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Introduction: Identity as Kandinsky

Objectives, Contextualisation, the Outline

The simple Draconian propositions, that crime must be punished, and that he who misjudges the law must take the consequences, have an extraordinary hold on the professional as well as the popular imagination. But the rule of law is more complex and more intelligent than that and it is important that it survive.

(Dworkin, *Taking Rights Seriously*)

1 Setting the Scene – Identity as Kandinsky

Imagine one of the late paintings by Kandinsky:[1] splashes of shapes and colours, rapturous and operatic compositions, geometric and biomorphic planes of colour; overlapping, abstract, and metaphorical. Kandinsky communicated the 'unique visual vocabulary that surpassed the material reality to depict the human condition'.[2] For him, true inner experiences might be best expressed through fully abstract and symbolic compositions.[3]

Identity is like an abstract painting by Kandinsky. For a start, it is almost impossible to describe the concept, as the colours and motions can hardly be explained with words. Moreover, due to the metaphysical nature of identity, which remains alive in the imagined,[4] collective sense of community, it cannot be pinned down by just one single meaning. Finally, the metaphor takes effect visually.[5] Identities exist in multitudes; they are overlapping, and hard to extrapolate.

Pythagoras once said that words alone cannot describe music; only the ears are made for harmony. Similarly, collective identity escapes encapsulation by static description. That is not to say that identity does not exist or that it does not play a significant role; it just means that it is closer to abstract and complex shapes and lines than to a coherent narrative or conception.

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1 Wassily Wassilyevich Kandinsky (1866–1944), painter and art theorist. Kandinsky is generally credited as a pioneer of abstract art.

2 artincontext, 'Kandinsky Paintings – Exploring the Best Wassily Kandinsky Artworks' (*artincontext.org*, 9 November 2021) <https://artincontext.org/kandinsky-paintings/> accessed 24 February 2023.

3 The Art Story, 'Wassily Kandinsky Paintings' (*The Art Story*) <https://www.theartstory.org/artist/kandinsky-wassily/> accessed 24 February 2023.

4 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2016) 23. Anderson pointed out that 'the figuring of imagined reality was overwhelmingly visual and aural'.

5 The comparison between the visual aspects of Kandinsky's painting and the complexity of the world of public international law in general was made orally by Martin Belov (University of Sofia, Bulgaria) at the conference organized by the IACL-AIDC: the International Association of Constitutional Law, at the Roundtable Constitutional Identity, St Petersburg, Russia 10–13 June 2021. This research has picked up the comparison and applied it in a different and more intricate way.

National identity is constructed as a narrative and an emotion.[6] It is a 'cognitive and affective relation of individuals to a concept or an idea'.[7] Similarly, like religions or other ideas, a collective identity only exists when a sufficient number of individuals adopt the narrative and start believing in it.[8] In contrast with other metaphysical ideas and philosophical narratives, the meaning and scope of national identity cannot be traced back to some text or teaching; or to a constitution, for that matter. An identity in the collective sense is tacitly present, it is collectively believed in, but its specificities remain mystically blurred behind the array of numerous individual perceptions which are never fully articulated.

Alas, if national identity is like Kandinsky, escaping the conceptual clarity of words due to its abstract nature, what does transplanting the concept of identity into the legal world mean for constitutional considerations? Do the complexity and abstraction of the concept help to make sense of the similarly abstract constitutionalism, built around a collective which has to exhibit a certain connecting factor distinguishing its members from other entities?[9] Or does the said malleability rather create additional constitutional misunderstandings and projections, at odds with liberal values and principles?[10]

The metaphor of Kandinsky is not just a colourful linguistic notion to keep the reader attentive. It serves specifically to inject a visual dimension to national identity, which may (un)consciously help to correct the idea of national identity as monolithic, descriptive, objective, and a controllable concept.[11]

This introductory chapter further unfolds in the following three steps. The first section presents the objectives of the research. It explains the

6 David McCrone and Frank Bechhofer, *Understanding National Identity* (Cambridge University Press 2015) 67.

7 Klaus Eder, 'A Theory of Collective Identity Making Sense of the Debate on a "European Identity"' (2009) 12 European Journal of Social Theory 427, 431.

8 See e.g. Yuval Noah Harari, *Homo Deus: A Brief History of Tomorrow* (1st edn, Harvill Secker 2016) 120, 142. Harari distinguishes between objective, subjective, and intersubjective reality. The latter depends on communication among many humans.

9 WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (1st edn, Cambridge University Press 2007) 97, 132ff.

10 Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 German Law Journal 1703, 1704.

11 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457, 467.

research questions, the methodology, and the existing identity research (Section 1). The second section contextualises two crucial aspects closely connected with national constitutional identity in the EU. First, it clarifies why the delimitation of competences cannot entirely prevent constitutional tensions among the EU and the Member States. Moreover, it pronounces the research's normative position as a point of departure, namely, that of constitutional pluralism (Section 2). The last section briefly outlines the complete structure of the research (Section 3).

1.1 Research Questions and Objectives

What is the appropriate balance between the supranational European Union and its constitutive Member States? Moreover, what kind of role does national constitutional identity play in shaping, navigating, and managing the said equilibrium?[12]

These questions concern the EU citizen as *homo politicus*; they are fundamental to the further political development of the European project, and are articulated legally – thus making them the subject of constitutional considerations. The EU is a flexible supranational polity, created as an ever closer Union.[13] Accordingly, the European constitutional architecture intrinsically denotes an inner tension. On the one hand, the Member States as the Masters of the Treaties aim to preserve a considerable amount of political control over the EU. On the other hand, the progressive development of the Union via its autonomous legal system[14] is increasingly challenging

12 See also Luke D Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57 Common Market Law Review 361.

13 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007 [2007] OJ C306/1, Preamble.

14 Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal 389; JHH Weiler and Ulrich R Haltern, 'The Autonomy of the Community Legal Order-Through the Looking Glass' (1996) 37 Harvard International Law Journal 411; Koen Lenaerts, José A Gutiérrez-Fons and Stanislas Adam, 'Exploring the Autonomy of the European Union Legal Order' [2021] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 47. See also Case 6-64 *Flaminio Costa v E.N.E.L.* (*Costa ENEL*) [1964] ECLI:EU:C:1964; Case Avis 1/17 *Accord ECG UE-Canada* (*CETA Opinion*) [2019] ECLI:EU:C:2019:341.

aspects of national self-governing which until recently were considered as exclusively national matters.

Claims of national constitutional identity stand at this intersection: they concurrently represent and articulate the described inherent tension, and at the same time offer themselves as a vehicle to navigate and potentially solve the said paradox.[15] National identity is a constitutional EU concept under the Treaty on European Union (TEU),[16] and synchronously only determinable by the Member States and their apex courts. It is likewise an accepted solution for creating an appropriate equilibrium, and concurrently it facilitates the resolution of the said constitutional tension.

From the European perspective, Article 4(2) TEU, the European identity clause, 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.'[17]

The EU shall respect national identities: the essential State functions, as well as political and constitutional structures. A respect for national constitutional identity is both the subject and the responsibility of EU law.

From the national perspective, the Member States' apex courts occasionally refuse to apply EU law, arguing that it conflicts with their national constitutional identity. The Italian *Frontini* decision in 1973[18] and the German

15 François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (Lextenso editions et Karine Roudier 2013) 239–56.

16 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13, art 4(2).

