To Identity and Beyond?

Commission v Hungary and the constitutional identity rationale

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Commission v Hungary proved, unsurprisingly, yet another bold leap forward in the Court's value jurisprudence. Central to the reasoning of the Court has been the notion that Article 2 forms part of "the very identity of the Union as a common legal order", which popped up five times in the 44 short paragraphs of the Court's reasoning on Article 2. While much attention has already been paid to the judgment, the role of the Court's "identity rationale" in the judgment merits a separate examination.

The identity rationale is the most recent of three overarching rationales advanced by the Court for the enforcement of requirements flowing from Article 2. First, there was the *functional rationale*: Adherence to a common set of values needs to be safeguarded because the "fundamental premiss" of such a common set of values is essential for the functioning of European integration (para 522 in *Commission v Hungary*). It was later joined by the *commitment rationale*, which entered the ring with cases such as *Wightman* and *Repubblika*: The Union's shared values can be enforced because, in the Court's understanding of Article 49 TEU, the Member States have legally committed themselves to upholding these values when they acceded to the Union (para 521).

The identity rationale tells us that Article 2 TEU needs to be judicially enforceable because that article forms part of "the very identity of the EU as a common legal order". Following its first appearance in the Conditionality judgments, the identity rationale has become a staple in the Court's reasoning, prominently featuring in landmark cases. In *Commission v Hungary*, too, the appeal to identity is frequent: The "very identity of the Union as a common legal order" shows up five times in the relatively short segment the Court dedicated to Article 2 TEU. Despite the frequency of its mention, however, *Commission v Hungary* might not have brought us any closer to understanding what precisely the Court means by referring to identity, nor even what purpose the appeal to identity serves in the EU context.

What Does the Court Mean?

Following the identity rationale's first appearance in the *Conditionality* judgments, scholarship quickly surmised that the Court was at the very least alluding to, if not fully embracing, a "constitutional identity" doctrine analogous to similar doctrines advanced by the Member States.

The constitutional identity arguments developed by member states are rooted in a foundationalist constitutional paradigm that imagines constitutions as grounded in the people's constituent power and aims to safeguard the essence of that act of constituent power against being superseded or eroded both from within and from the outside. Implicitly or explicitly, they follow a (questionable) Schmittian logic that understands the "constitution" in a material sense— the fundamental decision of the constituent power in favour of a certain type of political existence— as separate from and superior to the mere multitude of "constitutional laws". In other words, in the state context, constitutional identity is defended not simply because certain provisions are contingently deemed more important than others, but because a violation of the "constitutional identity" of a polity would, in effect, signify a usurpation of constituent power.

Advocate-General Ćapeta's opinion in *Commission v Hungary* represented the most serious attempt thus far to transplant this logic from the Member State level to the EU level. Indeed, at times, the AG's opinion sounds surprisingly Schmittian. Ćapeta understands

Article 2 as encapsulating "*the choice* of the founders of the European Union as to the type of society that the Member States have pledged to create together within the framework of the European Union" (AG opinion, para 155, emphasis added). This choice represents the "very identity" of the Union, because "without those values, the European Union would cease to be the Union as envisaged by the Treaties" (AG opinion, para 158). Ćapeta even goes as far as enmeshing the moral with the political, by suggesting that the question of defining a "good society" is a matter of political choice (para 157). The AG's opinion, in its seeming attempt to embrace a form of "supranational decisionism", was daring and profoundly political (in the best sense of that term).

Yet, the foundationalist logic of constitutional identity is not easily transplanted into the EU context: The EU is not based on an act of original constituent power. It did not emerge from "the Political" but from a more mundane sphere of international treaty-making, notwithstanding the magnitude of the Treaties themselves. The Treaties may have encapsulated a decision in favour of certain values, but it is simply not clear on what basis that decision could appear any qualitatively different from a choice in favour of a single market, in favour of price stability in the Eurozone, or in favour of qualified majority voting as a decision-making principle. If the EU's constitutional identity claim is indeed modelled after the identity claims of the Member States, it appears strained and implausible.

In the Court's final judgment, Ćapeta's supranational decisionism has all but evaporated. Here, the identity rationale simply materialises out of thin air, without any explanation about what concretely it means that Article 2 amounts to the "very identity" of the EU legal order. The Court does not derive the "identity status" of Article 2 from a political foundationalist logic but seems to simply understand the latter as *a result of* the fact that adherence to values is functionally important for the EU and the Member States have legally committed themselves to upholding the values in Article 2 (para 525). In other words, the identity rationale appears as a mere restatement of the functional and commitment rationales, rather than as hinting at a more distinctly political logic. This is not just underwhelming; it raises the question what an appeal to identity adds to the Court's justification for enforcing Article 2 TEU at all.

What Purposes Does the Identity Rationale Serve?

EU legal scholarship, keen to develop the analogy between EU and Member State constitutional identity, has jumped on several purposes to which the identity rationale could be utilised. It could provide a definitive like-for-like response to the (often abusive) assertions of national constitutional identity from which the EU legal order has found itself under attack in past decades. It could even serve the stipulation of amendment limits within EU law.

