

National identities as a limit to the european values : what is at stake ? What solutions ?

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Introduction

- Art. 2 TEU (Lisbon treaty) : « The Union is founded on the **values** of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are **common to the Member States** in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail ».

These values :

- Condition for accession (art. 49 TEU)
- Condition for membership (art. 7 TEU)

Plan

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I. From national identities as a basis for European values to national identities as a limit to European Values

National identities as the basis of european values

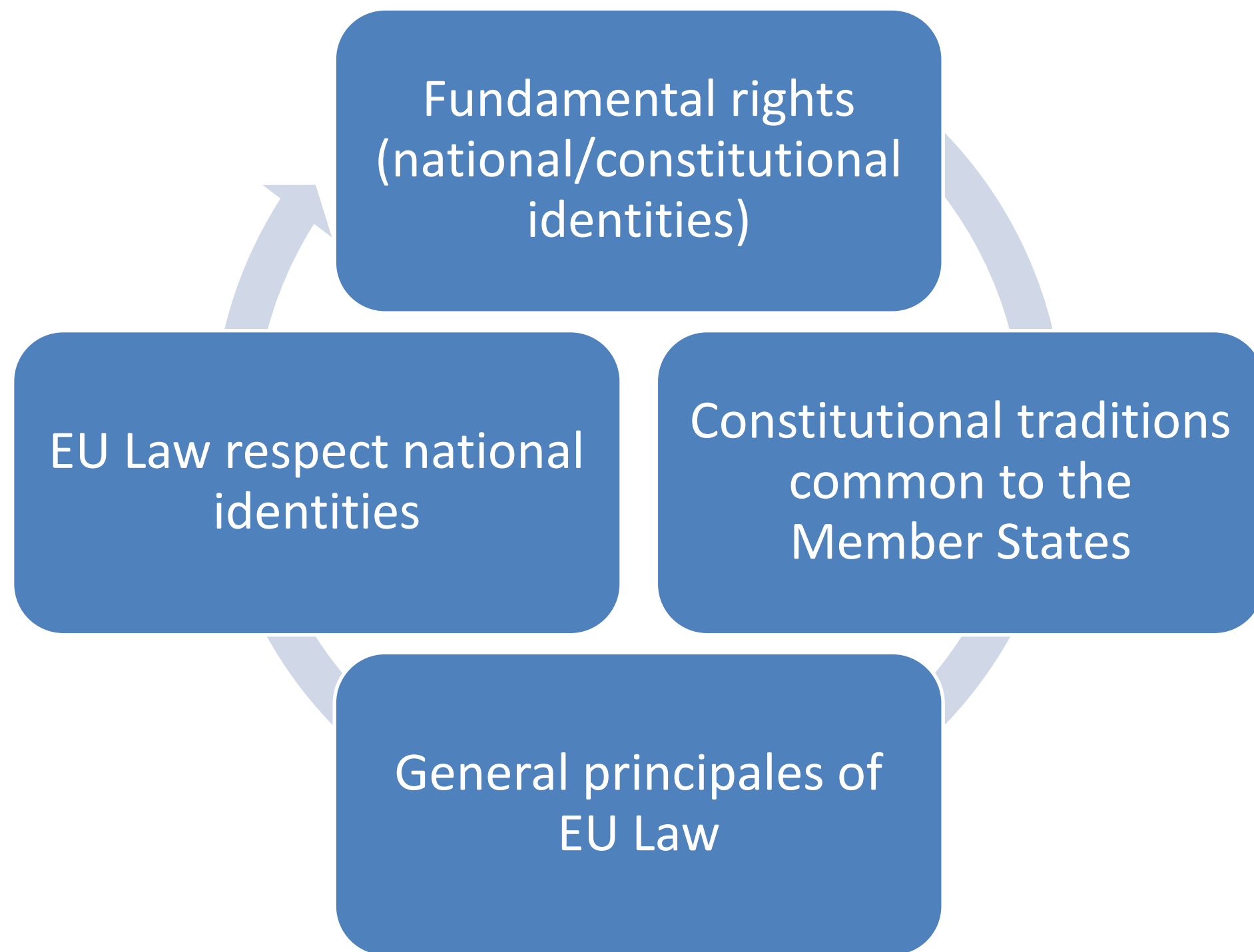
- **Historically, the european values were built on the basis of national identities**
- *Cf. GCC, Solange I judgment, 29 May 1974* (see also the italian « contro-limiti » doctrine)
- *ECJ, 17 December 1970, Internationale Handelsgesellschaft* : the fundamental rights, as they result from the constitutional traditions common to the Member States, are guaranteed in the EU legal order as general principles of EU law
- This solution was enshrined in the Maastricht treaty (art. 6§2)

Art. 6§2 TEU (Maastricht treaty)

« 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 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 ».



National identities as a limit to the primacy of EU Law

GCC, 12 October 1993, Maastricht decision : the German court sets a limit to Germany's participation in the EU: the **constitutional identity**, which requires respect for the key principles of the German constitution, i.e.

- **democracy** (with the consequence that the Bundestag must remain the central place of political decision-making)
- and **statehood** (which implies that the Member States still hold the "competence of the competence », hence the possibility of an ultra vires control of EU acts made by the German Court itself)

In the German case-law, **the notion of « constitutional identity »** refers to what is unique and thus has to be defended against the European integration.

Cf. **french Constitutional Council, 27 July 2006** : « the transposition of a Directive cannot run counter to a rule or principle **inherent to the constitutional identity** ».

