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Protection of National Identity in the CJEU

Nacionalinio Tapatumo Apsauga ESTT

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ABSTRACT AND KEY WORDS

The present work deals with the topic of protection of national identity in various aspects, such as the protection of rights connected to national identity in CJEU and cases related to the topic of the thesis. The work was prepared on the basis of the study of various legislative acts and directives, which are indicated in the list of used resources, as well as the research was conducted on the basis of consideration of articles related to this topic. Various cases have been analysed in order to research the actions taken to solve the problems arising on the basis of the chosen thesis. Having familiarised with the work it is possible to see not only the theoretical side of the work, but also different approaches of researchers who have studied and provided their point of view. The work has collected a huge amount of information, many factors concerning the topic have been considered in detail, and definitions have been given for many concepts found in the defence of human rights and in law itself.

Keywords: protection, national identity, human rights, European Union, Court of Justice of the European Union, Brexit, integration, law, policy.

Šiame darbe nacionalinio identiteto tema nagrinėjama įvairiais aspektais , pavyzdžiui, teisių apsauga, teismai ir bylos, susijusios su disertacijos tema. Darbas parengtas remiantis įvairių teisės aktų ir direktyvų, nurodytų naudotų šaltinių sąraše, studija, taip pat tyrimas atliktas nagrinėjant su šia tema susijusius straipsnius. Siekiant išanalizuoti veiksmus, kurių buvo imtasi sprendžiant pasirinktos disertacijos pagrindu kylančias problemas, buvo nagrinėjami įvairūs atvejai. Susipažinus su darbu galima pamatyti ne tik teorinę darbo pusę, bet ir skirtingus tyrėjų, nagrinėjusių ir pateikusių savo požiūrį, požiūrius. Darbe surinkta labai daug informacijos, išsamiai išnagrinėta daug su tema susijusių veiksnių, pateikti daugelio sąvokų, aptinkamų žmogaus teisių gynimo srityje ir pačioje teisėje, apibrėžimai.

Pagrindiniai žodžiai: apsauga, nacionalinis identitetas, žmogaus teisės, Europos Sąjunga, Europos Sąjungos Teisingumo Teismas, Brexit, integracija, teisė, politika.

TABLE OF CONTENTS

Introduction

Relevance of the topic:

At the heart of the work is the theme of protection of national identity. In the first chapter we are introduced to the concept of national identity. The national identity clause first appeared in the Maastricht Treaty in Article F, which stated: "The Union shall respect the national identity of its Member States whose systems of government are based on the principles of democracy". This clause was slightly expanded in Article 6 of the Treaty of Amsterdam. The Treaty is a legally binding contract concluded between the member states of the European Union (EU). It defines the objectives of the EU, establishes the rules of the EU institutions, defines the decision-making process and defines the relationship between the EU and its member states.

The place where the treaty was negotiated and signed was Maastricht. The Maastricht Treaty and its Protocol on the Statutes of the European System of Central Banks and the European Central Bank have as one of their objectives the establishment of the European System of Central Banks (ESCB). The Treaty was signed on 7 February 1992 and influenced European integration, creating the European Union, paving the way for the euro and introducing EU citizenship.

The globalisation taking place in the modern world, which has covered all spheres of social life - economic, political, cultural and others - is complex and contradictory. On the one hand, it is objective, because as humanity develops, the processes of integration of cultures, civilisations, peoples and states deepen. But on the other hand, globalisation leads to the loss of national mentality, national identity, national values and cultures. The world is becoming cosmopolitan and monotonous. But there is every reason to correct the negative effects of globalisation. After all, people make their own history. Therefore, they can and should eliminate the negative aspects of globalisation. National identity and national culture can and should be preserved, so there is a need for the protection of national identity

The aim, tasks and the object:

The purpose of the thesis was 1) to give an introduction to the concept of national identity based on articles and views of researchers; 2) research the clause of national identity at the legal level. 3) looking at the cases related to the protection of identity; 4) review of measures taken for protection and court decisions, in which we see the outcome and identify gaps in the clause.

The applied methods:

The work aims to examine the measures taken in the field of protection, to consider the shortcomings in the clause and in the court decisions, and it is also important to note the actions taken in favour of the protection of national identity. The methods of academic legal research include: comparative analysis, documentary analysis, interdisciplinary research, sociological studies, empirical studies, etc.

Originality:

The originality of this work is that we have tried to put together materials on national identity, on its protection, on the laws and measures taken with regard to national identity clause. Court cases and decisions have also been collected. Adjustments and descriptions of cases, shortcomings and gaps in the laws. The opinion of prominent experts on the topic of the thesis.

The most important sources:

The sources of work materials consist of legal and non-legal sources. Legal sources include law EU, directives of the EU and implementations regarding the protection of national identity, as well as relevant CJEU case-law. Furthermore, legal sources include legal articles, books, and journal publications. As to non-legal sources, they are used in this work in order to present researchers` opinions on the presented topic, were used articles of John Edwards, M.Claes, W. Sadurski and books of M. Dobbs, J.H. Reestman, Melissa S. Williams. In this thesis, special attention is paid to works of prominent scholars and competent experts regarding the topic of national identity clause and its protection, comparative analyses and approaches, challenges regarding the topic of the research.

1. The Nature of National Identity

Before starting an extensive review and study of the concept of national identity[1], we would like to consider the concept of identity itself, answering questions about what identity is. Identity is from the Latin word "identitás" (emphasizes an individual`s mental image of themselves, a concept expressing a person's belonging to various social), national, professional, linguistic, political, religious, racial, and other groups or other communities, or identifying oneself with a particular person with similar properties to any community.[2] Identity is divided into natural (self-regulatory structure), artificial (formed under the influence of external factors, and cannot be formed independently) and mixed types. Natural identity includes ethnic, racial, territorial (landscape), global, species, and artificial identity includes national, professional, contractual, confessional, regional, (sub)continental, mixed gender identity (Edwards, 2009).

In this chapter we will talk about national identity. The term nation is one example of the fact that everything depends on the tradition and context of perception of this word, because even in modern dictionaries such a definition of nation is given[3]. A nation is a community of people who identify themselves and distinguish themselves from others on the grounds of history, culture, ethnicity and language, or political grounds. Depending on what culture we are in and live in, this is how we will understand the problem of the nation and the national definition. If we are in the American tradition, the political concept of the nation will be brought to the fore. A political nation is not an ethnic, linguistic, or historical concept, yes, history is included there, but definition of the concept itself included something else. If we consider European nations, we will immediately fall into another plane, this concept, which defines, for example, language, history, ethnicity, will play a certain role. So, we fall into a trap, there is no unambiguous definition of a nation and national identity. In most cases, this is one of the problems of the concept of national identity, since everyone perceives this concept based on their own ideas. That is why we will examine in detail and analyze the concept of national identity.[4]

[1] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf
[2] https://www.cambridge.org/core/journals/german-law-journal/article/constitutional-identity-in-europe-the-identity-of-the-constitution-a-regional-approach/83D8D1737788756FEF098CF9485D7B1C
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0083
[4] https://www.cambridge.org/core/journals/german-law-journal/article/protection-of-national-constitutional-identity-and-the-limits-of-european-integration-at-the-occasion-of-the-gauweiler-case/C14BF4E4BAB7EB89040236516FF10E23

1.1. Main Aspects of National Identity, its values and objectives

We must be aware that nationality sometimes hides identification or a sense of loyalty to the state, and sometimes to the nation as an ethnic community. Identity is also a word "corrupted" in professional language. Depending on how we define these two concepts (whether we are talking about belonging to the state, belonging to an ethnic group, the identity that accompanies a person all the time, or about the mobilization side of this phenomenon), the answers will be different.[5]

First of all, we need to understand that when we talk about national identity as something obvious, we impose a certain interpretation. We kind of assume a building that is being built brick by brick, which is wrong. We can talk about national identity within a country when it is known that someone considers himself a European, an American, a Jew, a Russian, and then suddenly it turns out that something that was perceived as a single national identity, belonging to some country, is quite complexly structured inside. Sometimes we acquire this or that identity not because we want it, but because we are identified in this way. There is self-identification and identification by others. All this is very situational. (Jeff Spinner-Halev and Elizabeth Theiss-Morse, 2003, pp. 515-532)

Identity, one way or another, is activated and mobilized in conflict situations. In a normal situation, national, regional, gender, class, sexual identity is one of many. The most diverse identities exist in everyday life, and we are guided by them. We see before our eyes some identities that seemed obvious to us, disintegrate and even disappear. Identity is very situational, unstable and constantly changing. One of the reasons why national identities are so important is due to the very nature of countries.[6]

The areas that humanity has designated as states are not based on any universal logic, although they are often rooted in some cultural heritage. Most are also not separate geographical entities, like a single island. Rather, they are cultural constructions, which exist because their populations - and in many cases, the international community - have agreed to it.

As the Israeli historian Yuval Noah Harari points out in his 2011 book entitled "Sapiens: A Brief History of Humankind", if a population collectively changes its mind about a country, or disappears itself - for example as a result of a war, famine or migration -, its nation also disappears. "There are physical phenomena such as radioactivity in a different way. But their impact on the world can nevertheless be enormous," analyzes Yuval

[5] https://repository.essex.ac.uk/21400/1/published konstadinides uaces.pdf
[6] https://www.bbc.com/future/article/20220316-how-countries-get-their-national-identities

Noah Harari. In addition to countries, many of the most important forces in history occur in this form, such as law and money.

Since the beginning of human civilization, countless countries and empires have disappeared because people stopped believing in them, from the Roman Republic to ancient Egypt, the Papal States, Persia and East Germany. Even the empire of Mali, which was famous in the medieval world for its staggering wealth and which produced the richest person who had ever lived, ended up dissolving.

The stronger a country's national identity is - defined broadly as the sense of belonging of its population and its confidence in its political system - the easier it is for it to endure. Patriotism is placed above all, if people feel a sense of pride in being part of the country.[7]

Nationalism goes a little further. It encourages the individual to support his territory of origin, as a political entity. As a passionate supporter of a particular state, he may want to contribute to the promotion of its interests, for example, by invading another country to acquire resources. Yet there are many other ways to acquire a national identity in a hurry. At the beginning of the twentieth century, the region was largely controlled by the Ottoman Empire, which was in decline. But in 1916, six years before its final collapse, two diplomats - one British, the other French - met and reached a secret agreement on how they would distribute the remnants of the empire between the spheres of influence of their two countries.[8]

It was the Sykes-Picot Agreement, which laid the foundations for the creation of many Middle Eastern countries over the next decade, including the precursors of Lebanon, Palestine, Syria, Iraq, Jordan, and Saudi Arabia. Other nations in the region have also sprung up or redrawn their borders in the chaos.

Many of these "postcolonial states", as they are sometimes called, were created from scratch - the interference of Great Britain and France ignored existing divisions, such as those based on language, ethnicity, and religion, and created completely new countries rooted in what was politically convenient for the Europe of the time. The same thing happened in large parts of Africa, where the colonial powers drew largely arbitrary lines on the maps to create borders in places where, often, they did not exist before. And there was a problem with that.

[7] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union

[8] https://www.bbc.com/future/article/20220316-how-countries-get-their-national-identities

It turns out that we can simply invent a national identity. The "invented traditions" are those that have the appearance of being inherited from previous generations, but which in reality have been created quickly and artificially. But invented traditions often go even further, sometimes going so far as to become a fundamental element of the national character or to feed stereotypes.

We can briefly describe the main fundamental features of national identity as:

- A history territory or homeland
- Common myths and historical memories
- A common mass public culture
- Common legal rights and duties for all members
- A common economy with territorial mobility for members

The concepts of National Identity are ethnic identity and civic identity. Ethnic identity refers to the sense of belonging and connection to a specific ethnic group, as well as the influence this membership has on one's thoughts, perceptions, feelings, and behavior. It is important to note that ethnic identity is distinct from personal identity as an individual, although the two can mutually impact each other.[9] Major components of ethnic identity are ethnic awareness, self-identification, ethnic attitudes and behaviors. A civic national identity is one that is built on a shared political history and civic values based on the equality of individuals with rights and responsibilities as citizens. (Melissa S. Williams, 2003, p.208-247).

1.2. National Identity Clause[10]

The historiography of identity dates back to the XII–XVIII centuries, when the concepts of "national spirit", "genius of the nation" and "national character" were in use, which were used by Shaftesbury, Rousseau, Kant. Since the XX century, the concept of "national identity" has become the most common term at the forefront of social science thought[11]. National identity, being a later historical formation, represents a further evolution of the process of ethnization. At the same time, national identity performs a socio-

[9] https://dokumen.pub/national-identity-theory-and-research-1nbsped-9781681235257-9781681235240.html

[10] The national identity clause first occurred in the Treaty of Maastricht in article F which stated that: "The Union shall respect; the national identities of its Member States, whose systems of government are founded on the principles of democracy". It was slightly expanded in the Treaty of Amsterdam, in article 6

[11] https://www.semanticscholar.org/paper/National-Identity,-Constitutional-Identity,-and-in-Cloots/0de266afcc14d1cdfe8e5de7752c13c705788565

political function, which is based on a principle uniting ethnic groups associated with the achievement of a common goal. The term "national identity" is a universal definition that allows us to identify the main path of historical existence. The leading role in its study is occupied by historical studies, since the existence of any nation "takes place on the field of history, which determines the choice of certain scientific strategies that enrich and deepen the understanding of the reality of life."[12]

The national identity clause first occurred in the Treaty of Maastricht[13] in article F which stated that: “The Union shall respect; the national identities of its Member States, whose systems of government are founded on the principles of democracy”. It was slightly expanded in the Treaty of Amsterdam, in Article 6. A treaty is a legally binding contract established among member countries of the European Union (EU).[14] It outlines the objectives of the EU, establishes rules governing the operation of EU institutions, defines the decision-making process, and delineates the relationship between the EU and its member countries.[15]

Maastricht was the place where the treaty was negotiated and signed. The Maastricht Treaty and its Protocol on the Statute of the European System of Central Banks and of the European Central Bank have as one of their objectives the establishment of the European System of Central Banks (ESCB). The Treaty was signed on 7 February 1992 and had an impact on European Integration, established the European Union, paved the way for the euro, and created EU citizenship.

