# European Essentials: A Contribution to Contemporary Constitutional Culture

## A research proposal, revisited

**Pedro Cruz Villalón**

Back in 2007, I engaged in a research proposal as part of an eventually unsuccessful application for a post in a European academic institution. It bore the title "European Essentials: A contribution to contemporary constitutional culture". Years later, having been asked to contribute to the present collective volume in honour of *Albrecht Weber* under the general heading "Common European Legal Thinking", my thoughts soon went back to those few pages, as they could be viewed as a plausible exercise in common legal thinking at European scale.

As I managed to retrieve the text from my files I had a mixture of impressions: Its content appeared to me to be at the same time both old and new. On the one hand, the basic underlying idea of a normative layer of exceptional resistance, under whatever circumstances, to partial derogations of the Constitution appeared alive as ever. On the other hand, *the name* itself could be questioned: "Essentials" might not be the proper, indeed the most adequate, word any more. Instead, another word, that of "identity", or better still "identities", could aspire to better convey that same idea. Worse still: How did I manage to speak about the subject – apart from an occasional appearance – while letting the word "identity" show up hardly at all? The text might already be old from the very beginning ... But I think it is time to let it – apart from small alterations[1] – speak for itself:

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## 1 Foundations of the European Constitutional Culture

It should be readily accepted that Comparative Public Law somehow alters its nature when its object comes to be what it is being called the "European constitutional space" (*R. Bieber*[2]). This is clearly so when the space alluded to is that of the

The opinions expressed herein are strictly personal to the author.

[1] A short number of footnotes have been added.
[2] Bieber and Widmer 1995.



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European Union, rather less so in the case of the Council of Europe (European Convention of Human Rights). Particularly in the first case we are confronted with a well-known plurality (multilevel) of legal orders, reciprocally conditioned by means of a set of substantive and procedural mechanisms (*I. Pernice*[3]). The outcome is a combination of basic coincidences and singular identities (*A. v. Bogdandy*[4]), be it national or European in the narrow sense.

The phenomenon doesn't lack antecedents in different federation processes of the past,[5] which nonetheless have only a limited value for the contemporary process of European integration. It is debatable whether the term "Comparative Law" is still valid in the European scene, or whether a more suitable one should be found (in the way of "integrative" law, or something of the sort). Whatever the case, it seems undisputed the emergence of a *ius publicum europaeum*[6] in which "comparison" still has a decisive role to play.[7] Public Law concepts or notions may certainly have *different* meanings in the legal orders of the different European states, but there is a fast growing probability that they have the *same*, or very similar meaning in most of them (*J. Ziller*[8]).

In this context the research proposal opts for the category "constitutional culture" (*P. Häberle*[9]), in preference to other related categories, such as the above-mentioned "constitutional space", as well as the more familiar "acquis", "patrimonio" (*A. Pizzorusso*[10]) or even "common traditions". The notion of "constitutional culture" offers the advantage of emphasizing the dynamic dimension of the process, more intensely so than the more neutral "space" or the seemingly more established notions of acquis, patrimonio, or traditions. "Constitutional culture", on the other hand, demands interdisciplinarity more compellingly than other notions. Up to a certain degree, "constitutional culture" smoothes "the Channel divide" in Public Law[11]. The research proposal acknowledges the viability of a long-term research programme centred on the notion "European constitutional culture".

The reference to "Foundations" ("Grundlagen") finally may aptly identify the level where the inquiry ("visualisation") on this European constitutional culture is needed. The term itself points in the direction of abstraction. A research project centred on the notion "European constitutional culture" immediately calls for a reference to the term "foundations". The project obviously does not pretend to engage in very specific questions right away. Rather, the subject matter of the research proposal ("European essentials") should fit in this "foundations" level.

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[3] Pernice 1999, p. 703.
[4] Bogdandy 2003, p. 156.
[5] Elleser 1928; Reißfelder 1959; Pleines 1973.
[6] von Bogdandy, Cruz Villalón and Huber 2007.
[7] The hundreds of "notes de recherche", internal comparative studies undertaken within the ECJ, bear witness to it.
[8] Ziller 2005, p. 452.
[9] Häberle 1994.
[10] Pizzorusso 2002.
[11] Loughlin 2003; Loughlin 2010.

