„Cultural, Religious and Humanist Inheritance of Europe“ – Its Future Legal Relevance

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Summary: By the Treaty of Lisbon, the “Masters of the Treaties” not only completed a catalogue of founding values (Article 2 TEU) but provided also an indication wherefrom these values “have developed”, i.e. “from the cultural, religious and humanist inheritance of Europe”. This contribution – originally presented at the Third Annual Conference of the Czech Association for European Studies Prague, 12. and 13. June 2014 – aims at analyzing the normative relevance and implications of this indication which might mean a considerable change of paradigm for secular Member States like Austria, Czech Republic or France.

Keywords: Cultural, Religious, Humanist Inheritance; Reference to God; Transcendent Foundation; Laicism; Values; Common Good; Preamble; Scepticism; Checks and balances; Principle of Equal Treatment; Justice

1. Prologue

*“In a nutshell, the project of the Enlightenment consists in adherence to the **rule of reason**” which, in turn, entails “the **sharp divide between faith and reason**”.*[1]

From that perspective, any religion claiming relevance not only in the private sphere of an individual, but in politics has to be considered as a “frontal attack against” that said “separation between the realm of faith and that of reason”[2], and, thus, as a severe challenge for “the neutrality of the secular state”.[3]

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1 Cit *Michel Rosenfeld*, Law, Justice, Democracy, and the Clash of Cultures. A Pluralist Account (2011), 1, 7.

2 It is worth noting, however, that at least the Roman Catholic Church does not at all accept this separation, cf the most recent Encyclica *Lumen Fidei* of 29 June 2013 (AAS 2013, 555ff), point 32:

It is apparently in this vein that the Charter of Fundamental Rights of the Czech Republic[4] not only grants, in its Article 15 (1), *explicitly* also the right to have *no* denomination at all[5], but states, in Article 2 (1): *"The State is founded on democratic values and may not be bound either by an exclusive ideology or by a religious belief"[6],* hence **opposing** "democratic values" to adherence to (*any*!) religious belief and, thus, at least implicitly declaring *democracy to be a priori incompatible with religion*.

At first sight, these constitutional provisions[7], together with the preamble to the Constitution[8], reflect the high degree of **secularization** of the Czech Republic.[9] At second sight, however, one realizes not only that the first presi-

"Fides christiana, quatenus veritatem nuntiat totalis amoris Dei et ad potentiam huius amoris fovet aditum, ad magis reconditum centrum pervenit experientiae hominis, qui amoris ope in lucem editur, et ad amandum vocatur ut in luce maneat. Desiderio compulsi omnem realitatem illuminandi, initium sumentes ab amore Dei in Iesu manifestato, eodem amore amare quaerentes, **primi christiani Graecum orbem, esurientem veritatem, invenerunt** socium idoneum **ad dialogum**. Eo quod **evangelicus nuntius philosophicam doctrinam apud antiquos convenit**, id decretorium fuit iter ut ad omnes gentes perveniret Evangelium, idque effecit **ut fides et ratio inter se agerent**, quod saeculorum decursu usque ad nostram aetatem increbruit. Beatus Ioannes Paulus II in *Litteris Encyclicis Fides et ratio* monstravit **quomodo fides et ratio altera alteram confirment**. …" – a position fully in line with traditional Aristotelian cooperation between "nus" and "episteme", cf *Manfred Riedel*, Für eine zweite Philosophie (1988), 40, 43.

3 Cit *Rosenfeld*, Law, 6.

4 Act. Nr. 2/1993 (Listina základních práv a svobod).

5 This **negative aspect** of the freedom at issue ("freedom *from* a particular religion") has also been recognized by the ECtHR under Article 9 ECHR (cf *David Harris et al*, Harris, O'Boyle &Warbrick, Law of the European Convention on Human Rights[2] [2009], 430; *Christoph Grabenwarter/Katharina Pabel*, Europäische Menschenrechtskonvention[5] [2012], § 22, point 104, both volumes referring to ECtHR's Judgment of 18 February 1999, ANo 24645/94 [*Buscarini v. RSM*], point 34; see also ECtHR's Judgment of 18 March 2011, ANo 30814/06 [*Lautsi et al v. Italy*], point 60: "freedom not to belong to a religion") and, therefore (i.e. by virtue of its Article 52 [3]), also Article 10 of the EU Charter of Fundamental Rights (EUCFR) is to be interpreted in this way (see, e.g*., Norbert Bernsdorff*, comment on Article 10 EUCFR, point 12, in: *Jürgen Meyer* [ed], Charta der Grundrechte der Europäischen Union[3] [2011]). But it is (only) the Czech Charter where this aspect is **explicitly stated in the text**. See for that Article in more detail *Petr Jäger*, comment on Article 15, in: *Eliška Wagnerová* et al, Listina základních práv a svobod. komentář (2012), 371ff.

