



*Jean - Monnet - Lehrstuhl
für Europäische Integration*

Freie Universität



Berlin

Berliner Online-Beiträge zum Europarecht Berlin e-Working Papers on European Law

herausgegeben vom
edited by

Lehrstuhl für Öffentliches Recht und Europarecht
Chair of Public Law and European Law

Prof. Dr. Christian Calliess, LL.M. Eur
Freie Universität Berlin

Nr. 108

15.10.2015

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Zitiervorschlag:

Verfasser, in: Berliner Online-Beiträge zum Europarecht, Nr. 108, S. XX.



**EU Member State Constitutional Identity:
A Comparison of Germany and the Netherlands as Polar Opposites**

DRAFT PAPER, July 2015

Setting the scene

The concept of constitutional identity has become a topic of increased attention in comparative and European Union (EU) law scholarship. The concept is not only a feature of academic literature and case law ranging from the Supreme Court of India to the Constitutional Council of France, but is also addressed by article 4(2) Treaty on European Union (TEU) that enjoins the EU to respect the identity of each of the 28 Member States' constitutional orders.¹ The purpose of this contribution is to compare in the light of European integration the concept of constitutional identity as it applies to Germany and the Netherlands as two of these national orders. Although both of these neighbouring countries count as founding members of what has become the EU, they exhibit very different approaches to articulating and protecting their respective constitutional identities. Closer inspection of both of these orders is warranted as it may be said that they represent near opposite approaches to national constitutional expression in the shared European constitutional space. Comparing Germany and the Netherlands not only allows for these polar opposites to be defined, but it also allows for these different approaches to be evaluated. In addressing these constitutional identity will first be clarified, after which it will be investigated in each of the two orders followed by an evaluation against the requirements and needs of the constitutional framework of the EU.

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¹ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225), paras 424, 506, 580, 619-621, 646, 1206; French Constitutional Council, no. 2006-540 DC, 27 July 2006, para. 19; no. 2006-543 DC, 30 November 2006, para. 6.

Constitutional identity clarified

Although a firm fixture of modern-day constitutional law, the notion of constitutional identity has been described as an essentially contested concept.² Rosenfeld has described constitutional identity as encompassing the three distinct meanings of fact, content and context.³ The first meaning relates to classifying orders based on whether they possess a constitution or not. The notion of constitutional identity then serves to distinguish constitution-based orders from orders not so founded. As both Germany and the Netherlands possess constitutions, typifying identity as fact adds very little to the meaning of identity for present purposes. Identity as content serves to distinguish constitutional orders according to the choices made by an order regarding its constitutional structures and checks-and-balances, while identity as context places these choices within a broader framework taking into account factors such as religion and ideology. Identity as content and context serves to distinguish constitutional orders according to the choices made by that order. For instance while both democracies today, their different historical development has led to Germany becoming a federal republic in 1949 as opposed to the Netherlands' constitutional monarchy that was established in 1814.

Although relevant to understanding the concept of identity, another dimension needs to be added. Namely, identity as the individuality or essence of an order.⁴ To paraphrase Chief Justice Sikri of the Supreme Court of India, the identity of a constitution amounts to those elements without which the constitution would not be the same in an essential way.⁵ Identity then does not refer to the entire information base of an order. Describing identity as comprising the essential elements of a constitutional order, also has consequences for defining what amounts to a constitution. In order to be able to capture the essential elements of such an order, a wide or generous interpretation of what amounts to a constitution must be adopted. Limiting the concept to a codified constitution runs the risk of excluding essential identity elements that might not be protected by such a document. As a matter of fact, an order does not even need to possess a codified constitution for it to have a constitutional identity as the United Kingdom proves. Nor is constitutional identity to be equated with the presence of higher law, as not all orders operate on the basis of such law or might have chosen to express their identity in this way.⁶ Instead constitutional identity can be found wherever constitutional customs and rules are present that sustain a framework for governance, including checks and balances such as the protection of fundamental rights.⁷

² Michel Rosenfeld, Constitutional Identity, in Michel Rosenfeld & Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012, p. 756.

³ Michel Rosenfeld, Constitutional Identity, in Michel Rosenfeld, Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012, p. 756, 757.

⁴ See Gerhard van der Schyff, The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU, 37 *European Law Review* 2002, p. 563, 569-570, 567-577; Elke Cloots, *National Identity in EU Law*, Oxford University Press 2015, p. 143.

⁵ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, para. 1260.

⁶ On the absence of higher law in the UK, see David Feldman (ed.), *English Public Law*, Oxford University Press 2004, p. 44-45.

⁷ Gerhard van der Schyff, The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU, 37 *European Law Review* 2002, p. 563, 576.

German constitutional identity explored

Affirming the ‘total’ Constitution

While the *Lisbon* judgment of 2009, in which the Federal Constitutional Court ruled on the compatibility of the Lisbon Treaty with the German Constitution, may have propelled the topic of constitutional identity to wider attention, it was certainly not the first time that the concept made its appearance in German case law.⁸

In tracing the Constitutional Court’s thinking on European integration, the attention must turn to the *Solange I* judgment of 1974.⁹ The main thrust of the judgment was to reserve a right for the Constitutional Court to review secondary law adopted by the then European Economic Community (EEC) against the fundamental rights of the German Constitution until a European charter of rights had been adopted that equalled the protection provided in the Constitution.¹⁰ The Constitutional Court defended its right of review with reference to the fact that fundamental rights formed part of the Constitution’s essential structure or identity.¹¹ The judgment added that transferring sovereign powers to the EEC in terms of the then Europe provision in article 24 could not result in changing the identity of the Constitution without formally amending the Constitution.¹² Although of theoretical importance, the *Solange I* doctrine has never resulted in a finding that secondary law violated German fundamental rights.

As a matter of fact, according to the *Solange II* judgment in 1986 the protection of fundamental rights at the European level had reached a sufficient level of equivalence for the Constitutional Court not to exercise its own review of secondary law.¹³ Importantly although not explicitly, the judgment seemed to follow the minority opinion in *Solange I* by reducing constitutional identity to the foundational principles from which the fundamental rights in the Constitution were deduced, instead of equating identity with the rights as such.¹⁴ In 2000 the *Bananas* judgment confirmed the *Solange II* judgment when the Constitutional Court refused to review whether EC law had infringed the right to property in article 14 of the Constitution.¹⁵ The Court insisted that it would not exercise review in so far as the European level ‘generally’ safeguarded fundamental rights.¹⁶ Incidental infringements would only trigger national constitutional review where it was shown that the ‘evolution’ of the protection guaranteed at the European level had sunk to a level below that required in the *Solange II* judgment.¹⁷

While the *Lisbon* judgment, which is discussed below, developed the concept of identity to set limits to European integration that could not be crossed even by means of formal constitutional amendment as referred to in *Solange I*, the *Solange* judgments formed

⁸ German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009.

⁹ German Federal Constitutional Court, BVerfGE 37, 271 (*Solange I*) 29 May 1974, para. 56.

¹⁰ German Federal Constitutional Court, BVerfGE 37, 271 (*Solange I*) 29 May 1974, para. 56.

¹¹ German Federal Constitutional Court, BVerfGE 37, 271 (*Solange I*) 29 May 1974, para. 44.

¹² German Federal Constitutional Court, BVerfGE 37, 271 (*Solange I*) 29 May 1974, para. 53.

