

A Member State’s ‘national identity’ plea as a justification for circumventing EU law obligations

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Abstract

This paper explores the European Union’s duty to respect the national identities of its Member States, understood in its capacity as a justification that Member States can invoke to derogate from certain EU law-mandated obligations. Since it was originally inserted in the Maastricht Treaty, the ‘national identity’ clause has undergone several modifications, the existing version having potentially far-reaching and unforeseeable implications. The analysis focuses on how the ‘national identity’ clause has been employed by the Member States in practice, spotlighting the current developments in Poland and Hungary as a fitting illustration. Namely, the Polish and the Hungarian government have been known to play the ‘national identity’ card in order to justify and legitimize the rule-of-law backsliding processes taking hold of their countries. In addition, in October 2021, the Polish Constitutional Tribunal delivered a judgment which openly challenges the principle of primacy of EU law over national law as a core principle of the EU legal order. Lastly, the paper assesses the limits of the Member States’ discretion to use the ‘national identity’ justification as a means of evading the authority of EU law, addressing the ‘thin red line’ that exists between using and abusing this justification, as well as the considerable anti-integration potential that the justification’s misuse carries with it.

Keywords

European Union, Poland, Hungary, national identity, constitutional identity, rule of law, primacy of EU law.

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1. The Article 4(2) TEU ‘national identity’ clause as a double-edged sword

‘National identity’ can be a loaded term, especially when placed in the context of the relationship between the European Union and its Member States. The Member States have been using the argument relating to the safeguarding of their national identities as a way of challenging or otherwise defying the EU’s law-making authority or its so-called ‘competence creep,’ denoting a practice whereby the EU legislates or takes regulatory action in areas where it has not been conferred a specific competence.¹ This paper scrutinizes the European Union’s duty to respect the national identities of its Member States, seen as a justification they can use in order to avoid complying with certain requirements set forth by EU law. The analysis will look more closely at how the ‘national identity’ clause of Article 4(2) TEU has been employed by the Member States, placing the spotlight on ongoing developments in Poland and Hungary as a fitting example. In recent years, the governments of Poland and Hungary have played the ‘national identity’ card to justify and legitimize the continued deterioration of the state of the rule of law in their countries.² What has been curious to observe is how the political structures in power in these countries have instrumentalized the ‘national identity’ justification to pursue the goal of establishing *their own, alternative* rule of law standards that contradict those enshrined by EU law.

In addition, in October 2021, the Polish Constitutional Tribunal (PCT) issued a ruling which openly challenges the principle of primacy of EU law as a core principle of the EU legal order. By refusing to acknowledge that EU law has priority over national constitutional provisions, the PCT launched an unprecedented contestation of the principle of primacy of EU law – a bedrock principle instrumental in driving forward the process of European legal integration. Aside from examining these issues, this paper will also consider the scope of the Member States’ discretion in employing the ‘national identity’ for the purpose of circumventing those rules of EU law they consider incompatible with particular aspects of their national identity. Finally, the discussion will weigh in on the ‘thin red line’ that separates the use and the abuse of the ‘national identity’

¹ See S. Weatherill, “Competence Creep and Competence Control,” *Yearbook of European Law* (2004) Volume 23, Issue 1; S. Garben, “Competence Creep Revisited,” *Journal of Common Market Studies* (2019) Volume 57, Issue 2.

² See e.g., C-824/18 *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, EU:C:2021:153; C-157/21 - Poland v Parliament and Council, ECLI:EU:C:2022:98; C-156/21 - Hungary v Parliament and Council, ECLI:EU:C:2022:97.

justification, addressing the considerable anti-integration potential that the justification's misuse carries with it.

The original 'national identity' clause was inserted in the 1992 Maastricht Treaty (Treaty on European Union; TEU), but has since been modified. The current version of the clause, found in *Article 4(2) TEU*, states that 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 (...)*."³ Seeing as the concept of 'national identity' shares many common elements with that of 'constitutional identity,' for the purposes of this paper, the two terms will be used interchangeably.⁴

The core principles sustaining the operation of the EU legal order (e.g., the principle of primacy of EU law) and the Union's foundational values of *Article 2 TEU* (among which, the rule of law) have a directly proportional relationship with one another. Thus, when a Member State fails to fully and correctly comply with principle of primacy of EU law, this, in turn, necessarily disturbs the levers of the EU's system of values. The EU's foundational values are enounced in Article 2 TEU and include the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The Court of Justice of the European Union (CJEU) has underscored the elemental constitutional importance of these shared values for the EU edifice, declaring that the Union is composed of "States which have *freely and voluntarily committed themselves to the common values* referred to in Article 2 [TEU]."⁵ In this regard, the CJEU has emphasized the *mutual trust* that exists between the Member States and, in particular, their courts and tribunals, which derives from the basic premise that the Member States share among them a set of common values.⁶ Moreover, the CJEU considers a Member State's compliance with the Article 2 TEU values as a *condition for the enjoyment of all of the rights* flowing from the application of the Union Treaties to that Member State.⁷ Apart from representing baseline values for all of the Member States, the values enshrined in Article 2 TEU act as EU membership benchmarks for the countries aspiring to become future EU Member States.⁸ It follows that, for the current Member States, adherence to the Union's basic

³ Emphasis added.

