Comments on the German Constitutional Court's Decision on the Lisbon Treaty

The Franco-German Constitutional Divide

Reflections on National and Constitutional Identity

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German Constitutional Court decision of 30 June 2009 on the compatibility of the Lisbon Treaty with the German Constitution – 'Identity' key word of the *Lissabon-Urteil* – The national identity clause in the current Union Treaty – Nation: people and state; diachronic and synchronic identity – Constitutional patriotism – The national identity clause in the Lisbon Union Treaty – *Volksidentität* and state identity – *Verfassungsidentität*: diachronic identity – *Identité constitutionnelle de la France*: synchronic identity – confidence and diffidence in the Union

'Identity' has been characterised as one of the 'Plastikworte' of our time, 'one of the semantic molluscs that mean everything and nothing, but sound scientific.'[1] The same is probably true for 'national identity'. The Dutch historian Kossmann has compared this notion to a big jellyfish on the beach which, after having given it careful attention, we should leave alone because it is too complicated, too multifaceted and too variable.[2]

These two indeed slippery notions are among the key concepts in the *Lissabon-Urteil* of the *Bundesverfassungsgericht* of 30 June 2009. The judgment testifies to the fact that they, formerly the domain of psychologists, political scientists and historians, have now become a necessary object of study for European constitutional scholars.

* Thanks to Joep Leerssen, Chloé Charpy, Joost de Reede, Ed Santen Sr. and Tom Eijsbouts. All remaining errors are of course entirely mine.

[1] Lutz Niethammer, *Kollektive Identität. Heimliche Quellen einer unheimlicher Konjunktur* (Hamburg, Rowohlt 2000) p. 33.

[2] E.H. Kossmann, 'Verdwijnt de Nederlandse identiteit?' [Is Dutch national identity disappearing?]', in Koen Koch & Paul Scheffer (red.), *Het nut van Nederland. Opstellen over soevereiniteit en identiteit* [The usefulness of The Netherlands. Essays on sovereignty and identity] (Amsterdam, Bert Bakker 1996) p. 67-68.

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If I have counted well, the *Lissabon-Urteil* uses the term 'identity' no less than thirty-six times. Most often it appears in combination with the word for 'constitution' ('Verfassungsidentität' and 'Identität der Verfassung'), but it is also used in combination with the term 'people', the term 'state' and the term 'national'. This last combination only appears when the German court quotes Article 4(2) of the post-Lisbon Union Treaty, which requires the European Union, *inter alia*, to respect the member states' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' ('nationale Identität, die in ihren grundlegenden politischen und verfassungsmäßigen Strukturen einschließlich der regionalen und lokalen Selbstverwaltung zum Ausdruck kommt').

With the term 'constitutional identity' ('Verfassungsidentität' or 'Identität der Verfassung') the *Bundesverfassungsgericht* refers to the inviolable core of the German Constitution, which must be respected by German politics and the European Union alike. For the constitutional court this national duty, embodied in Article 79(3) of the German Constitution, is essentially the same as that which Article 4(2) of the post-Lisbon Union Treaty imposes on the European Union. In other words and as far as Germany is concerned, the German constitutional duty to respect the German constitutional identity corresponds to the European Union's Treaty duty to respect the 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

The *Bundesverfassungsgericht* is not the only national constitutional court to use the concept of constitutional identity, nor is it the first to equate the national constitutional limits on the applicability of Union law[3] with the Union's duty enshrined in the Lisbon identity clause. In both respects it travels together with the French constitutional court, the *Conseil constitutionnel*. But there are fundamental and enlightening differences between the two courts which deserve to be explored and explicated, as in turn these differences will inspire the meaning of the Union's new and yet inarticulate identity duty.

Before getting there, however, we need to pick up on some of the fundamentals of the history of identity as a legal concept in the Union.

From national identity to constitutional identity

The Treaty of Maastricht first obliged the Union to respect the national identities of its member states. This duty in the Union Treaty, Article 6(3) in the Amsterdam

[3] To make matters not more complicated than they already are, no distinction is made between 'EC law' and 'EU law', although some of the case-law referred to only concerns EC law.

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version, is explained by the wish to counterbalance the Union's federal 'vocation'.[4] For its first ten years this clause led a rather marginal existence in both the case-law of the Court of Justice and in scholarship. The link between 'national identity' and 'constitutional identity', that appeared later, had not yet been made. The Luxembourg government once invoked the provision *and* its Constitution (Article 11) before the Court of Justice in order to justify a nationality requirement for certain public offices, but did not link the two conceptually, and neither did the Court itself.[5]

As far as scholarship is concerned: the duty to respect the national identities of the member states has been connected to such diverse obligations as respect for the continuing existence of the member states as sovereign states, for national cultures, family law, the established relationship between state and church, (official) languages, (access to) a state's welfare system, a state's social-economic organisation and even traditional (food) products.[6] But at least in the texts that I had access to and that analysed the identity clause more profoundly, the authors considered the connection between 'national identity' and 'constitutional structures' not to be clear.[7] This is quite understandable in the light of what I presume is the most common reading of 'national identity'. Before we go into that, let me shift back once more and make a few semantic remarks on the component parts of the term 'national identity'.