¹³ German Federal Constitutional Court, BVerfGE 73, 339 (*Solange II*) 22 October 1986, para. 132. See also Christian Tomuschat, The Defence of National Identity by the German Constitutional Court, in Alejandro Saiz Arnaiz & Carina Alcoberto Llivinia (eds), *National Constitutional Identity and European Integration*, Intersentia 2013, p. 205, 208.

¹⁴ German Federal Constitutional Court, BVerfGE 37, 271 (*Solange I*) 29 May 1974, para. 81; BVerfGE 73, 339 (*Solange II*) 22 October 1986, para. 104.

¹⁵ German Federal Constitutional Court, BVerfGE 102, 147 (*Bananas*) 7 June 2000.

¹⁶ German Federal Constitutional Court, BVerfGE 102, 147 (*Bananas*) 7 June 2000, para. 38.

¹⁷ German Federal Constitutional Court, BVerfGE 102, 147 (*Bananas*) 7 June 2000, para. 39.

an important step in laying the ground for such later judgments on the relationship between the Constitution and European integration. This is because the judgments can be interpreted as affirming the principle that the Constitution, and in particular its identity, provides the ultimate norm applicable to the German legal order. In this regard the Constitution resembles Mattias Kumm's definition of a 'total' constitution that through its substantive constraints allows for the adjudication of 'any and every' political decision to assess the constitutional merits for such decisions.¹⁸ Kumm contrasts the 'total' constitution against the 'total' state as advanced by Carl Schmitt, which is understood as an order in which everything is 'up for grabs politically'.¹⁹ The constitutional moment caused by the destruction of the National Socialist dictatorship in 1945 decisively rejected the 'total' state in Germany in favour of a 'total' constitution in which law, as ultimately interpreted and protected by the Constitutional Court, became a device guaranteeing good governance and fundamental rights.

Enter state-based democracy

Whereas the EEC could be described as an economic community respectful of fundamental rights, the European project entered a new phase of heightened integration with the Treaty on European Union (TEU) signed in Maastricht in 1992. The Maastricht Treaty not only lay the groundwork for the current monetary union, but also injected political elements into the European project such as the creation of a common citizenship in addition to Member State citizenship. The Treaty also saw the EEC renamed the European Communities (EC) as the first of the newly created EU's three pillars.

The Maastricht Treaty caused a stir in many of the then twelve Member States, including Germany. In a show of judicial activism the Constitutional Court allowed a group of private petitioners to challenge the constitutionality of the act of parliament consenting to the Treaty even though they had not yet been directly affected by the act.²⁰ The Constitutional Court justified the parties' standing based on their right to elect members of the *Bundestag* in article 38(1) of the Constitution. The provision was interpreted as encompassing more than a mere formal right to participate in elections, but also implied that a national parliament had been elected capable of taking real decisions. The Constitutional Court pointed to the newly formulated article 23(1) of the Constitution that enjoined Germany to participate in the EU but only in so far as article 79(3) was not violated.²¹ Article 79(3), or the so-called eternity clause, provides that a number of core principles enshrined in the Constitution may not be amended. These include the federal character of the country as well as the principles protected in articles 1 and 20, such as the inviolability of human dignity and democracy. As the guardian of the total Constitution the Constitutional Court therefore had to decide whether the Treaty did indeed violate the democracy principle by curtailing the applicants' franchise rights in article 38(1). The Court found that the principle was not violated, but it was quick to add that the *Bundestag* had to 'retain functions and powers of substantial import'.²² In addition the Court characterised the EU a *Staatenverbund*, or compact of sovereign states, that could only exercise the powers which had been conferred on it by the concluding act of

¹⁸ Mattias Kumm, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, 7 *German Law Journal* 2006, p. 341, 343.

¹⁹ Mattias Kumm, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, 7 *German Law Journal* 2006, p. 341 discussing Carl Schmitt, Die Wendung zum totalen Staat, 7 *Europäische Revue* 1931, p. 241.

²⁰ German Federal Constitutional Court, BVerfGE 89, 155 (*Maastricht*) 12 October 1993, paras 58, 63.

²¹ German Federal Constitutional Court, BVerfGE 89, 155 (*Maastricht*) 12 October 1993, para. 85.

²² German Federal Constitutional Court, BVerfGE 89, 155 (*Maastricht*) 12 October 1993, para. 102.

parliament in the case of Germany.²³ In a metaphorical sense such an act provides a bridge for European law to enter the state while the constitutionality of any access is controlled by the Constitutional Court.²⁴ In claiming the last word on whether conferred powers are exercised in accordance with their conferral the *Maastricht* judgment created the *ultra vires* ground for review, as it would become known in the *Lisbon* judgment.²⁵

Although the *Maastricht* judgment did not use the term ‘constitutional identity’ it is clear that the concept underlies the judgment as far as the Court emphasised the need for democracy to be protected as one of the Constitution’s essential features.²⁶ Also, the Court pointed repeatedly to the new duty included in article F(1) TEU enjoining the EU to respect the ‘national identities’ of the Member States ‘whose systems of government are founded on democracy’.²⁷ The provision, which can be understood as encompassing constitutional identity, was included in the TEU to confirm the importance of Member States as part of the European project in lieu of failing to reach agreement on whether to label the EU as federal or not.²⁸

Emphasising national sovereignty

Whereas the *Maastricht* judgment chose to highlight the EU’s duty to protect Member State identity, the *Lisbon* judgment of 2009 used the successor provision of article F(1) TEU to bolster the national protection of German constitutional identity. In its current incarnation as article 4(2) TEU, the provision requires that the EU respects Member States’ ‘national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’ and is generally interpreted as protecting national constitutional identity.²⁹ In approving the Lisbon Treaty, which amended the TEU and the Treaty on the Functioning of the European Union (TFEU) in the aftermath of the failed Constitutional Treaty, the Constitutional Court expressly introduced ‘identity review’ as a specific action in addition to the *Maastricht* judgment’s *ultra vires* review.³⁰ As in the *Maastricht* judgment the *Lisbon* judgment promised openness and friendliness, or

²³ German Federal Constitutional Court, BVerfGE 89, 155 (*Maastricht*) 12 October 1993, para. 90.

²⁴ Paul Kirchhof, Der deutsche Staat im Prozeß der europäischen Integration, in Josef Isensee & Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol. 10, C.F. Müller 2012, p. 299, 302.

²⁵ German Federal Constitutional Court, BVerfGE 89, 155 (*Maastricht*) 12 October 1993, para. 106; German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 240.

²⁶ See also Christian Tomuschat, The Defence of National Identity by the German Constitutional Court, in Alejandro Saiz Arnaiz & Carina Alcobero Llivinia (eds), *National Constitutional Identity and European Integration*, Intersentia 2013, p. 205, 209-210.

²⁷ German Federal Constitutional Court, BVerfGE 89, 155 (*Maastricht*) 12 October 1993, paras 90, 109, 161-162, 164.

²⁸ See Frank Schorkopf, Nationale Verfassungsidentität und europäische Solidarität: Die Perspektive des Grundgesetzes, in Calliess (ed.), *Europäische Solidarität und nationale Identität: Überlegungen im Kontext der Krise im Euroraum*, Mohr Siebeck 2013, p. 99, 107; Monica Claes, National Identity: Trump Card or Up For Negotiation?, in Alejandro Saiz Arnaiz & Carina Alcobero Llivinia (eds), *National Constitutional Identity and European Integration*, Intersentia 2013, p. 109, 116. Its Amsterdam amended version, art. 6(3) TEU was interpreted similarly, see Arnd Uhle, *Freiheitlicher Verfassungsstaat und kulturelle Identität*, Mohr Siebeck 2004, p. 479.

