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1 General introduction

1.1 Starting point

The European Economic Community (EEC) and Turkey signed an Association Agreement in Ankara on 12 September 1963 with the purpose to "facilitate the accession of Turkey to the Community at a later date".[1] Since 1963, Turkey's quest for joining the EU has often been resembled to a long, rough, winding road or to the story of Sisyphus,[2] who was doomed to roll a large rock up a hill, only to watch it roll back down and then try again. As difficult as Sisyphus' task seems to be, that of Turkey has been harder, as each time the rock rolled down, Turkey found a larger rock to roll and a higher hill to climb. The hill grew to become a mountain with a life of its own, which never stopped growing ("widening and deepening" in EU terminology), almost as if out of control of the Gods that had created it.

This story (thesis) is about the growing rock (*acquis communautaire*) and the mountain (the EU) rather than Sisyphus (Turkey). Sisyphus is the starting point, the excuse to tell the tale of the mountain, which managed to slowly escape the rule of its creator Gods (the Member States) to acquire a life of its own. The aim is to shed light on the process in which the once omnipotent and omnipresent Gods of the mountain saw their hands and feet tied on certain occasions. As will be demonstrated below, many elements in the mountain joined forces to form the spirit of the mountain (EU constitutional law) which, combined with tricks of faith and some magic, managed to constrain its creator Gods (the Member States) to some extent so that the mountain could develop to lead a relatively autonomous and independent life.

After setting the general plot of this thesis, what follows is the specific research question it aims to answer, namely whether Member States of the EU have a completely free hand in drafting Accession Treaties, or whether there are some legal constraints on their primary law making function. It is worth noting from the outset that the thesis focuses exclusively on Member States'

1 See the preamble of the Agreement, OJ C 113/2, Eng. Ed., 24.12.1973.

2 For two examples, see A. E. Çakır (ed.), *Fifty Years of EU-Turkey Relations: A Sisyphean Story* (Routledge, 2011). T. Tayanç, *A long and winding road: Turkey-EU relations through cartoons* (Istanbul: Tarih Vakfi, 2012).

primary law making function under Article 49 TEU.[3] It argues that such constraints exist, and accordingly, tries to identify them as well as the sources they are flowing from, thereby hoping to provide some insight into the nature of the EU legal order. The point of departure as well as the main focus of the study is the proposed permanent safeguard clause (PSC) on free movement of persons in the Negotiating Framework for Turkey. It is with reference to the PSC that legal provisions, rules, principles and norms constraining Member States as primary law makers in the context of drafting an Accession Agreement are identified.

Before going into discussing how the issue is approached and structured, the term "legal constraints" is defined and discussed so as to enlighten us as to the types of constraints covered by this study. It should be noted that the focus is exclusively on constraints flowing from EU law, even though occasionally the most obvious constraints flowing from public international law might be mentioned as well. Since the concept of constraint and the premise on which this study is based, i.e. that the EU legal order is of constitutional nature, are inextricably linked they will be briefly elaborated on below simultaneously. After discussing the salient characteristics of the EU legal order that merit its categorisation as constitutional, analogies will be drawn from other constitutional legal orders, which have developed implicit and explicit rules (constraints) in order to protect their most basic and foundational characteristics from arbitrary change.
There are many examples, but the German, and Indian legal orders protected by their constitutions are particularly insightful for our purposes. Next, to complete the endeavour of defining "legal constraints", a working definition of the term is developed in light of the preceding discussion on the nature of the Union legal order. This working definition, as well as discussions underlying the characteristics of the term, lies at the basis of the methodology chosen for this thesis.

After explaining the methodological course adopted for this study and the rationale underlying this choice, the final term that needs clarification in the introduction is: the "permanent safeguard clause". After briefly discussing the vague wording provided in the Negotiating Framework, the term is defined in light of the common features of other safeguard clauses used in past Treaties and Accession Agreements. Last but not least, comes the description of the structure of the thesis, which identifies constraints flowing from three levels of analysis: the pre-accession level, the accession process itself, and the constitu-

3 It does not deal with issues or constraints on Member States in the context of Article 48 TEU. Primary law in the Union legal order is composed of the Treaties (Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)), the Charter of Fundamental Rights (CFR), and various Acts of Accession, which contain the terms of accession for new Member States. In other words, this thesis deals only with the last aspect of primary law. For more information on primary law in the Union legal order see, N. Foster, *Foster on EU LAW*, 3 ed. (OUP, 2011). 111.

tional foundations of the Union. The approach taken in those parts and their structure is explained below at the very end of this chapter.

1.2 Existence of "legal constraints": Nature of the EU legal order

"Law not only constrains government but also constitutes and enables it."[4] It enables action by legitimizing assertions of authority by those who fulfil its requirements. Thus, it is argued that these enabling rules also act as constraints.[5] In other words, "constitutional constraint and empowerment are two sides of the same coin".[6] In the EU legal order the primary instruments that perform the function of constituting and enabling have been the founding Treaties, which have for long been regarded as "the constitutional charter" of the EC by the Court of Justice.[7] As early as in *Van Gend en Loos*, the Court held that the subjects of the new legal order created by the EEC Treaty were not only Member States but also their nationals. The new legal order conferred on individuals both rights and obligations. According to the Court, "[t]hese rights arise not only when they are expressly provided by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".[8] This illustrates clearly that the Treaties are the main source of empowerment and constraint on Member States, as well as other actors operating within the Union legal order. Another source of constraint that is worth mentioning is the case law of the Court interpreting the Treaties.

Just like constitutions function in states, in the EU legal order the Treaties establish the actors/institutions as well as the procedures through which the legal order functions. One of these institutions, the Court of Justice of the EU (CJEU, the Court, or the Court of Justice) is empowered to "ensure that in the interpretation and application of the Treaties the law is observed".[9] In their functioning, both the institutions created by the Treaties, as well as the Member States, which have laid down the rules in the Treaties, are equally bound and constrained by them. The Treaties lay down both procedural and substantive constraints on the Member States as well as on other actors/institutions that function within their scope. For their actions to be legal and legitimate, all

4 C. A. Bradley and T. W. Morrison, "Presidential Power, Historical Practice, and Legal Constraint," *Columbia Law Review* 113(2013): 1124.

5 Ibid.

6 R. H. Fallon, "Constitutional Constraints," *California Law Review* 97, no. 4 (2009): 1035.

7 See, *Case 294/83 Les Verts*, [1986] ECR I-1339; and *Opinion 1/91 EEA*, [1991] ECR I-6084. Since Article 1(3) TEU provides that "[t]he Union shall replace and succeed the European Community", it could be argued that the Treaties are now "the constitutional charter" of the EU as well.

8 *Case 26/62 Van Gend en Loos*, [1963] ECR 1, 12.

9 See Article 19(1) TEU.

actors functioning within the EU legal order need to comply with both types of constraints.

It should be noted from the outset that it is not possible to find the word "constraint" in legal dictionaries.[10] One reason for its absence might be the fact that the nature and form of "constraints" in law ("legal constraints") are different in different jurisdictions as well as in different areas of law depending on whom they apply.[11] This brings the necessity to coin our own definition in light of existing literature on legal constraints and taking account of the specificities of the EU legal order (as well as using dictionaries providing the colloquial definition of the term).[12]

To begin with the nature of the EU legal order, as it serves as a stepping-stone to move from the issue of "existence" of constraints to that of "identifying" them, there is an overwhelming agreement among EU law scholars that despite their international law origins, the founding Treaties on which the legal order is founded, have gradually evolved over the decades and transformed the order to one of constitutional nature.[13] This process of constitutionalisation has been driven by the Court of Justice and consolidated by subsequent Treaty amendments. What causes some divergence of opinion as to the nature of the legal order is the fact that it contains both constitutional and international

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10 B. A. Garner, *Black's Law Dictionary*, 8 ed. (USA: Thomson-West, 2007); B. A. Garner, *A Dictionary of Modern Legal Usage*, 2 ed. (OUP, 2001).

11 Different studies focus on the constraining power of different types of legal rules on different actors. For an example of legal constraints on the powers of the president in the US legal order, see Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint."; for a conceptual study on the sources of constraints on judges as decision makers, see E. Braman, "Searching for Constraint in Legal Decision Making," in *The Psychology of Judicial Decision Making*, ed. D. E. Klein and G. Mitchell (OUP, 2010), 204-16; for a study examining constitutional constraints on judicial as well as non-judicial actors in the US legal order, see Fallon, "Constitutional Constraints," 975-1037.

12 (1). A constraint is something that limits or controls the way you behave or what you can do in a situation. (2). Constraint is control over the way you behave which prevents you from doing what you would prefer to do. See, J. M. Sinclair, *Collins Cobuild English Language Dictionary* (London: HarperCollins, 1994). 302. Another dictionary provides the following definition: "the act of constraining; restraint, compulsion, necessity; a compelling force; a constrained manner; reserve, self-control. [OF constreign-, stem of constreindre, L constringere (stringere, to draw tight)]". See, B. Kirkpatrick, *The Cassel Concise English Dictionary* (London: Cassel Publishers Limited, 1989). 279.