6 See in more detail *Eliška Wagnerová,* comment on Article 2, in: *Wagnerová* et al, komentář, 79ff.

7 Pursuant to Articles 3 and 112 (1) of the Czech Constitution, this Charter forms part of the Constitution.

8 As *Vojtěch Šimíček* (comment on the preamble, point 7, in: idem et al, Ústava České republiky. komentář [2010]) puts it: It is evident from the **absence of any reference to God** in the Preamble that the **Czech Republic is a secular state** („laický stát").

9 „The Czech Republic is often said to be one of the most secularized countries in Europe …" (cit *Jakub Havlíček/Dušan Lužný*, Religion and Politics in the Czech Republic: The Roman Catholic Church and the State, IJSSS 2013, 190ff, 193).

dent of Czechoslovakia, *Tomáš Garrigue Masaryk*, originally stated that *"our whole humanitarian programme is **founded in religion** and has, as its ultimate source, the Brethren and the Reformation ...*[10], but that, "at the macro level", "religion" seems to be still of "persisting importance" for contemporary political life even in the Czech Republic.[11]

It is in particular against that somewhat inconsistent background that a provision of European Union primary law, the second recital of the preamble to the current version of the Treaty on European Union (TEU) – whereby **the value of "democracy",** enshrined in Article 2 TEU, is **also founded** at least *inter alia* on the "**religious** … **inheritance** of Europe" – deserves specific attention also and above all in the Czech Republic which has now been a member of the EU for a decade and **shares**, therefore, *also in purely national contexts*[12] the values mentioned in Article 2 TEU and, thus, also their "starting point"[13], the "inheritance" mentioned in the said recital.

2. The "… Religious … Inheritance" as part of Instated Law

2.1 The Second Recital

Already the preamble to the "Treaty establishing a Constitution for Europe[14] *began* with the following recital: *"DRAWING INSPIRATION from the **cultural, religious and humanist** inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.."*

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[10] See *Tomáš Garrigue Masaryk,* Jan Hus. Naše obrození a naše reformace (1896), 333, cited via *Zwi Batscha*, Eine Philosophie der Demokratie. Thomas G. Masaryks Begründung einer neuzeitlichen Demokratie (1994), 117; cf also the references given by *Batscha*, ib, 115ff.

[11] *Havlíček/Lužný,* IJSSS 2013, 197, refer to the "Te Deum mass" accompanying the "presidential inaugurations of Václav Havel" as well as to the "plea" of President Miloš Zeman "for God's mercy" when concluding his inauguration address, and conclude, with specific regard to the "importance of" St. Vitus Cathedral in Prague "for Czech statehood and national identity" (cit 197) that also in the Czech Republic "the **state needs**" (or, perhaps more precisely, continues to need) "**religion**" (cit 200; emphasis not original). See also *Horák*, Religion and the Secular State, 251 ("… the religious communities play quite an important role in Czech society"), *Wagnerová,* comment on Article 2, point 28, and infra fn 33.

[12] Arg the proposition by which the second sentence starts: „These values are common to the Member States …".

[13] Arg "from which have developed …".

[14] OJ 2004 C 310, 1.

This Constitutional Treaty never came into force, but the Lisbon Treaty which was signed on 13 December 2007 and enacted on 1 December 2009 also adopted precisely this recital.[15]

In addition, the second paragraph of the Preamble to the Charter of Fundamental Rights of the European Union (EUFRC) also evinces a religious context, seeing that it begins (in the *German* version) with: *„In dem Bewusstsein ihres **geistig-religiösen und sittlichen** Erbes gründet sich die Union auf die unteilbaren und universellen Werte der Würde des Menschen, der Freiheit, der Gleichheit und der Solidarität. Sie beruht auf den Grundsätzen der Demokratie und der Rechtsstaatlichkeit. ....*

This text already formed part of the original version proclaimed on 7 December 2000[16] (which then lacked, however, full binding force, whereas the current version, pursuant to Article 6 (1) TEU, "shall have the same legal value as the Treaties"[17]).

It is true that the religious context in the Charter is still given somewhat *less emphasis* e.g. in the *English* or in the *French* version, which states: "Conscious of its *spiritual and moral* heritage…" or "Consciente de son *patrimoine spirituel et moral*…"[18] respectively. So it was claimed these discrepancies of language versions might be the result of a German peculiarity[19], or even just a simple translation error.[20] For the versions of the current second recital to the preamble to the TEU, however, this interpretation cannot apply, since, as far as it can be seen, **all of** the language versions also **explicitly** state the "**religious**" inheritance.[21]

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[15] Second recital to the preamble to the TEU.

[16] OJ 2000 C 364, 1.

[17] This normative statement means not only equal rank in the hierarchy of norms, but also, that – notwithstanding the time gap as to the drafting – the current versions of the Treaties and the Charter entered into force *simultaneously*, so that the lex posterior rule cannot apply.