Article 6 (ex Article F)

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4

[12] https://vdoc.pub/documents/the-concept-of-cultural-genocide-an-international-law-perspective-3i1nv0nk7cf0

[13] The Treaty on European Union, commonly known as the Maastricht Treaty, is the foundation treaty of the European Union (EU). Concluded in 1992 between the then-twelve member states of the European Communities, it announced "a new stage in the process of European integration" chiefly in provisions for a shared European citizenship, for the eventual introduction of a single currency, and (with less precision) for common foreign and security policies.

[14] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union

[15] https://www.cambridge.org/core/journals/german-law-journal/article/protection-of-national-constitutional-identity-and-the-limits-of-european-integration-at-the-occasion-of-the-gauweiler-case/C14BF4E4BAB7EB89040236516FF10E23

November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

As was mentioned before The National Identity clause was expanded in the Treaty of Amsterdam, in article 6[16], which clarifies Article 6 (ex Article F) of the Treaty on European Union by stating unequivocally that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

1.3. Necessity of Protection of National Identity

Previously, individual countries and peoples of the world were isolated from each other. Now they have entered into close deep ties – they all found themselves in conditions of mutual contacts, relationships of interdependence. Various international and regional organizations and institutions have been established to regulate political, cultural, economic, and other relations between States and peoples.

The global system that has emerged is very complex and diverse. It involves peoples and States standing at different levels of development, having their own national cultures and traditions, their own religious beliefs and beliefs. All this poses many new problems that humanity has not yet realized and has not learned to solve in accordance with the new realities.

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[16] Article 6 — (ex Article 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

   The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

   The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Researchers of globalization and national identity are very interested in studying integration issues. They forget that integrative processes are complex and contradictory. For example, the European Union, in addition to coordinating common actions on various issues, does not yet testify to the true integration of European peoples. Suffice it to say that the European Constitution has not yet been adopted, which was rejected by the French, the Dutch, and some other EU members. The problem of political citizenship of the European Union has not been solved. In general, the European Union is not a union of peoples, but a union of states.

If some Europeans appear instead of the French, Germans, and other peoples of Europe, then the French, German, Spanish, and other cultures of European peoples should disappear. The past and the present are a kind of unified whole. There is no past without the present and the present without the past. The memory of the past helps people to know their traditions, their culture, and their national values better and, starting from them, go further along the path of social progress. The memory of the past helps to preserve one's national identity. It is very important to take measures to preserve national identity at the international level, so that, despite the development of society, it does not lose its past, in which the national identity of any culture is embedded. In no case should development jeopardize ethnic aspects, historical memory. [17]

Patriotism is connected with historical memory. Discussions of both patriotism and nationalism are often marred by a lack of clarity due to the failure to distinguish the two. Many authors use the two terms interchangeably. Among those who do not, quite a few have made the distinction in ways that are not very helpful. In the 19th century, Lord Acton contrasted “nationality” and patriotism as affection and instinct vs. a moral relation. Nationality is “our connection with the race” that is “merely natural or physical,” while patriotism is the awareness of our moral duties to the political community (Acton 1972, 163). In the 20th century, Elie Kedourie did the opposite, presenting nationalism as a full-fledged philosophical and political doctrine about nations as basic units of humanity within which the individual can find freedom and fulfillment, and patriotism as the mere sentiment of affection for one’s country (Kedourie 1985, 73–74). Some researchers reject patriotism, while others, on the contrary, defend it. To preserve one's ethnic identity, one must protect and multiply one's culture. Patriotism is unthinkable without national identity. The modern American researcher S. Huntington in the book "Who are we?" writes that identity, that is,

[17] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union

self-consciousness, is inherent not only to the individual, but also to social groups and peoples. Without identity, there is no individual, no group, no people.

Patriotism does not exclude internationalism, respect for other peoples, for their cultural values. But patriotism rejects cosmopolitanism. Sometimes you can observe an undisguised, brazen imposition of your ideals and goals by a stronger one, which causes a response from the people who are exposed to this influence. This reaction, aimed at protecting the uniqueness of their culture, and their national identity, to create the most favorable climate for their own development, and to ensure the progress of their society, is reflected in patriotism.

It should be noted that not only the layman but also people with academic degrees and academic titles, do not always understand and represent the real processes taking place in the modern world. So, in recent years, so-called "economic killers" have appeared in the West, who deliberately offer other countries and peoples a deliberately false path of development, leading them to a dead end, and not ensuring their stability.[18] They end up under the control of developed countries. It should also be noted that the so-called liberal path of development has not led any backward state to economic success. Only those countries have achieved a high level of development that have not abandoned their cultural values, their national identity and their way of life. We are talking primarily about India, China, South Korea, etc. Therefore, the preservation of a kind of backbone for each state is the key to its success. Patriotism occupies a central place in this backbone.[19]

The globalization taking place in the modern world, which has covered all spheres of public life – economic, political, cultural, and others – is complex and contradictory. On the one hand, it is objective, because as humanity develops, the integration processes of cultures, civilizations, peoples, and states deepen. But, on the other hand, globalization leads to the loss of national mentality, national identity, national values, and cultures. The world is becoming cosmopolitan and monotonous. But there is every reason to correct the negative consequences of globalization. After all, people make their own history. Therefore, they can and should eliminate the negative aspects of globalization. It is possible and necessary to preserve national identity and national culture, which is why there is a need to protect national identity.[20]

[18] https://www.semanticscholar.org/paper/National-Identity,-Constitutional-Identity,-and-in-Cloots/0de266afcc14d1cdfe8e5de7752c13c705788565
[19] https://searchworks.stanford.edu/view/10280914
[20] https://curia.europa.eu/juris/document/document.jsf?docid=251504&doclang=EN

2. Protection of National Identity in EU

This chapter of the thesis consists of five sections. In section 2.1 entitled National Identity in the EU law, we consider national identity in detail precisely in the context of the law. In section 2.2 which is called the Protection of National Identity in the EU Legal System, we consider how identity protection is carried out. In the next section 2.3. we get acquainted with the Court of Justice of the European Union. Section 2.4. General principles of the work of the European Court of Human Rights allow us to get acquainted with the work of the Court in more detail. The last section of this chapter is 2.5. contains the implications that assist in considering the adopted results with regard to identity at the level of the law.

2.1. National identity in EU law

National Identity should not be confused with two related concepts-nationalism and patriotism. Nationalism is a strong attachment to one's country and the sense that one's country, and that it is, is superior to all others. Patriotism is a strong devotion to one's country and one's behavior in support of its decisions and practices. National identity is a sense of belonging to and being a member of a geopolitical entity. (Richard R. Verdugo, 2016)

A Nation is a geopolitical construct where belonging is mainly driven by an Essentialist/Primordialist viewpoint. That is, belonging and being a member of a nation is based on blood ethnicity history ancestry, common values, kinship, and language. In a nation, the focus of the national organization is its people. (Richard R. Verdugo, 2016)

A State is a geopolitical construct where membership and belonging are based on shared civic values about citizenship. Membership is constructed and based on a constructivist/postmodern viewpoint of identification. The focus is a state's institutions and the values that legitimate its authority. Nation-State is an imbrication of a Nation and a State. It is a system of political governance that derives its legitimacy from its people in governing and serving as a sovereign nation.

One of the best-known descriptions of a nation is Benedict Anderson's (1983) conception of nations as imagined communities. They are imagined "because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion" (Anderson, 1983, p. 15).

Martin (1995) and Wodak, De Cillia, Reisigl, and Liebhart (1999) have identified language and discourse as the essential means through which the uniqueness and

distinctness of a community and its particular values are presented, making these a key instrument in the social construction of imagined communities. Following Wodak et al. (1999), national identity "is constructed and conveyed in discourse, predominantly in narratives of national culture. National identity is thus the product of discourse" (p. 22). Conceived in language, rather than blood (Anderson, 1983, p. 133), nations and national identities, when perceived as imagined communities, are essentially socially constructed. Because they are "mobilized into existence through symbols invoked by political leadership" (Dryzek, 2006, p. 35), discourses are powerful in that they can construct, perpetuate, transform, or dismantle national identities (Wodak et al., 1999).

EU law consists of the founding Treaties (primary legislation) and the legal acts that the European institutions adopt, which enable the EU to exercise its powers (secondary legislation: regulations, directives, decisions, recommendations, and opinions).[21]

In a broader sense, EU law encompasses all the rules of the EU legal order, including the Charter of Fundamental Rights (since the Treaty of Lisbon) and the general principles established by the Court of Justice of the European Union.

International agreements with non-EU countries or with international organisations are also an integral part of EU law. These agreements are separate from primary law and secondary legislation and form a sui generis category. According to some judgments of the CJEU, they can have a direct effect and their legal force is superior to secondary legislation, which must therefore comply with them. (Richard R. Verdugo, 2016)

The emergence of Article 4(2) was one of the most controversial innovations of the Lisbon Treaty, which entered into force on 1 December 2009. According to this article, the European Union shall respect the equality of Member States as well as the national identity of the Member States. In doing so, the article makes reference to the basic political and constitutional foundations of the EU Member State. The article further specifies that the Union shall respect the fundamental functions of the EU Member State, including the preservation of territorial integrity, the rule of law and national security. Furthermore, the preamble to the EU Charter of Fundamental Rights stated that the Union shall respect the national identity of the Member States and the organisation of their public authorities at national, regional and local level. In accordance with Article 19 of the Treaty on European Union, the Court of Justice of the EU has the exclusive right to interpret this Article.[22]

[21] https://eur-lex.europa.eu/EN/legal-content/glossary/eu-law.html
[22] https://vdoc.pub/documents/the-concept-of-cultural-genocide-an-international-law-perspective-3i1nv0nk7cf0

The prototype of this article was Article 6(3) of the Maastricht Treaty, which established that the Union shall respect the national identities of the Member States. However, this article did not fall within the jurisdiction of the ECJ and remained largely a dormant rule. The Court of Justice of the EU referred to this Article only once, when it used the term "national identity" in the judgment in Case C-473/93 Commission v. Luxembourg. In that judgement[23], the Court stated that the preservation of national identity was a legitimate aim that could justify a restriction on the fundamental freedoms of the internal market. Both cases concerned a restriction on employment in the form of a requirement of knowledge of the official language of the country.

The reformulated new article on national identity in the Lisbon Treaty speaks of the foundations and functions of the state, which has led researchers to believe that, compared to the Maastricht Treaty, the emphasis is now specifically on constitutional identity. As one researcher writes, "the interpretation of the concept of national identity has gradually shifted from historical or sociological to a more legal one, and the link between national and constitutional identity has begun to be accepted as a self-evident truth". In favour of this argument, Article 3(3) of the same Treaty specifically stipulated that the Union should respect its cultural and linguistic diversity.[24]

It is worth paying attention to the fact that instead of the Union's obligation to respect the sovereignty of the EU Member States, which was expected by many people, the final version of the Lisbon Treaty used a much softer and incomparably more vague wording about the Union's respect for the national identities of the Union's states[25], with the word identity being used in the plural (identities).[26]

However, for all its external attractiveness, the same article opened the field for different interpretations and no less different uses. A number of authors refer the provisions enshrined in Article 4(2) of the Lisbon Treaty to the category of so-called incomplete contracts, where the ambiguity and vagueness of certain contractual provisions are deliberately preserved by the drafters in order to reach a final compromise. The wording of Article 4(2) of the Lisbon Treaty largely repeats Article I-5 of the Treaty on a Constitution for Europe, which was drafted by a working group under the leadership of H. Christophersen (hence its name in the literature as "Christophersen reservations"). A

[23] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union
[24] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union
[25] https://www.semanticscholar.org/paper/National-Identity,-Constitutional-Identity,-and-in-Cloots/0de266afcc14d1cdfe8e5de7752c13c705788565
[26] https://lirias.kuleuven.be/retrieve/667907

familiarity with the working materials of this group shows that during the intense discussions on this issue, the EU Commission refused to interpret this provision as an enshrinement of the doctrine of counter-limits at the EU level, while the EU Member States, in their turn, wanted to see in this article a list of powers of the states, which the European Union cannot encroach upon under any circumstances. The proposal for some kind of Charter of Rights of Member States was categorically rejected. In the end, the final text of this article was satisfactory to all parties, but their views on the meaning and application of this article were diametrically opposed.[27]

It is generally agreed that the Lisbon Treaty's article on national identity can be used in several different ways.

Firstly, it can be understood as an obligation of the EU institutions to take into account the national identity of member states when drafting and adopting new normative acts (preliminary control), and as a basis for appealing such acts to the Court of Justice of the EU in the framework of the annulment procedure, if these normative acts infringe on the national identity of a state (subsequent control).