13 J. H. H. Weiler, "The transformation of Europe," *Yale Law Journal* 100 (1990-1991): 2410; Dashwood qualified it as "constitutional order of states", see A. Dashwood, "States in the European Union," *European Law Review* 23(1998): 201-16; J.-C. Piris, "Does the European Union have a Constitution? Does it need one?," *European Law Review* 24(1999): 559; P. Craig, "Constitutions, Constitutionalism and the European Union," *European Law Journal* 7, no. 2 (2001): 125; E. Tanchev, "The Lisbon Treaty within and without Constitutional Orthodoxy," in *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, ed. I. Pernice and E. Tanchev (Baden-Baden: Nomos, 2009), 29; A. Cuyvers, "The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World," *European Law Journal* 19, no. 6 (2013): 712-13.

elements at the same time,[14] which makes it difficult to identify what kind of entity exactly it is; hence the use of the term *sui generis* to describe the nature of the legal order. As 'lame' as that description might be,[15] no new terminology reflecting the true nature of the legal order that is widely acknowledged has been coined yet.

The divergences of opinion on the role of Member States as primary law makers under Article 48 TEU and of the end product under the Treaty revision procedure is a good illustration for the latter point. While for some the Treaty revision procedure is "more compatible with an international treaty than with a constitution",[16] others see the procedure differently. While acknowledging the prominent role of the intergovernmental conference, Besselink argues that "this does not detract from its being embedded in the EU structures",[17] since Article 48(3) TEU stipulates that "the European Council shall define the terms of reference for a conference of representatives of the governments of Member States".

The controversial *sui generis* nature of the EU legal order necessitates a closer look at the qualities it manifested at its various stages of development and its current state. This discussion is important not only in its own right, but also because it will demonstrate the existence of "legal constraints". Without this discussion or demonstration, the thesis could be criticised on the ground that it is built on an assumption of the existence of constraints. In short, the brief discussion on the nature of the legal order in the introduction will demonstrate the *existence* of "legal constraints" and will enable us to move on to the issue of identifying those constraints in the following parts. Moreover, this discussion will also influence the definition of the term "legal constraints", which is central for the findings of this thesis.

Unfortunately, the difficulties are not only limited to the novel and unique nature of the legal order under analysis, but also extend to our use of ancient concepts, which have acquired different meanings over centuries, and were developed in the framework of the nation-state.[18] Hence, the need to define

14 A. M. G. Martins, "The Treaty of Lisbon – After all another Step towards a European Constitution?," in *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, ed. I. Pernice and E. Tanchev (Baden-Baden: Nomos, 2009), 74.

15 B. De Witte, "Treaty Revision Procedures after Lisbon," in *EU Law After Lisbon*, ed. A. Biondi, P. Eeckhout, and S. Ripley (Oxford: OUP, 2012), 51.

16 Martins, "The Treaty of Lisbon – After all another Step towards a European Constitution?," 74.

17 L. Besselink, "The Notion and Nature of the European Constitution After the Lisbon Treaty," in *European Constitutionalism Beyond Lisbon*, ed. J. Wouters, L. Verhey, and P. Kiiver (Intersentia, 2009), 268.

18 The problems arising out of the use of concepts that emerged in the context of the nation-state to describe the nature of the EU legal order has been called "the problem of translation". See, N. Walker, "Postnational constitutionalism and the problem of translation," in *European Constiutionalism Beyond the State*, ed. J. H. H. Weiler and M. Wind (Cambridge: Cambridge University Press, 2003), 27-54.

what is meant by those terms: the most central ones for this thesis being constitution, constitutionalisation (of the EU legal order) and constitutionalism (in the context of the latter order).

1.2.1 Constitutional or not?

As Grey eloquently puts it "[c]onstitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse."[19] To illustrate his point he provides examples of mutually inconsistent definitions of the term used by different scholars in different periods.[20] For our purposes the focus will be exclusively on the qualities of the term that fit the emergence and development of the EU/EC/EEC legal order, which goes back only around half a century. To begin with what is considered as the "one essential quality"[21] or "the centre piece"[22] of constitutionalism and constitutions respectively, it is their role as "a legal limitation on government"[23] or "the limitation of power"[24], in other words, their role as constraint on the exercise of public power.

"A central way the Constitution [the Treaties] constrains is by constituting or otherwise giving rise to institutions and legal practices [procedures] that perform constraining function."[25] As mentioned above, constraint and empowerment in this sense are inseparable. "Constraint inheres not just in threats of sanctions",[26] as will be discussed in more detail below, "but also in the incapacity to act with recognized authority beyond the sphere of tenable claims of lawful power, and in norms that define official roles and obligations."[27]

In the EU legal order, the founding Treaties laid down the institutional structure as well as the rules and procedures for its lawful functioning. In this "thin sense" of the term constitution, as the law establishing and regulating

19 T. C. Grey, "Constitutionalism: An Analytic Framework," in *Constitutionalism*, ed. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1979), 189.

20 See, ibid. For more information on the features of 'ancient constiutionalism' versus 'modern constitutionalism', see M. La Torre, *Constitutionalism and Legal Reasoning: A New Paradigm for the Concept of Law*, Law and Philosophy Library 79 (The Netherlands: Springer, 2007). 1-12.

21 C. H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947). 21; cited in Grey, "Constitutionalism: An Analytic Framework," 189.

22 D. Castaglione, "The Political Theory of the Constitution," *Political Studies* XLIV(1996): 417.

23 McIlwain, *Constitutionalism: Ancient and Modern*: 21; cited in Grey, "Constitutionalism: An Analytic Framework," 189.

24 Castaglione, "The Political Theory of the Constitution," 417.

25 Fallon, "Constitutional Constraints," 995.

26 Ibid., 1035.

27 Ibid.

the main organs of government and their powers,[28] the founding Treaties were indisputably of constitutional nature. As far as the Treaties encompassed the fundamental legal norms underlying the polity, in addition to establishing the institutional framework, which was to create general legal norms, they were also a constitution in a "material sense".[29] However, as Curtin explains, the material constitution refers to "*the totality* of fundamental legal norms that make up the legal order of the polity",[30] which is not limited to the Treaties, but includes the contributions of the Court of Justice. By developing the principles of supremacy, direct applicability and direct effect the Court instigated the development of the empirical constitution, which refers to the way in which the EU is organized and functions as a matter of fact.[31] What the Treaties have never been, however, is a democratic or political constitution, as the emphasis in the latter conception of the term lies in the manner in which the constitution is adopted, that is deliberated by the people directly or through their representatives.[32]

The "thick sense" of the constitution is more controversial as different scholars emphasize different features of the term.[33] For instance, Griller bases this "thicker" concept on the European Enlightenment, the gist of which is illustrated in Article 16 of the French Declaration of the Rights of Man and of the Citizen (1789): "Any society in which the guarantee of rights is not secured, and in which the separation of powers is not determined, has no constitution at all."[34] Hence, according to Griller, a constitution needs to perform three important functions: firstly, to recognize the rights of citizens;

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28 J. Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in *Constitutionalism*, ed. L. Alexander (Cambridge University Press, 1998), 152-53; cited in Craig, "Constitutions, Constitutionalism and the European Union," 126.

29 S. Griller, "Is this a Constitution? Remarks on a Contested Concept," in *The Lisbon Treaty: EU Constitutionalism without a Constiutional Treaty?*, ed. S. Griller and J. Ziller (Austria: Springer, 2008), 30.

30 Emphasis added. D. Curtin, "The Sedimentary European Constitution – The Future of 'Constitutionalisation' without a Constitution," in *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, ed. I. Pernice and E. Tanchev (Baden-Baden: Nomos, 2009), 77.

31 Ibid.

32 Ibid., 77-80.

33 Craig cites seven features that Raz finds important for a constitution to be considered a constitution in the thick sense: firstly, it needs to be *constitutive*, i.e. define the main institutions of government and their powers; secondly, it needs to provide a *stable* framework for the legal and political institutions; thirdly, it needs to be enshrined in one or few *written* documents; fourthly, it needs to be *superior law*; fifthly, it needs to be *justiciable*; sixthly, it needs to be *entrenched*, i.e. amendable only by special procedures; and lastly, it needs to express a *common ideology*. Craig acknowledges that any constitution will contain these elements to a lesser or greater degree. Not all constitutions will contain all the elements listed. Yet, it is important to identify them in order to understand the nature of constitutions in general. See, Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries."; cited in Craig, "Constitutions, Constitutionalism and the European Union," 126-27.

34 Griller, "Is this a Constitution? Remarks on a Contested Concept," 29-30.

secondly, to organize the relations between the government and those governed; and lastly, to establish a system of checks and balances among the various branches of government. In the EU, there are now rules in place that fulfil all these criteria.[35]

To begin with the first of Griller's criteria, the Court established at the very beginning that individuals (Member State nationals) are granted rights by the Treaty on which they can rely and have enforced in national courts.[36] Yet, that was just the beginning. Subsequently, taking the hints of some national constitutional courts, the Court also established that individuals have fundamental rights, which Union institutions and Member States need to respect when they act within the scope of EU law. Drawing inspiration from the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the common constitutional traditions of the Member States, the Court established that fundamental rights constitute general principles of EU law. Those rights are now enshrined in a Charter (Charter of Fundamental Rights (CFR)), which has the same status as the Treaties.[37]

Another monumental development in the history of European integration was the move from economic to political integration with the signature of the Maastricht Treaty and the inclusion of intergovernmental cooperation in the two new pillars of the EU: Common Foreign and Security Policy, and Justice and Home Affairs. To mark the importance of this shift, and create a concept that would bring Member States' nationals closer to the integration project, the status of Union citizenship was introduced.[38] While the concept of Union citizenship was regarded as empty and superfluous at the beginning, the Court managed to flesh it out. It proclaimed that it "is destined to be the fundamental status of nationals of Member States".[39] In short, in terms of securing rights of individuals, the EU legal order has moved a long way forward compared to its early days.

