



UCLouvain
SAINT-LOUIS BRUXELLES

BEUSL2800- Travail de fin d'études

The concept of national identity as a limit to the supremacy of the EU law and as a justification for the violation of the rule of law: the reaction of the Court of Justice of the European Union

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August 2025

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Summary

This paper examines the notion of national identity as a legal concept at the EU level and how it has come to be politically manipulated. In the first part, the theoretical concepts of national and constitutional identity are examined, the importance of national identity is briefly discussed and then the paper proceeds into more legal considerations, like Article 4(2) TEU and its identity clause as well as the supremacy of EU law. Based on these, we then turn to some examples of abuse of national identity on the basis of Article 4(2) TEU as a tool in the hands of some Member States to deconstruct the rule of law and the primacy of EU law in general. In the second part of the attention is drawn to the reaction of the Court of Justice of the European Union (CJEU) towards various instances of misuse or abuse of national identity taking a closer look to relevant case-law through a qualitative approach. Various cases are discussed. Then, the paper concludes.

Key words: national identity; constitutional identity; abuse of national identity; primacy of the EU law; European Court of Justice

Introduction

Sociologically speaking, the concept of identity is not stable; it can change over time, and it is characterized by multiplicity, meaning it always depends on the context and the circumstances. In other words, it is a socially constructed term. The fact that identity bears all these characteristics means that there is not a single identity that takes precedence over another¹. This fluidity renders identities more exposed to various manipulations. In political discourse, identity is the epicentre since it can be used either as a unifying factor (belonging to the same nation) and/or it can also be used to make up for or intensify social differences. Since identity can be equated with a sense of belonging to a particular community with specific norms and legitimacy, common culture, shared history and territory², it can offer the pretext to cut communities off the opportunity to contest the social and political status quo³; in this case, identity might be regarded as something fixed and unchanging and under constant threat from contact with others⁴. So, it is only logical that identity politics- the exploitation of identity narratives for political goals-is central to the discussion in Europe and elsewhere, especially within the context of the rise of populist trends. Populists try to downplay this complexity of identity to their benefit⁵. They try to defy the values vital to European integration, looking for their own legitimization in the concept of national/ constitutional identity⁶ and they pass as defenders of national identities against “cosmopolitan globalism”⁷. They are in favour of national sovereignty, since they consider the nation to be above and beyond other political constructions, for example the European Union⁸. For them Europe shares a set of cultural values and a territory where these values have flourished and therefore they refer to a “homogeneous identity”⁹. But this is only a romanticized perception of Europe which is mostly based on affective discourse¹⁰. Shared culture and identity with political ulterior motives in fact can contribute to the erosion of European integration

¹ Lahire, Bernard. 2011. *The Plural Actor*. English ed. Cambridge, UK : Malden, MA: Polity reference in Bard, P., Chronowski, N. & Fleck, Z. (2023). *Use, Misuse, and Abuse of Constitutional Identity in Europe*. CEU Democracy Institute Working Papers No. 6, 2023, <http://dx.doi.org/10.2139/ssrn.4367087>

² Balent, M. (2011). *Disquiet over identity in Europe: Rising to the challenge set by national populism*. Schuman Papers n°205. Accessible here: <https://www.robert-schuman.eu/en/european-issues/205-disquiet-over-identity-in-europe-rising-to-the-challenge-set-by-national-populism>

³ Scholtes, J. (2023). *The abuse of constitutional identity in the European Union* (First edition). Oxford University Press.

⁴ Balent, M. (2011).

⁵ Bard, P., Chronowski, N. & Fleck, Z. (2023). *Use, Misuse, and Abuse of Constitutional Identity in Europe*. CEU Democracy Institute Working Papers No. 6, 2023, <http://dx.doi.org/10.2139/ssrn.4367087>

⁶ Scholtes, J. (2023)

⁷ Balent, M. (2011)

⁸ *ibid*

⁹ *ibid*

¹⁰ *ibid*

and weakening of liberal constitutionalism, with illiberal democracies in Hungary and Poland, Brexit and the Catalan independence movement being examples of these dynamics¹¹. The concept of identity can also be found in public law, where it is also an ambiguous concept with different interpretations. In EU law, the concept of identity went through a “process of legalization”: it first appeared in the Treaty of Maastricht as a political term and then it assumed constitutional meaning in the Treaty of Lisbon¹² with its Article 4(2), which explicitly obliged the EU to respect the national identities of Member States¹³. It was only then, after 2000, that the concept of national identity (and subsequently of constitutional identity) became part of the legal discourse¹⁴.

The identity debate on the EU level lies on the difficulty that the European Union has in forging a shared political identity, based on legal foundations, that would complement the separate national identities to which European citizens remain highly attached¹⁵.

Part A-Theoretical background

I. National and constitutional identity: a few remarks.

The European project, bringing together member states which are different and alien to one another, presupposes, among other things, acceptance and trust not only of other Member States per se but also of those other political and judicial systems. That is why literature is so deeply interested in studying the implications of identity as far as European integration is concerned¹⁶.

Constitutional identity generally constitutes the foundation of a legal system, its very core, which is beyond the power of amendment. National constitutional courts are charged with the responsibility to control the respect of constitutional boundaries¹⁷ and the right to protect their exclusive constitutional identity falls within their exclusive jurisdiction¹⁸. In the EU, constitutional identity has become a doctrinal concept which serves the purpose of limiting the power and influence of EU law and negotiating the authority between national and European legal orders, a way to draw a red line to the process of European integration¹⁹. However, this does not mean that national constitutional orders do not respect the primacy of the EU law²⁰. In her article Kovács²¹ supports that constitutional identity is socially constructed and stems from texts of democratic constitutions. Therefore, she supports that it is not a pre-institutional concept; rather it is the result of democratic institutional structures and procedures, political institutions and fundamental constitutional values. When constitutional identity entails respect of human rights, democracy and the rule of law it can be also recognized as national identity. On the contrary, not all national identities are also constitutional identities even if they stem from a national constitution.

¹¹ Wind, M. (2020). The Tribalization of Europe: A Defence of our Liberal Values. Sound/Visual production (digital), New Books Network. <https://newbooksnetwork.com/marlene-wind-the-tribalization-of-europe-a-defence-of-our-liberal-values-polity-2020>

¹² Faraguna, P. (2021). On the identity clause and its abuses: “back to the Treaty”. *European Public Law*, 27(3), 427-446. <https://doi.org/10.54648/euro2021020>

¹³ Kovács, K. (2022). Constitutional or ethnocultural? National identity as a European legal concept. *Intersections-EEJSP*, 8(1), 170-190. <https://doi.org/10.17356/ieejsp.v8i1.713>

¹⁴ *ibid*

¹⁵ Balent, M. (2011)

¹⁶ Besselink, L.F.M. (2010). National and Constitutional Identity Before and After Lisbon. *Utrecht Law Review*, 6(3), 36-49. <https://doi.org/10.18352/ulr.139>

¹⁷ Cruz Mantilla de los Ríos, P. (2024). European Constitutional Identity as the Unamendable Core of the EU Treaties. *European Constitutional Law Review*, 20(4), 545–568. <https://doi.org/10.1017/S157401962400035X>

¹⁸ Bobić, A. (2022). The jurisprudence of the constitutional conflict in the European Union. Oxford University Press.

¹⁹ Claes, M. (2013). National identity: trump card or up for negotiation? In A. Saiz Arnaiz, & C. Alcobarro Llivina (Eds.), *National constitutional identity and European integration* (pp. 109-140). Intersentia reference in Kovács, K. (2022).

²⁰ Scholtes, J. (2023)

²¹ Kovács, K. (2022)

On the other hand, national identity is what differentiates one state from another and its content is determined by the respective national constitutions²², in other words it is related to a state's ethnocultural characteristics²³. It is not something natural or unchanging. Instead, it is a consciously constructed construct. Political actors design and utilize national identity in ways that align with particular historical circumstances, often by invoking traditions and symbolic practices that imply a link to a carefully chosen version of the past²⁴. In this way, identity is constantly shaped and reshaped through how history is told and represented²⁵. Into this direction, the national identity may even opt for traditional religious values, protection of the national language, shared local rituals and symbols²⁶. But this is the ethnocultural point of view of identity, which is often accompanied by the desire for internal homogeneity of the community, and 'the elimination or eradication of heterogeneity'²⁷ because these kinds of national communities are somehow genetically affiliated and share common interests and will.

