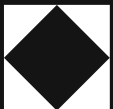


Schriftenreihe
Europäisches Recht, Politik und Wirtschaft

Jakob Gašperin Wischhoff

National Constitutional Identity

Judicial Resistance in the EU
As Civil Disobedience and Conscientious Objection



Nomos

Schriftenreihe Europäisches Recht, Politik und Wirtschaft

Herausgegeben von

Prof. Dr. Armin Hatje, Universität Hamburg

Prof. Dr. Claas Friedrich Germelmann, LL.M.,
Leibniz Universität Hannover

Prof. Dr. Jörg Gundel, Universität Bayreuth

sowie bis 2024 von

Prof. em. Dr. jur. Dres. h.c. Jürgen Schwarze[†],
Direktor des Europa-Instituts Freiburg e.V.
Universität Freiburg

Band 406

Jakob Gašperin Wischhoff

National Constitutional Identity

Judicial Resistance in the EU
As Civil Disobedience and Conscientious Objection



Nomos

The publication of this work was supported by the Open Access Publication Fund of Humboldt-Universität zu Berlin. The research was funded by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation) – 397044234.



Funded by



Deutsche
Forschungsgemeinschaft
German Research Foundation

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Berlin, Humboldt-Universität zu Berlin, Juristische Fakultät,
Dissertation, 2023/Disputation

Original title: “Rethinking National Constitutional Identity in the EU, Shedding Light on Identity Claims Through Civil Disobedience and Conscientious Objection.”

1st Edition 2025

© Jakob Gašperin Wischhoff

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-2321-9 (Print)

ISBN 978-3-7489-4970-1 (ePDF)

DOI <https://doi.org/10.5771/9783748949701>



Online Version
Nomos eLibrary



This work is licensed under a Creative Commons Attribution
4.0 International License.

to rosanna

Acknowledgements

I am profoundly thankful to my mentor, Mattias Kumm, who gave me the opportunity to enter in the world of reading, thinking, and writing. He believed in me and provided invaluable feedback, support, and encouragement. I learned so much from his remarkable intellectual breadth and ability to break down complex issues and convey them in a clear and engaging way. This has profoundly shaped both the structure and clarity of this book, as well as my personal academic growth. Through his invitations to the Berlin Colloquium on Global and Comparative Public Law and the WZB Research Group on Global Constitutionalism, I was able to test my arguments among exceptional colleagues and scholars as well as to read and get to know numerous international scholars.

This book would not have been possible without the institutional and financial support of the Humboldt University Library (open access contribution) and the support of Nomos (especially Johannes Rux). Moreover, I am grateful for the scholarship of DAAD and for being a member at EPEDER – the European PhD Research Group “Unity and Diversity in the European Legal Order” (Einheit und Differenz im Europäischen Rechtsraum) as part of the European Law School at Humboldt University of Berlin (thanks to Yoan Vilain, Matthias Ruffert and Martin Eifert, among others). Finally, I am thankful for the meaningful friendships which have been forged through EPEDER research collaborations (Mascha Hesse, Laura Jung, Vladimir Bogoeski, and others).

My time at the EUI in Florence was a magical period of this journey (thanks to my mentor Urška Šadl and Gabor Halmai’s Working Group Constitutional Law and Politics). I have met inspiring people (Julian Scholtes, Anne-Carlijn Prickartz, Carolin Lerch, Alexander Lazović) and thoroughly enjoyed the beauty, food, and the culture. And all the countless *caffè normale*.

It takes a village to raise a child, and I believe the same holds true for writing a book. I am grateful to the many people who have helped nurture this project. From the Reading Groups (Florence and Berlin) to numerous academic discussions (Smarika, Jakob H., Teodora, Iva, Marcin), to the enriching experience of growing with my students at HUWISU (thanks to Hanno, Pierre, and Sanja), to an amazing collaborative book project

(Marjan Kos and others), and to all the conferences across Europe where I gathered impressions and feedback.

I owe my deepest gratitude to my first and most formative mentor Aleš Novak, who introduced me to legal philosophy and academic thinking during my studies in Ljubljana. Moreover, I am indebted to Matej Avbelj, whom I met in Berlin and with whom I discussed my initial draft research proposal and many more topics thereafter. His openness, friendship, and colorful discussions in Berlin's bars and beer gardens mean a great deal to me.