⁴ See L. Besselink, "National and constitutional identity before and after Lisbon," *Utrecht Law Review* (2010) Volume 6, Issue 3; R. Uitz, "National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades," *Verfassungsblog*, 11 November 2016.

⁵ Emphasis added; See C-896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para. 62; C-619/18 *Commission v Poland*, ECLI:EU:C:2019:531, para. 42; C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999, para.63; C-64/16 *Associação Sindical dos Juizes Portugueses* (Portuguese judges) EU:C:2018:117, para.30.

⁶ Emphasis added; *Repubblika*, para. 62; *Portuguese judges*, para.30.

⁷ Emphasis added; *Repubblika*, para. 63; *Contra*, Williams suggests that the EU values have been applied in a haphazard fashion, oftentimes without an understanding of their normative content – the CJEU has positioned itself pragmatically by focusing on the EU's principles of governance rather than attempting to offer a way of satisfactorily defining its values or ensuring that they are enforced (A.T. Williams, "Taking values seriously: Towards a philosophy of EU law," *Oxford Journal of Legal Studies* (2009) Volume 29 Issue 3).

⁸ Article 49 TEU provides that "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

values should be a ‘given’ and should stem from the very fact of being part of the EU.⁹ However, the Polish and the Hungarian example point to a paradox of sorts – the two governments have for some time now been relying on the EU’s duty to respect the Member States’ national identities for the purpose of avoiding having to comply with the Union’s fundamental values – most notably, the rule of law.

When assessing the scope of and limits to employing the ‘national identity’ justification, it is important to take into account the TEU provision which follows immediately after the Article 4(2) ‘national identity’ clause. *Article 4(3) TEU* enshrines the principle of sincere cooperation which requires that the Union and the Member States, in full mutual respect, assist each other in the execution of the tasks which arise from the Treaties. In this vein, pursuant to the same provision, the Member States are obligated to ensure fulfilment of the obligations stemming from the Union Treaties or the acts of the EU institutions of the Union, as well as facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. One could submit that the second and the third paragraph of Article 4 TEU correspond to one another in a way that requires the former to be exercised in conformity with the letter and spirit of the latter. The Union’s and the Member States’ duties flowing from the foregoing provisions are arguably inextricably linked and can be seen as a sort of a *quid pro quo* arrangement. In this way, while the Union is responsible for fully respecting the national identities of its Member States, the latter, in turn, have an obligation to guarantee the fulfilment of the obligations arising from the Union Treaties and the acts of the EU institutions, to facilitate the achievement of the Union's tasks, and to refrain from any measure which could undermine the attainment of the Union's objectives.

2. What does a Member State’s ‘national identity’ plea actually comprise?

Under the current version of the *Article 4(2) TEU* ‘national identity’ clause, the Union pledges to *respect* the equality of the Member States before the Union Treaties as well as their national identities, which are inherent in their fundamental political and constitutional structures. Further, the Union undertakes to respect the Member States’ essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. The original, Maastricht Treaty version of the clause is more generally phrased and significantly shorter: it provides that the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy (Article F, paragraph 1). The Amsterdam Treaty version is more laconic and solely states that the Union “shall respect the national identities of its Member States.” (Article F, paragraph 3). The foregoing shows

⁹ I. Cenevska, “Safeguarding the Rule of Law in the European Union: Pre-Accession Conditionality and Post-Accession Reality,” Trans European Policy Studies Association (TEPSA) Policy Brief (January 2020), p.1-2 (http://www.tepsa.eu/tepsa-brief-ilina-cenevska/?fbclid=IwAR1x6Xjp9mIOArmFH7_h4MM51KrglifYHydK2oBrmim_jFek7SGqeBY6NpQ).

that the present (latest) version of the clause, while not necessarily more comprehensive or clear, is certainly more concise and descriptive than the previous versions.

