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National and constitutional identity before and after Lisbon

To the memory of Max Kohnstamm (1914-2010), pioneer of European integration and promotor of its academic study

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Introduction

The theoretical reflection in this essay has its origin in the theme of a multi-disciplinary conference on ‘Euroscepticism and multiculturalism’. These two notions form a curious and intriguing couple. For the purpose of discussing them in the context of the development of European integration, we divert the notion of Euroscepticism from a political party ideology¹ towards a recent core issue in the relations between the European Union and the Member States, i.e. the respect for Member State constitutional identity. This, as well as associating the roots of the notion of ‘multiculturalism’ with the relation between the EU and Member States, needs a brief conceptual explanation, which is offered in the first part of this essay (Section 1).

Next I move on to a concise historical reconstruction of the relationship between the Union and the Member States (Section 2) in preparation for the main part of this essay, in which we more specifically focus on the place of national identity and constitutional identity in the Treaties (Section 3). A paramount issue is the question of who is legally to decide on what respecting this identity amounts to (Section 4).

To avoid any erroneous expectations, first a few words on the approach taken in comparison with the existing literature and doctrine. Although a certain body of literature has developed on the issue of ‘national identity’ and EU integration, this has mainly focused on the national political and cultural notions, and much less so on the position under EU law, even though, as we argue below, in hindsight the Maastricht Treaty contained it *in nuce* as a constitutional and

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1 Instead of many others, A. Szczerbiak & P. Taggart (eds.), *Opposing Europe? The Comparative Party Politics of Euroscepticism, Volume I: Case Studies and Country Surveys*, 2008; and *Volume II: Comparative and Theoretical Perspectives*, 2008.

legal concept. The theories in the literature on the relations between EU and Member State constitutional orders at the time of the Lisbon Treaty have hinged on a variety of conceptual frameworks. Central concepts were ‘multilevel constitutionalism’, ‘compound’ or ‘composite constitutionalism’, ‘legal pluralism’, ‘constitutional pluralism’, ‘constitutional supremacy’, ‘hierarchy’, ‘heterarchy’, ‘polyarchy’, ‘best fit’, ‘pluricentricity’ and ‘counterpunctual law’.²

This essay does not address the issue for the various Member States, but restricts itself to an analysis of how the notion of ‘national identity’ has over time acquired a legally more relevant flavour by its reformulation as ‘constitutional identity’, which as I argue is a legal concept of EU law. Nor is this essay intended to elaborate the divergent theories on the plurality and overlap of legal and constitutional orders for their relevance to the issue of constitutional identity after the Lisbon Treaty. Curiously, the notion of ‘constitutional identity’ has at best remained inarticulate in that literature so far, though it looms large in the background of the theories mentioned.

This essay seeks to outline and reflect on how the conscious political effort to overcome the divisiveness of Member States’ idiosyncrasies has matured into the constitutional recognition of Member State identities as an essential part of the European project, within the parameters of liberty, democracy, human rights and the rule of law. These principles have been the beginnings and ends of peaceful European integration, for which its pioneers fought. What these must mean in practice must, however, remain the object of a constitutional, political and legal debate premised on tolerance, acceptance of otherness and trust.

1. The prolegomena of European integration: otherness, tolerance, acceptance and trust

European integration is necessarily based on a minimum level of tolerance, acceptance and trust of the other Member States. This may seem self-evident, but it is not. One may even say that tolerance, acceptance and trust of other states was originally not so much the *premise* as the *objective* of European integration. After all, the intention was to overcome antagonism and centuries of warfare between France and Germany by constructing economic ties which would create the necessity to tolerate each other to such an extent that it would become impossible to take up arms against each other – warfare would no longer be perceived as in the interest of either. That objective has been an utter success. In no century of the previous millennium has there been such a long time during which there was no war between Western European states. And in fact, is it imaginable that a war would break out between the European powers united in the Union?

This is not to say that the states have become obliterated, quite to the contrary. The Member States are the partners coming together in what is now called the EU. The EU is a community created and vested on the states uniting in it, notwithstanding many developments which have made the states intentionally or unintentionally less important within the enterprise of European integration. The process of European integration has been brought far beyond industrial cooperation and beyond economic integration in key economic areas or even in general. Advanced forms of economic integration, once spilt over into the monetary field, require policy coordination and cooperation that, in turn, require tolerance, acceptance and trust among the states which need to coordinate their policies and carry out any relevant European decision-making. By now it has come to cooperation in sensitive fields as criminal law, public prosecution of public offences, foreign policy and defence policy, and in these affairs states as political entities (rather than

2 E.g. the work of Ingolf Pernice, Neil Walker, Miguel Poyares Maduro, Matthias Kumm, Julio Baquero Cruz and Jan Komarek.

economic facilitators) are cardinal institutions in the European project.³ None of these states can be set aside if they are to be part of the integration project in these fields.