Secondly, this article can be used already by EU Member States as one of the possible legitimate grounds for refusing to fulfill a particular obligation under EU law (on a par with the public policy, security, etc. considerations provided for in the EU Treaties). In this case, the propriety and proportionality of using this ground on a case-by-case basis should be considered by the Court of Justice of the EU.[28]

Thirdly, and most interestingly, the argument that Article 4(2) impinges on national identity may well be used by constitutional courts as a basis for reviewing the constitutionality of any acts of the EU institutions (including decisions of the Court of Justice of the EU) and, if such inconsistency is found, declaring them inapplicable in the national legal order. While the first two options leave the Court of Justice of the EU with the leading role in the interpretation of Article 4(2), the third option assumes a priori the priority and finality of the interpretation to be given to the notion of "national (constitutional) identity" by the various constitutional courts of the EU Member States.[29](Dieter Grimm, 2019, pp 407–492)

At the same time, all options contain both obvious advantages and equally obvious disadvantages. Thus, on the one hand, in the case of the first two options, the concentration

[27] https://repository.essex.ac.uk/21400/1/published konstadinides uaces.pdf
[28] https://www.bbvaopenmind.com/en/articles/the-impact-of-european-integration-on-national-democracies-democracy-at-increasing-risk-in-the-eurozone-crisis/
[29] European Constitutionalism and the German Basic Law | SpringerLink

of the right to interpret Article 4(2) in the hands of the Court of Justice of the EU makes it possible to streamline the process and avoid the risks of "constitutional cacophony" or "interpretative anarchy". However, any attempt to establish a single content of "national identity" for all EU Member States would not only look absurd but also contradict the very text of this article, which speaks about the identities of EU Member States. In case the Court of Justice of the EU tries to determine independently what is included in the national identity of a country, the crucial question is what it will take as a basis. Researchers agree that constitutional courts are much better suited to determine the content of the national constitutional identity of their state than the Court of Justice of the EU. This has also been argued very convincingly by the Advocate General of the Court of Justice of the EU, P. Maduru, in his opinions. Another counterargument is that the EU Court of Justice is in principle not entitled to interpret national constitutions (although, as the above practice shows, this does not stop it).

On the other hand, the involvement of constitutional courts in the interpretation and application of the national identity clause may take various forms and be perceived as an expression of the doctrine of counter-limits already at the pan-European level, marking a new stage in the ongoing dialogue between the Court of Justice of the EU and constitutional courts. However, the unilateral use of Article 4(2) by constitutional courts, i.e. as a ground for declaring an EU act inapplicable in the national legal order, may also have a very negative impact on both the unity and integrity of the EU legal order and legal certainty, especially if two factors are taken into account. Firstly, the exclusive right of the Court of Justice of the EU to interpret the rules of the constituent treaties (including Article 4(2)) would be called into question. And secondly, the situation is complicated by the extremely diverse perceptions of constitutional courts as to what exactly constitutes their 'national identity'. In their judgments, constitutional courts describe it in very broad strokes, thus leaving themselves room for further maneuver.[30]

2.2. Protection of National Identity in the EU Legal System

The assessments made by researchers regarding the scope, procedural significance, and possible consequences of the application of the national identity clause in the Lisbon Treaty have been numerous and very diverse. Representatives of the optimist camp are A. von Bogdandy and S. Schill, who in their detailed study consider Article 4(2) of the Lisbon Treaty as a legal basis for a new stage of dialogue between the Court of Justice of the EU

[30] http://aei.pitt.edu/74891/1/Court_of_Justice.pdf

and the constitutional courts, a kind of cornerstone of the "complex constitutional structure" of the EU. These authors note that the successful implementation of Article 4(2) is only possible on the basis of a dialogue between the courts, where constitutional courts decide for themselves what constitutes their constitutional identity and leave it to the Court of Justice of the EU to decide how to use it through its prejudicial enquiries. The possible divergent positions of these courts are seen as an acceptable cost compared to the scenario of a strictly hierarchical model of relations between the courts. In their own view, Article 4(2) will not only help overcome the blindness of EU law to the constitutional limits of EU Member States, but also mitigate the absolute priority doctrine promoted by the Court of Justice of the EU. With some tension, but to the optimists we can include T. Constadinides, who also believes that the value of Article 4(2) is that it represents not only a "shield" in the hands of the EU Member States, providing them with a legitimate ground for refusing to comply with EU rules, but also a "sword", providing the constitutional courts of the EU Member States with the possibility to test EU acts on this ground and to decide on their application in national legal orders. According to B. Guastaferro's assessment, a possible and undiscovered potential of the identity clause is that it could become the basis for the introduction into the EU practice of a margin of appreciation doctrine similar to that used in the practice of the European Court of Human Rights.[31](Elisa Novik, 2016)

However, it admittedly requires the EU Court of Justice to sacrifice its extremely rigid approach to assessing the lawfulness and proportionality of national measures that run counter to EU norms. The opinions of sceptics are much more numerous. Thus, M.Wendel calls this article a "Pandora's box", arguing that it will be possible to avoid this catastrophic scenario only through co-operation between the Court of Justice of the EU and the constitutional courts of the Member States of the Union, whereby national courts will decide on the content of their national identity and the task of the Court of Justice of the EU will be to decide how, when and to what extent this identity will prevail over other principles of EU law.[32] J.Martinico argues that the broad language of Article 4(2) of the Treaty does not reduce, but rather increases, the risks of constitutional conflicts . He agrees with L. Faraguna, who takes perhaps the toughest position, arguing that due to its extremely vague wording, the article on national identity can be seen as a bilateral invitation to a fight both on the interpretation of this article and on the issue of determining the competent authority responsible for such interpretation, which in the context of the eurozone crisis

[31] https://vdoc.pub/documents/the-concept-of-cultural-genocide-an-international-law-perspective-3i1nv0nk7cf0

[32] https://link.springer.com/chapter/10.1007/978-94-6265-273-6_10

and the rise of euroscepticism is tantamount to a ticking time bomb. That is why, in his view, the best option would be for the courts not to apply the article. In this case, the article would remain a "judicial" atomic bomb that can be threatened but never used. Eight years have already passed since the national identity clause appeared in the Lisbon Treaty, and it is already possible to speak about which version of the use of this article has been realised in practice. Contrary to expectations, the Court of Justice of the EU has not heard a single case in which an EU act has been challenged on the basis of Article 4(2), i.e. as impinging on national identity. On the one hand, this can be regarded as the existence of effective prior control of compliance with this Article at the stage of drafting and adoption of normative acts by the EU institutions.(Richard R.Verdugo, 2016)[33]

On the other hand, this can also be seen as a reluctance on the part of potential claimants to rely on this Article as a basis for their claims for the annulment of an EU act. The option of using Article 4(2) as a legitimate ground for states to derogate from their obligations under EU law has also remained underutilised. Such cases are isolated and in all such cases, the ECJ has taken a hard line, refusing to treat the national identity clause as an unlimited right of EU Member States or as an indulgence granted for all occasions. It is believed that the first time the Court of Justice of the EU spoke out on Article 4(2) of the Lisbon Treaty was in its famous judgement in Case C-208/09 Sayn-Wittgenstein[34] . In that case, the ECJ was responding to a request from an Austrian court which was considering a claim by an Austrian citizen living in Germany who held the title of princess ("Fürstin von Sayn-Wittgenstein"). The plaintiff challenged the decision of the local authorities to amend her documents to bring her name into conformity with a constitutional law passed by the Austrian Parliament. This law cancelled the official use of any titles and ranks as elements of the surname, with mandatory changes to the registration documents. Two circumstances are of interest. Firstly, the compliance of the law with the Austrian Constitution had already been verified by the Austrian Constitutional Court, and secondly, the fact that the national court in its request asked the Court of Justice of the EU to clarify the question of the compliance of the adopted law with Article 21 of the Treaty on the Functioning of the EU, which guarantees freedom of movement within the EU (i.e. no request to verify the adopted law for compliance with Article 4(2) of the Lisbon Treaty was made in the request). It is therefore not surprising that the Court mentioned national identity at the very end of the judgment, having already decided for itself whether such a restriction

[33] https://dokumen.pub/national-identity-theory-and-research-1nbsped-9781681235257-9781681235240.html

[34] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CA0208

on freedom of movement was permissible on the basis of the public policy clause rather than the national identity clause, and having checked the law in question for compliance with the principle of proportionality. The ECJ agreed with the Austrian government that the adopted law was aimed at protecting the constitutional identity of the Republic of Austria, stating that under Article 4(2) the Union must respect the national identities of the Member States of the Union, which in the case of Austria included the adopted law, as well as the republican form of government of the Austrian state. The next time the Court of Justice of the EU addressed the issue of national identity was in Case C-391/09 Malgožata Runevič[35](Directive 2000/43/EC). In this case, the ECJ was responding to a request by a Lithuanian court hearing a claim by Malgorzata Runevič, a Lithuanian citizen of Polish origin, and her husband, a Polish citizen, against Lithuanian civil registry authorities who refused their request to change the spelling of her name in documents and to use Polish language rules instead of Lithuanian pronunciation and spelling rules. As in the Sayn-Wittgenstein case, on the merits of the dispute, there was an earlier judgment of the Lithuanian Constitutional Court, which stated that the name and surname in official documents should be written in accordance with the pronunciation rules of the official language of the country in order not to infringe its constitutional status. The EU Court of Justice found in its judgment that the Lithuanian authorities' refusal to amend the documents amounted to a restriction of the right of EU citizens to freedom of movement under Article 21 TFEU. However, the requirement to spell the name and surname in accordance with the rules of the official language constituted a valid ground for such a restriction because, under Article 4(2), the Union must respect the identity of its Member States, of which the protection of the national official language is an integral part. According to the Court of Justice of the EU, the Lithuanian language is for Lithuania "a constitutional asset which safeguards the national identity". The EU Court of Justice's formula that the protection of the official language is an integral part of national identity under Article 4(2) was then reiterated by the EU Court of Justice in the judgment in Case C-202/11 Anton Las v. PSA Antwerp NV[36]. In its judgement in Case C-51/08 Commission v. Luxembourg[37], the Court of Justice of the EU refused to recognise the validity of the nationality restriction on the employment of a notary under Luxembourg law. Responding to the defendant's argument that the nationality requirement was intended to ensure respect for Luxembourg's history, culture, traditions and national identity, the Court stated literally

[35] https://curia.europa.eu/juris/liste.jsf?language=en&num=C-391/09
[36] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0202
[37] https://curia.europa.eu/juris/liste.jsf?num=C-208/09

the following: "While respect for national identities is a legitimate objective to be respected in the EU legal order, as reflected in Article 4(2) of the EU Treaty, this can be achieved by a less restrictive measure than the total exclusion of nationals of other EU Member States". In the O'Brien judgment in Case C-393/10 O'Brien[38], the Court of Justice of the EU agreed that the particularities of the organisation of the national judicial system are part of the national identity.

However, the Italian government's attempt in Case C-58/13 Torresi to justify its requirement of a compulsory bar examination for persons who had obtained the status of a lawyer in another Member State by reference to national identity was not understood by the Court of Justice[39]. An analysis of these judgments shows that the ECJ has so far been unable or unwilling to develop either its own autonomous definition of the term "national identity" or an understandable methodology for interpreting and applying Article 4(2) on national identity to invalidate EU acts and for EU states to justify their departure from the implementation of secondary EU law acts. As the above judgements show, the EU Court of Justice has relegated Article 4(2) to a marginal role in which Article 4(2) is perceived as just another ground provided by the EU Treaties for restricting the fundamental freedoms of the EU, which can only be used within narrow limits and under the strict control of the EU Court of Justice. The ECJ itself does not consider the requirement to respect national identity to be an absolute priority, but only a relative one, which implies a balancing of this requirement with other rights granted by the EU Treaties, as well as proportionality of measures to protect national identity. Finally, also contrary to expectations, no war between the constitutional courts and the Court of Justice of the EU, nor any co-operation between them on the interpretation of Article 4(2) also occurred. The constitutional courts have chosen to avoid prejudicial appeals to the Court of Justice of the EU on this issue, and their position is understandable. Such recourse places the constitutional courts on a par with other national courts, depriving them of the halo of specialness and particularity inherent in constitutional justice.(Elisa Novic,2016)

On the other hand, this silence could also mean a reluctance to give the ECJ any opportunity to say something on this issue and to avoid a situation where the answer received would be at variance with the constitutional court's submissions. In this case the choice would be even more unpleasant - either to agree with the ECJ or to go to an open conflict. Obviously, for constitutional courts, as well as for the Court of Justice of the EU, but for other reasons, the policy of ignoring this article proved to be preferable. The only

[38] https://curia.europa.eu/juris/liste.jsf?num=C-393/10&language=EN
[39] https://curia.europa.eu/juris/liste.jsf?num=C-58/13

exception, and even that proved the correctness of the ignoring approach in the end, was the bold and even provocative step of the German FCC. Until 2014, the German Federal Constitutional Court was the last constitutional court of an EU Member State that had never used its right of inquiry before the Court of Justice of the EU. This tradition was broken in 2014, but the first request made was quite remarkable, as it appeared to be a demonstrative and public statement of the German FCC's position. Thus, the German FCC[40] stated that it still assumes that the EU is a community of states that remain masters of the founding treaties. According to the German FCC, unlike the priority of federal law in the case of a federation, the priority of EU law cannot be all-encompassing. The prejudicial opinion of the Court of Justice of the EU can only be used as a basis for interpreting national identity. Commenting on the EU Court of Justice's decisions on national identity, the German FCC noted that its control over respect for national identity is fundamentally and conceptually different from the control exercised by the EU Court of Justice under Article 4(2) of the Treaty on European Union and fundamentally disagreed with the use of the term "national identity" in the jurisprudence of the EU Court of Justice. The German FCC sees the expression of constitutional identity in key constitutional provisions that cannot be amended or repealed (eternity clause) and does not consider it possible to follow the logic of the ECJ that the requirement to respect national identity must be balanced against other rights conferred by the EU Treaties (§ 29)[41]. The German FCC is convinced that national identity is not a subject for compromise and is prepared to defend this thesis. In turn, the Court of Justice of the EU, in responding to this request, completely ignored the German FCC's reasoning on identity and limited itself to recognising the EU acts that were the subject of the request as being in conformity with the constituent treaties. The EU Court of Justice thus showed that it is not ready or willing to engage in a dialogue with constitutional courts on the issue of national identity[42]. Apparently, the constitutional courts of the EU member states have learnt this lesson well and are doing what they can do in this situation - checking the national identity compliance of domestic acts adopted pursuant to the EU acquis. They do so without paying attention to either Article 4(2) or the ECJ's

[40] The **Federal Constitutional Court** (German: *Bundesverfassungsgericht* abbreviated: *BVerfG*) is the supreme constitutional court for the Federal Republic of Germany, established by the constitution or Basic Law (*Grundgesetz*) of Germany.

