

National language: an element of the national identity of a member state to be respected in accordance with the second paragraph of article 4 of the treaty on European Union

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Abstract

One of the values characterising the constitutional identity of a State and, more broadly, the national identity, is the official language. The purpose of the article is to determine whether and how it is possible to ensure the protection of the national language by reinforcing the common values of the Member States. The article analyses the legal doctrine, as well as the case law of the Court of Justice of the European Union and the Constitutional Court, and concludes that it is the Member States, their constitutional courts, that ensure that the elements of national identity specific to each State are respected and protected. At the same time, while respecting the common values of the Member States, as well as the competence of national courts and the Court of Justice of the European Union, a dialogue based on the principle of sincere cooperation and mutual respect also plays a role in this respect.

Keywords

European Union law • national identity • constitutional identity • national language

INTRODUCTION

The European Union is a unique union of 27 EU countries. It is a legal system unlike any other in the world. The European Union is based on the idea of Europe and the recognition that, despite all the differences between European countries and peoples, Europe is united by a number of factors and values. The Court of Justice of the European Union has ruled that, under Article 2 of the Treaty on European Union (Treaty, [EU] 2016), the Union is founded on values common to the Member States: human dignity, liberty, equality, democracy and the rule of law and human rights. The Member States have defined and shared these values. These values define the very identity of the Union as a common system of law and are expressed in principles that contain legally binding obligations for the Member States (Court of Justice of the European Union, C-156/21; Court of Justice of the European Union, C-157/21). Thus, Article 2 of the Treaty on European Union reflects the EU's own understanding of its common values (Von Bogdandy, 2021).

However, this does not mean that Article 2 of the Treaty on European Union establishes and creates a homogeneous system of constitutional states (Schroeder, 2021). Nor can it be ignored that, by delegating part of their competencies to the EU, the Member States have remained sovereign states with

a distinct constitutional identity. This is consistent with the understanding of the European Union as a union of countries with different historical backgrounds, implying constitutional pluralism (Dobbs, 2014). The constitutional identity encompasses the legal identity specific to the State and the identity of the State's system. It answers both the question of what a given State is, i.e., it reflects the constitutive elements of the State recognised in international law—territory, people and sovereign state power—and the question of what system the particular State has in place. When reflecting the territory, people and power of a State in its constitution, extra-legal factors, such as history, politics, national, cultural and other factors that identify that State are taken into account. On the contrary, the identity of a given state system is determined by the general principles of law that characterise the system of that State. Constitutional identity is, thus, a broad, expansive phenomenon. In turn, the references contained in the constitution to, *inter alia*, the history of the State and the nation, traditions, the circumstances in which that State was founded, its objectives, language or other elements that, from the point of view of constitutional law, help to identify a given State, give it a specific meaning and describe it, are the elements underlying the identity of the given State (Constitutional Court of the Republic of Latvia, Case No. 2020-39-02, 2021).

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In view of this, it is important that, on the one hand, the European Union respects the constitutional uniqueness of the Member States and their diversity. On the other hand, the Member States, by reference to their constitutional identity, must not ignore the common values agreed by the Member States themselves when the European Union was founded. The aim of the article, when analysing the concept of national identity and one of its expressions—the official language, is to explain whether and how it is possible to respect both of these interests. To clarify this, the article analyses the findings expressed in the legal doctrine, the case law of the Court of Justice of the European Union and the Constitutional Court.

RESEARCH RESULTS AND DISCUSSION

The scope of the concept of national identity

Article 4(2) of the Treaty on European Union states: ‘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’. This European Union rule and the concept of national identity reflect the constitutional pluralism that characterises the European Union (Dobbs, 2014). Article 4(2) of the Treaty on European Union is one of the instruments limiting the principle of the primacy of European Union. This provision guarantees that, although the Union is supranational, the Member States, their basic constitutional structures, values, principles and fundamental rights continue to exist after a Member State has become part of the Union (Constitutional Court of the Republic of Latvia, 2008-35-01, 2009).