If we are to come to terms with the requirements of European integration, we have to recognize that the states joined in the European Union are to each other ‘others’. They are to each other ‘others’ both in what is different between them and in what they hold in common. States are political orders and legal orders. Acceptance and trust of other Member States imply unavoidably also acceptance and trust in those other political and juridical orders and cultures. This is a crucial starting point to understand the challenges and risks at the juncture at which integration in the European Union finds itself. It is also the starting point for the further analysis I offer of the development of European integration, focussing on the relation between the EU institutions and the Member States in terms of mutual acceptance and trust versus scepticism and distrust.

Multiculturalism and Euroscepticism: celebrating and challenging otherness, tolerance, acceptance, trust

The theme of this issue of the *Utrecht Law Review* is Euroscepticism and multiculturalism. The relation between the two can be construed in a quasi-Aristotelian manner as conceptual moral opposites.

If Euroscepticism is scepticism towards some strange otherness – ostensibly the European Union – then multiculturalism is its opposite: the celebration of simultaneous different cultures. It is the celebration of otherness, tolerance, acceptance and trust. Logically, the opposite would also seem to be true: the rejection of multiculturalism coincides with Euroscepticism.

Euroscepticism can be understood as scepticism towards a strange ‘other’ – in a sense the opposite of multiculturalism: it challenges and shuns otherness. But which is that ‘other’? The European Union and its institutions? The other Member States? Is it the political and legal order of those other Member States? Their culture? In another contribution to this issue some more empirical approaches are used to determine the nature, context and substance of Euroscepticism. Here the empirically perhaps somewhat naïve hypothesis is that Euroscepticism may be a sentiment which combines the three elements of ‘otherness’ of the culture and legal and political order of other Member States, in order to turn it against the EU and its institutions.

2. European responses to distrust, intolerance and rejection of otherness

2.1. From supranationalism to intergovernmentalism

Historically and originally, European integration is a response to intolerance between states. It was a response to the mutual rejection of states and the distrust which fostered continued warfare on the European continent between all major states. We mentioned the antagonism of Germany and France which is at the basis of the original European design. But also the accession of Greece, Portugal and Spain was clearly a key in overcoming the anti-democratic past which divided the continent. It needs no further elucidation that this was also the case with the last twelve acceding Member States: it marks the end of the Cold War and although no great vision like that of Jean Monnet seems at the basis of the enlargement towards Middle and Eastern

3 The EU is not ‘a Union of citizens’ if this is meant as the EU being based on an immediate constitutive act of citizens. Some Member State governments have either never consulted their citizens on accession (tellingly the six original Member States) or on the present form of EU membership, or have suffered sensitive blows when doing so (Denmark, Ireland, France, the Netherlands). The Lisbon Treaty lends itself to a reading as the most intergovernmental of all EU Treaty amendments.

Europe, it is safe to say that integration into the EU is intended as preventing any falling back into the days of the potentially fatal conflict between Western and Eastern Europe.

The methods used in the European response to conflict on the continent have changed over time. The European project started off with a view of integration based on ‘supranationalism’. The idea was to construct a Europe which was over and above states and their devastating nationalism. It was the states’ claim of sovereignty which was considered the root cause of conflict in Europe. This is apparent from the language used by the European Court of Justice in the early years of the EEC. The Community, in the language of the European Court of Justice in its foundational case law in *Van Gend & Loos*, constituted a new legal order to the profit of which the Member States have limited their sovereign rights and of which the subjects are not only the states but also their nationals.⁴ The equally important case of *Costa* actually completed the picture by speaking of sovereign rights which were ‘transferred’ to the EEC, which thus had ‘real powers’.

This structure of the power exercise was later referred to as ‘the Community method’. To the essence of this ‘method’ belonged the fact that only the independent Commission can initiate decision-making, and never the Member States. The Commission owed accountability to the European Parliament only. In fact, from the very beginning it was noticed and regretted by some of the national parliaments engaged in the parliamentary approval of the original founding treaties that this European Parliament did not have full legislative powers.⁵ That it was not directly elected but composed of (directly elected) members of national parliaments was considered less problematic.

Fundamentally, the Community method is based on ‘state scepticism’, a distrust of states and their sovereignty. A.M. Donner, the second Dutch judge of the European Court of Justice (later also a judge of the European Court of Human Rights), who had sat both on *Van Gend & Loos* and *Costa*, had previously been the most prominent professor of constitutional law.⁶ As manifold editor of the standard manual on Netherlands constitutional law⁷ he was a defender of the state as necessary for social life. He coined the ultimate Dutch metaphor of the state: the state is the dikes. In the preface to the last of the editions he prepared, he admitted that in his work as a judge in Luxembourg he had come to understand the extent to which states should be distrusted, as they always tried to escape from the obligations they had entered into.⁸

The ‘Community method’ has always had its adversaries. Indeed, among them France as of the era of De Gaulle as president, who defended *l’Europe des patries* and forced, through the

4 The English text is not original, the French is : ‘La Communauté économique européenne constitue un nouvel ordre juridique de droit international, au profit duquel les états ont limité, bien que dans des domaines restreints, leurs droits souverains et dont les sujets sont non seulement les états membres mais également leurs ressortissants.’