[41] https://www.legislation.gov.uk/eut/teu/article/29#:~:text=Article%2029(ex%20Article%2015,conform%20to%20the%20Union%20positions.

[42] https://vdoc.pub/documents/the-concept-of-cultural-genocide-an-international-law-perspective-3i1nv0nk7cf0

jurisprudence, but only on the basis of their own understanding of identity.(Elisa Novic, 2016)

A case in point is the open opposition of the constitutional courts of EU member states to the introduction into national law of the scandalous Directive on the compulsory storage by telecommunications companies of their subscribers' call data, adopted to combat international terrorism. Initially, this directive was unsuccessfully challenged by two states in the Court of Justice of the EU. However, national legislation implementing the provisions of the Directive has since been successfully overturned by the constitutional courts of Germany, Romania and the Czech Republic, as well as by the highest courts of Bulgaria and Cyprus. In the context of this article, of particular interest is the reasoning of the German Federal Constitutional Court, which stated in its judgement that it is part of Germany's constitutional identity that citizens' exercise of their freedom cannot be totalised or recorded and that the government is obliged to protect this at European and international level. Facing such an onslaught from the constitutional courts, the EU Court of Justice was eventually forced to change its position. Thanks to a prejudicial request from the Austrian Constitutional Court, the ECJ was given the opportunity to intervene in this process and in its judgement completely annulled the entire Directive on the grounds that it contravened the EU Charter of Fundamental Rights (but without mentioning Article 4(2)). In assessing the overall practice of the courts in utilising Article 4(2), it can be said that almost all commentators were wrong in their initial assessments and expectations about this article. Romantic predictions that Article 4(2) would become a bridge between the Court of Justice of the EU and national constitutional courts, opening a new era of judicial dialogue, have not materialised. Nor have the assessments of this article as a "Pandora's box" or the basis for new and more conflicts between the Court of Justice of the EU and the constitutional courts of the EU Member States come true. To paraphrase one of the authors, Article 4(2) has become neither a meeting place for the courts nor a battleground between them. The Court of Justice of the EU chose to interpret this article as narrowly as possible, minimising its meaning and potential, and without any cooperation and assistance from the constitutional courts[43]. In turn, the constitutional courts have also chosen to avoid the choice between co-operation with the ECJ or war with it by choosing to ignore the article.

[43] https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj

2.3. Court of Justice of the European Union

The Court of Justice of the European Communities was set up in 1952 as part of the European Coal and Steel Community (ECSC). With the advent of the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) in 1957, the Court was established as a common Court for all three Communities[44]. Articles 251-281 of the Treaty[45] on the Functioning of the European Union (TFEU) set out the main provisions concerning the Court. The 1993 Treaty on European Union gave the ECJ power to 'impose a lump sum or penalty payment' if a Member State fails to comply with a judgement (a power first used in July 2000, when the judgement in case Commission v. Greece (C-387/97)[46] ordered Greece to pay €24,600 for each day it delayed implementing an earlier judgement concerning waste disposal in Chania, Crete).(IV191)[47]

The TEU also extended the ECJ's right to review the legality of acts to include those adopted by the European Parliament, and brought the European Central Bank under the Court's jurisdiction. The Treaty of Amsterdam gave the ECJ new responsibilities, covering fundamental rights, asylum, immigration, free movement of persons, judicial co-operation in civil matters, police and judicial co-operation in criminal matters (with restrictions).[48]

- The ECJ has made a number of rulings which are significant for the Court itself and for EU law: The 1963 Van Gend en Loos judgement established the principle of 'direct effect', by stating that: 'independently of the legislation of Member States, Community law ... not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'
- In 1964, in Costa v. ENEL, the Court ruled that Community law is supreme, taking precedence over national law: 'the law stemming from the treaty could not, because of its special and original nature, be overridden by domestic legal provisions ... without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.' (Elisa Novic, 2016)
- The 1991 judgment in the Francovich case gives individuals the right - under certain circumstances - to claim compensation for injury suffered where the State fails to implement EC Directives punctually and properly.

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[44] https://www.linkedin.com/pulse/origins-european-court-justice-ana-muniesa
[45] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF
[46] https://curia.europa.eu/juris/liste.jsf?language=en&num=c-387/97
[47] https://lirias.kuleuven.be/retrieve/667907
[48] https://www.cambridge.org/core/journals/german-law-journal/article/protection-of-national-constitutional-identity-and-the-limits-of-european-integration-at-the-occasion-of-the-gauweiler-case/C14BF4E4BAB7EB89040236516FF10E23

To help ease the workload of the ECJ, a Court of First Instance (CFI) was created by Decision 88/591 (after the 1986 Single European Act had given the Council power to create such a court). The CFI began work on 25 September 1989 and heard its first case in November of the same year.[49]

The Court of Justice currently comprises 28 judges - one per Member State - and eight Advocates-General. All are appointed by agreement between the Member States, for a six-year, renewable term; in common with the General Court, the membership of the Court of Justice is partially renewed every three years, under Article 253[50].

The role of an Advocate-General is to act with complete impartiality and independence, and - under Article 252[51] - to: make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

The submission - or opinion - of an Advocate-General is made in court at the end of the oral proceedings. It summarises the relevant legal issues and suggests how the case should be resolved. Although the opinion of an Advocate-General is not binding on the Court, it is usually a good guide to the final judgment.

Judges in both the Court of Justice and General Court elect a President to their respective Courts for a three-year term. The President administers the work of the Court, fixes dates and times of sittings, and presides at hearings and deliberations. A President is elected to each of the Chambers in which the Court sits. There are eight Chambers, which meet with either three or five judges. Presidents of the three-judge Chambers are elected for one year; those of five-judge Chambers for a three-year term.

Under terms first agreed in the Treaty of Nice, the Court of Justice may sit in a Grand Chamber comprising 13 judges (including the President of the Court and the Presidents of the five-judge chambers) that will generally deal with cases previously handled by the full Court in plenary session (used only in exceptionally important cases, such as where it must compulsorily retire the European Ombudsman or a Member of the European Commission who has failed to fulfil his/her obligations). Recently, for example, Grand Chambers have sat and ruled on preliminary references on an extremely important issue i.e. the legal basis

[49] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31988D0591

[50] The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurists of recognised competence; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E253

[51] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E252

upon which an EU citizen resident in another Member State for more than 10 years could be deported Tsakourdis (2010) and P.I. (2012).

Article 253 requires the Rules of Procedure of the Court of Justice (version of 25 September 2012) to be approved by the Council. The Statute of the Court of Justice (March 2010 version) is laid down in a Protocol attached to the TFEU, as required by Article 281 of the Treaty[52]. Regulation (EU, Euratom) 741/2012[53] of 11 August 2012 'amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto' aimed to adapt the working methods of the General Court and to ensure better distribution of the Court's workload.

The Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.

It can also, in certain circumstances, be used by individuals, companies or organisations to take action against an EU institution, if they feel it has somehow infringed their rights.

The CJEU gives rulings on cases brought before it. The most common types of case are:

- **interpreting the law** (preliminary rulings) – national courts of EU countries are required to ensure EU law is properly applied, but courts in different countries might interpret it differently. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law.
- **enforcing the law** (infringement proceedings) – this type of case is taken against a national government for failing to comply with EU law. Can be started by the European Commission or another EU country. If the country is found to be at fault, it must put things right at once, or risk a second case being brought, which may result in a fine.
- **annulling EU legal acts** (actions for annulment) – if an EU act is believed to violate EU treaties or fundamental rights, the Court can be asked to annul it – by an EU government, the Council of the EU, the European Commission or (in some cases) the European Parliament. Private individuals can also ask the Court to annul an EU act that directly concerns them.
- **ensuring the EU takes action** (actions for failure to act) – the Parliament, Council and Commission must make certain decisions under certain circumstances. If they don't,

[52] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E281
[53] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0741

EU governments, other EU institutions or (under certain conditions) individuals or companies can complain to the Court.

- **sanctioning EU institutions** (actions for damages) – any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff can take action against them through the Court.[54]

In the Court of Justice, each case is assigned 1 judge (the "judge-rapporteur") and 1 advocate general. Cases are processed in **2 stages**:

- **Written stage**

The parties give written statements to the Court - and observations can also be submitted by national authorities, EU institutions and sometimes private individuals.

All of this is summarised by the judge-rapporteur and then discussed at the Court's general meeting, which decides:

How many judges will deal with the case: 3, 5 or 15 judges (the whole Court), depending on the importance and complexity of the case. Most cases are dealt with by 5 judges, and it is very rare for the whole Court to hear the case.

Whether a hearing (oral stage) needs to be held and whether an official opinion from the advocate general is necessary.

- **Oral stage** – a **public hearing**

Lawyers from both sides can put their case to the judges and advocate general, who can question them.

If the Court has decided an Opinion of the advocate general is necessary, this is given some weeks after the hearing.

The judges then deliberate and give their verdict.

- **General Court procedure** is similar, except that most cases are heard by 3 judges and there are no advocates general.[55]

2.4. General Principles of the CJEU

In this section are described general principles of the Court of Justice of the European Union (CJEU), which consists of two courts, the Court of Justice proper and the General Court, and offers various means of redress, as laid down in Article 19 of the Treaty on

[54] http://aei.pitt.edu/74891/1/Court_of_Justice.pdf
[55] https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en

European Union (TEU), Articles 251-281 of the Treaty on the Functioning of the European Union (TFEU), Article 136 Euratom, and Protocol No 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union[56].

Court of Justice. The Court gives a ruling on proceedings against states or institutions that have not fulfilled their obligations under EU law.[57]

- Proceedings against a Member State for failure to fulfil an obligation

These actions are brought:

- Either by the Commission, after a preliminary procedure (Article 258 TFEU): the opportunity for the state to submit its observations and reasoned opinion (1.3.8);
- Or by a Member State against another Member State after it has brought the matter before the Commission (Article 259 TFEU).

Role of the Court:

- Confirming that the state has failed to fulfill its obligations, in which case the state is required to put an immediate end to the infringement.
- If, after a further action is brought by the Commission, the Court finds that the Member State concerned has not complied with its judgment, it may impose on it a financial penalty (a fixed lump sum and/or a periodic penalty payment), the amount being determined by the Court on the basis of a Commission proposal (Article 260 TFEU).

Proceedings against the EU institutions for annulment and for failure to act

Subject: cases where the applicant seeks the annulment of a measure supposedly contrary to EU law (annulment: Article 263 TFEU) or, in cases of infringement of EU law, where an institution, body, office, or agency has failed to act (Article 265 TFEU).

Referral: actions may be brought by the Member States, the institutions themselves, or any natural or legal person if the actions relate to a measure (in particular a regulation, directive, or decision) adopted by an EU institution, body, office, or agency and addressed to them.

Role of the Court: the Court declares the act void or declares that there has been a failure to act, in which case the institution at fault is required to take the necessary measures to comply with the Court's judgment (Article 266 TFEU).

3. Other direct proceedings

As the General Court has jurisdiction in all first instance actions referred to in Articles 263, 265, 268, 270 and 272 TFEU, only actions against Commission decisions imposing

[56] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11957A136

[57] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union

penalties on firms (Article 261) are to be brought to the Court of Justice, as well as those provided for in the Statute for the Court of Justice (as last amended by Regulation (EU, Euratom) 2019/629 of 17 April 2019[58]. Article 51 of the Statute of the Court of Justice[59] provides that, by way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:

- An act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:
  - decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union[60];
  - acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;
  - acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;
- An act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union.

Jurisdiction is also reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an inst an act of or failure to act by the European Central Bank.

The national courts are normally responsible for applying EU law when a case so requires. However, when an issue relating to the interpretation of the law is raised before a national court or tribunal, the court or tribunal may seek a preliminary ruling from the Court of Justice. If it is a court of last instance, it is compulsory to refer the matter to the Court. The national court submits the question(s) about the interpretation or validity of a provision of EU law, generally in the form of a judicial decision, in accordance with the national procedural rules. The Registry notifies the request to the parties to the national proceedings

[58] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R0629
[59] https://www.icj-cij.org/statute#:~:text=Article%2051,referred%20to%20in%20Article%2030.
[60] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E108

and also to the Member States and the institutions of the European Union. They have two months within which to submit any written observations to the Court of Justice.

The Court has the jurisdiction to review appeals limited to points of law in rulings and orders of the General Court. The appeals do not have a suspensory effect.

If the appeal is considered admissible and well-founded, the Court of Justice sets aside the General Court's decision and decides the case itself, or else must refer the case back to the General Court, which is bound by the decision.

The Court of Justice has shown itself to be a very important factor - some would say even a driving force - in European integration.

One of the great merits of the Court has been its statement of the principle that the Treaties must not be interpreted rigidly but must be viewed in the light of the state of integration and of the objectives of the Treaties themselves. This principle has allowed legislation to be adopted in areas where there are no specific Treaty provisions, such as the fight against pollution: in its judgment of 13 September 2005 in Case C-176/03[61] (Commission v Council), the Court authorised the European Union to take measures relating to criminal law where 'necessary' in order to achieve the objective pursued as regards environmental protection.

The Judicial Network of the European Union (JNEU)[62] was created on the initiative of the President of the CJEU and the Presidents of the constitutional and supreme courts of the EU Member States, on the occasion of the 60th anniversary of the signature of the Treaties of Rome in 2017.

It is designed to promote the exchange of information on jurisprudence between the participating national courts and the CJEU. On a site with limited access, the participating national courts and the CJEU publish information on their jurisprudence concerning EU law, on questions which the national courts had referred to the CJEU for a preliminary ruling, and on notes and studies.

