3

Clusters of Identity Claims

Shared Constitutional Values, Institutional Diversities, Undermining Identities

I agree with Hume, that stability in a society is important, so that it may be better at times to suffer bad laws than to alter these laws so frequently as to undermine the authorities of laws and institutions as such, which may end by causing greater misery than the bad laws and institutions themselves. But peace and stability – still less laws, customs, rules – are not an ultimate value, as are truth, or love, or friendship, or freedom, or art, or justice, or equality, or life itself.

(Isaiah Berlin, *A Matter of Life*)

1 Introduction

Chapter 2 critically outlined the genesis and gradual development of national constitutional identity in Germany, concluding that the respective identity account cannot sufficiently serve as an archetypical comprehensive account across the Member States.

This chapter adopts a broader outlook, observing and analyzing a wide variety of identity claims in a multitude of Member States in the EU. If one is to understand and determine the scope and meaning of identity claims, all identify claims must be considered.

The chapter highlights the overwhelming diversity of understandings of national constitutional identity in theory and in practice. While the overlapping and contradictory descriptions and definitions fail to offer a clear understanding of national constitutional identity, the analyzed case law generates even more incoherence. The first section displays these difficulties and concludes that there is no single coherent common nominator connecting all identity claims. Accordingly, it abandons the pursuit of determining one single coherent theoretical account of national constitutional identity (Section 1).

The next section provides a response to the said diversity. It explores the varying underlying rationales and justificatory reasons for identity claims and evaluates them accordingly. Concretely, the section works out several clusters of identity claims due to their varying normative basis. Claims of national constitutional identity as fundamental rights interpretations and standards will be separately addressed in Chapter 4. Apart from the said fundamental rights cluster, the section presents identities based on shared and common commitments – identity as sameness. It outlines the cluster of identity claims concerning national sovereignty, where the Member States claim their exclusive control and independence over essential areas.

Moreover, the cluster of identity claims protects institutional diversity, referring to political and constitutional fundamental structures. Furthermore, the section highlights a cluster of identity claims which derive from idiosyncratic understandings of shared principles, like human dignity and equality. The special cluster concerns the protection and advancement of the Member States' languages. Finally, the section addresses identities as

historical circumstances, cultural diversities, and connections to the Member States as expressed through nationality and citizenship (Section 2).

The next section shows how the differential classification of identity claims, here articulated through the various clusters of identity claims, enables a better in-depth evaluation concerning their varying legitimacy. Furthermore, the section demonstrates which clusters of identity claims enjoy preponderate legitimacy and where the CJEU consistently rejects them.

The section introduces the clusters of identity claims by presenting different case law, as well as some other legal and political sources. The concrete instances of claims of national constitutional identity serve to illustrate and justify the introduced clusters. In that sense, the section shows as many identity claims as possible, but without following the objective to exhaustively explicate all existing identity claims. In other words, the presented framework of clusters of identity claims serves as a guiding mechanism also for the future or omitted claims of national constitutional identity. Its existence inherently entails normative differentiations (Section 3).

The subsequent section differentiates yet another cluster of identity claims – undermining illiberal identity claims. The reason that the section considers it separately is twofold. First, undermining claims are ab initio considered illegitimate and unacceptable. While the legitimacy and acceptance among the other clusters differ in scope, undermining claims cannot demand and justify the accommodation of EU law. Second, the section here adopts an alternative research methodology. It focuses less on single individual cases mentioning identity, but rather on the general trajectory of respective legal and political entities and the circumstances of how and why one adheres to identity claims. Concretely, it explicates the development in two Member States: Hungary and Poland. Once again, the section does not argue that only these two-cited Member States generate undermining identity claims, but the other way around. Undermining identity claims can be best explicated by the examples of the said political and legal trajectories. In recognizing the pattern, one can apply the following principles and guidelines for other similar circumstances in the other Member States as well (Section 4). The chapter recapitulates with a brief conclusion (Section 5).

2 In the Name of (National Constitutional) Identity

This section briefly highlights the lack of common theoretical scholarly understanding of the meaning of national constitutional identity, showing how the concept of identity is muddying the waters (2.1). Based on the broad conceptual understanding of identity, it presents a wide variety of identity claims across the Member States (2.2). Finally, given the unbearable lightness of the identity concept's meaning, it explicates the lack of an underlying common nominator potentially connecting the presented identity claims into one account (2.3).

2.1 National Constitutional Identity – Muddying the Waters

The meaning of national constitutional identity is not finally determined – its meaning remains open and disputed.[1] Scholars have provided varying descriptions which oscillate between national and constitutional identity, connecting and distinguishing between the identity of the people and the identity of the constitution,[2] referring to legal theory and judicial practice. It appears that (legal) scholarship still does not have the final common answer on how to determine appropriately the meaning of national constitutional identity within the EU and which factors and elements are relevant for its characterisation.

For example, for Michel Rosenfeld, '[s]elf-identity can connotate sameness or selfhood'.[3] Analogously, national constitutional identity is 'based on the dynamic interaction between projections of sameness and images of selfhood'.[4] Aristotelian constitutive understanding conflates the identity of

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

2 José Luis Martí, 'Two Different Ideas of Constitutional Identityidentity of the Constitution v. Identity of the People' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 30.

3 Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 27.

4 Ibid.

a nation and a state (polis), being at odds with the contemporary liberal understanding of constitutionalism.[5] Anderson sees communal identity as socially constructed, imagined because the members of even the smallest nation will never know most of their fellow members.'[6] Fukuyama argued that national identity could be embodied in formal laws and institutions, and language, but it also extends into the realm of culture and values, the stories that people tell about themselves or their shared historical memories.[7]

According to Weiler, '[o]ur constitutions are said to encapsulate fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state, as a community, or as a union'.[8] What is more, for Jacobsohn, 'a constitution acquires an identity through experience, that this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Rather, identity 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. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings.'[9]

However, other scholars refused to project any transcendental meaning into national constitutional identity, making it metaphysical and indeterminable.[10] De Witte argued that national constitutional identities, from the European perspective under Article 4(2) TEU,[11] simply 'respect the institutional diversity of its Member States'.[12] Laurence Burgorgue-Larsen similarly purposely limited herself to looking simply and naively only at

5 Aristotle, *The Politics of Aristotle* (Ernest Barker tr, Oxford Univ PR 1962) 98–9.
6 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2016) 6.
7 Francis Fukuyama, 'Why National Identity Matters' (2018) 29 Journal of Democracy 5, 8.
8 JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3 International Journal of Constitutional Law 173, 184.
9 Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 7.
10 Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017) 13.
11 Consolidated version of the Treaty on European Union [2007] OJ C326/13, art 4(2).
12 Bruno de Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (2021) 27 European Public Law 559, 561.

the case law of the CJEU and determined the 'jurisprudential banality' of national constitutional identity.[13]

Some of the above-cited descriptions and definitions of national constitutional identity carry an almost poetic aura; they are highly abstract, paradoxical and inexplicable for legal practice. They muddy the waters rather than elucidating the concept. Accordingly, the research resorts to the best alternative – the existing claims of national constitutional identity. If one is to reach a comprehensive understanding of the meaning and scope of national constitutional identity, one should analyze judicial practice throughout the Union and its Member States, establishing a pattern of given meanings and creating a coherent theoretical account. The subsequent sub-section therefore turns to the expressions of national constitutional identity across the Member States in the EU.[14]

2.2 Legal Intuition and Beyond

The following expressions of national constitutional identity exhibit the wide varieties of the concept. The research adopts the approach of Callies and Schyff, who offered a broad definition of national constitutional identity to devise an inclusive account. National constitutional identity is defined as:

> 'the core or fundamental elements or values of a particular state's constitutional order as the expression of its individuality. Individuality does not have to imply the exclusivity of a whole identity or some of its elements, but it does imply an identity which is rooted in national self-reflection. The definition of constitutional identity is descriptive and does not require any particular normative relationship between its (possible) contents and the EU legal order.'[15]

13 Laurence Burgorgue-Larsen, 'A Huron at the Kirchberg Plateau or a Few Naive Thoughts on Constitutional Identity in the Case-Law of the Judge of the European Union' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 304.

14 The purpose of the identity expressions is not to include *all* possible instances of identity argument, but rather to demonstrate their varying nature and meaning.

15 Christian Calliess and Gerhard van der Schyff, 'Constitutional Identity Introduced' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 7.

The sub-section demonstrates how legal intuition struggles to extrapolate the common and connecting denominator among the following claims of national constitutional identity.

- The EU-Canada Comprehensive Economic and Trade Agreement (CETA) violates Irish juridical sovereignty and thus the Irish constitutional identity – which could be potentially remedied should the court(s) acquire the power to stop enforcement of an award that materially compromises the constitutional identity of the State or fundamental principles of its constitutional order, or its obligation to give effect to EU law;[16]
- The powers for maintaining law and order and safeguarding internal security;[17]
- In the light of Article 4(2) TEU, the objective of safeguarding national security against terrorist activity is capable of justifying measures entailing more serious interferences with fundamental rights than those that might be justified by the objectives of combating crime and of safeguarding public security;[18]
- An obligation for the higher education institutions to provide teaching solely in the official language of that Member State;[19]
- Article 4(2) TEU concerns internal reorganization of powers within a Member State;[20]
- Constitutionally determined relationship between the state and autonomous religious communities, enjoying the right of self-determination, which justifies the reduced scope of judicial review with respect to aspects of employment relations;[21]

16 Supreme Court of Ireland, Case IESC 44, Patrick Costello v. The Government of Ireland, 11 November 2022. See also Oran Doyle, 'Trojan Horses and Constitutional Identity' (*Verfassungsblog*, 23 November 2022) <https://verfassungsblog.de/trojan-horses-and-constitutional-identity/> accessed 24 February 2023.