5 This was the case in France and the Netherlands as well as Germany. The proposals for a resolution of the *Bundestag* were included in the parliamentary documents of the Netherlands States General, see *Bijlagen Handelingen Tweede Kamer* [Parliamentary Documents Lower House] 1956-1957, 4725, no. 14: ‘Der Bundestag wolle beschliessen dass (...) 8. die Stellung der europäischen Versammlung stetig gestärkt und vor allem so entwickelt wird, das alle parlamentarischen Rechte, auf welche die nationalen Parlamente der Mitgliedstaaten durch die Ratifikation der Verträge verzichten, auf das europäische Parlament übergehen, und die Stärkung der Kontrollbefugnisse der Versammlung verbunden wird mit einer Weiterentwicklung der Kompetenzen der Kommissionen’ (proposal CDU/CSU of 4 July 1957; a quite similarly worded proposal of the same date was made by the SPD).

6 A.M. Donner (1918-1992) was Professor of General Theory of the State, Constitutional and Administrative Law at the Free University of Amsterdam from 1945-1958; was a member of the European Court of Justice from 1958 until 1979; Professor of Constitutional Law at the *Rijksuniversiteit Groningen* from 1979-1984; a member of the European Court of Human Rights from 1986-1987; was also a member of the *Van Eysinga* Committee which prepared the constitutional amendments of 1953 on the priority of international law over conflicting national law, and of the *Kranenburg* Committee which prepared the amendments of 1956 concerning international relations and the effect of treaties in the national legal order restricting the priority to directly effective international provisions.

7 C.W. van der Pot et al. *Handboek Van Het Nederlandse Staatsrecht*, 2006, p. 1073, first edition by Van der Pot 1940, C.W. van der Pot, *Handboek Van Het Nederlandsche Staatsrecht*, 1940, p. 606.

8 Edition 1983, C.W. van der Pot et al., *Handboek Van Het Nederlandse Staatsrecht*, 1983, p. 652, Preface.

means of ‘empty chair’ politics, the exceptions into the Community method whenever a Member State would invoke vital national interests. These were laid down in the ‘Luxembourg Accord’ also known as the ‘Luxembourg Compromise’, a set of Council conclusions of January 1966, which codified a procedure which was applied until 1985.⁹ The echoes of the *Luxembourg Accord* are still resounding in the *Ionanina Agreement* and the transitional period under the Lisbon Treaty before the ‘double majority’ requirement (a majority of Member States constituting a majority of the European inhabitants) enters into force.

Taking giant steps from the 1960s and ’80s through the history of European integration, a structural move away from the Community method began with the Maastricht Treaty. With this Treaty a new phase in the process towards political integration beyond economic policy was entered. It created two pillars of *intergovernmentalism* next to the single pillar of the European Community which was mainly economic in nature (although it lost this epithet in the Maastricht Treaty). It nowadays seems hard to imagine the vocabulary of the intergovernmental conference at the time, but the negotiations were held under two main headings, the first being the ‘Economic and Monetary Union’, and the second the ‘European Political Union’ (the latter was to signify a further step towards integration than the then existent European Political Cooperation which had taken shape almost entirely outside the Community framework¹⁰). A true ‘political union’ was of course not established in Maastricht. The two intergovernmental pillars were considered like a heresy to nearly all Community lawyers. It was considered a distortion of European integration, and its result at best was ‘a Europe of bits and pieces’.¹¹ While the outlook thus remained that of state scepticism, the intergovernmentalism introduced by the Maastricht Treaty may be considered as a form of Euroscepticism on the part of the Member States. During the first 15 years after the entry into force of the Maastricht Treaty it was unclear how these two opposing tendencies were to find a future equilibrium. This has recently become clearer.

2.2. *The present equilibrium: from Maastricht to Lisbon*

Maastricht

The provisions of the Treaty on European Union which were at the time of the Maastricht Treaty perhaps the most political as well as the most constitutional in nature are Articles 6(1) and (3):

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. (...)
3. The Union shall respect the national identities of its Member States.

9 For the text of the agreements see <http://www.ena.lu/final_communique_extraordinary_session_council_luxembourg_29_january_1966-02-19630>; for further analysis and discussion see J.-M. Palayret, et al. (eds.), *Visions, Votes and Vetoes. The Empty Chair Crisis and the Luxembourg Compromise Forty Years On*, 2006.

10 It did have a foundation in Title III of the Single European Act, 1986.

11 The expression gained currency after the title of an article by D. M. Curtin, ‘The Constitutional Structure of the European Union: A Europe of Bits and Pieces’, 1993 *CML Rev.*, pp. 17-69, which critically analyzed the results of the Maastricht Intergovernmental Conference. The metaphor was actually first coined by Sir Andrew Schonfield, *Europe: Journey to and Unknown Destination*, 1973, p. 17. Curtin derived it from Joseph Weiler, who dedicated his famous EU working paper on ‘Supranationalism Revisited’ to the memory of Schonfield and quoted his expression; Weiler’s paper is reprinted as J.H.H. Weiler, ‘Supranationalism Revisited – a Retrospective: The European Communities After Thirty Years’, in W. Maihofer (ed.), *Noi Si Mura: Selected Working Papers of the European University Institute*, 1986, pp. 341-396, at pp. 356-357.