A further reference to the Member States' national identities can be found in the *third recital of the Preamble to the EU Charter of Fundamental Rights* which refers to the Union striving to preserve and develop its foundational values while “respecting the diversity of the cultures and traditions of the peoples of Europe as well as the *national identities* of the Member States and the organization of their public authorities at national, regional and local levels.”¹⁰ In a certain way, this formulation couples the duty to respect the common values with the duty to respect the Member States' national identities, marrying the objective of safeguarding the Union's basic values with the duty to respect the Member States' national identities in a way that the Union is expected to protect its values in a manner that *does not threaten or interfere* with the Member States' national identity considerations. This opens up the possibility for national governments to play the ‘national identity’ card, with the aim of escaping their obligations relative to the safeguarding of the Union's values. In this respect, another Treaty provision that can be seen as complementing Article 4(2) TEU and the third recital to the EU Charter of Fundamental Rights is *Article 67(1) TFEU* which specifies that the Union, constituting an area of freedom, security and justice, respects “the different legal systems and traditions of the Member States.”

National identity is a complex and highly abstract concept whereby the multitude of cultural identities is mirrored in the multiple dimensions of people's conceptions of nationhood.¹¹ The most salient dimensions of nationhood include: i) a historically shared territory (territorial boundedness) of a given population, ii) the shared nature of myths and origin and historical memories of the community; iii) the common bond of a standardized public culture; iv) common economy and territorial mobility for all members of a population, and v) the existence of a unified system of common legal rights and duties for all members, established under common laws and by common institutions.¹² When it comes to defining the term ‘national identity’ and the Member States' interpretation of it, it has been argued that the notion can have different meaning to different Member States.¹³ For some states, national identity matches the notion of *state identity* and is thus understood in its politico-constitutional sense, while for others, especially those with multicultural societies, it is construed as equally incorporating relevant linguistic, ethnic, religious and cultural elements.¹⁴ The notion of ‘national identity’ has over time been further enhanced through the addition of more legally relevant layers, especially those with EU law relevance, and has gradually been rebranded as ‘constitutional identity’¹⁵ – a term that is reflective of the notion's versatile and

¹⁰ Emphasis added.

¹¹ A.D. Smith, “National Identity and the Idea of European Unity,” *International Affairs* (1992) Vol. 68, No. 1, p.60.

¹² *Ibid*, p.60; As presciently observed by Smith back in 1992, “given the multiplicity of language groups and ethnic heritages in Europe, it is reasonable to expect the persistence of strong ethnic sentiments in many parts of the continent, as well as the continuity of periodic revival of national identities (...).” (*Ibid*, p.64)

¹³ L. Besselink, “National and constitutional identity before and after Lisbon,” *Utrecht Law Review* (2010) Volume 6, Issue 3, p.42.

¹⁴ *Ibid*.

¹⁵ *Ibid*, p.37; For a discussion on the legal significance of the ‘national identity’ clause, whether invoking it helps Member States gain leverage in cases launched before the CJEU, and whether the clause can be considered as a legal

multi-faceted nature.¹⁶ Scholars have interrogated the notions of ‘constitutional pluralism’ and ‘constitutional identity’ within the context of the sometimes conflictual relationship between the CJEU and national constitutional courts, particularly surrounding the issue of which judicial organ should assume the ultimate authority to rule on the boundaries of EU competence.¹⁷ Despite what the wording of Article 4(2) TEU may suggest, as far as the CJEU is concerned, the potential of the national identity clause to effectively act as a barrier against EU’s competence creep is highly limited: namely, the CJEU is very unlikely to annul an EU-wide legal act on account of the constitutional specificities of a single Member State.¹⁸

Assessing the relevance of the theories of constitutional pluralism and constitutional identity in light of present-day developments in Poland and Hungary, commentators have decried the way in which the work of distinguished legal scholars like Neil MacCormick¹⁹ and statements made by Member State constitutional courts, such as the German Federal Constitutional Court, have been misguidedly relied upon by autocratic regimes and their captured courts to justify defiance of the EU’s fundamental values.²⁰ It has been observed that regressive states deploy the rhetoric of constitutional identity and assert “a measure of legal exceptionalism and specificity” to avoid criticism of their rule of law eroding actions,²¹ which, in turn, results in ‘constitutional identity’ devolving into a potentially flawed concept, one that is inherently prone to abuse by autocrats and “other enemies of the rule of law.”²² The governments of Hungary and Poland have been known to instrumentalize the concepts of constitutional identity and constitutional pluralism to justify flouting their EU law-prescribed obligations, particularly those relating to the checks and restraints on their power.²³ E.g., with respect to the Polish case, when the Polish government takes actions that violate the independence of the national judiciary, it would routinely claim that such matters fall outside the scope of EU law and therefore, CJEU’s jurisdiction. The Polish government has used this type of argument to legitimize domestic legislative changes which enable, as the European Commission puts it, “the executive or legislative powers to systematically interfere significantly with the composition, the powers, the administration and the functioning of [the]

limit to EU’s competence creep, see S. Garben, Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers, *Journal of Common Market Studies* (2020) Volume 58, Number 1; E. Cloots, *National Identity in EU Law*, 2015, Oxford University Press.