However, here there is a paradox: the paradox with the two terms. A few Advocates General to the European Court of Justice have used the concept of "constitutional identity" to describe what Article 4(2) TEU refers to, even though, the Treaty explicitly used the term "national identities". Take for example the Opinion of Advocate General Polares Maduro in the *Michaniki* case (C-213/07²⁸) where he speaks about being "true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset... the obligation was explicitly stated for the first time upon a revision of the treaties... the Union shall respect the national identities of its Member States'. The national identity concerned clearly includes the constitutional identity of the Member State". On the other hand, some national constitutional courts have mentioned Article 4(2) TEU to justify their right to review secondary EU law against their constitutional identity. But also, among academics national identity is equated with constitutional identity²⁹. Karakamiseva-Jovanovska sustains that national identity and constitutional identity are the two sides of the same coin. "Without a protected constitutional identity, there is no complete national identity and *vice versa*".³⁰ And while some use it interchangeably, others sustain that the two should not be confused. According to Cruz Mantilla de los Ríos³¹ constitutional identity refers to the "intangible nucleus" of the constitution, whereas national identity is a more general principle of EU law that mediates the relationship between the national legal systems of Member States and the legal system of the European Union. For Cloots³², it wouldn't be acceptable to identify EU Treaty's identity clause with the concept of constitutional identity. The reason is simple: the constitutional identity concept was developed by certain national courts as a way to assert national sovereignty. National identity, as described in Article 4(2) TEU, is the epitome of basic principles and values of the identity of its constituent national groups, for which a multinational political community is required to show respect. It is very important to highlight the fact that the concept of "national identity" was also incorporated in the preamble to the EU Charter of the Fundamental Rights, which revealed how important this concept can be for the European context³³. However, national identity is not granted

²² Besselink, L.F.M. (2010)

²³ Kovács, K. (2022)

²⁴ Hobsbawm, E. (1992). *The Invention of Tradition*. Cambridge University Press reference in Kovács, K. (2022).

²⁵ Rév, I. (1995). *Identity by History*. In S. Greenblatt, I. Rév & R. Starn, Introduction. Representation, 49, 8–10.

<https://doi.org/10.2307/2928746> reference in Kovács, K. (2022).

²⁶ Smith, A. D. (2001). Will and Sacrifice: Images of National Identity. *Millennium: Journal of International Studies*, 30 (3), 571–584. <https://doi.org/10.1177/03058298010300031301>

²⁷ Schmitt, C. (2000). *The Crisis of Parliamentary Democracy*. Trans. E. Kennedy. The MTI Press

²⁸ Case C-213/07, *Michaniki*, paragraph 31

²⁹ Cloots, E. (2016). National Identity, Constitutional Identity, and Sovereignty in the EU. *Netherlands Journal of Legal Philosophy*, 45 (2), 82-98. <https://doi.org/10.5553/NJLP.000049>

³⁰ Karakamiseva-Jovanovska, T. (2024). Constitutional Identity and National Identity—Two Sides of the Same Coin. *Constitutional discourse*. Accessible here: <https://constitutionaldiscourse.com/constitutional-identity-and-national-identity-two-sides-of-the-same-coin/>

³¹ Cruz Mantilla de los Ríos, P. (2024)

³² Cloots, E. (2016)

³³ Kovács, K. (2022)

absolute and unconditional protection within EU law; rather it must be measured against the principle of uniform application of the EU law³⁴.

In this paper, we will be dealing with national (constitutional) identity as it is found in EU public law.

II. The value and importance of national identity

As it becomes obvious, national identity has come to be regarded as a rather negative concept because it has been linked to ethnonationalist and illiberal discourse. However, we should not get trapped in the oversimplified dichotomy European vs national, as in anything European equals modernity and progress whereas anything national equals tradition in its negative sense³⁵. It is not an either/or situation: either stick to your national identity or be a European citizen. Calhoun³⁶ underlines the importance of national identity and their pivotal role in promoting solidarity, political mobilisation and democratic governance. Political systems cannot be completely separate from their cultural roots and shared values without reaching an impasse. Democracies work best not just as a set of logical rules, but as a deeply held belief that is shaped by and makes sense within the unique traditions and identity of each society. People get a sense of belonging to a particular group which can promote the integrity of a state. This common sense of identity reinforces the cohesion among people who would otherwise remain separated due to political, cultural, ethnic etc reasons³⁷. Through national identity people may develop a sense of trust which can facilitate exchanges with other people on informal norms and shared values at an economic and political level³⁸. Furthermore, national identity can weave sound “social safety nets” that can alleviate economic inequalities³⁹. All these can provide an explanation as to why “liberal nationalism”⁴⁰ and “inclusive patriotism”⁴¹ have recently emerged in discussions around the ways in which the issue of populism and the loss of trust in liberal democracy can be dealt with. The main conclusion in a research conducted by Gustavsson & Stendahl⁴² is that the fostering of a sense of national belonging is what can serve the purpose of liberal nationalists in their effort to build trust and reinforce national identity.

III. Article 4(2) TEU and the identity clause

*“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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”*⁴³.

³⁴ Schill, S.W. & Bogdandy, A. (2011)

³⁵ Calhoun, G. (2002). The Class Consciousness of Frequent Travelers: Toward a Critique of Actually Existing Cosmopolitanism. *South Atlantic Quarterly*, 101(4) 869-897. <https://doi.org/10.1215/00382876-101-4-869>

³⁶ *ibid*

³⁷ Gustavsson, G., & Stendahl, L. (2020). National identity, a blessing or a curse? The divergent links from national attachment, pride, and chauvinism to social and political trust. *European Political Science Review*, 12(4), 449–468. <https://doi.org/10.1017/S1755773920000211>

³⁸ Fukuyama, F. (2018). Why national identity matters. *Journal of Democracy*, 29(4), 5-15. <https://doi.org/10.1353/jod.2018.0058>

³⁹ *ibid*

⁴⁰ Tamir, Y. (2019), *Why Nationalism*, Princeton, NJ: Princeton University Press, reference in Gustavsson, G., & Stendahl, L. (2020)

⁴¹ Mounk, Y. (2018), *The People vs. Democracy*. Cambridge: Harvard University Press, reference in Gustavsson, G., & Stendahl, L. (2020)

⁴² Gustavsson, G., & Stendahl, L. (2020)

⁴³ Consolidated version of the Treaty on European Union - TITLE I COMMON PROVISIONS - Article 4. https://eur-lex.europa.eu/eli/treaty/teu/2012/art_4/oj

Article 4 TEU is a somehow ambivalent provision in that it allows for multiple readings and interpretations⁴⁴ and it has even been applied in “innovative” ways by national actors, as it is the case in Hungary⁴⁵. Member States tend to view this clause as a kind of competence clause according to which the EU should pursue its shared goals without compromising national identities in the process⁴⁶. And although it may seem to some that Article 4(2) TEU gives Member States the ability to invoke their specific national identity as a justification for limiting the application of certain EU law obligations, still this is not exactly the case: the EU is restricted to respect respective national identities as long as they do not come in contrast with the EU core principles as described in the treaties⁴⁷. Over the years and as the integration process was moving forward, the EU was acquiring more and more competences, even in areas that were previously reserved for the states, for example monetary policies or migration and asylum policies. So, the introduction of the identity clause in the Treaty of Lisbon should be examined in the light of this context; attempts were being made to clarify the boundaries of EU competences and to tame the expansion of EU law into “restricted” areas⁴⁸.

Before turning to instances of straightforward abuse, it is worth briefly turning to the case of the German Constitutional Court which attempted to give its own interpretation of Article 4, trying to delineate the concept of national identity. In doing so, it specified the dimensions that make up the national constitutional identity and it set the most “influential precedent for the use of constitutional identity as a limit to the authority of EU law”⁴⁹. In fact, what it actually did was to set the constitutional limits of European integration according to the “eternity clause” of the German Constitution; it even went as far as to claim it had the right to test EU law for compliance with the German constitutional identity⁵⁰ and for any transgressions of boundaries when the EU claims competences⁵¹. According to the Court, the core areas of Germany’s constitutional identity are considered to be criminal law, the police and the military, fiscal policies, the social state, educational system, as well as the relationship with religious communities⁵². The precedent set by the German constitutional court was later followed by other constitutional authorities as well⁵³. But Martinico & Pollicino⁵⁴ see the risk of “interpretive anarchy” here if every national court was to offer their own interpretation of what constitutes national identity.

Generally, Article 4(2) TEU has not played an autonomous role up to now, therefore the cases where it was invoked were not dealt with in a different way in comparison to cases that concerned derogation from free movement⁵⁵. Article 4(2) TEU offers an alternative to the notion of EU law’s absolute primacy and challenges the traditional hierarchical view of the relationship between EU and national constitutional law, as it supports a more pluralistic approach to their interaction⁵⁶.

⁴⁴ Konstadinides, T. (2011). Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement. *Cambridge Yearbook of European Legal Studies*, 13, 195–218. <https://doi.org/10.5235/152888712801753031>

⁴⁵ Halmai, G. (2028). Abuse of constitutional identity: the Hungarian constitutional court on interpretation of article E) (2) of the fundamental law. *Review of Central and East European law*, 43(1), 23-42. <https://doi.org/10.1163/15730352-04301002>

⁴⁶ Faraguna, P. (2016). Taking Constitutional Identities away from the Courts. *Brooklyn Journal of International Law*, 41 (2), 491–578. <https://ssrn.com/abstract=2799608>

⁴⁷ Konstadinides, T. (2011)

⁴⁸ Bonelli, M. (2021). National Identity and European Integration Beyond “Limited Fields”. *European Public Law*, 27(3), 537-538. <https://doi.org/10.54648/euro2021025>

⁴⁹ Scholtes, J. (2023)

⁵⁰ *ibid*

⁵¹ Bobić, A. (2022). The jurisprudence of the constitutional conflict in the European Union. Oxford University Press.