[18] Cf also the Danish („Unionen, der er sig *sin åndelige og etiske arv* bevidst, …"), the Italian („Consapevole del suo *patrimonio spirituale e morale* …"), the Dutch („De Unie, die zich bewust is van haar *geestelijke en morele erfgoed* …"), the Spanish („Consciente de su *patrimonio espiritual y moral* …") or the Czech ("Unie, vědoma si svého duchovního a morálního dědictví, …") version. This wording shows close similarity with the 6th paragraph of the preamble to the Czech constitution where reference is made to the *inherited* wealth, be it natural or cultural, material or *spiritual*.

[19] Cf *Jürgen Meyer*, comment on the Preamble, point 25, in: idem, Charta; see also ib, points 18 and 21, where we see how controversial (and *strongly opposed by the majority*) still then the insertion of a reference to religion had been, in particular with regard to the **French laïcité** (see, therefore, in particular point 25, fn 66).

[20] See the references given by *Meyer*, Preamble, point 32.

[21] What we realize here, therefore, is that during the small period of time between the drafting of the Charter and that of the Constitutional Treaty, a double rapprochement of the other language versions a) to the German one and b) to religion. So, since the entry into force of the Treaty

Now, this recital of the TEU does *not* set itself firmly *only* upon the "religious heritage" but **also appeals to the "cultural" and the "humanist heritage"** in the same breath. And clearly the term "religious inheritance" incorporates *not only Christianity* or even just its subset, (Roman) Catholicism; neither does it limit itself to monotheism, but appears to include – in the sense of the well-known dictum of *Theodor Heuss* who had claimed that the "Occident" had its beginnings on the three hills of the Capitol, Acropolis and Golgotha[22] – even the *polytheistic religions of antiquity*, at least of Greece and Rome, into which evidently the "humanist heritage" is rooted. In contrast, some may doubt, regarding the history of Europe[23], whether *Islam* – although monotheistic – actually is to be considered part of the European "*inheritance*", at least *as such.*[24]

2.2 What is "Religion"?

So reference to "religion" *does*, since 1 December 2009, form part of European Union law. But what is actually the meaning of the Treaty term "religion"? When we understand it here, in the preamble to the TEU, in the same way as in Art 17 (1) of the Treaty on the Functioning of the European Union (TFEU) – where a *difference* is made between "churches and religious associations or communities" on the one hand and "philosophical and non-confessional organisations" on the other hand – or in Article 10 EUCFR – where "religion" is *juxtaposed* to "belief" – and when we take also into account that the terms "philosophical"[25] as well as "belief"[26] are, in the German version, expressed by the *same* term "Weltanschauung", we may infer that

- on the one hand, "religion" is **comparable** to a "philosophy", "belief" or "weltanschaung"
- on the other hand, there must be a **differentia specifica** which "religions" have, whereas other – secular or laical – "weltanschauungen" do not.[27]

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of Lisbon, it is hard to argue that the EU continues to be a "secular institution" (as did in fact *Pierre-Arnaud Perrouty/Julie Pernet*, Dialogue with religious and philosophical organisations: toward an equal and fair dialogue?, in: *Johannes W. Pichler/Alexander Balthasar* [eds], Open Dialogue between EU Institutions and Citizens – Chances and Challenges [2013], 183).

22 Reden an die Jugend (1956), 32.

23 As it is well-known European identity several times (in Spain, on the Balkan, in medieval Palestine) was developed by veritable *crusades against* Islam.

24 To the extent to which the results of Islamic dogmatic theology correspond to those of Christianity or Judaism, the question obviously does not hold any practical importance.

25 In the French version: "philosophique".

26 In the French version: "pensée".

27 It is exactly this opposition of "religion" to "secularism" or "laicism" which is why, originally, in the Charter Convention, the majority still resisted the insertion of the term "religious" (see supra fn 19).

This differentia specifica, however, is, quite obviously[28], rooted in the sphere of the "*sacred*"[29], including *divine* service, adoration and worship[30] and, thus, a **belief in a transcendent authority**.[31]

So, in a way, current European Union Law on Treaty – and, thus, "constitutional" – level contains exactly that "constitutional **reference to God**" which had, most prominently, also been supported[32] by a member of the European Parliament for twenty years, *Otto von Habsburg*, also the last heir to the Czech Crown.[33]

2.3 The European Constitutional Tradition in Regard to Religion

What remains to be done is a closer analysis of

- the **normative relevance** of this and if this can be sufficiently found,
- its **normative content.**

But before this, it should be mentioned briefly that the mentioning of the "religious … inheritance" – which is, in essence, the adoption of an explicit "constitutional reference to God" – in the primary law of the European Union

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[28] Cf, e.g., *Antonius Liedhegener/Ines-Jacqueline Werkner* (eds), Religion, Menschenrechte und Menschenrechtspolitik (2007); although this book lacks any explicit definition of the term "religion", it is perfectly clear that this term is understood as including only Christianity and Judaism, Islam and Hinduism as well as those parts of Chinese thinking related to the existence of "God" or "Heaven".