17 Joined Cases C-368/20 and C-369/20 NW *gegen Landespolizeidirektion Steiermark und Bezirkshauptmannschaft Leibnitz* (*Steiermark*) [2021] ECLI:EU:C:2021:821, Opinion of AG ØE, para 53.

18 Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier ministre and Others* (*La Quadrature*) [2020] ECLI:EU:C:2020:791, paras 134–8.

19 Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others* (*Cilevičs*) [2022] ECLI:EU:C:2022:638, para 87.

20 Case C-51/15 *Remondis GmbH & Co. KG Region Nord v Region Hannover* (*Remondis*) [2016] ECLI:EU:C:2016:985, para 41.

21 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (*Egenberger*) [2018] ECLI:EU:C:2018:257.

- Titles of nobility are forbidden pursuant to the principle of equality in the light of history and fundamental values;[22]
- 70 years of common statehood and common constitutional tradition in a common state, together with peaceful dissolution as a completely idiosyncratic and historic situation with no parallel in Europe, is a building block of constitutional identity;[23]
- The extraordinary nature of World War II justifies the expulsion of (Sudeten) Germans and Hungarians and the confiscation of enemy property, based on the collective responsibility of German (and also Hungarian) people;[24]
- Limitation of the already achieved procedural level of protection of fundamental rights and freedoms violates constitutional identity;[25]
- Member States have the right to determine the conditions for exploiting their energy resources, their choice between different energy sources, and the general structure of their energy supply, including nuclear energy;[26]
- The statute of limitations is a matter of material and not procedural law – henceforth, a matter of national constitutional identity;[27]
- Security, defence cooperation, criminal law, migration and asylum, citizenship and fiscal policy are areas of national constitutional identity;[28]

22 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (*Sayn-Wittgenstein*) [2010] ECLI:EU:C:2010:806.

23 Case C-399/09 *Marie Landtová v Česká správa socialního zabezpečení* (*Landtová*) [2011] ECLI:EU:C:2011:415; Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012.

24 Czech Ústavní Soud, Case Pl. ÚS 14/94 *Dreithaler* 8 March 1995.

25 Czech Ústavní Soud, Case Pl. ÚS 36/01 *Bankruptcy Trustee* 25 June 2002, p 10.

26 [26] Case C-594/18 P *Republic of Austria v European Commission* (*Hinkley Point*) [2020] ECLI:EU:C:2020:742.
Pursuant to the Article 194 (2)(2) TFEU, the CJEU de facto recognized the exclusive competences of the Member States to choose the core of energy, even when the matter is intrinsically connected with the state-aid, which as the prerogative of the EU, inter alia, has to pursue an objective of common interest.

27 Case C-42/17 *Criminal proceedings against M.A.S. and M.B.* (*Taricco II*) [2017] ECLI:EU:C:2017:936.

28 For all 4 exceptions from EU law in Denmark see 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) 132.

- Clean environment (environmental sustainability), gender equality and welfare systems constitute constitutional identity;[29]
- A democratic form of government and democracy which presupposes freedom of speech, freedom of assembly and freedom of association;[30]
- Judge-made principles of EU law, such as the general principle of non-discrimination on the grounds of age, are not binding because the said principle did not have its origin in a specific Treaty provision;[31]
- To process and review the right to asylum regardless of the lack of formal jurisdiction within the Schengen area;[32]
- The indivisibility of the Republic and the unity of the people both prohibit the use of regional and minority languages other than the official state language in public services;[33]
- The principle of *la laïcité républicaine* – secularism which guarantees freedom of conscience but solely within the limits of respect of public order, being distinct from the right to manifest religion or belief;[34]
- The life of the unborn, constitutionally protected, cannot be balanced with any other principle;[35]
- The right to life, family and education, taxation and security and defence;[36]

29 Ibid. 128, 132.

30 Ibid. 127. See also Danish Højesteret, Case Ugeskrift for Retsvæsen 1998.800H [1998]; Danish Højesteret, Case Ugeskrift for Retsvæsen 2013.1451H [2013]; Danish Højesteret, Case Ugeskrift for Retsvæsen 2017.824H [2017].

31 Helle Krunke and Sune Klinge, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' (2018) 3 European Papers 157. Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS' (*Verfassungsblog*, 30 January 2017) <www.verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos> accessed 24 February 2023.

32 French Conseil Constitutionnel, Decision 91-294 DC 25 July 1991. 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) 150.

33 French Conseil Constitutionnel, Decision 2004-505 DC *Constitutional Treaty* 19 November 2004, para 18. See also Millet (n 16) 149.

34 Millet (n 32) 149.

35 Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* (*Grogan*) [1991] ECLI:EU:C:1991:378.

36 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L60/129.

- Constitutional identity remains in close relation to the concept of national identity, which also includes history, traditions and culture;[37] the understanding of the elements of identity arises from the context of historical and cultural experiences;[38]
- A laser game with toy guns, where the players simulate killing, violates the principle of human dignity and thus also constitutional identity as the core value of the constitution;[39]
- The significance of national sovereignty shall be seen as constitutional and systemic identity;[40]
- The State's territorial integrity is an indispensable part of constitutional identity;[41]
- The following areas have to remain within the exclusive national domain as part of national constitutional identity: substantial and procedural criminal law; monopoly on the use of force by the police and the military (war and peace); taxation, public revenue, expenditures and fiscal decisions; social policy considerations or welfare; and culture, education and religion;[42]
- The advancement of Irish is designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture;[43]
- The Lithuanian language constitutes a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities; Article 4(2) TEU provides that the Union must also respect

37 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, p 23.
38 Ibid. 41.
39 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bon* (*Omega*) [2004] ECLI:EU:C:2004:614.
40 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, p 38.
41 José Martín Y Pérez de Nanclares, 'Constitutional Identity in Spain: Commitment to European Integration without Giving Up the Essence of the Constitution' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 283.
42 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 249, 252.
43 Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* (*Groener*) [1989] ECLI:EU:C:1989:599, para 18.

the national identity of its Member States, which includes protection of a State's official national language;[44]
- Respect and promotion of the diversity of cultures is ultimately an expression of the Union to respect national identities under Article 6(3) EU;[45]
- Distributing information in Ireland, where abortion (was) constitutionally prohibited, about the abortion possibilities in other Member States;[46]
- The fundamental nature of the institution of marriage as a union between a man and a woman, having constitutional status, justifies the restriction of Article 21 TFEU,[47] as the refusal to recognize same-sex marriages concluded elsewhere in the Union, on the grounds of national identity;[48]
- The protection of constitutional self-identity may be raised when Hungary's linguistic, historical and cultural traditions are affected;[49]
- Relocation of asylum-seekers has a greater 'cultural impact' on the virtually homogeneous population of Poland, whose population is different from a cultural and linguistic perspective;[50]

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44 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, paras 84, 86.

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

46 Case C-159/90 *Grogan* [1991] ECLI:EU:C:1991:378. See also Eoin Daly, 'Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019). See also Gráinne de Búrca, 'Fundamental Human Rights and the Reach of EC Law' (1993) 13 Oxford Journal of Legal Studies 283.
The Irish Constitution has a normative 'identity', based on popular sovereignty, which is not based on any substantive principle, but rather on the procedural mechanism.

47 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 21.

48 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.

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

50 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.

– Constitutional pluralism enshrined in Article 4(2) TEU also guarantees that each Member State may shape its own judicial system in a sovereign manner; constitutional identity sets the limit for the regulatory intervention of the EU;[51]
– The role of Christianity in preserving nationhood; migration as an attack on Europe and its destruction.[52]

2.3 The Unbearable Lightness of Identity

The above-cited claims of identity vary from high generality to astonishing specificity. They were issued by courts and claimed by politicians, derived from written texts, or construed by interpretation. Moreover, they embody specific legal rights and sociological aspects of culture and tradition beyond the confines of legal parameters.

Indeed, the initial scope of identity was defined in a broad sense, not to exclude any potential understanding of identity. Identity claims are understood as 'the core or fundamental elements or values of a particular state's constitutional order, as the expression of its individuality, and as the content of Article 4(2) TEU, which refers to national identity that can be found in the fundamental structures, political and constitutional, inclusive of regional and local self-government'.[53] Naturally, the short descriptions and summaries above cannot do justice to all the relevant details and specificities contextualizing the use and application of identity. Yet, they are all examples which claim(ed) to have a link with national constitutional identity.

The listed identity claims arguably leave an observer with an uneasy feeling of confused legal intuition. One simply cannot find a common denom-

51 The Chancellery of the Prime Minister, 'White Paper on the Reform of the Polish Judiciary' 170, 206, 207 <https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chanceller-white-paper-3-18.pdf>.