The collaborative JNEU platform available in all EU languages, pools the work carried out by the judges of the Court of Justice of the EU and national judges in the course of their judicial activities. Judges have access to a tool enabling them to make their case-law and research and analysis work available to their counterparts, with a view to sharing knowledge and improving efficiency.

[61] https://curia.europa.eu/juris/liste.jsf?language=en&num=C-176/03

[62] The Judicial Network of the European Union (JNEU) is managed by the Court of Justice of the European Union (CJEU). https://www.bverwg.de/en/das-gericht/internationale-beziehungen/jneu

It has more than 2 000 users in the constitutional and supreme courts of the Member States.

The Court of Justice of the European Union consists of two courts, the Court of Justice proper and the General Court. As the Court of Justice has exclusive jurisdiction over actions between the institutions and those brought by a Member State against the European Parliament and/or against the Council, the General Court has jurisdiction, at first instance, in all other actions of this type, particularly in actions brought by individuals and those brought by a Member State against the Commission.

The Statute may extend the General Court's jurisdiction to other areas. In general, judgments given by the General Court at first instance may be subject to a right of appeal to the Court of Justice, but this is limited to points of law.

The General Court has the jurisdiction to give preliminary rulings (Article 267 TFEU[63]) in the areas laid down by the Statute (Article 256(3) TFEU[64]). However, since no provisions have been introduced into the Statute in that regard, the Court of Justice currently has sole jurisdiction to give preliminary rulings. Rulings made by the General Court, limited to points of law, may, within two months, be subject to an appeal to the Court of Justice. In accordance with Article 218(11) TFEU[65], Parliament can request an opinion of the Court of Justice as to whether an envisaged international agreement is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised[66].

2.5. The Constitutionalisation of National Identity in EU Law and its Implications

The EU is under an obligation to respect the identities of the Member States – political or constitutional. The Treaty makes this obligation explicit. A 'national identity clause' was first inserted in the Treaty of Maastricht. Article F (1) TEU was the first provision to constitutionalise such obligation by plainly stressing that 'the Union shall respect the national identities of its Member States'. Article F (1) TEU of the Maastricht Treaty was later replaced by Article 6 (3) TEU of the Amsterdam Treaty which then gave way to current Article 4 (2) TEU of the Lisbon Treaty. The latter provision is a lot more

[63] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E267%3Aen%3AHTML
[64] http://data.europa.eu/eli/treaty/tfeu_2016/art_256/oj
[65] Consolidated version of the Treaty on the Functioning of the European Union - PART FIVE: EXTERNAL ACTION BY THE UNION - TITLE IV: RESTRICTIVE MEASURES - Article 218 (ex Article 300 TEC) OJ C 115, 9.5.2008, p. 144–146. http://data.europa.eu/eli/treaty/tfeu_2008/art_218/oj

[66] https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-european-union

comprehensive compared to its predecessors. Its origins lie in Article I-5 of the deceased EU Constitutional Treaty.(T. Konstadinides, 2011)

Not only Article 4 (2) TEU is longer and more descriptive than its predecessors but it is also supported by the preamble to the EU Charter of Fundamental Rights which reinforces that in its action, the EU must respect the national identities of the Member States. What is more, its legal geography is remarkable. Respect to national identity is packed in Article 4 TEU alongside the principles of conferral and loyalty. Respect to all three principles is therefore fundamental to the good functioning of the EU. As a supplementary to the principle of conferral further manifested in Article 5 (1) TEU, one would expect that Article 4 (2) TEU is addressed to the EU legislature meaning that the Commission, the Council and the Parliament shall not go beyond achieving objectives which may impinge on the national identity of the Member States. Yet the wording of Article 4 (2) TEU implies that the obligations stemming from it are binding on the EU as a whole. This all-encompassing reference implies that all EU Institutions are bound by Article 4 (2) TEU during the exercise of their duties.

Accordingly, respect to national identities can be invoked by a Member State as a means of placing under review the legality of EU legislative acts in accordance with Article 263 TFEU. In this respect Article 4 (2) TEU implies that national identity counterweights the principle of EU law primacy. It also keeps any expansionist claims of EU competence at bay. This attribute of Article 4 (2) TEU as a cause of action under Article 263 TFEU is particularly beneficial for the UK and Dutch governments whose general aversion towards making a federation out of the EU is well known. Both governments have recently conducted a balance of competence review to explore how much power has the EU acquired since they joined the EU. But despite the British or Dutch views about European integration, the fact that, for instance, apart from the principle of conferral the Commission needs to be cautious when proposing legislation not to impinge upon national identities is a welcome development for any of the twenty-eight Member States. For instance, an insistence on identity-scrutiny of EU legislative proposals may motivate national parliaments to be more observant in their reading of proposals emanating from the Commission. Indeed, post-Lisbon the Protocol on the application of the principles of Subsidiarity and Proportionality is more focused on the procedural aspects of the application of Article 5 TEU introducing the so-called ‘yellow’ and ‘orange’ card procedures which ensure early in the legislative process, that the principle of subsidiarity is not violated by the EU Institutions. National identity could easily become part and parcel of this new framework for the conduct of subsidiarity. One has to be careful however -

under the early warning system introduced by the Treaty of Lisbon, subsidiarity constitutes a mere political judgment and not in itself a ground for judicial review. Therefore, national parliaments, which are primarily concerned with subsidiarity or/and national identity violations, are not entitled to bring a direct action against a Council measure under Article 263 TFEU. The CJEU would have jurisdiction to consider subsidiarity infringements brought by a Member State or notified by them in accordance with their legal order on behalf of their national parliament. (A. VON BOGDANDY, S. SCHILL, 2011, p. 1417 et seq.)

3. Evaluation of National Identity Protection in CJEU

The topic of national legal traditions in the EU has gained new momentum with the entry into force of the Lisbon Treaty and the new place the concept of national identity has in it. The national identity of a Member State is protected by Art. 4, para. 2, TEU, the so-called identity clause. This provision offers the perfect starting point to investigate the continuing importance of national legal traditions in the EU. Hence, in this section will be made an overview of this case law, trying to find out what role the identity clause plays in the EU and what this tells us about the fate of national legal traditions. A discussion of the identity clause should begin with the European Convention, more precisely with the Final report of Working Group V on complementary competencies. This group of competences concerns those "national policy areas of significance for the identity of the Member States". (European Convention, 2002,p. 1.)

3.1. Achievements and Limitations of National Identity Protection in CJEU

By a better allocation of competences, the Group aims to show the Union's respect for certain core responsibilities of the Member States. This follows from the fundamental principle, the identity clause, then to be found in Art. 6, para. 3, TEU. Hence, the Group's "purpose would be to provide added transparency of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence". (Ivi, p.10) Indeed, by a clarification of the notion of national identity one could both safeguard the role of the Member States in the Treaty and grant them a certain amount of flexibility, without this provision being a general derogation clause.(Ivi, p. 11.) Ultimately, Working Group V arrives at the following recommendation: "The provisions contained in TEU Article 6(3) that the Union respects the national identity of the Member States should be made more transparent by clarifying that the essential elements of the national identity include, among others, fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces". (Ivi, p. 12.)

Looking at the discussion on the identity clause, the first thing that attracts attention is that most commentators submit that national identity should be understood as national constitutional identity and that this notion refers to certain aspects of the national constitutions of the Member States which remain unaffected by EU law. This would make

the identity clause an answer to the case law of several national constitutional courts (T. Konstadinides, 2011, p. 195). In this case law, constitutional courts have questioned the higher rank of EU law vis-à-vis national constitutions (J.H. Reestman, 2009, p. 374) . They see the EU as an ordinary international organization and the Member States as Masters of the Treaties(P. Kirchhof, 2005, p. 765). Accordingly, they maintain that EU law has no primacy over national constitutions and that they, the national constitutional courts, are the guardians of these constitutions. Yet, this claim contradicts a key doctrine of EU law. According to well-established case law of the CJEU, the EU forms its own, autonomous legal order claiming authority independent of its Member States (B. DE Witte, 2011, p. 323). One of the principal consequences of this autonomy is the primacy of EU law, meaning that EU law has precedence over all law of the Member States, even national constitutions.

What interests the author here is first and foremost the reasoning of the CJEU in the cases on the identity clause. While this case law does not solve the authority problem sketched above, it does show in what way the CJEU deals with national legal traditions in the EU on a day to day basis. At this moment, it is mostly Advocates General who have referred to the identity clause in their Opinions. An important number of these cases was concerned with language. For instance, Advocate General Maduro argued as follows in his Opinion in Spain v. Eurojust: "Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC". [67]

In his Opinion in the case of Michaniki, Maduro even puts the respect for national identity at the very heart of European integration: "It is true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States".[68]

Discussing some case law, Maduro identified several functions a reference to national identity might fulfil. First of all, a Member State may invoke national identity as a ground for derogation from the applications of the fundamental freedoms. In this respect, he called to mind that the preservation of national identity "is a legitimate aim respected by the

[67] Opinion of AG Poiares Maduro delivered on 16 December 2004, case C-160/03, Kingdom of Spain v. Eurojust, para. 24

[68] Opinion of AG Poiares Maduro delivered on 8 October 2008, case C-213/07, Michaniki AE v. Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias, para. 31.

Community legal order".[69] Secondly, national identity may be relied upon by a Member State in order "to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement". Discussing some case law, Maduro identified several functions a reference to national identity might fulfil. First of all, a Member State may invoke national identity as a ground for derogation from the applications of the fundamental freedoms. In this respect, he called to mind that the preservation of national identity "is a legitimate aim respected by the Community legal order".[70] Secondly, national identity may be relied upon by a Member State in order "to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement" (Ivi, para. 33.). This would entail a broad discretion for the Member States to develop its own standards. Thirdly, a Member State may also rely on national identity "to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation".[71] Maduro stresses that the preservation of national identity does not constitute the absolute right for a Member State to diverge from EU law. Indeed, national constitutional law and the European legal order should mutually take into account each other's requirements. Moreover, derogations from a fundamental freedom should be proportionate and are subject to judicial review. This would entail a broad discretion for the Member States to develop its own standards. Thirdly, a Member State may also rely on national identity "to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation" (Ivi, para. 86.).

In its judgment in the case of Sayn-Wittgenstein, the CJEU itself stated that the Austrian Law on the abolition of nobility had constitutional status and was meant to foster equal treatment. As such, it could "be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law" (Ivi, para. 93.). The justification of the Austrian government was read by the CJEU as one of public policy. The Court stressed that this notion should be interpreted strictly, only to be allowed as a legitimate interest when "there is a genuine and

[69] Ivi, para. 35 (referring to Court of Justice, judgment of 2 July 1996, case C-473/93, Commission v. Luxembourg).
[70] Ivi, para. 32.
[71] Court of Justice, judgment of 22 December 2010, case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, para. 83.

sufficiently serious threat to a fundamental interest of society".[72] While Member States have a margin of discretion here, any measure should always pass the proportionality test. In this case, the CJEU deemed the restriction not disproportionate (Ivi, para. 86.). In the case of Runevic, the Lithuanian government argued for the protection of the Lithuanian language as "a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities" (Ivi, para. 88.). Answering to this plea, the CJEU stressed that the protection of the national language falls under the identity clause (Ivi, para. 91.). However, it reiterated its well-known case law concerning restrictions on one of the fundamental freedoms: these measures can be justified "by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures".[73] It remains, however, the responsibility of the national court to strike a fair balance between the interests involved in the case at hand.[74] In the case of O'Brien, the CJEU rejected the Latvian Government's claim that "the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU" (Ivi, para. 143.). In his Opinion in the case of Las, Advocate General Jääskinen reiterated the bond between national identity and language. He makes the following distinction in this regard: "The concept of 'national identity' therefore concerns the choices made as to the languagesused at national or regional level, whereas the concept of 'linguistic diversity' relates to the multilingualism existing at EU level" (Ivi, para. 145.). In his Opinion in the case of Melloni, Advocate General Bot argued that in this particular case the identity clause played no part, since the national identity of Spain was not affected.[75] Yet, Bot stresses that "the taking into account of the distinctive features of the national legal orders is part of the principles which must guide the construction of an area of freedom, security and justice". The joint approach taken by the Member States with regard to the execution of judgments rendered in absentia is "compatible with the diversity of the legal traditions and systems of the Member States".

[72] Court of Justice, judgment of 12 May 2011, case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others, para. 84.
[73] Court of Justice, judgment of 1 March 2012, case C-393/10, Dermod Patrick O'Brien v. Ministry of Justice, formerly Department for Constitutional Affairs, para. 49. The legislation discussed was Directive 97/81/EC of the Council of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC and the Framework Agreement on part-time work.
[74] Opinion of AG Jääskinen delivered on 12 July 2012, case C-202/11, Anton Las v. PSA Antwerp NV, para. 59.
[75] Ivi, para. 145.