Yet, whether these purposes are truly pertinent to the EU context can be questioned: The stipulation of amendment limits hardly could have been on the Court's mind in any of the cases in which identity was summoned. The debate around such limits is truly 'academic' (in the worst sense of that term). Nor does the Court need to advance a constitutional identity analogue to displace and override the identity claims of the Member States: The most basic of European constitutional orthodoxies – the primacy of EU law itself – already does that job. Already in *Commission v Poland,* identity played a subdued and mostly rhetorical role in dealing with the Polish Constitutional Tribunal's diatribes. To claim that EU law needs its own constitutional identity to provide an additional layer of superiority entrenching Article 2 values suggests a very strange, and infinitely replicable, shell game of constitutional one-upmanship. The Court's reasoning in *Commission v Hungary,* making quick work of Hungary's plea for respect for national identity under Article 4(2), demonstrates its dispensability: It dismisses Hungary's identitarian objections without so much as mentioning identity in the relevant paragraphs (557-563).

A closer look at the Court's use of the identity rationale in *Commission v Hungary* raises the question of why the Court needed to appeal to identity at all. Despite the frequency of its mention, its function

remains opaque. Appeal to identity is often tacked onto (eg para 546: "In the first place [...] the values set out in [Article 2] lay down horizontally binding obligations *and define the very identity of the Union as a common legal order*") or simply crammed into sentences (para 549) without itself doing much justificatory work. The Court established the legally binding nature of Article 2 TEU by appealing to commitment rather than to identity: That Article 2 imposes legally binding and judicially enforceable obligations on the Member States follows from the Court's interpretation of Article 49 and the non-regression principle it had already established prior (para 520-525). The status of Article 2 as "identity of the EU legal order" equally follows as a corollary of the Member States' commitment, and so hardly does any justificatory work in and of itself.

Later, the appeal to identity seems to come close to serving a heuristic purpose: Because "particularly serious and manifest" violations of the Union's founding values amounted to an infringement of the "very identity" of the Union legal order, the Court ruled that such breaches directly violated Article 2 TEU (paragraph 551). Yet even here, it remains difficult to see what concretely the Court gains from the reference to identity. It hardly adds clarity to the 'particularly serious and manifest' threshold stipulated in that paragraph but simply provides an additional layer of conceptual opacity. Nor does it explain why reference to the "identity of the EU legal order" justifies the direct judicial enforcement of Article 2: What is it about the "identity of the EU legal order" that conduces the Court to finding a violation of Article 2 TEU? How come it is only violated in "particularly serious and manifest" cases? For the finding of an Article 2 violation in this case, the appeal to identity was entirely dispensable.

Identity Unbound?

The only clue left for the potential role of the identity rationale is speculative and prospective. Much has already been said about the Court hinting at potential violations of Article 2 TEU even where EU law is not otherwise engaged. In paragraph 550, the Court argues that the scope of Article 2 violations must be limited because the Court needs to safeguard the effectiveness of Article 51(1) of the Charter, which confines the Charter's application to situations in which the Member States are "implementing Union Law". The Court passes this off as judicial restraint, but the underlying logic hints, however carefully, at a potentially highly expansive scope for Article 2, enforceable even where EU law is otherwise not engaged at all. In the case of "particularly serious and manifest" violations of common values, where the *identity of the EU as a common legal order* is engaged, the Court might free itself from the constraints of the Charter.

Appeal to the "identity of the EU legal order" may not be needed to justify finding a violation of Article 2 TEU where EU law is otherwise engaged, as it was in this case. But it might come in handy as a justification for displacing boundaries to the Court's jurisdiction by which it is otherwise constrained. If the EU's "identity" was elevated to a normative plane above the Treaties themselves, the Court could prioritise the identity of the EU legal order over fidelity to the text of the Treaties.

The Court's current formulaic and vacuous approach to identity, however, seems hardly capable of carrying such a propulsive use of Article 2 TEU. It would need to follow AG Ćapeta in understanding Article 2 TEU as encapsulating a fundamental political decision. Appeal to identity would, then, signify a totalising and capital-P "Political" dimension of Article 2 TEU, transcending the more strictly purpose-bound and functional aspects of EU constitutionalism and instead embracing a comprehensive vision of the European common good, which the Court of Justice is empowered to protect in all facets of the political life of the Member States and the Union.

However, as argued above, such a full-blown embrace of the analogy between Member State and EU constitutional identity would be conceptually strained and implausible. It would require a significant leap of faith, if not a suspension of disbelief, to fully buy into the analogy. Consequently, the Court's embrace of such a view of Article 2 would, potentially quite perilously, rely on political buy-in rather than

compelling legal reasoning even more than it is doing already. Whether such political buy-in would be sustainably forthcoming is anybody's guess, but no matter how many times the Court alludes to a European "society in which pluralism prevails", it can hardly be generated from or grounded in the law alone.

Likewise, such a normative instrumentalisation of constitutional identity would not be without danger. If the Court of Justice can rely on a contingently constructed sense of constitutional identity to disregard or erode constraints that were hard-wired into the Treaties, it might be acting not too dissimilarly from populist leaders who have mobilised their own sense of constitutional identity for much more nefarious purposes. Displacing the constraints of the Treaties on grounds of constitutional identity would risk playing fast and loose with the rule of law on the basis of a contestable account of constitutional legitimacy.

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