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## Concluding Article

# The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law

Leonard BESSELINK<sup>\*</sup>

*In this contribution I attempt to explain why so many fundamental controversies surrounding the provision on national identity have not been nearly resolved ten years after the entry into force of the Lisbon Treaty. Also, I indicate why these problems and controversies can be expected to linger on for at least the next ten years.*

**Keywords:** Constitutional identity, EU law, constitutional law, EU member states

What things the law can do with words is remarkable. Academic lawyers have the vocation to explore them, but in the constitutional context, this is sometimes difficult and confusing due to what not only lawyers, but also the political actors do with words, and what they cause in practice, which moreover can be uncomfortable and even abusive.

All this occurs with the concept of ‘constitutional identity’, that was introduced through Article 4(2) of the TEU, imposing on the European Union (EU) the duty to respect the Member States’ national identities ‘inherent in their fundamental structures, political and constitutional’. The confusion was not surprising given the concept’s relative novelty, to the point that some denied this provision says anything about ‘constitutional identity’. Nor was the discomfort surprising, since anti-multiculturalism and Euroscepticism had begun sweeping through the Union by the time the Lisbon Treaty entered into force. Over time, the confusion and discomfort may even seem to have grown. And as could be expected, the concept was soon abused.

All that, however, should not deter us from an academic inquiry of whether the concept is meaningful. Although also the abuse of the concept merits comprehensive, precise and penetrating analysis, we abstain from doing so here. As the saying goes, *abusus non tollit usum*. So, again, abuse should not deter us from efforts to make sense of the concept of constitutional identity.

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The contributions in this issue indeed show that progress has been made in this endeavour in various respects, from the study of the origins of the Treaty provision to its application in the case law of the Court of Justice of the EU, and to the concept's use in Member State courts. Still, points of controversy have not changed all that much over the last ten years.<sup>1</sup> The lingering of these issues, and the sometimes perplexingly divergent views on them are remarkable and urge reflection.

In this essay I attempt to understand why these issues are so persistent and why they are the object of so much controversy. In particular, I focus on the *scope* of the notion of constitutional identity under Article 4(2) TEU, as this determines the debates in the context of the relation between the notions of difference, similarity and identity more in general in the constitutional context of Europe.

My reflections and ruminations start off from a brief discussion of ideas of identity and homogeny, on the non-identity of identities and the paradox of pluralism, to arrive at a discussion of the relation between national identity and constitutional structures, and of institutional and substantive notions of identity. Next I discuss to what extent fundamental rights concern political and constitutional structures, and finally I make some remarks on who decides about constitutional identity. All these are issues that may go at least some way to explain the persistence of controversies in the present phase of European integration.

## 1 IDENTITY AND HOMOGENY

Debates about the very idea of the constitutional identity of states in the Union bear a superficial similarity to the medieval philosophical and metaphysical debates on the uniqueness of the soul of each human person, as opposed to the idea of an overarching and encompassing homogenous world soul and universal intellect in which individuality blends and is dispersed – the scholastic masters versus Averroists and neo-Platonists, but then in the immanentized political manner of our times. How can it be that there is a core identity of individual polities (Member States), a 'soul' that identifies them as such, and a simultaneous belonging to a universal, comprehensive political entity that is called the Union. How does the unified entity relate to individual members that claim to have an identity that should not be understood to have merged into that larger unified entity?

One answer that is given to these questions is to distinguish and separate respective powers, thus staking out the realm of the Union and the realm of the

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<sup>1</sup> See for instance *National and Constitutional Identity Before and After Lisbon*, in 3 *Utrecht L. Rev.* 36–49 (Nov. 2010), <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/139/135> (accessed 1 Nov. 2010), that was written for a student organized conference at the University of Utrecht which had as its theme Euroscepticism and National Identity on 7 Dec. 2009.

Member State. This approach consists in attributing powers to one (Union) or another (Member States), as attribution of powers, or conferring powers, is one of the core functions of a constitution.

