

Foreword

IDENTITY OF THE EUROPEAN UNION AND IDENTITIES OF THE MEMBER STATES: WHAT IS THE RELATIONSHIP?

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There are two different ways of conceiving the relationship between the identity of the Union and the constitutional identity of the Member States: the first sees them in opposition, the second in a relationship of cooperation and mutual learning.

The notion of 'identity' itself has an inherent ambiguity. On one hand, identity is used to distinguish oneself from others and requires protection against those who have been marked by a different identity and have the power to destroy and assimilate the former.

Today we speak of the *politics of identity* specifically to indicate the urge of groups with a distinct identity to demand to be recognised as such, rather than be assimilated into the dominant identity and even to obtain forms of redress for abuses committed against them.

At the same time, cultural rights, which precisely signify the recognition and guarantee of cultural identities that are juxtaposed and in no way assimilated to the identity considered dominant are becoming more prominent. In this case, identity is used to erect barriers to protect the identities of very specific groups identified on the basis of certain cultural factors.

Cultural identity can also be non-exclusive, but open to confrontation and dialogue. In this case, several identities may overlap and bridges are built between them thus connecting them, although they remain distinct. In contrast to the first version of identity, belonging to an identity is not exclusive, so that the same subject can belong to different groups, each with its own identity.

This relationship between different but complementary identities is at the core of the European Union. Article 4 TEU, which recognises national identities, must be read in conjunction with Article 2, which sets out the fundamental values of the European Union. They form the basis of what Article 2 itself configures as a single society: respect for human dignity,

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freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Member States are equal parts of this European society, according to Article 4(2) TEU, which mentions equality between Member States before national identities. Common values, a European society, equality between Member States and then the guarantee of national constitutional identities are the foundation of the Union.

In the historic judgment of the Court of Justice of 27 February 2018, the *Portuguese Judges' Association* case,¹ as it is known, considered it of “primary importance” to preserve the independence of judges in order to guarantee the principle of effective judicial protection of the rights that individuals derive from Union law. The Court linked this principle to the value of the rule of law enshrined in Article 2 TEU, stressing that the Union is founded on certain values common to the Member States, including the rule of law.

This judgment marked a turning point in the constitutional structure of the Union, as it focused the constitutional identity of the Union on the common values listed in Article 2 TEU.

More recently, in the judgments adopted by the Grand Chamber on 16 February 2022, the so-called *conditionality judgments*, the Court stated that “Article 2 is not merely a statement of political guidelines or intentions, but contains the values which ... are an integral part of the identity of the EU as a common legal order, these are values which find concrete expression in principles, including binding obligations on the States”.²

As the President of the Court of Justice, Koen Lenaerts, observed in an extrajudicial context, the Union is “first and foremost a Union of values”. This is not just the value of the rule of law, but all the values listed in Article 2.

This view of the Union has important consequences. First, values – but mind you, values, not legal principles – express a particularly strong form of integration. To share the values listed in Article 2 is not simply to be part of an internal market or an international organisation looking after com-

¹ECJ, judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117.

²K. Lenaerts, “On Checks and Balances: the Rule of Law within the EU”, *Columbia Journal of European Law*, Special Issue, 2023, p. 1, and also K. Lenaerts, *National Identity, the Equality of Member States before the Treaties and the Primacy of EU law, Bilateral meeting between the Court of Justice of the European Union and the Italian Constitutional Court: celebrating the 70th Anniversary of the Court of Justice of the European Union*, Rome, 5 and 6 September 2022.

mon interests. It means being part of a European society. Von Bogdandy argues explicitly that Article 2 and the European public law based on it are at the origin of a European society.³

Member States freely joined this society and agreed to share these values. Values, unlike principles, do not provide for trade-offs or allow themselves to be sacrificed for the sake of another value, such as a State's cultural identity.