The most formative experience, however, has been my academic family at Humboldt University of Berlin within the DFG Research Project DynamInt (Dynamic Integration). My sincere gratitude goes to the unwavering support of Kerstin Schuster, Rüdiger Schwarz, and Matthias Ruffert. But mostly, thank you, dear *Dynamienties*, for all your support during lonely days of Covid, our time in the office, for all the mutual reading, constructive criticism, and endless discussions. I especially want to thank Elisavet Lampropoulou, Alba Hernández Weiss, and Moritz Schramm for reading and editing my drafts (and to Anna Sophia Tiedeke), as well as to Charlotte Langenfeld, Anna Sakellarakis, Lukas Huthmann, Friederike Grischek, Julius Richter, Paul Friedl, Sabrina Klein, Frederik Gutmann, Lennart Gau and Caterina Bresci (and all the others – students, visiting and associated colleagues) for sharing this incredible journey with me, particularly during the final stretch. Your contributions have made all the difference, and we have forged lasting friendships.

I am genuinely grateful to my family – Anja, Jernej, Miha, Ati, and Mami – for standing by me through thick and thin, even if only from afar. And to Simon, for the friendship. Furthermore, I am deeply indebted for all the days in Grindau. I was fortunate to find a sense of productive peace there, complemented by long walks through the forest, especially during the period of isolation. Thank you for your unwavering support and warm welcome, which made me feel at home.

Finally, to my rock and my inspiration: with your immense patience, acceptance, support and love, thank you for believing in me. You are the reason I expanded the limits of my world.

Contents

1 Introduction: Identity as Kandinsky <i>Objectives, Contextualisation, the Outline</i>	23
2 A Deconstructive Account <i>Genesis and Critical Assessment of Constitutional Identity in Germany</i>	59
3 Clusters of Identity Claims <i>Shared Constitutional Values, Institutional Diversities, Undermining Identities</i>	129
4 Forgetting Fundamental Rights Identity Claims <i>The New Constitutional Paradigm in Multilevel Fundamental Rights Standards</i>	203
5 Dimensions of Identity <i>Functions, Protagonists, Deficiencies</i>	245
6 Constitutional Identity for the EU <i>Against the Sisyphean Endeavour to Imagine an Identity for the EU</i>	327
7 A Reconstructive Account <i>A Structural Comparison of Identity Claims with Civil Disobedience and Conscientious Objection</i>	369
8 Conclusion	467

Detailed Table of Contents

List of Abbreviations	21
1 Introduction: Identity as Kandinsky	
<i>Objectives, Contextualisation, the Outline</i>	23
1 Setting the Scene – Identity as Kandinsky	25
1.1 Research Questions and Objectives	27
1.2 Methodology and Terminology	32
1.3 Existing Identity Research and Scholarly Interlocutors	34
2 Contextualisation	38
2.1 Delimitation of Competences and National Constitutional Identity	38
2.1.1 Functional Characteristics of the EU’s Competences and its Consequences	39
2.1.2 Retained Exclusive Member States’ Competences	41
2.1.3 Actions Explicitly Prohibited by the EU: Reserved Member States’ Competences	42
2.1.4 Interim Conclusion	44
2.2 European Constitutional Pluralism	45
2.2.1 Competing Claims to Authority	45
2.2.2 Complementing Visions of Constitutional Pluralism: A Point of Departure	47
3 Outline	50
2 A Deconstructive Account	
<i>Genesis and Critical Assessment of Constitutional Identity in Germany</i>	59
1 Introduction	61
2 Theoretical Framework: Constituent Power and Constitutional Form	65