See also **Council of State, 21 April 2021, French Data Network** : « constitutional requirements, which do not benefit, in Union law, from an equivalent protection »

All of this case-law (which allows national courts to review the validity of secondary EU Law and, if needed, to make their constitutional identity prevail) is based on a reading of Article 4(2) TEU, which should be understood, according to these (german and french) national courts, as granting the Member States a final say on their "constitutional identity", understood as equivalent to the « national identity » guaranteed by this Article 4(2) TEU.

Art. 4 § 2 TEU : « The Union shall respect the equality of Member States before the Treaties as well as their **national identities**, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State ».

Limit to primacy vs. limit to european values

These (german and french) rulings are questionable because they defeat the principle of primacy. But the notion of « constitutional identity » is not used to challenge the basis of common values.

However, in recent years there has been a **new claim** by the so-called « illiberal democracies » **to invoke their constitutional/national identity** not so much in a normative framework (i.e. to defeat the principle of primacy in the event of a conflict of norms) **but in an axiological framework**, i.e., to legitimize a different reading of EU values (which is far more problematic)

What is « illiberal democracy » ?

Illiberal democracy describes a governing system that **officially** respect democratic institutions and procedures (electoral/soft authoritarianism)

While liberal democracies protect individual rights and freedoms, illiberal democracies do not (more precisely : fundamental rights are often listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary).

Instrumentalization of national identities

Cf. [ECJ, 16 February 2022, aff. C-157/21](#) : Poland argued that the conditionality regulation breaches the obligation provided for in art. 4(2) TEU to respect « national identities inherent to the essential functions ».

In other words, Poland (and Hungary) claims that the respect that the EU owes to the national identity of the MS should imply that the MS have :

1. The freedom to determine the organization of the institutions that are fundamental to ensure the essential functions of the state (judiciary)
2. Their own freedom to define the content of the rule of law and the European values

Common values as « part of the identity of the EU »

ECJ, 16 February 2022, aff. C-157/21 :

« Article 2 TEU (...) contains values which are an integral part of the **very identity of the European Union as a common legal order** (...).

Even though the EU respects the national identities of MS, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one MS to another.

Whilst they have **separate national identities**, the MS adhere to a concept of ‘**the rule of law**’ which they share, as a value common to their own **constitutional traditions, and which they have undertaken to respect** »

II. National identities vs European values : what is at stake ?

Mutual trust

- Risk for the functioning of core areas of EU Law (cf. Area of Freedom, Security and Justice), which are based on a logic of mutual trust.

Cf. [ECJ, 25 July 2018, LM, C-216/18 PPU](#) : « EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected »

Cf. ECJ, 25 July 2018, LM, C-216/18 PPU :

« where the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are **systemic deficiencies**, or, at all events, generalised deficiencies, which, according to him, are **liable to affect the independence of the judiciary** in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State »

➤ In the perspective of **enlargement**, this reasoning send a counterproductive signal to the candidate countries that there is no obligation to respect common values.

=> Accepting that a candidate or member state does not share the EU common values or have its own definition of these values, on the basis of its national identity, would **put in danger the “constitutional pact”** on which European integration is based.

Construction of a European polity

- Opposing national identities and European values is also a way to deny the capacity of the EU to transform into a political entity, based on a community of citizens sharing common constitutional values.

It is a way to affirm that the nation is still the vital framework of political reference for the citizens.

It is another version of the « no demos thesis » which aims at denying the EU the quality of polity and/or to underline its democratic deficit.

III. National identities vs European values : what solutions ?

Political sanctions

- Article 7 TEU :
- Attempts to trigger this so-called « nuclear weapon » in order to sanction Member States that seriously breach the European values on which the EU is founded have failed because of its high threshold and the reluctance of member states to use it against their peers.

Judicial sanctions before the EC

- Limited scope (art. 2 TEU ; art. 51 of the Charter)
- The only possibility is to identify a specific breach of EU law (cf. [27 février 2018, Associação Sindical dos Juizes Portugueses, aff. C-64/16](#) : art. 19 TEU has been interpreted as implying the obligation, for the Member States, to ensure the independance of the judicial)
- Long procedure which allows the State to bypass it by modifying its legislation, as Poland did. But the ECJ can issue an order to enjoin the suspension of the contested measures (cf. [ECJ, 14.07.2021, C-204/21 R](#)), if necessary under a daily penalty ([ECJ order, 27 october 2021, C-204/21 R](#)) but it has no proved to be efficient until now.

Budgetary sanctions : conditionality regulation (dec. 2020)

- Limited scope also : a genuine link has to be established between a « breach of a principle of the rule of law » and an « effect on the sound financial management of the Union or the financial interests of the Union » (cf. [ECJ, 16 february 2022](#))
- Again it depends on the political will of the Council to bring the procedures to a successful conclusion. It has only been activated against Hungary.
- There are proposals to expand the possibility for EU to suspend all the EU funds in case a MS does not respect the European values.
- Still, it seems to be inefficient for MS that don't rely on EU funds.

Other solutions ?

- Preventing tools (cf. the EU Justice Scoreboard, the European Semester, the New framework for the rule of law established in 2014 or the European Rule of Law Mechanism established in 2020) : non-binding
- Need to refine art. 7 TEU in order to lower the threshold (QMV)
- Exclusion clause ? Only for new Member States ?

Conclusion

Cf. Luuk van Middelaar :

« Is the unification of Europe a project of peace or project of power? (...)

As part of a project of peace Europe is "an eminently moral act" supported by the desire for reconciliation and by idealism.

As a project of power European integration is a political act involving the redefinition of the participants own interests.

In the first case national citizens must become stateless citizens of the world sharing universal values (or depoliticised consumers); in the second instance, they must become committed Europeans. This project of power demands the development of a European identity »

Thanks for your attention !