People and state; diachronic and synchronic identity

The adjective in 'national identity' derives from the noun 'nation', which can refer to 'a people' (defined, variously, in terms either of ethnic descent, shared culture,

[4] P.J.G. Kapteyn, 'Inleidende beschouwingen over het Verdrag betreffende de Europese Unie' [Introductory views on the Treaty on European Union] , *SEW* (1992) p. 667 (668); Wouter Devroe and Jan Wouters, *De Europese Unie* [The European Union] (Leuven, Peeters, 1996) p. 91.

[5] ECJ 2 July 1996, case C-473/93 (*Commission* v. *Luxembourg*), para. 32-38; *see also* ECJ 11 March 2003, case 186/01 (Dory), in which the Commission submitted that Germany could rely on, *inter alia*, Art. 6(3) EU to justify the exclusion of women from compulsory military service in 'accordance with the forms developed in their national traditions'; para. 28).

[6] Albert Bleckmann, 'Die Wahrung der "nationalen Identität" im Unions-Vertrag', *JuristenZeitung* (1997) p. 265; Ernst Steindorff, 'Mehr staatliche Identität, Bürgernähe und Subsidiarität in Europa?', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (1999) p. 395; Annette Schrauwen, 'Safeguarding National Identity in Community Legislation', in D. Obradovic, N. Lavranos (eds.), *Interface between EU Law and National Law* (Groningen, Europa Law Publishing 2007) p. 105; Devroe and Wouters, *supra* n. 4, at p. 92.

[7] Bleckmann, *supra* n. 6; Steindorff, *supra* n. 6; but *see also* Adelheid Puttler, in Christian Calliess & Matthias Ruffert (eds.), *Kommentar zu EU-Vertrag und EG-Vertraf*, 2. Auflage (Neuwied, Luchterhand 2002) p. 141 (142); Bengt Beutler, in Hans von der Groeben & Jürgen Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäische Gemeinschaft*, Band I, 6. Aufl. (Baden-Baden, Nomos 2003) p. 138 (p. 140).

or socio-political cohesion), but which, to make matters even more complicated, can in English, French, German and Dutch and probably many other languages, also refer to a 'state' – in collocations such as 'the national debt', the 'national government' and 'the national capital'. Indeed, in analyses of the identity clauses in the Union Treaties the term 'national identity' is read by some as 'a people's identity' and by others as 'state identity', as we will see.

The term 'identity' likewise has different connotations. The *Oxford English Dictionary* defines 'identity', *inter alia*, as: 'The sameness of a person or thing at all times or in all circumstances; the condition or fact that a person or thing is itself and not something else; individuality, personality.' In this definition two dominant meanings need to be distinguished. In the first, the so-called *diachronic* meaning, identity means 'permanence through time' or 'continuity'. In the second, the so-called *synchronic* meaning, identity stands for 'separate and autonomous individuality'.[8] Although these two aspects are distinct, it should be emphasised that they cannot be totally separated. They are two sides of the same coin. In our context it is a matter of emphasis on either 'continuity of "a people" or "a state"', or on 'characteristics which make "a people" or "a state" different by comparison to other "peoples" or "states"'. This duality of diachronic and synchronic identity is almost invariably found in texts on the identity clauses in the Union Treaties and also is relevant in a comparison of the constitutional identity concepts of the German and French constitutional courts. But that is for later.

Objective and subjective national identity; 'Verfassungsidentität'

In what is presumably the most common reading of 'national identity' at the present time, the adjective refers to 'a people' in the sense of 'the aggregate of persons that belong to a certain state'. Modern usage is, however, partly imbued with echoes of an earlier usage, when 'national identity' referred to 'national characters' or 'common mental predispositions of the individuals belonging to a certain people' which distinguish these individuals from individuals belonging to another people (synchronic identity) and which are immutable (diachronic identity): 'the Dutch are and always have been a tolerant people', etc.[9] In this older usage, the people so characterised are linked not by their joint appurtenance to a certain state, but by their shared mores, culture and traditions.

[8] Manfred Beller and Joep Leerssen, *Imagology: The Cultural Construction And Literary Representation Of National Characters: A Critical Survey* (Amsterdam/New York, Rodopi Publishers 2007) p. 335-342.

[9] J.Th. Leerssen , 'Over nationale identiteit' [On national identity], *Theoretische Geschiedenis* [Theoretical History] (Amsterdam, AUP 1988) p. 417. As Joep Leerssen once said in a personal conversation, the average Dutchman of these days has more in common with the average Spaniard of these days than with the average Dutchman of a century or so ago.

In modern literary, historical, cultural and political science analysis, the concept, if it is used at all, is considered to refer not to objective, empirically measurable characteristics, but rather to subjective perceptions: to 'images', 'narratives' or 'constructions' concerning a given nation. These images are mental constructs, belonging to the realm of attitude, prejudice or opinion, and as such are changeable in time. Individuals are held to identify themselves with these images.[10] In short, '[N]ationality is not a question of identity, but of identification.'[11] This approach is also reflected in the *Oxford English Dictionary*'s definition of national identity as a '*sense* of a nation as a cohesive whole, as represented by (the maintenance of) distinctive traditions, culture, linguistic or political features, etc.' (emphasis added).

For example, this also seems Bleckmann's approach in his analysis of the 'old' identity clause. He defines national identity as 'the body of ideas (*Ideengehalte*) with which the peoples organised in the member states identify themselves' and distinguishes two nation concepts: the German one, in which the bond between the individuals that together form the nation is a common history, language and culture; and the French (and British) one, in which, heedful of the famous words of Ernest Renan that a nation is a 'plébiscite de tous les jours', the bond is the will to belong to the state. In the end, according to him, one can only understand the concept 'nation' if one takes both elements together, cultural unity and the will to belong to the state.