But this way of differentiation of powers may not convince at the level of the specific nature of what power really is and does within both realms, i.e., when we look at characteristics of when and how it is *exercised* by the Union and Member States.<sup>2</sup> They are both essentially political entities that exercise power and authority over citizens, a power and authority that is in its essence and nature identical, whether exercised by the Union or by a Member State. That essential similarity is, if not required, at least desirable if powers of the one (the Member States) can be transferred to the other (the Union), and if those powers can also be exercised either by the one (the Union authorities) or by the other (the Member State authorities) in a coordinated manner – this is the whole point of European integration. The merging of Member States into the Union may, in this perspective, seem to be analogous to the quasi-Averroist blending of individual personality with a world soul and universal intellect. Although the eventual dissolution of Member States into a larger political unit is historically not impossible, this is not what is conveyed in the Treaties, not even when viewed from the dynamic principle of ‘an ever closer union’.

At the heart of the issue of constitutional identity of Member States in the EU context is the question what it means to have an independent and separate Member State legal order while the power exercised within it is so often determined by the Union of which it is a member and a constitutive part. To what extent can these legal and political orders really be considered to exist alongside each other without giving up on each one’s nature? This is where the mere conferring of powers within respective spheres of competence falls short of adequately addressing this question, and where we must look at how the exercise of power is regulated.

From a constitutionalist perspective a core point in this matter is that constitutions typically *prohibit* the exercise of certain forms of public authority and power in certain cases – an auto-limitation that is a typical function of

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<sup>2</sup> The contribution of Bonelli in this issue hinges on this constitutional distinction between the attribution of powers and their regulation. It may be useful here to recall a third major function of constitutions, apart from the attributive (power conferring) and regulative (regulating the exercise of the powers conferred) functions, which is the constitutive function. These functions are distinct, but can coincide when we look at concrete constitutional norms. Many constitutional norms that confer powers also stipulate manners in which they should be exercised; the attributive and regulative functions then coincide. The constitutive and attributive functions also often coincide in constitutional norms that at the same time provide (often implicitly) for the existence of a certain institution by stipulating what powers it has. This coincidence often makes one overlook the doubling of what is happening in the speech act i.e., comprised in constitutional norms.

constitutions. Also, constitutions define the cases in which a certain exercise of legislative or executive power *urged* as a positive *obligation* – the empowering function of constitutions. It creates problems if the exercise of the public power mandated by the Union should be permitted in Member States while Member States' constitutions prohibit that exercise of power; and if the power exercise that is urged as obligatory under their national constitutions would be prohibited by the Union. This problem would make it questionable whether Member State constitutions can do what they were intended to do, and taken to extremes, what the point is of saying there is such a thing as a Member State. This is where the constitutional identity issue comes in.

## 2 THE NON-IDENTITY OF IDENTITIES AND THE PARADOX OF PLURALISM

Constitutional identity in the sense of Article 4(2) TEU can refer to features of Member States that are common or shared, and which can normatively be conceived of as the values of Article 2 TEU that are at the basis of the Union. But identity conferring features also concern things that *distinguish* a Member State from some, several, or all other Member States. It is this latter type of identity, distinctness, that is considered problematic. We need to reflect on what exactly is problematic about this, and to what extent.

For a start, it needs to be clear that without the distinctness of a Member State's constitutional identity, there would be little point in having a duty to respect it, beyond its very narrowest meaning that Member States should at all exist. In this narrowest sense, the discussion would turn into what statehood means in the context of being a member of the Union, a discussion that may not render more clarity than a discussion of what constitutional identity means.

Distinctness and difference of a Member State as categories are inherently in tension with the similarity, communality and unity that is implied in being part of a Union that wants to be a 'union', and is moreover based on common values. But it is possible to assume there can be enough communality without having to give up on essential distinctness that is implied in speaking of constitutional identity.

It is true quite in general, that speaking of identity of persons can be framed as implying forms of uniqueness and exclusiveness that negate pluralism, emphasizing one identity conferring feature over others.<sup>3</sup> This may indeed very well be what identity talk does, but actually it may also be the other way

<sup>3</sup> Amartya Sen, *Fog of Identity*, 8 Pol. Phil. & Econ. 285–288 (2009), to which Wendel refers in his contribution in this issue, stresses this aspect.

round: having a certain identity does not preclude having another identity as well. The very fact that a person can be identified as  $x$ , does not preclude that person from being identified as  $y$  as well; identities are multiple and in this sense also mixed.