## 2 "Essentials": An *Essential* Component of Contemporary Constitutional Culture

Throughout its bicentennial history and mainly on the occasion of responding to different challenges, (written) Constitutions have come to self-recognise a "core" in their content – "essentials" – aspiring to enhanced stability, and usually also to a higher form of legitimacy or social consensus.

In order not to get lost in a jungle of circumstances, I will strictly confine myself to what are arguably the three most illustrious challenges producing this effect that have been known up to the present: emergency situations, constitutional changes and integrations processes, it should be added, by order of appearance. Each of these challenges has sooner or later prompted the Constitutions to allow for the introduction in their content of the adequate provisions. But the ensuing constitutional provisions are always self-contained, in no way related to each other, since they tackle quite heterogeneous challenges.

Nonetheless they have something in common: all three of them tend to affect the empire of the Constitution and, at the same time, all of them may define a "no go zone", that is, an at all events preserved core or set of constitutional "essentials", placed beyond the reach of these situations. And all three set up an extraordinary type of power: The emergency power(s), the amending power, the "integration power".

It is not at all the case that all three challenges are to be placed at the same or even at a similar level. As such "challenges", they are quite distinct in themselves, the first having almost inevitably negative connotations, in sharp contrast with the other two. The only thing that is relevant to the purpose of the project is that all three may indirectly appear as *purveyors* of constitutional "essentials". They all frequently make explicit what is to be considered unaffected by these processes: What is not to be affected by emergency powers, what is not to be within reach of the amending power, what is not to be included in the integration process. And, in doing so, all of them contribute together, in each given constitutional order, to give expression to *the core* of the Constitution.

It cannot be said that, at the moment, there exists a ready at hand term to identify the phenomenon, which undoubtedly adds up to the somewhat obscure title heading this research proposal. There is good reason to emphasise the tentative character of the term (taken from a dictum by President *Herzog* when recapitulating on the European Convention 1999–2000)[12]. Other expressions could convey the same idea in other languages, such as "Verfassungskern" (*P. Pernthaler*[13]); they may even be more telling, but they fail to transmit their formulation through a plurality of usually key notions, as arguably essential components in themselves of contemporary constitutional culture. But one should be forewarned against the notion that these "essentials" belong to a qualitative different dimension, in terms of suprapositivity

[12] Herzog 2001, p. 44.
[13] Pernthaler 1998.

or even the Law of Nature. The notion of "essentials" should thus rely on the comparative – relative – side: *higher* stability, *stronger* legitimacy, *superior* consensus.

This is not to say that this inner differentiation of the Constitution (constitutional asymmetry?) was to be wholly unknown up until the present. The phenomenon has always been there, from the outset of constitutionalism. Suffice it to mention the differentiation between "Declaration of Rights" and "Frame of Government", or between "Déclaration des Droits" and "Constitution" on either side of the Atlantic. From a perspective that today we might call "identitary", article 16 of the *Déclaration* of 26th August of 1789 also points to some essential components, but the example could be misleading (*G. Stourzh*[14]).

Two hundred years later, through a process of long duration, accelerated in modern times, the cases of constitutionally protected "essentials" multiply themselves, becoming more varied. Each and every one of these purveyors of "essentials" is sufficiently known. New should be the uniting of them under the same magnifying glass. What is new is – again – rather the plurality of purveyors, sources or channels through which one enters into this zone of enhanced constitutional resistance. It is the diversity of "generating instances" of "the essential" that allows, now arguably more than ever, to proceed through accumulation: Formulations of "essentials" become particularly abundant, so facilitating observation.

