

Enforcement of EU Values and the Tyranny of National Identity – Polish Examples and Excuses

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Professor A. von Bogdandy in his recent [piece](#) published at Verfassungsblog analyzes difficulties regarding enforcement of the EU values. He argues that the application of Treaty provisions relating to EU fundamental values should be cautious in order to avoid controversy or pressure. However, the ‘national identity argument’ is not convincing in the Polish case. It cannot be used by a Member State in an arbitrary or blanket way without being checked and confirmed. Otherwise, it is only an excuse. Unfortunately, the Polish rule-of-law saga offers a number of such excuses, which eventually allowed the rule of law backsliding to flourish

National Identity Matters only When it Really Exists

There is no doubt that references to the constitutional identity of the Member States are powerful and fully legitimised since Article 4 of TEU [had been developed by the ECJ](#). The different constitutional courts used the identity in [different ways](#) as a tool of dialogue with the ECJ but also [as sword and shield](#) against the EU constitutional integration. There are well-analysed examples of abusive use of constitutional identity by [illiberal public actors](#) and by [the constitutional courts](#) within the EU. At least four different types of discourse on the constitutional identity [were found](#). Unfortunately, it became more and more popular and at the same time vast and nebulous. Notwithstanding the difficulties, the ECJ tried to [square the identity argument](#) under the EU law and now that card cannot be played as an [exception to the primacy of EU Law](#). As Ch. Calliess and G. van der Schyff recently suggested ‘the EU can only respect the constitutional identity of its Member States, if those identities are known and clear’¹⁾Ch. Calliess, G. van der Schyff, *Constitutional Identity Introduced and Its EU Law Dimension*, [in:] *Constitutional Identity in a Multilevel Constitutionalism*, ed. by Ch. Calliess, G. van der Schyff, Cambridge 2019, p. 5.. That’s why we believe that the Member State claim for respecting their own constitutional identities by the EU cannot be erected on violations of national constitutional provisions, as it has happened in Poland since 2015.

The constitutional identity argument cannot be used to defend the 2015-2019 judiciary ‘reforms’ in Poland without risk of hypocrisy. Firstly, contrary to the Hungarian case the Constitution in Poland has not been replaced or amended since the rule of law crisis started. Therefore, any references to the Polish constitutional identity have to take into account constitutional developments achieved before 2015. It could be difficult for the ruling party officers since they adopted the strategy

of undermining the 1989-2015 achievements, i.a. by the '[constitution-hostile interpretation](#)'.

Secondly, the academic discussion on the Polish constitutional identity has [just been started](#). It may be understandable when we take into account the young age of our Constitution and a lack of eternity clause or unamendable constitutional provisions. They are often a natural base for reconstruction of the constitutional identity. Direct references to the identity appeared in the [Lisbon case](#) for the first time and they [have never been developed](#) by the Polish Constitutional Tribunal so far. It was [argued](#) that 'the Polish Constitutional Tribunal developed the concept of constitutional identity to establish the relationship between Poland and the European Union and determine the scope of competence to confer competences to European institutions.' The identity argument has been limited by the Tribunal to the issue of conferral of competences so far. One may say that paradoxically Poland is at the beginning of the road to uncover its constitutional identity. Since it is a concept under the construction it cannot be a 'trump card' in the Polish case.

Thirdly, the constitutional identity argument had been directly used to justify the constitutional crisis in Poland [only once](#). Unfortunately, it was not elaborated and exemplified. Contrary to the Hungarian example, even after the Constitutional Tribunal was unconstitutionally captured, it avoided using the identity argument in its 2016-2019 case-law. Indirect references to the connotational identity and tradition softly appeared in a dialogue between the Commission and the Polish government under Article 7 TEU proceeding. The Polish government [argued](#) that part of the judiciary reforms, including the election of new National Council for the Judiciary, were justified by the Polish constitutional identity. Moreover, Prime Minister Morawiecki, in his recent press interview, when asked about incoming CJEU preliminary ruling on independence of National of Judiciary and Disciplinary Chamber, [argued](#) that according to the Treaties, the EU institutions need to respect legal traditions of the Member States. However, he forgot this argument cannot be applied to the National Council for the Judiciary, which long-standing rules of composition were amended in March 2018. It's difficult to classify them as a part of Polish legal tradition. Before that happened judges-NCJ members were selected by their peers for almost 30 years. Unfortunately for the PM's opinion, the unconstitutionally composed Constitutional Tribunal [directly claimed](#) that National Council for the Judiciary has never been a part of the Polish constitutional tradition.²⁾ Judgement of 25 March 2019, case no. K 12/18. To make the whole situation even more bizarre, the government supports the new way of appointing judges-NCJ members by referring to institutional solutions adopted in Spain. Such an abusive comparativism can hardly be classified as reinforcing national identity.