In hindsight they can be considered a constitutional *volte face*. From a Community turning away from and beyond the Member States, depriving them of their sovereign essence, the Treaty acknowledged that the Union was based on the Member States. Instead of going beyond them, the Member States were made the constitutional foundation; moreover, their different identities had to be respected rather than overcome. The supranational vision of the 1950s had to come to terms with the political reality that Member States were not going to be superseded by the European Community or Union. Article 6 TEU (pre-Lisbon) can be considered the expression of this.

No reference was made to Article 6(1) by the ECJ until 3 September 2008. We may notice this was shortly after the failure of the Constitutional Treaty. The provision played a pivotal role in the Court's reasoning in the famous *Kadi* judgment of that date. The provision was invoked to deny effect to the implementing EU decision of a binding UN Security Council Resolution under Chapter VII of the UN Charter, which imposed sanctions on Mr Kadi, if giving effect to such a legally binding UN resolution would be in conflict with the values enumerated in Article 6(1)¹² – the ECJ found such a conflict to exist. This judgment was a full recognition of the values shared by the Member States and the Union; moreover, it was a recognition in the face of an (in a certain sense) 'external' legal order, that of the UN, even though it concerned 'enforcement action' under Chapter VII of the UN Charter with legally binding effect *erga omnes*, and which prevails over any contrary law.¹³ Such is the very importance of the common Member State values on which the EU is founded.

To the third paragraph of Article 6 TEU (pre-Lisbon) no reference has ever been made in the ECJ case law. Its political significance is that for all intents and purposes it seems a rhetorical signifier which provides a counterweight to the supranational approach which had been dominant in the age of the Community. In the phase of the Constitutional Treaty – the run-up to the Lisbon Treaty – the provision was revised, in the form of a provision which had as its heading 'Relations between the Union and the Member States' (Article I-5). It was retained in the Lisbon Treaty as Article 4(2).

Lisbon

The Treaty of Lisbon establishes a new equilibrium, which to some extent reflected the position actors were forced into after the failure of the Constitutional Treaty in two of the original founding Member States. Significantly, it abolishes the 'pillar structure' which had turned the Union into to a curious hybrid of Member State dominated 'intergovernmentalism' and a Community inspired by 'supranationalism'. This was not to make the 'Community method' as such the dominant one, but rather to integrate the two perspectives. This is the only way to understand the reinforced role attributed in the Lisbon Treaty to national parliaments, to the European Council, as well as the consolidation of the right of initiative for Member States in certain particular areas of EU competence, together with the 'emergency brake' with regard to certain politically sensitive decisions.¹⁴ Here we focus on the treaty provision on national identity.

The provision on respect for the national identity of Member States was rephrased:

12 See *Kadi*, Para. 303: 'Th[e] EC Treaty] provisions [on the direct effect and priority of international law, in particular the obligations Member States have accepted for the purpose of maintaining international peace and security] cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Art. 6(1) EU as a foundation of the Union.'

13 Art. 103 UN Charter: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

14 These are briefly analyzed in the contribution by Irene Aronstein in this issue of the *Utrecht Law Review*.

Article 4(2) TEU

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. ‘National identities’ as ‘constitutional identities’

We need to assess the meaning of the expression ‘national identities’ in Article 4(2) of the TEU in the Lisbon version. Usually, Article 6(3) of the EU Treaty in the version adopted in Maastricht and Article 4(2) as adopted in Lisbon are taken to be equivalent. Nevertheless, a textual comparison of the similarities and differences of these and other relevant provisions in both treaties gives rise to some remarks.

Schematically the differences between the Maastricht and the Lisbon versions are as follows.

**Article 6 (3) TEU
Maastricht**

The Union shall respect the national Identities of its Member States.

**Article 4(2)
Lisbon**

The Union shall respect [the Member States’] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions (...)

We start our exegesis with a remark about the ambiguity in the use of the plural ‘national identities’ in the two provisions which we need to explore briefly, because this is too easily believed to coincide with the plural ‘Member States’ in both provisions – but this is not necessarily the way we need to understand it, as we now explain.

National identity does not necessarily coincide with *state* identity. Some of the Member States are multinational, such as Spain, and the UK. Many of the new Member States are historically and actually ridden with ethnic and linguistic minorities, which also from time to time are referred to as nations in an ‘ethnic’ sense. If national identity is taken in a linguistic, ethnic, religious and cultural sense rather than in a politico-constitutional sense, also a country like Belgium may be counted as a Member State with a twofold national identity, even though the text of the Belgian Constitution suggests there is only one nation.¹⁵ If a Member State may have more than one national identity, a Member State’s identity can be multinational or multicultural.