²⁹ See Gerhard van der Schyff, The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU, 37 *European Law Review* 2002, p. 563, 567-569; Armin von Bogdandy & Stephan Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, 48 *Common Market Law Review* 2011, p. 1417, 1424-1425, 1427. Even those who reject the idea, accept that ‘national identity’ in art. 4(2) TEU shows significant overlap with constitutional identity, see Elke Cloots, *National Identity in EU Law*, Oxford University Press 2015, p. 167.

³⁰ German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, paras 228, 240-241, 332.

Europarechtsfreundlichkeit, towards European law in exercising such review, but the Court was not willing to cede the last word to the European Court of Justice (ECJ).³¹

Having staked its claim to protecting constitutional identity in the *Lisbon* judgment, the Constitutional Court proceeded to develop the concept as a comprehensive gauge of and limit to European integration and law. In this way the Court essentially refined the principle of the ‘total’ constitution that inhered in the *Solange I* judgment. The Court based much of its thinking on article 23(1) of the Constitution that forbids European integration from violating the eternity clause in article 79(3).³²

In developing the concept of constitutional identity the *Lisbon* judgment built on its thinking in the *Maastricht* judgment by emphasising the state as the natural and primary space for democratic expression in the European constitutional space. In this regard the Constitutional Court noted that constitutional identity comprised Germany’s ‘sovereign statehood’ which could not be alienated by further European integration.³³ Sovereignty was not to be defended for its own sake though, but had to be protected in order to protect German voters’ right to determine their own destiny as guaranteed in article 38 as part of German constitutional identity. It was therefore up to German voters, the constituent power in the words of the Court, to dissolve the state in a new and as yet to be formed European state and not up to the country’s political or constituted powers.³⁴

In defining the reach of the newly introduced identity review the *Lisbon* judgment set about listing the essential functions of the state, which has opened the Constitutional Court to the criticism that it wants to define the impossible given the difficulty of the terrain in this regard.³⁵ The Court nonetheless observed that integration must leave ‘sufficient space ... for the political formation of the economic, cultural and social living conditions’ in Member States. The Court elaborated that this included democratic decisions on criminal law, the state’s monopoly on force, public revenue and expenditure, the German concept of the social state and decisions relating of cultural importance such as family law, education and religious affairs.³⁶ Later judgments have clarified a number of points regarding identity such as holding in the *Data Retention* case that individual freedom dictates that not every piece of communication may be recorded and registered in its totality, which led to the unconstitutionality of an act of parliament that implemented the EU Data-Retention Directive while not reviewing the Directive itself.³⁷ Also, in the *EFSS* case it was held that the

³¹ German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, paras 225, 240, 332, 340.

³² German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 240.

³³ German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 216. See also Daniel Thym, Attack or Retreat? Evolving Themes and Strategies of the Judicial Dialogue between the German Constitutional Court and the European Court of Justice, in Monica Claes, Maartje de Visser, Patricia Popelier & Catherine Van de Heyning (eds), *Constitutional Conversations in Europe*, Intersentia 2012, p. 235, 242-243; Dier Grimm, Defending Sovereign Statehood against Transforming the European Union into a State, 5 *European Constitutional Law Review* 2009, p. 353.

³⁴ German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 179.

³⁵ See Daniel Halberstam & Christoph Möllers, The German Constitutional Court says ‘Ja zu Deutschland!’, 8 *German Law Journal* 2009, p. 1241, 1249-1251; Kathrin Dingemann, Zwischen Integrationsverantwortung und Identitätskontrolle: Das Lissabon-Urteil des Bundesverfassungsgerichts, 9 *Zeitschrift für Europarechtliche Studien* 2009, p. 491, 509.

³⁶ German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 252.

³⁷ The implementing act exceeded the minimum norms of EU Directive 2006/24/EC, which is why the Court focussed its attention only on the act. German Federal Constitutional Court, BVerfG, 1 BvR 256/08 (*Data Retention*) 2 March 2010, para. 218. See also Christian DeSimone, Pitting Karlsruhe Against Luxembourg? German Data Protection and the Contested Implementation of the EU Data Retention Directive, 11 *German Law Journal* 2010 p. 292.

Bundestag may not have its budgetary autonomy limited through agreements accepting financial liability for third parties of which the effects are difficult to calculate.³⁸

The latter point is of particular importance to the 2012 Outright Monetary Transaction (OMT) decision by the European Central Bank (ECB) that if necessary it would buy state-issued government bonds in supporting the Eurozone upon certain conditions being met by the state in question.³⁹ The fact that no upper purchase limit was mentioned by the OMT decision led to the Constitutional Court to make its first ever preliminary reference allowing the ECJ to decide if the ECB had exceeded the powers conferred upon it by the TFEU.⁴⁰ Having ruled that the ECB did not exceed its mandate, the Constitutional Court will now have to consider the ECJ's answer in deciding for itself if the OMT decision was *ultra vires* or impairs German constitutional identity.⁴¹ As to reviewing constitutional identity, the Constitutional Court made it plain that only it has jurisdiction in deciding any matter related to German constitutional identity, which is why the Court refused to shape its reference as to include the question whether the OMT decision violates such identity.⁴²

While not all questions on German constitutional identity have been settled yet, what can be deduced from the overall discussion is that the concept plays a central role in determining if and how EU law is to apply in the country and in determining the fate of further German integration in the EU.

Dutch constitutional identity explored

A 'modest' Constitution

Although Germany lies at the geographical heart of the EU and is influential both economically and politically, its constitutional ideas have not taken root in the Netherlands. As a matter of fact the Netherlands occupies something of an exceptional position in the European constitutional landscape. Whereas many EU Member States have affirmed or erected constitutional safeguards and barriers in the face of EU integration the country has not followed this trend. A reason for this difference, especially with regard to Germany, is that the Dutch constitutional order is not based on the notion of a 'total' Constitution, but on what may be called a 'modest' Constitution. The country's Constitution that dates from 1814 does not purport to be the *Grundnorm*, or ultimate norm, of the dispensation to which all norms can be traced. As a matter of fact, the Constitution is not even the highest domestic norm, a status which is reserved for the Charter of the Kingdom of 1953 that regulates the relationship between the Netherlands, Curacao, Aruba and Saint Maarten that together form the Kingdom.⁴³ In characterising the Constitution Stellinga has explained that the document

³⁸ German Federal Constitutional Court, BVerfGE 129, 124 (*EFSF*) 7 September 2011, para. 127. See also Wolfgang Kahl, *Bewältigung der Staatsschuldenkrise unter Kontrolle des Bundesverfassungsgerichts*, 128 *Deutsches Verwaltungsblatt* 2013, p. 197, 200-203.

³⁹ See the ECB Press Release of 6 September 2012, http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html. On the background, see Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 *German Law Journal* 2014, p. 111, 112-113.

⁴⁰ German Federal Constitutional Court, BVerfG 2 BvR 2728/13 (*OMT*) 14 January 2014.

⁴¹ ECJ, C-62/14, *Gauweiler* ECLI:EU:C:2015:400. See also Dietrich Murswiek, ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014, 15 *German Law Journal* 2014, p. 147, 163.