Bleckmann infers that the Union's duty to respect the national identities is twofold. First, the Union must respect the sovereignty of the member states. Secondly, the Union may not affect the legal and political position of the member states to such an extent that the peoples of the member states cannot any longer 'identify themselves with their state as an organized nation.' This second element concerns the prohibition against violating the 'core values with which the peoples of the member states identify themselves.' These values differ from state to state, according to Bleckman. Here, his sigh that Germany knows no 'Verfassungspatriotismus' as the United States does is at its most relevant. Only if it were otherwise, he continues, would the imperative to respect the national identity of Germany also include the 'founding principles of national constitutional law' ('tragenden Prinzipien des nationalen Verfassungsrechts').[12]

[10] Thomas Risse & Daniela Engelmann-Martin, 'Identity Politics and European Integration: The Case of Germany', in A. Pagden, *The Idea of Europe* (Cambridge, CUP 2002) p. 287 (289-294); Maria Grever & Kees Ribbens, *Nationaliteit en meervoudig verleden* [Nationality and multiple past], WRR rapport 2007, p. 26.

[11] Joep Leerssen, *National Thought in Europe. A Cultural History* (Amsterdam, AUP 2006) p. 230.

[12] Bleckmann, *supra* n. 6, at p. 266-269. *See also* Steindorff, *supra* n. 6, who reads 'national identity' as 'state identity' (p. 411) and wonders if the Union on the basis of the old identity clause is not obliged to respect certain specific German constitutional principles (p. 414/415). For a critical reply

Bleckmann's negative answer to the question of whether the Germans in their 'construction' or 'image' of Germany also involve their Constitution is plausible to me. Of course, others assess more positively the 'identity enhancing' role of the German Grundgesetz, as in the idea of constitutional patriotism, defended by Habermas and others.[13] The question actually is the domain of social sciences or perhaps psychology, not that of law. Also, I do not doubt that, as the *Bundesverfassungsgericht* writes in the *Lissabon-Urteil*, 'the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification which are related to the nation-state, language, history and culture.'[14] And, certainly, there are many Germans that highly esteem their Constitution (or the German constitutional structures). But as to the assertion that this document or these structures should be a binding element for Germans and in that sense belong to the German national identity, i.e., that Germans generally (also) 'feel' German because of their Constitution, etc., I dare to doubt that. Is this different in, for instance, the United Kingdom or France? It certainly is not in the Netherlands.

More generally, as will have become clear, 'national identity' in this sense is highly subjective. Not only is the link with constitutional structures particularly uncertain and questionable, it also fans out in all directions. The values with which, in Bleckmann's terms, people identify not only differ from state to state, but also from person to person: I may and probably at least partially will identify with my home state or my fellow citizens on totally different grounds than my neighbours. It is 'national identity' in this sense that is the subject-matter of a 'grand débat' on French national identity organised by the French government in January and February 2010. The main question to be answered by the participants is 'what does being French mean to you today?' In the accompanying questionnaire, the following possible elements of national identity are mentioned, amongst others: 'our values', 'our universalism', 'our history'; 'our language'; 'our culture'; 'our countryside'; 'our agriculture'; 'our culinary art'; 'our wine'; 'our way of living'; 'our architecture'; 'our industry'; 'our high technology'.[15]

to Bleckmann, *see* Ulrich R. Haltern, 'Europäischer Kulturkampf. Zur Wahrung "nationaler Identität" im Unions-Vertrag', *Der Staat* (1998) p. 591.

[13] *See* A. von Bogdandy, 'The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe, *I.con* (2005) p. 295 (p. 299, n. 17). Cf. Otto Depenheuer, 'Integration durch Verfassung? Zum Identitätskonzept des Verfassungspatriotismus', *Die Öffentliche Verwaltung* (1995) p. 854.

[14] BVerfG 30 June 2009, 2 BvE 2/08 (Lisbon), para. 251; all references are to this judgment, except if otherwise indicated.

[15] *See* the website: <http://www.debatidentitenationale.fr/> and for the questionnaire: <http://www.debatidentitenationale.fr/IMG/pdf/Pour_aller_plus_loin.pdf>.

So on the basis of this most common reading of 'national identity' it is very hard, if not impossible, to define with any measure of objectivity what the Union's duty to respect the national identities of its member states legally entails. In the countenance of such an intangible concept, law and legal scholarship simply lose solid ground. This probably accounts for the relative obscurity of the identity clause in the era before the European Constitutional Treaty. The reformulation of the clause in the European Constitutional Treaty changed this and brought the clause into the 'sweet spot' of European constitutional law and scholarship.