**2.1** The oldest source of "essentials" is the case of constitutional provisions confronting emergency situations, singularly political instability. The liberty vs. security dilemma is as old as the Constitution itself. The need to temporally suspend a set of constitutional contents – in lieu of the entire Constitution – as a way of preserving the constitutional order as a whole has been argued since the beginning of the constitutional era. Well known is the long process through which the emergency provisions found their way into the Constitution, and so came to be constitutionally recognised. But the focus was traditionally oriented to what came to be identified as the temporally "suspended" spaces, not the preserved ones, even in these emergency situations. Be it as it may: most Constitutions define today, normally by default, spaces "emergency-proof". And international treaties on human rights (Art. 15 ECHR) occasionally allow for the States to suspend some of the rights therein declared, while excluding some of them from whatever suspension.

During the second half of the 20th century the recourse to declarations of emergency situations was to be seen as a constitutional relic, in open contrast to the period previous to World War II. Nevertheless, *September 11* and its aftermath have changed dramatically this state of things. Emergency legislation has recovered unexpected centre stage, sometimes affecting even the core of the Constitution. The occasional discussion on the legitimacy of torture even if restricted to uppermost, truly dramatic, exceptional situations, illustrates best the phenomenon.

**2.2** The second indirect source of "essentials" in order of appearance is that of the material limits to the amending power. The process has again been a long one. To

[14] Stourzh 1987, p. 78; Stourzh 1976, p. 397.

begin with, only gradually did an amending power emerge as different from the ordinary legislative power. And apart from limitations *ratione temporis*, it was only in a much later moment that material limitations to the amending power appear. Then the true material limits to the amending power are the absolute ones, that is, the ones allowing for no change of the core of the Constitution under no circumstances whatsoever. The most conspicuous example is of course Art. 79.3 of the German Basic Law, depicting the "eternal", or "perennial", Constitution. But there are other cases in which material limits to the amending power are only circumstantial, that is, requiring for instance exceptionally high majorities in Parliament, or other devices: they should also be considered. The flourishing of these material limits to the amending power may be occasionally explained by the perception of a "dark self" by some political communities, that is, the fear present in many polities to the "domestics devils".

**2.3** The third and most recent purveyor of "essentials" is regional integration, and only sporadically "devolution" (Spain). European integration is indirectly providing an unprecedented complex, while bidirectional set of "essentials" ("reciprocal metaconstitutional provisions"[15]). The paradigmatic case is that of the pair formed by Art. 6.1 TEU and Art. 23 of the German Basic Law. In waiting is Art. 2 of the Treaty establishing a Constitution for Europe,[16] while many other State Constitutions have followed the German example identifying their own "essentials".

## 3 European Constitutional "Essentials"

There is no doubt that "essentials" – taken from these different sources – matter in the understanding of a given constitutional order. But, when applied to the European space, "essentials" matter particularly, both the "essentials" of the Union and that of the States. There is, arguably, a *practical* need to get acquainted with "essentials" in Europe, since they have come to represent one of the keystones of European integration. But there is also a more far-reaching need for a common position in Europe vis-à-vis emergency situations. And again a caveat should be pronounced: The search in this case is not primarily for *distinct* European "essentials", ready to be confronted with other regional identities; the search is ultimately intended as a contribution to present day – global – constitutional culture.

The proposed research should develop in the three following steps:

First Step: "The Law of Essentials". By such should be understood a) the ensemble of legal, normally constitutional provisions and, as the case may be, judicial decisions (Italy, France, Germany) signalling a "no go zone", be it by emergency, amending or integration powers (*substantive* law of essentials); and b) the norms providing for the safeguard of the core constitutional arrangements (*instrumental*

[15] See Cruz Villalón 2003 = Cruz Villalón 2004, p. 65.
[16] Art. 2 TEU.

law of essentials). Safeguards may be of *political* nature (Art. 7 TEU). But the key role should belong to the Judiciary: Are the courts in a position to review the respect of the outer limits of the emergency, the amending and the integration powers? Comparative work in this first step should allow us to know which one of the States have one of more descriptions of their constitutional core, and which State Constitutions, and how far, allow for the Judiciary to effectively protect it against the said powers.