17 Ibid.

18 The Italian Corte Constituzionale was the very first of the apex national courts to identify the existence of constitutional limitations to the application of EU law within the domestic legal order through the doctrine of counter-limits (*contro-limiti*). See Italian Corte Costituzionale, Case 183/1973 *Frontini* 27 December 1973. See also Federico Fabbrini and Oreste Pollicino, 'Constitutional Identity in Italy: Institutional Disagreements at a Time of Political Change' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 213.

Solange I[19] decision in 1974 are the most notorious examples. According to different domestic constitutional doctrines, the apex courts would exceptionally set the limit to, or review, EU law. In that way, they protect their national constitutional identity vis-à-vis the Union.[20]

The national and supranational perspectives sometimes overlap: the Member States would claim their identity, and the Union might acknowledge and recognise them, awarding to a respective Member State an exception to disapply EU law if it stands in conflict with the national constitution.[21] The Member States would obtain an exception from the primacy and unifying application of EU law. However, the national and supranational perspectives may not always overlap. The apex courts may not even submit the preliminary questions to the CJEU, asking for exception; or the CJEU may refuse to recognise the claimed identity:[22] perhaps because the said exception would not be proportionate, or the claims by national apex courts would purportedly extend beyond the ambit of Article 4(2) TEU. In these scenarios of multilevel constitutional tensions, the respective Member State and the EU both claim the authority ultimately to resolve the subject matter.[23]

19 BVerfGE 37, 271 *Solange I* 29 May 1974.

20 E.g., in France, Millet argued that the French Conseil Constitutionnel was the very first constitutional court in Europe that relied on constitutional identity, in 2006, in the following terms: 'the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto.' See also François-Xavier Millet, 'Constitutional Identity in France: Vices and – Above All – Virtues' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 135.

21 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bon* (*Omega*) [2004] ECLI:EU:C:2004:614; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (*Sayn-Wittgenstein*) [2010] ECLI:EU:C:2010:806; Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (*Runevič-Vardyn*) [2011] ECLI:EU:C:2011:291; Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others* (*Cilevičs*) [2022] ECLI:EU:C:2022:638.

22 Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (*Coman*) [2018] ECLI:EU:C:2018:385, paras 42-6.

23 Mattias Kumm, 'Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 Common Market Law Review 351, 384; Ingolf Pernice, *Der Europäische Verfassungsverbund* (Nomos 2020) 383ff.

The current research is a response to these described tensions. It asks a simple question: How can one properly understand the meaning and scope of claims of national constitutional identity in the light of shared constitutional commitments and beyond; and how best accommodate them within EU law?

The main research question above contains several supplementary queries. If one aims at a proper understanding of identity claims, one can analyse them from several perspectives, most notably according to their foundations and functions.[24] First, one can examine where the claims of national constitutional identity come from; and how the terminology of identity found its way into constitutional law. Moreover, one can examine what lies behind the identity claims: what foundational principles or concrete values are being protected in the name of identity? Furthermore, one can differentiate between the underlying rationales for identity claims, and thereby establish a sort of qualitative distinction among them to determine their legitimacy.

From the functional perspective, one can investigate what aims the identity claims serve.[25] Are they merely constitutional arguments, or do they also undertake the role of constitutional mechanisms, regulating and managing multilevel constitutional tensions and conflicts?[26] If the latter, can they rightfully fulfil this self-assumed role, managing constitutional differences, or does their constitutional nature essentially impede that objective? Additionally, do identity claims occasionally function as judicial resistance, aiming to amend and ameliorate the European constitutional order as a better reflection of the common and shared principles and values – as a corrective mechanism? If that be the case, how ought one to evaluate them in this respect?

Another aspect of identity claims concerns their role as potential limits of European (legal) integration.[27] National constitutional identity signals that it ought to remain national and thereby unchanged by EU law. In that sense it discourages further (legal) integration. There are two main implications. First, it creates a material argument for what ought to remain

24 See also Kassandra Wetz, *Funktionen von Verfassungsidentität als Gerichtliches Konzept in der Europäischen Union*, vol 18 (1st edn, Mohr Siebeck 2021) 49ff.

25 Thomas Wischmeyer, 'Nationale Identität und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 Archiv des öffentlichen Rechts 415, 419ff.

26 Ingolf Pernice, 'Der Schutz nationaler Identität in der Europäischen Union' (2011) 136 Archiv des öffentlichen Rechts 185, 194.

27 Wischmeyer (n 25) 433.

under exclusive national control: it opens a Pandora's box of what a State is, and ought to be, and whether one can think of democracy beyond a nation-state.[28] Second, it is usually a national apex court that argues what ought to remain solely within the national ambit. This begs the question of whether the constitutional courts are truly the appropriate agents to decide how deep and intense the European integration can be.[29] This research can only lightly touch on these two big questions, intrinsically connected with identity claims, if it is not to lose track of the main objectives.

Additionally, while trying to understand the meaning and scope of identity claims, this research includes certain critical assessments. The research goes considerably beyond a mere descriptive and analytical scrutiny of identity claims. Rather it aims to make a normative assessment of their validity and persuasiveness, thus construing a critical approach. In that light, it also addresses certain terminological and conceptual misguidances of identity in constitutional law.

Finally, to counter any deconstructive critical observations, the research offers a complementary, reconstructive view. In what proves to be a highly innovative and unconventional endeavour, it suggests a structural comparison to shed some additional light on identity claims. The research explores the structural similarities of identity claims against the CJEU with civil disobedience and conscientious objections.[30] When national apex courts refuse to apply EU law because the Union, for example, would not provide a sufficient level of fundamental rights protection, these acts are structurally equivalent to civil disobedience.[31] Alternatively, when an apex court demands that the CJEU accommodate a disputed EU law, which conflicts with the respective national constitution, that act structurally resembles conscientious objection.[32] Namely, a state would adjust its respective legal

28 Christoph Möllers, 'Multi-Level Democracy' (2011) 24 Ratio Juris 247, 248ff.

29 See also Nik de Boer, 'Karlsruhe's Europe and the Politics of National Constitutional Identity Review', *Judging European Democracy The Role and Legitimacy of National Constitutional Courts in the EU* (Oxford University Press 2023) (forthcoming).

30 See Mattias Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 238. Matej Avbelj and Jan Komárek, 'Four Visions of Constitutional Pluralism', *EUI Working Paper LAW No. 2008/21* (European University Institute 2008) 19 <https://cadmus.eui.eu/handle/1814/9372> accessed 24 February 2023.

31 See in that light BVerfGE 37, 271 *Solange I* 29 May 1974.

32 See in that light Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.

obligation rather than demand from objecting individuals to concede their convictions.[33]

The final objective of the research is to seek to establish the said structural comparison and examine whether one can understand and evaluate identity claims any better in that light. Due to the structural comparison,[34] the research aims to analyse the case law of identity as 'institutional civil disobedience' and 'constitutional conscientious objection'.[35] Through the findings of civil disobedience and conscientious objections, as understood in legal theory and applied in judicial practice, the research's structural comparison offers an evaluative framework which should guide us to a better understanding of claims of national constitutional identity in the EU.