3.2. Challenges in EU National Identification Protection

Guibernau (2007) proposes a number of dimensions about national identity. There are, according to Guibernau, at least seven dimensions to national identity: psychological, cultural, antiquity, original, historical, territorial, and political. To be sure, these dimensions are related to national identity as Guibernau argues. However, the list is not complete because there are at least two other factors that appear to affect national identity: Economics and social demography. Scholars can debate what other factors might influence national identity, however the chapters included in this volume highlight the following factors: Social demography, economics, national hegemony related to a specific governance regime, and politics. (Richard R. Verdugo, Andrew Milne)

Social demography. Demography affects national identity. Whatever the causes might be for demographic changes, emigration and immigration appear to be exerting pressure on national identity in many Western countries. Demographic factors affect population size and composition and thus cultural content in a geopolitical entity. As the size of the immigrant population increases, natives appear to have serious questions about their culture and what it means to be a member of their society. In essence, there are concerns about the sustainability of native culture and its way of life. (Richard R. Verdugo, Andrew Milne)

Generally, the better the economic situation, the more positive is national identity. Loss of work, economic depressions, and other negative economic factors lowers identity. Keep in mind that identity is a sense of belonging to a geopolitical entity, and citizens expect their leaders to protect their basic rights and needs. Failing to do so leads a citizenry to question their government, their leaders, and the meaning of membership in their society. National hegemony. By hegemony, we mean a framework of governance or dominance. A change in hegemony creates confusion, and depresses national identity. If change is drastic, it changes roles and statuses in a social system. For example, going from Communism and a planned economy to a form of Democracy and Capitalism is a major change if the cultural and structural apparatus are not in place to support such a change. Another example would be changing from an absolute Monarchy toward greater freedom for a population. Changes in hegemony challenges national identity. A related issue is constant hegemonic change. A social system that is in relatively frequent hegemonic change also taxes national identity. In fact, it may be that the more frequent hegemonic changes occur, the more likely invented traditions are used in stabilizing a social system. (Richard R. Verdugo, Andrew Milne)

Politics is a broad concept, and our use of it refers to the acquisition and maintenance of power. Some examples include wars, conquests, imperialism, colonialism, and other forms of aggression where a geopolitical entity is involved in some conflict. State policies are another marker. The effects on the nation are significant. Politics influence the social demography, composition, and distribution of achieved and ascribed statuses, such as ethnicity, race, social class, or religious groups. The ability of a host society in integrating immigrants or a conquered people challenges national identity. If a country has been conquered or colonized, it is a complex problem as to whether its population will develop a sense of belonging with the conquering country. (Richard R. Verdugo, Andrew Milne)

3.3. Impact of Brexit

"Brexit" is the name given to the United Kingdom's departure from the European Union. It is a combination of 'Britain' and 'exit'.[76]

On 23 June 2016, the UK held a referendum on its membership of the EU. The question facing voters was: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' 51.89% of voters voted to leave the EU. The UK left the EU on 31 January 2020.

Up to and including 31 December 2020 a transition period was in place. During that time nothing changed and the UK continued to comply with all EU laws and rules. Negotiations were also held on the new relationship between the UK and the EU during this time.

On 24 December 2020 negotiators for the EU and the UK reached a deal on the two parties' new relationship. The EU and the UK have set out the terms of this deal in three agreements:

- the Trade and Cooperation Agreement
- the Information Security Agreement
- the Nuclear Cooperation Agreement.[77]

This agreement sets out the rules on the new partnership between the EU and UK that apply from 2021. The rules cover areas such as:

- travel and border controls

[76] https://www.government.nl/topics/brexit/question-and-answer/what-is-brexit
[77] https://dcubrexitinstitute.eu/blog/brexit-negotiations/

- trade in goods, such as flowers and food
- security, such as agreements on cooperation to combat crime and terrorism.

On 27 April 2021 the European Parliament approved the EU-UK Trade and Cooperation Agreement. The parliament's approval was needed in order to ensure the agreement entered in to force on 1 May.[78] To minimise disruption, the agreement already provisionally entered into force on 1 January 2021. This why the rules on cooperation changed earlier. EU rules in the field of public procurement no longer apply to and in the United Kingdom.

Economic operators from the United Kingdom interested or participating in public procurement procedures in the European Union will have the status of economic operators based in a third country regarding their access to the EU's public procurement market. However, the United Kingdom has joined the WTO Agreement on Government Procurement on 1 January 2021. Under this agreement, the European Union and the United Kingdom have taken mutual commitments to give access to each other's operators, goods and services to certain public procurement opportunities. Moreover, Title VI of Heading One of Part Two of the Trade and Cooperation Agreement provides for additional mutual commitments on access to public procurement opportunities.(Richard R. Verdugo, 2016)

Brexit was an accident waiting to happen. It was a consequence not just of the politics of the moment but of the history of Britain's relationship with the EU and its actions within the EU. These include the UK's push for a particularly neoliberal EU and its increasing demands for opts-out of major areas of EU policy. (Scott L. Greer, Janet Laible)

There are those who argue that now that the UK is moving out of the EU, the EU can quickly move to integrate more deeply. But this would be a mistaken assumption, given the existing differences among member states across a number of areas. Moreover, it fails to deal with the ongoing problems of the EU, in particular its inability to resolve some of the major crises it has been facing in recent years (Börzel and Risse 2018).

In some areas, such as the Eurozone, integration has gone very far indeed. In response to the sovereign debt crisis, integration deepened with the reinforcement of macroeconomic rules mandating low inflation, low deficits, and low debt along with greater oversight over member state governments' budgets (Blyth 2013). This was to ensure greater convergence. Instead, Eurozone policies of 'governing by rules and ruling by numbers' have only increased the divergence between national political economies (Schmidt 2015, 2016). The differences have been particularly pronounced between the export-oriented creditor

[78] https://curia.europa.eu/juris/document/document.jsf?docid=251504&doclang=EN

countries in the North that have continued to flourish during the crisis and the more consumption-oriented debtor countries in the South which have languished as a result of the stability-based regime (Baccaro and Pontusson 2017). The Eurozone crisis has also fueled anti-euro and even anti-EU feeling, swelling the ranks of the populists both in the South opposed to austerity – and in the North – angry about what they think of as a 'transfer union'.

In other areas, EU integration has barely developed at all, such as immigration or defense. In the refugee crisis, the EU response has, in contrast with the Eurozone, involved a lack of coordination accompanied by increasing fragmentation. member states have divided over what to do and how, retreating even from the integration already in place, both in terms of Schengen's borderless Europe and the rules governing asylum seekers. In the security crisis, moreover, the failure to move toward any significant integration continues to plague the EU's Common Security and Defense Policy (CSDP) – and this despite the rising risks of terrorism coming from the Middle East and the continued threat from Russia linked to the frozen conflict in the Ukraine not to mention the complications coming from volatile US foreign policy with regard to, for example, Iran or North Korea. Brexit represents its own special challenge. Here, the uncertainty of how and what the UK will negotiate in terms of its future relationship with the EU opens up a whole range of questions not only about the future of the UK but also of the EU.[79] The negotiation process itself risks splitting the member states with regard to the terms of Brexit, in particular given all the other crises that have made EU governance increasingly gridlocked. Moreover, the loss of the UK – if it comes to that – while perhaps facilitating agreements among the remaining, at the same time weakens the EU economically as well militarily, unless some form of positively differentiated integration is negotiated. But even more importantly, and regardless of the outcome, Brexit from the EU in any form challenges the very idea of European integration and raises the specter of EU disintegration.

These crises not only pose major policy challenges for the EU, whether with regard to promoting economic prosperity, guaranteeing the borders, ensuring security, or negotiating Brexit. They also represent significant political challenges, with spillover effects on national democracy and legitimacy.

Together, the policy crises embody a cross cutting political crisis concerning the EU's democratic legitimacy. As authority and control have moved up to the EU level in order to solve common problems, national democracy has been increasingly emptied of substance

[79] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0059

in EU dominated policy areas, in particular as EU level technocratic decisions are perceived to have substituted for the national level politics of left and right (Schmidt 2006). All member states as a result struggle with an upsurge of populism, as the political extremes have made the EU a prime target because of concerns about national identity and sovereignty focused on the impact of the euro and fears of immigration mingled with worries about terrorists. The simple fact of Brexit only further intensified the populist pressures by energizing European extremist parties with calls for withdrawal from the EU, or at least the euro, as well as an end to open borders (Schengen) and restrictions on immigration and citizenship. Finally, even though most populist parties moderated their rhetoric with regard to exit from the euro subsequent to Macron's election defeat of Marine Le Pen, this constituted only a momentary reprieve from the rise of populism, as attested by the new Austrian conservative far Right government and the Italian far Right (Lega) and radical center (5 star) government. [80]

The only way out of this political crisis is for the EU to respond effectively to its crisis challenges with new, more successful policies as well as new politics. But none of this will be easy, given how the increasing politicization related to rising Euroscepticsm on the political extremes along with growing citizen dissatisfaction negatively affect EU member state leaders' ability to reach agreements in the Council of Ministers.

The problem with visions of a future EU at multiple speeds with concentric circles is that it doesn't reflect the realities of what is already a highly differentiated Europe, with different member states participating in different policy communities. While all member states are part of the Single Market, membership of other policy areas is variable, with many countries in and others out of the Eurozone, Schengen, Common Security and Defense Policy, and so on. If we continue to think about the EU as at multiple speeds, the question for the UK is whether it would be at the outer limits of the second speed, in a third speed all its own, with many more opt-outs outside with occasional opt-ins.

The problem with a hard-core Europe, especially one in which the Eurozone sits at the core, is that it assumes that France and Germany agree on policy. They do not, in particular in the Eurozone, where Germany stands for restrictive budgetary policy to maintain stability, France for more expansionary policy to promote growth.3 Were such a hard core to be established, it would most likely be dominated by Germany. Moreover, there is little certainty that a smaller hard core around Germany and France would be able to come to agreement more readily than the larger EU membership, in particular if the

[80] https://www.bbvaopenmind.com/en/articles/the-impact-of-european-integration-on-national-democracies-democracy-at-increasing-risk-in-the-eurozone-crisis/

unanimity rule were maintained. In fact, deeper integration in one area could instead produce an even higher degree of differentiation without integration in other policy areas (Tocci 2014). What is more, it would fully alienate the post-Brexit UK, and most likely preclude British engagement with the EU beyond a minimal involvement with the Single Market. If the Eurozone were to become the central focus of EU integration as a whole, with a hard core of member states led by Germany and France, where insiders with dedicated institutions then set the trajectory for the remaining outsiders. However, the EU could retain its appeal - for the UK as well as other member states resisting membership of the Eurozone, such as Sweden, or on the outside looking in, such as Norway and Switzerland – if the Eurozone were to be seen as just one of the EU's many policy 'communities', and the EU itself seen as consisting of a soft core of overlapping clusters of member states in which any duo or trio of member states would take leadership. With this in mind, while the UK may continue to stand aside with regard to the Eurozone, it could decide that it should reclaim a leadership role in Common Security and Defense Policy, as one of two European nuclear powers. As for immigration policy, given the problems of reaching a common policy in the context of the refugee crisis and mounting disagreements over immigration more generally, this might be an area where deeper integration involving EU wide agreement on principles of treatment could be accompanied by more differentiated integration regarding the modalities of implementation. (Schmidt 2009)

Seeing the future of EU integration as a differentiated process of member state participation in different policy communities beyond the Single Market would also allow for each such community to further deepen by constituting its own special system of governance. In two of the three crisis policy areas, immigration and security, the EU has so far done very little of the institution building and law-making required for deeper integration. So the question for these areas is how they can move forward to deepen integration either differentially – most likely the case for security, or all together, as must be the case for refugee policy (as a human rights issue) – while allowing for solutions adapted to the differences among country hosts.

4. Examination of Selected Cases on National Identity Protection in CJEU

Article 4(2) TEU subjects the EU not only to respect the national identity of the Member States, but also their equality (principle of equality of the Member States) and essential State functions.

Moreover, the article expressly establishes that national security remains within the exclusive competence of the Member States. As recognised by Dobbs, this final phrase guarantees Member States' continued autonomy on the matter in response to the eradication by the Treaty of Lisbon of the three-pillars structure. (M. Dobbs, 2014, pp. 298–334)

The first and second question referred to the CJEU concerned whether Article 2(2)(b) of Directive 2000/43/EC should have been construed as prohibiting Member States from indirectly discriminating against individuals on grounds of their ethnic origin in a case where national legislation provided that forenames and surnames may only be written on certificates of civil status respectively: (i) in the national language; and (ii) using only Roman characters and not employing modifications to those characters which are used in other languages.

The Court, while dismissing the first and the second question due to the inapplicability to the case of Directive 2000/43/EC, admitted the third and the fourth question based on the Treaty provisions on citizenship of the Union. In answering those questions, the Court recalled its ruling in Groener and restated that EU law did not preclude the adoption of a policy for the protection and promotion of a language of a Member State which constituted both the national and the first official language. The Court also referred to Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, eventually recognising also that: "Article 4(2) TEU provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language". (Ibid, par. 86)

A first ruling in which Article 4(2) TEU was used to protect national identity as inherent in fundamental structures of the State and related specific understandings of fundamental rights is the Sayn-Wittgenstein[81] ruling. In this case, the CJEU was referred a preliminary ruling on the interpretation of Article 21 TFEU and its compatibility with the refuse by the Austrian authorities to correct the surname of the applicant after her adoption by a German national due to indications in the German surname of nobility, not permitted under Austrian constitutional law.

[81] Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien [2010] ECLI:EU:C:2010:806. See also, for an analogous ruling, Case C-438/14, Bogendorff von Wolffersdorff, ECLI:EU:C:2016:401.

While the identity clause states that EU membership must not and cannot result in any change to the institutional structure of government of the Member States, it could be argued that the effective protection of national identity as expressed in the allocation of competences between on the one hand the central government and, on the other hand, local and regional authorities might require more than simply not calling into question the issue.

4.1. National Identity Protection and case-law examples

Identity refers to those attributes and qualities that enable us to recognize an individual or collective from others. The cultural theorist Stuart Hall distinguished two ways of thinking about identity (Hall, 1990). The first model assumes that there is an intrinsic content to identity which constitutes the 'truth' or 'essence' of a person or group (ibid.: 223). For instance, in a collective, this essence can be shaped by a perceived common origin or shared history which endows that collective with a stable frame of reference. The second model, favoured by Hall, emphasizes the impossibility of such fully constituted and distinct identities. In this model, identities are always incomplete and in process, undergoing constant transformation. Rather than being fixed in some essence, identities are subject to the continuous 'play' of history, culture and power (ibid.: 225).