¹⁶ While the term ‘constitutional identity’ does not figure anywhere in the Union Treaties, it has been widely used in the context of their application (see e.g., N. Walker, “The Idea of Constitutional Pluralism” *Modern Law Review* (2002) Volume 65, Issue 3; R. Uitz, “National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades,” *Verfassungsblog*, 11 November 2016; L. Besselink, n.11 above).

¹⁷ R.D. Kelemen and L. Pech, “Why autocrats love constitutional identity and constitutional pluralism Lessons from Hungary and Poland,” *RECONNECT Working Paper* No.2, September 2018, p.5.

¹⁸ S. Garben, “Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers,” *Journal of Common Market Studies* (2020) Volume 58, Issue 1, p.50-51.

¹⁹ N. MacCormick, “The Maastricht Urteil: Sovereignty Now” *European Law Journal* (1995) Volume 1, Issue 3; See also N. Walker, “The Idea of Constitutional Pluralism” *Modern Law Review* (2002) Volume 65, Issue 3.

²⁰ Kelemen and Pech, n.17 above, p.10.

²¹ D. Kochenov and P. Bard, “The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU,” *University of Groningen Faculty of Law Research Paper Series* No. 5/2019, p.11.

²² Kelemen and Pech, n. 17 above, p.10.

²³ Kelemen and Pech, n. 17 above, p.6.

judicial bodies.”²⁴ Therefore, while it is certainly true that the competence to organize and reform the national judiciary rests with the Member States, this cannot be accomplished in a way that undermines the principles of judicial independence, effective judicial protection and inviolability of the judicial function.

The *White Paper on the Reform of the Polish Judiciary*²⁵ issued by the Polish government in 2018 provides a much-needed insight into the government’s understanding of the notion of ‘constitutional identity,’ as well as its scope and practical implications. The *White Paper* lists the arguments put forward by the Polish government to defend its goal to overhaul the national judicial system.²⁶ Following are some of those arguments:

“169. *The legal system of the European Union is based on constitutional pluralism of the member states ... Each country has specific constitutional solutions that are rooted in its history and legal traditions and these differences are protected by the treaty law of the [EU] (...)*

170. *Constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities, but also sets the limit for regulatory intervention of the European Union.*

(...)

173. This special character of the European legal system – comprised both of national systems and *acquis communautaire* was best described by a Scottish law philosopher, Neil MacCormick. In his commentary to the German Federal Constitutional Tribunal in its ruling over the Treaty of Maastricht (case Brunner) where one can find roots for the nowadays ample and developed *theory of constitutional pluralism*.

(...)

206. The European legal system is founded *on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union* which also guarantees that each member state *may shape its own judicial system in a sovereign manner*, as long as it does not threaten judicial independence.

(...)

207. Tensions between the executive and the judiciary lie in the nature of democratic systems, yet their very existence does not mean that judicial independence is endangered. *The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence*, which means that reforms of the judiciary should be assessed at the national level by competent authorities.”²⁷

²⁴ European Commission, *Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland*, COM(2017) 835 final, 20 December 2017, at point 173.

²⁵ The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary*, Warsaw, 7 March 2018 [previously available at: <https://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html>] (the text has been reproduced in Kelemen and Pech, n.15 above).

²⁶ The Polish government’s reform of the national judiciary re-structures the Polish justice system, which consists of: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the National Council for the Judiciary, the prosecution service and the National School for the Judiciary (European Commission, *Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland*, COM(2017) 835 final, 20 December 2017).

²⁷ The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary*, Warsaw, 7 March 2018 [Emphasis added].

Coming to the issue of employing the ‘national identity’ justification as a means of avoiding the obligations that arise from the Union Treaties or as a means to justify refusing to apply provisions of EU law (allegedly) incompatible with the idiosyncrasies of a Member State’s national identity, it bears recalling some of the observations made by the European Parliament (Parliament) with regard to the *boundaries* of the ‘national identity’ justification. Specifically, the Parliament considers the ‘national identity’ clause as a “barrier against any actual or potential Union encroachment upon Member State competences and activities,”²⁸ stressing that respect for the cultural diversity and national traditions of the Member States should not impede the uniform and high-level protection of democracy, rule of law and fundamental rights.²⁹ In the Parliament’s view, respect for the EU’s common values *should go hand in hand* with the Union’s commitment to diversity, which flows from the fact that the Article 2 TEU values themselves originate from the common constitutional traditions of the Member States, instituting the “basic framework within which Member States can preserve and develop their national identity.”³⁰ The Article 2 TEU values therefore *cannot be played off against* the Article 4 TEU obligation to respect the Member States’ national identities.³¹