1.2 Methodology and Terminology

The present study applies several methods, starting with the classical legal analysis of case law across the Member States and by the CJEU. Since of course one cannot understand every language of the 27 states, nor comprehend the various legal cultures and other relevant contexts, this research inevitably relies on translations and secondary scholarly sources. This inherently causes limitations, as well as potentially producing linguistic and other biases.

Given the influence and origins of identity case law in Germany, Chapter 2 gives extensive attention to constitutional jurisprudence and case law by the German Federal Constitutional Court (FCC), which is dogmatically rich and has a long continuity.[36]

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33 Kumm (n 30) 239.

34 Andreas Føllesdal, 'Law Making by Law Breaking? A Theory of Parliamentary Civil Disobedience against International Human Rights Courts' in Andreas Føllesdal, Geir Ulfstein and Matthew Saul (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (Cambridge University Press 2017) 335.

35 See also N Türküler Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' (2010) 16 European Law Journal 551, 551.

36 Christian Tomuschat, 'The Defence of National Identity by the German Constitutional Court' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National constitutional identity and European integration* (Intersentia 2013) 207–2017; Christian Calliess, 'Constitutional Identity in Germany: One for Three or Three in One?' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 154–166; Monika Polzin, 'Irrungen Und Wirrungen Um Den Pouvoir Constituant: Die En-

Furthermore, the study goes well beyond a doctrinal approach. Its normative considerations and deconstructive critical assessments have a strong theoretical focus. The research is discursive in so far as it critically engages with other scholarly contributions, and it builds strongly on legally informed personal argumentative assessments, supported by constitutional arguments and legal theory. Accordingly, the research has a normative conceptual methodology with comparative constitutional elements.[37]

Finally, the last chapter applies interdisciplinary methods, delving into the legal theories of civil disobedience and conscientious objection. The research in that respect aligns the findings of the legal theory concerning civil disobedience and conscientious objections with the national and CJEU's identity case law in the EU.[38] Notably, it adopts a distinctive method of structural comparison[39] which does not correspond to traditional comparative law focusing on functional methods.[40]

As to the legal sources, the study primarily analyses classical legal sources, but is not exclusively limited to them. Apart from national and supranational case law, scholarly contributions and legal theory, it also refers to less conventional texts, such as working documents of governments, political speeches and statements in journals. Moreover, the study does not systematically cover and analyse *all* existing case law that one could connect with arguments of identity. This methodology is different: it uses respective case law to demonstrate the underlying rationales, differences with other decisions, and the contextualised functions of these decisions. In that sense the research does not represent a completed and categorised collection of identity cases: they are rather scattered across the study as examples.

A brief note on terminology may be conducive to helping the reader navigate across chapters. The most evident is the use of 'claims of national

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twicklung des Konzepts der Verfassungsidentität im Deutschen Verfassungsrecht Seit 1871' (2014) 53 Der Staat 61, 87–91.

37 See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 224ff.

38 See i.e. a broader understanding of comparative law concerning the choice of units of comparison in Mathias Siems, *Comparative Law* (Cambridge University Press 2018) 369.

39 Ibid. 126. The method of structural comparison applied here slightly differentiates itself from the classical understanding of structural comparison in comparative law, known as 'playing card analogy'.

40 Cf Uwe Kischel, 'The Comparative Method' in Uwe Kischel and Andrew Hammel (eds), *Comparative Law* (Oxford University Press 2019) 102ff.

constitutional identity'. The cited Article 4(2) TEU, speaking of 'national identities', has implications beyond the legal and constitutional considerations, whereas its further wording contradictory refers more to the Member States' institutional diversities, their fundamental structures and essential functions.[41] Furthermore, several Member States' apex courts, most notably German FCC, refer only to 'constitutional identity'. The term 'national constitutional identity' in this study thus covers both aspects, incorporating *all* types of identity claims.[42]

When the study refers to 'EU law', it applies this generic term to all aspects of EU law, all rights and obligations, judicial decisions, primary and secondary sources, etc. – the whole body of EU law over time. Alternatively, due to the context, 'EU law' may also denote just one respective norm in question.

Finally, according to German scholarly practice, the study often uses the term 'European multilevel constitutional Verbund'.[43] The term denotes simultaneously all constitutional orders, national and supranational. It refers to 28 constitutional systems – the 27 national constitutions and the EU constitution, existing concurrently in a non-hierarchical, overlapping manner.[44]

1.3 Existing Identity Research and Scholarly Interlocuters

This research is titled: Rethinking national constitutional identity in the EU. 'Rethinking' not just due to its critical and deconstructive methodology, but also because national constitutional identity is not an entirely new concept, but has been vividly present for the last ten years. One can consider the research here almost as 'second wave work', gratefully building on and

41 Bruno de Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (2021) 27 European Public Law 559.

42 The differences and similarities between national and constitutional identity are addressed in Chapter 5, Section 3. See also Anita Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 9ff. Carina Alcoberro Llivina and Alejandro Saiz Arnaiz (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013).

43 Ingolf Pernice, 'Europäisches und nationales Verfassungsrecht', *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (De Gruyter 2001) 163.

44 Pernice, *Der Europäische Verfassungsverbund* (n 23).

simultaneously rethinking the monumental studies, mostly dating back to 2013.

Leaving aside Aristotle here, who was a passionate collector of constitutions and wrote about constitutional identity, differentiating between the walls of a polis and its real identity,[45] contemporary legal scholarship has for the last decade engaged intensively with constitutional identity. For example, two substantial books on constitutional identity were published in 2010. Gary Jeffrey Jacobsohn wrote a monograph on constitutional identity, arguing how particularities and universalities define the identity of a constitution. Identity is 'changeable but resistant to its own destruction, and it may manifest itself differently in different settings'.[46] Moreover, he argued that 'a constitution acquires an identity through experience', which 'emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past'.[47] Then Michael Rosenfeld wrote *The Identity of the Constitutional Subject*, in which he addressed at length the paradoxes of constitutionalism and the most salient challenges surrounding identity.[48]

In relation to constitutional identity concerning the concrete relationship between the Member States and the European Union, three important contributions came out in 2013: François-Xavier Millet's thesis on *L'Union Européenne et l'Identité Constitutionnelle des Etats-Membres*;[49] Elke Cloots' thesis as the first comprehensive and in-depth analysis of national identity within EU law, later published as a monograph with OUP;[50] and an edited volume *National Constitutional Identity and European Integration* by Alejandro Saiz Arnaiz and Carina Alcoberro Llivina.[51] All three contributions dealt national constitutional identity a mostly optimistic assessment, anticipating identity as the door connecting two spheres, national and supranational. Identity had a magic aura in European constitutional law; for many lawyers it was preferable to sovereignty, and at the same time reas-

45 Aristotle, *The Politics of Aristotle* (Ernest Barker tr, Oxford University Press 1962) 98.
46 Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 7.
47 ibid.
48 Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010).
49 Millet (n 15).
50 Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015).
51 Alejandro Saiz Arnaiz and Carina A Llivinia, *National Constitutional Identity and European Integration* (Intersentia 2013).

suring that national sensibilities – cultural, historical, religious, linguistic, etc. – would not just dissolve at the hand of the supranational Union, with its dubious democratic legitimacy and questionable focus on fundamental rights and national idiosyncrasies.