The jurisprudence of the Court of Justice on the rule of law, which does not tolerate violations by a State in the name of its specific cultural identity, but also the jurisprudence on the prohibition of regression in the realisation of a value, fits into this perspective. Values, by virtue of their universality require a gradual process of realisation. A State cannot move backwards to the level of realising a value and thereby weaken it. That is why, according to the Court, no illiberal and anti-democratic tendency can be allowed in the Union.⁴

One of these values is equality between Member States. Equality means that Union law must have the same meaning for everyone. Hence the role of the Court of Justice in ensuring the uniform interpretation of Union law.

The national courts, and particularly the constitutional courts, have the interpretation of national constitutions reserved to them, but the interpretation of Union law from the Treaties for everyone is the responsibility of the Court of Justice.

The same requirement of equality and of a law applied in the same way in all States grounds the two principles of the supremacy of Union law and direct effect, but also the essentiality for the Union's legal order of the preliminary reference, which prevents as the Court of Justice has stated, the power of the individual national court to refer a question to the Court for a preliminary ruling from being limited.

The binding and uncompromising nature of the values is coupled with their generality, which comprises of different forms of realisation. This is where the constitutional autonomy of the Member States comes into play, in the face of which the Union comes to a halt, except in the case of a specific conflict with the rules of European law.

Thus, the Court of Justice recognises that the value of the rule of law underpins the inviolable principle of the independence of judges, but recognises that each State may define its judicial order differently in accordance with its own constitutional principles,⁵ or that the prohibition of discrimination in

³ A. Von Bogdandy, *Strukturwandel des öffentlichen Rechts*, Berlin 2022.

⁴ ECJ, judgment of 20 April 2021, *Repubblica*, C-896/19, EU:C:2021:311.

⁵ ECJ, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034; ECJ, judgment of 22

labour relations applies to all States, as laid down in the relevant directives, but that since states follow different constitutional principles regarding the place of religion in the public sphere, they will regulate in accordance with their constitutional principles the possibility of wearing the Islamic headscarf by a civil servant in a public administration, even to the extent of justifying the ban.⁶ In *Boris Cilevičs and Others*,⁷ the Court of Justice held that it was legitimate for a member State to protect its national identities by adopting measures that sought to promote and develop the use of the official language in higher education. Such a policy, according to the Court, constitutes a manifestation of national identity for the purpose of Article 4(2) TEU.

But if values are generic and are specified in the principles that are then detailed in more stringent rules, in this process of specification comes the dialogue between the Courts, between the Court of Justice and the Constitutional Courts. In this way, a process takes place that is not top-down, but is circular. The Constitutional Courts question the Court of Justice on the meaning of the Union law, also of the Union constitutional law, and the Court's answer influences the national living constitution, because the Constitutional Courts in their judgments use the case law of the Court of Justice (a frequent occurrence in the case law of the Italian Constitutional Court). At the same time, the Court of Justice takes its cue from the indications contained in the preliminary references from the constitutional courts to interpret EU law, which is thus animated by what the Court of Justice has long called the "constitutional traditions common to the Member States". The Court of Justice and the Constitutional Courts also make references to the Jurisprudence of the Court of Strasbourg, when dealing with fundamental rights. The community of the European supreme courts (Court of Justice, Strasbourg Court, Constitutional Courts) thus forms, through a process of mutual learning, the European constitutional heritage, which is and must remain essentially pluralistic, cohesive around common values while safeguarding national constitutional specificities.

This complex framework forms the basis of this volume, edited by Maria Grazia Rodomonte and Ludovica Durst. By retracing some of the main threads of the European integration process, it has the merit of providing the reader with a broad overview of the problematic definition and construction of a European constitutional identity. This is a crucial issue that imposes itself on the reflection not only of jurists in relation to future developments of participation in the common European project.

February 2022, RS (Effect of the decisions of a constitutional court), C-430/21, EU:C:2022:99.

⁶ ECJ, judgment of 28 November 2023, *Commune d'Ans*, C-148/22, EU:C:2023:924.

⁷ ECJ, judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638.