

Constitutional Identity in and on EU Terms

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The EU protects national constitutional identities and does not protect national unconstitutional identities. This is the message the Court of Justice of the EU has sent with its decision of 16 of February 2022, in the cases initiated by Hungary and Poland about the rule-of-law conditionality mechanism, in which it ominously referred to the constitutional identity of the EU. Constitutional identity, according to the CJEU, is a key concept of public law and a fundamental pillar of the EU, so Member States constitutional identities may not be manipulated in such a way that turns into a violation of the constitutional identity of the EU.

In a seminal statement, the Court of Justice rejected a growing stream of the legal literature, advocating for the abandonment of the concept of constitutional identity, given its recent abuses. On the contrary, the European Court clearly defined “constitutional identity” in EU terms. This is a very important step in the jurisprudence of the European Court of Justice, raising a historical challenge to Member States who are trying to abuse the European concept of national identity to find a constitutional justification to their illiberal and autocratic transformation. In fact, the EU respects “national identities”, following a fundamental principle first spelled out in the Treaty of Maastricht as a “political statement”, and then reinforced and legalized by the Treaty of Lisbon with the subjection of the “identity clause” under the jurisdiction of the Court of Justice and specific references to the constitutional dimension of national identities. The growing importance of this concept led to increasing misuse and abuse of it (then again, isn’t this true of any successful concept, such as democracy, liberalism, equality?). Abuses by political and – more painfully – judicial actors, led some legal scholars to advocate the need for abandoning the concept of constitutional identity as an inherently dangerous concept.

With its decision, the Court of Justice took a very different path.

A seminal decision

The CJEU – for the first time in such clear terms – defined the constitutional identity of the EU as follows: “The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.” [paras 127 and 145 of the decisions in the Hungarian and Polish cases, respectively].

This is more detailed in the further parts of the judgments: “Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are

given concrete expression in principles containing legally binding obligations for the Member States. Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of ‘the rule of law’ which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.”

There are two major implications of this decision for the conceptualization and application of the legal term of constitutional identity.

The first is that democracy, rule of law, and human rights as characteristics of a legal order are part of the identity of the EU. The decisions also imply that there is something like a common rule of law understanding within the EU, which one of us has already indicated as the European Rule of Law, which could be a benchmark when assessing the rule of law deterioration of Member States.

The second is that this decision also gives a firm basis to the argument that the national constitutional identities, and components thereof, of the Member States, cannot be contrary to the identity of the EU. Article 2 and Article 4(2) TEU are on the same level: therefore, claiming that Article 4(2) TEU protects a national measure that violates Article 2 TEU shall be recognized as an abusive application of the identity clause. A political debate has (necessarily) been transformed into a legal one, which, however, needs further theoretical elaboration. We would propose the following.

Three dimensions of identity

In our view, this decision supports the argument that a European constitutional identity can be conceptualized by looking at different dimensions of identity. Identity can emerge in the interaction of one legal system with another: this happened in the EU with the Kadi judgment, where the Court of Justice put constitutional limits to international law, aiming at protecting parts of the EU constitutional identity. In that seminal decision, the Court of Justice discerned between limitations placed on fundamental freedoms of the internal market, which are to be held permissible under exceptional circumstances, and limitations entailing a violation of the untouchable core of EU fundamental principles, to be rejected under all circumstances.

Another dimension unfolds in the procedure established by Article 7 TEU and the new rule of law conditionality mechanism, which the CJEU has declared to be in conformity with the Treaties. The Article 7 procedure, regardless of the flaws in its actual implementation, as well as the conditionality mechanisms intend to protect the values expressed in Art 2 TEU. The rule of law conditionality mechanism was prima facie outside of the context of constitutional identity. Nevertheless, it specified one of the principles enshrined in Art 2 TEU, the rule of law, and attached the risk of legal measures

(withholding money) to its violation. Even if the legal bases of sanctions and their consequences only affect the management of EU funds, the mechanism results in a differentiation between the rule-of-law abiding Member States and those which do not respect the European understanding of the rule of law. Thus, it describes a need for self-identification (EU) as opposed to others (eg, Hungary and Poland).

Finally, identity may also emerge in a procedural dimension: even though Art. 48 TEU, which provides for the ordinary and simplified revision procedure of the Treaties, does not include any textual hints to determine a European “eternity clause”, substantive constraints to the Treaty amending power may derive from theories of implicit unamendability.

Another step forward

Over the years, both the CJEU and the constitutional legislator (Member States acting jointly when adopting the treaty amendments or new treaties) have developed and strengthened the basic principles of the EU legal system, such as supremacy and direct effect of the EU law and protection of fundamental rights, which have been also enriched by considerations of national constitutional and high courts. Older Member States have been participating in these changes, new ones have joined the EC/EU knowingly, by changing their own national constitutional structure and legal system, while respecting the state of integration they found at the time of their accession. There is thus a presumption that Member States would not act against the EU’s constitutional identity, which brings us back to Article 4(2) TEU, which, in turn, demands that the EU shall respect the national, i.e. constitutional identities of the Member States. In this context and having experienced how Member States, especially Hungary and Poland, has abused this obligation of the EU to avoid complying with EU principles, we propose another step forward in the conceptualization and, maybe, judicial application of constitutional identity of the EU:

If an identity is to be constitutional, it needs to refer to the specific principles of a given constitution of a specific member state, including its European clause or provisions in participation in international/supranational organization, but also to the principles attaining at having a constitution in general. This requires, according to a normative conception of the concept of constitution, that “Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution”.²⁾ Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789. According to this normative conception of constitutional identity, the “particular” aspect of constitutional identity could not contradict its “general”³⁾ In the sense meant by Tripkovic B (2017) *The Metaethics of Constitutional Adjudication*. Oxford University Press, Oxford UK-New York. aspect. Therefore, abusive, illiberal, in short “unconstitutional” constitutional identities, which appear in the misuse of Art 4(2) TEU and related domestic legal actions, shall be rejected.

The CJEU decision is a seminal step in this direction of rejecting abusive practices involving constitutional identity arguments. Such a rejection would moreover strengthen the European constitutional identity, which the CJEU for the first time spelled out in such

an explicit way. However, within this framework, there is a weakness that lies in the illiberal and autocratic character of the renegade Member States, Hungary (and Poland). They do not want to enter into a meaningful dialogue with the bodies of the EU but are ready to aggressively misrepresent judicial decisions, [like this one](#), for the domestic audience in the hope to be able to maintain the enemy narrative, especially, before elections. Only the future will tell if this significant move by the Court of Justice will persuade reluctant national judicial actors to begin a new course of action or if it will inspire a new political course in these countries, particularly if citizens of these Member States will realize the detrimental impact of the old course for their own interests.

References

- ↑1 Art. 4(2) TEU currently reads as follows: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”

- ↑2 Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789.

- ↑3 In the sense meant by Tripkovic B (2017) *The Metaethics of Constitutional Adjudication*. Oxford University Press, Oxford UK-New York.

References

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