⁵² *ibid*

⁵³ Scholtes, J. (2023)

⁵⁴ Martinico, G. & Pollicino, O. (2020). Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?, *Yearbook of European Law*, 39, 228–249, <https://doi.org/10.1093/yel/yeaa015>

⁵⁵ Millet, F.X. (2021). 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way. *European Public Law*, 27(3), 571-596. <https://doi.org/10.54648/euro2021027>

⁵⁶ Schill, S.W. & Bogdandy, A. (2011)

IV. How can national identity be abused? Some examples.

Abuse refers to instances where constitutional identity is invoked without genuine justification, not as a legal argument but as a tool shaped by political influence, clearly aimed at bypassing EU obligations through the national constitutional court⁵⁷. Some national constitutional courts have ruled that EU law is limited by certain fundamental provisions of national constitutions, provisions that in fact constitute a given country's "constitutional identity" and a dialogue has opened between national constitutional courts, which try to promote national constitutional identity and the CJEU, whose duty is to safeguard the primacy of EU law⁵⁸. This trend has been observed mainly in both Hungary and Poland with the two countries violating the rule of law and disregarding fundamental EU values⁵⁹. These countries' ethnocultural national identity claims can contradict the national identity as viewed in the EU public law.

In the Hungarian Constitution (Fundamental Law), in the preamble (National Avowal) the country's historical and cultural identity, values and goals are outlined. Its Christian culture should be sustained, and the children should be raised according to Christian values. By examining this text, one realizes that the Hungarian national identity is closely connected to religion and the way the nation is perceived can only accommodate people who can identify these characteristics, while excluding all others who cannot be considered part of the community⁶⁰. Orbán's illiberal methods are often defended as a matter of constitutional identity⁶¹ and thus, Hungary is manipulating the concept of national identity, in conjunction with Article 4(2) TEU, to derogate from its obligations as a Member State of the EU. To this direction, let's briefly refer to the case C-643/15 in which Hungary, along with Slovakia, turned against the EU refugee relocation scheme⁶². With this action for annulment, Hungary was in fact asking from the EU to adjust the concept of national identity and allow the country not to participate in this refugee relocation scheme, which, of course the CJEU rejected on the grounds that it was the country's EU obligation. From the point of view of Hungary, the EU relocation scheme tried to impose a multicultural society that the Hungarian government did not desire because they believed that undermined their historic national identity⁶³ and it was the government's intention to draw the line on the joint exercise of power with other EU Member States so as to protect the country's national identity by not allowing foreigners to enter Hungary's territory⁶⁴. Following closely the developments in the Hungarian Constitutional Court one can see it manipulated the concept of national identity as it is described in Article 4(2) TEU by reading it in isolation, and not along with the concept of loyal cooperation (Article 4(3) TEU) as it should have done, but it read it in light of its own idea of constitutional identity which promotes the preservation of (national) sovereignty⁶⁵.

In Poland, in 2015, the right-wing government began its attempts to politically control the judiciary system. In this context, the government made unconstitutional appointments to the Polish Constitutional Court and made reforms on all the levels of the country's judiciary system⁶⁶. Poland even went as far as to declare Articles 1, 2 and 9 of the TEU as partially unconstitutional by reinterpreting its wording in an attempt to provide a solid basis for the "rebellion" of Poland against the Court of Justice of the European Union; the Polish Constitutional Court even declared CJEU's case law on judicial independence to be incompatible with the Polish Constitution because through it

⁵⁷ Bárd, P., Chronowski, N. & Fleck, Z. (2023)

⁵⁸ Scholtes, J. (2023)

⁵⁹ Progin-Theuerkauf, S. & Berger, M. (11 March 2022). "ECJ Confirms Validity of the Rule of Law Conditionality Regulation." European Law Blog. <https://doi.org/10.21428/9885764c.59ff5edf>

⁶⁰ Kovács, K. (2022)

⁶¹ Scholtes, J. (2023)

⁶² Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. <https://eur-lex.europa.eu/eli/dec/2015/1601/oj/eng>

⁶³ Kovács, K. (2022)

⁶⁴ Bárd, P., Chronowski, N. & Fleck, Z. (2023)

⁶⁵ Martinico, G. & Pollicino, O. (2020)

⁶⁶ Scholtes, J. (2023)

the CJEU has asserted authority to set standards for the structure of national judicial systems and to enable national judges to challenge the independence of courts and judges in Poland⁶⁷. Of course, this coincided with the radical change of the composition of the Constitutional Court by the government⁶⁸. The judicial reforms of the Polish government are seen as a direct attack against the rule of law⁶⁹, practically leading to its collapse. As in the case of Hungary, Polish government sustained that all the reforms put in place were for the sake of the constitutional identity, protected by the respect of national identity as prescribed in the TEU⁷⁰, and all the judgements of the CJEU against these reforms were answered with the same line of reasoning; the protection of the national constitutional identity⁷¹.

In conclusion, in the case of Hungary and Poland, national (constitutional) identity is manipulated in two different ways: to serve the rhetoric of ethnic homogeneity (Hungary) or to justify the violation of the rule of law at a national and European level⁷².

V. Primacy of the EU Law

The CJEU cases C-26/62 (Van Gend en Loos) and C-6/64 (Costa v Enel) are considered to be the milestones for the “construction of the European legal order”⁷³. Both cases refer to the fact that in order for the European Community to function the Member States had to limit their sovereignty by conferring some competences to a supranational authority, “albeit within limited fields”, meaning that, overall, the Member States were free to shape their policies and legal system according to their taste⁷⁴. The Costa case was instrumental in defining the principle of the primacy of European law, which actually refers to the “EU law priority over national law both at the European and at national levels”⁷⁵ and in fact it is the EU law that has “absolute and unconditional precedence” and is to take precedence every time there is a conflict with provisions of the national law⁷⁶. This principle is essential if the European legal order is to work and be built on the grounds of coherence, unity and effectiveness⁷⁷. Primacy along with the principles of direct effect and of uniform applicability are believed are regarded as the very foundations of the European legal order⁷⁸. However, the principle is only applicable in areas where States have yielded their sovereignty to the EU institutions (ex. free market, environment etc) and not in areas where they retain their sovereignty (like for example in defence or fiscal policy)⁷⁹. However, this version of the principle of primacy of the EU law is the EU’s side of story; this unconditionality that is being mentioned has not been the case for Member States as well, since the latter tried to compromise the primacy of the EU law with core provisions in

⁶⁷ *ibid*

⁶⁸ Bárd, P., Chronowski, N. & Fleck, Z. (2023)

⁶⁹ Scholtes, J. (2023)

⁷⁰ The Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary (2018). <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf>, accessed 23 June 2025, reference in Scholtes, J. (2023). *The abuse of constitutional identity in the European Union* (First edition). Oxford University Press.

⁷¹ Scholtes, J. (2023)

⁷² *ibid*

⁷³ Bonelli, M. (2021)

⁷⁴ *ibid*

⁷⁵ European Studies Hub. The supremacy of European Law. Accessible here: <https://hum.port.ac.uk/europeanstudieshub/learning/module-3-governance-in-a-multi-level-europe/the-supremacy-of-european-law/>

⁷⁶ Claes, M. (2015). The Primacy of EU Law in European and National Law, in Chalmers, D. and Arnall, A. (eds), *The Oxford Handbook of European Union Law*, 178-211, Oxford Handbooks. <https://doi.org/10.1093/oxfordhb/9780199672646.013.8>

⁷⁷ *ibid*

⁷⁸ Kwiecień, R. (2005). The Primacy of European Union Law over National Law Under the Constitutional Treaty. *German Law Journal*, 6(11), 1479–1495. <https://doi.org/10.1017/S2071832200014450>

⁷⁹ European Studies Hub. The supremacy of European Law.

national Constitutions. According to Kelemen⁸⁰, the Constitutional Courts in Member States should welcome the primacy of the EU law unconditionally. In the literature, it becomes clear that primacy remains a very sensitive concept and that is perhaps the reason why it was not included in the main body of the Lisbon Treaty⁸¹. The addition of the identity clause in Article 4(2) in the same Treaty as well as the Article in the Charter of Fundamental Rights of the European Union, still have not altered the nature of the principle of primacy; Member States cannot unilaterally decide to escape from EU obligations and the application of EU law and give precedence to provisions of the national law⁸².