As to the latter two criteria, separation of powers is foreseen both vertically and horizontally in the EU.[40] The Treaties lay down the division of competences between the Union and its Member States, and provide for procedures through which the Union institutions interact in order to be able to legislate. The Court makes sure that those procedures and the balance between the

35 Curtin also identifies modern constitutionalism with three elements. Those are limited government, adherence to the rule of law and protection of fundamental rights. See, Curtin, "The Sedimentary European Constitution – The Future of 'Constitutionalisation' without a Constitution," 80.

36 *Case 26/62 Van Gend en Loos*.

37 See Article 6(1) TEU.

38 See Article 20 TFEU.

39 *Case C-184/99 Grzelczyk*, [2001] ECR I-6193, para. 31.

40 See Articles 5 and 13 TEU.

institutions is respected,[41] which leads Griller to the conclusion that the Treaties can be qualified as a constitution.[42]

1.2.2 Evolution towards further entrenchment of rights

Since the French revolution individual rights, together with representative government, (which according to Bellamy was largely assimilated to the principle of separation of powers), have defined constitutionalism for a long time. However, rights have become predominant in recent years. "Rights, upheld by judicial review, are said to comprise the prime component of constitutionalism, providing a normative legal framework within which politics operates."[43] While rights have risen to provide the substantive aspect of the constitution, political mechanisms and procedures have been relegated to a secondary role. Accordingly, argues Bellamy, "constitutionalism has come to mean nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process".[44] In the same vein, Dworkin pointed out that constitutionalism is increasingly understood as being no more than "a system that established legal rights that the dominant legislature does not have the power to override or compromise".[45] The question is whether that is the case in the EU legal order as well, and if so, to what extent? The experiences of the German and Indian constitutional orders, which are briefly discussed below, provide useful clues and guidance that enable us to draw some conclusions for the EU legal order as well.

The latter definition of constitutionalism implies the entrenchment of certain individual rights or a hierarchically superior position in comparison to other provisions of a constitution. While many constitutions declare that it is "the people" who are sovereign and exercise that power through the democratic process, they also establish limits on what can and cannot be done within that process. As far as individual rights constrain and limit the legislature, this is viewed as the clash of democracy versus rights,[46] or the clash of ancient versus modern constitutionalism,[47] also referred to as the counter-majoritarian

41 See *Case 138/79 Roquette Fréres*, [1980] ECR 3333; *Case 139/79 Maizena*, [1980] ECR I-3393; *Case C-70/88 Parliament v Council*, [1990] ECR I-2041.
42 Griller, "Is this a Constitution? Remarks on a Contested Concept," 32.
43 R. Bellamy, "The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy," *Political Studies* XLIV(1996): 436.
44 Ibid.
45 R. Dworkin, "Constitutionalism and democracy," *European Journal of Philosophy* 3, no. 1 (1995): 2.
46 E. Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment," *Columbia Journal of Law and Social Problems* 29(1996): 252-53.
47 La Torre, *Constitutionalism and Legal Reasoning: A New Paradigm for the Concept of Law*: 1-12.

difficulty.[48] What led to the rise of constitutionalism in the latter sense were events such as the atrocities committed during the Second World War, post-colonialism, and military interventions in troubled democracies.[49] They resulted in the insertion of "immutable constitutional clauses" protecting the rights of the individual in the constitutions of many states.[50]

While some of those rights were spelled out explicitly by the constituent power (*pouvoir constituant*) that had drafted the constitution in some states, such as Germany and Brazil,[51] in others, the same result was achieved by judicial activism. Constitutional courts in countries, such as India,[52] South Africa[53] and Colombia,[54] developed doctrines to protect individual rights

48 The counter-majoritarian difficulty is seen as the "intrinsic constitutional dilemma", which arises in legal systems in which the judiciary has the ultimate authority to interpret the constitution and is able to overrule unconstitutional acts of the executive and legislative branches through judicial review. See, Michael Freitas Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," *The International Journal of Human Rights* 15, no. 5 (June 2011): 765.

49 This logic can be seen in Klass Case of the GCC: "The purpose of Article 79, paragraph 3, as a check on the legislator's amending the Constitution is to prevent the abolition of the substance or basis of the existing constitutional order, by formal legal means of amendment …. and abuse of the Constitution to legalize a totalitatrian regime." See, Privacy of Communications Case (Klass Case), BverfGE, 1 (1970).

50 Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 765-67. Not all examples of immutable clauses deal directly with the protection of individual rights. Often, it is the form of government that is protected. For instance, Article 89 of the 1958 French Constitution, Article 139 of the 1947 Italian Constitution, Article 288 of the 1975 Portuguese Constitution and Article 4 of the 1982 Turkish Constitution protect the republican form of government. An interesting example to note is Article 112 of the 1814 Norwegian Constitution, which protects the "spirit" of the constitution. It provides that constitutional amendments "must never […] contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution". See, K. Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Turkey: Ekin Press, 2008). 52-53 and 70.

51 See, H. Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany," *NUJS Law Review* 1(2008); D. P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40(1991); Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority."; R. O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms," *Journal of Civil Liberties* 4(1999); R. Albert, "Nonconstitutional Amendments," *Canadian Journal of Law and Jurisprudence* XXII, no. 1 (January 2009).

52 S. Prateek, "Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations and the Future of Political Progress in India," *NUJS Law Review* 1(2008); Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 770-72; G. J. Jacobsohn, "An unconstitutional constitution? A comparative perspective," *International Journal of Constitutional Law* 4, no. 3 (July 2006): 470-76.

53 Albert, "Nonconstitutional Amendments," 25-28; Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority."

as well as certain aspects of their systems, which they viewed as defining or essential for their constitutional identity.[55] In the case of Germany and Brazil, their constitutions laid down the so-called "eternity clauses" or "petrified clauses" (*cláusulas pétreas*), which future legislatures acting as constituted powers (*pouvoir constitué* or also called "derived constituent power") would not be able to amend.[56] In Germany, it is Article 79(3) of the Basic Law (*Grundgesetz*; henceforth GG) that prohibits the amendment of the constitution "in such a way as to change or abrogate the principles laid down in Arts. 1 and 20 GG".[57] While Article 20 GG lays down the central qualities of the German State such as democracy, republican State order, federal organization etc., Article 1 GG enshrines one of the constitution's "most fundamental, 'supra-positive' principles",[58] which declares human dignity inviolable. Article 60 of the Brazilian constitution plays a similar function.[59]

The existence of the immutable clauses should not be taken to mean that the German and Brazilian courts were less activist compared to their Indian or Colombian counterparts.[60] The German Constitutional Court (GCC) has widened the scope of application of Article 79(3) GG by providing a broad interpretation to the concept of human dignity.[61] In the same vein, its Brazilian counterpart has extended the immutability doctrine to almost all

54 C. Bernal, "Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine," *International Journal of Constitutional Law* 11, no. 2 (2013).

55 For a comparative study including various traditions of judicial review of constitutional amendments, see Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*.

56 The distinction between constituent and constituted powers is traced back to Emmanuel Joseph Sieyès. While the former refers to the sovereign power of the people to create a new constitutional regime without any restraints (also called "original constituent power"), the latter refers to the power to reform the constitution in accordance with the procedural and/or substantive limits set by the original constituent power (also called "derived constituent power"). See, E. J. Sieyès, *What is the Third Estate?* (New York: Praeger, 1963); cited in J. I. Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," *Constellations* 18, no. 3 (2011): 366.

57 R. Herzog, "The Hierarchy of Constitutional Norms and Its Functions in the Protection of Basic Rights," *Human Rights Law Journal* 13, no. 3 (1992): 90.

58 Ibid.

59 It prohibits any proposition to abolish: "(a) federative form of the state; (b) the concealed, direct, universal and periodic right to vote; (c) the separation of powers and (d) individual rights and guarantees." See, Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 773.

60 O'Connel argues that the doctrine of "unconstitutional constitutional norms", proclaimed in the Southwest Case, 1 BVerfGE 14 (1951), is controversial, since there is no explicit authorization in the Basic Law for the review of legality of constitutional amendments. That power was claimed by the GCC in order to "protect the objective order of values on which the Constitution rests". See, O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms," 54.