2.1	<i>Pouvoir Constituant</i> and <i>Pouvoir Constitué</i> as Ideal Paradox	65
2.2	Constitutional Populism and Constitutional Form – the Power of the FCC	68
2.3	Carl Schmitt and Identity of the Constitution – A Voluntaristic Account	71
3	Identity Finds its Way into Case Law – The Part and the Legal Principles Underlying Fundamental Rights	75
3.1	The Eternity Clause – Identity Terminology Omitted	75
3.2	Identity: The Part of the Basic Law Dealing with Fundamental Rights	76
3.3	Identity: The Legal Principles Underlying Fundamental Rights	80
4	The Birth of the Contemporary Constitutional Review of EU Law	83
4.1	The Maastricht Treaty and the European Article	83
4.2	The <i>Maastricht</i> Decision: The New Constitutional Review of EU Law	85
4.2.1	The Principle of National Democracy and the Right to Vote	85
4.2.2	Maastricht's Empirical and Normative Assumption	87
4.2.3	Inner Contradiction of the Maastricht Argumentation	88
4.2.4	Neologism of Staatenverbund	89
5	Constitutional Identity and Ultra Vires Review: National Democracy and Five Essential Areas of State	91
5.1	The <i>Lisbon</i> Decision	91
5.2	Constitutional Identity and Ultra Vires Review Introduced	92
5.3	Five Essential Areas of a State – A Theory of State Introduced	93
5.3.1	Five Essential Areas 'Since Always' (seit jeher)	94
5.3.2	Exclusive Control or Substantial Freedom of Action	96
5.4	The Lack of Democratic Legitimacy of the EU	97
5.5	<i>Staatenverbund</i> Intensified and Impossibility of the EU as a Federation	99
5.6	Concluding Remarks	100

6	Finding Appropriate Self-Restraint – The Criterion of Manifest and Structurally Significant Violations	101
6.1	Introduction – Continuity and Revisions	101
6.2	<i>Mangold</i> and the Right to Err	103
6.3	Ultra Vires Only as Manifest and Structurally Significant Violations	104
6.4	Concluding Remarks	108
7	The OMT Saga and Fiscal Independence – About Money	109
7.1	The Context of the Outright Monetary Mechanism	110
7.2	<i>OMT I</i> – FCC’s First Reference ‘Dictate’ to the CJEU	111
7.3	Relationship Between Constitutional Identity and Ultra Vires Review	114
7.4	Article 4(2) and National Constitutional Identity by the FCC	115
7.5	The Right to Vote and Constitutional Review – <i>OMT I</i> , <i>ESM</i> and <i>OMT II</i>	117
7.6	Concluding Remarks	120
8	Since <i>Solange II</i>	122
8.1	<i>EAW</i> – Human Dignity and the Principle of Individual Guilt	122
8.2	Reviewing EU Law Against German Fundamental Rights Standards	123
9	Conclusion	125
3 Clusters of Identity Claims		
<i>Shared Constitutional Values, Institutional Diversities, Undermining Identities</i>		129
1	Introduction	131
2	In the Name of (National Constitutional) Identity	133
2.1	National Constitutional Identity – Muddying the Waters	133
2.2	Legal Intuition and Beyond	135
2.3	The Unbearable Lightness of Identity	141

3	Clusters of Identity Claims	144
3.1	Identity and Fundamental Rights	144
3.2	Shared Liberal Constitutional Commitments – Sameness	145
3.3	Sovereignty – Control and Independence Over Essential Areas	147
3.4	Political and Constitutional Fundamental Structures – Institutional Diversity	149
3.5	Shared Principles and their Idiosyncratic Applications	151
3.5.1	Human Dignity and Identity	153
3.5.2	Equality and Nobility Titles	154
3.5.3	Principles of Criminal Law	156
3.5.4	Interim Concluding Remarks	157
3.6	Sensitive Areas and Unifying Effects	157
3.6.1	Unifying Effect of Fundamental Rights and Freedoms	158
3.6.2	Self-Determination of Churches and Non- Discrimination	159
3.6.3	Recognition of Same-Sex Marriages and Fundamental Freedoms	161
3.7	Protection and Advancement of Language	162
3.7.1	Protection of Languages and Equality of the Member States	163
3.7.2	Language as Identity in the CJEU’s Case Law	164
3.8	History and its Influence on National Constitutional Identity	166
3.8.1	Uneasy Historical Narratives	166
3.8.2	Common State and Questions of Dissolution	167
3.8.3	Colonial Past	170
3.9	Cultural Diversities	171
3.10	Citizenship and Nationality	173
3.11	Interim Conclusions	175
4	Undermining Illiberal Identity Claims	177
4.1	Hungarian Illiberal Democracy – I Threw My Hat in the Air	178
4.1.1	Constitutional Transformation and Illiberal Democracy	179
4.1.2	Relocation of Refugees and Identitarian Constitutional Defence	181