Part B- Research

I. The reaction of the Court of Justice

As we have already seen, in the recent years the concept of national identity has been subject to abuse and manipulation by politicians and constitutional courts in different Member States. Generally, though, the Court had been hesitant to elaborate on Article 4(2) TEU and “preferred to resolve sensitive questions based on other grounds”⁸³; in fact, according to Faraguna⁸⁴ this attitude could be considered a judicial strategy since then the Court would have to very carefully move between a narrow interpretation of the Article with the risk of it being rejected by national courts and a broader reading of the Article that might jeopardise the supremacy of the EU law. However, there has been a change of attitude quite recently and the Court has approached the question of national identity with much greater detail⁸⁵. Three cases stand out. As Bonelli⁸⁶ put it, these cases “should probably not be considered a total paradigm shift” because the references to national identity were not actually decisive for the final judgement, still, though, they suggest a more straightforward reading of national identity on the part of the Court of Justice. Before we turn to these three cases, we will take a look at some others where the concept of national identity was put forward by the concerned Member States as well as at the reaction of the Court of Justice with the aim of better understanding this “change” we are mentioning above.

A. Research question and hypothesis

We started the article by hypothesing that the number of judgments of the CJEU regarding the question of national identity as it is delineated in Article 4(2) TEU must have increased, given the fact that recent attacks towards the rule of law in the EU have been made under the pretext of national identity protection. Therefore, we posed the following research questions:

- How has the concept of national identity been treated in judgements of the CJEU?
- Is there a difference in the way the CJEU has treated national identity sensitive cases in comparison to those that abuse national identity with the aim to undermine the rule of law?

⁸⁰ Kelemen, R. D. (2018). The dangers of constitutional pluralism. In G. Davies & M. Avbelj (Eds.), *Research handbook on legal pluralism and EU law*, 392–403. Edward Elgar Publishing.
<https://doi.org/10.4337/9781786433091.00030> reference in Scholtes, J. (2023)

⁸¹ Claes, M. (2015)

⁸² *ibid*

⁸³ Martinico, G. (2023). Book review: Julian Scholtes, *The Abuse of Constitutional Identity in the European Union*. *Comparative Constitutional Studies*, 1(1). 163–168. <https://doi.org/10.4337/ccs.2023.01.08>

⁸⁴ Faraguna, P. (2021)

⁸⁵ Bonelli, M. (26 April 2022). Has the Court of Justice embraced the language of constitutional identity?. *Diritti Comparati*. Accesible here: <https://www.diritticomparati.it/has-the-court-of-justice-embraced-the-language-of-constitutional-identity/>

⁸⁶ *ibid*

B. Methodology

In order to answer the aforementioned questions, we tried to find cases concerning national identity and a reference to Article 4(2) by conducting a search on https://curia.europa.eu/jcms/jcms/Jo1_6308/. There, in the advanced search, we asked for cases from the Court of Justice and in the text search button we entered the terms “national identity” and “Article 4(2) TEU”. The search yielded 74 documents (judgements and opinions). In the table below⁸⁷, there is the list of cases (judgements), we came across:

Case	Date	Name of the parties	Subject-matter
C-51/08	24/05/2011	Commission v Luxembourg	Freedom of movement for persons- Freedom of establishment
C-208/09	22/12/2010	Sayn-Wittgenstein	Principles of Union law
C-202/11	16/04/2013	Las	Freedom of movement for persons - Freedom of movement for workers
C-58/13	17/07/2014	Torresi	Freedom of movement for persons - Freedom of movement for workers
C-438/14	02/06/2016	Bogendorff von Wolffersdorff	Principles of Union law
C-673/16	05/06/2018	Coman and Others	Non-discrimination and citizenship of the Union -Citizenship of the Union
C-658/19	25/02/2021	Commission v Spain	area of freedom, security and justice
C-391/20	07/09/2022	Cilevičs and Others	Non-discrimination and citizenship of the Union -non-discrimination

⁸⁷ The categories of the tables and their content is an exact match with the results appearing in the search. You can verify [here](#)

C-490/20	14/12/2021	Stolichna obshtina, rayon „Pancharevo“	Non-discrimination and citizenship of the Union -Citizenship of the Union
C-156/21	16/02/2022	Hungary v Parliament and Council	Principles of Union law
C-808/21	19/11/2024	Commission v Czech Republic () and qualité de membre d'un parti politique)	Non-discrimination and citizenship of the Union - Citizenship of the Union
C-814/21	19/11/2024	Commission v Poland () and qualité de membre d'un parti politique)	Non-discrimination and citizenship of the Union - Citizenship of the Union
C-181/23	29/04/2025	Commission v Malta	Non-discrimination and citizenship of the Union - Citizenship of the Union
C-430/21	22/02/2022	RS	Law governing the institutions

Then, within the pdf version of the judgements with the help of the search button, using the terms “national identity”, “national identities” and Article 4(2), we spotted the relevant instances in the document to see how the concept is treated by the Court. Of the cases that the search returned, we excluded cases C-393/10 (O’Brien), C-300/11 (ZZ), C-51/15 (Remondis) because they were not connected to national identity. They appeared in the results just because they included the relevant search terms, which, however, were used in relation to other types of argumentations, ex. division of competences. Also, Avis 1/19 (Opinion of the Court on the Convention of Istanbul) was also excluded because it referred to a request for an Opinion from the CJEU by the European Parliament as to the legal basis to be used for the signing of the Convention and other relevant preoccupations, which fall outside the scope of this paper. In the same way, case C-767/21P was not considered because it concerned a internal issue of the European Parliament (action for annulment of the oral measure of the President of the Parliament, prohibiting MEPs from displaying national flags on their lecterns. Finally, Opinions on case C-239/23 and C-448/23 were not included because the cases are still in progress. However, the latter could be of high interest for the purposes of our paper because the Advocate General makes extensive reference to the concept of national identity so a quick reference will be made to it further down.

Moreover, we chose to refer not only to judgements, though, because they give a glimpse into the tendencies within the Court. These Opinions are: C-566/10 P (Italy v Commission), C-399/11 (Melloni), C-151/12 (Commission v Spain), C-58/13 (Torresi), C-62/14 (Gauweiler and Others), C-

115/ 14 (RegioPost), C-216/14 (Covaci), C-358/14 (Poland v Parliament and Council), C-51/15 (Remondis), C-157/15 (G4S Secure Solutions), C-541/15 (Freitag), C-566/15 (Erzberger), C-74/16 (Congregación de Escuelas Pías Provincia Betania), C-310/16 (Dzivev and Others), C-414/16 (Egenberger), C-673/16 (Coman and Others), C-42/17 (M.A.S. and M.B), C-221/17 (Tjebbes and Others), C-391/17 (Commission v United kingdom), C-621/18 (Wightman and Others), C-742/19 (Ministrstvo za obrambo), C-391/20 (discussed below in greater detail), C-490/20 (Stolichna obshtina, rayon „Pancharevo“), C-157/21 (Poland v Parliament and Council), C-808/21 (Commission v Czech Republic), C-814/21 (Commission v Poland), C-148/22 (Commune d'Ans), C-743/22 (DISA) and C-430/21 (RS).

In most of them, the search did not turn the judgement along with the Opinion with means that although the concept of “national identity” and ‘Article 4(2) TEU’ was included in the Opinion of the Advocate General, it was not taken up by the Court. For example, in the C-221/17 (Tjebbes and Others), the Dutch authorities did not invoke the national identity clause, but it was done so by the Advocate General⁸⁸.

II. Discussion of the concept of national identity in Advocates General’s Opinions

In Advocates General’s Opinions—such as in C-58/13, C-62/14, and C-673/16 (all references for preliminary rulings)—national identity is seen as the justification to be put forward by Member States to derogate from “obligations imposed by EU law” as a means to protecting it, but still this cannot be without limits⁸⁹, and “virtually at the discretion of each Member State” if we are to “preserve *this* Union, as we know it today”. And “that is particularly the case if that ‘constitutional identity’ is stated to be different from the ‘national identity’ referred to in Article 4(2) TEU”⁹⁰. National identity “cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU”⁹¹. Advocate General Kokott (on case C-157/15⁹²-religious discrimination in the workplace) refused that national identity could exclude the applicability of EU law. Specifically, she mentioned that “The European Union’s obligation under Article 4(2) TEU to respect the national identities of its Member States does not in itself support the inference that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78⁹³. It requires rather that the application of that directive must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the Directive as such but must be duly taken into account in the interpretation of the principle of equal treatment”⁹⁴. However, the CJEU did not include arguments based on national identity in its judgement. In the Opinion of case C-621/18⁹⁵, Article 4(2) was used a simple reference in the interpretation of Article 50 TEU. Similarly, in C-742/19, the Advocate General questioned whether military availability could truly be part of constitutional identity (the same way as the official language or the republican form of the State⁹⁶, drawing a distinction between core constitutional structures and broader national practices. This distinction signals the Court’s reluctance to allow Article 4(2) to be stretched beyond a narrow constitutional core. For the Advocate General of this case “constitutional identity” refers only to a “hard core” of national constitutional rules. In the Opinion for case C-490/20, the Advocate General accepts the “traditional” family is “a

⁸⁸ Bonelli, M. (2021)