61 Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany," 408.

constitutional provisions that confer rights on individuals.[62] However, those clauses are not the only means employed by constitutional courts to guarantee the identity and continuity of the constitutions, whose guardians they are. It is worth citing more extensively from the case law of the GCC, since it forms part of the constitutional tradition on which the jurisprudence of the Court of Justice is built and serves as a source of inspiration for the doctrines developed by other constitutional courts, such as "the basic structure doctrine" of the Indian Constitutional Court.[63]

In German constitutional theory, the constitution is seen as a coherent and unified structure of principles and values.[64] Hence, the GCC provided that:

> 'An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an *inner unity*, and *the meaning of any part is linked to that of other provisions*. Taken as a unit, a constitution reflects certain *overarching principles* and fundamental decisions to which individual provisions are subordinate.
> …
> That a constitutional provision itself might be null and void, is not conceptually impossible just because it is part of the constitution. There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene these principles.'[65]

The court clarifies that both harmonious interpretation as well as invalidation are possible options. In a later case, it also explained that fundamental constitutional change was possible, but only if it were in line with the overarching principles and the logic/identity of the constitution, i.e. if it were carried out "in a system-immanent manner".[66] Hence, a constitutional amendment could

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62 Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 773.

63 Prof. Dietrich Conrad, a German scholar of Indian politics and law, is seen as the instrumental name in acquainting Indian judges with the German experience. See, Jacobsohn, "An unconstitutional constitution? A comparative perspective," 477; see also, Chapter I titled "Sanctity of the Constitution: Dieter Conrad – the man behind the 'basic structure' doctrine", in A. G. A. M. Noorani, *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability* (New Delhi: OUP, 2006).

64 Kommers, "German Constitutionalism: A Prolegomenon," 851; Jacobsohn, "An unconstitutional constitution? A comparative perspective," 478.

65 Emphasis added. The Southwest Case, 1 BVerGE 14 (1951), cited in W. F. Murphy, "Slaughter-House, Civil Rights, and Limits on Constitutional Change," *The American Journal of Jurisprudence* 32(1987): 13-14.

66 Privacy of Communications Case (Klass Case), BverfGE, 1 (1970). The GCC declared as follows: "Restrictions on the legislator's amending the Constitution … must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional

be nullified to the extent that it transformed the constitution into something "fundamentally incoherent".[67]

Similarly, in one of the most important cases of Indian constitutional law, *Kesavananda Bharati v. the State of Kerala*,[68] the Supreme Court of India ruled by a narrow majority (7-6) that the constitution could be amended following the procedure stipulated in Article 368, however, no part could be amended so as to change its "basic structure". Six of the Justices argued that Article 368 did not empower the Parliament to abolish fundamental rights because it contains "inherent or 'implied limitations'"[69] that protect the "basic structure" of the constitution. The other six disputed the existence of such limitations. The Justice tilting the balance (Justice Khanna) rejected the theory of implied limitations but argued that the word "amendment" itself contained limitations. He argued that "[t]he power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution."[70] That is the same argument that lies at the basis of "the constitutional replacement doctrine" developed by the Colombian Constitutional Court.[71]

It is argued that the doctrine developed by the Indian Court constitutes a version of the coherence requirement developed by the GCC. As far as it also emphasized the need to preserve the identity of the Indian constitution, it is viewed as a more demanding criterion,[72] even though both are interlinked. As Jacobsohn argues, "the incongruities and inconsistencies that could lead to a finding of constitutional incoherence might only mean that the document's identity has been obscured in a manner that seemingly casts doubt on its fundamental character and commitments".[73] As to the vexing issue of what

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principles in a system-immanent manner", cited in Jacobsohn, "An unconstitutional constitution? A comparative perspective," 477.

67 Ibid., 478.

68 AIR [1973] SC 1461.

69 Noorani, *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability*: xv.

70 Ibid.

71 Articles 241 and 379 of the Colombian Constitution empowers the Court to review constitutional amendments, however, only with respect to the rules establishing the amendment procedure. The Colombian Constitutional Court developed the "constitutional replacement doctrine" to circumvent this constraint. Put succinctly, it argued that the power to amend the constitution does not entail the power to replace it, but to only modify it. The Court has the power to check whether the amending authority is only modifying, or replacing the constitution. However, that requires an analysis of the content to be able to determine whether the constitution is modified or replaced. In short, the Colombian Court concludes that "the power to review whether the constitution has been replaced implies the competence to review the content of constitutional amendments". Bernal, "Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine," 340.

72 Jacobsohn, "An unconstitutional constitution? A comparative perspective," 478.

73 Ibid.

constitutes a state's identity, and when it could be considered to have changed, Aristotle provided the following answer: "a polis's identity changed when the constitution (referring to more than just a document) changes as the result of *a disruption in its essential commitments*".[74] Hence, we can identify the EU's identity by looking at its main goals and commitments. When those goals clash with the means to achieve them, according to Murphy, "it is the means that must yield, unless a people rethink and redefine their goals".[75]

What can be extrapolated from the German and Indian examples for the EU legal order? There are no explicitly set immutable clauses in the Treaties. However, it can be argued that there is an implied hierarchy within the Treaties, which is also confirmed by the case law of the Court.[76] Just as the Indian Supreme Court established that some fundamental rights form part of the "basic structure" of the Indian Constitution, which it protects, the CJEU established the fundamental nature of some principles, which form part of "the very foundations"[77] of the Union legal order, whose guardian it is. The Court did not hesitate to give negative opinions about signing agreements, which it found incompatible with principles that form part of "*the very foundations* of the Community",[78] or as it stated more recently, incompatible with "*the essential character of the powers* which the Treaties confer on the institutions of the European Union and on the Member States and which are *indispensable to the preservation of the very nature of European Union law*".[79]

Fundamental rights are now deeply entrenched in the EU legal order. They are called "constitutional principles" by the Court.[80] They are qualified as "constitutional core values".[81] This can be inferred both from the Treaty text itself, as well as from the case law of the Court. To begin with the latter, in *Kadi*, the Court explicitly stated that other Treaty provisions "cannot be understood …to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article

74 Aristotle, *The Politics of Aristotle*, trans. E. Barker (OUP, 1962). 99; cited in Jacobsohn, "An unconstitutional constitution? A comparative perspective," 478.
75 Murphy further warns that "means – institutional arrangements – inconsistent with those ends pose grave problems for the system's survival". See, Murphy, "Slaughter-House, Civil Rights, and Limits on Constitutional Change," 18.
76 See *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, [2008] ECR I-6351, paras. 288-90.
77 Ibid., para. 303. See also, *Opinion 1/91 EEA*; and J. L. C. Vilaça and L. N. Piçarra, *Are there material limits to the revision of the Treaties on the European Union?* , Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte Nr 46 (Bonn: Rheinische Friedrich-Wilhelms-Univesität Bonn, 1994).
78 Emphasis added. *Opinion 1/91 EEA*.
79 Emphasis added. *Opinion 1/09 of the Court of Justice*, [2011] ECR I-1137, para. 89.
80 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 285.
81 See, J. Kokott and C. Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?," *The European Journal of International Law* 23, no. 4 (2012): 1015.

6(1) EU [now Article 2 TEU] as a foundation of the Union".[82] The Court elaborated further, that other provisions, in this case Article 307 EC, "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights".[83]

The foundational or overarching character of fundamental rights can also be inferred from the clear wording of Article 2 TEU as well as their central place in the Treaty. As soon as Article 1 TEU declares the establishment of the European Union, Article 2 TEU lists the values (previously, principles listed in ex Article 6(1) TEU) on which the Union is built. According to Article 2 TEU:

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

Moreover, first among the list of the Union's objectives in Article 3(1) TEU is the promotion of peace, Union's values and the well being of its people. Article 6 TEU is also entirely devoted to demonstrate the central place of fundamental rights in the EU legal order. After declaring the rights and freedoms in the CFR have the same legal value as the Treaties in its first paragraph, Article 6(2) TEU mandates Union's accession to the ECHR. Last but not least, Article 6(3) TEU proclaims that fundamental rights as guaranteed by the ECHR and common constitutional traditions of the Member States constitute general principles of Union law.

The fact that the very first sentence of Article 49 TEU, which lays down the procedure for accession of new Member States mentions respect for the values in Article 2 TEU as well as commitment for their promotion as a precondition for application of EU membership, also illustrates their importance. However, arguably, the provision that implies their hierarchical superiority is Article 7 TEU. While other fundamental rights provisions in the Treaty apply on the proviso that Member States act within the scope of Union law, there is no such limitation in Article 7 TEU. The values enumerated in Article 2 TEU are considered to be so important, so vital for the EU legal order that a clear risk of serious breach of those values eradicates the "acting within the scope of Union law" requirement for Member States. Hence, the European Council is empowered to take punitive measures against a Member State in serious and persistent breach of these values, even when the latter breach falls under

82 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 303.
83 Ibid., para. 304.

the so-called "internal situation" rule.[84] Article 7 TEU clearly illustrates the degree to which protection of fundamental rights has been internalized in the EU legal order. Even though the process whereby fundamental rights were incorporated into the case law of the Court was instigated by the push of a few national constitutional courts, the EU now acts as a guarantor of rights both against the Member States (by virtue of Article 7 TEU) as well as against international organizations.[85] This clearly demonstrates the emergence of the EU legal order as a new and autonomous legal level between national and international law.[86]

The latter discussion leads us to a definition of constitutionalisation, which signifies the process by which the Treaties assert their normative independence *vis-à-vis* the Member States and become "the founding charter of a supranational system of government".[87] It is usually argued that the border between an international treaty and a constitution will be transgressed if future amendments are no longer a prerogative of the Member States.[88] In other words, the crucial question is to what extent the EU as the subject created by the Treaties can become legally independent from the Member States, which are the parties to the Treaties?[89]

While it is still the Member States that are "the Masters of the Treaty text",[90] as illustrated above, once ratified they escape their exclusive control.[91]

84 In its Communication on Article 7 TEU, the Commission provided the following explanation concerning its application: "[t]he scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously." See, Communication from the Commission to the Council and European Parliament, on "Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based", COM(2003) 606 final, 15.10.2003, p. 5. See also, Communication from the Commission to the European Parliament and the Council, "A new EU Framework to strengthen the Rule of Law", COM(2014) 158 final/2, 19.3.2014, p. 5.