Crucially, the Parliament views the duty of respect for ‘national identities’ (Article 4(2) TEU) and for the ‘different legal systems and traditions of the Member States’ (Article 67(1) TFEU) as being intrinsically linked with the principles of sincere cooperation (Article 4(3) TEU), mutual recognition (Articles 81 and 82 TFEU) and mutual trust.³² As a consequence, a Member State’s violation of the Union’s common principles and values should not be defended by invoking the respect for its national identity or traditions where the violation in question results in a *deterioration of the core principles of European integration*.³³ According to the Parliament, invoking Article 4(2) TEU *can only be acceptable provided that a Member State respects the Article 2 TEU values*.³⁴

Certain Member States’ constitutional courts, like the German Federal Constitutional Court and the Polish Constitutional Tribunal, have invoked the preeminence of national constitutional rules as a central argument in their ‘national identity’ / ‘constitutional identity’ plea.³⁵ Regarding the potential for abuse that the notion of constitutional identity carries with it, Advocate General Maduro comments that: “[...] respect owed to the constitutional identity of the Member States

²⁸ European Parliament, *Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights* (2015/2254(INL)), recital L.

²⁹ *Ibid.*

³⁰ European Parliament, *Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)* (2012/2130(INI)), recital K [Emphasis added].

³¹ *Ibid.*

³² *Ibid.*, recital L [Emphasis added].

³³ *Ibid.*, recital M [Emphasis added].

³⁴ *Ibid.*, recital M [Emphasis added].

³⁵ See Polish Constitutional Tribunal, Judgment No.K3/21, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, 7 October 2021 [<https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>]; German Federal Constitutional Court, *Maastricht Treaty judgment*, BVerfGE 89 (1993).

cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid [Union] law in given fields.”³⁶

3. Some examples of ‘national identity’ pleas raised before the Court of Justice of the EU

Following is a look at how the ‘national identity’ defense has been practically used by the Polish and the Hungarian government in proceedings before the CJEU, drawing on the cases *A.B. and Others v. Krajowa Rada Sądownictwa and Others*³⁷ (judgment delivered in March 2021), *Hungary v. Parliament and Council* and *Poland v. Parliament and Council*³⁸ (judgments delivered in February 2022). In the cases examined, the pleas raised by the two governments largely gravitated around the argument of protecting their respective national identities from unwarranted EU encroachment.

3.1. *A.B. and Others v. Krajowa Rada Sądownictwa and Others*: On the possibility for national legal amendments to preclude national courts from exercising their jurisdiction to rule in the first and last instance, thereby depriving them from the opportunity to refer questions for a preliminary ruling to the CJEU

In *A.B. and Others*, requests for preliminary rulings were made in proceedings between A.B., C.D., E.F., G.H. and I.J., and the Polish National Council of the Judiciary, concerning resolutions by which the latter decided not to propose to the President of the Republic of Poland the appointment of the persons concerned to positions as judges at Poland’s Supreme Court, and to propose the appointment of other candidates to those positions.³⁹ In its questions referred to the CJEU, Poland’s Supreme Administrative Court inquired, inter alia, about whether the relevant TEU provisions should be interpreted as precluding national legal amendments which prevent a national court from exercising its jurisdiction to rule in the first and last instance, and thus deprive this national court of the possibility of obtaining an answer to the questions referred to the CJEU for a preliminary ruling.⁴⁰ The Polish government maintained that the EU *lacked competence* concerning the procedures for the appointment of judges in the Member States, and that a judgment such as that sought from the CJEU would have a *normative rather than interpretative effect*.⁴¹ The government deemed that to enable the referring court to rule on the disputes in question would be

³⁶ Emphasis added; Opinion of Advocate General Poiares Maduro in C-213/07 *Michaniki AE* (8 October 2008), ECLI:EU:C:2008:544, para.33.

³⁷ C-824/18 *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2021:153.

³⁸ C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97; C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

³⁹ *Ibid*, para.2.

⁴⁰ Emphasis added; *A. B. and Others*, para.71.