52 Viktor Orbán, 'Prime Minister Viktor Orbán's Speech at the 30th Bálványos Summer Open University and Student Camp' (30th Bálványos Summer Open University and Student Camp, Tusnádfürdő (Băile Tuşnad), Romania, 27 July 2019) <www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp> accessed 24 February 2023. See also the Hungary's Constitution of 2011 with Amendments through 2013.

53 Krunke (n 28) 114.

inator which would serve as the connecting underlying glue, explaining identity through praxis.[54]

Except if identity purposely assumes the lack of any potential understanding from the outside view. In that case, one would have to accept a self-restrained view, that one cannot judge and evaluate the other's national constitutional identity because it is, by definition, out of the reach of anyone except the respective agent. In the same manner, it would be impossible to determine and evaluate the other's judgements of taste or thoughts because they remain deeply subjective and subject only to individual determination.

Can the European multilevel constitutional Verbund, in the light of constitutional pluralism, adopt this view and tolerate the identity concept that it is entirely immune from any external evaluation? The initial hypothesis of the research here rejects this vision – even in the light of constitutional pluralism.[55] If several constitutional authorities concurrently claim the power and competence to give an ultimate deliberation on the subject matter, the said matter must be decided due to the underlying normative justifications. Hence, identity signals constitutional competition on normativity and justification.[56]

Accordingly, one must investigate what lies behind the cited claims of national constitutional identity. Only when the varying underlying rationales become apparent would one be better equipped to determine the legitimacy of a distinctive identity claim. The following section undertakes this objective. It identifies several distinctive clusters of identity claims,

54 Fabbrini and Sajó (n 1) 467.

55 Maduro and Kumm both presuppose common and shared values and principles as a starting point, against the vision of constitutional pluralism which insists on radical relativity. See Matej Avbelj and Jan Komárek, 'Four Visions of Constitutional Pluralism', *EUI Working Paper LAW No. 2008/21* (European University Institute 2008) 17 <https://cadmus.eui.eu/handle/1814/9372> accessed 24 February 2023. 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) 234.

56 The proposition above is not without its own challenges. Dworkin argued 'that a state that accepts integrity as a political ideal has a better case for legitimacy than one that does not'. See Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press 1986) 192. See also Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 129.

which encourages better contextualization, differentiation among them and eventually evaluation with improved understanding.[57]

57 Scholtes similarly focused on one specific type of identity claims, namely, abusive claims. See Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534.

3 Clusters of Identity Claims

The following section introduces several partially intertwined yet distinctive clusters of identity claims. Their unique normative foundations can help both theory and judicial practice to determine the scope of the legitimacy of identity claims in relation to EU law.

First, national constitutional identity as idiosyncratic national standards and interpretation of fundamental rights – *fundamental rights identity claims* (3.1). Moreover, claims of national constitutional identity are based on common and shared principles and values – identity as sameness (3.2). Furthermore, identity claims which require national control and independence over the essential areas of political self-determination are often articulated as sovereignty (3.3). The next cluster of identity claims concerns institutional diversity, referring to political and constitutional fundamental structures (3.4). What is more, the cluster of identity claims derives from idiosyncratic understandings of shared constitutional principles (3.5). The subsequent clusters of identity claims protect politically and legally perceived sensitive areas (3.6) and protection and advancement of language (3.7). Additionally, the sub-section presents a cluster of identity claims alluding to special historical circumstances (3.8). Finally, the last two clusters concern cultural considerations (3.9) and attachment to the state as expressed through nationality and citizenship (3.10). The sub-section sums up with interim conclusions (3.11).

3.1 Identity and Fundamental Rights

One of the most significant types of identity claims relates to fundamental rights and their idiosyncratic national standards as determined through judicial interpretation.[58] These *fundamental rights identity claims* deserve

58 François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 European Public Law 571, 579. See i.e. critical view on national constitutional identity as protection of fundamental rights in Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:564, Opinion of AG Bot, para 179: 'a concept demanding protection for a fundamental right must

special attention and are thoroughly and independently addressed in Chapter 4.[59] Here it must suffice to say that multilevel fundamental rights protection is currently subject to progressive changes[60] requiring separate evaluation of this type of identity claim.[61]

3.2 Shared Liberal Constitutional Commitments – Sameness

National constitutional identity as shared liberal constitutional commitments serves to protect the basic fabric and ideological orientation of the respective political entity. Because the Member States and the Union under the current Lisbon Treaty share these common values and principles, identity here acquires the meaning of *sameness*.[62] Consequently, one cannot claim national constitutional identity in the said sense against the EU.[63]

Identity as the basic political and constitutional product of the respective entity can be invoked against other political entities globally committed to conflicting values and principles: for example, entities which do not recognize freedom of speech, democratic forms of government, and respect for human rights. Exceptionally, one could imagine a claim of national constitutional identity against the EU should the said supranational entity radically deteriorate into a different type of polity, de facto abandoning shared and common values and principles.

Identity claims as protection of the basic constitutional commitments is of a general nature, most often expressed in the judicial decisions concerning ratification of EU treaties, most notably the Lisbon Treaty.[64] For exam-

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not be confused with an attack on the national identity or [...] the constitutional identity of a Member State.'

59 See a critical view on identity as fundamental rights standards in Monica Claes, 'National Identity and the Protection of Fundamental Rights' (2021) 27 European Public Law 517.

60 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; Austrian Verfassungsgerichtshof, Case U 466/11, 14 March 2012.

61 Matthias Goldmann, 'As Darkness Deepens: The Right to Be Forgotten in the Context of Authoritarian Constitutionalism' (2020) 21 German Law Journal 45, 46.

62 Julien Sterck, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law' (2018) 24 European Law Journal 281.

63 Gerhard van der Schyff, 'Constitutional Identity of the EU Legal Order: Delineating Its Roles and Contours' [2021] Ancilla Iuris 1.

64 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 131.

ple, Krunke argued that Danish national constitutional identity demands that 'Denmark must have a democratic form of government',[65] 'must remain a democracy',[66] and 'the human rights protection in the Constitution must be upheld'.[67] Moreover, a democratic form of government and democracy presupposes freedom of speech, freedom of assembly, and freedom of association.[68] In addition, gender equality, a clean environment and a welfare system are also part of Danish national constitutional identity.[69]

Similarly, in assessing the constitutionality of the Lisbon Treaty, the Latvian Constitutional Court stated that the rule of law, separation of powers, fundamental freedoms and democracy are essential guarantees which cannot be infringed by a delegation of competences.[70] The Polish Constitutional Tribunal highlighted that the EU shares the same basic commitments, namely, 'democracy, respect for the rights of the individual, cooperation between the public powers, social dialogue as well as the principle of subsidiarity'.[71]

Finally, as explicated in Chapter 2, *Frontini*[72] and *Solange I*[73] were typical examples of protecting the core commitments of national legal orders: the commitment and guarantee to provide adequate protection of fundamental rights.

To conclude, while arguments about the core commitments of the political entities enjoy the highest legitimacy, they only have a symbolic significance considering the shared values and principles among the Member States and the EU.

65 Krunke (n 28) 125.
66 Ibid. 126.
67 ibid.
68 Ibid. 127. See also Danish Højesteret, Case Ugeskrift for Retsvæsen 1999.1798H [1999].
69 Krunke (n 28) 128, 132.
70 Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 German Law Journal 917, 956.
71 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, p 25.
72 Italian Corte Costituzionale, Case 183/1973 *Frontini* 27 December 1973; Italian Corte Costituzionale, Case 170/84 *Granital* 8 June 1984. See also Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019) 15 European Constitutional Law Review 731.
73 BVerfGE 37, 271 *Solange I* 29 May 1974.

3.3 Sovereignty – Control and Independence Over Essential Areas

'In saying identity, one means sovereignty',[74] wrote Wischmeyer. Weiler, stating that 'mobilizing in the name of sovereignty is passé; mobilizing to protect identity by insisting on constitutional specificity is à la mode'.[75] Many other scholars have also highlighted the connectedness and interchangeability of both concepts.[76]

The sub-section here refers to identity articulated as sovereignty in the following sense. The Member States require independent control over certain *essential* areas of their self-governance. They do not refer to their sensitive legislative areas or to a potential transgression of the conferred competences by the EU, but to the areas they consider indispensable for their (independent) existence. In other words, sovereignty here concerns the essential areas of a state which cannot be transferred to the EU. The following examples explicate the argument.

The German *Lisbon*[77] decision was thoroughly explained in Chapter 2: the German Federal Constitutional Court (FCC) demanded that five essential areas remain under the independent control of Germany: substantial and procedural criminal law; monopoly on the use of force by the police and the military (war and peace); taxation, public revenue, expenditures and fiscal decisions; social policy considerations or welfare; and finally, culture, education and religion.[78]

Similarly, although not under the baton of the judiciary but in a political dialogue between Danish and EU institutions, Denmark obtained four major exceptions from the EU. Following the rejective outcome of the Maastricht referendum, Denmark opted out of the areas of monetary union, common security and defence, justice and home affairs, and citizenship of the EU.[79] Krunke argued that these four areas present the national con-

74 Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 Archiv des öffentlichen Rechts 415, 427.