85 See, *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*.

86 According to Möllers, in the context of EU law, constitutionalisation denotes the developing autonomy of the legal order from intergovernmental action. It can also be defined as "a phenomenon of the gradual formation of a new legal level". See, C. Möllers, "Pouvoir Constituant – Constitution – Constitutionalisation," in *Principles of European Constitutional Law*, ed. A. von Bogdandy and J. Bast (Hart Publishing and Verlag CH Beck: 2009), 195. See also, *Case 26/62 Van Gend en Loos*; and G. De Búrca, "The EU, the European Court of Justice and the International Legal Order after Kadi," *Harvard International Law Journal* 1, no. 51 (2009).

87 T. Tridimas, *The General Principles of EU Law*, 2nd ed. (Oxford: OUP, 2006). 5.

88 Möllers, "Pouvoir Constituant – Constitution – Constitutionalisation," 176; see also, Besselink, "The Notion and Nature of the European Constitution After the Lisbon Treaty," 268.

89 Griller, "Is this a Constitution? Remarks on a Contested Concept," 23.

90 De Witte, "Treaty Revision Procedures after Lisbon," 36. J. Shaw, "Process and Constitutional Discourse in the European Union," *Journal of Law and Society* 27, no. 1 (March 2000): 29.

91 De Witte, "Treaty Revision Procedures after Lisbon," 36.

The enormous contribution of the Court of Justice to the development of the unwritten or empirical constitution was already mentioned. It is true that Treaty amendments "provide for a framework but it takes tradition, conventions and implementing law to make the system tick".[92] The process of development of these legal and institutional practices is incremental and cumulative, some of which lead to corresponding changes in the Treaties over time.[93] If Member States act as Masters of the Treaties from one amendment to another, while in between the system incrementally evolves and takes shape in the light of the interactions of the EU institutions, what conclusion does this lead us to?

As Walker explains eloquently:

> '… constitutionalism and constitutionalization should be conceived of not in black-and-white, all-or-nothing terms but as questions of nuance and gradation. There is no unitary template in terms of which constitutional status is either achieved or not achieved …'[94]

Accordingly, if "constitutional" and "not-constitutional" are seen as the two opposite ends of a spectrum, the constitutionalisation of the EU legal order can be viewed as a gradual and evolutionary process that has slowly but surely been moving towards the "constitutional" end of the spectrum spurred by the case law of the Court and Treaty amendments. Since EU constitutional law comprises both the Treaties as well as the case law of the Court, it is often compared to the unwritten constitution of the UK, which is comprised of charters, bills, declarations, Parliamentary statutes, constitutional conventions etc.[95] As argued above, Tanchev confirms that the concept of the unwritten EU constitution, though more difficult to comprehend, "reflects a relatively high level of independence of the Communities from the Member States and has a highly developed level of legally regulated power, institutional framework independently existent from the Member States".[96]

92 Curtin, "The Sedimentary European Constitution – The Future of 'Constitutionalisation' without a Constitution," 82.

93 Ibid., 85.

94 N. Walker, "The Idea of Constitutional Pluralism," *The Modern Law Review* 65, no. 3 (2002): 339. Like other scholars cited above, Walker identifies a set of factors that enable one to identify and measure the degrees of constitutionalisation. His "indices of constitutionalism" can be summarized as follows: discursive self-awareness, authority, jurisdiction, interpretive autonomy, institutional capacity, citizenship and voice. For a more detailed elaboration of those indices, see pp. 343-354.

95 Tanchev, "The Lisbon Treaty within and without Constitutional Orthodoxy," 31; See also, Besselink, "The Notion and Nature of the European Constitution After the Lisbon Treaty," 262-67.

96 Tanchev, "The Lisbon Treaty within and without Constitutional Orthodoxy," 31-32.

The role of the Court of Justice in the constitutionalisation of the EU legal order can indeed not be overrated.[97] Sólyom draws attention to the importance of historical circumstances as well as the self-understanding of constitutional courts, since they actively shape their own competences and power.[98] In that regard, both the self-understanding of the Court of Justice,[99] which can be inferred from the Court's reference to the Treaties as 'constitution', 'constitutional' or 'the basic constitutional charter',[100] the historical circumstances under which it was established in the framework of the Communities in the aftermath of the Second World War, as well as the constitutional traditions of the Member States' constitutional courts from which it draws inspiration and with which it interacts, have been instrumental in how the Court shaped its own jurisdiction as well as the legal order within which it operates.[101]

In short, this overview serves to demonstrate how the process of entrenchment of fundamental rights in some of the European national legal orders was followed by the Court of Justice as well as other constitutional courts around the world. This process of emulation has, in addition to other factors and developments, contributed to the further constitutionalisation of the Union legal order. The more entrenched rights are in a legal order (that is the more deeply rooted they are), the more constraining they get for actors operating within it. For the purposes of this thesis, it is important to expose that a PSC on free movement of persons would violate rights that are deeply rooted in the Union legal order. In our case, such an exposition would imply that Member States would not have the power to override those rights, i.e. those rights would constrain them from including the PSC in a future Accession Agreement. A preliminary examination of the compatibility of the PSC with the legal order and some of its fundamental principles follows in 5.2.4.3.2.

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97 There are many scholars, who in defining the process of constitutionalisation, lay emphasis on the Court's contribution to the process. For instance, Tanchev provides the following definition: "[t]he constitutionalization is a mechanism through which the unwritten constitution is taking shape through the Court's jurisprudence". See, ibid.

98 L. Sólyom, "Comment," in *European and US Constitutionalism*, ed. G. Nolte (Cambridge University Press, 2005), 249.

99 For a brief elaboration of the constitutional powers exercised by the Court of Justice, see M. L. F. Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999). 23-25.

100 See *Opinion 1/76*, [1977] ECR 741, para. 12; *Case 294/83 Les Verts*, para. 23; *Joined Cases 46/87 and 227/88 Hoechst AG*, [1989] ECR 2859, para. 62; *Opinion 1/91 EEA*, para. 20; *Case C-314/91 Weber*, [1993] ECR I-1093, para. 8; *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, paras. 202, 81 and 316. For a deeper discussion of these cases, see Esteban, *The Rule of Law in the European Constitution*: 26-37.

101 It is argued that many "European constitutional courts were created out of a deep mistrust in the majoritarian institutions, which had been misused and corrupted during the Nazi, fascist, and communist regimes". It was this historical setting that led the judges to see themselves as guarantors of their democratic legal orders and explained their "self-conscious activism". See, Sólyom, "Comment," 249-50.

1.3 NATURE OF "LEGAL CONSTRAINTS": THEORETICAL DEFINITION

The preceding discussion on the nature of the legal order is important, as it provides important clues as to the types of legal constraints operating within it. It is possible to make different categorizations of the concept of legal constraints. So far, procedural and substantive constraints were mentioned, as well as those relating to the overall structure or identity of a constitution. While procedural constraints were just mentioned in passing, the significance of some substantive constraints, especially those flowing from the fundamental nature of some principles and norms, was emphasized. It was also argued that just like some national constitutional courts protect the "basic structure", identity or coherence of their constitutions, so does the Court of Justice protect "the very foundations" of the Union legal order. In other words, those "very foundations" place constraints on Member States and Union institutions, which need to be taken account of.

To begin with the theoretical underpinning of the concept of legal constraints in the literature, the constraining effect of law is typically considered to be based on internal and external considerations (internal (normative) versus external constraints). The first and most obvious way that law constrains is when relevant actors or institutions within a system have internalized legal norms derived from "authoritative text, judicial decisions, or institutional practice",[102] i.e. they have learnt what those texts or decisions say and act accordingly, out of belief they "ought to" do so. As far as the protection of fundamental rights in the EU legal order is concerned, it is not difficult to demonstrate how deeply internalized they are as they are mentioned widely in the Treaties, as well as in Member States' constitutions. Moreover, they have been incorporated into the case law of the Court as general principles of EU law as mentioned above, and have always been actively promoted by the political institutions.[103] All actors believe in the value of and need to act in accordance with established standards of fundamental rights. The last Chapter of this thesis provides a specific example of the general principle of equality.