[29] *Havlíček/Lužný,* IJSSS 2013, 192, cite the standard definition of *Emile Durckheim*: "a religion is a unified system of beliefs and practices relative to **sacred** things, that is to say, things set apart and surrounded by prohibitions – beliefs and practices that unite its adherents in a single moral community called a church", the weakest part of which, nevertheless, is the definition of the "sacred".

[30] Cf *Grabenwarter/Pabel*, EMRK, § 22, point 102.

[31] So also *Jäger*, comment on Article 15, point 12. Cf, to that extent, also paragraph 1 (1) of the Austrian Law on the recognition of religious associations of 20 May 1874, Imperial Law Gazette No 68 (originally also valid for Bohemia, Moravia and Silesia), containing the term "Gottesdienst", or the Explanatory Memorandum (RV 938 Blg NR XX. GP) to the Federal Austrian Law on religious confessions, BGBl I 1998/19, referring to the "Transzendenzbezug".

[32] Cf, e.g., http://www.zenit.org/de/articles/otto-von-habsburg-vieles-spricht-fur-eine-re-christianisierung-europas (last visit on 20 May 2014).

[33] This Crown is (like in the Hungarian Constitution, see infra fn 42) still, in a way, mentioned in the preamble to the current Czech Constitution ("věrni všem dobrým tradicím dávné státnosti zemí Koruny české …"; *faithful* to *all the good old traditions of statehood of the lands of the Czech Crown* [!]). Remembering that (also) this Crown – of St. Wenceslaus – was founded in the transcendent sphere the explicit commitment to stay "faithful" to "all the good old traditions of statehood" represented by this Crown might very well serve as a sufficient constitutional justification for the – otherwise – somewhat startling sociological finding mentioned supra in fn 11.

in no way represents a fundamental break with its own former traditions, since **in no way** have **all member states** been as secular or laical as *France*[34]*, the Czech Republic*[35] or *Austria*[36]*:*

Instead, there is – if one takes only the republics (monarchies as a rule have always been founded upon the "grace of God", although the only clear statement left at present is the preamble to the Danish constitution of 5 June 1953) – an explicit **invocatio dei** still in the preambles to the constitutions of **Ireland**[37] and of **Greece**[38], and a marked **reference to God** in **Germany**.[39]

In closest proximity to the ambiguity of the second recital to the TEU preamble, however, seems to be the preamble to the **Polish** constitution of 2 April 1997:

"Having regard for the existence and future of our Homeland. we, the Polish Nation – all citizens of the Republic both those who believe in God as the source of truth, justice, good and beauty as well as those not sharing such faith but respecting those universal values as arising from other sources, …"[40]

But also the invocation of "the political and cultural heritage of our forebears" in the preamble of the **Slovakian** constitution (of 1 September 1992) as well as of the "*spiritual heritage of Cyril and Methodius*"[41] there, similar to the fourth sentence of the "National Testimony" which now stands at the

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[34] Pursuant to the first sentence of Article 1 of the French Constitution of 4 October 1958, "France is an indivisible, laical, democratic and social Republic".

[35] See supra Prologue.

[36] See in more detail *Alexander Balthasar*, Die österreichische bundesverfassungsrechtliche Grundordnung unter besonderer Berücksichtigung des demokratischen Prinzips. Versuch einer Interpretation (2006), 326ff. During the 20th century, only the constitution of 1 May 1934 (in force until 13 March 1938) took the opposite perspective, starting with the invocatio dei „Im Namen Gottes des Allmächtigen, von dem alles Recht ausgeht …“ (In the Name of almighty God, the source of all the law …)..Cf, however, now (since BGBl I 2005/31) Article 14 (5a) of the current Austrian Constitution (B-VG) where the founding values of the schools are mentioned and where the goal is spelled out that the students will be able to assume responsibility "… **guided by** social, **religious** and moral **values** …".

[37] "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, …" (ex 1937).

[38] „In the name of the Holy and Consubstantial and Indivisible Trinity" (ex 1975).

[39] „Im Bewusstsein seiner Verantwortung vor Gott …“ (Conscious of its responsibility to God …); this formula was created in 1949 but upheld in 1990 when the preamble was reformulated on the occasion of the German reunification.

[40] Some years ago apparently exactly this formula inspired *Herwig Hösele*, former president of the Austrian Second Chamber of Parliament ("Bundesrat") and then member of the Austrian Constitutional Convention of the time to make a very similar proposal (see *Herwig Hösele*, Was ist faul im Staate Österreich? Eine Reformagenda [2010], 51f).

[41] As is well known, *St. Cyril* and *St. Method*, who were declared Patrons of Europe by Roman Catholic Pope *John Paul II* in 1980, bear enormous **religious significance**.

beginning of the **Hungarian** constitution of 25 April 2011[42], are to be mentioned in this context.