⁴² German Federal Constitutional Court, BVerfG 2 BvR 2728/13 (*OMT*) 14 January 2014, paras 26-27, 102.

⁴³ See Ernst M.H. Hirsch Ballin (ed.), *De constitutionele orde van het Koninkrijk der Nederlanden*, Wolf Legal Publishers 2015.

creates a framework which allows a system to develop, thereby placing the emphasis more on the Constitution as a starting point for further development than an all-encompassing final station.⁴⁴ The extent to which the Constitution lays such foundations is a matter of dispute. This is because academic opinion is divided on whether article 81 of the Constitution creates legislative capacity or simply records a pre-existing capacity, the procedure of which the provision then only serves to regulate.⁴⁵

The limited place of the Constitution is put further into perspective when the role of unwritten constitutional law is considered. This is because not only fundamental principles such as proportionality in the administration of law, but also the confidence rule are not codified in the Constitution.⁴⁶ In other words, the fact that the Netherlands is a parliamentary democracy that requires the executive to enjoy the political confidence of parliament in order to govern, is a matter of settled practice and not of constitutional imperative. The result of parliament's drawn-out struggle in the nineteenth century to emancipate itself from an overbearing executive succeeded, but not as far as being protected in the Constitution. Given this lack of pretension as far the Constitution is concerned, it should come as no surprise that the Constitution contains no provision similar to the eternity clause in article 79(3) of the German Constitution.

To this reluctance to codify constitutional principles can be added the avoidance of 'big concepts' in Dutch constitutionalism. For instance, while the concept of sovereignty has come to influence the debate on German integration in the EU, the concept can hardly be found in Dutch constitutional law and thought. Sovereignty, it has been observed, 'is simply not part of the Dutch constitutional alphabet'.⁴⁷ The absence of the concept can be explained on various grounds.⁴⁸ For instance, the founding of the Dutch Republic in 1581 left open the question whether the provinces each or the republic as a whole enjoyed sovereignty. This uncertainty lasted throughout the republic and was still not cleared up when in the late eighteenth century a unitary state was established and in 1815 the monarchy proclaimed. The concept was further avoided as Calvinist thinking emphasised that each unit of society, be it the state, church or family enjoyed sovereignty in its own sphere, leaving ultimate sovereignty to God. Combined this means that sovereignty never developed into a viable constitutional concept, at least on the national plane. A similar statement to that of the preamble to the German Constitution referring to the people as the constituent power is thus absent from the Dutch Constitution, as is even a preamble for that matter. Dutch academics have discussed the concept of sovereignty in the context of EU law though, where they have usually indicated the need to think in terms of a limited or shared sovereignty in the European constitutional space, instead of proposing the concept as a limit to European integration in the mould of the *Lisbon* judgment.⁴⁹

⁴⁴ See the foreword to J.R. Stellinga, *De Grondwet systematisch gerangschikt*, Tjeenk Willink 1950.

⁴⁵ E.g. M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen & R.J.G.M. Widdershoven, *Beginselen van de democratische rechtsstaat* 7th edn, Kluwer 2012, p. 76 support the view that the Constitution creates a general competence to legislate, while W.J.M. Voermans, *Toedeling van bevoegdheid*, Boom Juridische Uitgevers 2004 notes and criticises the difference of opinion.

⁴⁶ See L. Dragtra, N.S. Efhymiou, A.W. Hins & R. de Lange, *Beginselen van het Nederlandse Staatsrecht* 17th ed., Kluwer 2012, p. 100-106.

⁴⁷ Bruno De Witte, Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and The Netherlands, in Neil Walker (ed.), *Sovereignty in Transition*, Hart Publishing 2003, p.351, 361.

⁴⁸ The reasons discussed here draw on Bruno De Witte, Do not Mention the Word: Sovereignty in Two Europhile Countries: Belgium and The Netherlands, in Neil Walker (ed.), *Sovereignty in Transition*, Hart Publishing 2003, p.351, 359-360.

⁴⁹ E.g. Ernst M.H. Hirsch Ballin, Soevereiniteit in de Europese Unie, *Nederlands Juristenblad* 1997, p. 2005.

Emphasis on democracy

The interpretation of article 79(3) by the German Federal Constitutional Court has been important in developing identity review in that jurisdiction. Yet, even with such a provision, a similar course would be difficult to imagine in the Netherlands because of the bar on constitutional review. Article 120 of the Dutch Constitution prohibits the courts from reviewing the constitutionality of acts of parliament, or of treaties for that matter. The effect of the provision has been such that in 1989 the Supreme Court interpreted the silence in the Charter of the Kingdom on whether it may be applied by the courts with reference to article 120, which meant that the bar on review also applies to the Charter.⁵⁰ The Supreme Court has also affirmed the bar with respect to the fundamental unwritten principles of constitutional law.⁵¹ It is therefore not surprising that when in 2012 a claim was brought before the district court in the Hague to prevent the Netherlands from becoming a party to the European Stability Mechanism because of an alleged violation of the legislature's right to set the national budget as determined in article 105 of the Constitution, the claim was rejected partly for a lack of jurisdiction in reviewing the constitutionality of acts of parliament including the democratic process leading to any enactment.⁵²

Article 120, which was inserted in the Constitution in 1848 and which has survived various attempts at amendment, can rightly be said to be one of the keys to unlocking Dutch constitutional identity.⁵³ In limiting the courts' powers of review, the provision affirms the importance of the democratic process to the very constitutional being of the Netherlands, but in a way very different to that of the *Maastricht* judgment. Democracy in the Netherlands is not to be understood as a concept entirely dependent on the Constitution for its delineation and development as safeguarded by the courts as in Germany, this is because democracy is as much respected for its autonomy as it is regulated by the Constitution. Although similar in some aspects the Dutch position is not to be confused with the doctrine of parliamentary sovereignty in the United Kingdom either, as the Constitution in the Netherlands amounts to higher law that binds the legislature. The protection of national higher law in the Netherlands differs from Germany in that the legislature and not the courts are the ultimate interpreter and protector of such higher law. Apart from article 120 of the Constitution, this is evidenced in that the Constitution prescribes no substantive brake on the extent to which its rights may be limited leaving that decision to an act of parliament or delegated legislation.⁵⁴ This does not deny fundamental rights as guaranteed in the Constitution as an essential element of the country's constitutional identity, but emphasises that protection is primarily a matter for the legislature with the courts usually practising restraint.⁵⁵

⁵⁰ Dutch Supreme Court, HR 14 April 1989, *NJ* 1989 469 (*Harmonisation*), para. 4.6.

⁵¹ Dutch Supreme Court, HR 14 April 1989, *NJ* 1989 469 (*Harmonisation*), para. 3.6.

⁵² The Hague District Court, Preliminary Judgment 6 June 2012, ECLI:NL:RBSGR:2012:BW7242, paras. 2.2, 3.2.-3.3.

⁵³ In 2002 a private bill was tabled aimed to allow the review of civil and political rights in the Constitution, while keeping art. 120 further intact, see Second Chamber Parliamentary Papers, TK 2001-2002, 28 331, no. 9. It is however questionable if the bill will receive the necessary two-thirds majority to amend the Constitution. Once tabled, bills do not lapse, hence the time span. See further Gerhard van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Bridge too Far?*, 11 *German Law Journal* 2010, p. 275.