In fact, I would argue that multiple and mixed identities are the norm. Identities are a consequence of the role that a person has in a specific setting. In practice this is hardly ever the single role a person has to play. Persons play a multiplicity of roles in a variety of settings. This is also true as regards the political role of persons: one may be identified as a citizen of Amsterdam, as well as being a citizen of the Netherlands, in some cases also a citizen of another state, and on top of that a European citizen.<sup>4</sup> There is little to object against this multiple identification. These political roles can combine with other social roles a citizen may have, for instance as a father, a fan of this or that soccer club, a member of this or that religion, and so on. From context to context this or that identity can be included as relevant or irrelevant, on which in liberal societies individuals can to a significant extent have a determining influence.

Social pluralism is dependent on the multiplicity of social identities, in as much as people in social contexts are assumed to combine those identities. This dependence on multiplicity applies also to political pluralism that is a precondition for democracy, which is dependent on different views and preferences standing side by side and seeking interaction on the basis of rational deliberation and decision-making on an equal footing among different persons holding different views. Complying with the outcome of decision-making on specific issues is not requiring to give up on differences, not at least ordinarily and under all circumstances. Strong disagreement does not imply you will not comply with the outcome of decisions you do not agree with.

It is paradoxical, but nevertheless true that social and political pluralism presume the existence of a plurality of identities. This is the same for the cooperation by Member States within the framework of a Union. Member States, each with different identities, make for the pluralism on which the Union is based. This was nicely captured by the successive Treaty preambles. The clause on an 'ever closer Union' in the Community Treaties was recalibrated in the Maastricht Treaty by the inclusion of diversity as a founding value.<sup>5</sup> In the preamble to the Treaty establishing a European Constitution, 'diversity' took over the first place that was previously held by the 'ever closer Union'; it coined the motto of Unity in Diversity that was subsequently

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<sup>4</sup> These plural citizenship identities make for the possibility of their stratification in political and constitutional terms, the specific combination of which can be part of the political and constitutional identity of a Member State. See on this Diane Fromage elsewhere in this issue.

<sup>5</sup> On this, see more elaborately Faraguna in this issue.

changed into ‘United in Diversity’.<sup>6</sup> To put it in the metaphysical terms of the medieval debate we referred to, the individuality of the soul was posited as opposed to the view of it being a mere emanation of the homogenous universal spirit.

### 3 INHERENT IDENTITY AND POLITICAL AND CONSTITUTIONAL STRUCTURES

The wording of Article 4(2) TEU leaves room for an important unresolved problem that seems to follow from different word games that can be played with ‘identity’ in relation to ‘constitutional structure’. The different language versions contribute to this ludic aspect.

The English language version of the Treaty provision speaks of an identity that is ‘inherent’ in political and constitutional structures, just like the French, Spanish, Romanian, Bulgarian, Estonian and Maltese versions: *inhérente à*, *inherente a*, *присъща на*, *on omane* and *inerentã fl* – respectively.<sup>7</sup>

Some language versions seem to use *more* essentialist language, like the Italian, which uses *insito*, which can be rendered with ‘deeply rooted’ or ‘innate’; the Polish *nirozzerwalnie zwiqzana z*, which means ‘inseparable from’ or ‘inextricably linked with’; the Finnish *joka on olennainen osa*, which is rendered as an ‘essential part of’; and the Czech *spočívá v*, which says that identity ‘consists in’ the political and constitutional ‘systems’.

The Portuguese is unique in saying that identity is ‘reflected in’ the structures, *refletida nas estruturas*.

Somewhat weaker than these ‘essentialist’ expressions are the Irish and Hungarian texts, which refer to identity as ‘integral part’ of the structures (*ina cuid dhílis*, and ‘*amely elválaszthatatlan része*’ respectively). Close to this, or perhaps closer to the inherency language is the Dutch *besloten liggen in*, which would literally be ‘lies encapsulated in’; and the Slovak expression *obsiahnutú v*, ‘contained in’.