The opposite may be the case as well: a Member State might consider its national identity to comprise the idea of multinationalism and multiculturalism, and for that matter a high degree

¹⁵ Art. 33 of the Belgian Constitution reads: ‘All powers emanate from the Nation’ [*Alle machten gaan uit van de Natie*]. This stems from the original Constitution of 1830, but since 1994 the Constitution opens with the provision: ‘Belgium is a federal State composed of the communities and regions’ [*België is een federale Staat, samengesteld uit de gemeenschappen en de gewesten*].

of Europhilia. Thus, the Netherlands would have prided itself in this type of self-characterization before 2002, being a country which has historically composed of minorities, of old cherishing tolerance also towards migrant populations ever since the end of the 16th century, and at the same time staunchly supporting European integration mainly of the supranational type across the political party spectrum.¹⁶ In 2002, in that country populist sentiment was disengaged by Pim Fortuyn in a manner from which domestic politics is still to recover. The state of political disarray throughout the political spectrum is perhaps best illustrated by the fact that the very word ‘multicultural’ has become totally taboo in the Netherlands (as in some other Member States). This shows the irony that the countries which historically have consisted of minorities, and celebrated tolerance of some kind, can within a very short time span evolve towards ones with the crassest rejections of multiculturalism.¹⁷

On the basis of what was just remarked, we have concluded that ‘national identities’ may rightly also refer to the ‘multinational identity’ of a Member State. This clearly suggests a ‘cultural’ aspect to national identity. If this is a correct inference, Article 4(2) TEU also includes the obligation for the EU to respect cultural identity as part of the national identity.

This would seem to be corroborated by the only reference to ‘respect’ in the preamble to the EU Treaty, the sixth recital which states:

‘DESIRING to deepen the solidarity between their peoples while respecting *their history, their culture and their traditions* (...)’¹⁸

Since the Lisbon Treaty, the matter seems of less practical importance than under the Maastricht provisions. Prior to Lisbon, the only reference to cultural diversity was in the clause in the preamble we just quoted and in respect of cultural diversity which occurred in the EC Treaty only in the context of education in Article 149(1) EC Treaty:

‘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.’

The duty to respect cultural identity more broadly outside the context of education policy could only be construed by subsuming cultural identity under ‘national identities’ in the sense of the then Article 6(2) EU (Maastricht version).

16 ‘Euroscepticism’ was traditionally confined to Communists (until the 1980s) and orthodox Calvinists. Neither had anything in common with rejections of multiculturalism in the present-day sense, and is Euroscepticism *avant-la-lettre*. In government, certain more sceptical approaches to supranationalism have existed more strongly than in party politics. In the 1970s these were overcome in a foreign and European policy which was decidedly supranationalist and led to the disastrous proposal for a federalist Union during the inter-governmental conference leading to the Maastricht Treaty, see B. van den Bos, *Mirakel en debacle: de Nederlandse besluitvorming over de Politieke Unie in het Verdrag van Maastricht*, Ph.D. thesis Leiden University, 2008.

17 On the EU-fear in the Netherlands, instilled in political parties previously staunchly supporting European integration by the rejection of the Constitutional Treaty, see L. Besselink, ‘Double Dutch: the Referendum on the European Constitution’, 2006 *European Public Law* 12, no. 3, pp. 345-352.

18 Unchanged since Maastricht, where it was the fifth recital.

Since Lisbon, the EU Treaty contains in Article 3 the following provision:

‘It [the EU] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.’

This may lessen the practical need to subsume cultural identity under ‘national identities’ in Article 4(2) EU. The separate clauses on respect for *cultural* identity suggest a differentiation from *national* identities.

Hence, the interpretation is possible that *national* identities in Article 4(2) EU are not primarily the *cultural* identities of the Member States. Although I consider this a possible interpretation, I would hesitate to exclude cultural identity from ‘national identities’ in the sense of Article 4(2) EU. I argue this on the following grounds.

If we compare the succinct formulation of Article 6(3) EU in the Maastricht version (‘The Union shall respect the national identities of its Member States’) with the very wordy formulation in the Lisbon version (‘(...) shall respect their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government (...)’) it is quite clear that the political and constitutional aspect is much enhanced in the Lisbon version. To the extent that the Lisbon Treaty here focuses on state structures, there is a shift in emphasis from national identity as such to *constitutional* identity. But this need not lead us to abandon the idea that national identities can be multiple and encapsulate cultural identities as well. In fact, the very structures of many political and constitutional arrangements are fundamentally an expression of cultural phenomena. Most clearly this is the case with regard to the extent to which Member States in varying degrees allow or disallow regional and local self-government. Can the institution of ‘autonomous regions’ in Spain and Italy be viewed separate from the very cultural identities at the basis of these constitutional and political arrangements? Posing the question is answering it.

4. Who decides on the constitutional identity of Member States?

One of the most intriguing legal questions concerning the EU obligation to respect the constitutional identities of Member States, is who is to decide on what the constitutional identity of a Member State is, and when a certain concrete EU act or measure affects that constitutional identity unlawfully.