The concept of national identity used in Article 4(2) of the Treaty on European Union is often used interchangeably with the concept of ‘constitutional identity’ (Besselink, 2010). There is also a view that ‘national identity’, contained in Article 4(2) of the Treaty on European Union, is not the same as ‘constitutional identity’ (Cloots, 2015: 163). Similarly, the conclusions of the Court of Justice of the European Union and the Advocates General consider constitutional identity as part of a broader concept of national identity (Fromage and De Witte, 2021; Opinion of the Advocate General, C-213/07; Opinion of the Advocate General, C-399/11).

The concept of national identity cannot be interpreted in isolation from other principles of the European Union, in particular, the common values of the Member States, as enshrined in Article 2 of the Treaty on European Union, and the principle of sincere cooperation and mutual respect, enshrined

in Article 4(3) of the Treaty on European Union (Fromage and De Witte, 2021). The common values of the Member States enshrined in Article 2 of the Treaty on European Union and the principle of national identity, enshrined in Article 4(2), thereof, are fundamental principles of the European Union law, which have equal force in the European Union legal system and must be interpreted harmoniously, in mutual balance (Fromage and De Witte, 2021; Spieker, 2021). For others, the common constitutional values of the Member States are, in essence, the red line that limits the constitutional autonomy of a Member State (Von Bogdandy, 2021). As Pedro Cruz Villalon, the Advocate General at the Court of Justice of the European Union, points out: ‘the Court of Justice of the European Union has long worked with the category of “constitutional traditions common” to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. In particular, it is on the basis of this shared constitutional tradition that the Court of Justice of the European Union has first sought to establish its own legal culture—the legal culture of the Union. The Union has thus acquired the character, not only of a community governed by the rule of law but also of a “community imbued with a constitutional culture”. That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States’ (Opinion of the Advocate General, C-62/14). This means that only a concept of national identity that does not manifestly contradict the fundamental values of the Union as set out in Article 2 of the Treaty on European Union can be protected.

In legal doctrine, it is argued that the true meaning of Article 4(2) of the Treaty on European Union is ambiguous, since the wording of that provision, ‘the Union shall respect the [...] national identities of the Member States’, is ambiguous and political in nature, and often the Court of Justice of the European Union plays a decisive role in giving the specific definition of the concept of national identity (Dobbs, 2014). However, it should be noted that the exact content of the concept of national identity may vary from one Member State to another and, by its very nature, cannot be determined without reference to Member States’ perceptions of their inherent national identity. In this respect, the Union’s obligation to respect the national identities of the Member States enshrined in Article 4(2) of the Treaty on European Union is, in fact, an obligation to respect the diversity and, therefore, the differences inherent in each Member State. Thus, national

identity underpins the Union's motto 'United in diversity'. That means that it is not up to the European Union to define the core elements of the national identity of each Member State, and they have considerable discretion in this respect (Opinion of the Advocate General, C-490/20; Opinion of the Advocate General, C-391/20).

The Court of Justice of the European Union must, therefore, have due regard to the core of the constitutional identity of a Member State, which is safeguarded and defined by the constitutional court and is embodied in the concept of national identity referred to in Article 4(2) of the Treaty on European Union. The Court of Justice of the European Union could only reject a Member State's invocation of its national identity in extreme cases, where it would clearly and unequivocally contravene one of the values common to the Member States, enshrined in Article 2 of the Treaty on European Union, or where it would be obvious that the Member State was abusing the national identity clause to derogate from the principle of the primacy of European Union law and to lay down specific rules in policy areas, which are not within its exclusive competence. In other words, the discretion of Member States in defining their national identity is not absolute. The solution for avoiding disagreements that may arise between the Member States and the European Court of Justice lies in a dialogue based on the principle of sincere cooperation and mutual respect. It can be agreed that the principle of sincere cooperation, enshrined in Article 4(3) of the Treaty on European Union, complements and limits the clause on respect for national identity (Opinion of the Advocate General, C-157/21).