The 'new' identity clause: constitutional identity; 'Volks-'identity

The term *Verfassungsidentität* is not new in the case-law of the *Bundesverfassungsgericht*. Already in earlier judgments the court ruled that Germany, when transferring powers to international organisations, may not surrender 'the identity of the constitutional order in force of the Federal Republic of Germany' by 'an infringement of its basic construction, of its constituent structures'; consequently Union law infringing this identity is not applicable in Germany.[16] As is well-known, this case-law bears great resemblance to the case-law of the Italian constitutional court, the *Corte Costituzionale*, on the status of Union law in the Italian legal order. The *Corte Costituzionale* has stipulated repeatedly that Union law amongst other things may not violate the 'fundamental principles of our constitutional order'.[17]

I cannot prove it, but somehow this Italian/German case-law must have influenced the working group of the European Convention that prepared the text of Article I-5 of the European Constitutional Treaty, which later would become Article 4(2) of the Lisbon Union Treaty.[18] This working group set out to reformulate the 'old' identity clause. It did not want to give the clause a new meaning, but only to make it more 'transparent' by clarifying that the

> essential elements of the national identity include fundamental structures and essential functions of the member states, and notably their political and constitu-

[16] BVerfGE 73, 339 (375/6; 22 Oct. 1986; Solange II): Die Ermächtigung auf Grund des Art. 24 Abs. 1 GG ist indessen nicht ohne verfassungsrechtliche Grenzen. Die Vorschrift ermächtigt nicht dazu, im Wege der Einräumung von Hoheitsrechten für zwischenstaatliche Einrichtungen die Identität der geltenden Verfassungsordnung der Bundesrepublik Deutschland durch Einbruch in ihr Grundgefüge, in die sie konstituierenden Strukturen, aufzugeben (…); *see also* BVerfGE, 37, 271 (279 et seq.; 29 May 1974, Solange I). Cf. Paul Kirchhof, 'Die Identität der Verfassung in ihren unabänderlichen Inhalten', in Josef Isensee & Paul Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland,* Band I (Heidelberg, C.F. Müller, 1987) p. 775 (795 et seq.)

[17] CC 27 Dec. 1973, case 183/1973 (Frontini); CC 8 June 1984, case 170/84 (Granital).

[18] Cf. Monica Claes, 'The European Constitution and the Role of National Constitutional Courts', in A. Albi & J. Ziller (eds.), *The European Constitution and National Constitutions. Ratification and Beyond* (The Hague/London/New York, Kluwer Law International 2007) p. 235 (243-244).

> tional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organization of armed forces.[19]

Of these elements, only the first would survive in the text of Article I-5 of the European Constitutional Treaty as subject-matter in which the national identity of the members is 'inherent'; most of the other elements mentioned, however, are now expressly protected by other Treaty articles.[20]

This 'new' identity clause, even only *in statu nascendi*, unleashed a new dynamic. The provision immediately drew the attention of the French and Spanish constitutional courts,[21] which in their judgments on the Constitutional Treaty turned it into a hinge provision for the relationship between the European and the national constitutional orders, just as the *Bundesverfassungsgericht* does in its *Lissabon-Urteil* (*see infra)*.

Suddenly and remarkably, the notion of national identity is also simply linked up to the concept of constitutional identity. For instance, Advocate-General Maduro, in his opinion in the case *Michaniki* states without any ado that the Union's duty to respect the national identities, a duty which in his eyes obliges the Union to respect the continuing 'political existence of the States', also 'clearly includes the constitutional identity of the Member State'.[22]

And, on close inspection, the *Bundesverfassungsgericht* in the *Lissabon-Urteil* provides support for this link-up. It refers to the people in the context of the Constitution and holds that the Grundgesetz

> does not renounce the sovereignty, contained in the last word of the German constitution, as the right of a people to constitutively decide on fundamental questions regarding its own identity. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with the law of international agreements (…) provided this is the only way in which a violation of fundamental principles of the constitution can be averted.[23]

[19] CONV 375/02, p. 12; *see also* John-Erik Fossum, *Still a Union of deep diversity. The Convention and the Constitution for Europe*, Arena Working Paper 21/03, p. 14; R. Barents, *Een Grondwet voor Europa* [A Constitution for Europe] (Deventer, Kluwer 2005) p. 315 et seq.

[20] Respectively Art. 3(3), last paragraph EU (language); Art. 20 FEU (national citizenship); Art. 4(2) EU, second sentence (territory); Art. 17 FEU (church-state relations).

[21] *See* on this latter judgment Camilo Schutte, 'Spain. Tribunal Constitucional on the European Constitution. Declaration of 13 December 2004', *EuConst* (2005) p. 282 (287, 288). The French case-law will be dealt with below.

[22] Opinion of AG Maduro of 8 Oct. 2008 in case C-213/07 (Michaniki), para. 31; *see* on the *Michaniki* judgment the case note of Vasiliki Kosta in this issue of *EuConst*.

[23] Para. 340. The first sentence of the quote is missing in the English translation of the judgment on the website of the *Bundesverfassungsgericht* and is my own; the second sentence stems from the translation. The German original: 'die in dem letzten Wort der deutschen Verfassung liegende

Here, the *Bundesverfassungsgericht* appears to link 'a people's identity' with national constitutional structures. The people's identity to which the court refers is not the identity of the individuals of a people in the sense of Bleckmann, but the identity of 'a people' as a constitutional entity. It is the same entity which according to the preamble of the German Constitution has given itself 'dieses Grundgesetz'[24] and which the *Bundesverfassungsgericht* elsewhere in the judgment calls the *Staatsvolk*:[25] the original, pre-constitutional, constitutional lawmaker, the constituent power which in French constitutional theory is called 'le pouvoir constituant originaire'. This 'Deutsche Volk' is represented (or made up) by the German voters. It is this entity which has the exclusive power to decide on an 'Identitätswechsel der Bundesrepublik Deutschland', hence on the question whether Germany should become a component of a federal European state.[26]