⁴¹ Emphasis added; *A. B. and Others*, para.78.

contrary to Article 4(2) TEU, which requires the European Union to respect the national identities of the Member States, inherent in their constitutional structures.⁴²

The CJEU responded to this ‘national identity’ plea by stating that Member States are required, when exercising their competence, in particular that relating to the *enactment of national rules governing the process of appointing judges*, to comply with their obligations deriving from EU law.⁴³ It affirmed that any judgment in which the CJEU were to establish the existence of an obligation under EU law for the referring court to disapply the national rules at issue, would be *binding on that court, and could not be affected by provisions of domestic law, including constitutional provisions*.⁴⁴ In its rebuttal to the attempted ‘national identity’ justification, the CJEU decreed that it would be contrary to, among other provisions, the third subparagraph of Article 4(3) TEU⁴⁵ (which lays down the obligation for the Member States to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives), for Member States to amend their national legislation in a way that *prevents requests for a preliminary ruling* addressed to the CJEU from being maintained after they have been made.⁴⁶ Moreover, Member State legislation of that kind is considered as undermining the effectiveness of the cooperation between the CJEU and the national courts, established through the preliminary ruling mechanism, by virtue of Article 267 TFEU.⁴⁷ By making these pronouncements, the CJEU deftly used the full potential of Article 4(3) TEU against the Polish government’s attempted (possible) misuse of the Article 4(2) ‘national identity’ clause.

Unfortunately, what ensued after the delivery of this CJEU judgment was further reticence from the Polish side, this time coming from the Polish Constitutional Tribunal (PCT). In its judgment issued on October 7th 2021, the PCT evaluated the conformity with the Polish Constitution of selected TEU provisions⁴⁸ and openly called into question the primacy of EU law over national constitutional rules. First, the PCT referred to Article 1, first and second paragraphs, in conjunction with Article 4(3) TEU, construed in the way that it enables and/or compels the Polish courts to refrain from applying the Polish Constitution or requires them to apply provisions of law in a way inconsistent with provisions of the Polish Constitution, which the PCT declared to be contrary to the relevant provisions of the Polish Constitution.⁴⁹ Second, the PCT referred to

⁴² *A. B. and Others*, para.78.

⁴³ Emphasis added; *A. B. and Others*, para.79.

⁴⁴ Emphasis added; *A. B. and Others*, para.81.

⁴⁵ Article 4(3) TEU: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

⁴⁶ Emphasis added; *A. B. and Others*, para.95.

⁴⁷ *A. B. and Others*, para.107.

⁴⁸ Polish Constitutional Tribunal, Judgment No.K3/21, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, 7 October 2021 [<https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>].

⁴⁹ *Ibid.*

Article 19(1), second subparagraph, in conjunction with Article 4(3) of the TEU, construed in a way that, for the purpose of ensuring effective legal protection, the Polish courts are obliged to apply provisions in a way inconsistent with the Polish Constitution, which the Tribunal declared to be incompatible with the relevant articles of the Polish Constitution.⁵⁰ Third, the PCT declared that Article 19(1), second subparagraph, in conjunction with Article 2 TEU, construed in a way that it authorizes the Polish courts to review the independence of judges appointed by the President of the Republic of Poland, as well as to review the National Council of the Judiciary's resolution to refer a request to the President of the Republic to appoint a judge, was to be considered to be incompatible with the relevant articles of the Polish Constitution.⁵¹ Importantly, the PCT found that the EU authorities had acted outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties, thereby jeopardizing the Polish Constitution as the supreme law of the Republic of Poland which takes precedence in terms of its binding force and application; as a consequence of this, the Republic of Poland had been prevented from functioning as a sovereign and democratic state.⁵² As concerns the 'national identity' clause, in the absence of an official English translation of the judgment on the PCT's website (the judgment summary being the only official text available in English relating to the judgment K 3/21 of 7 October 2021), it is curious to note that the PCT has made no direct reference to national or constitutional identity, focusing instead on the duties and obligations conferred on the Union and the Member States pursuant to Article 4(3) TEU.

The EU's reaction to the PCT judgment was prompt. Within a short period of time, in December 2021, the European Commission started infringement proceedings against Poland, claiming that two recent PCT rulings (among which, the foregoing one) have been found to be contrary to the principles of autonomy, primacy, effectiveness and uniform application of EU law and the binding effect of the judgments of the CJEU.⁵³ The Commission considers that the PCT has neglected its obligations under EU law, having expressed strong doubts over the independence and impartiality of the PCT and deeming the Tribunal as no longer meeting the "court previously established by law" requirement emanating from Article 47 of the EU Charter of Fundamental Rights.⁵⁴

3.2. *Hungary v. Parliament and Council and Poland v. Parliament and Council: Contesting the validity of the rule-of-law conditionality mechanism established by EU Regulation 2020/2092*

Designed to play a part in curbing the rule of law violations of its Member States, or prevent their occurrence altogether, the *Regulation 2020/2092 on a general regime of conditionality for*

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ European Commission, "Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal" (Press Release), 22 December 2022); [\[https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070\]](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070).