Also the Latvian version has a unique way of expressing itself by speaking of an identity that is ‘characteristic’, *kas raksturīga*, for its political and constitutional structures.

Much weaker than any of these are the German, Danish and Swedish versions, which speak about an identity that is expressed in their political and constitutional

<sup>6</sup> I explore this further in *Does EU Law Recognize Legal Limits to Integration? Accommodating Diversity and Its Limits*, in *The EU Between ‘an Ever Closer Union’ and Inalienable Policy Domains of Member States* 59–78 (Thomas Giegerich, Oskar Josef Gstrein & Sebastian Zeitmann eds, 2014), <https://dx.doi.org/10.2139/ssrn.2343751>.

<sup>7</sup> DeepL.com was used and its translations compared to Linguee and Google Translate online.

structures (*die zum Ausdruck kommt; som den kommer til udtryk i; som kommer till uttryck*).

Let us look at the semantics of the various versions. What does it mean if we say that something is inherent in something else? If one were to say that something is 'reflected in' something else, one would assume that the two are identical, the one being the mirror image of the other. But if A is inherent in B, is B also in some sense inherent in A? Not in the sense that if A is implied in B, B is also necessarily implied in A: e.g., the symptoms of coughing, sneezing, a temperature and a headache may be inherent in a Covid infection, but a Covid infection is not necessarily inherent in all cases in which these symptoms occur. This 'irreversibility' may be clearer if one says that something is 'part of', 'contained' or 'expressed in' something else.

Nevertheless, there is a deep connectedness when something is said to 'inhere' in something else. This connectedness is particularly clear when one would say that A 'consists in', is 'innate' or 'inextricably linked to' B. Focussing on this essential nexus, suggests that the one cannot be considered separate from the other; they are mutually dependent on each other, even if the one does not necessarily exhaust the other.

Saying that national identity inheres in political and constitutional structures, as the Treaty provision says in some language versions, is saying that identity cannot really be separated from political and constitutional structures, and political and constitutional structures cannot be fully separated from national identity.

Does this matter? I think it does, because there is an understandable but not necessarily justified temptation to try and disengage a Member State's constitutional structures from its national identity when speaking of its constitutional identity, and to overemphasize the constitutional structure over the identity that informs that structure. Doing so may get rid of uncomfortable aspects of national identity – after all, national identity has historically led to exaggerated talks of nationalism with ugly and too often devastating consequences. And yet, a strict separating out of 'national identity' from 'constitutional structures' may not be sustainable if we speak of constitutional identity. Comparative constitutional law suggests that specific elements and features of a Member State constitution can only be understood in terms of the specificities of that Member State's history. So narrowing down the discussion on constitutional identity to 'structures' only, may not succeed.

Similarly, attempts at narrowing down the meanings of constitutional identity only to those features that concern institutional aspects of political structures may be too limited to be successful in the long run, at any rate in some respects.



#### 4 FORMAL INSTITUTIONS AND SUBSTANTIVE CONSTITUTIONAL IDENTITY

We must now move to discuss the scope that a Member State's identity can have within the Union. A first clarification is in order. The wording of Article 4(2) does not, in any of the language versions, refer to *institutional* structures, nor does the wording entail that its meaning is restricted to purely institutional matters *only*. It speaks of 'identity that inheres in *fundamental structures*,<sup>8</sup> political and constitutional'. What gives those structures an identity may indeed not be the institutional nature of the political and constitutional structure *per se*, but the substance, context and purpose of those structures. A political or constitutional structuring feature of a Member State may very well consist in a sociocultural phenomenon that goes beyond the institutional structure *per se*.

Such sociocultural phenomena are historically determined as much as the purely institutional ones, but that need not detract from their identity conferring quality. To the contrary, what might not be a matter that is identity conferring in one Member State might be of the essence of another state's political and constitutional identity. Language is a notable example. Can one think of Belgium, its politics and its constitutional system, in particular its development from a unitary state into the centrifugal type of federalism, without considering language to be at the heart of its constitutional DNA? Clearly not. Can one think of the Netherlands, its political and constitutional system, in particular its decentralized unitary system, or any other constitutional arrangement, institutional or otherwise, without considering language as a matter of any importance? Yes indeed. Language is conferring identity to the political and constitutional structures inherent to the Member State Belgium; language does not at all confer identity to the political and constitutional structures inhering to the Member State Netherlands.