Second step: "The Culture of Essentials". Here is where the notion of "constitutional culture" comes into play. But already the singular form "culture" is problematic. Anyway, "essentials" do not exist in some exterior world, out of time and space. Their necessary stability does not prevent them from change (new "essentials" may surge – death penalty, gender discrimination –, some may die out – primacy of the self-decided legal order). Space plays also a decisive role. And immediately: What is the role of the Legislative here, what that of the Judiciary in shaping the constitutional essentials? Essentials are not free of "interpretation", singularly judicial interpretation: In their written form, they are most frequently, though not always, expressed in abstract terms (rule of law, human dignity; but then again, on the other side, proscription of slavery, or of torture), terms that are most frequently "subject" to interpretation (N.B. Are there special conditions for the interpretation of essentials? How is proportionality supposed to behave here?)

Furthermore, the enhanced legitimacy and consensus around "essentials" should express itself in the form of enhanced support by the civil society: This is crucial in the case of States that broadly lack a "law of essentials" in the above-mentioned sense, but have nevertheless a solid notion of essentials (Great Britain, the Netherlands). Here some help from political scientists is direly needed.

Third and final step: "The Europe of Essentials". This is obviously the time for conclusions. What is the "faith" of Europe as a whole, constitutionally speaking? Or the "faiths", for that matter? How does it give expression to its deepest community convictions? How and how far is it ready to defend them? At the end, we should be in a position to offer, certainly not yet a general picture of the state of the constitutional culture in Europe, but hopefully a well-founded analysis of one of its crucial components.

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Eight years after I wrote them, the previous pages present me, first, with an opportunity for reflection, almost a task of introspection: a reflection on my own way of approaching constitutional law, a reflection on how a project – even when it concerns categories that appear permanent – can "age" after a few years, a reflection, finally, on the possibility of "thinking in common" about constitutional law at European Union constitutional level. It is with a good deal of uncertainty about whether there is any point in this endeavour, and, I fear, in a rather disorganised (somewhat chaotic) manner, that I have decided to put down in writing a few of the thoughts that have occurred to me as a result of reading those pages. I only hope that they

will be received kindly by their main intended recipient, *Albrecht Weber*, when tribute is paid to his academic career in which comparative law, in particular European comparative law, has played such an important role.[17]

The research I proposed at that time centred as a whole around an expression, "Constitutional Essentials", whose scope was far from clear.[18] Nor did the subtitle help to give it a meaning that could be transposed to or used in a precise manner in the sphere of constitutional law. In any event, that was how I always imagined it, in English. As in the case of another quite similar term, "fundamentals", that noun does not exist in the languages with which I am most familiar, but I can imagine it perfectly integrated into my language, imported thus from English.[19] At first sight, that type of wording, without even needing to be framed more accurately yet, appears to belong to the sphere of cultural sciences[20] – constitutional cultural sciences in this case – rather than to the sphere of positive law. And, of course, as the proposed research develops it will eventually lead to constitutional culture. However, the starting point, as I conceived it, is the sphere of positive law, the sphere of "written" constitutions, so to speak.

The purpose was to start from the empirical inquiry into the fact that, often enough, it is possible to identify in constitutional texts a difference in the effectiveness of their provisions depending on how they behaved in response to a variety of, so to speak, "specific" situations. As I shall explain below, those situations have very little in common. However, they do all share one feature: in all those situations, one witnesses a difference in the "behaviour" of the various provisions comprising a particular Constitution. It was thus possible to refer to the "added value" of certain components of a Constitution by comparison with "the rest" of its provisions.

The circumstances which could render operational that difference in the application of constitutional components might be hugely varied, as already known. Likewise, the specific consequences for the application or effectiveness of one or other provision might also be varied. What allowed me to conceive a common *name* to designate all those varied situations was the fact that it was possible to single out normative components with the capacity to assert their effectiveness in response to situations which, however, might affect the "normativity" of the rest.

In short, what mattered to me was that all those situations, governed by the Constitution in such terms that gave rise to "asymmetrical" situations in the effectiveness of the different constitutional provisions, made it possible to identify what I proposed categorising as "constitutional essentials", in other words, the ultimate foundation of the political community.