The fourth reason is that, since the identity is [deeply rooted](#) in a [country's constitutional history and legal culture](#), it should be broadly recognised by different actors of public life, including the highest courts. Unfortunately, we are living now in a constitutional trap in Poland, with four different courts considering substantial constitutional matters in alternative ways. The different judgements or decisions were adopted by the [unconstitutionally elected](#) Constitutional Tribunal, 'old' Chambers of the Supreme Court, newly appointed Chambers of the Supreme Court

and the Supreme Administrative Court, which has survived generally untouched by the political majority so far. With such a kind of proliferation of constitutional interpretation, there is no place for the honest constitutional identity references.

That's why the Court of Justice became probably the last constitutionally legitimised forum where Polish judges may [look for a remedy](#) for [democratic backsliding](#) or – as it was suggested – by prof. A. Von Bogdandy – ‘the only forum where the foreign government can get a fair hearing’. In this context, the [last CJEU judgement](#) regarding the independence of judges at the newly established Disciplinary Chamber of the Polish Supreme Court, postponed the risk of violation of the constitutional identity as well as risk ‘[tyranny of values](#)’. The CJEU did not impose any theoretical or substantial model of judiciary organization on Poland, as it was earlier suggested by [AG Tanchev](#). Instead of doing that, the CJEU rightfully referred to the [test of appearance of independence](#) and left a space for national courts to act in accordance with their own constitutional sensibility and responsibility.

The constitutional identity may be always used to ‘signify both axiological sameness, equivalence or convergence, and distinctiveness³⁾ of constitutional legal orders’³⁾A. #ledzi#ska-Simon, M. Zió#kowski, *Constitutional identity in Poland: is the Emperor Putting on the Old Clothes of Sovereignty, Constitutional Identity in a Multilevel Constitutionalism*, ed. by Ch. Calliess, G. van der Schyff, Cambridge 2019, p. 267.. However, it does not mean that we should abandon that concept or allow to use it for justification of [statutory anti-constitutionalism](#) in Poland. The Polish rule of law backsliding shows that severe violation of rule of law by a Member State cannot cause caution on the EU side. Both in theoretical and practical terms national identity cannot trump rule of law. Neither democracy nor connotational identity allows capturing independent courts. In our opinion, it was the 2015-2019 ‘reforms’ which undermined the core elements of the Polish constitutional identity.

Power, Pressure and Avoidance

Further arguments presented by Professor A. von Bogdandy seem to resonate with ‘national identity. He argues that ‘*if the Union prevails over a combative Polish government, this would imply an enormous proof of power*’. It is not clear, however, what happens if Poland prevails in dispute over the violations of EU law. It would most probably suggest not only a proof of the power of “rogue Member State”, but in the long run would pose a great threat of impunity eroding the essence of the rule of law. It was confirmed in December 2018 by the Polish MFA Jacek [Czaputowicz](#) who stated ‘Article 7 is dead. European Commission lost’. Is a situation where Member States suggest that the EU law does not work (because it is dead) of a greater concern than future hypothetical EU power?

Professor A. von Bogdandy argued correctly [elsewhere](#) that ‘*trust in the legal order is undermined (...) when violations become the normal state of affairs*’. Illegal actions remaining without any reaction, lead to erosion of the rule of law, because they undermine effective enforcement of law. Such a feature cannot be avoided or changed due to the fact that it is about enforcement of the EU and not national law. Tackling wrongdoing cannot be perceived – in the first place – as a proof of

abstract power, but as an evidence that the rule of law works in practice, that *law rules*. And yes, when law is being enforced, it might cause ‘pressure’. However, with regards to rule of law backsliding in Poland, the only moment when real pressure was (finally) put on Polish government was in October 2018 when the Vice President of the Court of Justice issued [interim measure](#) and ordered the government to allow the Supreme Court judges to return to their work. It was a real and enforced ‘red line’ – one of those which allow to ‘to resist illiberal threats’. To be meaningful in process of establishment of ‘constitutional moment’, those ‘red lines’ need to be enforced, otherwise they become pale threads with purely decorative function.