It is of course possible to contain substantive forms of constitutional identity within manageable proportions by elevating them to concepts of a higher level of abstraction. For instance, language as the motive of identity could be aggregated at a higher level of abstraction as a motive of minority protection. This is a concept with constitutional value, as is expressed in Article 2 TEU where respect 'for the rights of persons belonging to a minority' is considered a value that is foundational to the Union and common to the Member States. This form of reconceptualizing specific forms of constitutional identity may help recognizing their legitimacy in the abstract, but does not explain the concrete expressions of the minority interests that receive specific constitutional treatment in this or that Member State, and cannot therefore contribute to determine whether such a concrete expression

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<sup>8</sup> The Czech and Slovak versions speak of 'systems'.

should be allowed to call for respect by the Union in terms of constitutional identity in the sense of Article 4(2) TEU. It is the historical diversity of the Member States that has led a specific ‘cultural’ phenomenon to acquire political and constitutional relevance and importance, substantively in the sense that it can be said to be ‘inherent in their political and constitutional structures’, and this may or may not be in terms of specific formal institutional structures. History is decisive for the shape of society, political and constitutional structures, and these necessarily differ in various places. This ‘local’ history not only explains differences, it may also legitimate them in as much as it may require deference towards local differences by non-local entities when they express fundamental values.

## 5 FUNDAMENTAL RIGHTS AND THE RULE OF LAW AS CONSTITUTIONAL IDENTITY: POLITICAL AND CONSTITUTIONAL STRUCTURES?

If sociocultural phenomena such as national or minority languages can be considered to be fundamental markers of constitutional structures, so are understandings of fundamental rights of individual citizens as well as broader conceptions of the rule of law.

Specific substantive arrangements aimed at guaranteeing the shared value of the rule of law may be part of the political and constitutional identity of a Member State. This has been acknowledged with respect to the principle of legality in criminal law in the course of the well-known *Taricco*-saga by the Court of Justice itself.<sup>9</sup> Although the Court of Justice has so far not acknowledged this in so many words, this may also be the case with constitutional guarantees for a high quality and professional standard of barristers or advocates in access to and the dispensation of justice, which is in Italy contained in Article 33(5) of the *Costituzione della Repubblica*, requiring an examination of the qualities of a person before he or she can become a member of the bar.<sup>10</sup> The rule of law in liberal democracies depends on the high professional and ethical standards, as well as the independence of the bar and its members.<sup>11</sup> If the constitutional standard aiming to ensure these qualities could at its core be circumvented by avoiding *any* assessment of the experience and quality of a barrister in practice, as is possible

<sup>9</sup> Case C 42/17, 5 Dec. 2017.

<sup>10</sup> ‘State examinations are prescribed for admission to and graduation from the various branches and grades of schools and for qualification to exercise a profession’. This has been implemented by legislation on various legal professions.

<sup>11</sup> The Court refers to this in ECJ Case C-3/95, 12 Dec. 1996, para. 38. See Roberto Mastroianni & Amedeo Arena, *Free Movement of Lawyers and the Torresi Judgment: A Bridge Too Far?*, 11 Eur. Const. L. Rev. 373–388, 387–388 (2015).

under EU law,<sup>12</sup> this might, at least arguably, very well interfere with a constitutional guarantee that contributes to the rule of law.

Constitutional structures of fundamental rights and the rule of law do not only structure the political processes as such, but they also structure the relation between public authorities and citizens as individual persons. From this point of view there is not much point in requiring that constitutional identity only refers to public structures as such, since that would leave out the role and place carved out for private individuals. Protection of an individual's freedom is in the classic liberal view about protecting the sphere to which the exercise of public authorities does not extend, the 'state-free' sphere. If one were nevertheless to consider the definition of this sphere outside the scope of political and constitutional structures, this would be tantamount to a general denial of the relevance of fundamental rights to the constitutional identity of Member States.