The national language as an element of the national identity of a Member State

Although the Court of Justice of the European Union has not yet provided an exhaustive definition of national identity, it has expressly concluded in a number of rulings that, in accordance with Article 4(2) of the Treaty on European Union, the Union also respects the national identity of the Member States, which includes the protection of the official language of the respective Member State (Court of Justice of the European Union, C-391/09; Court of Justice of the European Union, C-202/11; Court of Justice of the European Union, C-391/20). National languages are one of the central and most visible elements of national identity (Cloots, 2015: 163). Designating a language as an official language means that it assumes the status of a constitutional value. The national language protects the identity of the nation, promotes the integration of civil society, ensures the exercise of national sovereignty, the integrity and indivisibility of the State and the proper functioning of state institutions. The national language is usually one of the national symbols and a key element of its constitutional order (Druviete et al., 2014).

The most recent ruling, in which the Court of Justice of the European Union considered the protection of the language of a Member State as an element of national identity, was adopted in Case C-391/20 *Boriss Cilevičs and Others*, which was initiated to provide answers to the questions raised by the Constitutional Court in the preliminary ruling proceedings. The facts of the case related to the Latvian legal framework which imposes an obligation to develop and use the Latvian language in the field of higher education, including private higher education institutions, namely, the study programmes of private higher education institutions were conducted in English and Russian, but legal provisions restricted the right of private higher education institutions to implement study programmes in foreign languages. It was argued that this created an obstacle to the entry into the higher education market and the provision of higher education services in foreign languages by citizens and companies from other EU Member States. This, in turn, affects the right to freedom of establishment guaranteed by the European Union law, enshrined in Article 49 of the Treaty on the Functioning of the European Union. When asking questions on the interpretation of, *inter alia*, Article 49 of the Treaty on the Functioning of the European Union, the Constitutional Court noted that the national language was considered to be one of the manifestations of national identity (Constitutional Court of the Republic of Latvia, Case No. 2020-33-01, 2020).

It should be noted that this is the first ruling in which the Constitutional Court has used the notion of 'national identity', recognising the national language as one of its elements. The concept of 'constitutional identity' entered the Latvian legal doctrine as late as 2012, when the opinion on the Constitutional Foundations of the State of Latvia and the Inviolable Core of the *Satversme* (Latvijas Republikas Satversme: Latvijas Republikas likums, 1922) [Constitution] was adopted on 17 September 2012 (Osipova, 2020: 44). However, this does not mean that there were no constitutional values that defined the identity of the State of Latvia prior to the definition of the concept of constitutional identity. Undeniably, one of the values that characterise the constitutional identity of a State is its language. That is to say, language is one of the reference points for the formation of society and the existence of a nation and, therefore, the national language cannot be separated from the constitutional identity of the nation. The official language, Latvian in the Republic of Latvia, is an essential constitutional value. The legislator has determined the legal status and corresponding protection for the Latvian language by enshrining it in Article 4 of the Constitution of the Republic of Latvia and in external laws and regulations (Osipova, 2020: 48). The core of the Constitution in any case includes the obligation not only to legally ensure the status of the Latvian language as the official language but also to ensure, by the legal means at the disposal of the State, that

the Latvian language actually fulfils its function as the official language, that is, as the common language of communication and democratic participation in society (Konstitucionālo tiesību komisija, 2012).

The Constitutional Court has also recognised that the Latvian language is one of the values that are the basis for building an inclusive democratic society. It is an integral part of the constitutional identity of the Latvian State. The constitutional status of the official language implies its function as the common language of communication and democratic participation in society (Constitutional Court of the Republic of Latvia, Case No. 2018-12-01, 2019). Given that Latvia is the only place in the world where the existence and development of the Latvian language and, thus, also of the title nation, can be guaranteed, the narrowing of the scope of the use of Latvian as the official language in the territory of the State is also considered as being a threat to the democratic order of the State (Constitutional Court of the Republic of Latvia, Case No. 2001-04-0103, 2001).