4.1.3	Identity Decision – Historical Constitution	184
4.1.4	National Constitutional Identity and Migration	185
4.1.5	Interim Conclusions	186
4.2	Structures of Judiciary	187
4.2.1	Contextualizing the Struggles of Former One-Party Systems	188
4.2.2	The Trajectory of Changes – Undermining the Judiciary	190
4.2.3	The CJEU’s Milestone Protecting Judicial Independence – ASJP	192
4.2.4	Introduction of Identity to Safeguard Judicial Reform	194
4.2.5	The CJEU Further Strengthens National Judicial Independence	195
4.2.6	Legal Polexit as Climax of the Constitutional Conflict	197
4.2.7	Interim Conclusions	198
5	Conclusion	200
4 Forgetting Fundamental Rights Identity Claims		
<i>The New Constitutional Paradigm in Multilevel Fundamental Rights Standards</i>		203
1	Introduction	205
2	National and Supranational Fundamental Rights Standards	207
2.1	Multilevel Constitutional Design of Fundamental Rights Protection	207
2.2	The Scope of Fundamental Rights Application – A Disputed Matter	209
2.3	Three Levels of Fundamental Rights Protection – Turning Minimum Protection into a Final Norm	211
3	Identity as Protection of National Fundamental Rights Standards	214
3.1	European Identity Clause and Fundamental Rights – Going Beyond	214
3.2	Identity as Commitments, Interpretations and Unique Fundamental Rights	216
3.3	Treating Fundamental Rights Identity Claims Differently	218

4	<i>Right to be Forgotten I</i> – National Standards of Review	221
4.1	<i>To be Forgotten I</i> – Reviewing the Basic Law’s Standards	221
4.2	The Basic Law as the Standard of Review in EU Matters	222
4.3	Embracing or Facilitating Diversity of Fundamental Rights in the EU	224
4.4	Marginalizing the EU Charter but Forgetting Constitutional Identity	226
5	<i>To be Forgotten II</i> – The Change of Paradigm	228
5.1	Direct Application of the EU Charter in Constitutional Complaints	228
5.2	Constructive Pluralism in the Field of European Fundamental Rights	231
5.3	The Tensions of the <i>Right to be Forgotten II</i> – Applying and Interpreting	232
5.4	Co-Shaping the Process of Constitutionalization of the EU	235
6	Forgetting Fundamental Rights Identity Claims	238
7	Conclusion	242
5 Dimensions of Identity		
<i>Functions, Protagonists, Deficiencies</i>		245
1	Introduction	247
2	National (Constitutional) Identities from the EU’s Perspective	251
2.1	Evolution of European Identity Clause under the EU Treaties	251
2.2	Identity as a Core National Responsibility	253
3	National Constitutional Identity: National or Constitutional	258
4	Mutual Constraint between Identity and other Values and Principles	268
4.1	Protecting National Identity to Sacrifice Common European Values	268
4.2	National Constitutional Identity and the Other EU Principles in Accord	276

5	Multilevel Constitutional Relations – From Engagement to Resistance	280
5.1	Deterrence and Engagement	280
5.2	Identity as Dissent and Resistance	284
6	Multifarious Identity Functions	290
6.1	Identity as a Pre-Constitutional Conception to Define the Community	290
6.2	Identity as a Constitutional Argument – <i>Identitarian Adjudication</i>	294
6.3	<i>Identitarian</i> Adjudication Beyond the EU	296
6.4	Protecting the Core of the Constitution	300
7	Identity Protagonists	303
7.1	The Courts	303
7.2	The Legislator	306
7.3	The Executives	308
7.4	Legal Scholarship	311
8	Deficiencies of National Constitutional Identity	313
8.1	From Public Policy to National Identity – Connections and Shortcomings	313
8.2	Possibilities for Misuse and Considerations of Abandoning the Concept	317
8.3	Identity in the Light of Tradition, History and Culture	319
9	Conclusion	322
 6 Constitutional Identity for the EU		
	<i>Against the Sisyphean Endeavour to Imagine an Identity for the EU</i>	327
1	Introduction	329
2	The Oracle of Delphi	332
2.1	Know Thyself	332