Normative (or internal) constitutional constraint is a matter of law: it does not depend on what any particular actor or institution believes the law to be. However, since different actors can perceive the law differently, Fallon distinguishes further between "direct normative constraints" and "mediated constitutional constraints".[104] The former are about "the *perceptions* of constitutional obligation"[105] experienced by particular actors. Since different per-

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102 Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1132; in the literature, this is referred to as the "Hartian" perspective. See, H. L. A. Hart, *The Concept of Law*, 2 ed. (1994).

103 See, Joint Declaration by the European Parliament, Council and the Commission concerning the protection of fundamental rights and the ECHR (Luxembourg, 5 April 1977).

104 Fallon, "Constitutional Constraints," 995-97.

105 Ibid., 1036.

ceptions might lead to a dispute about constitutional meaning, the importance of the latter concept comes to the fore, as "mediated constitutional constraint" is about the interpretation adopted by the judiciary, which further constrains the non-judicial actors and institutions.[106]

In the EU legal order, it is the Court of Justice that provides authoritative interpretation of provisions of both primary and secondary law.[107] To provide an example, it is not rare that different institutions have different understanding of what the Treaties provide for. In *Chernobyl*,[108] different understandings of what Article 173 EC (now Article 263 TFEU) meant (direct normative constraint) led to a dispute between the European Parliament and the Council. The Court held that the provision should be interpreted to allow Parliament to bring an action for annulment to safeguard its prerogatives, despite the fact that it was not listed as one of the institutions that could do so under Article 173 EC. The Court's pronouncement constituted an example of a "mediated constitutional constraint", which was thereafter, binding on all actors and institutions operating within the scope of Union law.

As to the second type of constraints, called external constraints, their power arises from "[t]he prospect of inefficacy and the threat of sanctions".[109] Actors within a legal order are aware of the boundaries of their competence and authority. They know that transgressing those boundaries would make their assertions of power inefficacious, and trigger sanctions in some cases. For instance, if the Council fails to follow the procedure prescribed in the Treaties, and tries to legislate without obtaining the consent of the Parliament as required, the promulgated legal act could be invalidated by the Court, for not fulfilling "an essential procedural requirement".[110] Similarly, there are procedures built in the system, for instance the infringement proceedings under Article 258 TFEU, whereby Member States, which fail to fulfil their obligations under the Treaty might end up incurring heavy financial sanctions.[111]

Despite the distinction between internal and external (sources of) constraints in the literature, scholars point out that in many contexts the two do not

106 Ibid.

107 See, Article 19(1) TEU and Article 267 TFEU.

108 *Case C-70/88 Parliament v Council*.

109 Fallon, "Constitutional Constraints," 1036. For a more detailed discussion of "external sanctions", see ibid., 997-1000; and Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1137-40.

110 *Case C-65/90 European Parliament v Council*, [1992] ECR I-4593, para. 21.

111 Bradley and Morrison explain further that enforcement does not have to be formal. Even formal modes of enforcement are considerably strengthened by informal mechanism, such as criticism and public shaming. See, Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1127.

operate independently.[112] Bradley and Morrison underline that often practices followed out of fear of external sanction become internalized as a result of habit. This is called "the normative power of the actual" and denotes people's inclination "to give normative significance to that with which they are familiar".[113] When applied to actions of States in the context of international law, that type of behaviour or practice results in the formation of 'custom'.[114] In political science, the latter logic is called "path dependency".[115] In the latter context, it is not necessarily borne out of fear of external sanction, but rather out of habit and the convenience of the familiar. Overall, given how the internal and external constraints are intertwined, this thesis does not make an effort to disentangle them or specify exactly what sort of legal constraints we are dealing with.

1.4 Identifying "legal constraints": Operational definition

In this thesis the focus is on constraints that limit Member States' behaviour as primary law makers in the particular context of drafting Accession Agreements. The focus is on constraints that find their source in the EU legal order. Even though our focus is on "legal" constraints, as it will become clear below, a wide interpretation of the term "legal constraint" is employed. Hence, what is covered is a wide range of rules, norms, principles and practices deriving from the pre-accession and accession process of a new Member State as well as from the constitutional foundations of the Union that constrain existing Member States and compel them to follow a particular course of action.

To be more specific about what falls within the scope of our broad definition of "legal constraints" in EU law, it is composed of three categories: directly effective law (justiciable law), or hard law; law that is not clear, precise and unconditional enough to produce direct effect (non-justiciable law); and established practices and procedures (written and unwritten). To begin with the first category of constraints, "directly effective law" comprises provisions, principles and norms that can be invoked in courts of law. Those could be invoked in their own right, such as directly effective Treaty provisions, as well

112 Ibid., 1040. Fallon agrees with that, but points out that there could be few instances when the two might diverge. For instance, in the American system voters could sanction a state court judge for upholding an unpopular but legally valid constitutional claim. See, Fallon, "Constitutional Constraints," 1036.

113 Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1140.

114 M. Koskenniemi, "The Normative Force of Habit: International Custom and Social Theory," in *International Law*, ed. M. Koskenniemi (New York University Press, 1992), 213-89.

115 P. Pierson, "The Path to European Integration: A Historical Institutionalist Analysis," *Comparative Political Studies* 29, no. 2 (1996): 145-46; J. Giandomenico, "Path Dependency in EU Enlargement: Macedonia'a Candidate Status from a Historical Institutionalist Perspective," *European Foreign Affairs Review* 14(2009): 89-112.

as to check the legality of other measures, such as the general principles of law, to provide two examples.

Second, come legal provisions with no direct effect, i.e. the so-called "quasi-legal" norms and principles, which can also be traced back to Treaty provisions or other legal measures. These norms, even though not suitable for reliance in courts of law, do affect Member States' behaviour; hence they need to be taken into account. The line between the political and legal is not always easy to draw.[116] What will distinguish the norms, principles and values identified in this category from the purely political, in other words what will qualify them as "quasi-legal" will be the fact that they are traceable to a given written binding legal source. For instance, while principles can be invoked in courts, we do not know whether the same is true for "values",[117] which are also mentioned in the Treaties. If we were to stick to a very strict definition of what "legal" is, we would be able to identify only some of the factors constraining Member States as primary law makers, and would miss many other significant ones.

Another reason for not being very strict with this category are the developments of the last twenty years. The EEC was initially a legal and technocratic project, but the EU is now far beyond that, which is visible in the TEU and TFEU. The Treaties are imbued with "fundamental rights and freedoms" language. As will be demonstrated in Part III of this thesis, which is on the constitutional foundations of the Union, the impetus for many legal developments was political. The creation of the citizenship concept or the incorporation of the CFR in the Treaties are all part of efforts to bring the Union closer to its citizens and thereby increase the legitimacy of the integration project. In other words, the political rationale underlying certain provisions can be seen as an additional force contributing to their power as legal constraints.

The third category of legal constraints consists of the established practices and procedures, which Member States and the institutions of the EU follow even if those are not to be found in strictly legally binding (or written) instruments. Those established practices are customs similar to the "constitutional conventions"[118] in UK law, or "customs" under public international law.[119] They also constrain Member States. In Part II, it will be illustrated how the process of the accession of a new Member State is governed by practice set

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116 As Bradley and Morrison argue, law and politics are frequently intertwined. See, Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1124.

117 Compare the wording of *ex* Article 6(1) TEU with the current Article 2 TEU.

118 A constitutional convention is defined as an informal and uncodified procedural agreement that is followed by the institutions of a state. For a more detailed elaboration see, P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, 2 ed. (Hart Publishing, 2012). 32-41.

119 See Koskenniemi, "The Normative Force of Habit: International Custom and Social Theory."; D. Kennedy, "The Sources of International Law," in *International Law*, ed. Martti Koskenniemi (New York University Press, 1992), 362-79.

by the first wave of accession (that of the UK, Ireland and Denmark). Even though there were some changes to accommodate the particular needs of every enlargement wave, the basics of this process were followed in all subsequent enlargement waves.

To sum up, the reason for the employment of a broad definition of legal constraints is to provide as accurate a picture as possible of the accession process, which culminates in the drafting and ratifying of an Accession Agreement. Focusing only on one or two of these dimensions would produce a picture that is blurred, patchy and incomplete, hence the need for a broader definition that provides a clearer and more accurate picture.

1.4.1 Methodology

This thesis is a case study, which aims to establish the existing legal constraints on Member States as primary law makers in the context of accession. There are many more types of constraints in operation in the Union legal order: of a political, economic or psychological nature to name but a few. For the purposes of this thesis, as discussed above, constraints of a "legal" nature are of relevance. Yet, there are a myriad of constraints of a legal nature. This thesis provides a case study of the PSC, which means that it aims to identify those "legal constraints", which would operate to preclude the inclusion of a PSC that would seriously breach them.

The method of a study needs to be suitable for the analysis of the material at hand. It should be able to help to extract a meaningful answer to the main research question. The methodology chosen for this thesis is firstly, determined by the operational definition coined for the concept of "legal constraints"; and secondly, by the nature of the (legal) material available in the three levels of analysis, i.e. constraints that flow from association law, enlargement law, and EU constitutional law.