75 Joseph HH Weiler, 'A Constitution for Europe? Some Hard Choices' (2002) 40 Journal of Common Market Studies 563, 569.

76 Monika Polzin, 'Irrungen und Wirrungen um den Pouvoir Constituant: Die Entwicklung des Konzepts der Verfassungsidentität im deutschen Verfassungsrecht seit 1871' (2014) 53 Der Staat 61, 65ff; Mattias Wendel, *Permeabilität Im Europäischen Verfassungsrecht*, vol 4 (1st edn, Mohr Siebeck 2011) 574.

77 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009.

78 Ibid. paras 249, 252.

79 Krunke (n 28) 132. See alsoTreaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts -

stitutional identity of Denmark since, in Denmark, 'political institutions, having such a strong platform in the separation of powers, can contribute to defining constitutional identity'.[80] Moreover, the Danish Supreme Court stated in the Danish *Maastricht*[81] decision that Denmark must remain an independent state.[82]

Similar objections concerning potential loss of sovereignty, although perhaps less specific, were made elsewhere. The Latvian Constitutional Court argued that the sovereignty of the State and the people could not be infringed by the EU.[83] Additionally, the Polish Constitutional Tribunal explicitly emphasized the significance of national sovereignty as a constitutional and systemic identity, while referring to similar judgements also in other Member States:

> 'A common characteristic of those adjudications [Czech Republic, Germany, Hungary, French Republic, and Austria] is the emphasis on the openness of the constitutional order with regard to European integration, and the focus on the significance of constitutional and systemic identity – and thus sovereignty – of the Member States [...] On the basis of those Treaty provisions which regard the Union as an international organisation, and not as a federal state, [...] European constitutional courts confirm the significance of the principle of sovereignty reflected in the provisions of the state's constitution'.[84]

As highlighted in the German example, the exact definition of the nationally reserved areas in the name of sovereignty is an easy target for critique. 'Sovereignty describes the characteristic of the absolute independence of a unit of will from other effective universal decision-making units.'[85] Dyzenhaus's cited definition indicates how far away from full sovereignty are the

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Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community - Protocol on the position of Denmark [1997] OJ C340/101.

80 Krunke (n 28) 121. See also Helle Krunke and Felix Schulyok, 'National Citizenship and EU Citizenship: What Actual Competence Is Left for the Member States in the Field of Citizenship?' in Thomas Giegerich, Oskar J Gstrein and Sebastian Zeitzmann (eds), *The EU Between 'an Ever Closer Union' and Inalienable Policy Domains of Member States* (Nomos 2014).

81 Danish Højesteret, Case Ugeskrift for Retsvæsen 1998.800H [1998].

82 Ibid. p 53, subsection 9.8. See also Krunke (n 28) 126.

83 Claes and Reestman (n 70) 956.

84 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, p 38.

85 Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (David Dyzenhaus ed, Oxford University Press 2019) 124.

Member States in the EU. Hence, claiming sovereignty tells little about the factual and normative limitations of a state's control over the respective subject matters. The question essentially concerns the potential limits of the conferral of powers from a national to a supranational political entity. It is questionable whether the apex courts are the appropriate sovereign power which ought to determine that political question.[86]

3.4 Political and Constitutional Fundamental Structures – Institutional Diversity

A specific cluster of identity claims concerns fundamental structures, political and constitutional, of the Member States. In other words, it refers to institutional diversity. This is also the wording of the European identity clause, Article 4(2) TEU, which will be elaborated in Chapter 5. The said provision protects 'fundamental structures, political and constitutional, inclusive of regional and local self-government'.[87]

Identity as institutional diversity acknowledges different political and constitutional structures in the Member States, such as monarchical structures, presidential and parliamentary systems, referenda typical in Ireland, different electoral systems, and the status of federal and sub-federal structures.

For example, the Danish realm includes Denmark, the Faroe Islands and Greenland. The latter two are included in the Danish Constitution, share their citizenship, the Supreme Court, foreign security and defence policy, and monetary policy.[88] Yet, the Faroe Islands and Greenland both have self-government in all other areas, they have a distinctive heritage and history, and they are not part of the European Union.[89]

The Catalan secessionist movement is another burning issue with a distinct regional and constitutional context. Whereas Spanish Constitutional scholars 'seem to agree on the position that ensuring the State's territorial

86 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).

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

88 Krunke (n 28) 128.

89 Ibid.

integrity is an indispensable part of constitutional identity',[90] the Spanish Constitutional Court also 'settled that any part of the Constitution may be amended. Even core principles [...], such as the indivisibility of Spain, are amendable.'[91]

However, the EU must respect national and regional fundamental structures as part of national constitutional identity. That confirms why the EU was tiptoeing around the utterly shocking events of police brutality, trying to physically prevent the (illegal) Catalan independence referendum in October 2017. The ballot aimed to approve the resolution declaring independence from Spain, but it was against the constitutional decision of the Constitutional Court of Spain.

There are many other examples where the Member States adhere to their autonomous political and constitutional fundamental structures as part of their national constitutional identity. The most general identity claims concerning fundamental structures, political and constitutional, are, for example, claims to refer to a republican state as a constitutional form. Article 89(5) of the French Constitution on amendments to the Constitution specifically states that 'the republican form of government shall not be the object of any amendment'.[92] The German Eternity clause, Article 79(3) of the Basic Law, prohibits any amendments affecting the division of the Federation into Federal States (*Bundesländer*) as well as their legislative participation.[93]

Moreover, the CJEU specifically stated in the *Digibet*[94] decision concerning restrictions on gaming and betting activities, which varied in different federal states in Germany due to the competence on the subject by the federal states, that:

> 'the division of competences between the Länder cannot be called into question, since it benefits from the protection conferred by Article 4(2)

90 de Nanclares (n 41) 283.

91 Ibid.

92 See the French Constitution, adopted by the Referendum of September 28, 1958 and promulgated on October 4, 1958, art 89(5). See also Claes and Reestman (n 70) 952.

93 See the German Basic Law, art 79(3): 'Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig.'

94 Case C-156/13 *Digibet Ltd and Gert Albers v Westdeutsche Lotterie GmbH & Co. OHG* (*Digibet*) [2014] ECLI:EU:C:2014:1756. See also Case C-51/15 *Remondis* ECLI:EU:C:2016:985, para 40.

> TEU, according to which the Union must respect *national identities*, inherent in their fundamental structures, political and constitutional, including regional and local self-government.'[95]

Furthermore, claims of national constitutional identity concerning institutional diversity refer also to how the Member States establish and reform their institutions. For example, Poland stated that the protection of national constitutional identity guarantees that each Member State shapes its own judicial system in a sovereign manner, excluding any regulatory intervention by the EU.[96] As de Witte argued, even though the CJEU insisted on the independence of the judiciary, it 'nevertheless refrained from setting out a template for how judicial councils should be composed and how judicial appointments should happen in the Member States'.[97]

A wide range of identity claims concern fundamental structures, political and constitutional.[98] Among others, the respective cluster of identity claims includes regional and local dimensions, as recognized by the respective Member State,[99] where the relationships remain ambiguous and undetermined, as Diane Fromage has explicated.[100] Finally, although Article 4(2) TEU specifically protects the described institutional diversity as part of national constitutional identity, the CJEU's case law indicates that respect for institutional diversity is subject to other respective considerations.

3.5 Shared Principles and their Idiosyncratic Applications

Identity claims can refer to special and idiosyncratic applications of shared and common principles. These specific expressions of general principles are not merely constitutional interpretations which are constantly chang-

95 Ibid. para 34 (emphasis added).
96 The Chancellery of the Prime Minister (n 51).
97 de Witte (n 12) 566. Cf Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment' (2011) 7 European Constitutional Law Review 355.
98 See e.g. also Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais (T-267/08) and Communauté d'agglomération du Douaisis (T-279/08) v European Commission* [2011] ECLI:EU:T:2011:209, paras 61, 62, 88.
99 de Witte (n 12) 565.
100 Diane Fromage, 'National Constitutional Identity and Its Regional Dimension Post-Lisbon as Part of A General Trend Towards Multilevel Governance Within the EU' (2021) 27 European Public Law 497, 511.

ing, but rather the long-established and deeply rooted understanding of them.

For example, the separation of state and church is a common and shared principle among the Member States. Yet, in the United Kingdom of Great Britain and Northern Ireland (UK), when still a Member State of the EU, the said constitutional monarchy is ruled by the monarch, who is concurrently the Supreme Governor of the Church of England.[101] In Germany, the public tax authorities collect and distribute taxes of the churches for the churches and have religious lessons in public schools. In France, under the principle of the secular state, *laïcité républicaine*, the said separation exists in a considerably more consistent way.[102] Moreover, one understands *laïcité républicaine* as part of the French national constitutional identity.[103] This brief example indicates how differently one can understand the same principle of separation of state and church in the various Member States, subject to different historical, geographical, political and other circumstances underpinning legal and constitutional arrangements.

The sub-section outlines three further examples of the identity cluster concerning idiosyncratic expressions of shared constitutional principles. In all three instances, the CJEU recognized claims of national constitutional identity and accommodated EU obligations of the respective Member States accordingly. Claims of national constitutional identity concern the German understanding of human dignity in the *Omega*[104] decision (3.5.1), the Austrian understanding of equality principles in the *Sayn-Wittgenstein*[105] decision (3.5.2), and the Italian understanding of the statute of limitations as material criminal law, and thus subject to the principle of legality in the *Taricco II*[106] decision (3.5.3).