⁵⁴ Ibid.

*the protection of the Union budget*⁵⁵ (Rule-of-Law Conditionality Regulation; Regulation), in effect since January 2021, establishes the necessary rules for the protection of the Union budget in the event of Member State breaches of the rule of law.⁵⁶ The rule-of-law conditionality mechanism introduced by the Regulation makes payments from the Union budget contingent on the Member States' observance of the rule of law. Poland and Hungary (separately) challenged the validity of the Rule-of-Law Conditionality Regulation before the CJEU, claiming that the Regulation lacks a correct legal basis and infringes, among others, the principle of legal certainty and the principle of equality of the Member States before the Treaties.⁵⁷

Notably, as regards the 'national identity' considerations, in *Hungary v. Parliament and Council*⁵⁸ (judgment delivered in February 2022), Hungary contended that the conditionality mechanism introduced by the Regulation is not consistent with the Article 4(2) TEU guarantee that the Union is to respect the national identity of the Member States, inherent in their fundamental, political and constitutional, structures, since it establishes a procedure whereby a Member State's legislation or practice is to be evaluated "even where it falls outside the scope of EU law."⁵⁹ Concerning the concept of the rule of law, Hungary asserted that it *cannot be precisely defined*, nor be given a *uniform interpretation* due to the obligation to protect the national identity of each of the Member States.⁶⁰ Hungary's contention was that the definition of the rule of law provided in Article 2(a) of the Regulation also included other Article 2 TEU values, which, in its estimation, were political rather than legal in nature;⁶¹ for this reason, Hungary insisted that the Union's Article 4(2) TEU obligation to respect the Member States' national identities should allow for the possibility that the rule of law and the principles of the rule of law *be assessed differently* in each of the Member States, especially since the EU institutions "do not always assess different legal situations uniformly."⁶² This assertion stemmed from the fact that the Union had in practice failed to consistently apply its own rule of law principles, whereas a fundamental element of the rule of law and legal certainty is that "the law must be formulated in such a way that like situations are treated in the same way."⁶³ On the basis of these arguments, Hungary held that the Regulation did not satisfy the conditions for a uniform application of the law, on account of the alleged conceptual deficiencies of the act and the impossibility to define the concept of the 'rule of law' with precision.⁶⁴

⁵⁵ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1–10.

⁵⁶ Article 1 of the Regulation.

⁵⁷ C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97; C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

⁵⁸ C-156/21 *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97 (judgment delivered in February 2022).

⁵⁹ Para.202; Poland brought an action for annulment before the CJEU concerning the same Regulation, employing mainly the same arguments as Hungary (C-157/21 *Poland v. Parliament and Council*, ECLI:EU:C:2022:98 (judgment delivered in February 2022)).

⁶⁰ Emphasis added; Para.226.

⁶¹ Para.226.

⁶² Para.211.

⁶³ Para.211.

⁶⁴ Para.211.

After addressing all of Hungary’s pleas, the CJEU decided to uphold the validity of the Rule-of-Law Conditionality Regulation. The CJEU stated that, by virtue of Article 4(2) TEU, the Member States “enjoy a certain degree of discretion in implementing the principles of the rule of law,” which however does not mean that the obligation to observe the rule of law – as an obligation as to the result to be achieved – may vary from one Member State to another.⁶⁵ In this vein, it was stressed that, while all the Member States have separate national identities which are inherent in their fundamental political and constitutional structures and which the European Union respects, the presumption remains that they all adhere to a shared concept of ‘the rule of law’ as a value common to their constitutional traditions.⁶⁶

4. Concluding remarks

The insights provided in this paper concerning the Article 4(2) TEU ‘national identity’ clause – invoked by Member States attempting to circumvent or derogate from specific obligations prescribed by EU law – have demonstrated the elastic and malleable nature of the concept of ‘national identity’/‘constitutional identity.’ For this reason, the concept has been rightly characterized as open-ended and abuse-prone,⁶⁷ with the recommendation that the Court of Justice of the EU should be the actor assuming the role of containing and controlling the effect of the ‘national identity’ clause by “centralizing its meaning,” through crafting a “range of acceptable meanings.”⁶⁸ However, one problematic aspect to this would be that the CJEU as a supranational body cannot always be expected to fully grasp the importance of national identity issues and strike the correct balance between adherence to the EU’s fundamental principles and respect for the Member States’ national identities.⁶⁹ Alternatively, it has been argued that the EU legislature (the Council of the EU and the European Parliament) is the one better placed than the CJEU to tackle national identity questions – especially in the matter of resolving potential instances of conflict between EU secondary legislation and national identity considerations.⁷⁰

While it is prudent to side with the position that the ‘national identity’ clause necessitates “a nation-sensitive, differentiated construction of EU law,”⁷¹ as it happens, it is not always decidedly straightforward whether in a particular case the Article 4(2) TEU clause is being used or misused/abused by the Member States. When misused by the Member States, the ‘national identity’ clause becomes a vehicle for pursuing goals that contravene the EU’s values, principles

⁶⁵ Para.233.