⁸⁹ Opinion of Advocate General Wahl, C-58/13, paragraph 100

⁹⁰ Opinion of Advocate General Cruz Villalón, C-62/14, paragraph 59

⁹¹ Opinion of Advocate General Wathelet, C-673/16, paragraph 40

⁹² C-157/15 (G4S Secure Solutions)- reference for preliminary ruling

⁹³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. <https://eur-lex.europa.eu/eli/dir/2000/78/oj/eng>

⁹⁴ Opinion of Advocate General Kokott, Case C-157/15, paragraph 32

⁹⁵ Case C-621/18 (Wightman and Others)- request for preliminary ruling

⁹⁶ Opinion of advocate General Saugmandsgaard, Case C-742/19, footnote 114

value protected as an element of national identity within the meaning of Article 4(2) TEU”⁹⁷; however, “only a conception of national identity which is consistent with the fundamental values of the European Union as enshrined inter alia in Article 2 TEU may be protected under Article 4(2) TEU”⁹⁸. In C-148/22⁹⁹ and C-391/20, the Advocate Generals underline that while Member States enjoy significant discretion in defining their national identities, that discretion is not absolute or limitless and cannot justify departures or be used as an “escape clause” from fundamental EU law and especially from principles such as the rule of law and judicial independence. The EU obligation to respect national identities does mean that the Member States can “disregard EU law at their convenience”¹⁰⁰. Therefore, national identities should be compatible with EU law and especially with the fundamental values (Article 2 TEU) and aims (Article 3 TEU) of the EU¹⁰¹.

III. Discussion of the concept of national identity in various CJEU cases

In several judgements, such as C-51/08¹⁰² and C-208/09¹⁰³, the Court briefly acknowledges national identity as a legitimate aim, yet it offers little substantive interpretation beyond citing the Treaty. In the latter case, the Court sustained that the ban on a person using the noble elements of their name constituted a part of the national identity embodied in the legal system of Austria¹⁰⁴. Similarly, in C-202/11¹⁰⁵ national identity is mentioned largely in passing, without detailed analysis. In C-673/16 (concerning residence permit for same-sex partners), Latvia sustained that the national identity clause of Article 4(2) TEU would be a means to justify a restriction of free movement rights (resulting from Romania’s refusal to recognize same-sex marriage). The Court held that “an obligation to recognise such marriages.... does not undermine the national identity”, because it does not undermine the institution of marriage, which falls within the exclusive competence of the Member States¹⁰⁶, revealing the Court’s unwillingness to take national identity claims at face value¹⁰⁷. The same approach was also followed in the Torresi case, where once the again the issue in question (access to the profession of lawyer in Italy) could not affect national identity in the sense of Article 4(2) TEU¹⁰⁸. In C-438/14¹⁰⁹ (Bogendorff von Wolffersdorff), even though the Court accepted claims on national identity and cultural diversity and made admissible Germany’s constitutional choice to abolish privileges of birth and rank as an element of national identity¹¹⁰, still it avoided making national identity the focal point of its decision¹¹¹. National identity, under Article 4(2) TEU, is invoked by Member States in contexts ranging from language policy (C-391/20¹¹²), availability of military personnel (C-742/19), and LGBTQ+ family rights (C-490/20), to procedural obligations in infringement proceedings (C-658/19¹¹³). In Case C-391/20 (request for preliminary ruling on whether the Latvian legislation, according to which higher education courses should be delivered only in Latvian, is compatible with the EU law), the Court accepted the Latvian government’s claim regarding language as part of national identity and that as such it should be protected and promoted,

⁹⁷ Opinion of Advocate General Kokott, Case C-490/20, paragraph 2

⁹⁸ Opinion of Advocate General Kokott, Case C-490/20, paragraph 73

⁹⁹ Case C-148/22 (Commune d'Ans) – request for a preliminary ruling

¹⁰⁰ Opinion of AG Emiliou, Case C-391/20, paragraphs 84, 86

¹⁰¹ Opinion of AG Emiliou, Case C-391/20, paragraphs 87

¹⁰² Case C-51/08 (Commission v Luxembourg) - Failure of a Member State to fulfil obligations

¹⁰³ Case C-208/09 (Sayn-Wittgenstein) - Reference for a preliminary ruling

¹⁰⁴ Kovács, K. (2022)

¹⁰⁵ Case C-202/11 (Las) - Request for a preliminary ruling

¹⁰⁶ Opinion Advocate General Kokott, Case C-490/20, paragraph 94

¹⁰⁷ Bonelli, M. (2021)

¹⁰⁸ Case 673/16, paragraph 58

¹⁰⁹ Case C-438/14 (Bogendorff von Wolffersdorff) – request for a preliminary ruling

¹¹⁰ Kovács, K. (2022)

¹¹¹ Bonelli, M. (2022)

¹¹² Case C-391/20 (Boriss Cilevičs and Others) - Request for a preliminary ruling

¹¹³ Case C-658/19 - Commission v Spain (Directive données à caractère personnel - Domaine pénal) - Failure of a Member State to fulfil obligations. <https://curia.europa.eu/juris/liste.jsf?num=C-658/19>

which demonstrates that cultural considerations may be taken into account, as long as they are linked to the national identity as established in the domestic legal order¹¹⁴. By acknowledging that the official national language of a Member State can be part of its national identity, the Court accepted therefore that EU law does not oppose to adoption of measures that promote and protection of these official language(s) and it can even justify a restriction on one or more freedoms of movement¹¹⁵.

However, the Court maintains a consistently cautious and constrained approach, often referencing national identity but rarely engaging in deep elaboration of the concept. For instance, in C-658/19, Spain's appeal to national identity was acknowledged but not explored in substance—the Court prioritized compliance with EU obligations over the invocation of Article 4(2) TEU. In C-391/20, the protection of language as part of national identity was accepted in principle, yet the Court reaffirmed that such policies must be proportionate and cannot infringe disproportionately on fundamental freedoms. In C-490/20, concerning same-sex parent recognition, the national identity claim was critically balanced against EU values such as private life and free movement. In cases such as C-808/21¹¹⁶ and C-814/21¹¹⁷, the Court acknowledges that elements like national political participation form part of a state's constitutional identity, yet it emphasizes that such claims must remain compatible with EU values, particularly democracy and non-discrimination under Articles 2 and 10 TEU. The notion of national identity is thus not a *carte blanche* for exemption from EU law but a parameter to be balanced with sincere cooperation under Article 4(3) TEU, as reaffirmed in C-181/23¹¹⁸ concerning investor citizenship schemes. For this last case, there is a very interesting article in *Le Monde*¹¹⁹, where the authors criticise Malta's attitude in commercialising national identity because they think it undermines European citizenship as a whole and call the Court to take an important decision for Europe's future.

The M.A.S. & M.B. case (C-42/17¹²⁰) is a characteristic example of the relationship of EU law and a national (i.e. Italian) legal system as well as another example of the Court's reluctance to consider arguments based on national identity. Although M.A.S. & M.B. (*Taricco II*) shows that the CJEU is more receptive towards the questions of national courts, still the language used from either side is still quite different. The concept “national identity” did not even appear in the ruling and the third questions of the preliminary reference was not even touched by the Court; the question was whether a national court was obliged to disapply provisions of national law even if that would come in contrast with the principles of the constitutional order of a Member State (in other words if it was related to its constitutional identity). Instead, the Court chose to talk about common “constitutional traditions”¹²¹, inviting thus the national courts “to frame their fundamental rights concerns in terms of common principles and common traditions, rather than on the basis of constitutional identity”¹²². In a way, the CJEU allowed Italy to use the idea of protection of fundamental rights as a justification

¹¹⁴ Kovács, K. (2022)

¹¹⁵ Opinion of Advocate General Emiliou, Case 391/20, paragraph 79

¹¹⁶ Case C-808/21 - Commission v Czech Republic () and qualité de membre d'un parti politique)- Failure of a Member State to fulfil obligations

¹¹⁷ Case C-814/21 - Commission v Poland () and qualité de membre d'un parti politique) - Failure of a Member State to fulfil obligations

¹¹⁸ Case C-181/23- Commission v Malta (Citoyenneté par investissement)- Failure of a Member State to fulfil obligations

¹¹⁹ Lepoutre, J. & Weil, P. (17 October 2024). Jules Lepoutre et Patrick Weil : « En vendant la citoyenneté de l'Union, Malte dégrade le statut de tous les citoyens européens ». *Le Monde*.

https://www.lemonde.fr/idees/article/2024/10/16/jules-lepoutre-et-patrick-weil-en-vendant-la-citoyennete-de-l-union-malte-degrade-le-statut-de-tous-les-citoyens-europeens_6353444_3232.html (full version accessible by Europresse database)

¹²⁰ Case C-42/17 (C-42/17 - M.A.S. & M.B)- Reference for a preliminary ruling

¹²¹ Case C-42/17, paragraph 53

¹²² Bonelli, M. (2018). The *Taricco* saga and the consolidation of judicial dialogue in the European Union. CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555; and C-42/17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017. *Maastricht Journal of European and Comparative Law*, 25(3) 357–373. <https://doi.org/10.1177/1023263X18773046>

to derogate from EU law, but this should not be seen as a total overturn of the primacy of EU law; EU law continues to have primacy over national law¹²³.