In this view the German people has organised itself in and with its Constitution. This is the expression of its self-determination and its separate and autonomous individuality, i.e., 'synchronic' identity.[27] Incidentally, 'Volks-'identity in its diachronic sense is also easily found in the *Lissabon-Urteil*: as long as it has not decided to change the 'identity of its state', the German 'Staatsvolk' must remain 'Staatsvolk', which also implies that Germany must remain a sovereign state.[28]

All these references to a unitary 'Deutsches Volk' giving itself 'dieses Grundgesetz', etc., are perhaps a bit hard to stomach. But it is traditional (German) constitutional parlance and, of course, merely a constitutional abstraction or construction – in 1949 the Grundgesetz was not even put to a referendum.[29] This approach is usable in states in which the theorem of the 'sovereignty of the people' is accepted and the Constitution is considered to be the expression of the will of the people. However, contrary to what the *Bundesverfassungsgericht* thinks,[30] this is not the case in all member states of the Union, for instance not for Great Britain and the Netherlands.

Souveränität als Recht eines Volkes, über die grundlegenden Fragen der eigenen Identität konstitutiv zu entscheiden. Insofern widerspricht es nicht dem Ziel der Völkerrechtsfreundlichkeit, wenn der Gesetzgeber ausnahmsweise Völkervertragsrecht (…) nicht beachtet, sofern nur auf diese Weise ein Verstoß gegen tragende Grundsätze der Verfassung abzuwenden ist.' *See also* para. 228.

[24] The relevant part of the Preamble: 'Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben.' *See also* para. 216.

[25] For instance para. 298.

[26] Para. 179; 228.

[27] Para. 208.

[28] Para. 340.

[29] It is however also possible that the *Bundesverfassungsgericht* really believes in this unitary and monolithic people; compare Kirchhof, *supra* n. 16, at p. 799: 'Das deutsche Volk ist auch als Kulturgemeinschaft vom Verfassungsgeber vorgefunden'.

[30] Para. 347.

State identity

An alternative, for which the *Lissabon-Urteil* also seems to give certain leads,[31] is to read national identity as 'state identity'.[32] This may provide the link with the relevant case-law of the *Conseil constitutionnel*. The French constitutional court protects the *identité constitutionnelle de la France* against secondary Union law, that means the constitutional identity of France, and so it seems that of the French state, and not that of the French people.[33] But perhaps this interpretation of the *Conseil constitutionnel*'s formula is too far fetched and indeed, as Bleckmann already suggested, it is hard to distinguish between 'the people' and 'the state', especially if popular sovereignty is the starting point of one's reasoning. After all, the difference appears to be primarily a matter of presentation. Surely, this 'state identity' approach is also based on an abstraction – although one that requires no reference to the constitutional hocus pocus of a unitary and monolithic people.[34]

A state may be defined as an organisation of individuals living within a demarcated territorial area with structured power relations and a claim to highest authority, which acts in the outer world as one.[35] In this definition it is equally easy to discern the two elements of the Union's duty that the *Bundesverfassungsgericht* distinguishes, as does also Advocate-General Maduro in his *Michaniki* opinion (*supra*). The respect of the national identities of the member states not only concerns their diachronic identity, in the words of Maduro their continuing 'political existence', but also their synchronic identity, their separate autonomous individuality, which, *inter alia*, resides in their territory, but also in their structured power relations, of which the fundamental rules are laid down in their constitutions, whether written or unwritten. Put simply: the political continuity of the member state also presumes that its specific political and constitutional order, whether chosen or accepted by a majority of individuals or of their representatives or historically grown, continues to exist.

[31] Para. 226; 340.

[32] In this sense Steindorff, *supra* n. 6, at p. 414-415; Luis Marïa Díez-Picazo, 'Observaciones sobre la cláusula de identidad nacional', in Marta Cartabia et al. (eds.), *Constitución europea y constituciones nacionales* (Valencia, Tirant lo blanch, 2005) p. 437 (438).

[33] CC 27 July 2006, decision no. 2006-540 DC: 'que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti'.

[34] As the *Bundesverfassungsgericht* writes: 'the State is (not) a myth … but the historically grown and globally recognised form of organisation of a viable political community'; para. 224

[35] I borrow this slightly modified definition from W.H. Roobol, 'Notities over de *natiestaat*: het woord, het begrip en het ding' [Notes on the *nation-state*: the word, the concept and the thing], *Theoretische Geschiedenis* (1998) p. 370 (373), who bases himself on a discussion of the term 'state' by Michael Mann, 'The Autonomous Power of the State', in John A. Hall (ed.), *States in History* (Oxford/New York, Basil Blackwell 1986) p. 109 (112).

Having gone through these explanations of national and constitutional identity in the light of the history of the European Constitutional Treaty and the Lisbon Treaty, we can now proceed to analyse the ways in which the German and the French constitutional courts use the new identity clause to justify national constitutional limits to European law.

German and French constitutional identity

The popularity of the term constitutional identity has been explained by the pressure put on national constitutions by globalisation and Europeanisation.[36] These trends necessitate the search for the essential and/or characteristic features of constitutions that at any rate must be protected. This also is the gist of the case-law of both the *Bundesverfassungsgericht* and the *Conseil constitutionnel*, though each takes on the matter in its own way. The difference can be understood from the elements resulting from the above analysis.