In addition to the cited books, many other valuable scholarly contributions have been written on identity in the Union. The present research seriously engages with them throughout the chapters, most notably with the recent volume by Christian Calliess and Gerhard van der Schyff, *Constitutional Identity in a Europe of Multilevel Constitutionalism*,[52] which covers constitutional identity across the Member States, and many others.[53] However, it was arguably with the advent of the Hungarian and Polish constitutional backsliding that the scholarly discussions on national constitutional identity became less enthusiastic and hopeful. The tide has slowly changed, with more critical and focused contributions, such as for example *Abusing Constitutional Identity*[54] by Julian Scholtes and *The Dangers of Constitutional Identity* by Federico Fabbrini and András Sajó.[55] On the contrary, the described dangers of the potential of identity abuse have even reinforced the confidence in identity argument by others, believing that constructing constitutional identity for the EU may counterbalance and essentially solve these national abuses.[56] In other words, to remedy identity

52 Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

53 Bosko Tripkovic, 'Constitutional Identity' in Bosko Tripkovic (ed), *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017); Barbara Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018); Monika Polzin, *Verfassungsidentität*, vol 272 (1st edn, Mohr Siebeck 2018); Spieker (n 12); Bruno de Witte and Diane Fromage, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27 European Public Law 411; Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022); Robert Pracht, *Residualkompetenzen des Bundesverfassungsgerichts ultra vires, Solange II, Verfassungsidentität* (1. edn, Mohr Siebeck 2022); Laurianne Allezard, 'Identité(s) et Droit Constitutionnel' (These de doctorat, Université Clermont Auvergne 2021) <https://www.theses.fr/2021UCFAD009> accessed 24 February 2023; Wetz (n 24).

54 Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534.

55 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457.

56 Gerhard van der Schyff, 'Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours' [2021] Ancilla Iuris 1. Tímea Drinóczi and Pietro Faraguna, 'The Constitutional Identity of the EU as a Counterbalance for Unconstitutional

with identity.[57] The new contributions on the constitutional identity of the EU are indicative of this second strand of scholarship.[58]

This research engages with all the cited contributions, various in nature. It adds a distinctive critical outlook and a new structural comparison methodology and joins the other scholarly interlocuters on national constitutional identity.

Constitutional Identities of the Member States' in Jurgen de Poorter et al. (eds), *A Constitutional Identity for the EU?*, vol 4 (TMC Asser Press 2022) (forthcoming).

57 See also Armin von Bogdandy and Luke D Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391, 406.

58 Jurgen de Poorter et al. (eds), *A Constitutional Identity for the EU?*, vol 4 (TMC Asser Press 2022) (forthcoming).

2 Contextualisation

Before specifically addressing national constitutional identity in the subsequent chapters, this introductory chapter briefly contextualises two important aspects: namely, the competence delineation in the EU (3.1) and the theoretical framework of constitutional pluralism (3.2).

If national constitutional identity protects national constitutional sensibilities and essentialities against EU law,[59] and if it functions as a mechanism to manage the relationships among the EU and the Member States,[60] one may ask oneself the following two questions. Why cannot we specifically determine the competences of the EU and of the Member States beforehand, and therefore resolve any further constitutional conflict?[61] Moreover, if a potential conflict cannot be avoided, why cannot we determine which final authority, the EU or the Member States, has ultimate authority to settle the constitutional issue in question?[62]

The following section briefly explains why none of the above-stated propositions can prevent constitutional tensions and conflicts.

2.1 Delimitation of Competences and National Constitutional Identity

When two constitutional sources of authority concurrently claim the exclusive competence to regulate a particular issue in question, a clear delimitation of exclusive competences may possibly solve the conflict. Hence, facing constitutional conflicts in the European multilevel constitutional Verbund, this sub-section first investigates the nature and consequences of the EU's competences (3.1.1). Then it briefly explains the exclusive competences of

59 Pietro Faraguna, 'Constitutional Identity in the EU–A Shield or a Sword?' (2017) 18 German Law Journal 1617, 1627.

60 Giacomo Di Federico, 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards' (2019) 25 European Public Law 347, 374.

61 Bruno de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences Between the EU and the Member States* (Hart Publishing 2017) 60.

62 Kumm (n 23) 384.

the Member States; the retained competences (3.1.2), and the reserved competences (3.1.3). It sums up with a short interim conclusion (3.1.4).

2.1.1 Functional Characteristics of the EU's Competences and its Consequences

The Treaties define the competences of the Union as *exclusive*[63] and *shared*,[64] meaning that the Member States can act only if the EU has chosen not to,[65] with those competences being to *support, coordinate or supplement*[66] actions of the Member States. Additionally, the EU has the competence to define and implement *a common foreign and security policy*,[67] 'including the progressive framing of a common defence policy that might lead to a common defence'.[68] Finally, as a *special competence*, the EU can take measures to ensure that the Member States coordinate their economic, social and employment policies at the EU level.

The cited competences are extensive and far-reaching, considering that even in the exclusive areas of Member States' competences, the EU's institutions carry out concrete harmonisation measures.[69] Moreover, due to the nature of the internal market and fundamental freedoms, the EU's competences are constructed as *functional* powers, going beyond a specific sector

63 In the following areas: customs unions, competition rules, monetary policy, common fisheries policy, common commercial policy, and concluding international agreements. See Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, art 3.

64 In the following areas: internal markets, social policy (limited), economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, areas of freedom, security and justice, common safety concerns in public health (limited), research, technological development and space, development cooperation and humanitarian aid. See TFEU [2012] OJ C326/47, art 4.

65 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.' See 18. Declaration in relation to the delimitation of competences [2012] OJ C326/346.

66 'Protection and improvement of human health, industry, culture, tourism, educational, vocational training, youth and sport, civil protection, administrative cooperation.' See TFEU [2012] OJ C326/47, arts 2(5), 6.

67 TEU [2007] OJ C326/13, arts 24, 25, 40.

68 TFEU [2012] OJ C326/47, art 2(4).

69 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 63.

or field of governance.[70] According to these purposive characteristics, it is not surprising that Koen Lenaerts observed that 'there simply is no nucleus of sovereignty that the Member State can invoke, as such, against the Community'.[71]

The Member States addressed this issue of wide-ranging competences of the EU in the Convention on the Future of Europe,[72] putting in motion the Working Group V (WG V).[73] The WG V was requested to identify and discuss how to respect the core responsibilities of the Member States, elaborate on the fundamental principle of national identity,[74] and provide an overview of what essential elements the EU has to respect.[75]

The work of the WG V is further explained in Chapter 5, concerning the *travaux préparatoires* and the purpose of the European identity clause.[76] Here it must suffice to say that the group identified two main areas of the Member States' core responsibilities: on the one hand, fundamental structures and essential functions of the Member States;[77] on the other

70 Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 6.

71 Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American Journal of Comparative Law 205, 220.

72 The Convention on the Future of Europe (the European Convention) was established by the European Council in December 2001 as a result of the Laeken Declaration. The objectives were to address the four main issues concerning the further development of the EU: a better division of competences; simplification of the EU's instruments for action; increased democracy, transparency and efficiency; and the drafting of a constitution for Europe's citizens. See also 23. Declaration on the future of the Union, annexed to the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001 [2001] OJ C080/1.

73 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1.

74 The national identity principle was at that time enshrined in Article 6(3) TEU (Nice Consolidated Version), stating: 'The Union shall respect the national identities of its Member States.' See Treaty on European Union (Consolidated version 2002) [2002] OJ C325/5, art 6(3).

75 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1, p 11.