Closely related to the above is the case C-107/23 PPU¹²⁴ in which the CJEU also clarified the responsibilities of Member States in addressing fraud that impacts the EU's financial interests, while ensuring the protection of fundamental rights under both EU and national law at the same time¹²⁵. This case (preliminary reference requested by a Romanian Court) is another clear example of the direct effect and primacy of the EU law and the role of national fundamental rights standards in the EU legal order¹²⁶. As with the M.A.S. case, here as well the Court discussed the possible disapplication of national provisions in conflict with Article 325 TFEU, although its direct effect was not mentioned in the ruling of the M.A.S. case¹²⁷, something that was explicitly stated here. The M.A.S. case and case C-107/23 both can be seen as the intention of the Court to loosen the direct effect test by lowering the level of "clarity", "precision" and "unconditionality", which served as requirements for a provision to have direct effect¹²⁸, leading to multiple complications concerning the application or disapplication of national legislation. This is especially intense in criminal cases like the M.A.S. and the Lin. What is very important about this case is the fact that the Court called the Romanian courts to disapply specific judgements of the Romanian Constitutional Court because otherwise it would lead to a "systemic risk of impunity" for offences which endanger the financial interests of the Union¹²⁹. Although this would lead to a restriction of the national standard of protection (*lex mitior*), still the EU law should take primacy over EU law. The limitation periods which were mentioned in the questions posed by the referring court had to be exercised in compliance with the EU law although they remain a competence of the Member States and they are not subject to "legislative harmonization by the Union"¹³⁰. What the Court actually stated is that even though fundamental rights must be protected, still the Member States are obliged to take all measures needed to fulfill their obligations that derive from the Treaties and to protect the (financial interests of the Union)¹³¹. Furthermore, the CJEU also made reference to the possible disciplinary consequences of the judges disapplying the Romanian Constitutional Court's case-law by declaring that judges shall not be subject to disciplinary proceedings for that matter¹³² because that would be against the principle of the primacy of EU law. The final decision was in stark contrast with the Advocate General's, Campos-Sánchez Bordona's Opinion who in his reasoning sustained that "...the protection of the Union's financial interests cannot come at the cost of infringing fundamental rights"¹³³. The fundamental right mentioned here is the "principle of retroactivity of the most favourable criminal law"¹³⁴, i.e. "where there were differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment was rendered, the courts were required to apply the law whose provisions were most favourable to the defendant"¹³⁵. In the M.A.S. case the primacy of the EU law was limited in order to allow for the

¹²³ *ibid*

¹²⁴ Case C-107/23 PPU (Lin)- Request for a preliminary ruling

¹²⁵ Haupt, S. (12 August 2023). ECJ: EU Law Protecting the Union's Financial Interests Prevails over National Fundamental Rights. Eucrim. Accessible here: <https://eucrim.eu/news/ecj-eu-law-protecting-the-unions-financial-interests-prevails-over-national-fundamental-rights/>

¹²⁶ Bonelli M. (2024). Growing pains: Direct effect, primacy and fundamental rights after Lin. *Common Market Law Review*, 61(4), 1045-1076. <https://doi.org/10.54648/cola2024068>

¹²⁷ *ibid*

¹²⁸ *ibid*

¹²⁹ Íñiguez, G. (27 July 2023). Balancing fundamental rights and the Union's financial interests: the Court of Justice delivers its judgment in *Lin* (C-107/23 PPU). EU Law Live. Accessible here: <https://eulawlive.com/analysis-balancing-fundamental-rights-and-the-unions-financial-interests-the-court-of-justice-delivers-its-judgment-in-lin-c-107-23-ppu-by-guillermo-iniguez/>

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² Haupt, S. (12 August 2023)

¹³³ Opinion of Advocate General Campos-Sánchez Bordona, C-107/23 PPU, paragraph 150

¹³⁴ Íñiguez, G. (27 July 2023)

¹³⁵ Opinion of Advocate General Campos-Sánchez Bordona, C-107/23 PPU, paragraph 98

application of the national higher standard¹³⁶. The opposite is true for the Lin case. Direct effect does not always promote individual rights and may, in some cases, offer no benefit to individuals. In fact, it can undermine their legal standing and restrict their fundamental rights¹³⁷.

Last but not least, the case-148/22 concerns the issue of religious neutrality in the workplace and it was treated as a case of indirect discrimination on grounds of religious beliefs. The Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation allowed the case to be brought under the scope of EU law¹³⁸. It is the first case that concerned the public sector and not a private employer, which appears to have given the chance to the CJEU to go a step further and allow more restrictions on the wearing of religious symbols at the workplace, allowing at the same time to the competent authorities a margin of discretion as to the extent of such a ban¹³⁹. However, the Court accepts the policy of strict neutrality of a public administrative body as long as it is justified by a “legitimate aim”, pursued in a “consistent and systematic manner” and the measures taken are the ones strictly necessary; only the national courts are competent to observe if these prerequisites are complied with¹⁴⁰. Another characteristic feature of this ruling is that its grounds were based on collective rather than the individual circumstances of the case¹⁴¹ as mentioned above. Once again there was a discrepancy between the Advocate General’s Opinion and the Court’s judgment. The Advocate General invokes the concept of national identity in this particular context as a proper justification to “limit the impact of EU law in areas considered essential for the Member States”¹⁴². He also sides with the French government’s arguments in that “the imposition of restrictions on the freedom of public sector employees to manifest their ... religious beliefs in the performance of their duties may be of such importance in some Member States that it forms part of their national identities...”¹⁴³ and with other Advocates General in other cases in that the EU “has an obligation to respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional” which stands for the respect of the plurality of views among other things¹⁴⁴. But contrary to the French government, here the Advocate General does not see relevance of national identity in this case because “the principle of State neutrality, even though it is generally described as a constitutional principle, is not enshrined as such in the Belgian Constitution, with the exception of the very specific field of education, and, above all, that the scope and extent of that principle are not clearly and uniformly defined in the Belgian legal order”¹⁴⁵, therefore hardly making part of the Kingdom of Belgium’s national identity¹⁴⁶. And although this case might set a dangerous precedent, since it allows for a level of discretion into EU anti-discrimination law by enabling not just Member States and their courts, but also various public authorities, to independently determine how to regulate the wearing of religious symbols in the workplace, which eventually might create the legal uncertainty¹⁴⁷, still it is an example

¹³⁶ Bonelli M. (2024)

¹³⁷ *ibid*

¹³⁸ Callewaert, J. (22 December 2023). Luxembourg not the end of the story on freedom of religion in the workplace? Judgment of the CJEU in the case of Commune d’Ans. Prof. Dr. iur. Johan Callewaert. <https://johan-callewaert.eu/luxembourg-not-the-end-of-the-story-on-freedom-of-religion-in-the-workplace-judgment-of-the-cjeu-in-the-case-of-commune-dans/>

¹³⁹ Howard, E. (05 December 2023). The Court of Justice and headscarves at work: discretion in EU anti-discrimination law: a dangerous precedent (Case C-148/22 OP v Commune d’Ans). EU Law Live. Accessible here: <https://eulawlive.com/op-ed-the-court-of-justice-and-headscarves-at-work-discretion-in-eu-anti-discrimination-law-a-dangerous-precedent-case-c-148-22-op-v-commune-dans-by-erica-howard/>

¹⁴⁰ Press release No 181/23 (28 November 2023). Wearing of religious symbols in the workplace: a public administration may decide to prohibit all of its employees from wearing such signs. Accessible here: https://curia.europa.eu/jcms/jcms/Jo2_7052/en/?jsp=jcore%2Fquery.jsp&annee=2023

¹⁴¹ Callewaert, J. (22 December 2023)

¹⁴² Opinion of Advocate General Collins, case C-148/22, paragraph 47

¹⁴³ Opinion of Advocate General Collins, case C-148/22, paragraph 46

¹⁴⁴ Opinion of Advocate General Collins, case C-148/22, paragraph 45

¹⁴⁵ Opinion of Advocate General Collins, case C-148/22, paragraph 71

¹⁴⁶ Opinion of Advocate General Collins, case C-148/22, paragraph 72

¹⁴⁷ Howard, E. (05 December 2023)

of the primacy of EU law over matters of national identity. It is very important to keep in mind how difficult it is for the CJEU to strike a balance on issues concerning national identity given the fact that national identity may comprise different things among Member States. For example, in this case, the case concerns religious freedom and secularism (*laïcité*), which lies at the very core of French political and social life, and it constitutes a central element of the republic model of France¹⁴⁸, closely linked to its national identity. On the other hand, in Belgium, for example, while there is the principle of neutrality, there is not a separation of the church and the state as strict as in France. “Belgium's unique heritage of political pluralism and the financial support provided to religious institutions in Belgium combine to set Belgium's *laïcité* apart from that of France” according to Van Oost et al¹⁴⁹.