⁵⁴ E.g. Art. 8 of the Constitution: 'The right of association shall be recognised. This right may be restricted by Act of Parliament in the interest of public order.'

⁵⁵ An example of the courts foregoing their general restraint relates to The Hague District Court, Judgment 24 June 2015, ECLI:NL:RBDHA:2015:7145. In this matter the state was enjoined to limit its emission of greenhouse gasses. While the Court did not question art. 120 of the Constitution, it constructed a duty of care based in part on the state's duty in art. 21 to protect and improve the environment, on the basis of which it ruled that the government's failure to act would be unlawful at private law.

This emphasis on the democratic process also explains article 92 of the Constitution that regulates the conferral of legislative, executive and judicial powers on international institutions by or pursuant to a treaty. The provision does not require a conferral to be for a specific period of time only, nor does the provision limit the type of power as to its character or range. What is required in article 91(1) of the Constitution is that a treaty be approved by both houses of parliament. In taking such a decision the houses are aided by the non-binding advice of the Council of State that usually amounts to a mixture of constitutional law coupled with an appreciation of the specific context.⁵⁶ Were the legislature to find a treaty in violation of the Constitution, article 91(3) allows for such a treaty to be adopted by a two-thirds majority thereby resolving the conflict in favour of the treaty. Given that the Constitution is particularly rigid, this provision allows for a procedural and democratic safety valve in settling the matter, instead of opting for the drawn-out and laborious procedure of constitutional amendment in article 137. As it lacks a similar provision, it seems that the Charter of the Kingdom would have to be amended before a treaty may be adopted in violation of its provisions. However, this has not been the case to date and arguments alleging a violation have not fallen on fertile ground.⁵⁷

Also important to note is that article 91(3) of the Constitution has never been used in condoning unconstitutional treaties. As a matter of fact all treaties concerning the EU have always been adopted by at least a two-thirds majority rendering the provision's use superfluous. In addition academic opinion in the past that provisions from the Maastricht Treaty were unconstitutional for instance, thereby activating article 91(3), were contested and rejected.⁵⁸ An attempt to amend the Constitution in order to always require a two-thirds majority in approving EU treaties has to date not met with success either.⁵⁹ This means that the Netherlands is one of only four EU Member States to allow EU treaty accession based on a simple majority in parliament, as opposed to the special majorities or referendums required in the other Member States as a matter of course.⁶⁰ The fact that the draft EU Constitutional Treaty was rejected by Dutch voters in 2005 was therefore not because the Constitution required the holding of the referendum, but because of the then coalition government deciding to consult voters on whether to support the treaty or not.

An 'open' Constitution

The other key to understanding the constitutional identity of the Netherlands is to be found in article 94 of the Constitution. The provision codifies the unwritten constitutional rule that international law operates on the basis of monism and regulates the application of such law.

Whereas article 120 of the Constitution bars the constitutional review of acts of parliament, article 94 requires the judiciary and executive to refuse application to any statutory regulation that conflicts with binding treaties and resolutions passed by international

⁵⁶ See the Council of State's 2014 annual report, p. 42-43.

⁵⁷ For such arguments, see Leonard F.M. Besselink, *Het Verdrag van Maastricht wijkt ook op andere punten af van de Grondwet en eveneens het Statuut*, *Nederlands Juristenblad* 1992, p. 864.

⁵⁸ Rejecting the case of Aalt W. Heringa, *De Verdragen van Maastricht in strijd met de Grondwet*, *Nederlands Juristenblad* 1992, p. 749, see C.A.J.M. Kortmann, *De Verdragen van Maastricht niet in strijd met de Grondwet*, *Nederlands Juristenblad* 1992, p. 862; I. Sewando, *Grondwettelijke bezwaren tegen Maastricht ver gezocht*, *Nederlands Juristenblad* 1992, p. 863.

⁵⁹ Second Chamber Parliamentary Papers, TK 2006-2007, 30.874 (R1818), no. 3.

⁶⁰ See Leonard F.M. Besselink, Monica Claes, Šejla Imamović & Jan Herman Reestman, *National Constitutional Avenues for Further EU Integration*, 2014, p. 31. To be found at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET%282014%29493046 (last accessed 3 July 2015).

institutions.⁶¹ The fact that the provision applies to such regulations ‘in force within the Kingdom’ means that also the Charter of the Kingdom must not be applied in case it conflicts with international law.⁶² This leads to the peculiar situation that a Dutch court must apply an act of parliament even where the act violates the Constitution, or the Charter for that matter, while the court would have to refrain from following the same act in the event of it violating international law. Article 94, which was included in the Constitution in 1953, thereby encourages and affirms the legal order’s openness to international law, a far-reaching openness when article 92 of the Constitution is added to the equation. It is no coincidence that these provisions were adopted just as the European Coal and Steel Community, the EU’s forerunner, had been created by the Treaty of Paris in 1951.

Constitutional practice with regard to EU law, however, took a different route than that foreseen in the 1950s. This is because the majority of academic opinion came to accept the position in *Costa* that EU law operated autonomously in the national order.⁶³ In other words, EU law operates independently of the Constitution and Charter, which means that article 94 fulfils no ‘bridge’ function in the German sense by allowing the application of EU law on the condition of constitutionality. Article 94 is therefore only relevant with regard to international law other than EU law, especially the European Convention on Human Rights and the International Covenant on Civil and Political Rights as essential elements of the country’s constitutional order. This position has also been accepted by the Supreme Court.⁶⁴ Were it to pass which is doubtful, the recent proposal to amend article 94 and mirror article 120 of the Constitution in preventing the courts from applying international law to acts of parliament would therefore have no effect on EU law.⁶⁵

The fact that Dutch constitutionalism is not predicted on the idea of national sovereignty, coupled with its monist system has meant that there have been no real hurdles in accepting the special status of EU law. While countries such as Cyprus adopted constitutional provisions to ensure the primacy of EU law, a similar course of action was not necessary in the Netherlands.⁶⁶ It should also come as no surprise that the country’s Constitution lacks a dedicated Europe provision as adopted in other EU Member States to affirm European integration or determine the relationship between national and EU law. Calls to adopt such a provision have also fallen on deaf ears, such as that in 2010 by a member of the State Commission for constitutional reform seeking to codify the state of affairs and mention the enhanced role of national parliaments in the post-Lisbon EU constellation.⁶⁷ Dutch constitutional identity exists as before, exhibiting a radical openness to international and in particular EU law, coupled with a strong belief in the democratic legitimacy of the national legislature under the judicial control of such law. These reference points condition all other essential elements in the order, including its commitment to fundamental rights.

⁶¹ Self-executing treaties are usually considered as binding, including civil and political rights but not socio-economic rights. In conducting treaty review the courts usually practise restraint, see generally Jerfi Uzman, Tom Barkhuysen & Michael L. van Emmerik, *The Dutch Supreme Court: A Reluctant Positive Legislator?*, in Allan R. Brewer-Carias (ed.), *Constitutional Courts as Positive Legislators: A Comparative Study*, Cambridge University Press 2011, p. 645, 667-673.

⁶² See J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen*, Boom Juridische Uitgevers 2004, p. 341.

⁶³ ECJ, Case-C 6/64, *Costa* [1964] ECR 585.

⁶⁴ Dutch Supreme Court, HR 2 November 2004, *NJ* 2005 80 (*Rusttijden*), para. 3.5. See also L.F.M. Besselink, H.R.B.M. Kummeling, R. de Lange, P. Mendelts & S. Prechal, *De Nederlandse Grondwet in de Europese Unie*, Europa Law Publishing 2004, p. 30-42.