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[17] To cite but a few works: Weber 1989; Weber 2007a; Weber 2007b; Weber 2010.

[18] As a more recent example of abundant recourse to the notion ("essential requirements", also "material core") in constitutional decision making, see Czech Constitutional Court, Pl. ÚS 27/09 (Decision of 10 September 2009) – *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*, English version: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=468&cHash=44785c32dd4c4d1466ba00318b1d7bd5

[19] To my knowledge it is possibly *Herm.-J. Blanke* who has incorporated the notion in 2002, preferring the Latin, "Essentialia einer europäischen Verfassungsurkunde": Blanke 2002.

[20] Häberle 1998.

As an operational category in constitutional law, "constitutional essentials" refers to certain components of the respective Constitution which are capable of demonstrating a greater capacity to assert their effectiveness in response to specific situations, by comparison with the rest of the constitution.

The fact that I started my academic career with a comparative historical study of one of the said situations – a study of the process of "constitutionalisation" states of emergency in the 19th century[21] – may have contributed to the outline of my proposal. The suspension of certain constitutional guarantees in emergency situations revealed, by default, the existence of other guarantees the application of which remains unaffected in an emergency situation. It is surely the Germans who have the most accurate term for denoting that difference in the application of constitutional provisions in response to emergency situations governed by the Constitution: "notstandsfeste Verfassung"; in other words, the Constitution resistant to the emergency situation.

Of course, the foregoing implies that it is not "the whole" of the Constitution ("l'empire de la Constitution") that is suspended in a state of emergency. In any event, the constitutional regulation of states of emergency can in itself serve as an illustration of how to implement the transition from the field of positive law to the field of constitutional culture. In fact, the choice to respond to emergency situations with a limited suspension of the Constitution also reveals those components of the Constitution which the political community is not prepared to withdraw even in such emergency situations. In other words, this type of regime may make it possible to identify that which constitutes the very legitimacy of the constitutional order; its *raison d'être*, ultimately.

Thus, the constitutional culture of the bourgeois liberal State of the 19th century was able to demonstrate clearly, in response to emergency situations, the "non-essential nature" of the public freedoms granted by the Constitution, compared with the foundations of bourgeois society (security, property). An analysis of the instruments which constitutional States use today to combat, in particular, the threat of terrorist attacks also reveals the difference between what, in terms of rights and freedoms, may be sacrificed in emergency situations and what should never be given up under any circumstances. The difference is that emergency situations today are much more complex in nature.

However, emergency situations are not the only conceivable situation in which it is possible to discover "asymmetrical" situations within a Constitution, as far as its resilience is concerned. The same pattern is repeated vis-à-vis the power to review the Constitution, at least in some constitutional systems. The Constitution may reveal a number of absolute limits on the possibilities for its amendment. Or it may provide for more than a single constitutional amendment procedure. In both cases, the motivation is the same: the identification of an "area" of the Constitution which is beyond the reach of the power of review or, at least, may be amended only by means of a procedure more laborious than normal. The political community (at least to the extent that it continues to be represented in the historical constituent

[21] Cruz Villalón 1980.

assembly) prohibits itself from withdrawing certain constitutional components. Or, alternatively, it enables a minority to block a constitutional amendment which might be desired by the majority. And that is all based on the strong belief that certain provisions of the Constitution must aspire to a higher degree of permanence.

The third and final field of research I proposed at the time is specifically European. It can be described simply as the field of the limits of European integration as it arises either directly from constitutional provisions or from constitutional case-law. This is without doubt the part most in need of updating. It is striking that one category, that of "identity", is virtually absent from my project of eight years ago, even though that category has acquired a degree of prominence for it to aspire to displace the notion of "essentials". This is not, of course, the time to present that category, even in the most elementary terms.[22] What is important in the notion of "identity", be it "national" or "constitutional", is that European integration makes it possible to identify within the Constitution the components over which the political community in question seeks to retain control, thereby excluding any situation of "heteronomy".