In the *Lissabon-Urteil,* the *Bundesverfassungsgericht* equates the duty of the European Union to respect the German *Verfassungsidentität* based on the German Constitution with the identity clause enshrined in the Lisbon Treaty:

> the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 sentence 3 in conjunction with Article 79.3 of the Basic Law is respected (…). The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (…); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 sentence 1 TEU Lisbon, cannot be safeguarded in any other way. *In this respect, the guarantee of national constitutional identity under constitutional [law] and the one under Union law go hand in hand in the European legal area.*[37] (emphasis added)

The 'inviolable core content' of the German Constitution regards the principles of human dignity and fundamental rights protection,[38] democracy, rule of law, the social state en the federal state that Article 79(3) *Grundgesetz* declares unchange-

[36] Cf. Pedro Cruz Villalón, 'Grundlagen und Grundzüge staatlichen Verfassungsrecht: Vergleich', in Armin von Bogdandy, Perdro Cruz Villalón & Peter M. Huber, *Handbuch Ius Publicum Europaeum*, Band I, (Heidelberg, HJR 2007) p. 772.

[37] Para. 240; *see also* para. 234 and 298. The quotation might give the impression that the term 'constitutional identity' has a broader meaning than the 'inviolable core content of the Basic Law'. However, in other paragraphs the German court clearly equates 'Identität der Verfassung' and 'Verfassungsidentität' with this 'inviolable core', *see* for instance para. 208 and 218.

[38] BVerfGE 73, 339 (22 Oct. 1986; Solange II).

able.[39] They are therefore even out of bounds for the Constitution amending power of the German Parliament, the 'verfassungsändernden Gesetzgeber', the (secondary) constitutional lawgiver which the French would call 'le pouvoir constituant dérivé'. Article 23(1), third sentence, Grundgesetz makes clear that these principles also must be respected when powers are transferred to the European Union: 'was nicht geändert werden darf, darf auch nicht übertragen warden.'[40]

Protection of this German constitutional identity entails for instance that the constituent power of the member states as the 'Masters of the Treaties', and hence German sovereign statehood, must be maintained and no *Kompetenz-Kompetenz* may be transferred to the Union;[41] that European fundamental rights protection against Union acts must at least be equivalent to the protection the German Constitution offers, which is currently the case;[42] and that the Bundestag must 'retain a formative influence on the political development in Germany', which entails that the Bundestag has 'responsibilities and competences of its own of substantial political importance or (…) the Federal Government, which is answerable to the Bundestag, is in a position to exert a decisive influence on European decision-making procedures.'[43]

Now the *Bundesverfassungsgericht* in the *Lissabon-Urteil* also appoints (five) essential domains for German state activity, which are discussed to some detail in the judgment:

> European unification on the basis of a union of sovereign states under the Treaties may (...) not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding as regards culture, history and language and which unfold in discourses in the space of a political public that is organised by party politics and Parliament. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external

[39] For instance para. 217; *see also* para. 364: 'The principle of guilt forms part of the constitutional identity which is inalienable due to Article 79.3 of the Basic Law and which is also protected against encroachment by supranational public authority'.

[40] Franz Mayer, < http://www.jura.uni-bielefeld.de/Lehrstuehle/Mayer/diesunddas/Mayer%20Schriftsatz%20BT%20vor%20BVerfG%20Lissabon%2022082008.pdf>m, p. 148.

[41] Para. 235.

[42] BVerfGE 73, 339 (22 Oct. 1986; Solange II); BverGE 12 Oct. 1993, BverGE 89, 155; (Maastricht); BverG 7 June 2000, BverGE 102, 147 (Bananas III).

[43] Para. 246.

> financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as the deprivation of liberty in the administration of criminal law or the placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology.[44]

If I understand it well, these domains do not belong to the *Verfassungsidentität* proper, but they are anyway closely connected to it via the principle of democracy.[45] They are, moreover, domains in which the chances of an encroachment of other principles belonging to the German constitutional identity seem particularly great.[46] This gives the protection of the *Verfassungsidentität* a dazzling scope.

Let us now turn to France. From 2006 the *Conseil constitutionnel* has been of the opinion that although the execution of Union law is for French authorities a constitutional duty based on Article 88-1 of the French Constitution,

> the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.[47]

This concept of the 'constitutional identity of France' as a barrier to the applicability of Union law in France came to replace a concept which the *Conseil constitutionnel* developed in a series of judgments in the summer of 2004, commencing on 10 June. The *Conseil* then ruled that

> the transposing of a Community Directive into domestic law results from a constitutional requirement with which non-compliance is only possible by reason of an express contrary provision of the Constitution.[48]

The 'express contrary provision of the Constitution' has puzzled French scholarship. The *Conseil constitutionnel* in a decision later that summer of 2004 more or less clarified that, to put it shortly, it meant constitutional provisions which are specific

[44] Para. 249; *see also* para. 251 et seq.; 351 et seq.

[45] Para. 247.

[46] Para. 364.

[47] CC 27 July 2006, decision 2006-540 DC, para. 19: 'que la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti'.

[48] CC 10 June 2004, decision 2004-496 DC, para. 7.

to France, i.e., those that are protected in the French legal order but *not* also in the Union's legal order. In this decision of 29 July 2004, the *Conseil constitutionnel* refused to test a provision in an Act of Parliament implementing a Community Directive against Article 11 of the Declaration of the Rights of Man and Citizens of 1789 (freedom of expression). The reason was that this freedom is also protected by Article 10 ECHR (and hence is also part of the Union's legal order).[49] In other words: if a principle is common to both legal orders, it is up to the Court of Justice to provide protection, not to the *Conseil constitutionnel*.