⁶⁵ Second Chamber Parliamentary Papers, TK 2011-2012, 33359 (R1986), nos. 2, 3.

⁶⁶ Art. 1A of the Cypriot Constitution.

⁶⁷ Report of the State Commission on the Constitution, 2010, p. 110, and for the cabinet’s negative reaction, see First Chamber Parliamentary Papers, EK 2011-2012, 31570, no. A.

Germany and the Netherlands Evaluated

Having delineated the constitutional identity of Germany and the Netherlands with respect to European integration, the attention now turns to evaluating the approaches. While both countries profess friendliness or openness to EU law, they differ quite markedly in their approach. The Constitutional Court places the identity of German constitutional law outside the reach of EU law and firmly in the hands of the Court's protection as the guardian of the 'total' Constitution. Instead of creating two legal orders in this way, the one national and controlled by constitutional identity limits and the other European and controlled by the Treaties, the constitutional identity of the Netherlands insists on a single legal order in which a higher position is assigned to EU and international law than to national law including its 'modest' Constitution. The German approach evidences a bottom-up conditional approach to accepting EU law, while the Netherlands departs from the unity of such law as guaranteed by the ECJ in a top-down fashion.

When factoring in EU law, it quickly becomes apparent that the Dutch model of radical openness satisfies the primacy rule as stated in *Internationale Handelsgesellschaft* that the validity of EU law can never be affected by any national law, while Germany sets limits to the rule.⁶⁸ As a consequence of the German approach, constitutional conflict between the Constitutional Court and the ECJ cannot be ruled out as far as the limits imposed by constitutional identity are concerned, while embracing the unqualified reception of EU law as a part of constitutional identity in the Netherlands is designed to avoid just that. Based on the desire to safeguard the unity of EU law and so avoid conflict at any cost, the Dutch model cannot be challenged, apart from it also satisfying EU positive law to the hilt. Although the German model disappoints in this regard, the qualified acceptance of the primacy of EU law does not have to be all negative, as the national insistence on protecting constitutional identity can also have a positive effect on the course of EU law. For instance the *Solange* jurisprudence of the Constitutional Court, which emphasised the principled importance of fundamental rights, provided a strong impulse supported by the threat of judicial sanction that helped to fire the further development of fundamental rights at the EU level. In this the Constitutional Court helped to turn the European project into one increasingly respectful of such rights in addition to its economic goals. The Constitutional Court's *Maastricht* judgment illustrated that its helping hand could also be turned inward by pointing the national legislature to its democratic mandate in representing German voters. Not only must the range of national democracy be safeguarded according to the *Lisbon* judgment, but national democracy must exercise oversight at the EU level too, as required in the *EFSF* and *OMT* cases. The effect is to ensure that more than mere lip service is paid to the mandate of national parliamentarians and references to the importance of democracy in the Treaties.⁶⁹

With their unqualified acceptance of the primacy of EU law, courts in the Netherlands could not have acted in a similar fashion to ensure the protection of fundamental rights or democracy as essential parts of the country's constitutional dispensation. The Council of State has expressed concern in this regard as far as international law other than EU law is concerned.⁷⁰ The Council's concern has also been supported by some authors who argue that a formal insistence on monism in support of the international legal order means that the

⁶⁸ ECJ, Case C-11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, 1134.

⁶⁹ For further examples and arguments, see Paul Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration*, in Josef Isensee & Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 10, 2012, p. 299, p. 373-377.

⁷⁰ Second Chamber Parliamentary Papers, TK 2007-2008, 31 570, no. 3.

content of international norms receives very little attention.⁷¹ While this may support legal unity and provide clarity, questions can be raised as to whether this approach is always healthy as far as the quality of the law is concerned that is to be applied in the Netherlands. As Von Bogdandy has argued:

There should always be the possibility, at least in liberal democracies, to limit legally, the effect of a norm or act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts (...).⁷²

While the decision-making institutions of the EU are arguably better developed than that of some other international actors, the recognition that national constitutional identity could conceivably be drawn on when absolutely necessary can also be applied to EU law.⁷³ The current state of European integration might have qualified, but has certainly not dissolved national constitutional orders, thereby illustrating the continued importance of such orders and their respective constitutional identities. Peter Lindseth has argued similarly that:

In a system where democratic and constitutional legitimacy remains fundamentally national, but significant normative power is increasingly supranationalized (heretofore on a 'pre-commitment' basis), it must be recognized that there are limits to European solidarity and hence integration.⁷⁴

Yet against this background, the simple fact remains that at present the pillars of monism and the bar on constitutional review by the courts mean that the debate on the material content of the Netherlands' constitutionalism has fallen all but by the wayside. Constitutional principles are hardly ever referred to in political debate, as opposed to Germany where such principles help to form political thinking in relation to the country's participation in the EU.⁷⁵ Although this might be explained by the aversion to 'big concepts' in the Netherlands, it certainly does not justify the lack of appetite for things constitutional. The Dutch approach to pretending that ever-closing union in Europe entails no significant implications for its constitutional order has been criticised as early as 1980, yet continues in much the same way.⁷⁶ This is the case even though research has shown identity loss to be one of the main fears having caused Dutch voters to reject the draft Constitutional Treaty in 2005.⁷⁷

In addressing this situation the government has only recently been willing to include a limited value provision in the Constitution drawing attention to the fact that the document guarantees democracy, fundamental rights and the *rechtsstaat*.⁷⁸ Although the government

⁷¹ Leonard Besselink & Ramses Wessel, *De internationale rechtsorde en de Nederlandse rechtsorde*, 63 *Internationale Spectator* 2009, p. 569, 572-573.

⁷² Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 *International Journal of Constitutional Law* 2008, p. 397, 412.

⁷³ For such arguments based on art. 4(2) TEU, see Leonard F.M. Besselink, *National and Constitutional Identity before and after Lisbon*, *Utrecht Law Review* 2010, p. 36, 48; Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 *Common Market Law Review* 2011, p. 1417, 1419, 1449-1450, and based on national constitutional law, see Paul Kirchhof, *Der deutsche Staat im Prozeß der europäischen Integration*, in Josef Isensee & Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol. 10, C.F. Müller 2012, p. 299, 373-377.

⁷⁴ Peter L. Lindseth, *European Solidarity and National Identity: An American Perspective*, in Christian Calliess (ed.), *Europäische Solidarität und nationale Identität*, Mohr Siebeck 2013, p. 57, 64.

⁷⁵ Compare Ernst M. H. Hirsch Ballin, *De Grondwet in Politiek en Samenleving*, Boom Lemma 2013, p. 9-12 and Peter M. Huber, *The Federal Constitutional Court and European Integration*, 21 *European Public Law* 2015, p. 83.

⁷⁶ See T. Koopmans, *Juridisch Stippelwerk*, Kluwer 1991, p. 277.

⁷⁷ Arjen Nijeboer, *The Dutch Referendum*, 1 *European Constitutional Law Review* 2005, p. 393, 398.