The limitation of the research to those three cases seems rather unsatisfactory to me today. Other cases could have been included already at the time but I shall refer only to one of them: the transnational or "cross-border" effectiveness of rights. As is well known, the notion is that there are certain essential components of rights and freedoms which a political community may not jeopardise, in particular, by agreeing to surrender a person to the authorities of another State, either through extradition or through another channel. The Spanish Constitutional Court (*Tribunal Constitucional*) coined a specific term – the "contenido absoluto" ("essence") of the fundamental right – to refer to those components, during my time as a member of that court.[23] Over the years, the Spanish Constitutional Court referred that issue to the Court of Justice of the EU, leading to the *Stefano Melloni* case[24].

Be that as it may, the first part of the proposal ("The Law of Essentials") seems to me now to be excessively focused on positive law; in short, on the written Constitution. Admittedly, the "unwritten" Constitution plays today a marginal role at European Union constitutional level, but not to the extent that that its presence was not envisaged in the identification of the essential components of a Constitution, by one means or another. At the same time, however, it is necessary to acknowledge that the line which, in theory, must separate "The Law of Essentials", as I have described it, from "The Culture of Essentials" is rather difficult to draw in the case of the unwritten Constitution. Lastly, in so far as the notion of "constitutional essentials" was intended to be used to identify certain components of the written Constitution, the inclusion of cases of unwritten constitutions could have been dysfunctional.

[22] Sáiz Arnáiz and Alcoberro Llivina 2013; de Boer 2013; Jovanovic 2013; Konstantinides 2010–2011, p. 195.

[23] Spanish Constitutional Court (Tribunal Constitucional), STC 91/2000 (Decision of 30 March 2000) – *Paviglianiti* (in Boletín Oficial del Estado núm. 107, de 4 de mayo de 2000, p. 99 et seqq.), https://www.boe.es/boe/dias/2000/05/04/pdfs/T00099-00118.pdf

[24] Case C-399/11, *Melloni* (ECJ 26 February 2013).

The challenge of defining a "culture of essentials" based on data collected through a comparative study of the *written* Constitutions of a large or small number of Member States of the European Union now seems to me to be more problematic than it did eight years ago. There can be no doubt that that data can be used to work extensively on the task of identifying those components having "enhanced legal force", which, in the main, are replicated in the different systems analysed, and those components appearing as minority components. Similarly, a diachronic analysis can be carried out, for example, of the generalisation of the abolition of the death penalty and its possible inclusion among the components endowed with enhanced legal force.

Of course, all this is in no way a trivial task. And, as a category applicable to *positive* constitutional law, I also think that that outcome would have been worth the effort. In short, it still is, to my knowledge, a research that has not been undertaken, at least in the form explained above. The difficulty arises, as I see it now, when I proposed a dual recourse to the category, both for the Constitution "as law" and for the Constitution "as culture".[25]

I find the reason, as I see it today, simple to explain. Fairly frequently, and almost unavoidably, written Constitutions are now chronically *lagging behind* the constitutional culture. When I say "constitutional culture", I am referring to the whole set of constitutional beliefs that a political community either shares or is in the process of discussing publicly. In any event, written Constitutions – whether they were drawn up a few or many years ago – today give a clearly insufficient picture of a constitutional culture (or even, by default, "lack of culture") which must confront issues and challenges that are often totally new.

The most significant challenges faced by political communities in this second decade of the 21st century (bioethics, big data, migration flows, to give just two or three examples) must be "thought about" in terms of constitutional culture. By this I mean that the foundations of our political societies will be those resulting from the way in which we face up to those phenomena. In that connection, I am of the view that the progress which our societies are capable of making in terms of "constitutional culture" need to go ahead and pave the way for constitutional – written – law. It is highly unlikely for a constitutional assembly to be so far-sighted as to include those components in a written Constitution in a sufficient manner, and furthermore to endow those components with a particular resilience to the specific situations described above.

Therefore, if this is to be the correct way of approaching the "culture of – constitutional – essentials" in today's world, and specifically in Europe, the difficulty and, arguably, the insufficient nature of its analysis from the *formalised* perspective which I used as a starting point are clear.