All this of course does not provide grounds for a "common constitutional tradition" (in the sense of Article 6 (3) TEU) among the Member States.[43] But it can indeed be concluded from this evidence – and here the constitution of founding member Germany is of particular importance – that even an explicit "**constitutional reference to** God" was **never irreconcilable** with the fundamental values of what is now the European Union.

3. Regarding the Normative Relevance of the Second Recital of the TEU

3.1 The Status of Preambles in EU Fundamental Law

In Austria, where originally even the two first *articles* of the federal Constitution were denied any normative relevance[44], a simple *recital* in a *preamble* might be considered as rather insignificant from a legal perspective, as apparently might also be the case in the Czech Republic.[45]

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[42] "We recognize the role which Christianity has played to preserve the Nation. We respect the different religious traditions of our country." See, however, also the first declaration (reference to King St. Stephen who made Hungary part of Christian Europe) and the 18th declaration (reference to the Holy Crown).

[43] Even with the most favourable calculation (all the six republics mentioned in the text plus the seven monarchies) it would still be only a – strong – minority of the current 28 Member States disposing of any religious reference in their respective constitution.

[44] See first *Hans Kelsen/Georg Froehlich/Adolf Merkl*, Die Bundesverfassung vom 1. Oktober 1920 (1922), 65 („Art1 hat **keinen relevanten Rechtsinhalt**" [Article 1 does not contain any significant normative content), 66 („Ähnlich wie die Bestimmungen des Art. 1 hat auch die Deklaration: ‚Österreich ist ein Bundesstaat' an und für sich keinen relevanten Rechtsinhalt" [Similar to what is true for Article 1, neither does the declaration "Austria is a federal state" hold any significant normative content); see further the references given by *Heinz Peter Rill/Heinz Schäffer*, comment on Article 1 B-VG, in: iidem (eds), Bundesverfassungsrecht. Kommentar (first delivery 2001), points 1ff, fns 3 and 6. *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan Frank*, Österreichisches Staatsrecht 1^2 (2011), point 10.007, still follow this line of thinking, not *Robert Walter*, however (Österreichisches Bundesverfassungsrecht. System (1972), 105f. See now also *Balthasar*, Grundordnung, 187ff, in particular 201f; *Theo Öhlinger/Harald Eberhard*, Verfassungsrecht[9] (2012), point 64; *Walter Berka*, Verfassungsrecht[4] (2012), point 133.

[45] Cf *Vladimír Sládeček/Vladimír Mikule/Jindřiška Syllová*, Ústava České republiky*:* komentář (2007), 2, point 1 („Sama o sobě sice nemá normativní význam (není závazným pravidlem chování), může však být důležitou pomůckou při výkladu zákona"; the preamble has *no normative relevance* (because it does *not contain a binding rule governing our behaviour*) but may be of importance for the interpretation of the normative part of the legislative act). See, however,

For the European Union, however, it is possible to show[46], upon accumulated consideration of

- the fact that the TEU continues to form part of international law[47]
- the status which Art 31 (2) of the Vienna Convention on the Law of Treaties (VCLT; of 22 May 1969)[48] bestows on a "preamble" in relation to other text in the treaty[49]
- the position which is accorded to the VCLT in current international jurisprudence in general and in the case law of the Court of Justice of the European Union (CJEU) in particular even beyond formal status of ratification[50]
- the significance which the (formal predecessor of the current) CJEU itself attached – in a case which continues to be of crucial importance for the legal system of the EU – to the fact that the **preamble** of the then Treaty establishing the European Economic Community (EEC Treaty) was not only **addressed** to governments, but also **to** the respective **peoples**[51]

that at least EU *primary* law preambles[52] indeed **have normative relevance**, namely as the **binding context** of the following provisions.

3.2 The Function of the Second Recital of the TEU

Precisely this function as "binding context" is now evidently **claimed** by the recital at issue **itself**, since it states explicitly that: *"the universal **values** ..."*

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supra fn 8 (*Vojtěch Šimíček* is even ready to draw fundamental normative conclusions from the fact that a certain content was not enshrined in the preamble; cf also ib, point 4).

[46] See in detail *Alexander Balthasar*, Was ist eine Präambel wert? Eine neuerliche Auseinandersetzung mit einem alten Thema aus Anlass der nunmehrigen Berufung der Europäischen Union auf ihr „kulturelles, religiöses und humanistisches Erbe“, in: *Erich Schweighofer* et al (Hrsg), Zeichen und Zauber des Rechts. Festschrift für Friedrich Lachmayer (2014), 717ff.

[47] Cf *Oliver Dörr*, comment on Article 47 TEU, point 78; in: *Eberhard Grqabitz/Meinhard Hilf/Martin Nettesheim* (eds), Das Recht der Europäischen Union (loose-leaf, 44. delivery, May 2011); *Wolfgang Graf Vitzthum*, Begriff, Geschichte und Rechtsquellen des Völkerrechts, in: idem, Völkerrecht[3] (2010), point 40.