⁷⁸ Second Chamber Parliamentary Papers, TK 2013-2014, 31 570, no. 24.

insists that the provision should not be called a preamble, it is difficult to imagine it as anything else, especially as it was made clear that the proposal was intended to respect the modest nature of the Constitution. Instead of this proposal renewed attention should be given to the State Commission's 2010 proposal for a value provision.⁷⁹ The proposal would have affirmed the Netherlands as a democratic *rechtsstaat*, while requiring public power to respect human dignity, fundamental rights as well as fundamental constitutional principles. In addition the provision would have based the exercise of such power on the Constitution. Unlike the government's proposal the effect would arguably have been to bring the application of EU law under the auspices of the Constitution and its values, instead of its present extra-constitutional character. In addition in addressing questions of constitutional significance the original proposal would provide the political process with a more comprehensive guide to important national values. An indirect effect would be to assist national organs in reviewing the subsidiary of EU legislation by articulating a national benchmark worthy of respect.⁸⁰ Moreover, the EU would also benefit from such an articulation of core values in respecting the constitutional identity of the Netherlands as required by article 4(2) TEU.

The role of the national judiciary would not change immediately if the value provision were to be adopted though, as article 120 of the Constitution would still prohibit the judicial constitutional review of acts of parliament and treaties, thereby leaving the monist pillar untouched. However the case can be made that article 120 should be changed, even though the current political climate might not welcome it. This is because allowing the courts to apply the value provision to EU, and international law, will complement the political protection of such core values at the national level. This would not mean rejecting monism, which would itself qualify as one of the fundamental constitutional principles according to the value provision. The combined effect would be to insist on an identity-based monism, instead of monism as pure procedure.⁸¹ Whether a special court would be needed to coordinate identity-based monism would have to be considered as opposed to allowing all courts to conduct treaty review as is currently the case.⁸² The benefit of centralised review though would undoubtedly be to foster constitutional unity within the current system of four highest national courts, while also allowing the country to engage in the European-wide judicial dialogue between national courts and the ECJ that has come to characterise the debate on the European project in recent years.⁸³ What is therefore called for in the Netherlands is not a total upset of the current system as much as a rebalancing that would allow the courts a say in articulating and protecting constitutional identity.

The value of EU Member States vindicating constitutional fundamentals in the European space should not be over-emphasised though. This is because an over-insistence on protecting national constitutional identity can undermine the effectiveness of EU law and harm the stated goal of ever closer union in the preamble to the TEU. Apart from its benefits, the German model is also a case in point here. Disappointing in this regard is the

⁷⁹ Report of the State Commission on the Constitution, 2010, p. 36-42.

⁸⁰ On the link between constitutional identity and subsidiarity review, see Dominique Rousseau, *Die Verfassungsidentität – Schutzschirm für die nationale Identität oder Teil des europäischen Sterns?*, in Susanne Baer, Oliver Lepsius, Christoph Schönberger, Christian Waldhoff & Christian Walter (eds), *Jahrbuch des öffentlichen Rechts der Gegenwart* vol. 63, Mohr Siebeck 2015, p. 91, 97-99.

⁸¹ For a similar proposal, but then in the context of international law, see L.F.M. Besselink & R.A. Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht*, Kluwer 2009.

⁸² For such a proposal, see E.A. Alkema, *Over implementatie van internationaal recht – de internationale rechtsorde is de onze nog niet*, inaugural lecture Leiden 2005.

⁸³ On such dialogue, see the various perspectives in Monica Claes, Maartje de Visser, Patricia Popelier & Catherine Van de Heyning (eds), *Constitutional Conversations in Europe*, Intersentia 2012.

Constitutional Court's characterisation of the EU as a *Staatenverbund* coupled with its enthusiasm to protect 'sovereign statehood' as part of German Constitutional identity.⁸⁴ Although the Court is quick to add that identity review is to be exercised in the spirit of *Europarechtsfreundlichkeit* and the duty of loyal cooperation in article 4(3) TEU, its point of departure emphasises the role of sovereign states as the building blocks of the EU.⁸⁵ The effect is to point to division first, namely between state and non-state actors, sovereign and conferred authority and the national and European planes, before speaking the language of conciliation. To this division some authors add the constitutional and non-constitutional by questioning whether the EU is to be understood as a constitutional order at all, in contrast to national orders.⁸⁶

More appropriate would be for any national court entrusted with the protection of constitutional identity to stress the European project as a common endeavour based on a constant interaction between various constitutional actors. In this regard the concept of a *Staaten- und Verfassungsverbund* or state and constitutional compact, is helpful in conceptualising the project by recognising the states on the one hand, while stressing the creation of a new constitutional order that also regulates the states on the other.⁸⁷ Supporters of the compact theory also argue that the EU does not derive its ultimate legitimacy from the states, as pure *Staatenverbund* thinking would have it, but from the inhabitants of Europe instead.⁸⁸ The EU is therefore not a national servant as the Constitutional Court seems to imply by stressing the states as the masters of the Treaties, but a constitutional agent of the people, in much the same way as the state.⁸⁹

Measured against this view the current approach in the Netherlands stresses the constitutional compact between the Member States to the near total exclusion of a national voice, thereby effectively side-lining the constitutional function of the state in the EU context. On the other hand, the judgments of the Constitutional Court have increasingly come to exhibit *Staatenverbund* thinking. For instance, while in the *Lisbon* judgment the Court relied on the EU's duty in article 4(2) TEU to respect Member State constitutional identity in developing its own protection of such identity, the Court divorced the concepts a mere five years later in the *OMT* ruling arguing them to be 'fundamentally different'.⁹⁰ The effect is to reassert state mastery over constitutional identity, instead of using the opportunity provided by article 4(2) TEU to enter into a dialogue with the ECJ on the extent to which such identity can be realised within the European constitutional space. In framing this exchange reference could be made to the constitutional values entrenched in article 2 TEU that are as much foundational for the EU as they are for the Member States from which they are drawn.⁹¹ Although it might be unrealistic to expect of the Constitutional Court to unreservedly accept

⁸⁴ See also Jörg Ukrow, *Deutschland auf dem Weg vom Motor zum Bremsen der europäischen Integration?*, 9 *Zeitschrift für Europarechtliche Studien* 2009, p. 717, 720-724.

⁸⁵ E.g. German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009, para. 240.

⁸⁶ See Paul Kirchhof, *Die Identität der Verfassung*, in Josef Isensee & Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol. 2, C.F. Müller 2004, p. 261, 291-292.

⁸⁷ Christian Calliess, Art. 1 EUV, in Christian Calliess & Matthias Ruffert (eds), *EUV/AEUV Kommentar*, 4th edn 2011, p. 15-18.

⁸⁸ For a clear analysis, see Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 *European Law Review* 2002, p. 511.

⁸⁹ On state mastery of the Treaties, see Peter M. Huber, *The Federal Constitutional Court and European Integration*, 21 *European Public Law* 2015, p. 83, 86-87.

⁹⁰ German Federal Constitutional Court, BVerfGE, 123, 267 (*Lisbon*) 30 June 2009, paras 240, 332; BVerfG, 2 BvR 2728/13 (*OMT*) 14 January 2014, para. 29.

⁹¹ Art. 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

the primacy of EU law over all national law as the inescapable outcome of such an exchange, the Court's current approach denies the ECJ even a voice in issues concerning German constitutional identity irrespective of whether or not it chooses to follow the ECJ's position. A consequence of the refusal to grant the ECJ a place at the table as soon as the discussion turns to matters of constitutional importance is to monopolise not only the German debate, but by implication that too on the range and content of article 2 TEU as the provision that underpins the very constitutional fabric of the EU. In this way the constitutional identity of the EU is reduced to the sum of its parts, the logical conclusion of which is to reject the EU as an autonomous constitutional actor of any significance. This state of affairs opens the way for serious constitutional conflict with the ECJ as the highest interpreter of EU law.

