted a central theme for a number of Member States. Other subjects were specifically linked to a certain Member State. This was the case in relation to the issue of abortion and Catholic faith in the Irish debate, and the issue of the idea of *Heimat* in the German debate. In the second part of my study, I proceeded to an analysis of the evolution of the Union's duty to respect its Member States' national identities through the different stages of treaty revisions –

[1266] Burgess, *Federalism and European Union: the building of Europe, 1950-2000* at 15.

[1267] On Social Catholicsm in this regard, see Christian Waldhoff, 'Die Kirchen und das Grundgesetz nach 60 Jahren' in Christian Hillgruber and Christian Waldhoff (eds), *60 Jahre Bonner Grundgesetz - eine geglückte Verfassung?* (Bonn University Press 2010) at 154.

with the corresponding *travaux préparatoires*. In addition to the survey of the *travaux préparatoires* on the different versions of the national identity clause, I examined whether the categories I had identified as identity-relvant during the Maastricht treaty ratification received the same level of attention during subsequent treaty revisions. I have also identified specific treaty provisions or mechanisms that either contained a reference to national identity or provided for the preservation of such identity or more generally of the diversity among the Member States and then followed the evolution of these provisions and mechanisms throughout the treaty revisions.

In our quest to give substance to the concept of national identity under EU law, the analysis of the evolution of the Union's duty to respect its Member States' national identities through the different stages of treaty revisions has led me to the following conclusions:

Firstly, the incorporation of Article F(1) TEU appears to have responded to concerns over the loss of statehood or out of opposition to the reference to the federal nature of the Union that was supposed to be included in the treaty. While the treaty revisions in Amsterdam and Nice went by wihout any major modification to the national identity clause – only the reference to *democratic systems of government* contained in Article F(1) was dropped – the Constitutional Treaty led to its complete overhaul. At this point, a detailed analysis of the Convention works allowed me to determine the drafters' intentions behind the clause. Surprisingly, what is commonly termed the 'national constititutional identity clause' was not designed with a view to protecting the Member States' constitutional identity. The survey of the works of the Convention strongly suggests that Article I-5(1) CT was never intended to limit itself to protecting the Member States' national identities enshrined in *constitutional provisions*. Indeed, the reference to 'political and constitutional structures' was never discussed as a limiting

factor to the scope of the provision, but rather in relation to the Member States' regional and local autonomy. The Lisbon Treaty revision and notably the inclusion of a first paragraph before the national identity clause in Article 4(2) TEU, stating that powers not conferred upon the Union remained with the Member States, has, if anything, contributed to bringing the identity clause closer to what was envisioned by Working Goup V during the Convention. All of this speaks against interpreting Article 4(2) TEU as a treaty-based justification to overcome the primacy principle.

Secondly, the review of treaty provisions relating to national identity other than Article 4(2) TEU and its predecessors has allowed me to identify a process which I describe as the flowing of a 'language of identity' into EU primary law. A process which involved various provisions of the TEU and the preamble of the Charter of Fundamental Rights referrring to national identies. In this context, the vague and ambiguous meaning of 'identity' could become an advantage rather than an inconvenience. In this vein, Gráinne de Búrca has argued in relation to the subsidiarity principle that such 'weaselwords' were chosen by the drafters precisely because of their vagueness and not in spite of it.

> *'Many other examples can be given of terms which are highly significant within the EU legal and political context, but which remain nonetheless or even deliberately uncertain in scope and meaning: ever closer union, exclusive competence, the internal market, and the acquis communautaire, to name but a few. Political bargains which may be arduously negotiated between parties with very different priorities and aims are frequently encapsulated in language which is not only open to differing interpretations, as all language is, but which is specifically chosen to mediate between very different understandings and conceptions of the issue under discussion. Such compromises have been a key feature of EU law and policy-making over the years, appearing not only in secondary*

> *legislation and in softer forms of law, but also in key constitutional texts and treaty amendments.*'[1268]

Búrca argues that since the drafters or negotiators no longer controlthe provision once in force, the 'weaselword' will be used and interpreted by judicial and political actors and that use might lead precisely to the original broad meaning to 'crystallise into something less fluid and more concrete'.[1269] The same applies to the 'national identities' of the Member States, a broad notion of which different actors have made, and still make, highly varied use. The best example hereof is the appropriation of Article F(1) TEU by German MPs during the ratification debate to the Maastricht Treaty: They understood (or promoted) the national identity clause as the key to a federal Union, while the UK had apparently pushed it into the Treaty for the opposite reasons.

This vagueness and ambiguity may also help to provide a solution to the divide between the CJEU and national constitutional courts over constitutional identity. As we have seen, the concept of constitutional identity as an integration-proof core, as one encounters in Spanish and German constitutional case law, is hardly compatible with the CJEU's interpretation of Article 4(2) TEU. A broad and inclusive approach to Article 4(2) TEU by the Court of Justice would thus be preferable. In this sense, the recent CJEU case law pointing towards a more deferential attitude has to be welcomed.

[1268] de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' at 9.

[1269] de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' at 9 et seq.

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