76 Consolidated version of the Treaty on European Union (TEU) [2007] OJ C326/13, art 4(2).

77 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1, p 11: 'Political and constitutional structure, including regional and local self-government; national citizenship; territory; the legal status of churches and religious societies; national defence and the organisation of armed forces; choice of languages.'

hand, basic public policy choices and social values.[78] The WG V attempted to create a comprehensive list of exclusive, reserved competences of the Member States in the Treaties. However, it consequently rejected this proposition, allegedly to avoid the impression that the list suggests that all the competences and powers eventually derive from the EU.[79] Furthermore, as de Witte argued, the list might also give the wrong impression that the EU cannot impact on these areas at all.

To sum up, neither the conferral of competences on the EU nor the European identity clause specifically were defined to reject categorically and unconditionally the potential impact of EU law on the Member States, even in the core areas of governance. Hence the following question: Is there any nucleus of the Member States' power which must remain absolutely out of the EU's reach? The following two sub-sections further illustrate the issue.

2.1.2 Retained Exclusive Member States' Competences

Pursuant to the principle of conferral, everything which is not conferred on the EU remains within the ambit of national control.[80] Hence the exclusive competences of the Member States? The following issue illustrates how the EU still impacts on these areas where it has no conferred competences.

For example, the EU has no competences in the area of taxation. Yet when the German taxation system provided for a tax reduction on payments of fees for private schools in Germany, the provision was challenged in front of the CJEU.[81] The German family Schwarz sent their child to a private school in Scotland, but was denied a tax reduction by Germany. The CJEU stated in the *Schwarz*[82] decision that although direct taxation fell within the competence of the Member States, they 'must none the less exer-

78 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1, p 14: 'Basic public policy choices and social values of a Member State, e.g. policy for distribution of income; imposition and collection of personal taxes; system of social welfare benefits; educational system; public health care system; cultural preservation and development; compulsory military or community service.'

79 Ibid.

80 Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 267.

81 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 61.

82 Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* (*Schwarz*) [2007] ECLI:EU:C:2007:492.

cise that competence consistently with Community law [...] in particular the provisions on the freedom to provide services'.[83]

In other words, the Member States are free to exercise their retained competences only as long as their policies do not interfere with the exercise of EU competences. If the Member States discriminate among the European private schools and thus compromising the common EU market, that cannot be tolerated, even if it is carried out via policy in the exclusive scope of national competences. Henceforth, even if the EU does not have any conferred competences in the respective area, it can still impact on it accordingly.[84]

2.1.3 Actions Explicitly Prohibited by the EU: Reserved Member States' Competences

In several places scattered across the Treaties,[85] one finds specific provisions directly reserving power and competences of the Member States in particular subject matters. De Witte calls these competences the 'reserved competences'.[86] Is the EU ultimately prohibited from impacting its measures at least in these areas?

For instance, Article 36 TFEU regarding public policy exceptions to free movement; Article 153(5) TFEU regarding pay, association and strikes relating to social policy; Article 165 and 168 TFEU regarding education, cultural and linguistic diversity and public health; Article 345 and 346 TFEU regarding property ownership and security, production of and trade in arms, munition and war materials; and especially Article 352 TFEU as a limitation to the flexibility clause, which enabled EU institutions in the past to adopt measures to attain objectives of the Treaties where no other, more specific powers can be used.[87] Finally, Article 4(2) TEU which requires respect for national identities and essential state functions such as territorial integrity, law and order and national security.

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83 Ibid. paras 69, 70.
84 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 68.
85 Azoulai (n 70) 196.
86 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 60.
87 Bruno de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The division of competences between the EU and its Member States* (Hart Publishing 2017) 69.

The following examples tell the same story. In the *Simmenthal*[88] decision, public policy exceptions under Article 36 cannot be understood as 'to reserve certain matters to the exclusive competences of the Member States'.[89] Similarly, the CJEU stated in *Gaydarov*[90] that it is clear from the established case law that

> 'while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, […] those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.'[91]

Concerning security under Article 346 TFEU, the CJEU argued that a Member State cannot simply

> 'depart from the provisions of the Treaty based on no more than reliance on those interests[92] [but has to] prove that it is necessary to have recourse to that derogation in order to protect its essential security interests.'[93]

In the *Viking*[94] decision concerning the right of association and strike under Article 153(5) TFEU, it stated:

> 'even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question,

88 Case C 35/76 *Simmenthal SpA v Ministero delle Finanze italiano* (*Simmenthal*) [1976] ECLI:EU:C:1976:180.

89 Ibid. para 14.

90 Case C-430/10 *Hristo Gaydarov v Director na Glavna direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti* (*Gaydarov*) [2011] ECLI:EU:C:2011:749.

91 Ibid. para 32. See also Case C-33/07 *Ministerul Administrației și Internelor - Direcția Generală de Pașapoarte București v Gheorghe Jipa* (*Jipa*) [2008] ECLI:EU:C:2008:396, para 23; Case C-434/10 *Petar Aladzhov v Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti* (*Aladzhov*) [2011] ECLI:EU:C:2011:750, para 34; Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* [2012] ECLI:EU:C:2012:300, para 23.

92 Case C-387/05 *European Commission v Italian Republic* (*Commission v Italy*) [2009] ECLI:EU:C:2009:781, para 47.

93 Ibid. para 49.

94 Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* (*Viking*) [2007] ECLI:EU:C:2007:772.

> the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law.'[95]

To sum up, even in the specifically reserved areas, the Member States must comply with EU law as established by the CJEU's case law. Accordingly, there is simply no area of national legislation which can categorically claim to be immune on EU law and its measures.

2.1.4 Interim Conclusion

Indeed, there are few areas, if any, where the Member States still retain their unlimited governing powers without observing what kind of consequences their policy choices might have concerning the other areas regulated by the EU. Sacha Garben argued that one cannot protect the Member States through competence delimitation, but only through political process.[96] Furthermore, according to the case law by the CJEU, de Witte draws no fundamental difference between remaining and reserved competences: in both scenarios, the Member States must respect EU law. However, it would be wrong to think that the EU has the Member States under its thumb.

The EU has no *Kompetenz-Kompetenz*;[97] the Member States are the masters of the Treaties, and they can always withdraw from the EU under Article 50 TEU. This provision is the most obvious and transparent indication of the dormant,[98] yet still existing national sovereignty. Furthermore, as subsequent chapters show, the Member States are still drawing the red lines against European (legal) integration. The national apex courts occasionally resist EU law, despite its primacy, or carry out ultra vires[99] and identity reviews.[100] Finally, the Member States maintain their meta-competence to increase, decrease and define the competences of the EU, which can be

95 Ibid. para 40.
96 Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers' (2015) 35 Oxford Journal of Legal Studies 55.
97 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 233.
98 See Neil Walker, 'When Sovereigns Stir' (2018) Paper No. 2019/01 Edinburgh School of Law Research 6.
99 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 61; BVerfG, 2 BvR 1390/12 *ESM* 18 March.
100 Bobić (n 53) 75ff.

exercised through the change of Treaties,[101] as enshrined in Article 1 and 48(2) TEU. The Member States are therefore free to clip the EU's wings in the future.