This is an argument for not only considering the republican nature of a Member State a legitimate cause for relying on constitutional identity, but also the substance and purposes of fundamental rights as they pertain to individual persons.

It is not self-evident that this argument does not also apply to 'moral' issues that are implicit in fundamental rights. From *Grogan*<sup>13</sup> onwards, with *Omega*<sup>14</sup> as a milestone, the issue arose as to differences of understanding national constitutional rights, and how these can legitimately (or not) affect the application of EU law in Member States. That constitutional rights are identity conferring in their distinct constitutional meaning as opposed to other Member States' conceptions of rights and their place in the constitutional identity, is hard to deny. And so it is with the moral convictions underlying those constitutional rights. Indeed, they are not about the forms of political society or constitutional institutions as such, but they are very much about the exercise of public authority, and hence about public power and the limits that are structural to political society and overall constitutional arrangements. So it is impossible to exclude them categorically from constitutional identity discourse, even if the constitutional rights concerned are

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<sup>12</sup> Mastroianni and Arena point out that this is the combined effect of Arts 3 and 10 of Directive 98/5, which in the context of Italian law graduates registering in Spain as *abogado* without examination, implies they can after three years in practice in Italy register as *avvocato* without ever having assessed whether the person involved has the prerequisite knowledge or professional experience to act as barrister. This was ignored in Case C-58/13, 17 July 2014, *Torresi and Torresi* by the ECJ. In this judgment the Court also ignored the issue of the constitutional provision in the context of the *application* of the Directive in Italy (question 1 of the reference) and decided the issue only in the context of the question of the *validity* of the Directive (question 2 of the reference). This, curiously, seems to suggest that for the ECJ the role of constitutional identity is pertinent to the validity of EU law, not to its application, thus turning it into an issue which has far higher stakes than necessary. Compare Bonelli in this issue.

<sup>13</sup> Case C 159/90, 11 June 1991.

<sup>14</sup> Case C-36/02, 14 Oct. 2004.

strongly moral in nature (as many legal norms are, and certainly many that touch on fundamental rights).

If this is so, it also means that certain moral judgments underlying the social institution of matrimony may involve conceptions of rights that are part of constitutional identity. At least on the European continent, matrimony has been a state matter and a core matter of family law since at least the nineteenth century. In particular the number of partners within marriage, their sex, and certain obligations of mutual support and alimony, are topics that are subject to strict legislative regulation that is part of the *ordre public*. It may, moreover, in a number of Member States still be considered a matter concerning the foundations of society that is reflected<sup>15</sup> in political and constitutional structures in a way which makes it part of their identity. It is certainly interesting to note that some Member States have no constitutional provisions on marriage,<sup>16</sup> while in some Member States matrimony has been a self-evident constitutional rights matter that is expressed in<sup>17</sup> a constitutionally defined right to marry, but that in recent decades this has lost its foundational character. This is a clear proof that constitutional identity can evolve, and can evolve fairly rapidly. This is well-illustrated by certain Dutch politicians proudly claiming tolerance to ‘drugs, euthanasia, abortion and gay marriage’ as part of national identity – abhorrent as this might be to others, or even to a vast majority in parliament across the political spectrum only a few decades ago, before these features of an alleged ‘identity’ were reflected in law and practice in the Netherlands.

It may be that the common constitutional traditions have an inverse role to play in this context. If a certain civil right, including a certain understanding of that right, no longer belongs to the common constitutional tradition, it does not exist in the EU context either, if that understanding of the right is not part of the EU fundamental rights Charter either.<sup>18</sup> If the constitutional traditions change, then European legal protection also changes. These shifts in understandings of the common constitutional tradition may make it harder to invoke protection of constitutional identity at the ECJ, which has occasionally given the impression of a *common sense* approach as to whether something can be considered part of constitutional identity or not.<sup>19</sup> Here we touch upon the question not only how constitutional identity is decided, but also who decides what belongs to a Member State’s constitutional identity.

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<sup>15</sup> To use the wording in the Portuguese language version of Art. 4(2) TEU.

<sup>16</sup> But some Member States have no constitutional provisions on marriage, such as Denmark, Sweden, Finland, Estonia, Luxembourg and the Netherlands.