[48] The VCLT did, however, not enter into force until 27 January 1980.

[49] In the introductory sentence we read: "**text, including its preamble** …" Cf also *James Crawford*, Brownlie's Principles of Public International Law[8] (2012), 381.

[50] Cf *Crawford,* Brownlie's Principles, 368.

[51] See ECJ's Judgment of 5 February 1963, case No 26/62 (*Van Gend & Loos*), Official Collection 1963, 1ff, 24.

[52] For the status of preambles in *secondary* law see further *Balthasar*, FS Lachmayer, 721ff, with specific reference to the relevant case law of CJ (on the one hand, see its Judgment of 11 June 2009, C-429/07 [*Inspecteur van de Belastingdienst v X BV*], point 31 and the case-law cited there; on the other hand, however, note also the more recent Judgments a) of 1 March 2011, C-236/09 [*Association belge des Consommateurs Test-Achats ASBL*], point 17, and b) of 28 February 2013, C-483/10 [*Commission/Spain*], point 43 in conjunction with points 44f).

*have **developed** directly "**from** the cultural, religious and humanist inheritance of Europe".*

If one takes the other part of this recital as well, whereby the international law representatives of the Member States listed at the beginning of the preamble – in a concise description of the German Federal Constitutional Court, the "Masters of the Treaty"[53] – in fact **drew inspiration from exactly this inheritance** when agreeing[54] on the *following Treaty content*, then it is more than obvious from that fact alone (not to speak of the full coincidence of the text[55]) that the "rights" and "values" mentioned in this recital are exactly those upon which, according to *Art*icle *2 TEU,* not only the Union is founded but which in addition *"all Member States ... have in common"*.

The second recital to the Preamble to the TEU is thus – as a **binding context** – of **imminent relevance for the interpretation of Art 2 TEU.**

3.3 The Relevance of the Second Recital – read in conjunction with Article 2 TEU – for the Status of a Member State

The significance of this finding is illuminated by the interlacing of the Article 2 TEU with its Article 7:

The declaration of Article° 2 TEU (that the Union is founded on certain values which are also "common to the Member States") is by no means mere "constitutional lyricism", since already "a clear risk of a serious breach by a Member State of the values referred to in Article 2" (Article 7 (1)), even more so naturally "the existence of a serious and persistent breach" (Article 7 (2)) triggers severe sanctioning according to the **proceedings set out in Article 7 TEU**.[56]

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[53] See its Judgment of 12 October 1993, 2 BvR 2134 et al, BVerGE 89, 155, point 112 (*Maastricht*), and, likewise, the Judgment of 30 June 2009, 2 BvE 2/08 et al, BVergE 123, 267, point 298 (*Lissabon*); also Article 88 (1) of the French Constitution takes this perspective, cf *Christoph Grabenwarter*, Staatliches Unionsverfassungsrecht, in: *Armin von Bogdandy/Jürgen Bast* (Hrsg), Europäisches Verfassungsrecht[2] (2009), 121ff, 172.

[54] Cf the last sentence of the preamble.

[55] "Freedom, democracy, equality" and "the rule of law" appear likewise in the two provisions, whereas the value of "the inviolable and inalienable rights of the human person" (recital) may, without any difficulty, be parallelized to the "respect for human dignity" and "for human rights" (Article 2).

[56] In the meantime, an additional layer has been introduced (see the Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, of 11 March 2014, COM(2014)158 final/of 19 March 2014, COM(2014)158 final/2. For the background cf Gabriel Toggenburg, Was soll die EU können dürfen, um die EU-Verfassungswerte und die Rechtsstaatlichkeit der Mitgliedsstaaten zu schützen? Ausblick auf eine neue Europäische Rechtsstaatshygiene. ÖGfE Policy Brief 10'2013; Waldemar Hummer, Die gemeinsame Wertebasis in der EU, in: Johannes W. Pichler (ed), Rechtswertestiftung und Rechtswertebewahrung in Europa (2015), 65ff, 86ff.

Hence, the respective **predominant understanding of the normative content of Article 2 TEU** – and closer yet, of the content of the "cultural, religious and humanist inheritance of Europe" as the **source** of the values enshrined in Article°2 TEU – ultimately attains **decisive significance for the legal and political standing of a Member State in the European Union**.

4. The Normative Content of the Second Recital

4.1 "Herculean Task"

No one can seriously expect me to exhaustively summarize the content of "Europe's inheritance" to you here, now and in just a few sentences. The **reclaiming** and **repossessing** of this inheritance – which is administered today by various fields of disciplines, namely philosophy, literary studies and art history, but also by the different theologies which come into consideration[57], in part, however, also by specialised fields of jurisprudence as, in particular, international law, history of law, but also philosophy of law – **by European law and national constitutional law scholars** is – as I have already said on other occasion[58] – a veritable "Herculean task", and accomplishing it, after having realized the need thereof at all, would certainly in most countries have to result in fundamental **modifications of the curricula for the study of law**.