The answer to this question illustrates how far we have moved away from the supranational view in which the relations between the EU and the Member States is a zero-sum game (Member States have rescinded ‘sovereign powers’ and transferred them away to the EU), to a much more intricate mutuality which exemplifies the composite nature of the European constitutional order.¹⁹

Within a supranational view, it would be an ultimate power of the ECJ to the exclusion of national courts to interpret the EU Treaty. Hence it would ultimately be up to the ECJ in infringement proceedings to determine whether a certain EU measure conflicts with the constitutional identity of a Member State. Yet, it is inconceivable that the ECJ would do so, or at any rate that it would do so in an exclusive manner.

¹⁹ L. Besselink, *A Composite European Constitution*, 2007.

Strictly legally, the ECJ lacks the formal competence to do so, as adjudicating an alleged infringement of Article 4(2) EU would involve an interpretation of national constitutional law. This is incompatible with Article 19 EU (formerly 220 EC) which limits the jurisdiction of the ECJ to the interpretation of EU law, which according to continuous standing case law excludes the interpretation of national law. Also substantively, the ECJ is not in the position to determine what is and what is not part of the constitutional identity of a Member State, even if this is to determine whether EU law remains within the limits of Article 4(2) EU.

It is possible to understand this provision as urging a relationship of cooperation between national (constitutional) courts and the ECJ, the first to determine the constitutional identity, the latter to determine the meaning of the relevant European law in dispute.²⁰ This seems far-fetched but in some respects we are very near this situation already, as would seem to follow from the trends both in the ECJ case law and that of some of the national constitutional courts.

The ECJ case law

As regards the ECJ, it must be noted that the Court is far beyond the position it took in the famous *Internationale Handelsgesellschaft* case of 1970, in which it acknowledged, on the one hand, that it was to uphold the fundamental rights found in the national constitutional tradition common to the Member States and the human rights treaties to which they are a party, but which it grudgingly did so by emphasising that EC law enjoys superiority over national constitutions: ‘the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that state or the principles of a national constitutional structure.’²¹ Nowadays, the ECJ has referred in its case law several times to the relevance of particular constitutional arrangements in Member States in order to justify a particular exception or distinction which otherwise does not apply.²²

Most significant in this regard is no doubt the *Omega* judgment.²³ It was a case in which the Mayor of Bonn had prohibited the use of laser-gun games in which people pretend to kill other people for fun, on the basis of the assertion that this game is contrary to human dignity as protected under Article 1 of the German federal *Grundgesetz*. This prohibition was allegedly an infringement of the free movement of (goods and) services of the provider of the laser game. The Court dismissed this, in particular the assertion that exceptions to the free movement of services (such as this one based on fundamental rights) need to apply uniformly:

’37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.

(...)

20 The term ‘relationship of cooperation’ was coined by the *Bundesverfassungsgericht* in the *Maastricht Urteil*, also known as *Brunner Urteil*, BVerfGE 89, 155, 12 October 1993, 2 BvR 2134, 2159/92.

21 ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, 1125.

22 ECJ 6 September 2006, Case C-88/03, *Portuguese Republic v Commission of the European Communities*; ECJ 12 September 2006, Case C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* (EP electoral rights in Gibraltar).

23 ECJ 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*.

39 In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted 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.

40 In those circumstances, the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services.

41 (...) Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.’

For the purpose of our argument, particular note should be taken of the role which the ECJ attributes to the national court in Paragraph 39. It is a matter for the national court to decide the particular national constitutional rights involved; next it is the ECJ which determines the consequences of this state of affairs under EC law. Obviously, it is not up to the ECJ unilaterally to decide what belongs to the constitutional identity of a particular Member State. But once, as the result of what some metaphorically call a ‘dialogue’ of courts, it has emerged that a certain rule of principle belongs to that identity, the ECJ proves to be sensitive to this identity. This illustrates the relation of substantive cooperation in this field between the national and the European courts.

The national constitutional case law

On the part of the national (constitutional) courts the position in some countries approaches the language now used in Article 4(2) EU. It should be recalled that although in all Member States the highest courts and constitutional courts have accepted the primacy and priority of EC law over contrary national legislation,²⁴ the highest and constitutional courts in the large majority of Member States do not recognize their precedence over the national constitution.²⁵ It was the Italian *Corte costituzionale* which set a trend among constitutional courts to limit the refusal of priority to *fundamental* constitutional principles in *Fragd*.²⁶ This was taken over by the *Bundesverfassungsgericht* by the requirement in the field of fundamental rights of ‘equivalence’ instead of ‘identity’, and since 2007 also by the *Conseil constitutionnel*. The language of the latter two constitutional courts is closest to the language of Article 4(2) EU. Thus, the *Conseil constitutionnel* has determined that only when an EC act infringes rules and principles which are inherent in the ‘constitutional identity’ of France may a relevant EC act be declared to be in

24 For an account of this see K. Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe*, 2001; an earlier, more legal analysis is A.-M. Slaughter et al. (eds.), *The European Court and national courts : doctrine and jurisprudence : legal change in its social context*, 1998.