To conclude, although the competence delimitation broadly defines the spheres of national and European powers, and in most cases also successfully manages to keep a desired equilibrium, that is not the whole picture. There is an intersection of sets where two authorities, national and supranational, both concurrently claim their authority to define the matter.[102] In these cases, the question of competence delineation cannot solve the issue. Rather one should undertake a different, normative undertaking to solve the controversies at hand.[103] Identity claims are the vehicles for such undertakings. But before pluning *in media res*, the second question should be addressed. *Quis custodiet ipsos custodes*?

2.2 European Constitutional Pluralism

This research builds on a theoretical vision of constitutional pluralism. The following sub-sections briefly explain the main contours of the said view. The explicit theoretical vision of the European multilevel constitutional Verbund concerning the competing claims of authority affects the normative understanding of identity claims in the subsequent chapters; hence, it must be highlighted explicitly upfront. The EU and the Member States, all from their own standpoints, claim authority (5.2.1). Conflicting and complementary visions of constitutional pluralism best explain this multilevel constitutional landscape (5.2.2).

2.2.1 Competing Claims to Authority

The EU cannot be hierarchically integrated into the national legal system of the Member States; and the EU concurrently cannot hierarchically subordinate the Member States into the EU legal order. However, each

101 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 87) 73.
102 Federico (n 60) 370.
103 Miguel Poiares Maduro, 'Three CLaims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 70.

perspective claims to have the authority to exercise their powers independently and autonomously. From the EU's perspective, the long-established *Costa ENEL*[104] set up EU law as the supreme law of the land, trumping any other national norm, even constitutional, and even if enacted later in time.[105] From the Member States' perspective, national self-determination and self-governance as established by a constitution are the highest and the ultimate source of authority.

Constitutional pluralism accepts the existence of both cited views as the best description of the European multilevel constitutional Verbund; and it illuminates the fact that the resulting constitutional tensions and conflicts do not end according to the *right* claim of authority, national or supranational, but depending on the (shared) normative values and principles underlying these claims of authority. In the described constitutional landscape, law has several legitimate and independent sources of authority. Accordingly, one must 'escape from the idea that all law must originate in a single power source, like sovereign'.[106] Constitutional orders create 'overlapping relations without any necessary assumption of sub- or super-ordination of one to the other'.[107]

104 Case 6-64 *Costa ENEL* [1964] ECLI:EU:C:1964:66: 'the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.'

105 The primacy of EU law is not only the unwritten fundamental principle of the EU according to the above-cited case law, but it exists also due to the 17. Declaration Concerning Primacy, being annexed to the final act of the intergovernmental conference, which adopted the Treaty of Lisbon, signed on 13 December 2007. The Conference recalled that 'the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of MSs'. Moreover, the Conference attached the Opinion of the Council Legal Service, from 22 June 2007, stating, that 'primacy of EC law is a cornerstone principle of Community law, is "inherent to the specific nature of the European Community' and that 'the fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.'

106 Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 Modern Law Review 1, 8.

107 Ibid.

2.2.2 Complementing Visions of Constitutional Pluralism: A Point of Departure

There are several visions, operating on different levels of abstraction, of how best to operationalise constitutional pluralism, beyond mere observations of heterarchical and coexisting constitutional orders concurrently claiming their own authority. This sub-section briefly sketches several views,[108] while not subscribing to any of them specifically. The objective of the research is to make explicit what is the underlying common denominator of all the following theoretical accounts.

Joseph H. H. Weiler addressed constitutional pluralism on the meta-constitutional level, while recognising that constitutional tolerance relates to personal and collective humility, exercising one's love to the other, in her otherness:[109] pluralism as a value which encounters the individual with the possibility to exceed a sense of self-superiority.[110]

Neil Walker suggested a constitutional pluralism which is obedient to an 'axiom of epistemic incommensurability'.[111] Every system should be seen only as self-referential, and is therefore only plausible due to its own internal episteme.[112] When there is a collision of several systems, no one can claim superiority over the other. There can be no external perspective to mediate between colliding claims, since a quasi-external system functions in accordance with the same self-absorbed validity, claiming its own epistemological crestedness. Walker argued that true constitutional pluralism must remain open and undecided[113] when it comes to the question of superiority and final say.

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108 This is not a comprehensive account of all theoretical accounts of constitutional pluralism. See also Klemen Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

109 Joseph HH Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) 67.

110 Weiler also suggested the creation of a Constitutional Council having jurisdiction over all questions relating to competences (including subsidiarity) and being composed of all members of the constitutional courts in the MSs with a presiding president of the CJEU. See Joseph HH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 Journal of Common Market Studies 97, 127.

111 Jaklic (n 108) 32.

112 Ibid. 33.

113 Ibid. 36.

Moreover, Miguel Maduro explored how constitutional pluralism functions in the practice of the EU, as 'interpretive and participative pluralism'.[114] Searching for underlying principles to establish a common value nominator, he argued that 'there must be some kind of meta-methodological agreement between the actors of the different systems',[115] recognizing the competing claims of each other and therefore 'signalling that they are ready to mutually defer but also to establish the conditions for that mutual deference'.[116] Here it must suffice to highlight that his 'harmonious-discursive constitutionalism'[117] focuses on the question how pluralism can operate in practice, based on framework principles[118] and participatory dimension.[119]

Maduro mainly addressed the courts and expected from them not to be institutionally blind,[120] but rather to be aware and receptive to other institutional authorities, from which most likely their authorities would be challenged as well.[121] Maduro's constitutional pluralism is a type of non-radical pluralism, which aimed to achieve a certain level of coherence among constitutional agents, while recognizing mutual deference among them.[122]

Finally, Mattias Kumm defined constitutional pluralism as a response to conceptual shortcomings of monistic interpretations, and understood as

114 Jaklic (n 108).
115 Avbelj and Komárek (n 30) 17.
116 ibid.
117 Ibid. 3.
118 Maduro identified self-identity determination which has to be left to a 'self', meaning that each subject can only define its identity itself, otherwise an identity could be lost; coherence of a legal system vertically and horizontally; and the principle of universability, which has to anticipate that every national decision taken can and possibly will be *mutatis mutandis* adopted by the other national courts in comparable circumstances.
119 The participative element includes constitutional interpretation, which expects from a constitutional court to identify and defend idiosyncratic national traditions; subjective universalism, which takes into account also the interests of the other (the EU) but from the first-person-singular perspective, meaning to understand the interests of the other from the subjective standpoint of the observer; and inter-subjective universalism, which accepts a fiction, that both standpoints of a first-person-singular and of a second-person-singular are equally valid. See also Jaklic (n 108).
120 Avbelj and Komárek (n 30) 12.
121 Ibid.
122 Ibid. 17.

a better conceptualization of constitutional practice in the EU.[123] Constitutional pluralism encapsulates conceptually what is carried out according to existing case law. The source of authority is not only 'we the people', but also commitment and realization of basic constitutional principles, namely democracy, the rule of law, and human rights. The legitimacy of the claim for authority of the EU normatively depends on the actual (empirical) realization of these principles by the EU's institutions.[124] The main objective of his account of constitutional pluralism is to find legal coherence and constructive mutual engagements[125] among legal orders within the EU and the EU itself. According to Kumm, the law of a more expansive community should be respected. This presumption can nevertheless be rebutted by the fact that a more expansive community violates countervailing principles of legality, the jurisdictional principle of subsidiarity, the procedural principle of due process and the substantive principle of respect for human rights and reasonableness.[126]

To sum up, constitutional pluralism in the EU in the difficult cases of constitutional conflicts does not automatically give priority to one constitutional order. Moreover, it does not perceive the legal landscape as a perfectly, hierarchically organised structure, but rather as overlapping, heterarchical and competing claims for authority.[127] Accordingly, one cannot by default reject all national constitutional identity claims which are not recognised by the CJEU. Moreover, one equally cannot accept claims of national constitutional identity by the apex courts of the Member States as absolute and inalienable, holding the EU and all the other Member States hostage to their unconditional demands.[128] Rather one should evaluate these tensions and conflicts in the name of identity claims, due to their underlying rationales and normative justificatory reasons. This is the point of departure for the research at hand.