The second important consideration in choosing an appropriate method, in addition to available material, is the nature of the area under analysis. While in some areas, such as in EU constitutional law, which is the area examined in Part III of this thesis, there are plenty of sources of a legally binding nature; treaty provisions, secondary law, case law, Opinions of the Court, in other areas, such as enlargement law examined in Part II of this thesis, there is one relevant treaty provision and a few cases that shed light on the interpretation of that provision. The rest of the picture is painted with the aid of non-binding documents of Union institutions (and academic literature) evidencing past practice in this area.

In short, analysis of every topic in each Chapter begins by examining hard law, that is the Treaties and existing secondary law. That is often complemented by the case law and Opinions of the Court, followed by academic discussion on the matter. If information generated is not sufficient to provide

a full or satisfactory picture or an explanation, established rules and procedures and common practices are also examined. The examination is also complemented by soft law: non-binding documents issued by Union institutions which have explanatory value in terms of revealing existing practices or policy choices of those institutions.

1.4.2 The Permanent Safeguard Clause (PSC)

The central role played by the PSC in this study requires a brief definition of the term, a preliminary overview of where it comes from, what it might entail and how it will be used for the purposes of this thesis. Last but not least, existing scholarly comments on the proposed clause are examined, as they provide a basis as to why it could be problematic and worth studying further.

Safeguard clauses are provisions that form the legal basis on which, after an authorisation obtained from an institution specified in the clause (usually the Commission), Member States are able to take protective measures to tackle an unforeseen situation that arises during a transitional period. In principle, they are tools available for a certain period of time: for instance, in the case of the original Treaties, Article 226 EC was available to the original Member States only until 31 December 1969,[120] that is the end of the transitional period.[121] Similarly, all safeguard clauses employed in previous Accession Agreements were available for a pre-determined period of time within which a new Member State was expected to adapt to the working of the internal market and eventually, assume full responsibility as an equal Member State of the Union. Likewise, the safeguard clauses provided the old Member States with time to adapt to the new circumstances of an enlarged internal market. In other words, these clauses functioned as safety valves during transitional periods dampening the effect of unexpected shocks by allowing protective measures to be taken either on the part of the old or new Member States.

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120 Article 226 EC provided as follows: "1. If, during the transitional period, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market. 2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect. 3. The measures authorised under paragraph 2 may involve derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market."

121 For examples of other safeguard clauses used in that period, see P. J. Slot, "Vrijwaringsclausules en vrijwaringsmaatregelen in het recht van de Europese Economische Gemeenschap," *SEW: Tijdschrift voor Europees en Economisch Recht* 9(1976): 473-502.

As mentioned above, the PSC analysed in this thesis appeared in Turkey's Negotiating Framework. Neither its precise form nor its mode of operation has been specified. Its unprecedented nature makes those elements difficult to foresee. All these factors raise doubts as to the possibility of including such a clause in an Act of Accession as well as to its compatibility with the Treaties. To have a closer look at the exact wording of the Negotiating Framework, it refers to:

> 'Long transitional periods, derogations, specific arrangements or *permanent safeguard clauses*, i.e. *clauses which are permanently available as a basis for safeguard measures*, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as *freedom of movement of persons*, structural policies or agriculture. Furthermore, the decision-taking process regarding *the eventual establishment of freedom of movement of persons* should allow for a *maximum role of individual Member States*. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.'[122]

It is not possible to infer from this paragraph which type of measures will be employed regarding the different policy areas mentioned. The focus in this thesis is on the freedom of movement of persons, because of its paramount importance in the system of the Treaty. As previously mentioned, the most important novelty in the paragraph cited above is the reference to *permanent* safeguard clauses, which will be always available as a basis for taking protective measures. Bringing the word "permanent" next to the "safeguard clause" seems problematic in the context of EU law. As it will be illustrated in more detail in Part II, safeguard clauses are flexible tools and can take various forms. Even the institution authorizing the measure can change.[123] However, what has been constant over the decades was their "temporary" or "transitional" nature.

Like any provision derogating from the main rules of the Treaties, safeguard clauses are also to be interpreted strictly.[124] What the Court established regarding the application of temporary derogation clauses in Accession Treaties is insightful for our purposes. The Court ruled that "it was justified for the original Member States *provisionally* to accept such inequalities, it would be *contrary to the principle of equality of the Member States before Community law* to accept that such inequalities could continue *indefinitely*".[125] Hence, the Act

122 Emphasis added. Point 12, paragraph 4 of the Negotiating Framework for Turkey. Available online at: http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf

123 While it is usually the Commission, which plays the central role in the authorization of the employment of safeguard clauses, it was the Council that was responsible (upon the Commission's recommendation) to take the postponement decision under the membership postponement safeguard clause laid down in Article 39 of the 2005 Act of Accession for Romania and Bulgaria.

124 *Case 11/82 SA Piraiki-Patraiki and others v Commission*, [1985] ECR 207, para. 26.

125 Emphasis added. *Case 231/78 Commission v UK*, [1979] ECR 1447, para. 11.

of Accession had to be interpreted with due regard "*to the foundations and the system of the Community, as established by the Treaty*".[126]

The vague wording of the paragraph from Turkey's Negotiating Framework cited above lends itself to many interpretations. For instance, the statement that "the decision-taking process regarding *the eventual establishment of freedom of movement of persons* should allow for a *maximum role of individual Member States*", suggests that the clause adopted regarding free movement of persons might be only temporary, if *eventually* freedom of movement is to be established. However, if we were to put emphasis on the latter aspect of the statement, that individual Member States would be given a maximum role, it is not difficult to envision a scenario whereby such a clause might turn into a permanent derogation clause in the hands of some Member States. Hence, the possibility of various scenarios is taken into account throughout this thesis, and a broad approach is adopted aiming to identify whether Member States would be precluded from including such clauses effecting free movement of persons in an Accession Agreement and if so, what kind of legal constraints would play a role in that process? However, the primary focus is on the proposed PSC, which has also drawn some scholarly attention.

The prevalent view in the literature is that there is a difference between Articles 48 and 49 TEU. While the former provides for 'amendment' of the Treaties, the latter allows only for 'adjustments' necessitated by accession. It is argued that Accession Agreements have to respect the fundamental principles underlying the Union legal order, and any changes going beyond mere 'adjustments' have to be introduced via Article 48 TEU.[127] The proposed PSC has been qualified as a "Trojan horse"[128] threatening to undermine the fundamentals of the Union, first and foremost the principle of equality of its citizens,[129] as well as that of its Member States.[130] Such a clause would

126 Emphasis added. Ibid., para. 12.

127 C. Hillion, "Widen to Deepen? The Potential and Limits of Accession Treaties to Achieve EU Constitutional Reform," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (T.M.C. Asser Institute, 2007), 163-64; A. Ott, "A Flexible Future for the European Union: The Way Forward or a Way Out?," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (T.M.C. Asser Instituut, 2007), 153-54; K. Inglis, *Evolving Practice in EU Enlargement* (Martin Nijhoff Publishers, 2010). 48-55; U. Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," in *Jean Monnet Working Paper 15/01*, ed. Professor J.H.H. Weiler European Union Jean Monnet Chair (2001), 9. Contra, see B. De Witte, "The Semi-Permanent Treaty Revision Process," in *Convergence and Divergence in European Public Law*, ed. P. Beaumont, C. Lyons, and N. Walker (Oxford: Hart Publishing, 2002), 51.

128 M. Emerson, "Vade Mecum for the Next Enlargements of the European Union," *CEPS Policy Brief* 61 (Dec. 2004): 2.

129 See Article 9 TEU and Chapter III of the Charter of Fundamental Rights (CFR). See also, C. Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," *European Constitutional Law Review* 3, no. 2 (2007): 275-78; S. Baykal, "AB Hukukunun Temel İlkeleri Çerçevesinde AB'ye Katılım ve Türkiye'nin Müza-

blatantly discriminate on the basis of nationality, as its targets would be only future Union citizens of Turkish nationality.[131] The fact that the internal market, the historical crux of the integration project has been built on the principle of non-discrimination on the basis of nationality, which is still at the heart of its functioning, places a big question mark on the compatibility of the proposed PSC with the fundamentals of the Union legal order. Building on what has already been said and studied, this thesis aims to move beyond what has already been done by providing a holistic account of constraints in play during accession negotiations by examining all levels of EU law from which they might be flowing.

1.5 STRUCTURE OF THE THESIS

It is argued that in the context of drafting an accession agreement, there are constraints on Member States flowing from three levels: *the pre-accession level*, that is the existing legal framework around the EEC-Turkey Association Agreement, known as the Ankara Agreement (Part I); *the accession process level*, which is comprised of past practice and existing EU rules on enlargement (Part II); and last but not least, *the constitutional foundations of the Union* (Part III), which constrain Member States whenever they act within the scope of Union law as both primary and secondary law makers. It includes a case study of the specific role of the principle of equality as part of the very foundations of the Union, as an essential component of Union citizenship, the CFR as well as a general principle of EU law.

1.5.1 Part I: Legal constraints flowing from EEC-Turkey Association Law

To begin with Part I, the centrepiece of this Part is the Ankara Agreement and Ankara Association Law built around it by the Contracting Parties, the Court of Justice as well as the Association Council. However, before going into discussing the constraints flowing from Association Law, Chapter 2 focuses on the concept of association as an instrument of EU external relations, in order to place the Ankara Agreement in context, as a genuine pre-accession agreement, among different types of association agreements. After defining the main

kere Çerçeve Belgesinde Yer Alan Esaslar," *Ankara Avrupa Çalışmaları Dergisi* 12, no. 1 (2013): 21-22.