4.2 Epistemological Implication

What can be said, however, already now is that reference to this "inheritance" as ultimate source of binding values implies that it is in fact **possible**, at least to a sufficient degree, to **ascertain** the **content** of that "inheritance" in an intersubjectively convincing way[59]; so, apparently, the "Masters of the Treaty" have – as a precondition for the foundation of the values in "Europe's inheritance"

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[57] See supra text below fn 21.

[58] FS Lachmayer, 717, 720, 734.

[59] Cf, for that philosophical point of view, already *Theodor Adorno*, Philosophische Terminologie 1 (1973), 113ff, or *Adam Schaff*, Geschichte und Wahrheit (German version 1970), 71ff, 95, 111ff, 125ff, 169ff, and, in particular, *Karl-Otto Apel*, Wahrheit als regulative Idee (ex 2003), reprinted in: Ders, Paradigmen der Ersten Philosophie (2011), 322ff, 336f, 342f; see also *Alexander Balthasar*, Wieviel Reinheit braucht und wieviel verträgt die Rechtslehre? Zugleich ein Beitrag zur (angeblichen) Dichotomie von Sein und Sollen. Mit einem Anhang, Part 2, ZÖR 2007, 97ff, 141, fn 418. Cf also, recently, *Paul Boghossian*, Angst vor der Wahrheit: Ein Plädoyer gegen Relativismus und Konstruktivismus (German version 2013).

conducted by them – **rejected fully-fledged scepticism** or relativism as the appropriate underlying philosophy for the application of the Treaties.[60]

4.3 Selected Examples

In order, however, to not only offer you stones but at least a bit of bread[61], I would like to conclude with the following three examples where the said "cultural, religious and humanist inheritance" could indeed be of crucial importance for the future interpretation of our "common" European constitutional order:

- The principle of "**checks and balances** – requiring *control of every administration* of office as well as the *ban on the delegation of unlimited powers* of office – is, interestingly enough, not explicitly named in Article°2 TEU, though it most certainly forms part of the "common constitutional traditions of Member States" and hence is implied in the concept of "rule of law".
  On the basis of the second recital, however, we may either refer to *Juvenal's* question: "Quis custodiet ipsos custodes?"[62] and thus recourse to the "humanist inheritance", but also quite definitely to the Christian teachings of **original sin**.[63]
- "It is settled case law that the principle of equal treatment requires that comparable situations must not be treated differently, and that **different situations must not be treated in the same way**, unless such treatment is objectively justified".[64] Nevertheless, it is difficult[65] to deduce the second

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[60] Instead, for *Hans Kelsen* „political relativism" was the logical consequence of his fundamental scepticism regarding knowability of truth and values (see Vom Wesen und Wert der Demokratie, [1]1920, Chapter VII, [2]1929, Chapter X).

[61] Cf Matth 7, 9.

[62] Juvenalis Saturae VI, 347f.

[63] See *Alexander Balthasar*, Was heißt „völlige Unabhängigkeit" bei einer staatlichen Verwaltungsbehörde? Zugleich eine Auseinandersetzung mit dem Urteil des EuGH vom 09.03.2010, C-518/07 (Kommission/Deutschland), ZÖR 2012, 5ff, 33, fn 143, with reference to *Erich Kaufmann*, Die Grenzen des verfassungsmäßigen Verhaltens nach dem Bonner Grundgesetz, insbesondere: was ist unter einer freiheitlichen demokratischen Grundordnung zu verstehen? Festvortrag auf dem 39. deutschen Juristentag 1951 (printed by *Erhard Denninger* [ed], Freiheitliche demokratische Grundordnung I. Materialien zum Staatsverständnis und zur Verfassungswirklichkeit in der Bundesrepublik Deutschland [1977] 96).

[64] Cit CJ Judgment of 10. October 2013, C-336/12 (*Manova*), point 30 (with reference to previous case law); cf also *Koen Lenaerts/Piet van Nuffel*, European Union Law[3] (2011), point 7–050.

[65] See e.g. *Wolfgang Rüfner*, Der allgemeine Gleichheitssatz als Differenzierungsgebot, in: *Burkardt Ziemske* et al, Staatsphilosophie und Rechtspolitik – FS Martin Kriele (1997), 271ff; *Olivier Jouanjan*, Gleichheitssatz und Nicht-Diskriminierung in Frankreich, in: *Rüdiger Wolfrum* (Hrsg), Gleichheit und Nichtdiskriminierung im nationalen und internationalen

element of this phrase logically from the semantic structure of our present-day fundamental rights equality principle, e.g. from the wording of Article 20 EUCFR, which states:

"Everyone is equal before the law".