It thus became clear that the *Conseil* aimed to defend the constitutional 'exception française' in relation to the Union.[50] It is this (clarified) *réserve de souveraineté* that the *Conseil* in its ruling on the European Constitutional Treaty found to be compatible with the rule of precedence of Union law (Article I-6), and justified by the identity clause (Article I-5), in that Treaty.[51]

How does the new concept of the *identité constitutionnelle de la France* relate to the old one of an *express contrary provision of the Constitution*?[52] In at least one respect there is certainly continuity. There is no doubt that the new concept, like the old one, is somehow inspired by, refers to and, at least in the eyes of the *Conseil*, is justified by the identity clause in the European Constitutional Treaty (and thus that of Lisbon, the text of which was not yet known at the time the court formu-

[49] CC 29 July 2004, decision 2004-498 DC, para. 4-7. As was written in the 'official' *Commentaire* on the ruling in *Les Cahiers du Conseil constitutionnel* no. 17, p. 29: 'Les seules normes constitutionnelles opposables à la transposition d'une directive communautaire sont les dispositions expresses de la Constitution française et propres à cette dernière'.

[50] France's highest administrative court, the Conseil d'Etat (8 Feb. 2007 (*Arcelor*)), seems to conceive the constitutional 'exception française' more broadly than the CC. According to the Conseil d'Etat, not only the presence of a constitutional provision or principle specific to France, but also a difference in intensity and/or the scope of protection of a provision or principle which is found in both legal orders, can lead to the non-applicability of secondary Union law; *see* for instance, Florence Chaltiel, 'Le Conseil d'Etat reconnaît la spécificité constitutionnelle du droit communautaire', *RMC* (2007); Anne Levade, 'Le Palais-Royal aus prises avec la constitutionnalité des actes de transposition des directives communautaires' and Xavier Magnon, 'La sanction de primauté de la Constitution sur le droit communautaire par le Conseil d'Etat, *RFDA* (2007), resp. p. 335 and p. 578; Franz C. Mayer, Edgar Lenski, Mattias Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkung zur Entscheidung des französischen Conseil d'Etat von 8. Februar 2007 (Arcelor u.a.)', *Europarecht* (2008) p. 63.

[51] CC 19 Nov. 2004, decision 2005-505 DC, para. 13.

[52] *See* on this *also* Bertrand Mathieu, 'Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes de la jurisprudence des juges constitutionnel et administratif français', *RFDC* (2007) p. 675; Chloé Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'Etat*', *EuConst* (2007) p. 436; idem, 'Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'Etat', *RFDC* (2009) p. 621.

lated the new exception). And if there is continuity in this respect, there's probably continuity as to the contents as well, which is emphasized in an 'official commentary' on the 2006 ruling: the new exception refers to the same constitutional provisions as the old one, i.e., the provisions which are specific to France.[53] The definition of the persons entitled to vote in French political elections in Article 3 of the Constitution[54] and the definition of the criteria for access to public functions in Article 6 of the Declaration of 1789[55] have been offered as examples of this identity.[56] To these the republican principles of *laïcité* and of the prohibition to give specific rights to ethnic, linguistic and other minorities, both also enshrined in Article 3 of the French Constitution, may be added.[57]

In as far as this is the Council's view in full, it stands in clear contrast with that of the *Bundesverfassungsgericht*. In fact, several differences can be noticed.

First, while the protection of the German constitutional identity is absolute, that of the French one is not. In Germany the 'verfassungsändernden Gesetzgeber' cannot touch the *Verfassungsidentität* (only the German people can do so, and even that is not certain).[58] In France, however, not only the people expressing themselves in a referendum, but also both chambers of the French Parliament united in the *Congrès* approving by three-fifths majority an act adopted by each chamber individually (Article 89 French Constitution), can allow for breaches of the *identité constitutionnelle*. And at least practically, the fact that France has its own version of Article 79(3) *Grundgesetz* does not change this. Article 89(5) of the French Constitution declares that the 'republican form of government shall not be the object of any amendment.' This provision is amenable to an interpretation which gives it more or less the same content as Article 79(3) *Grundgesetz* and certainly limits the amending power of the French constitutional lawgiver. However, the *Conseil constitutionnel* feels itself not competent to strike down an amendment violating the provision, whether the act is adopted by the people in a referendum or approved

[53] Comment on the decision of 29 July 2004 in *Les Cahiers du Conseil constitutionnel* no.17, p. 28/29.

[54] 'Sont électeurs (..) tous les nationaux français majeurs des deux sexes, jouissant de leurs droits civils et politiques'.

[55] 'Tous les Citoyens (…) sont (…) admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents'.

[56] *See* the comment on the decision of 10 June 2004 in *Les Cahiers du Conseil constitutionnel* no. 17, p. 17.

[57] Bertrand Mathieu, 'Le respect par L'Union européenne des valeurs fondamentale de l'ordre juridique nationale', *Cahiers du Conseil constitutionnel* no. 18, p. 185 (186-187). Of course, institutional or organisational French constitutional principles (as the direct elction of the French president) might also easily be included in the 'identité constitutionnelle', but they are not, at least according to Chaltiel, *supra* n. 50, at p. 369.