IV. Discussion of the concept of national identity in CJEU cases relating to the rule of law

In this section, we will be making reference to cases that relate to national identity and the breach of the rule of law. Two characteristic cases constitute a hallmark for that matter: cases 156/21¹⁵⁰ and 157/21¹⁵¹ that have been jointly examined. The novelty here is that for the first time “national identity” is examined in reference to the European legal order and the rule of law and there is a more “direct and explicit approach” of the Court towards questions relating to national and constitutional identity^{152,153}.

These are actions of annulment from Hungary and Poland respectively concerning the validity of the Conditionality Regulation (2020/2092)¹⁵⁴. This Regulation was basically the outcome of the preoccupation of how to deal with the rule of law backsliding in certain Eastern European illiberal democracies. Apart from certain soft tool already in place, there have also been voices calling for financial consequences in the event of breaching EU law and disrespecting EU values¹⁵⁵.

Very concisely and for the flow of the discussion, we are mentioning the basic argumentative line of the two countries. The two countries resorted to the Court of Justice asking for the annulment of the Regulation because they sustained that the EU lacked the competence to adopt the Regulation (Article 322(1)(a) TFEU was not considered to be the appropriate legal basis), the notorious Article 7 TEU was circumvented (regarded as only legitimate procedure to deal with breaches of the rule of law), and that the Regulation breached the principle of legal certainty. More arguments were also put forward by the concerning countries, and among these it was the issue of respect for national identities (Polish case, paragraph 280)¹⁵⁶. For Hungary and Poland, the European values, as described in the Treaties, and especially the rule of law, are just general statements, which should not be defined at a European level and they should not be enshrined in the EU legislation and policy-making; instead,

¹⁴⁸ Firmonasari, A., Udasmoro, W. & Mastoyo, T. (2020)

¹⁴⁹ Van Oost, P., Bacus, J., Klein, O. & Yzerbyt, V. (2025)

¹⁵⁰ Case C-156/21 (Hungary v Parliament and Council) - Action for annulment

¹⁵¹ Case C-157/21 (Poland v Parliament and Council) - Action for annulment

¹⁵² Bonelli, M. (2022)

¹⁵³ Cruz Mantilla de los Ríos, P. (2024)

¹⁵⁴ In short, this Regulation “empowers the Commission to propose to the Council to adopt measures such as a suspension of EU payments in a situation where national breaches of the rule of law affect or seriously risk affecting the sound financial management of the EU budget or the protection of EU financial interests in a sufficiently direct way”. Pech, L. (2022). No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism. *Verfassungsblog*. Accessible here: <https://verfassungsblog.de/no-more-excuses/> . <https://dx.doi.org/10.17176/20220217-001101-0>

¹⁵⁵ Grabowska-Moroz, B. (2023). Case C-156/21, Hung. v. Eur. Parl. & Council and Case C-157/21, Pol. v. Eur. Parl. Council (C.J.E.U.). *International Legal Materials*, 62(4), 671–781. <http://dx.doi.org/10.1017/ilm.2023.10>

¹⁵⁶ Bonelli, M. (2022). Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation. *European Papers: a journal on law and integration*, 7(2), 507-525. <https://doi.org/10.15166/2499-8249/574>

the safeguarding of these principle should left in the hands of intergovernmental institutions, given the fact that the EU should have limited competences for that matter¹⁵⁷.

In these cases, it becomes clear that the EU does not wish to control the national identity of the member states as a whole, but rather it tries to protect its own identity by asking from the member states to respect the rule of law¹⁵⁸. The Court makes explicit reference to the constitutional identity of the Union and adopts a pluralist approach by putting the national identities of member states on the same constitutional level as the protection of the fundamental values of the EU. For the Court, constitutional identity is a key concept of public law and one of the pillars of the EU¹⁵⁹. In its judgements the Court used “bold and explicit constitutional language” and delineated the importances of values for the legal order of European Union as well as for its identity¹⁶⁰. We would say that the Court clearly defined the concept of identity in EU terms¹⁶¹: “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 order¹⁶². Thus, the European Union must be able to defend those values¹⁶³, within the limits of its powers as laid down by the Treaties.” And it continues by connecting the European and the national identity discourse¹⁶⁴: “Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States... those States enjoy a certain degree of discretion in implementing the principles of the rule of law¹⁶⁵, it in no way follows that that obligation as to the result to be achieved may vary¹⁶⁶ from one Member State to another. Whilst they have separate national identities.... 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”. The Court sustains here that the rule of law has been a common European value, a political ideal and legal conception¹⁶⁷ which can help assess the deterioration of the rule of law in member states¹⁶⁸. This interpretation of 'identity' suggests that, under its own constitutional framework, the EU is not permitted to make concessions when it comes to its core values¹⁶⁹. In practice, the Court of Justice ruled that national identities should be protected as long as they are constitutional and not “unconstitutional”¹⁷⁰. According to Faraguna & Drinóczi¹⁷¹, the reasoning of the Court has two implications; first, the identity of the EU is made up components like democracy, rule of law and human rights and second the national constitutional identities of member states cannot be contrary to the identity of the EU. Since Articles 2 and 4(2) of the TEU hold equal legal status, invoking Article 4(2) to justify a national measure that breaches the principles set out in Article 2 should be viewed as a misuse of the identity clause¹⁷².

¹⁵⁷ Bonelli, M. (2022). Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation. *European Papers: a journal on law and integration*, 7(2), 507-525. <https://doi.org/10.15166/2499-8249/574>

¹⁵⁸ Faraguna, P. & Barole, S. (2022). La condizionalità nell'Unione, i carrarmati fuori dell'Unione. *Diritti Comparati*. Accessible here : <https://www.diritticomparati.it/la-condizionalita-nellunione-i-carrarmati-fuori-dellunione/>

¹⁵⁹ Faraguna, P. & Drinóczi, T. (2022). Constitutional identity in and on EU terms. *Verfassungsblog on matters constitutional*. Accessible here: <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>

¹⁶⁰ Bonelli, M. (2022)

¹⁶¹ Faraguna, P. & Drinóczi, T. (2022)

¹⁶² Case C-156/21, paragraph 127

¹⁶³ Case C-156/21, paragraph 127

¹⁶⁴ Bonelli, M. (2022)

¹⁶⁵ Case C-156/21, paragraph 233

¹⁶⁶ Case C-156/21, paragraph 233-234

¹⁶⁷ Drinóczi, T. & Bień-Kacała, A. (Ed) (2021). *Rule of Law, common values, and illiberal constitutionalism: Poland and Hungary within the European Union*. London: Routledge. DOI: [10.4324/9781003052852](https://doi.org/10.4324/9781003052852)

¹⁶⁸ Faraguna, P. & Drinóczi, T. (2022)

¹⁶⁹ Pohjankoski, P. S. (2022). The Unveiling of EU's Constitutional Identity: Judgments in C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council. *EU law live. Weekend edition*, 91, 3-6. <https://helda.helsinki.fi/items/07efb740-78d2-48b0-a4c1-365da99f0ffe>

¹⁷⁰ Faraguna, P. & Barole, S. (2022)

¹⁷¹ Faraguna, P. & Drinóczi, T. (2022)

¹⁷² Faraguna, P. & Drinóczi, T. (2022)

According to Bonelli¹⁷³, although the concept of identity plays a minor role in the Court's judgement, still the reference to it and its incorporation in the reasoning is a novelty; it is the Court's way to remind in the most solid manner how important the values described in Article 2 TEU are for the EU legal order; to send a clear message to the parties concerned- and to any other member to follow-that national identity cannot be manipulated so as to derogate from the rule of law; and to clarify that the respect of the rule of law is a legal obligation once a country joined the EU and not just a political commitment. For Grabowska-Manor¹⁷⁴, these rulings can be seen as the most significant decisions on the rule of law in the Court's jurisprudence, as they place the rule of law at the heart of the European Union's identity, while others believe that this new development in the Court's case-law can be used as a means of protection of EU's legal order against the abuse of national identity by populist political actors in order to undermine the primacy of the EU law¹⁷⁵.

The Court reaffirmed its explicit, firm stance on the question of national identity as a means to escape EU obligations once again with case C-430/21 (RS). The Court dealt with the refusal of Romania to put in effect a Court's decision on the basis of constitutional identity claims, without however clearly identifying "what aspect of national identity the judgment in *Asociația Forumul Judecătorilor din România* impinges upon"¹⁷⁶. Characteristically, it mentions "...the Court may, under Article 4(2) TEU, be called upon to determine that an obligation of EU law does not undermine the national identity of a Member State"¹⁷⁷ on the one hand but on the other hand "that provision has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of the obligations under, in particular, Article 4(2) and (3) and the second subparagraph of Article 19(1) TEU, which are binding upon it, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court"¹⁷⁸. Only the Court "alone having jurisdiction to declare an EU act invalid". In case "a constitutional court of a Member State considers that a provision of secondary EU law... infringes the obligation to respect the national identity of that Member State... must a reference to the Court for a preliminary ruling under Article 267 TFEU, in order to assess the validity of that provision in the light of Article 4(2) TEU"¹⁷⁹. In fact, in this case, according to Selejan-Guțan¹⁸⁰, the CJEU "almost taught the Romanian Constitutional Court a EU law seminar". According to Bonelli¹⁸¹, the impressive aspect of this case is that the Court offers a very clear and detailed analysis of how Article 4(2) can/should or cannot/shouldn't be used and the strict attitude of the Court. One more time, as in the previous joint cases, the Court tried to send a clear message, not only to the Romanian Constitutional Court, but to all Constitutional courts in all Member States that the CJEU is the competent authority to interpret EU law and its primacy. So, if a Member State wishes to invoke the topic of national identity to justify a disregard for this primacy, the concept of national identity has to be precisely defined¹⁸².