The Court has established safeguards for identity under different Articles of the European Convention of Human Rights: the right to private life under Article 8 ECHR, religious freedom under Article 9 ECHR and freedom of association under Article 11 ECHR. Accordingly, the Court's case law regarding identity consists of three categories: private identity in conjunction with Article 8 ECHR, religious identity in conjunction with Article 9 ECHR and collective identity in conjunction with Article 11 ECHR.[82] This section expands on these categories and the judgments central to each category. The selection of cases was based on where the Court specifically used the term 'identity' in its reasoning. This discursive approach assigns particular significance to the Court's choice of words and allows to sketch a tentative conceptual outline of the Court's understanding of the notion of identity (Cf. Dembour, 2006: 10).

In the majority of cases where identity is mentioned, the Court regards identity as part of an individual's private life. As such, a right to identity has been developed under Article 8 ECHR, which guarantees the right to private life. The Court's standard

[82] The relevant judgments of the Court referred to in this article can be found in the Court's online database . https://hudoc.echr.coe.int/

consideration on identity and the right to private life was first formulated in the case of Mikulic´ v. Croatia.[83]

The applicant was a child looking to establish the fatherhood of a man who kept evading the scheduled DNA tests. The national courts ruled that evading the DNA tests was not sufficient to establish the man's fatherhood. The applicant complained, under Article 8, that the Croatian courts had failed to reach a decision in her case, which had left her uncertain about her personal identity. The Court agreed and found a violation of the applicant's rights under Article 8. The Court notes that the applicant had a vital interest to 'uncover the truth about an important aspect of [her] personal identity' (ibid.: para. 64). Thus, the right to identity gave the applicant a forceful claim to demand increased efforts by the authorities to establish paternity. The Court reiterated the aforementioned consideration in several cases, ruling that private life also encompasses gender and ethnic identity. In Van Kück v. Germany, gender identity was deemed 'one of the most intimate areas of a person's private life'. (Van Kück v. Germany: para. 56; see also Y.Y. v. Turkey: para. 66). In another transgender case, the Court held that Article 8 ECHR includes people's 'right to establish details of their identity as individual human beings'. (Christine Goodwin v. the United Kingdom: para. 90). In several cases concerning Roma rights, among which Aksu v. Turkey, the Court held that an affront to ethnic identity can also fall within the scope of private life (Aksu v Turkey: para. 58; cf. Perinc¸ek v. Switzerland: para. 200, 227; Chapman v. the United Kingdom). Moreover, in Putistin v. Ukraine, the Court accepted that the reputation of an ancestor could in some circumstances affect a person's private life and identity, and thus might engage Article 8 ECHR (Putistin v. Ukraine: para. 33, 36–41). In terms of legal consequences, the Court has ruled that the State's margin of appreciation is restricted when a person's identity is implicated. In a similar case to Mikulic´, the Court held in Odie`vre v. France that Article 8 guarantees the right to obtain information necessary to discover the 'truth' concerning important aspects of one's personal identity (Odie`vre v. France: para. 29). French law prevented the applicant from discovering information about her family as her mother had requested that details regarding the birth be kept secret. The applicant stated that establishing her basic identity was an integral part not only of her private life, but also of her family life with her natural family, with whom she hoped to establish emotional ties (ibid.: para. 25). The Court nonetheless found no violation, stating that the French lawmaker had struck a fair balance between protecting a person's identity and safeguarding third-party interests. In a dissenting opinion joined by

[83] Mikulic´ v. Croatia: para. 53

seven judges, the judges phrased the right to access to the 'essence of a person's identity' as 'the inner core of the right to respect for one's private life' and, therefore, higher scrutiny was called for when weighing up the competing interests (joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpa¨a¨ in Odie`vre v. France). In later cases, the Court embraced this dissenting opinion as its common view. In Evans v. the United Kingdom, the Court ruled that the State's margin of appreciation is limited in cases where an individual's identity is implicated. (Evans v. the United Kingdom: para. 77)

The Evans case concerned a female applicant's right under UK law to take decisions on her in vitro fertilization without consent from her former husband. The Court found no violation by the State for requiring continued consent between the man and woman in each stage of the reproductive process. Thus, the limited margin did not affect the outcome in this case. However, in the case of X. and Others v. Austria, the Court found a violation of Article 14 in conjunction with Article 8 ECHR for barring same-sex couples from obtaining second-parent adoptive parenthood (the applicants consisted of a female same-sex couple and the biological child of one of the partners), referring to the State's limited margin of appreciation in situations where a person's identity is implicated (X. and Others v. Austria). Therefore, violation of a person's right to identity may constitute a reason for the Court to find a breach of the Convention. In such cases, this can lead to a demand of increased efforts by the authorities (Mikulic´ v. Croatia) or to a limited margin of appreciation for the State (X. and Others v. Austria).

All cases mentioned before were related to Private Identity (Article 8), the next example of our observation is Religious Identity (Article 9 ECHR) is related to the right to religious freedom. The Court holds that the religious dimension is one of the most vital elements of the identity of believers. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. (Leyla S¸ahin v. Turkey: para. 104)

The third example of identity is Collective Identity (Article 11 ECHR). The Court has occasionally referred to collective identities as providing a basis for protection under the right to freedom of association (Article 11 ECHR). In a case where Polish authorities refused to register an association formed by people from Silesia, a minority in Poland, the court found a breach of Article 11 (Gorzelik and others v. Poland). The Court, referring to

the Framework Convention for the Protection of National Minorities, considered that the freedom of association is crucial for minorities to enable them to express and promote their identity. The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, 'a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity'. Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights. (ibid.: para. 93)

Besides the legal shortcomings, conceptual problems result from the Court's approach. While the Court constructs identity as an individual matter that warrants protection under Article 8's right to private life, it promotes a particular view of what is presented as an unquestionable part of identity. With its focus on biological parenthood, the Court sketches a picture of identity that is not as natural as the Court makes it out to be. Objectors to the notion of fixed parenthood oppose a status of father based on whether one has a blood connection, preferring a status based on whether one exercises the rights and fulfils the obligations of parenthood (Baker, 2004). Irrespective of one's opinion on this matter, positioning biological fatherhood at the core of identity shows that the Court has serious skin in the game of identity formation; what it places under the banner of identity is related to interests of upholding a particular conception of the common good.(Elisa Novic, 2016)

4.1.1. Judgments from the CJEU

The Court of Justice is called upon to rule on the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with the principle of the primacy of EU law in particular, in a context in which an ordinary court of a Member State has no jurisdiction, under national law, to examine the conformity with EU law of national legislation that has been held to be constitutional by the constitutional court of that Member State, and the national judges adjudicating are exposed to disciplinary proceedings and penalties if they decide to carry out such an examination. In the present case, RS was convicted on foot of criminal proceedings in Romania. His wife then lodged a complaint concerning, inter alia, several judges in respect of offences allegedly committed during those criminal proceedings. Subsequently, RS brought an action before

the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) seeking to challenge the excessive duration of the criminal proceedings instituted in response to that complaint. In order to rule on that action, the Court of Appeal, Craiova, considers that it must assess the compatibility with EU law[84] of the national legislation establishing a specialised section of the Public Prosecutor's Office responsible for investigations of offences committed within the judicial system, such as that commenced in the present case. However, in the light of the judgment of the Curtea Constituțională (Constitutional Court, Romania),[85] delivered after the Court's judgment in Asociaţia 'Forumul Judecătorilor din România' and Others,[86] the Court of Appeal, Craiova, would not have jurisdiction, under national law, to carry out such an examination of compatibility. By its judgment, the Romanian Constitutional Court rejected as unfounded the plea of unconstitutionality raised in respect of several provisions of the abovementioned legislation, while emphasising that, when that court declares national legislation consistent with the provision of the Constitution which requires compliance with the principle of the primacy of EU law,[87] an ordinary court has no jurisdiction to examine the conformity of that national legislation with EU law.

In that context, the Court of Appeal, Craiova, decided to refer the matter to the Court of Justice in order to clarify, in essence, whether EU law precludes a national judge of the ordinary courts from having no jurisdiction to examine whether legislation is consistent with EU law, in circumstances such as those of the present case, and disciplinary penalties from being imposed on that judge on the ground that he or she has decided to carry out such an examination. The Court, sitting as the Grand Chamber, finds such national rules or practices to be contrary to EU law.[88]

First of all, the Court finds that the second subparagraph of Article 19(1) TEU does not preclude national rules or a national practice under which the ordinary courts of a Member State, under national constitutional law, are bound by a decision of the

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[84] Specifically, the compatibility with the second subparagraph of Article 19(1) TEU and the annex to Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354. p. 56).

[85] Judgment No 390/2021 of 8 June 2021.

[86] Judgment of 18 May 2021, Asociaţia 'Forumul Judecătorilor Din România' and Others (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393; 'judgment in Asociația "Forumul Judecătorilor din România" and Others'), in which the Court held, inter alia, that the legislation at issue is contrary to EU law where the creation of such a specialised section is not justified by objective and verifiable requirements relating to the sound administration of justice and is not accompanied by specific guarantees identified by the Court (see point 5 of the operative part of that judgment).

[87] In its judgment No 390/2021, the Romanian Constitutional Court held that the legislation at issue complied with Article 148 of the Constituția României (Romanian Constitution).

[88] In the light of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law

constitutional court of that Member State finding that national legislation is consistent with that Member State's constitution, provided that national law guarantees the independence of that constitutional court from, in particular, the legislature and the executive.

However, the same cannot be said where the application of such national rules or a national practice entails excluding any jurisdiction of those ordinary courts to assess the compatibility with EU law of national legislation which such a constitutional court has found to be consistent with a national constitutional provision providing for the primacy of EU law. Next, the Court points out that compliance with the obligation of national courts to apply in full any provision of EU law having direct effect is necessary, in particular, in order to ensure respect for the equality of Member States before the Treaties – which precludes the possibility of relying on, as against the EU legal order, a unilateral measure, whatever its nature – and constitutes an expression of the principle of sincere cooperation set out in Article 4(3) TEU, which requires any provision of national law which may be to the contrary to be disapplied, whether the latter is prior to or subsequent to the EU legal rule having direct effect. In that context, the Court recalls that it has already held, first, that the legislation at issue falls within the scope of Decision 2006/928[89] and that it must, therefore, comply with the requirements arising from EU law, in particular from Article 2 and Article 19(1) TEU.[90]

Secondly, both the second subparagraph of Article 19(1) TEU and the specific benchmarks in the areas of judicial reform and the fight against corruption set out in the annex to Decision 2006/928 are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect.[91] It follows that if it is not possible to interpret the national provisions in a manner consistent with the second subparagraph of Article 19(1) TEU or those benchmarks, the ordinary Romanian courts must disapply those national provisions of their own motion. In that regard, the Court points out that the ordinary Romanian courts have as a rule jurisdiction to assess the compatibility of Romanian legislative provisions with those provisions of EU law, without having to make a request to that end to the Romanian Constitutional Court. However, they are deprived of that jurisdiction where the Romanian Constitutional Court has held that those national legislative provisions are consistent with a national constitutional provision providing for

[89] Decision 2006/928.

[90] Judgment in Asociaţia 'Forumul Judecătorilor din România' and Others, cited above, paragraphs 183 and 184.

[91] Judgment in Asociaţia 'Forumul Judecătorilor din România' and Others, cited above, paragraphs 249 et 250, and 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, paragraph 253.

the primacy of EU law, in that those ordinary courts are required to comply with that judgment of that constitutional court. However, such a national rule or practice would preclude the full effectiveness of the rules of EU law at issue, in so far as it would prevent the ordinary court called upon to ensure the application of EU law from itself assessing whether those national legislative provisions are compatible with EU law.

In addition, the application of such a national rule or practice would undermine the effectiveness of the cooperation between the Court of Justice and the national courts established by the preliminaryruling mechanism, by deterring the ordinary court called upon to rule on the dispute from submitting a request for a preliminary ruling to the Court of Justice, in order to comply with the decisions of the constitutional court of the Member State concerned.[92] The Court emphasises that those findings are all the more relevant in a situation in which a judgment of the constitutional court of the Member State concerned refuses to give effect to a preliminary ruling given by the Court, on the basis, inter alia, of the constitutional identity of that Member State and of the contention that the Court has exceeded its jurisdiction.

The Court points out that it 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. By contrast, that provision has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of its obligations under EU law, 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. Thus, if the constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, it must make a reference to the Court for a preliminary ruling, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid[93]. (Christina Scicluna)

In addition, the Court emphasises that since the Court alone has exclusive jurisdiction to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.

[92] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:338:0001:0006:EN:PDF
[93] https://www.mondaq.com/constitutional--administrative-law/1174414/the-principle-of-judicial-independence

Furthermore, on the basis of its earlier case-law,[94] the Court makes clear that Article 2 and the second subparagraph of Article 19(1) TEU preclude national rules or a national practice under which a national judge may incur disciplinary liability for any failure to comply with the decisions of the national constitutional court and, in particular, for having refrained from applying a decision by which that court refused to give effect to a preliminary ruling delivered by the Court.[95]

4.2. Implications for EU law and Policy

The European Union is based on the rule of law. This means that every action taken by the EU is founded on treaties that have been approved democratically by its members. EU laws help to achieve the objectives of the EU treaties and put EU policies into practice. There are two main types of EU law – primary and secondary.

Primary versus secondary law. Every action taken by the EU is founded on the treaties. These binding agreements between EU member countries set out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its members.

Treaties are the starting point for EU law and are known in the EU as primary law. The body of law that comes from the principles and objectives of the treaties is known as secondary law; and includes regulations, directives, decisions, recommendations and opinions.

The EU can pass laws only in those areas where its members have authorised it to do so, via the EU treaties. The treaties lay down the objectives of the European Union, the rules for EU institutions, how decisions are made and the relationship between the EU and its member countries. The EU treaties have from time to time been amended to reform the EU institutions and to give it new areas of responsibility. They have also been amended to allow new EU countries to join the EU.

The treaties are negotiated and agreed by all the EU countries and then ratified by their parliaments, sometimes following a referendum.

Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.

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[94] Judgment in Euro Box Promotion and Others, cited above.