[58] Para. 217.

by the Parliament united in *Congrès*.[59] In this sense the French court gives French politics more room to move than the German court gives German politics.

Secondly, the *Bundesverfassungsgericht*, in protecting the core principles of the *Grundgesetz*, might be said to protect the continuing existence of the German Constitution,[60] its diachronic identity, while the *Conseil constitutionnel* rather protects the specificities of the French Constitution in relation to the European Union, its synchronic identity. Also, substantively the scope of the German court's identity control, which directly or indirectly covers large parts of German society, is much wider than that of the French court, which extends to a few provisions only.

However, this analysis of the constitutional identity notions of the constitutional courts gives a picture that probably is not complete. On the one hand, it should be noted that the defence of the *Verfassungsidentität*, or at least of the democracy principle connected to it, (indirectly) serves to protect certain particularities of the German legal order at large (for instance 'the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, of the press and of association and the dealing with the profession of faith or ideology').[61]

On the other hand, the French position is also nuanced. This is somewhat more complex and it appears from taking the *conditions essentielles d'exercice de la souveraineté* into account. These essential conditions are among the criteria that the *Conseil constitutionnel* uses for testing the constitutionality of treaties before their ratification.[62] In terms of subject-matter they at least partly overlap with the domains in which the German court wants the German state to keep taking the fundamental decisions (police and military power monopoly). If the *Conseil constitutionnel* finds that (part of) a treaty threatens these essential conditions, the treaty concerned may not be approved and ratified by France before the Constitution is amended (Article 54).

[59] CC 26 March 2003, decision 2003-469 DC, para. 2-3: 'Considérant que l'article 61 de la Constitution donne au Conseil constitutionnel mission d'apprécier la conformité à la Constitution des lois organiques et, lorsqu'elles lui sont déférées dans les conditions fixées par cet article, des lois ordinaires ; que le Conseil constitutionnel ne tient ni de l'article 61, ni de l'article 89, ni d'aucune autre disposition de la Constitution le pouvoir de statuer sur une révision constitutionnelle'. In this case the constitutional amendment was adopted by the Congrès. In earlier case-law the CC already made clear that it has no power to rule on texts adopted by the people in a referendum; CC 6 Nov. 1962, decision 62-20 DC; 23 Sept. 1993, decision 92-313 DC.

[60] Kirchhof, *supra* n. 16, at p. 795: 'Das Verfassungsgesetz wahrt seine Identität und hält seinen Anspruch auf eine die Staatsentwicklung leitende und die Staatsorgane bindende Geltung aufrecht, wenn elementare Verfassungsvoraussetzungen erhalten und elementare Inhalte gewahrt bleiben'.

[61] Para. 249.

[62] For instance CC 20 Dec. 2007, decision 2007-560 DC (Lisbon Treaty), para. 9.

Can one imagine that the *Conseil constitutionnel* will only test a secondary Union act against the *identité constitutionnelle de la France* if this Union act obviously also involves the essential conditions for the exercise of national sovereignty without the consent of the constituent power? I don't think so. Let me explain. The *Conseil* has ruled that the provisions in the European Constitutional Treaty and that of Lisbon allowing for the creation of a European Public Prosecutor require a constitutional amendment, because of the consequences they may have for the exercise of national sovereignty.[63] Now let us suppose that a secondary Union act on the basis of the Union Treaty before Lisbon would create this European Public Prosecutor. It is hard to imagine that the *Conseil* would test that act only against the *identité constitutionnelle de la France* without carrying out a *conditions essentielles* test.[64]

Another connection between the two tests seems therefore more plausible. The *Conseil constitutionnel* apparently is of the opinion that if it has found that (part of) a Union Treaty does not threaten the *conditions essentielles*, it is highly improbable that secondary law based on that (part of the) Treaty will do so. In other words, the *Conseil* trusts that the Union faithfully will remain within the boundaries of the powers that France has transferred to it and that the Union, under the supervision of the Court of Justice, will stick to the principle of conferral of powers and to its limited competences.

This analysis on the one hand suggests that if need be, the *Conseil* will not only exert a identity review on secondary Union law, but also the 'normal' constitutionality test it exerts on treaty law before ratification. This in turn suggests that the overall position of the French court on review of secondary Union law finally does not differ as fully from that of the German court, with its identity and *ultra vires* review,[65] as an analysis of their constitutional identity notions might lead one to think.

What certainly remains, however, is a gulf between the two courts in terms of openness to the future. The overall confidence of the *Conseil constitutionnel* in the Union and its Court of Justice and in the French political (including constitutional) process strikes a great contrast with the diffidence of the *Bundesverfassungsgericht* concerning both the Union and German (constitutional) politics.[66]

[63] CC 19 Nov. 2004, decision 2004-505 DC (para. 28); CC 20 Dec. 2007, decision 2007-560 DC (para. 19).

[64] Philippe Blachèr and Guillaume Protière, 'Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires', *RFDC* (2007) p. 123 (132-135).

[65] Para. 241.

[66] Further proof for this is that the CC itself tests French Acts of Parliament against Directives they intend to implement, and that it only rules out asking preliminary questions to the ECJ because its constitutional duty to give judgments within a month (Art. 61 Constitution) prevents this; CC 27 July 2006, decision 2006-540 DC, resp. para. 18 and 20.