101 Protection of these constitutional structures would be better situated under the identity cluster of institutional diversities. Here it only highlights the sociological and political relationship between church and state, which is translated into constitutional principles and other legal rules.

102 Giulio Ercolessi and Ingemund Hägg, 'Recent Developments in France Concerning the Laïcité' in Fleur de Beaufort and Patrick van Schie (eds), *Separation of church and state in Europe* (European Liberal Forum 2012) 101ff.

103 Millet (n 32) 149.

104 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614.

105 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.

106 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:936.

3.5.1 Human Dignity and Identity

The principle of human dignity is the foundation and a substratum of all fundamental rights. The precise scope of human dignity and its concrete characteristics are disputed.[107] Some scholars claim that this principle itself incorporates the most deviant acts (torture, inhumane treatment, murder, rape etc.),[108] whereas others see it as a symbolic foundation which signals the first value of constitutionalism, more concretely articulated by fundamental rights.[109]

Human dignity is concurrently a value of the EU under Articles 2 TEU and 1 of the EU Charter.[110] At the same time, as shown in Chapter 2, it has served as a yardstick to justify a review of EU law in Germany.[111] Accordingly, it is a general principle which inevitably creates reasonable disagreements[112] across jurisdictions and among lawyers on its exact scope and meaning.

Respect for Germany, and a particular understanding of human dignity as part of its national constitutional identity, was recognized by the CJEU in the *Omega* decision, where the referring court stated that human dignity might be infringed in laser games. The German Federal Constitutional Court (FCC) argued that the players who simulate war and killing with their laser toy guns violate the German understanding of human dignity, and thus the core constitutional value of the German Basic Law. It stated:

> 'human dignity is a constitutional principle which may be infringed [...] by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected,

107 Aharon Barak (ed), 'Human Dignity as a Value and as a Right in Constitutions', *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 51ff.

108 Ibid. 65.

109 Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 20 Stellenbosch Law Review 171, 180.

110 Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and Its Interpretation Before the European Court of Justice' (2012) 33 Liverpool Law Review 281, 286. Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13, art 2.

111 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015.

112 Aharon Barak (ed), 'Human Dignity in German Constitutional Law', *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 232ff.

> such as the representation, as in this case, of fictitious acts of violence for the purposes of a game.[113]

The CJEU accepted this claim and allowed Germany to forbid this aspect of the game in Germany. The described understanding of human dignity thus justified the forbidden simulation of killing in a laser game. The case is symbolic of the relationship between the national and supranational levels, without having profound consequences for either party.[114]

3.5.2 Equality and Nobility Titles

The second *Sayn-Wittgenstein*[115] decision concerns the principle of equality and prohibition of nobility titles. Unlike the *Omega* decision, the argument here did not stem from the judiciary but from the statute of constitutional nature.

Ilonka Fürstin von Sayn-Wittgenstein was an Austrian citizen residing in Germany. She was adopted by a German citizen, Mr Lothar Fürst von Sayn-Wittgenstein, and acquired his surname. After 15 years of continuously using this name as an adoptee[116] and having a company named and registered in this as her full name, the Austrian administrative authorities eventually realized that this was against the law and thus informed her of their intention to change her surname in the register of civil status from Fürstin von Sayn-Wittgenstein to Sayn-Wittgenstein. Due to Austrian law on the abolition of the nobility, a citizen is not allowed to have or acquire a new surname, including a former title of nobility.

The law has constitutional status, and goes back to 1919 when the Austrian legislature abolished the nobility and its honorary privileges, including the display of their status, titles and ranks if not connected with professional, academic or artistic abilities. The titular particles, for example, *von*, *Rit-*

113 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614, para 12.

114 Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 German Law Journal 917, 940.

115 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.

116 In the process of adoption, the German authorities would have to apply Austrian laws in relation to the rules of the surname, prohibiting any nobility titles; however, the adoption decision did not pay attention to this rule. Hence, her surname was being defined as Fürstin von Sayn-Wittgenstein. Another mistake was made by the Austrian authorities, which was simply to put this name into the register of civil status. They only tried to correct this entry 15 years later.

ter (knight), *Freiherr* (baron), *Graf* (count), *Fürst* (prince), *Herzog* (duke) and other relevant designations of status were prohibited and abolished at constitutional level.

The case ended up before the CJEU, where the Austrian government argued that 'in the light of the history and fundamental values of the Republic of Austria',[117] this legislative prohibition reflected the fundamental decision of the newly formed state 'in favour of the formal equality of treatment of all citizens before the law'.[118] The Austrian government further claimed that the law on the abolition of the nobility had to be seen in the light of Austrian constitutional history, and that it constituted a fundamental decision in favour of formal equality.[119]

Despite the clear violation of freedom of movement by not recognizing the surname as determined in other Member States, as established by previous case law,[120] the CJEU recognized the argument of identity.[121] It decided that under Article 4(2) TEU, the Austrian authorities might pursue the fundamental constitutional objective – the principle of equality, by prohibiting nobility titles.[122]

117 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, para 75.

118 Ibid. para 74.

119 Some scholars argued that it is not a decision about fundamental rights, but rather about fundamental structures. See Georg Lienbacher and Matthias Lukan, 'Constitutional Identity in Austria: Basic Principles and Identity beyond the Abolition of the Nobility' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 55. Others understand it as a fundamental rights issues. Cf Elke Cloots, 'Constitutional Rights and Primary EU Law' in Elke Cloots (ed), *National Identity in EU Law* (Oxford University Press 2015) 266.

120 Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* (*Grunkin and Paul*) [2008] ECLI:EU:C:2008:559. See also later case law: Case C-438/14 *Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe* (*Bogendorff von Wolffersdorff*) [2016] ECLI:EU:C:2016:401.

121 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, para 80.

122 See also Lienbacher and Lukan (n 119) 54. For critique, see Thomas Kröll, 'Der EuGH als "Hüter" des republikanischen Grundprinzips der österreichischen Bundesverfassung?' (2011) Jahrbuch Öffentliches Recht 313.

3.5.3 Principles of Criminal Law

The Italian *Taricco*[123] saga serves as the third example. The CJEU first decided that the Italian national court could no longer apply national provisions on limitation periods, since Italian relatively short limitation periods prevented Italy from effectively countering illegal activities affecting the financial interests of the EU as an obligation of the Member States under Article 325(1)(2) TFEU.

Thereafter,[124] the Italian Constitutional Court issued the second preliminary question, arguing that in Italy the statute of limitations forms part of substantive criminal law and not a mere procedural element of criminal proceedings. Limitation periods are subsequently subject to the principle of legality, which prohibits any retroactivity in criminal law. It further stated that complying with the first *Taricco I* decision would breach overriding principles of the Italian constitutional order, and thus its national constitutional identity.[125]

The CJEU remained completely silent as to the constitutional identity argument,[126] but nevertheless acknowledged this Italian-specific 'overriding principle of its constitutional order'[127] and withdrew from its initial demand to disapply the respective limitation periods if that would violate the principle of legality.[128]

123 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:936.

124 Case C-105/14 *Criminal proceedings against Ivo Taricco and Others* (*Taricco I*) [2015] ECLI:EU:C:2015:555.

125 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:564, Opinion of AG Bot, para 49. 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) 215.

126 Interestingly the AG Bot in his opinion directly addressed identity argument but refused to make any amends. The CJEU on the other hand acknowledged the specific understanding of the constitutional principle but omitted any reference to identity argument. See Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:564, Opinion of AG Bot, para 49.

127 Ibid. para 170.

128 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:936.

3.5.4 Interim Concluding Remarks

All cases above share several similarities. Apart from framing these issues as national constitutional identities, they represent long-established idiosyncratic legal understandings of basic constitutional principles, which result in their specific applications.

They are not extra-constitutional, referring exclusively to social facts. However, these facts play a role in how these *legal* principles came about and have evolved through time. The *Sayn-Wittgenstein* decision alludes to historical specificities. Similarly, the *Omega* decision tacitly, without specifically articulating these circumstances, suggests that Germany is vigilantly careful when it comes to killing, even if it is only a simulation in a harmless game. When trying to understand this overly sensitive legal position, one cannot ignore German war history.

To sum up, while these basic principles are generally shared among the Member States, their concrete expressions and applications sometimes lead to results which are only with difficulty relatable to the other Member States.

3.6 Sensitive Areas and Unifying Effects

The next identity cluster concerns national 'sensitive' areas,[129] such as religion, abortion, euthanasia, family status, LGBTQIA+, etc. These areas are often politically disputed concerning the scope of the given rights and are thus intuitively perceived as matters which ought to be determined by the respective community. In other words, every political entity should define the scope of these matters itself due to their sensitive nature.

This sub-section explains how it is possible that the EU nevertheless indirectly impacts on the said areas, despite the lack of clear competences to harmonize these sensitive questions among the Member States. The tendency of the EU to affect these areas happens due to the nature of how fundamental rights and freedoms function. The described side effect is called here the *unifying effect of fundamental rights* and the *unifying effect of fundamental freedoms* (3.6.1). The following two sub-sections illustrate both effects with two examples: the question of religious self-determination (3.6.1) and the definition and recognition of same-sex marriages (3.6.2).