Discussion about systemic deficiencies in the field of rule of law (in Hungary or Poland) was described as an ‘inflammatory talk’ ‘from the outside’, which ‘holds considerable potential for conflict’ and can cause ‘serious reproach’. Interconnected nature of the Member States’ legal orders, judicial cooperation in particular, expressed by the principle of mutual trust, allows us to ask: is it still an *outside* perspective? [Celmer](#)saga, finalized with the recent Irish Supreme Court’s [ruling](#), suggests that the principle of mutual trust between Member States shortened the distance between legal orders to such an extent that questioning the factual basis of the trust was limited only to ‘exceptional circumstances’. The fact that the Court of Justice did not preclude such ‘background checking’, broadened the powers of national courts. The analysis of the post-*Celmer* case-law (i.a. [Lis](#); [Maciejec](#)) suggests that it is extremely difficult to document an individual threat to the right to a fair trial, so it is hardly possible that *Celmer*-test could contain currently ‘serious reproach’.

Values Enforcement – Still Distant

Finally, we also agree with Professor A. von Bogdandy when he concludes that *‘the European institutions appear distant and foreign’* and because of that any attempts to *‘revise important political projects’* need to be supported with *‘fair procedures to convincingly show a broad European public what the values require, why they have been violated, what needs to be done, and why it is not squashing European diversity.’* Otherwise the EU institutions risk becoming *‘self-important, arbitrary, illegitimate actors.’*

Our main doubt is, however, how to distinguish between ‘important political projects’ and simple abuse of power. Can numerous arbitrary amendments to the law on the Constitutional Tribunal, including unlawful denial to publish Tribunal’s rulings, be considered as ‘important political project’? It resulted in formal capture of the Tribunal in December 2016, which significantly limited access to effective judicial protection (and constitutional review) in Poland. The number of cases heard by the Tribunal has dramatically fallen between 2016 and 2019. Before that the existence of [truly effective constitutional review](#) used to allow to ‘revise important political projects’ at national level where politicians accepted (sometimes not without criticism) the Tribunal’s final rulings. By that the EU institutions was able to difficult task to protect the fundamentals of national constitutional order.

The second issue is how to secure that fair procedures, undertaken by the EU institutions, will inform a broad European public (including Polish citizens) and convince them why certain value-related procedures were introduced against a Member State? It will be truly challenging in the case of Poland, because one of the previous 'important political project' introduced in January 2016 resulted in public media in Poland being fully controlled by the government, with news programs becoming [propaganda](#) outlets. Role of public media affect not only the way the EU is perceived in Poland, but also it affects purely internal political processes, such as recent parliamentary elections. OSCE-ODIHR in its [preliminary conclusions](#) of Limited Election Observation Mission found that public TV's newscasts 'displayed a clear bias' against opposition candidates and echoed a 'primary campaign message of the ruling party', meaning portraying the LGBTI community as a threat to Polish culture and identity. Despite the fact that amendments to the law on public broadcasting were subject to the [Rule of Law Framework](#), they have never been challenged by the EU, whereas the [ruling](#) of the Constitutional Tribunal (issued in December 2016) has not been implemented so far. It proves that avoidance of taking actions at the EU level might result in institutional obstacles at national level undermining the fair procedures undertaken by the EU institutions.

Conclusions

Professor A. von Bogdandy recommends EU institutions to remain cautious when dealing with enforcement of the EU values. It is understandable because – as it was suggested – [we are perhaps facing a 'constitutional moment'](#). However, the presented arguments seem to aim at avoiding it. The reference to a constitutional moment appears naturally in hard times for constitutionalism. They are used then both in a [descriptive](#) and [interpretive](#) way with direct or indirect link to the [widely discussed](#) theory of [Bruce Ackerman](#). According to [one of the interpretations](#) of Ackerman's theory, all constitutional moments originated in the violation of law. They were preceded by serious constitutional crises. This suggestion corresponds with another important element of the constitutional moments, which is a sharp and longtime debate and – to use Ackerman's word – 'institutional jujitsu'⁴⁾ B. Ackerman, *We the People, Volume 2, Transformations*, Harvard University Press 1998, p. 14.. If we are living in the 'constitutional moment', we need to face the risk of that kind of 'jujitsu' to avoid a flood of ['constitutional barbarism'](#).

References

- 1. Ch. Calliess, G. van der Schyff, Constitutional Identity Introduced and Its EU Law Dimension, [in:] Constitutional Identity in a Multilevel Constitutionalism, ed. by Ch. Calliess, G. van der Schyff, Cambridge 2019, p. 5.
- 2. Judgement of 25 March 2019, case no. K 12/18.
- 3. A. #ledzi#ska-Simon, M. Zió#kowski, Constitutional identity in Poland: is the Emperor Putting on the Old Clothes of Sovereignty, Constitutional Identity in a Multilevel Constitutionalism, ed. by Ch. Calliess, G. van der Schyff, Cambridge 2019, p. 267.

- 4. B. Ackerman, *We the People, Volume 2, Transformations*, Harvard University Press 1998, p. 14.
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