Actually this element – containing an **obligation to differentiate**[66] which might be highly welcome as a counterweight[67] to excessive conclusions drawn from abundant prohibition of discrimination[68] – may be less a product of "equality" than of **"justice"** as it was understood in the traditional sense of *Ulpian's* "suum cuique"[69] and as it can be traced back already to the proportional principle of *Aristotle.*[70]

The legitimation, however, to refer even today within the framework of our current legal order to this jurisprudential inheritance can now be found in the Second Recital read in conjunction with Article°2 TEU, where the term "justice" indeed appears (in the second sentence).

- Every kind of political rule – even democracy – builds on the acceptance of decisions of the ruler by every individual forming part of the polity even in case that the decision would result in a **personal disadvantage** for the individual – including, in extremis, an existential **sacrifice.** This acceptance, however, seems to require a **transcendent foundation**, even if the content of the decision indeed corresponds to *Rousseau's* "volonté générale"[71], i.e. the **common good.** Furthermore, without transcendent foundation the rulers – in a democracy the majority of citizens – would seem to have no motivation whatsoever to base the decisions on the common good instead of their own interests.[72]

Menschenrechtsschutz (2003), 59ff, 67ff; *Martin Borowski*, Grundrechte als Prinzipien[2] (2007), 402ff; *Magdalena Pöschl*, Gleichheit vor dem Gesetz (2008), 157ff; *Sven Hölscheidt*, comment on Article 20 EUGRC, Rz 14, in: *Meyer*, Charta. Cf also the survey given by *Werner Heun* (in *Horst Dreier* [ed], Grundgesetz. Kommentar I[2] [2004], point 2).

66 Cf also the medieval proverb "**bene docet qui bene distinguit**" (see *Christoph Meyer*, Die Distinktionstechnik in der Kanonistik des 12. Jahrhunderts. Ein Beitrag zur Wissenschaftsgeschichte des Hochmittelalters [2000], 65).

67 Originally, CJ used to understand the principles of equal treatment and of non-discrimination as **one** principle (see still its Judgment 26 September 2013, C-195/12 *[Industrie du bois*], points 50, 82); more recent Judgments, however, seem to indicate a **separation** (see e.g. those of 14 November 2013, C-388/12 [*Comune di Ancona*], point 46, and C-221/12 [*Belgacom NV*], point 43, respectively). Cf already *Georg Nolte*, Gleichheit und Nichtdiskriminierung, in: *Wolfrum*, Gleichheit und Nichtdiskriminierung, 235ff.

68 Note that current Article 21 (1) EUCFR contains at least – *non exhaustive* (arg "such as") – 16 elements of non-discrimination (!).

69 Iustitia est *constans et perpetua voluntas* **ius suum cuique tribuendi"** (D 1.1.10pr).

70 Ethica Nicomachea, V/6.

71 See Du Contrat Social II/3; cf also *Jürgen Habermas*, Faktizität und Geltung (1994), 678.

72 In the language of *Rousseau* (see previous fn) corresponding to the „volonté de tous".

> In this sense, and almost 50 years ago, in fact *Ernst-Wolfgang Böckenförde* published his famous "paradox" according to which
> *"the liberal secular state lives on premises that it cannot itself guarantee".*[73]

It would now appear as though *all* the "Masters of the Treaties" (even the Czech Republic![74]) had reacted to this and ultimately – with the Second Recital – **provided** a comprehensive **transcendent foundation of our community of polities**, since its welfare otherwise, at least in times of crisis, could not (any longer[75]) **be guaranteed**.[76]

[73] Die Entstehung des States als Vorgang der Säkularisation (first published 1967, here cited from idem, Recht, Staat, Freiheit. Erweiterte Ausgabe [2006], 92ff, 112). Cf also *Dieter Gosewinkel*, „Beim Staat geht es nicht allein um Macht, sondern um die staatliche Ordnung als Freiheitsordnung". Biographisches Interview mit Ernst-Wolfgang Böckenförde, in: *Böckenförde/Gosewinkel*, Wissenschaft, Politik, Verfassungsgericht (2011), 30fff, 430ff.

[74] Cf supra fn 9.

[75] *Böckenförde* himself had been more optimistic originally, adding the following sentence to the sentence quoted in the main text: „Das ist das große Wagnis, das er" – dh „der freiheitliche, säkularisierte Staat" – "um der Freiheit willen eingegangen ist" (this is the great risk that the – liberal, secular – state has faced for the sake of liberty).

[76] I have developed this line of thought in more detail in my presentation at the Andrássy University Budapest on 24 March of this year (see *Alexander Balthasar*, Demokratie im europäischen Mehrebenensystem. Ein Plädoyer für das Machbare, in: *Alexander Balthasar/Peter Bußjäger/Klaus Poier* [eds], Herausforderung Demokratie. Themenfelder: Direkte Demokratie, e-Democracy und übergeordnetes Recht [2014], 163ff, 175ff).