In Case C-391/20, the Court of Justice of the European Union first held that the Union law did not preclude the adoption of a policy for the protection and promotion of one or more official languages of a Member State. In accordance with the fourth paragraph of Article 3(3) of the Treaty on European Union and Article 22 of the Charter of Fundamental Rights of the European Union, the Union respects its cultural and linguistic diversity. Referring to its previous case law, the Court of Justice of the European Union agreed with the Constitutional Court's interpretation of the national identity clause and emphasised: according to Article 4(2) of the Treaty on European Union, the Union also respects the national identity of the Member States, which includes the protection of the official language of the Member State concerned. The objective of promoting and encouraging the use of one of the official languages of a Member State is, therefore, regarded as a legitimate objective which, by its very nature, justifies the restriction of the obligations arising from the freedom of establishment enshrined in Article 49 of the Treaty on the Functioning of the European Union. Moreover, Member States have a wide margin of discretion in choosing the measures that achieve the objectives of their official language protection policy since, within the meaning of Article 4(2) of the Treaty on European Union, this policy is an expression of the national identity of the Member States (Court of Justice of the European Union, C-391/20).

As in its earlier case law, the Court of Justice of the European Union stressed the importance of the principle of proportionality in this case (Court of Justice of the European Union, C-391/09; Court of Justice of the European Union, C-15/15). The Court held that the legislation of a Member State requiring, without exception, that higher education programmes be conducted in the national language of that Member State would go beyond

what is necessary and proportionate to achieve the objective of that legislation to protect that language and promote its use. In other words, such a legal framework would, in effect, impose an absolute obligation to use only this language in all higher education programmes, excluding all other languages and failing to take into account the reasons that might justify the implementation of different higher education programmes in other languages. At the same time, it is possible for Member States to impose an obligation in principle to use their official language in these programmes, provided that exceptions to this obligation are made to ensure that a language other than the official language can be used for university studies. In this case, in order not to go beyond what is necessary to achieve the objective, those exceptions should allow the use of a language other than Latvian, at least in teaching undertaken in the framework of European or international cooperation, as well as in the study of culture and languages other than Latvian (Court of Justice of the European Union, C-391/20).

It follows from the above that the Court of Justice of the European Union recognises, in principle, that the objective of protecting the national language of a Member State may justify restrictions on the freedom of establishment. In this respect, the Court of Justice of the European Union has not agreed in substance with the conclusions of Advocate General Nicholas Emiliou in this case that it is not in the interests of the Member States or the European Union to create 27 monolingual (or bilingual or trilingual) 'islands' within the European Union (Opinion of the Advocate General, C-391/20). At the same time, the Court of Justice of the European Union has emphasised in that judgement that it is ultimately for the referring court to determine whether and to what extent a Member State's legislation is proportionate to the objective of protecting the national language, which is an element of the Member State's national identity, since it is for it alone to assess the circumstances of the main proceedings and to interpret the national legislation (Court of Justice of the European Union, C-391/20). Given that national identity is usually the result of the history and culture of a given State, as well as its inherent socio-political characteristics, it may, indeed, be difficult for a supranational court to fully appreciate the importance of protecting the national language in a given Member State and to assess whether the means used to achieve the objective pursued are proportionate to that objective (Cloots, 2015: 291). It is, therefore, justified that in such cases, in accordance with the guidance provided by the Court of Justice of the European Union, the proportionality test is carried out by the constitutional court, which is responsible for national identity or constitutional identity according to the theory of Latvian constitutionalism, while the Court of Justice of the European Union provides an interpretation of the place of this element of national identity in the legal system of the European Union. The principle of loyalty and sincere cooperation, enshrined in

Article 4(3) of the Treaty on European Union, is relevant in this respect (Dobbs, 2014).