<sup>17</sup> Compare the German, Danish and Swedish language versions of Art. 4(2) TEU.

<sup>18</sup> The latter seems to be the case on the basis of reading the Explanation on Art. 9 of the Charter, which makes clear it neither denies, nor specifically allows same-sex marriage.

<sup>19</sup> Compare, for this idea in a different historical context, L. Besselink, *A Composite European Constitution* 14 (2007).

## 6 WHO DECIDES

The question who decides could in theory be answered with the help of an answer to the question whether a certain matter is a Union competence or whether something is within the field of competences retained by Member States or belongs to their exclusive competence.<sup>20</sup> Article 4(1) TEU is a sovereignty clause comparable to the last provision of the American Bill of Rights: competences not conferred upon the Union in the Treaties remain with the Member States who remain in control.<sup>21</sup> Also Article 4(2) TEU may give the misleading impression that there are areas of sovereign Member State power that are immune to EU law, by speaking of ‘essential State functions’, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security, and that in particular, national security remains the sole responsibility of each Member State. Well, national security might remain ‘sole’ responsibility of Member States, but the meaning of this provision is no different from the clause about the Area of Freedom Security and Justice, that stipulates that it ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’ (Article 72 TFEU). Just as this clause has not prevented the EU from adopting a series of measures in the field of public order in the sense of peace and tranquillity in the public space, for instance regarding large-scale international demonstrations, international soccer matches, etc.,<sup>22</sup> there can be little doubt that also the ‘essential state functions’ cannot prevent free movement rights of EU citizens from applying in the ordinary manner, and other EU law for that matter, to apply also when these state functions may be touched upon.

As Bonelli makes plausible, the idea that matters that are left to the Member States would protect them from interference with their constitutional identity, does not reflect the Court of Justice’s understanding of its own jurisdiction and its limits, nor its understanding of constitutional identity, either in the sense of Article 4(2) TEU or in other manners that might inform its practice. The same goes for the Member States and their understanding of their constitutional identity. The idea of differentiation between spheres of competence of Union and Member States, whether through mutually exclusive or shared powers, does not help answer

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<sup>20</sup> The point is further analysed by Bonelli in this issue.

<sup>21</sup> Tenth Amendment to the US Constitution ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’. This provision and its meaning has become a politically polarized issue, that has become part of the present culture wars. See Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, in *State Sovereignty and the Tenth Amendment* 118–143(2015), Ch. 5.

<sup>22</sup> See on this Imelda Tappeiner, *Orde in de Unie: informatie-uitwisseling en bescherming van de privacy bij grensoverschrijdende openbare-ordehandhaving in de Europese Unie*, University of Utrecht (2009), <https://dspace.library.uu.nl/handle/1874/36032> (accessed 1 Nov. 2010).

the question who should do what in establishing whether a Member State's constitutional identity is at stake.

The overall impression is that of a clash between the ECJ claiming ultimate authority, and national constitutional courts asserting ultimate authority. Some have described this in terms of powerful egos and other psychoanalytic jargon. Although the position of these respective courts are in themselves understandable in terms of their respective jurisdictional vocations, there is a wont of clear normative solutions. Pluralist theories try to grapple with it but do not specifically address the issue who is to decide on the question of what belongs to a Member State's constitutional identity.

It is probably a too simplistic view to exclude the role of other constitutional actors than courts, not least the constitution-making and – amending power. If we nevertheless limit ourselves to courts, there is truth in saying that the Court of Justice is the ultimate arbiter of Article 4(2) TEU. This would be particularly justified if this provision restricted the operation of EU law in some manner in order to respect national constitutional law. However, as long as the ECJ remains true to its fundamental position that it is not competent to adjudicate and interpret national law including national constitutional law, it must necessarily rely on national courts' views on what the national constitutional rules actually mean. This is a particularly difficult thing to do, in as much as it is unusual for the ECJ to ask referring courts for additional information regarding the substance of preliminary references. It is quite clear that the opinions of agents of governments appearing before the Court do not necessarily reflect the views of the relevant national courts; governments sometimes have strong reasons to rely on their own views rather than on countervailing or even contrary views of its courts.<sup>23</sup> Nevertheless, it would be right for the Court to enquire into such views if constitutional identity issues arise, and to do so even of its own motion. The *Taricco*-saga makes abundantly clear that if a constitutional court pursues the matter with sufficient clarity and persistence regarding the national constitutional relevance and the consequences of ignoring it, the ECJ may be so sensitive and sensible as not to override the constitutional concerns with merely a blank assertion of its ultimate judicial power.<sup>24</sup>