An important factor in reducing the possibility of such conflict is the scope of constitutional identity. The broader the scope the greater the possibility of interference becomes. In this regard the *Lisbon* judgment alarmed some commentators by basing constitutional identity on article 79(3) of the Constitution in some passages, only to speak of such identity as if it were a free-standing concept in others.⁹² The fear was expressed that the latter position would allow a generous resort to constitutional identity, thereby diluting the idea of a core and turning nearly every dispute into an identity dispute capable of derailing EU law.⁹³ The *OMT* judgment in particular seems to have allayed such fears by bringing constitutional identity firmly within the ambit of article 79(3).⁹⁴ A consequence could be to exclude the ordinary protection of fundamental rights from the reach of constitutional identity.⁹⁵ Fundamental rights would then only be protected on identity grounds where human dignity, as one of the core values that cannot be amended according to article 79(3), is violated.⁹⁶ As not all rights possess a human dignity component and not every interference with such a right would constitute a violation of this component the possibility of conflict would be reduced.⁹⁷ This approach would also be more in line with the *Solange II* judgment that emphasised the protection of the principles underlying fundamental rights as forming part of German constitutional identity, than the *Solange I* judgment that included all such rights under identity.⁹⁸ Moreover, the high threshold to unlock identity review would be sufficiently high not to undermine the Constitutional Court's refusal in *Solange II* and *Bananas* to review the compatibility of secondary EU law with national fundamental rights.⁹⁹

Another factor that could influence the possibility of conflict relates to the height of the national threshold before finding a violation of constitutionality identity. This is a matter on which the Constitutional Court still has to decide although there might be some clues in

⁹² German Federal Constitutional Court, BVerfGE 123, 267 (*Lisbon*) 30 June 2009.

⁹³ Christian Calliess, *Verfassungssouveränität versus europäische Integration? Deutsches Verfassungsrecht und europäische Rechtsprechung*, in Ralf Thomas Baus, Michael Borchard & Günter Krings (eds), *Europäische Integration und deutsche Verfassungsidentität*, Konrad Adenauer Stiftung 2010, p. 111, 120-123. See also Maja Walter, *Integrationsgrenze Verfassungsidentität: Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive*, 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2012, p. 177, 190-192.

⁹⁴ German Federal Constitutional Court, BVerfG, 2 BvR 2728/13 (*OMT*) 14 January 2014, paras 22, 27, 29.

⁹⁵ Compare Matthias Bäcker, *Solange IIa oder Basta I? Das Vorratsdaten-Urteil des Bundesverfassungsgerichts aus europarechtlicher Sicht*, *Europarecht* 2011, p. 103, 118-119.

⁹⁶ Art. 79(3) does not protect human dignity directly, but indirectly as one of the foundational values in art. 1. See further Brun-Otto Bryde, Art. 79, in Ingo von Münch & Philip König (eds), *Grundgesetz: Kommentar* vol. 2 6th edn, C.H. Beck 2012, p. 189, 211; Karl E. Hain, Art. 79(3), in Hermann von Mangoldt, Friedrich Klein & Christian Starck (eds), *Kommentar zum Grundgesetz* vol. 2 6th edn, Franz Vahlen 2010, p. 2230, 2244; Horst Dreier, Artikel 79, in Horst Dreier (ed.), *Grundgesetz: Kommentar* 2nd edn, Mohr Siebeck 2006, p. 1795, 1811-1814.

⁹⁷ See also Matthias Herdegen, Art. 79, in Theodor Maunz & Günter Dürig (eds), *Grundgesetzes: Kommentar* vol. 5, C.H. Beck 2014, p. 1, 58.

⁹⁸ See the discussion of these cases above.

⁹⁹ See the discussion of these cases above.

this regard. A consequence of bringing constitutional identity within the ambit of article 79(3) could be to extend the high threshold applicable to the provision to EU law related disputes. The *Abhörurteil* for instance required that a principle protected by article 79(3) must in effect be removed from the constitutional order for the provision to be violated.¹⁰⁰ If also applied to EU disputes the danger of constitutional conflict would be reduced significantly, as the reach of EU law would have to be particularly far-reaching to pass the threshold. There is reason to doubt whether the *Abhörurteil* threshold will be applied to such situations without modification though, as copying it would reduce much of the Constitutional Court's efforts at developing constitutional identity in the context of EU law to mere rhetoric and posturing. In fixing the identity threshold for EU cases inspiration might be taken from the threshold for finding that the EU exceeded its conferred powers, or *ultra vires* review. In the *Honeywell* judgment the Constitutional Court made it clear that such a finding would only be made where the act is 'manifestly in violation' of EU competences and where the act is 'highly significant' within the relationship between the EU and its Member States.¹⁰¹ Applied to constitutional identity this would allow the Constitutional Court the room to protect German constitutional identity without allowing its review to derail the primacy of EU law except when really necessary to guarantee the integrity of such identity. To the extent that EU institutions win German confidence by respecting the country's constitutional identity in terms of article 4(2) TEU the Constitutional Court might even be persuaded to relinquish identity review provided that a negative trend does not develop at the EU level, similar to its *Solange II* and *Bananas* jurisprudence.¹⁰²

On 'total' and 'open' constitutions

Thus far the European project has not culminated into a new a state, and it might never reach that stage either. As a matter of fact, turning the EU into a state might be undesirable too. What is the purpose of criticising state sovereignty and advocating its supranational control only to create a new state, one might ask inspired by Hedley Bull?¹⁰³ 'Ever closing' union might also be achieved without producing a new sovereign state. In this regard the words of Walter Bagehot in comparing English and American constitutional law in the nineteenth century are insightful:

The English constitution, in a word, is framed on the principle of choosing a single sovereign authority, and making it good: the American, upon the principle of having many sovereign authorities, and hoping that their multitude may atone for their inferiority.¹⁰⁴

With these words in mind the European *Staaten- und Verfassungsverbund* can rightly be said to be based on the limitation of sovereignty by its division, as opposed to perfecting a single sovereign. The consequence of which is to acknowledge the constitutional legitimacy of the Member States and by implication their identities, but also that of the EU itself. Retreating into the 'total' constitution, to the extent of negating the EU as a constitutional actor worthy

¹⁰⁰ German Federal Constitutional Court, BVerfGE 30, 1 (*Abhörurteil*) 7 July 1970, para. 99. See further Hans D. Jarass & Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* 13th edn, C.H. Beck 2014, p. 887; Horst Dreier, Artikel 79, in Horst Dreier (ed.), *Grundgesetz: Kommentar* 2nd edn, Mohr Siebeck 2006, p. 1795, 1808.

¹⁰¹ German Federal Constitutional Court, 2 BvR 2661/06 (*Honeywell*) 6 July 2010, paras 55, 61.

¹⁰² See the discussion of these cases above.

¹⁰³ See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, Columbia University Press 2009, p. 265.

¹⁰⁴ Walter Bagehot, *The English Constitution*, Oxford University Press 1974 (originally published 1867), p. 202.

of engagement on fundamental values, is just as unsatisfactory as the 'open' constitution avoiding such engagement by dissolving the national in the supranational.