25 See in greater detail L. Besselink et al. (eds.), *Constitutional Primacy – The Rank of EU law and the Adoption of EU Treaties in the 27 Member States*, Groningen: Europa Law Publishing, 2010, forthcoming.

26 *Corte costituzionale*, Sentenza No 232/1989, 21 April 1989. A translation (which unfortunately on one crucial point is incorrect) is in A. Oppenheimer (ed.), *The relationship between European Community law and national law: the cases*, Vol. 1, 1994, pp. 653 et seq.

conflict with the French Constitution.²⁷ The *Bundesverfassungsgericht* has the older papers in relating the priority of the national constitution to what it called the *Verfassungsidentität*.²⁸

Not all constitutional courts are explicit on restricting the priority of the national constitution to the national core features which are part of the constitutional identity of the Member State. This means that a disjunction may exist between the duty on the part of the EU and its institutions, including the ECJ, to respect the constitutional identity of the Member States and the national constitutional position as regards the priority of EU law over national (constitutional) law.

The scope of the obligation to respect 'national identities': qualifying the primacy of EU law and the Michaniki judgment

The question arises what the scope of the duty to respect the national constitutional identity is. Article 4(2) of the EU Treaty speaks not just of respect for the principles which are common to the Member States, but of respect for the national *identity* of the Member States by the Union. National identity, as we implied in the previous section on 'national identities' above, refers to that which differentiates the Member States from one another. And this national identity is legally determined by the identity of the national constitution.²⁹

We may assume that Article 4(2) (like its predecessor in Article 6 in the Maastricht version) would only have significance if European acts which do not respect these fundamental values do not take precedence over national rules and acts which express that national identity and the common values of the democratic rule of law.

27 CC Décision no 2006-540 DC (27 July 2006): '17. Considérant qu'aux termes du premier alinéa de l'article 88-1 de la Constitution : « La République participe aux Communautés européennes et à l'Union européenne, constituées d'États qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences »; qu'ainsi, la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle; 18. Considérant qu'il appartient par suite au Conseil constitutionnel, saisi dans les conditions prévues par l'article 61 de la Constitution d'une loi ayant pour objet de transposer en droit interne une directive communautaire, de veiller au respect de cette exigence; que, toutefois, le contrôle qu'il exerce à cet effet est soumis à une double limite; 19. Considérant, en premier lieu, que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti; 20. Considérant, en second lieu, que, devant statuer avant la promulgation de la loi dans le délai prévu par l'article 61 de la Constitution, le Conseil constitutionnel ne peut saisir la Cour de justice des Communautés européennes de la question préjudicielle prévue par l'article 234 du traité instituant la Communauté européenne; qu'il ne saurait en conséquence déclarer non conforme à l'article 88-1 de la Constitution qu'une disposition législative manifestement incompatible avec la directive qu'elle a pour objet de transposer; qu'en tout état de cause, il revient aux autorités juridictionnelles nationales, le cas échéant, de saisir la Cour de justice des Communautés européennes à titre préjudiciel'.

28 BVerfG 22 November 1986, BVerfGE 73, 339 [2 BvR 197/83], *Solange II*, (which is from before the Maastricht EU Treaty!) used the expression for the first time to demarcate what is acceptable and not acceptable as concerns the constitutional impact of European law on the German constitutional order: 'The provision does not confer a power to surrender by way of ceding sovereign rights to international institutions the identity of the prevailing constitutional order of the Federal Republic by breaking into its basic framework, that is, into its very structure. That 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. An essential part which cannot be dispensed with and belongs to the basic framework of the constitutional order in force is constituted in any event by the legal principles underlying the provisions of the Basic Law on fundamental rights (see BVerfGE 37, 271 [279]; 58, 1 [30 f.]).' Later, the concept was reiterated as a principled stance in the *Lissabon Urteil*, BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009 [2 BvE 2/08] and recognized the mutuality in the duty to respect the constitutional identity of Member States as both a national constitutional obligation as well as an EU obligation, albeit that the latter was founded on the Member States' constitutions: 'Das Prinzip der begrenzten Einzelermächtigung ist deshalb nicht nur ein europarechtlicher Grundsatz (...), sondern nimmt – ebenso wie die Pflicht der Europäischen Union, die nationale Identität der Mitgliedstaaten zu achten (Art. 6 Abs. 3 EUV; Art. 4 Abs. 2 Satz 1 EUV-Lissabon) – mitgliedstaatliche Verfassungsprinzipien auf. Das europarechtliche Prinzip der begrenzten Einzelermächtigung und die europarechtliche Pflicht zur Identitätsachtung sind insoweit vertraglicher Ausdruck der staatsverfassungsrechtlichen Grundlegung der Unionsgewalt.' Under reference to this it was acutally applied in the *Dataretention Judgment*, BVerfG 2 March 2010 at 219 [1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08], in which it declared 'Dass die Freiheitswahrnehmung der Bürger nicht total erfasst und registriert werden darf, gehört zur verfassungsrechtlichen Identität der Bundesrepublik Deutschland (...), für deren Wahrung sich die Bundesrepublik in europäischen und internationalen Zusammenhängen einsetzen muss.'