Another very interesting case might be case C-448/23¹⁸³, judging from the Opinion of Advocate General only, because the case is still in progress and the ruling of the Court has not yet

¹⁷³ Bonelli, M. (2022)

¹⁷⁴ Grabowska-Moroz, B. (2023)

¹⁷⁵ Borger, V. (2022). Constitutional identity, the rule of law, and the power of the purse: The ECJ approves the conditionality mechanism to protect the Union budget: Hungary and Poland v. Parliament and Council. *Common Market Law Review*, 59(6), 1771-1802, reference in Grabowska-Moroz, B. (2023).
<https://doi.org/10.54648/cola2022118>

¹⁷⁶ Opinion of Advocate General Collins, case C-430/21, paragraph 62

¹⁷⁷ Case 430/21, paragraph 69

¹⁷⁸ Case 430/21, paragraph 70

¹⁷⁹ Case 430/21, paragraph 71

¹⁸⁰ Selejan-Guțan, B. (10 March 2022). Constitutional Court versus EU Law – A Romanian Saga. The Judgment in Case C-430/21 RS. EU Law Live. Accessible here: <https://eulawlive.com/op-ed-constitutional-court-versus-eu-law-a-romanian-saga-the-judgment-in-case-c-430-21-rs-by-bianca-selejan-gutan/>

¹⁸¹ Bonelli, M. (2022)

¹⁸² Selejan-Guțan, B. (2022)

¹⁸³ Case C-448/23 (Commission v Poland)- Failure of a Member State to fulfil obligations

been published. It is a case of Commission V Poland concerning infringement of the principles of autonomy, primacy, effectiveness and uniform application of EU law on the part of Poland. The Advocate General makes a very extensive analysis of the concept of national identity and while accepting as a justification in restriction of fundamental freedoms in internal market cases¹⁸⁴, still the Court cannot find any “ground for maintaining that requirements arising from respect for values and principles such as the rule of law, effective judicial protection and judicial independence.... are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU”¹⁸⁵. So, it will be of great interest to see how the Court will incorporate, if ever, this reasoning into its ruling.

In conclusion, this slight differentiation in the approach towards national identity that was implemented by the CJEU can be explained not only by the different implications national identity has in these last cases. According to Bonelli¹⁸⁶, the Court might have realized that by silence and lack of engagement, the abuses of national identity, especially those targeting the rule of law, cannot be effectively dealt with. On the other hand, a balance has to be found between common values and diversity. In the cases we looked into, (RS judgment and the Advocate General’s opinion in *Cilevičs and Others*), it is acknowledged that the national identity clause under Article 4(2) TEU can potentially serve both as a standard to assess the validity of EU law and as a justification for derogating from it. The development of a more defined concept of ‘constitutional’ national identity could encourage national courts to invoke Article 4(2) more frequently. However, the Court of Justice emphasizes that such claims must follow proper procedure—specifically, they should be raised through the preliminary reference mechanism, and national courts must act in line with the principle of sincere cooperation¹⁸⁷.

V. Conclusion

In overview, the Court accepted (or not) the reasoning of Member States, being based on provisions of the national constitutional law, to justify any restriction of freedoms, either without referring to the concept of national identity or by using it as a subsidiary point (as in the case *Sayn-Wittgenstein* for example)¹⁸⁸. Even when the Court accepted the identity-based arguments made by Member States, it emphasized that national identity cannot be used as an ultimate tool to override EU obligations. Instead, it must be weighed against other important considerations—especially the primacy and effectiveness of EU law—and it is the CJEU that holds the authority to carry out that balancing process¹⁸⁹.

Our analysis revealed a consistent reluctance by the Court to deeply engage with or define the scope of national identity claims. The Court’s hesitation may stem from a concern that offering a clearer definition could worsen tensions with national constitutional courts, especially given that some of them interpret the idea of constitutional identity in very different ways¹⁹⁰. In *Taricco II* (C-42/17) and *Lin* (C-107/23 PPU), the Court avoids engaging explicitly with the concept of national identity, even though national constitutional principles are at stake. Instead, it speaks of “common constitutional traditions” and fundamental rights, subtly redirecting the legal reasoning away from identity-based conflicts. This avoidance may reflect an effort to de-escalate tension with national courts while still preserving the primacy and direct effect of EU law, especially in sensitive areas like criminal justice and financial protection. The Court chooses to reaffirm the relevance of national identity without allowing it to limit the uniform application or primacy of EU law. This pattern suggests that, despite its constitutional elevation after the Lisbon Treaty, the concept of national

¹⁸⁴ Opinion of Advocate General Spielmann, case C-448/23, paragraph 85

¹⁸⁵ Opinion of Advocate General Spielmann, case C-448/23, paragraph 68

¹⁸⁶ Bonelli, M. (2022)

¹⁸⁷ *ibid*

¹⁸⁸ Schill, S.W. & von Bogdandy, A. (2011)

¹⁸⁹ Bonelli, M. (2021)

¹⁹⁰ *ibid*

identity remains troublesome in the Court's jurisprudence. However, most of the cases we dealt with concern "modest national features"¹⁹¹, like religion, family or nationality, language, which constitute areas where the EU does not have competence. For example, in C-391/20, the issue of linguistic identity is treated more leniently. We would assume that the Court does not seem to focus much on the content of national identity; instead, it seems that the Court's main aspiration is to strike a balance between national identity and European integration and between national identity and EU basic rules, especially market freedoms and fundamental rights¹⁹². National identity does not take precedence over these considerations. This is verified by the cases we came across in our search. However, given the illiberal tendencies, mainly in Eastern Europe, and the rule of law being under attack, national identity as a way to derogate not only from EU obligations this time, but to undermine or question the primacy the EU law made its appearance in recent cases. While Article 4(2) TEU requires respect for national identities, this cannot serve as a legal shield against the core values of the Union, especially the rule of law, judicial independence, and fundamental rights. Across the various fields examined — from language rights and family law to citizenship, public sector neutrality, and the rule of law — a pattern becomes visible. National identity is treated as a relevant but not decisive factor. It may inform interpretation, but it does not confer *carte blanche* to deviate from Union law. Ultimately, the comparative reading of these cases underscores that national identity, while constitutionally protected, is not a self-standing or absolute concept. It cannot be invoked unilaterally or arbitrarily, especially when it is used to undermine democratic procedures or the effective implementation of the EU law.

Taken together, these cases reveal an evolving jurisprudence regarding national identity under Article 4(2) TEU which illustrates the increasingly complex and politically sensitive role of this concept within the EU legal order. National identity is no longer ignored by the Court but is also not accepted as an unqualified basis for diverging from EU law. The case law examined reveals a clear shift in the CJEU's approach: national identity has transitioned from being cited occasionally in passing and being a marginal clause with little effort to define or delimit it to being a focal point of reference. The Court's firm and more structured stance in cases like *RS, Hungary and Poland v Parliament*, and *Lin*, suggests an effort to reclaim interpretive authority over the meaning and limits of identity within the Union.

As populist trends are on the rise across the continent and illiberal governments try to renationalize the identity clause, identity politics has become the scene where exclusionary values in stark contrast to the fundamental values embraced by the EU make their appearance. In this context, the Court might have to abandon its neutral position and become more decisive as far as the interpretation of national identity is concerned¹⁹³. The handling of the situation should be very careful because as Scholtes¹⁹⁴ suggests permitting Member States to challenge the authority of EU law on the grounds of national (constitutional) identity can destabilise the EU legal systems and can allow for populist and nationalist interpretation of EU law. All the cases discussed here are clear examples of the challenges that Court continues to face in balancing the duties it places on national authorities through direct effect and primacy with other important constitutional goals, such as safeguarding fundamental rights within the EU¹⁹⁵. As the EU faces internal challenges to its legal and democratic foundations, the treatment of national identity within the framework of Article 4(2) TEU will remain a critical legal battleground — one that will continue to test the limits of integration, tolerance, and shared constitutionalism in Europe.

¹⁹¹ Millet, F.X. (2021)

¹⁹² *ibid*

¹⁹³ Faraguna, P. (2021)

¹⁹⁴ Scholtes, J. (2023)

¹⁹⁵ Bonelli M. (2024)

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