Just as the Court of Justice claims the ultimate power to decide about EU law, national constitutional or supreme courts will certainly, and understandably, claim

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<sup>23</sup> For the issue in the *Melloni* case, see Besselink, *Parameters of Constitutional Conflict After Melloni*, 39 Eur. L. Rev. 531–552 (2014).

<sup>24</sup> German courts have of old the habit to explain in detail their own views on the questions referred and the consequences of either or not following them, also in constitutionally sensitive matters, and classic examples of successfully doing so is the reference of the *Verwaltungsgericht of Frankfurt-am-Main* in Case 11/70, *Internationale Handelsgesellschaft*, and later in Case 36/02, *Omega*.

the ultimate power to interpret their own constitution. They will all the more be inclined to do so when it comes to those constitutional principles and structures that make for the Member State's and its constitutional order's identity, *also* if it concerns an alleged interference with those core constitutional features by measures under EU law. Even where EU law is concerned, if a national constitutional court would find the constitutional identity of the Member State to be at stake, it is unlikely for that court to consider it a very relevant issue whether conceptually that 'constitutional identity' is the same as the 'constitutional identity' intended in Article 4(2) TEU, assuming counterfactually there is agreement on the meaning of this provision.

## 7 CONCLUSION

I have given some indications towards explaining why some troubling issues concerning the meaning of constitutional identity in European constitutional law give rise to persistent disagreements that also after ten years remain unsettled and will probably remain so.

Is this a cause for deep concern? I do not think so. EU constitutional law is a quite unsettled branch of law. In EU law we know far less what is 'constitutional' law and what is 'ordinary' law than is the case in most Member State legal orders. Let alone that we should know with certainty what does and does not pertain to the constitutional identity, either of Member States, or of the Union. The constitutional identity of Member States has been a matter that the Union has been aware of – although historically more in terms of a shared identity of being democracies under the rule of law than in terms of how they are constitutionally distinct. And it is a matter that Member States will not feel able to give up. In this sense 'constitutional identity' is a thing that both a Member State and a Union must grapple with, it is both a concern of the Union and a concern of the Member States.

At the same time its sensitive nature implies that it may be safer for the Court of Justice to avoid constitutional identity claims – and constitutional claims in general.<sup>25</sup> It may in fact be a way to avoid problems, but whether this is a successful approach depends on whether doing so does not ignore the real issues without helping to resolve them. National courts will bring cases in terms of constitutional identity if the EU in its legislative, executive and judicial activity has not allowed for what they consider legitimate constitutional diversity. In this light the ECJ's claiming of ultimate jurisdiction in deciding when national constitutional rights are allowed to be applied or not – as seems the central message

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<sup>25</sup> See in particular the papers of Millet, Faraguna and Claes in this issue.

and actual outcome of for instance *Melloni* – may upset the delicate balances on which European integration hinge when a Member State authority, typically a constitutional court, would find this right as a matter of self-understanding to be part of its constitutional identity.

The end result is for the time being pretty undecided, and reflects the present state of European integration: a precarious balance of Union and Member States constitutional interests, the success of which hinges on constitutional indeterminacy when it comes to ultimate issues.

As long as we cannot do away with history, we will have different perceptions and understandings of what constitutional identity is or requires. Of course, this is not to say we cannot overcome history in the sense of specific historical phenomena that lose meaning: history itself demonstrates that, and not only the history of the Union itself. To the contrary, what at one point in time was considered to upset fundamentally the national constitutional system in the form of primacy of EU law over parliamentary legislation, is now generally accepted, though not as regards core constitutional provisions; the day may come that these are accommodated to such an extent that the clash can no longer be perceived.