29 In this sense already before the existence of the Lisbon Treaty L. Besselink, *A Composite European Constitution*, 2007.

In this sense, and it has been little remarked in the EU law literature, the provision of Article 4(2) EU forms an important qualification of the rule on the primacy of EU law, and a modification of the case law under *Costa v ENEL*.

In line with what we discussed in the previous section, this exception to the primacy of EU law would seem to be restricted to issues of constitutional *identity*, which would suggest that constitutional provisions which are not fundamental and hence do not contribute to the very identity of the constitution do not share in that privileged position *vis-à-vis* EU law.

This is borne out by the *Michaniki* judgment by the ECJ of 16 December 2008.³⁰ This case concerned a provision introduced into the Greek Constitution in 2001 seeking to prevent power concentration by media tycoons *inter alia* by excluding owners, main shareholders or managers of media companies (as well as their spouses, relatives or financially dependent persons or companies) from involvement in contracting for work, services or provisions for the State or the public sector.

The Court started out by repeating that it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court continued to say that it is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it.³¹ It next assessed the compatibility of a national provision which ‘establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract’ with the law and principles of European public procurement law as contained in the relevant EC Directives. The Court conceded the legitimate objectives which give the Member States a margin of discretion to realize the objectives of transparency, equality and the prevention of distortion of competition. It pointed out, however, that precisely the irrebuttability in a national provision that in concrete cases there is no risk of such intransparency, inequality or distortion of competition, renders it in conflict with European public procurement law. A national provision which establishes a system of general incompatibility between the sector of public works and that of the media has the consequence of excluding from the award of public contracts public works contractors who are also involved in the media sector without affording them any possibility of showing, with regard to any evidence advanced, for instance, by a competitor, that, in their case, there is no real risk of the type referred to above. Thus, by excluding an entire category of public works contractors on the basis of that irrebuttable presumption, such a provision goes beyond what is necessary to achieve the claimed objectives of transparency and equal treatment.

This judgment seems difficult to square with the line taken by the Court in *Omega*. It has – small wonder – received much criticism, also by passing over the constitutional rank of the relevant provision.³²

Nevertheless, there is an explanation which brings this case into line with the distinction which in France, Italy and Germany is made as concerns the priority of fundamental national constitutional law over EU law. This suggests, as we implied above, that it is conceivable that

30 ECJ 16 December 2008, Case C 213/07, *Michaniki AE v Ethniko Simvoulío Radiotileorasis*.

31 *Ibid.*, Para 51.

32 V. Kosta, ‘European Court of Justice Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis, Ipourgós Epikratias*’, 2009 *European Constitutional Law Review* 5, pp 501-516.

more trivial provisions of national constitutional law – those which do not form part of the constitutional identity of the Member State – are not granted such priority, and the normal *Costa* doctrine of the priority of directly effective EU law prevails. In the case of *Michaniki*, it concerned a matter regulated by secondary EC law and hence of relatively minor importance in comparison with other types of constitutional provisions, such as the one on human dignity which is of special importance in the Federal Republic.³³

If this conjecture is right, the ECJ's justification derived from a scale of importance within EU law on which public procurement law as legislated on by secondary law (directives) is of lower rank than some other primary or EU constitutional law.³⁴

This type of approach tallies with the value ranking which inheres in Article 4(2) EU as we have explained above. At the same time, it is a risky enterprise to project a EU ranking of values onto national constitutional law. Preventing abuse of power in media concentrations is closely related also to such a constitutional value as the pluriformity of the media, as was an explicit background to the Greek constitutional amendment of 2001. Also it comes dangerously close to the ECJ establishing what constitutional provisions are compatible with EU law, thus vetting national constitutional amendments. This seems not quite what Article 4(2) EU intended to foster. Nevertheless, *Michaniki* is clearly one marker in what is referred to as the dialogue between the European and the national constitutional courts.

5. The present constitutional dialogue

We need to round off our essay by returning to the beginning by referring to the present constitutional dialogue in Europe. This is a dialogue between scholars in their writings, conferences and colloquia, between practitioners in court proceedings, and perhaps even between courts (though it may be less appropriate to refer to those whose utterances are unilaterally binding court judgments as a 'dialogue'). As any dialogue which deserves that name, the European constitutional dialogue is based on the assumption of tolerance, acceptance and trust of the other and of otherness. This implies in turn at least a minimum of shared values. Crucially, that minimum must include the acceptance that not all values are shared (cf. Article 4(2) EU). However, what these values are and even more so what they mean in practice shall always remain contested. A minimum of value pluralism is to remain with us, and in that sense, if you want, multiculturalism.

33 I owe the hunch that in understanding *Michaniki* it is significant that it concerns secondary EU law to Daniel Sarmiento's presentation of a paper at a conference on Constitutional Pluralism, Oxford 20-21 March 2009.

34 It could even be argued that substantively *Michaniki* itself applied a constitutional value, that of the prohibition of unjustified unequal treatment.