130 See Article 4(2) TEU. See also Inglis, *Evolving Practice in EU Enlargement*: 54; Emerson, "Vade Mecum for the Next Enlargements of the European Union," 2; Ott, "A Flexible Future for the European Union: The Way Forward or a Way Out?," 152-54; Baykal, "AB Hukukunun Temel İlkeleri Çerçevesinde AB'ye Katılım ve Türkiye'nin Müzakere Çerçeve Belgesinde Yer Alan Esaslar," 25.

131 See Articles 18-20 TFEU.

characteristics of the relationship of association, which are laid down in Article 217 TFEU (ex Article 238(1) of the EEC Treaty), an overview of different types of association agreements signed in the past between the EEC/EC/EU and third European states is provided. While the range of association agreements signed with third countries is much broader, the reason to restrict our analysis to agreements with European states is the requirement enshrined in Article 49 TEU that only "European" states may accede to become Union members. The analysis in Chapter 2 reveals how association agreements signed with European states have mostly evolved into becoming stepping-stones for membership, even when that was not the original intention. As to the Ankara Agreement, just like the Athens Agreement, it is undoubtedly among the most ambitious association agreements having the explicit aim to facilitate Turkey's accession to the Union once it is ready to take on obligations flowing from membership.

Chapter 3 starts by examining the aims, structure and content of the Ankara Agreement, and is followed by a brief discussion of the most developed area of the association that is the Customs Union. The rest of the Chapter is devoted entirely to the analysis of rules on free movement of persons, as it is argued that the rules applicable in this area could constrain Member States from introducing a PSC on free movement of persons when they are drafting an Accession Agreement. Those rules are expected to constitute, as a minimum, a solid building block that will have to be complemented with other rules of the *acquis communautaire* on free movement of persons at the time of Turkey's accession.

Hence, the Chapter tries to lay down the current state of affairs regarding the free movement of workers, services and freedom of establishment. However, surprisingly, that is not an easy task, as the area is in a state of flux. The Association Council failed to take all the necessary decisions for the implementation of the freedoms; however, it took the very first steps regarding free movement of workers by adopting Decisions 2/76 and 1/80, which include standstill clauses. Though, left unimplemented, the schedule for establishing free movement of workers, and a standstill clause in the area of free movement of services and freedom of establishment was also laid down in an Additional Protocol. The case law of the Court of Justice instigating change to the rules on free movement of persons recently, revolves around the standstill clauses, which prohibit Member States from introducing "new restrictions" on those freedoms. The analysis of the Court's case law reveals the state of development of the three freedoms, and the fact that introducing a PSC would in certain cases contravene even the existing standstill clauses. Hence, it is argued that the existing level of development of the freedoms as well as the commitments entered into in the Ankara Agreement as well as subsequent rules of the Association Law, would act as constraints on Member States in drafting the future Turkish Accession Agreement.

1.5.2 Part II: Legal constraints flowing from the Accession Process

The focus of Part II is on constraints that flow from the accession process. Since Article 49 TEU is the provision regulating the process, it is placed under the spotlight to identify both the procedural and substantive constraints flowing from that provision. As important as this provision is, as illustrated in Chapter 4, which focuses on the procedural constraints flowing from Article 49 TEU, it merely provides the basic contours of the process and is far from reflecting in full what happens in practice. Hence, to provide a clearer account of the dynamics of the process in practice, starting from the precedent set by the first enlargement and the principles governing the process set therein, an overview of subsequent waves of enlargement is provided in tandem with the evolving roles of the Union institutions involved thereby. This involvement is interpreted as a strong indication of the supranational character of the process, in addition to its well-known inter-governmental component. Last but not least, it is argued that the established practice of past enlargements in combination with the consistent application of the principles governing accession, have created (and consolidated) a well-trodden path with a centripetal force that induces Member States to follow it again and again, i.e. what political scientists call "path dependence".

Chapter 5 begins by analysing the main substantive constraint that flows from the wording of Article 49 TEU, namely that of "adjustment". While the English language version uses the concept "adjustments" for changes in primary law, it uses "adaptations" for changes in secondary law. Other language versions use one and the same concept for both. Hence, different language versions of the concept, the Court's pronouncements on the term "adaptations", as well as past Accession Agreements and their content are examined with a view to shedding light on the scope and meaning of the concept "adjustment". Subsequently, follow analyses of other measures, which even though they do not fall, strictly speaking, under the category "adjustments" or "adaptations", are worth looking into as they share the same broad purpose, namely: facilitating the full integration of new Member States into the Union. Finally, measures that do not share that broad purpose, and as such arguably go beyond being mere "adjustments", by creating permanent exceptions in certain areas, are analysed to identify their nature, scope, and effects on the internal market, so as to establish whether they could be considered as precedents paving the way for introducing the proposed PSC.

1.5.3 Part III: Legal constraints flowing from the constitutional foundations of the Union

Part III analyses the constraints that flow from the constitutional foundations of the Union. Chapter 5 begins by trying to identify the existence of those

foundations based on the Treaties, Opinions and case law of the Court. The latter illustrate the Court's conviction that such an area, which constitutes the "very foundations" of the Union, exists and provides examples of past cases in which Member States were precluded from introducing agreements that violate those very foundations. Next, it aims to identify the substance of those "very foundations" with a view to establishing whether they contain elements capable of precluding Member States from introducing a PSC on free movement of persons in a future Accession Treaty. The fundamental freedoms, and more specifically free movement of persons, Union citizenship, and fundamental rights are identified as areas containing elements that form part of those "very foundations", which could preclude Member States from introducing a PSC clause that could violate the core principles underlying all three areas/ concepts. Lastly, the Chapter looks into the application of the constitutional constraints that flow from the "very foundations" of the Union by the Court of Justice. It concludes by examining the recent *Pringle* case, which confirms that prior to their ratification, i.e. prior to becoming primary law, measures introduced in the primary law making process or procedures are also subject to judicial review.

Chapter 7 provides a case study of the principle that would be most seriously breached by the inclusion of a PSC on free movement of persons: namely, the principle of equality or more specifically the principle of non-discrimination on the basis of nationality. This Chapter demonstrates that equality is one of the most important principles constituting part of the "very foundations" of the Union legal order identified in Chapter 6, and as such would be able to constrain Member States from including such a clause in a future Accession Agreement. To illustrate its foundational role for the integration project, the evolution of the principle as well as its various roles and functions are examined with the purpose to demonstrate its ever widening scope and increasing importance in EU constitutional law. Chapter 7 demonstrates the latter point by providing examples of the principle as a general principle of Union law, as constituting an inalienable component of citizenship as well as an important part of the CFR. Lastly, it argues that a PSC would also be in breach of the principle of the equality of Member States, which has been recently codified to become Article 4(2) TEU.

1.6 Summary

The introduction laid down the scene for the following Chapters by introducing the research question, identifying the essential characteristics of the Union legal order, as well as introducing the most important concepts on which this thesis is built, namely "legal constraints" and the PSC. It established that this study aims to answer the question whether there are legal constraints on Member States when they act as primary law makers during the accession

process of a new Member State, and if so, to identify those constraints. The research question is answered by providing a case study of the proposed PSC on free movement of persons mentioned in Turkey's Negotiating Framework. Scholars have indicated their doubts as to the possibility of including such a clause, which would trample on the fundamental principles on which the Union is built. Hence, this thesis aims to establish whether these principles or other legal measures are capable of constraining Member States in the context of accession negotiations and what sources they are flowing from.

The first step in the introduction was to discuss the nature of the Union legal order. The fact that there is an agreement that it evolved to become more constitutionalised over the decades enabled us to make analogies with national legal orders as well as to move from the issue of existence of legal constraints to that of identifying them. It was argued that just like some constitutional courts protect the "basic structure", identity or coherence of their constitutions, so does the Court of Justice protect "the very foundations" of the Union legal order. The "very foundations" of the legal order were identified as the first and most obvious constraint on Member States.

Next, both a theoretical and operational definition of the concept of "legal constraints" was provided so as to understand its nature and the criteria according to which it could be identified. It was emphasised that the aim behind this exercise was not to establish all legal constraints on Member States as primary law makers in the context of accession, but only those that relate to the proposed PSC. In other words, the thesis is a case study based on the proposed PSC, and its compatibility with the fundamental principles underlying the Union legal order. Hence, the following step was to briefly define what kind of measures safeguard clauses were, how they had been used in the past, and last but not least, why scholars thought the proposed PSC would be problematic.

Lastly, the overall structure of the thesis was introduced. Three levels, or three sources, of constraints were identified: the pre-accession level, the accession process itself and lastly the constitutional foundations of the Union. These could also be considered as three temporal stages; starting from 'aspiring to be' a Member State, to 'becoming' one, and extending to 'being' a Member State. Put differently, the thesis tries to identify legal constraints on Member States flowing from association law, EU enlargement law, as well as constitutional law.