123 Ibid. 23.
124 Kumm (n 30) 234.
125 Ibid. 217.
126 Ibid. 233.
127 Armin von Bogdandy and Stephan W Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1419.
128 See also R Daniel Kelemen et al., 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020) <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/> accessed 24 February 2023.

3 Outline

The research unfolds in the following sequence. It first identifies and critically assesses the origins[129] and development of identity claims, starting with German jurisprudence and constitutional case law (Chapter 2).[130] Then it expands the scope of survey, and it analyses all claims of national constitutional identity across the Member States, differentiating them into several varying types – or clusters of identity claims (Chapter 3). Moreover, it specifically addresses identity claims concerning fundamental rights (Chapter 4). The research subsequently explores various dimensions of identity (Chapter 5) while rejecting the construction of the European constitutional identity (Chapter 6).[131] Finally, it reconstructs identity claims through a structural comparison with civil disobedience and conscientious objection (Chapter 7).[132]

The objectives of Chapter 2 are twofold: first, to describe and critically analyse German identity case law from its beginnings onwards; second, to make a critical evaluation and deconstruction of the German judicial understanding of national constitutional identity. There are two reasons to look closely at the German constitutional identity development specifically. The FCC's case law on identity and ultra vires is likely one of the most elaborate and dogmatically thorough, with a long continuity of almost fifty years. The steady development of numerous decisions through decades enables an observer to establish a more nuanced evaluation, in comparison to a single decision elsewhere, often subject to specific circumstances, which could prevent us from making more effective conclusions. Second, many national apex courts across the Member States eventually adopted a similar approach vis-à-vis the CJEU, directly referring to German examples

129 Polzin, 'Irrungen und Wirrungen um den Pouvoir Constituant: Die Entwicklung des Konzepts der Verfassungsidentität im Deutschen Verfassungsrecht Seit 1871' (n 36) 64.

130 See also Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 International Journal of Constitutional Law 411, 415ff; Calliess (n 36) 153; Tomuschat (n 36) 205ff.

131 Cf van der Schyff (n 56).

132 Kumm (n 30) 239.

of identity jurisprudence. The FCC's case law at the same time provides leading examples as well as a justification for national judicial resistance.[133]

The chapter critically engages with identity case law, such as *Solange I*,[134] *Solange II*,[135] *Maastricht*,[136] *Lisbon*,[137] *Honeywell*,[138] *OMT I*,[139] *OMT II*,[140] *ESM*,[141] *EAW*,[142] and others.[143] It develops observations on three different levels of abstraction, starting with the plausibility of the doctrinal framework. Moreover, it critically engages with the FCC's interpretation of highly abstract constitutional principles, as developed into concrete limitations on legal European integration. Finally, it questions the FCC's presumption of the respective principles itself. Why should one understand democracy solely as a national phenomenon? Is the proposition reasonable, that the Union does not possess any democratic legitimacy on its own?[144] Finally, how is it that a constitutional court can navigate and limit the scope of integration as a legal question, against the contrasting proposition that the intensity of European harmonisation shall be a political matter?[145]

While not all German doctrinal solutions concerning the relationship between the Member States and the Union deserve criticism – *Honeywell*, for example, may be the possible solution – the chapter concludes that identity case law by the FCC cannot serve as an archetype across the Member States.

Chapter 3 then investigates all identity claims across the Member States, focusing on concrete underlying rationales for claims of national constitutional identity. It demonstrates that one cannot construe one single account

133 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 99.
134 BVerfGE 37, 271 *Solange I* 29 May 1974.
135 BVerfGE 73, 339 *Solange II* 22 October 1986.
136 BVerfGE 89, 155 *Maastricht* 12 October 1993.
137 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009.
138 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.
139 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.
140 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.
141 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.
142 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015.
143 BVerfG, 2 BvR 1685/14 *European Banking Union* 30 July 2019; BVerfG 2 BvR 859/15 *PSPP* 5 May 2020.
144 Lenaerts, Gutiérrez-Fons and Adam (n 14) 133–136.
145 See also Christoph Möllers, '"We Are (Afraid of) the People": Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 102ff.

of identity claims, due to their considerable differences. Accordingly, the research identifies several distinctive *clusters* of identity claims, each of them having a distinctive normative basis. It distinguishes among the identity claims which protect the general commitment of the Member States to liberal constitutionalism[146] – a controlling mechanism that the EU does not deteriorate into an undemocratic Leviathan, without any meaningful control mechanism and accountability. Another type of identity claims concerns common principles, which the Member States understand differently: such as separation between church and state, human dignity, and equality.[147] The chapter further distinguishes among the identity claims which regard specific standards of shared fundamental rights, refer to national sovereignty,[148] or protect national political and constitutional fundamental structures.[149] Additionally, one separately categorises identity claims which refer to sensitive national areas, explicitly beyond the conferred competences: most notably, protection of national languages[150] and identity claims in relation to history,[151] culture,[152] citizenship and nationality.[153] Finally, the chapter focuses on identity claims which undermine shared and common liberal values and principles, the prerequisites for sustainable European cooperation.[154] It follows from the said differentiations among the clusters

146 Helle Krunke, 'Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 125–127.

147 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (*Egenberger*) [2018] ECLI:EU:C:2018:257; Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.

148 Mattias Wendel, *Permeabilität Im Europäischen Verfassungsrecht*, vol 4 (1st edn, Mohr Siebeck 2011) 574.

149 de Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (n 41) 559.

150 Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others* (*Cilevičs*) [2022] ECLI:EU:C:2022:638.

151 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66.

152 Case C-222/07 Unión de Televisiones Comerciales Asociadas (*UTECA*) [2008] ECLI:EU:C:2008:468, Opinion of AG Kokott, para 93.

153 Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxembourg* (*Commission v Luxembourg*) [1996] ECLI:EU:C:1996:263, para 32.

154 Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 German Law Journal 1703, 1720.

that various identified underlying rationales impact on and co-determine the extent of legitimacy of identity claims.