129 The word 'sensitive' is used to mean that it may often create diverse, strong and opposing views in society.

3.6.1 Unifying Effect of Fundamental Rights and Freedoms

If the above-mentioned sensitive areas were completely under the exclusive control of the Member States and recognized as national constitutional identities, the story would likely end here. However, as briefly indicated in Chapter 1 concerning the delineation of competences, the lines between national and supranational competences are blurred at best.[130] Moreover, the nature of fundamental rights and fundamental freedoms additionally complicates the matter.

To put it simply with a short example: What are we talking about when we refer to a dispute over crucifixes displayed in public schools? Is this issue about education in schools or about religion? The answer is both. Even if the matter concerns the competences of organizing public schools and organizing education, the question of education becomes a matter of religious freedom, positive and negative, and the neutrality of public authority thereof. Hence, the matter becomes part of fundamental rights protection, and thereby no longer an isolated matter of education.[131]

Lawyers from federal systems are well aware of the dilemma. For example, even if education falls within the sole responsibility of a German federal state like Bavaria, at the end of the day the German Federal Constitutional Court must decide whether the crucifix can or cannot be displayed – hence, where the freedom of federal cultural and educational sovereignty ends.[132]

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130 Franz C Mayer, 'Die Drei Dimensionen Der Europäischen Kompetenzdebatte' (2001) 61 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 577, 585ff. 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).

131 Elena Bertolini and Mark Dawson, 'Fundamental Rights as Constraints to and Triggers for Differentiated Integration' (2021) 27 Swiss Political Science Review 637, 638. See also Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015).

132 E.g., federal states in Germany have primary responsibility with regard to legislation and administration in the field of culture, i.e. in particular the responsibility for language, school and higher education, radio, television and art (Art. 30 of the Basic Law). This so-called 'cultural sovereignty' (*Kulturhoheit*) enables the federal states to regulate the cited areas independently. The Bavarian statute on education and instruction thus introduced a provision according to which a crucifix shall be placed in every classroom due to the Bavarian historical and cultural character (BayEUG). This matter was challenged, and the norm was eventually invalidated and declared unconstitutional.

One observes a similar tendency within the EU;[133] with one additional element. In the EU, it is not only fundamental rights which take nationally sensitive matters into consideration, but also fundamental freedoms, which work in a similar manner. This well-known aspect of negative integration[134] – the unifying effects of fundamental rights and freedoms – acquires a new dimension when connected with national constitutional identity. Accordingly, one faces three different dimensions of the dispute at hand: the realization of fundamental rights and freedoms; the lack of competences by the Union to harmonize the respective subject matter; and the claim of national constitutional identity. The following two examples relating to fundamental rights and fundamental freedoms indicate that even the argument of national constitutional identity in this highly sensitive area does not fully stop the reach of EU law in realizing fundamental rights and fundamental freedoms.[135]

3.6.2 Self-Determination of Churches and Non-Discrimination

The *Egenberger* case[136] concerns the scope of independence of association and administration of religious societies in Germany in relation to the effect of the Employment Equality Framework Directive.[137] This piece of EU legislation combats discrimination regarding employment and occupation on the grounds of religion or belief, disability, age or sexual orientation in the Member States, due to the principle of equal treatment.

The Evangelisches Werk e.V.[138] issued an offer of fixed-term employment for a project that was producing a report on racial discrimination. One of the conditions of employment was membership of a Protestant or other Christian church in Germany. Ms Vera Egenberger, of no denomination,

133 Federico Fabbrini, *Fundamental Rights in Europe* (Oxford University Press 2014) 269ff. Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2009) 155.

134 Fritz Scharpf, 'Negative and Positive Integration' in Fritz Scharpf (ed), *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 78.

135 Heinz Schäffer, 'Die Grundrechte im Spannungsverhältnis von nationaler und europäischer Perspektive' (2007) 62 Zeitschrift für öffentliches Recht 1, 7.

136 Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257.

137 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

138 Registered voluntary evangelical association, founded by the Protestant Church in Germany.

applied for the post and was also shortlisted after a preliminary selection. However, she was not invited to interview. Considering that she had been rejected because she did not belong to any denomination, Ms Egenberger challenged the decision, arguing that her rejection was a violation of the prohibition of discrimination.

In Germany, the status of churches is still regulated pursuant to constitutional provisions of the Weimar Constitution of 1919, which signals a long-established and firmly-rooted understanding of religious society's independence – the right of self-determination of the churches.[139]

The transposition of the Employment Equality Framework Directive by the German legislature cautiously took into consideration the long-existing case law of the German FCC, which due to the cited principle of self-determination of churches limited the scope of judicial review to a review of plausibility.[140] The General Law on Equal Treatment[141] provides that 'a difference of treatment on the grounds of religion or belief […] shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in a view of its right of self-determination […]'. Moreover, the courts would not review the justifiability of distinguishing among job offers that require alignment with the church's message, as determined by the respective church.

AG Tanchev[142] argued that respect for the principle of free status of churches under Article 17(1)(2) TFEU complements and gives specific effect to Article 4(2) TEU, respecting national constitutional identities. Yet, the CJEU did not pick up the argument of identity. It expressed the neutrality of the EU towards the various statuses of the churches and their relations with the Member States.[143] However, it decided that rejection of an application for employment can only be carried out if religion constitutes

139 Article 137 of the of Weimar Constitution provides that 'each religious society shall arrange and administer its affairs independently within the limits of the law that applies to everyone. It shall confer its offices without involvement of the State or the civil municipality'.

140 Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257, para 31.

141 *Allgemeines Gleichbehandlungsgesetz* of 14 August 2006 (BGBl. 2006 I, p. 1897).

142 Case C-414/16 *Egenberger* [2017] ECLI:EU:C:2017:851, Opinion of AG Tanchev, para 95.

143 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, art 17(1): 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.'

a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church. This requirement must be necessary and objectively dictated by the nature of the occupational activity concerned or the circumstances in which it is carried out. Moreover, the requirement must be proportionate and subject to effective judicial review, which must ensure that the stated criteria above are satisfied.[144]

The case illustrates that even in the most sensitive areas, the Member States do not enjoy immunity regarding fundamental rights. Although the matter was recognized as a national constitutional identity,[145] outside the scope of EU harmonization measures, and established by long-standing judicial practice and constitutional provisions dating back almost 100 years, the CJEU still required respect for non-discrimination.[146]

3.6.3 Recognition of Same-Sex Marriages and Fundamental Freedoms

The second claim of national constitutional identity concerns the politically sensitive area of recognition of same-sex marriages, the *Coman*[147] decision, relating to fundamental freedoms.

Mr Coman was a Romanian and American citizen who married an American citizen in Brussels, where he was living and working. Later, Mr Coman and his husband both moved to Romania for work, where the Romanian authorities refused to recognize their marriage, arguing that it was against the Romanian public order and national identity.

The case ended up before the CJEU, where Romania and Latvia both argued that even if the respective restriction violated the right to move and reside freely within the territory of the Member States under Article 21 TFEU, the limitation of this fundamental freedom was justified on the

144 Ibid. para 55.

145 Case C-414/16 *Egenberger* [2017] ECLI:EU:C:2017:851, Opinion of AG Tanchev, fn 102: 'During the Intergovernmental Conference of 1996 the German delegation reportedly proposed without success the following article: "The Union considers that the constitutional positions of religious communities in the Member States is both an expression of the identity of the Member States and their culture, as part of their common legal heritage".'

146 See also Gitta Kharraz, Britta Schultejans and Angelika Resenhoeft, 'Neues kirchliches Arbeitsrecht für mehr Diversität' *beck-aktuell heute im recht* (23 November 2022) <https://rsw.beck.de/aktuell/daily/meldung/detail/neues-kirchliches-arbeitsrecht---der-teufel-steckt-im-detail> accessed 24 February 2023.

147 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, para 42.

grounds of national identity, especially since some Member States treat the institution of marriage as a union between a man and a woman as a constitutional matter.[148]

The CJEU refuted the identity claim and decided: 'an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned'.[149]

Both cases, *Egenberger* and *Coman*, indicate the unwillingness of the CJEU to compromise the full realization of fundamental rights and freedoms, even in politically sensitive areas.[150] What appear to be nationally sensitive areas in a political sense, which intuitively signals importance and protection within the scope of national constitutional identity, does not prove to be the case from the perspective of the CJEU. The CJEU was willing to compromise the full realization of freedom of movement for recognition of the prohibition of nobility titles – a rather symbolic limitation. However, it was not willing to compromise the freedom of movement which would lead to an actual impediment for Mr Coman's husband to live in one of the Member States.

To sum up, the cluster of identity claims concerning sensitive areas in relation to EU law proves legally less significant than their politically laden importance for the respective entity suggests.