In short, the definition of constitutions as "living instruments", in the terms in which that notion is applied to the European Convention on Human Rights, should allow the *emerging* constitutional culture, in the terms indicated, to be incorporated into the normative Constitution. The greater legitimacy of constitutional compo-

[25] Cruz Villalón 2006, p. 525.

nents, their greater claim to enhanced resilience, is possibly no longer the result of formalised constitutional guarantees.

Finally, "The Europe of Essentials". I did not say so explicitly eight years ago but it is clear that, in this closing part, the European Union must be given priority over the Europe of the Council of Europe. I do not mean by this that the larger area covered by the State parties to the European Convention on Human Rights could not have been the focus of research of this kind. Today, however, it seems to me to be more urgent, as a question of common European legal thinking, to focus on the "constitutional essentials" of the European Union.

The connection between the previous part and this final part is undoubtedly the concept of "common constitutional traditions". Just as the European Union was "inspired" by the constitutional traditions of the Member States when it constructed the edifice of rights and freedoms within the Union, "constitutional essentials", as identified in the constitutions of the Member States, must also pave the way for the construction of this category at European Union level.

In that regard, it seems to me to be urgent to position ourselves at European Union level, rather than Council of Europe level, owing to the prominence which the concept of "identity", whether qualified as "national" or "constitutional", has been acquiring in the European Union over the eight years to which I am referring. And perhaps the most urgent need is for an enhanced reflection on "*European* identity".

As a constitutional category, I cannot hide my clear preference for the term "essentials" over the term "identity". The concept of "identity" always brings to the forefront an element of particularity, of singularity, which, to my mind, is to some extent unnecessary, and to some extent unsuitable. If it were possible to free "identity" from that burden of "particularity", I would have no difficulty at all in abandoning the concept of "essentials".

In setting out the "values" on which the Union "is founded" and declaring those values to be "common" to the Member States, it is clear that Art. 2 TEU is formulating, albeit in very general terms, what constitutes "the Europe of Essentials". As such, it might perhaps also be said that Art. 2 TEU is setting out a description of the identity of Europe. In that case, however, the following question arises: vis-à-vis what or whom must the identity of the Union be asserted: Vis-à-vis the Member States? Vis-à-vis States that are "only" members of the Council of Europe? Vis-à-vis *others*, as distinct from the aforementioned?

It would then be a matter of ascertaining whether the Union, for its part, needs to operate using the concept of identity for itself and for its own benefit, since that concept has become so firmly rooted in the very perception of the Member States of their position in relation to the Union. In other words, whether it makes sense that the Union, in return, should also appropriate the category of identity with the same aim; that is, as a way of defining its position and its autonomy in relation to the Member States.

In principle, that does not seem to me to be the correct response to the difficulties which the concept of identity may create, in so far as it refers to the Member States, in the constitutional architecture of the Union. In any event, I do not wish to stray

from my main point: Whether it is possible or useful to include the category of "constitutional essentials" at Union level.

In that connection, for example, the Treaties provide for multiple procedures by which they may be amended, and the Court of Justice has had occasion to consider them.[26] I fear, however, that that route would involve little progress towards the objective in point. It makes more sense that the identification of "constitutional essentials" within the European Union should be "inspired" by the constitutional traditions common to the Member States.

And, quite possibly, not only in relation to the more or less empirical data provided by constitutional texts themselves, but also in relation to the public debate, at national level, concerning what I referred to above as the "*emerging* constitutional culture".

At the end of this brief commentary on a research proposal that is about to return to my archive, I am left with the conviction that a Constitution must be inextricably two things: It must be *law* and it must be *culture*: the conviction that the core of what constitutes us Europeans as political communities should materialise, as essentials, in both respects – that of constitutional law and that of constitutional culture. In these early days of 2015, in light of the sharpening of the concerns over the recurrent episodes of terrorism and of the resulting debate on the available constitutional options, a great deal of effort of reasoning in that regard does not seem to me to be necessary.

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[26] See in particular, Case C-370/12, *Pringle* (ECJ 27 November 2012), and the Opinion of AG Kokott of 26 October 2012 in that case.

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