Chapter 4 continues by focusing on one particular identity cluster, namely *fundamental rights identity claims*, derived out of or based on common and shared fundamental rights. The European multilevel constitutional Verbund often results in constitutional conflicts concerning the concrete standards of fundamental rights protection. For the EU Charter sometimes guarantees maximum, and sometimes minimum, standards of protection.[155]

As a response, the Member States occasionally articulate their concerns about fundamental rights standards as idiosyncratically guaranteed by their national apex courts, via identity claims; especially considering the fact that the Union does not provide any alternative constitutional mechanism to address the problem of potentially conflicting fundamental rights standards. However, adhering to identity in that regard potentially creates more problems than it promises to solve. To avoid the Procrustean trap of forcefully unifying fundamental rights standards on the one hand,[156] and on the other moving away from an excessive application of identity claims concerning fundamental rights standards, the chapter highlights the recently issued case law *Right to be Forgotten I* and *II* which offers an alternative paradigm.[157]

In the cited case law, the FCC changed the previous approach and started to review violations of fundamental rights in the national proceeding of constitutional complaint directly under the EU Charter, should the matter fall within the scope of fully harmonised EU law. Alternatively, when the matter would be within the scope of EU law, which is not fully harmonised, the FCC would apply fundamental rights standards under the Basic Law (*Grundgesetz*), concurrently with the general regard for the EU Charter. Accordingly, in the former case the apex courts would no longer apply their idiosyncratic national standards of protection, but only the EU Charter, which would render redundant their claiming their national standards as

155 Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (*Melloni*) [2013] ECLI:EU:C:2013:107, paras 63, 65; Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (*Åkerberg Fransson*) [2013] ECLI:EU:C:2013:105, para 29.

156 Eleanor Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections about Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System' (2018) 55 Common Market Law Review 997, 997.

157 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019; BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019.

constitutional identity. In the latter case, they could directly apply their national standards, hence identity claims would be, once again, needless. Consequently, the new constitutional paradigm concerning multilevel fundamental rights standards could diminish the need for this identity clusters: henceforth, a proposition for forgetting fundamental rights identity claims.

Chapter 5 explores identity's multifarious dimensions: functions, protagonists, and deficiencies. First, it explains national constitutional identity from the EU's perspective. How the European identity clause came about and evolved through the various treaties, what the *travaux préparatoires* reveals about its intended meaning,[158] and how it connects with the other European principles.[159] Moreover, it highlights the terminological confusions between national and constitutional identity and its relationship with Article 2 TEU.[160]

Furthermore, identity can serve as a constitutional argument in adjudication, balanced against fundamental rights. Identity can represent 'an eternity clause', an unamendable core of a national constitution. Finally, it can function as a mechanism to balance the tensions between the trajectory of supranational unity on the one hand, and preservation of national diversities on the other. Identity can also serve as a vehicle to exceptionally disapply EU law, or object against the CJEU, claiming that it has overstepped the confirmed competences.

Additionally, it illustrates how the meaning of national constitutional identity is not construed by the national (apex) courts only, but by several other protagonists.

Finally, the chapter investigates identity's deficiencies and its potential for misuse and abuse. It shows the various meanings of identity; sameness or idiosyncrasy, change or unchangeability, essence or particularness, etc.[161] It shows how identity can nominate a pre-constitutional essence of a community and alludes to national history, tradition, and culture.[162] While the chapter exhibits many facets and modalities of this increasingly popular

158 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 60.
159 Guastaferro (n 53) 308.
160 Daniel Sarmiento, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 178.
161 Fabbrini and Sajó (n 55).
162 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66; Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631, para 302.

concept, the analysed multifariousness and manifestations of identity help to deliver a better understanding and evaluation of identity and its pitfalls in constitutional practice.

Chapter 6 is a plea against the Sisyphean endeavour to imagine the constitutional identity of the EU. Recent case law by the CJEU[163] and various scholarly contributions argue for a constitutional identity for the EU.[164] This chapter takes a reserved position towards such an artificial construction, asking the questions: What is the purpose of such an endeavour? According to what methodology can one imagine such an identity? And what are the pitfalls of this undertaking?

Claims of national constitutional identity are primarily reactions to constitutional conflicts among the Member States and the Union itself. On the one hand, respect for national identities – that are inherent in the fundamental political and constitutional structures of Member States – forms part of EU law. On the other hand, Member States are ultimately bound to respect the principle of primacy. One can often resolve these constitutional tensions through dialogue, in the sense of engagement and loyal cooperation. However, the imprudent and prematurely artificial construction of a constitutional identity for the European Union finds itself in a completely different context. Although imagining in good faith a constitutional identity for the EU might imply striving for more robust and enhanced commitment to essential liberal constitutional values, such as democracy, human rights and the rule of law, goodwill alone cannot replace the likely pitfalls of this undertaking.[165]

This chapter considers the challenges and examines the potential risks of imagining a European constitutional identity, questions the underlying motivation for such a formation, and seeks to demonstrate the unsuitability of identity-related terminology in European constitutional law. Moreover, it explores the conceptual history of the constitutional identity argument and delves into the inherent tensions between democracy and identity.

163 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232: 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.'

164 de Poorter et al. (n 58). Drinóczi and Faraguna (n 56); van der Schyff (n 56); Luke D Spieker, *EU Values Before the Court of Justice Foundations, Potential, Risks* (Oxford University Press 2023) 234–235.

165 Cf Drinóczi and Faraguna (n 56).

Finally, it argues that, rather than denominating essential constitutional commitments as a constitutional identity, in order to elevate their argumentative strength, one can facilitate their enforcement by taking existing constitutional principles seriously while simply calling them by their proper names.

Finally Chapter 7 adopts a reconstructive approach, aiming to provide guidelines for a better understanding and evaluation of identity claims. It argues that identity claims by the Member States against the CJEU in the EU are structurally equivalent and comparable to civil disobedience and conscientious objection.[166] When a Member State refuses to apply EU law because it arguably conflicts with one of its idiosyncratic or essential constitutional commitments, essentially asking the CJEU for an exception from EU law, it acts in a structurally equivalent manner to a conscientious objector who wishes to be exempt from a valid and generally applicable legal obligation.[167] Alternatively, when a Member State refuses to apply EU law because it finds it grossly unjust, or manifestly beyond the conferred competences, and it thereby demands that the Union ameliorate and remedy the defective law or the underlying structures for all the Member States, the situation is structurally equivalent to civil disobedience, directed towards legal reform.[168]

These two types of judicial resistance, having different objectives, reflect the structural characteristics of civil disobedience and conscientious objection as exemplified in legal theory and judicial practice. Accordingly, the chapter dwells on the legal theories behind the said conceptions, most notably but not solely by Joseph Raz,[169] Ronald Dworkin[170] and John Rawls.[171] The objective of the last chapter is to highlight the basic characteristics of civil disobedience and conscientious objection, as well as their ambiguities, and *transplant* their structural similarities into European constitutional law accordingly. As quickly becomes evident, the nature of both concepts purposely remains enigmatic, escaping positive legal definitions and unilateral solutions. Thus, one is left without a magic and straightforward formula

166 Kumm (n 30) 239.
167 See also Føllesdal (n 34) 335; Isiksel (n 35) 551.
168 See in that light BVerfGE 37, 271 *Solange I* 29 May 1974.
169 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprint edition, Oxford University Press 1983) 277–81.
170 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 210–215.
171 John Rawls, *A Theory of Justice: Revised Edition* (2nd edn, Harvard University Press 1999) 319–23.

for how to solve identity claims. Nevertheless, the chapter still identifies several guidelines which can help assess judicial resistance. Most notably: What is the aim of judicial resistance? Is it discursive: proactively looking for a dialogue with the CJEU? Or is it constructive? Or undermining for the European constitutional system? And what may be the consequences for other individuals and their fundamental rights? Finally, and most importantly, what are the underlying rationales of judicial resistance?

These questions should help produce a better understanding of these identity claims and a better evaluation of them. The research should then provide the first step in understanding identity in a more reserved and nuanced way.