3.7 Protection and Advancement of Language

'*Oui j'ai une patrie, la langue française*.'[151] Camus' words epitomise the elemental connection between language and homeland – national identity. The following two sub-sections concern protection and advancement of languages in relation to national constitutional identity. Protection of language is a unique aspect of identity, as explained below, and thus constitutes an individual cluster of identity claims. The first sub-section briefly highlights how the EU already directly acknowledges and protects languages

148 Ibid. para 42.
149 Ibid. para 46.
150 See also *Fedotova v Russia* App no 40792/10, 30538/14 and 43439/14 (ECtHR, 17 January 2023).
151 Albert Camus, *Carnets 1942-1951* (Hamish Hamilton 1966), Paris – Septembre 50.

(3.7.1). Thereafter, it highlights how the Member States argue for the protection of their languages as their national constitutional identity (3.7.2).

3.7.1 Protection of Languages and Equality of the Member States

The connection between claims of national constitutional identity in relation to EU law and the languages of the Member States is somehow paradoxical. While one can make a strong case that languages constitute national constitutional identity, they are already specifically acknowledged and protected under EU law. Hence, the creation of the said connection does not give much benefit to the Member States. This sub-section elaborates on both these aspects, starting with the latter.

Article 3(4) TEU states that the Union shall respect its rich linguistic diversity. In relation to education and teaching, Article 165(1) TFEU reassures that the Union's duty is to fully respect the linguistic diversity of the Member States. The Charter of Fundamental Rights of the European Union (EU Charter) echoes the same commitment. Article 22 states: 'The Union shall respect cultural, religious and linguistic diversity.'[152] In addition, the principle of non-discrimination pursuant to Article 21 of the EU Charter particularly refers to language as characteristic of the prohibition of discrimination. Finally, under Article 41 of the EU Charter, every person may write to the institutions of the EU in one of the languages of the Treaties and must receive an answer in the same language.

This general outline of several provisions across the Lisbon Treaty indicates that the Member States have an abundance of legal grounds directly addressing national languages and their protection. However, one can also make a plausible connection between identity and language in the EU.[153] For example, Article 4(2) TEU, the European identity clause, states that 'the Union shall respect the equality of Member States before the Treaties'. Equality of Member States presupposes equal protection and advancement of languages.[154] Moreover, language is the cornerstone of national identity

152 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art. 22.

153 Stephen Barbour and Cathie Carmichael (eds), *Language and Nationalism in Europe* (Oxford University Press 2002) 12ff.

154 The equality of languages is challenged by the fact that French, German, and English languages are more equal than the others. Furthermore, French alone is the working language at the CJEU. See also Xabier Arzoz, 'The Protection and Promotion of Language Equality in the EU: Gaps, Paradoxes, and Double Standards' in

beyond legal parameters. It is 'a symbol of personal and social identities'.[155] Henceforth, the EU must respect it.[156]

3.7.2 Language as Identity in the CJEU's Case Law

In 1989, the CJEU connected language and identity. The *Groener*[157] decision acknowledged the advancement of the Irish language 'designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture'.[158] While the respective measures should not be disproportionate and bring discrimination against other nationals of other Member States, the CJEU found that 'a permanent full-time post of lecturer in public vocational education institutions is a post of such a nature as to justify the requirement of linguistic knowledge [of the Irish language]'.[159]

Closely building on the cited *Groener* decision, the CJEU further connected the protection of the official national language in Lithuania with the duty to respect national identity in accordance with Article 4(2) TEU in the *Runevič-Vardyn*[160] decision. The decision concerned the requirement that the surnames and forenames of naturalized persons must be entered on certificates of civil status in a form which complies with the Lithuanian rules governing the spelling of the official national language. The Lithuanian administration refused to amend the surname of a Lithuanian citizen (born into the Polish minority in Lithuania who later married a Polish

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Thomas Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Springer International Publishing 2020) 98ff.

155 Stanley Dubinsky and William D Davies, 'Language and National Identity' in Stanley Dubinsky and William D Davies (eds), *Language Conflict and Language Rights: Ethnolinguistic Perspectives on Human Conflict* (Cambridge University Press 2018) 99.

156 One must emphasize that not all languages are recognized as official EU languages, despite having official status in the Member States: e.g., Luxembourgish in Luxembourg and Turkish in Cyprus. Additionally, no Romani language or other regional languages, as for example Catalan, Basque, Galician, or regional languages in France, are officially recognized in the EU. Also, English, being the most widely understood language (by 44% of all adults in the EU) is since Brexit the only official language of Malta (and the most widely spoken in Ireland).

157 Case C-379/87 *Groener* [1989] ECLI:EU:C:1989:599.

158 Ibid. para 18.

159 Ibid. para 24.

160 Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, para 86.

husband) in a way that would correspond to the spelling rules of Poland: from 'Malgožata Runevič-Vardyn' to 'Małgorzata Runiewicz-Wardens' (using diacritical modifications and the letter W). The Lithuanian government argued:

> 'The Lithuanian language constitutes a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities.'[161]

The CJEU accepted that identity claim and connected the EU's requirement to respect national identities under Article 4(2) TEU with the protection of an official language.[162] It stated:

> 'The Union must respect its rich cultural and linguistic diversity. Article 4(2) TEU provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language.'[163]

In yet another decision concerning national constitutional identity and language, AG Maduro wrote:

> 'My motherland is the Portuguese language. That famous statement by Pessoa, taken up by numerous men of letters, such as Camus, clearly expresses the link which may exist between language and a sense of national identity. Language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity.'[164]

161 Ibid.

162 See also Case C-391/20 *Cilevičs* [2022] ECLI:EU:C:2022:638, para 87: 'not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued.'

163 Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, para 86.

164 Case C-160/03 *Kingdom of Spain v Eurojust* (*Eurojust*) [2004] ECLI:EU:C:2004:817, Opinion of AG Maduro, para 36.

To conclude, through the cited case law, language became part of national constitutional identity, which the EU must respect.[165] Yet, the European identity clause does not mention languages. On the contrary, the specific obligation to respect the languages of the Member States is found elsewhere in the Treaties. The cluster of identity claims concerning the protection of languages is of symbolic nature. The EU must respect linguistic diversity regardless of the scope of national constitutional identity.[166]

3.8 History and its Influence on National Constitutional Identity

History as a constitutional argument occasionally finds its way into legal reasoning. In what follows, historical specificities of an argument were claimed before the CJEU to justify potential disregard for EU law. In all three subsequent instances, the argument of identity as special historical circumstance did not generate a significant role to potentially justify disregarding EU law. The sub-sections address claims of national constitutional identity as an uneasy historical narrative between Hungary and Slovakia (3.8.1), questions concerning the dissolution of the common state of Czechoslovakia (3.8.2), and a dispute on Gibraltar's voting rights in the EU between the UK and Spain because of the colonial past (3.8.3).

3.8.1 Uneasy Historical Narratives

On 21 August, the then Hungarian president Mr Sólyom was invited to a ceremony inaugurating a statue of Saint Stephen of Hungary in the Slo-

165 The vacancy notices for senior management posts were only in English, French and German. See Case T-185/05 *Italian Republic v Commission of the European Communities* [2008] ECLI:EU:T:2008:519, paras 38, 85–6.

166 See Millet (n 32) 149. Note how France applied the reverse argument, claiming that the indivisibility of the Republic and the unity of the people as part of French national constitutional identity prohibit the use of minority and regional languages other than the official state language in public services.
See also Lithuanian Respublikos Konstitucinis Teismas, Case 14/98 *Name Spelling* 6 November 2009: 'Under Article 14 of the Constitution, Lithuanian shall be the state language. The establishment of the status of the state language in the Constitution means that Lithuanian is a constitutional value. The state language preserves the identity of the nation, it integrates a civil nation, it ensures the expression of national sovereignty, the integrity and indivisibility of the state, and the smooth functioning of the state and municipal establishments.'

vakian town of Komárno. Saint Stephen was the founder and first king of the Kingdom of Hungary and is still celebrated in Hungary with a national holiday.

However, on 21 August 1968, the Warsaw Pact troops, which included Hungarian troops, invaded Czechoslovakia, which made this date in Slovakia uneasy. Accordingly, the Slovak authorities refused Mr Sólyom entry into the territory of the Slovak Republic on that date.

The case was brought before the CJEU, where Hungary argued that the Slovak Republic had violated the free movement of EU citizens within the EU territory. Apart from the arguments concerning diplomatic relations between the Member States, as governed by customary international law, the Slovak Republic asserted the EU's duty to respect national constitutional identity under Article 4(2) TEU.[167]

The CJEU never decided on the merits. It found the case inadmissible because the matter was already finished without any risk of repetition.[168]

3.8.2 Common State and Questions of Dissolution

The second claim of national constitutional identity concerns the dissolution of Czechoslovakia in 1992. The succeeding states agreed that they would pay out pensions to the workers based on the state of residence of the employers at the time of dissolution.[169] In 2004, both states joined the EU, and their international agreement became part of EU law, subject to EU rules and the principles of the single market.[170]

167 Case C-364/10 *Hungary v Slovak Republic* [2012] ECLI:EU:C:2012:124, Opinion of AG Bot, para 34.

168 Case C-364/10 *Hungary v Slovak Republic* [2012] ECLI:EU:C:2012:630, paras 67-72.

169 Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 110.