⁶⁶ Para.234.

⁶⁷ Kelemen and Pech, n.17 above, p.5.

⁶⁸ V. Perju, “On the (De-)Fragmentation of Statehood in Europe: Reflections on Ernst-Wolfgang Böckenförde’s Work on European Integration,” *German Law Journal* (2018) Volume 19, Issue 2, p.433.

⁶⁹ E. Cloots, *National Identity in EU Law*, Oxford University Press, 2015, p.224 et seq.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p.190-191.

and rules. In light of Poland and Hungary’s legal challenges to the Rule-of-Law Conditionality Regulation, it could be submitted that wayward national governments should not be so quick to consider the ‘national identity’ clause as a *carte blanche* allowing them to enact and implement rules that infringe the Union’s values and principles. In spite of the somewhat concessional character of Article 4(2) TEU, Member States should not consider themselves entitled to an unfettered discretion to play the ‘national identity’ card so as to bypass their EU law obligations. At the same time, one should also be careful not to make sweeping generalizations and outright dismiss *all* claims made by the Member States (Poland and Hungary, in particular) relating to the safeguarding of their national identities.

As far as the monetary side of things, recent developments have shown that the EU has started to slowly but surely put into operation the conditionality mechanism established by the Rule-of-Law Conditionality Regulation. Poland and Hungary’s less than ideal track-record for observing the rule of law has currently put the payouts from the EU’s Recovery Funds reserved for the two countries on stand-by. The release of the funds is made conditional upon progress with the implementation of rule of law reforms in both countries.⁷² Warsaw has responded with a harsh rhetoric to the withholding of Poland’s €35bn recovery package funds, threatening to use “all [its] cannon” on the European Commission, even if this would mean assembling an alliance to unseat its President and the College of Commissioners.⁷³ The Polish government insists that it has made concessions in exchange for the disbursement of the recovery funds, having reversed some of the controversial judicial reforms, including the closure of the infamous disciplinary chamber for judges – apparently, to no avail, as the EU has not yet fulfilled its part of the deal.⁷⁴ The European Commission, on the other hand, has brushed aside these statements, claiming that nothing has changed in its rule of law dispute with Poland and reiterating that the country will not receive the funds in question until it has made sufficient progress with its judicial reforms.⁷⁵ Even more explicitly so in the Hungarian case, the Commission has proposed to the Council the adoption (by qualified majority vote) of specific budget protection measures to be directed at Hungary under the Rule-of-Law Conditionality Regulation, in order to protect the EU budget against breaches of the principles of the rule of law in Hungary.⁷⁶

⁷² European Commission, “*NextGenerationEU: European Commission endorses Poland’s €35.4 billion recovery and resilience plan Brussels*” (Press Release), 1 June 2022 [https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375]; K.L. Scheppele, “Will the Commission Throw the Rule of Law Away in Hungary?,” *Verfassungsblog*, 11 July 2022 [<https://verfassungsblog.de/will-the-commission-throw-the-rule-of-law-away-in-hungary/>].

⁷³ *The Guardian*, “Poland threatens to turn ‘all our cannon’ on EU in rule-of-law row” (9 August 2022), <https://www.theguardian.com/world/2022/aug/09/poland-threatens-turn-cannon-eu-rule-of-law-row>.

⁷⁴ *Ibid.*

⁷⁵ *EUObserver*, “EU Commission shrugs off Polish threats on rule-of-law” (10 August 2022), <https://euobserver.com/rule-of-law/155738?fbclid=IwAR0gXvpM5Lzboc0KmdurSPhojXGFSZhquW-1yOBn4q-pR6Q2lteiVc0sMUE>.

⁷⁶ European Commission, Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 485 final, Brussels, 18.9.2022.

Does the pushback coming from Poland and Hungary indicate that these countries feel like Brussels is pressuring them to relinquish vital elements of their national identity, in exchange for being full-fledged members of the EU? It appears that only time will tell whether the previously discussed national identity claims made by the two governments have been grounded in a *genuinely* held conviction that the EU's actions are proving detrimental to singular aspects of their national identities, or whether these claims have merely served as a disguised attempt to justify the misbehavior of the two countries.

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