++When assessing whether the regulation that narrows the right of private higher education institutions to implement study programmes in foreign languages ensures a fair balance in the actual circumstances of Latvia between the right of private universities and the need to strengthen the use of the official language in higher education, the Constitutional Court first of all took into account that Latvia belonged to the European cultural space and one of the languages of this space was English. It is also one of the official languages of the European Union and the international language of science. The Court noted that the legislator, while respecting the need to protect the national language, should promote the learning of the official languages of the European Union, so that the Latvian State and society could fully participate in the European cultural space. Consequently, the Latvian legal framework, insofar as these provisions applied to the implementation of study programmes in private higher education institutions in the official languages of the European Union, was incompatible with the Constitution. At the same time, the Constitutional Court drew attention to the fact that the popularity and use of the English language was growing rapidly. The rapid spread of the English language in many areas of social life in the world and in Latvia, the belief of society and individuals in the need for the English language, as well as the dominant position of the English language in the Internet environment, affects the communication habits of young people and reduces the attractiveness of using and learning the Latvian language. Therefore, the legislator should create such a legal regulation that would preserve the role of the official language in higher education, while at the same time promoting the development of higher education and science in the European cultural space. At the same time, the Constitutional Court noted that the situation of the official language in Latvia was still affected by the consequences of the forced Russification practiced during the Soviet occupation. Currently, the position of the Latvian language in several sociolinguistic functions does not correspond to the status of the official language, and this is explained mainly by the linguistic self-sufficiency of the Russian speakers and the prevalence of Russian in the information space. Therefore, the legislator, by limiting the implementation of study programs in foreign languages that are not the official languages of the European Union, has ensured a fair balance between the right of private universities and the need to strengthen the use of the official language in higher education (Constitutional Court of the Republic of Latvia, Case No. 2020-33-01, 2023). The abovementioned judgment of the Constitutional Court confirms that it is the national courts, while respecting the common values of the Member States enshrined in Article 2 of the Treaty on European Union, including human dignity and

equality, which are best placed to assess whether national regulation ensures a proportionate balance between the need to protect the elements of national identity, specific to a particular State, and other fundamental rights.

Undoubtedly, Article 4(2) of the Treaty on European Union has been misused by some national courts, thus creating tensions between the Court of Justice of the European Union and the constitutional courts of the Member States (Martinico and Pollicino, 2020). Although it is too early to predict the future direction of relationships between the Member States and the Court of Justice of the European Union, it is possible to reach a mutual understanding, based on loyal and sincere cooperation and trust, as demonstrated by the above-mentioned case C-391/20. This ruling is also of utmost importance to Latvia, as it demonstrates that the European Union respects Latvia's efforts to develop a national policy aimed at protecting the Latvian language.

The formation of identity, including the national identity, is a long process that depends on historical circumstances. Consequently, the national identity, including constitutional identity, is not static (Constitutional Court of the Republic of Latvia, Case No. 2020-39-02, 2021). This shows, in particular, how important it is that the Member States and their constitutional courts are the ones ensuring that the elements of national identity inherent in each State are respected and protected. In the Latvian constitutional system, this task lies with the Constitutional Court. Undoubtedly, a Member State may not take measures that disproportionately interfere with the exercise of the fundamental freedoms, enshrined in the Treaty on the Functioning of the European Union. At the same time, it is important to be aware of the need to preserve Europe's cultural richness and ensure the diversity of its linguistic heritage. Cultural heritage, comprising each culture and language of a Member State separately and in their reciprocal interaction, is an asset in itself (Cloots, 2015: 111). It is no coincidence that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) states that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all. In addition, linguistic diversity is a key element of cultural diversity.

SUMMARY

The concept of constitutional identity is part of a broader concept of national identity. The exact content of the concept of constitutional identity may vary from one Member State to another and, by its very nature, cannot be determined without reference to Member States' perceptions of their inherent constitutional identity. However, there is no doubt that national languages are one of the central elements of national identity.

The Court of Justice of the European Union must, therefore, have due regard to the core of the constitutional identity, including national languages of a Member State, which is safeguarded and defined by the constitutional court and is embodied in the concept of national identity referred to in Article 4(2) of the Treaty on European Union. At the same time, only a concept of national identity that does not manifestly contradict the fundamental values of the Union as set out in Article 2 of the Treaty on European Union can be protected. As confirmed, among others, by the case law of the Constitutional Court of the Republic of Latvia, the solution for avoiding disagreements that may arise between the Member States and the European Court of Justice lies in a dialogue based on the principle of sincere cooperation and mutual respect.

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