2.2	European (Constitutional) Identity – Two Contrasting Methodological Narratives	335
2.3	(Constitutional) Identity as an Evasive Concept	338
2.4	An Endeavour of Numerous Projections – Following Intuition and Creating Meaning	341
2.5	Shared Constitutional Traditions – Comparison and Differentiation	343
3	Identity as Conceptual Substitute for Sovereignty – <i>Nihil Novum Sub Sole</i>	347
3.1	Conceptual History	347
3.2	Sovereignty and Identity Together	350
3.3	European Sovereignty and Neo-Colonial Delusions	352
4	Identity as a Relation	355
4.1	Identity as Relational, not Descriptive	356
4.2	Identified Subject Matter as Idea or Narrative	357
4.3	Singleness and Multitude of Identities	358
5	Tensions Between Identity and Democracy	360
5.1	Identity as Perpetuum Mobile	360
5.2	(Dis)Ability to Change and the Hierarchy of Norms	361
5.3	Law and Democratic Reversibility	362
6	Call the Essential Constitutional Commitments by their Name	365
7	Concluding Remarks	368
7 A Reconstructive Account		
<i>A Structural Comparison of Identity Claims with Civil Disobedience and Conscientious Objection</i>		369
1	Introduction	371
2	Points of Departure – Structural Similarities, Previous Research, Methods and Caveats	373
2.1	On Structural Similarities: The Birth of the Idea	373

2.2	Existing Scholarly Connections of Civil Disobedience and Conscientious Objection with the Acts of State and its Institutions – State Civil Disobedience	376
2.3	Institutions as Agents of Civil Disobedience – Parliaments and Courts	380
2.4	Structural Similarities Explained	383
2.4.1	Civil Disobedience and Solange I – Resistance to Change	384
2.4.2	Conscientious Objection and Sayn-Wittgenstein – Asking for Exemption	387
2.5	Methods of Research – Interdisciplinary Aspect	391
2.6	Caveats	392
2.6.1	The Scope of the Survey – Explored and Overlooked Theories	392
2.6.2	Apples, Oranges, and Anthropomorphism – Comparing Individuals and Constitutions, Civil Society and Judicial Institutions	394
2.6.3	(Un)Productive Journey – What Can We Learn?	398
3	Conscience and Conscientious Objection	400
4	Conscientious Objection in Legal Theory	406
4.1	Conscientious Refusal and Political Principles in the Theory of Justice	406
4.2	Conscientious Objection in the Theoretical Approach of Joseph Raz	410
4.3	When the Law is Doubtful – Dworkin’s Judicial Theory of Civil Disobedience	413
5	Transplants of Conscientious Objection	416
5.1	Nature and Purpose of the Law	416
5.1.1	Legal Paternalism and Self-Regarding Actions	416
5.1.2	Consent	419
5.2	The Spheres of Law	421
5.2.1	Objections Against the State and Beyond	421
5.2.2	Objection on Behalf of the State	423
5.2.3	Conscientious Objection Among Private Individuals	425

5.3	Compensation or Substitute Services	426
5.4	Away with a Comprehensive Legal Doctrine of Conscientious Objection	428
6	Civil Disobedience	430
6.1	Defining Civil Disobedience – The Last Resort, Non-violence, and Openness to Consequences	430
6.2	Moral Justificatory Reasons from Raz	432
6.3	Determining What is Morally Right and Wrong – Conflicting Examples	434
7	Transplants of Civil Disobedience – Modest Guidelines for Justification	438
8	Identity Jurisprudence in the Light of Institutional Civil Disobedience and Constitutional Conscientious Objection	441
8.1	Disobedience as Incentive to Change – Ultra Vires Review	441
8.2	Identity Claims as Constitutional Conscientious Objection – Asking for Exemption	452
9	A Reconstructive Account of National Constitutional Identity	457
9.1	The Motivation for Action – Individual v Collective Interests	457
9.2	Constructive and Undermining Consequences of Resistance – Time will Judge	458
9.3	Discursive or Absolute Resistance	460
9.4	Normative Justificatory Reasons for Action – The Rationale	462
10	Conclusion	464
8	Conclusion	467
1	Closing Insights	469
2	Key Takeaways	470
3	Looking Ahead	476
	Bibliography	477
	Table of Cases	511

List of Abbreviations

Basic Law	German Basic Law: <i>Grundgesetz</i>
CJEU	Court of Justice of the European Union
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EMU	Economic and Monetary Union
EP	European Parliament
ESCB	European System of Central Banks
ESM	European Stability Mechanism
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
FCC	German Federal Constitutional Court
FST	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
GDPR	General Data Protection Regulation
OMT	Outright Monetary Transactions
SPG	Stability and Growth Pact
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WG V	Working Group V