[95] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf

Directives require EU countries to achieve a certain result but leave them free to choose how to do so. EU countries must adopt measures to incorporate them into national law (transpose) in order to achieve the objectives set by the directive. National authorities must communicate these measures to the European Commission.

Transposition into national law must take place by the deadline set when the directive is adopted (generally within 2 years). When a country does not transpose a directive, the Commission may initiate infringement proceedings[96]. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations allow the EU institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. They have no binding force.

An 'opinion' is an instrument that allows the EU institutions to make a statement, without imposing any legal obligation on the subject of the opinion. An opinion has no binding force.

Delegated acts are legally binding acts that enable the Commission to supplement or amend non-essential parts of EU legislative acts, for example, in order to define detailed measures.

The Commission adopts the delegated act and if Parliament and Council have no objections, it enters into force. Implementing acts are legally binding acts that enable the Commission – under the supervision of committees consisting of EU countries' representatives – to set conditions that ensure that EU laws are applied uniformly.

4.3. Comparative Analysis of the Approaches to National Identity Protection in CJEU

The European Union was established and shaped to be an area of democracy and justice, uniting countries through their common values with the primary goal of protecting human dignity.

A constitutional judiciary is vital to the existence of a democratic legal system, especially in the long-term. The parliamentary tradition holds primary responsibility for democracy – that is, the right of the people to govern their country. The parliament is a reflection of its people on both a national, as well as on a European Union level, as people elect their representatives without requirements for specific knowledge or education. The people elect individuals they trust, relying on them to represent the electorate with honour

[96] Infringement procedure - European Commission (europa.eu)

and take political decisions accordingly. The people place the power of the nation state, and of a united Europe, in safe hands.

The constitutional judiciary, on the other hand, is responsible for the rule of law, without which the existence of democracy would be impossible. Judges are selected upon careful examination of their education, experience and reputation. They carry the responsibility of ensuring that democracy is exercised in a legitimate manner, and ensuring that fundamental human rights are respected. This is the basis of our complex modern power structure, which implies a balance between constitutional organs of the State, which are based on the principle of division of the power of the State. The legislator adopts laws, and the courts enforce them, thus establishing binding case-law.

The rule of law is designed with the aim of ensuring justice in society: politicians are responsible for enshrining values in laws, while judges enforce those values, making justice accessible to anyone who has not been able to achieve it otherwise, allowing the public to seek such justice before a court. Justice is delivered at all levels, both at the level of the individual Member States and at the level of the European Union as a whole. While there are many courts, the judiciary is one, all courts working towards a common goal: to nurture the European Union as an area of democracy and justice by administering law.

One and the same, the people, as a sovereign, legitimise the power structures of their nation-states and legitimise the exercise of power at the level of the European Union. Democratic power is exercised within and throughout the framework of law. For this reason, it is vital to develop a pan-European legal area in which every citizen of the European Union and every nation state is equal, not only in decision-making, but also in the implementation of such decisions, inter alia, within their jurisdiction. At a national level, the constitutional judiciary has 12 the final say on the legitimacy of laws and regulations, while at a European level, this power is vested in the Court of Justice of the European Union (‘the CJEU’). It is essential for the judiciary of each nation state and the judiciary of the European Union to work together in order to create a fair and just legal landscape which is accessible to every European citizen, and which aims to safeguard both the common values of the European Union and the right of nation states to self-determination, which is first and foremost expressed through their constitutional identity.

The protection of national identity is an area where the competences of the Member States’ constitutional courts and the CJEU often clash. It is therefore important to discuss how to reconcile the diverse national identities and constitutional values of the Member States, while ensuring consistent interpretation and application of European Union law. The

conference was another way in which the CJEU and national constitutional courts could come together to pursue their common goal: justice.

The comparative law method may be defined as an interpretative tool that serves the Court of Justice to resolve particular gaps, conflicts and ambiguities, be they at constitutional or legislative level. Whilst the comparative law method focuses primarily on the laws of the Member States, it does not rule out international law, or even the law of third countries such as the US.[97]

Three Treaty provisions provide the constitutional authority for the Court of Justice to apply the comparative law method.

First and foremost, by virtue of Article 19 TEU – a provision that gives concrete expression to the value of respect for the rule of law –, the Court of Justice is required to solve the cases over which it enjoys jurisdiction. Accordingly, as the Court stated already in 1957, where a case is brought before it and the Treaties do not contain any rules for its solution, 'unless the [Court] is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the [Member States]'.[98] It follows that Article 19 TEU invites the Court of Justice to engage in a comparative study of the laws of the Member States.[99]

The two other Treaty provisions refer rather explicitly to the comparative law method. Thus, Article 6(3) TEU mandates the EU to respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union's law'. Likewise, Article 52(4) of the Charter states that "[in] so far as [the] Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

Furthermore, by stating that the principle of non-contractual liability of the EU is to be developed 'in accordance with the general principles common to the laws of the Member States',[100] Article 340 TFEU clearly indicates that the authors of the Treaties envisaged recourse to the comparative law method as a means of filling lacunae in the EU legal order.

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[97] Lenaerts, K., and Gutman, K., 'The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited' in M. Andenas and D. Fairgrieve (eds), Courts and Comparative Law , Oxford University Press, Oxford, 2015.

[98] Judgment of 12 July 1957, Algera and Others v Common Assembly, 7/56 and 3/57 to 7/57, EU:C:1957:7, para. 55.

[99] Judgment of 5 March 1996, Brasserie du pêcheur and Factortame, C-46/93 and C-48/93, EU:C:1996:79, para. 27.

[100] See Article 340(2) TFEU

It follows from those three Treaty provisions and Article 52(4) of the Charter that the comparative law method may be relied upon in order to incorporate into the EU constitutional fabric the constitutional traditions common to the Member States, either by discovering general principles or by providing content to the rights recognised in the Charter.

Two examples from the case law may illustrate this point. In the first example, the Court of Justice came to the conclusion that there was no constitutional tradition common to the Member States, whilst in the second, it found that there was. In M.A.S. and M.B.,[101] a VAT case, the Court of Justice recalled that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonisation, it is for the Member States to determine the applicable limitation rules. Thus, a Member State is free to consider that its limitation rules form part of substantive criminal law.[102]

The reasoning of the Court of Justice implicitly shows that, when it comes to the legal nature of limitation rules in criminal matters, there is no common legal tradition in the laws of the Member States. Indeed, the Research and Documentation Directorate had examined twelve legal systems and identified three different approaches, namely procedural, substantive, and hybrid.[103] Accordingly, the absence of EU harmonisation – coupled with the absence of a common legal tradition – militated in favour of leaving the question to the laws of the Member States.

By contrast, in Związek Gmin Zagłębia Miedziowego,[104] the Court of Justice relied on the constitutional traditions common to the Member States, as explored by Advocate General Sharpston,[105] in order to discover a new general principle, namely that of fiscal legality. According to that principle, 'any obligation to pay a tax, such as VAT, and all the essential elements defining the substantive features thereof must be provided for by law'. It is noteworthy that the scope of application of the comparative law method is not limited to primary EU law, i.e. to discovering general principles of EU law and interpreting

[101] Judgment of 5 December 2017, M.A.S. and M.B., C-42/17, EU:C:2017:936.
[102] Where that is the case, the Court pointed out that such a Member State must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter.
[103] Court of Justice, the Research and Documentation Directorate, Research Note of 15 May 2017, 'Limitation rules in criminal matters', available at: https://curia.europa.eu/jcms/jcms/p1_2170124/
[104] Judgment of 8 May 2019, Związek Gmin Zagłębia Miedziowego, C-566/17, EU:C:2019:390.
[105] Court of Justice, the Research and Documentation Directorate, Research Note of 9 September 2018, 'Scope of the principle of the legality of taxation, particularly in relation to value added tax', available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-11ndr-2018-005_neutralisee_synthese_en.pdf

provisions of the Charter. That method of interpretation has also been relied upon by the Court of Justice with a view to clarifying specific provisions of secondary EU law. It provides a good framework for the Court of Justice to undertake what we have called 'federal common law-making'.[106]

Thus, in Coman and Others,[107] the Court of Justice was called upon to interpret the term 'spouse' set out in the Citizens' Rights Directive (Directive 2004/38)[108]. Advocate General Wathelet noted that, ever since that Directive was adopted, there has been a change in the legal recognition of marriage of persons of the same sex.[109] That change showed that there was no consensus at Member State level on a definition of marriage, since some Member States allowed marriage of persons of the same sex, whilst the constitutions of other Member States expressly define marriage as a union of two persons of opposite sex. Therefore, the Court of justice concluded that the term 'spouse' for the purpose of the derived right of residence of family members of Union citizens had to be interpreted in a neutral manner, thus deferring to the laws of the Member State where the marriage was legally entered into.[110]

As applied by the Court of Justice, the comparative law method favours a dynamic interpretation of EU law. Where societal change brings about a high degree of convergence in the laws of the Member States, that method enables the EU legal order to cope with those changes, thereby aligning the EU's legal culture with those of its Member States.

A consensus-based analysis enables an evolving interpretation of EU law: the emergence of a consensus may militate in favour of departing from existing case law that has, with the passage of time, become inconsistent with contemporary societal values.

However, the existence of consensus among the Member States is not by itself decisive. It must leave room for the EU legal order to preserve its autonomy. Admittedly, the existence of such consensus plays an important role in supplying the content of EU law, notably in discovering general principles of EU law. The same applies when the Court of Justice engages in federal common law-making. But the incorporation into EU law of a norm based on consensus among the Member States must always be made subject to its consistency with the founding principles of that law. In the same way, the absence of such a consensus does not prevent the Court of Justice from having recourse to other sources of

[106] K. Lenaerts and K. Gutman, "Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 American Journal of Comparative Law 55.
[107] Judgment of 5 June 2018, Coman and Others, C-673/16, EU:C:2018:385.
[108] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0038
[109] Opinion of Advocate General Wathelet in Coman and Others, C-673/16, EU:C:2018:2, point 58.
[110] Judgment of 5 June 2018, Coman and Others, C-673/16, EU:C:2018:385, para. 36.

law, such as international law, or from applying other methods of interpretation. That being said, the absence of a consensus counsels the Court of Justice to act with caution.

In addition, the application of the comparative law method at EU level may give rise to a 'spillover effect' triggering public debate in the Member States in which the solution advocated by the Court of Justice is not present in their law.[111] That approach produces cross-fertilization and mutual influence between the EU and national legal orders, thereby creating a 'common legal space' and giving concrete meaning to the motto 'United in diversity'.[112]

[111] https://lirias.kuleuven.be/retrieve/667907

[112] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf

Conclusion

1. Identity, one way or another, is activated in conflict situations. In a normal situation, national, regional, gender, class, and sexual identity is one of many. There are a wide variety of identities in everyday life, and we are guided by them. We see how before our eyes some identities that seemed obvious to us are disintegrating and even disappearing. Identity is very situational, unstable and constantly changing. One of the reasons why national identities are so important is related to the very nature of countries. In this paper, we consider the position of national identity and its protection at the legal level.

In the first chapter, we examined the concept of identity in order to have an idea of what is the basis of our work. Then we examined the situation of national identity and pointed out what causes the need for its protection, so we solved the.

2. In the second chapter, we studied the protection of national identity on the basis of the Evro law, then got acquainted with the Court of Justice of the European Union, with its main principles of operation, considered the implication and constitutionalization of national identity.

In the third chapter, we examined national identity against the background of the CJEU, achievements, limitations, challenges in identifying the protection of national identity. We paid special attention to impact of Brexit.

3. We conducted a comparative analysis of views regarding national identity, on the basis of which we see that the measures taken are not always a solution to cases that have come to court, the problem is also not closed cases that have not yet been closed since existing laws cannot be used in favor of cases concerning national identity.

4. Review of the protection measures taken and court decisions, in which we see the result and identify gaps in the paragraph. The conclusion that we can come to after studying all the cases is that the existing directives need to be revised and amended, which will take into account many nuances of cases concerning national identity and its protection.

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SUMMARY

Protection of National Identity in the CJEU

Ruslan Akhundov

The master thesis provides for the study of the concept of national identity, the position of national identity in the legal system of the European Union and the protection of national identity in the European Union. The paper considers both the concept as a whole, and there is a detailed analysis including all achievements, decisions made and their use based on real cases, difficulties and disadvantages of the position of national identity and measures taken to achieve the desired result in protecting the rights of individuals by the state.

The work of the European Union is also considered, on the basis of which it is possible to trace exactly how the situation was formed and why its protection of national identity is needed. The Court of Justice of the European Union is also considered in a separate chapter, where you can get acquainted with the principles of the court's work and the decisions taken with regard to cases related to the position of national identity.

When analyzing all the cases considered, we can see the main problems and shortcomings of the situation.

Magistro darbas numato nacionalinės tapatybės sampratos, nacionalinės tapatybės padėties Europos Sąjungos teisinėje sistemoje ir nacionalinės tapatybės apsaugos Europos Sąjungoje tyrimą. Straipsnyje nagrinėjama ir visa sąvoka, ir yra išsami analizė, apimanti visus pasiekimus, priimtus sprendimus ir jų naudojimą, pagrįstus realiais atvejais, nacionalinio identiteto padėties sunkumais ir trūkumais bei priemonėmis, kurių buvo imtasi norint pasiekti norimą rezultatą ginant asmenų teises valstybės.

Taip pat svarstomas Europos Sąjungos darbas, kurio pagrindu galima tiksliai atsekti, kaip susidarė situacija ir kodėl reikalinga jos nacionalinio identiteto apsauga. Europos Sąjungos Teisingumo Teismas taip pat nagrinėjamas atskirame skyriuje, kuriame galite susipažinti su teismo darbo principais ir priimtais sprendimais bylose, susijusiose su nacionalinio identiteto padėtimi.

Analizuodami visus nagrinėjamus atvejus, galime pamatyti pagrindines situacijos problemas ir trūkumus.