170 'The original bilateral international agreement between the Czech Republic and Slovakia of 1992 became embedded into the framework of Regulation No. 1408/71. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149/2. Point 9 of Annex III(A) to the Regulation stated that the key articles of the Czecho-Slovak Treaty on Social Security of 1992, namely Articles 12, 20, and 33, shall be applied as lex specialis within the regulation system.' See also Bobek, at 60.

The problem occurred because the Slovak pensions could be 30% lower than Czech pensions.[171] This resulted in situations where people who had lived in the same neighbourhood their whole lives received considerably lower pensions just because their companies were officially incorporated into Slovak territory at the time of dissolution.[172] These rules were challenged, and the CJEU decided in the *Landtová* decision[173] that a Member State is free to provide additional pension supplements, but they cannot be subject to discriminatory conditions based on nationality or residence.[174] The Czech Constitutional Court was not pleased.[175] It stated:

> 'The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal relations arising from the free movement of persons [...] in the European Union [...] is a failure to respect European history; it is comparing matters that are not comparable.'[176]

> 'In order to preserve the appearance of objectivity, the ECJ would familiarize itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic, which it draws from the common constitutional tradition with the Slovak Republic, that is from the over seventy years of the common state and its peaceful dissolution, i.e. from a completely idiosyncratic and historically created situation that has no parallel in Europe.'[177]

The Constitutional Court in *Slovak Pensions*[178] declared the cited decision as ultra vires. That was the first time in the EU that the national apex court

171 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54, 57.
172 Bobić (n 169) 111.
173 Case C-399/09 *Landtová* [2011] ECLI:EU:C:2011:415.
174 Ibid. para 49.
175 The Czech Constitutional Court sent a letter to the CJEU in the *Landtová* prelimnary reference proceedings, initiated by the Supreme Administrative Court, whereby it explained its previous case law. However, the CJEU sent the letter back explaining that it does not exchange correspondence with the third parties.
176 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012, p 13.
177 Ibid. p 14.
178 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012.

applied an ultra vires review[179] and declared the decision by the CJEU as inapplicable in the domestic legal system.[180]

Additionally, one must highlight the domestic context of the cited dispute. The pension dispute was a polygon for two rival national courts,[181] the Supreme Administrative Court and the Constitutional Court, both trying to consolidate their spheres of power.[182] Accordingly, the CJEU was dragged into this saga only to surpass one another.[183]

In another related matter,[184] the Supreme Administrative Court asked the CJEU directly whether the EU's respect for national constitutional identity under Article 4(2) TEU could justify direct discrimination based on nationality with respect to the special pension supplement. It suggested that the relevant subject matter had passed long ago and could not in any way affect the free movement of workers within the EU. Moreover, it argued that the dissolution of Czechoslovakia formed part of their national identity, which should be respected as such.[185]

It would be illuminating to hear the CJEU's answers to these queries. However, the story has an interesting closure. In the meantime, the Slovak pensions reached the Czech economic levels, which led to a quick agreement between disputing parties and ended the pending proceedings.

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179 Martin Faix, 'Genesis eines mehrpoligen Justizkonflikts: Das Verfassungsgericht der Tschechischen Republik Wertet ein EUGH-Urteil als Ultra-Vires-Akt' (2012) 20–21 Europäische Grundrechte-Zeitschrift 597.

180 Lenka Pítrová, 'The Judgment of the Czech Constitutional Court in the "Slovak Pensions" Case and Its Possible Consequences (In Light of the Fortiter In Re Suaviter In Modo Principle)' (2013) 3 The Lawyer Quarterly 86.

181 See also Robert Zbíral, 'Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12. – A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires' (2012) 49 Common Market Law Review 1475.

182 Jan Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' (2012) 8 European Constitutional Law Review 323, 352.

183 Bobek (n 171) 59. The judicial 'ping-pong' between the courts relating to Czechoslovak pensions produced 17 registered cases at the Constitutional Court in one decade and perhaps hundreds of similar cases in front of administrative courts with different outcomes

184 Czech Nejvyšší Správní Soud, Case 6 Ads 18/2012-82, 9 May 2012.

185 Case C-253/12, *JS v. Czech Social Insurance Authority* [2013] ECLI:EU:C:2013:212, withdrawn; Resolution Czech Nejvyšší Správní Soud, Case 6 Ads 18/2012-82, 9 May 2012; See also Bobek (n 171) 64.

3.8.3 Colonial Past

The final example of an identity argument in relation to historical circumstances concerns a dispute between Spain and the UK over the status of Gibraltar: specifically, whether the citizens of Gibraltar could vote in European Parliamentary elections.[186]

Gibraltar is 'a colony of the British crown'[187] or part of British Overseas Territories,[188] having a constitutional link with the UK but not forming part of the UK itself. While the British 'have been in Gibraltar for more than three centuries',[189] its sovereignty is disputed by Spain, which 'sought its return ever since it was ceded to Britain by the terms of the Treaty of Utrecht in 1713'.[190]

In 2003, the UK enacted a statute giving qualifying Commonwealth citizens the right to vote. Accordingly, Gibraltar was made an electorate of the UK constituency.[191] From the perspective of EU law, the electoral procedure for the European Parliament shall be governed in each Member State by its national provisions. However, the Kingdom of Spain strongly objected to this extension. It claimed, inter alia, that this extension of the right to vote to persons who are not citizens of the Union infringes EU law. Moreover, in light of the decolonization negotiations in progress between the UK and the Kingdom of Spain, the UK should not refer to the Gibraltar electorate as the territory of Gibraltar.[192] Spain further argued that recognition of Gibraltar as a separate electoral district runs counter to international rules governing a colony and indicates a step towards Gibraltar's independence.[193]

186 Case C-145/04 Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland [2006] ECLI:EU:C:2006:543.
187 Ibid. para 15.
188 Ian Hendry and Susan Dickson, *British Overseas Territories Law* (Hart Publishing 2018) 3.
189 David Levey, 'Gibraltar English' in Daniel Schreier et al. (eds), *Further Studies in the Lesser-Known Varieties of English* (Cambridge University Press 2015) 51.
190 ibid.
191 The respective change of voting was required by the ECtHR. See *Matthews v. UK* App no 24833/94 (ECtHR, 18 February 1999).
192 Case C-145/04 Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland [2006] ECLI:EU:C:2006:543, para 85.
193 Ibid. paras 63, 83.

Notably, it was the European Commission which invoked the argument of identity in relation to 'special historical links'[194] and 'history and constitutional traditions'.[195] In support of the UK's arguments, it stated:

> 'Although the concept of European citizenship is fundamental to the Union, the same applies to the Union's commitment to respect the national identities of its Member States. That principle is confirmed by Article 8 of the 1976 Act, since it provides that national provisions on the procedure for elections may if appropriate take account of the specific situation in the Member States.'[196]

The CJEU did not pick up the identity argument. It rejected the Spanish claim due to previous case law by the ECtHR,[197] according to which the UK must enable the citizens of Gibraltar to have the right to vote in European Parliamentary elections.

To sum up, claims of national constitutional identity concerning historical specificities are not absent from the legal argument, but nevertheless have not played a decisive role yet: partially due to the circumstances of the above-cited case law which ended abruptly and undecided, and partially because the CJEU chose to follow different arguments, keeping silent on the strength of identity claims in the light of historical idiosyncrasies. The cluster of identity claims concerning historical specificities nevertheless remains a relevant constitutional avenue for the Member States in the future – the potency of this type of identity claim is not fully exhausted yet.[198]

3.9 Cultural Diversities

A cluster of identity claims concerning culture is presented separately here, to differentiate it from language and history. History, as a constitutional argument, draws its strength from the facts of the past. Language is easily determinable as to the object of protection and advancement. Whereas

194 Ibid. para 55.
195 Ibid.
196 Ibid. para 58.
197 Ibid. para 96-97.
198 E.g., the Hungarian claim which is explored further as 'illiberal undermining identity claims', referring to linguistic, historical and cultural traditions. See Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66.

culture is different from both these aspects, in so far as it addresses the future and encompasses a multitude of dimensions in a respective society.

The following sub-section briefly outlines the legal acknowledgements of culture in EU law, and outlines a case law where the argument of culture as identity managed to justify an exception from EU law.

The Preamble of the EU Charter proclaims that the Union respects 'the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States'. Under Article 167 TFEU, the Union 'shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'. Moreover, the Preamble of the TEU posits culture among the sources of universal values and rights. The Member States are 'drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, [... and] desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions'.

The EU actively supports and promotes cultural diversity. According to the Television without Frontiers Directive,[199] the Member States must provide at least 10% of the transmission time and 10% of the programming budget for the European works. Moreover, national commercial television broadcasters must contribute 5% of their annual revenue to the pre-funding of European films.

The Spanish legislature specified the rules further and determined that 60% of the cited annual revenue for European films must be dedicated to works in the Spanish language. The association of commercial television companies in Spain, UTECA, challenged these rules, arguing that they are not compatible with the prohibition of state aid. AG Kokott wrote that in her opinion:

> 'The Community thus contributes to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore (Article 151(1) EC). It supports the action of Member States in inter alia

199 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [2010] OJ L298/23, art 5.

> improvement of the knowledge and dissemination of the culture and history of the European peoples and in the area of artistic and literary creation in the audiovisual sector (Article 151(2) EC). Respect for and promotion of the diversity of its culture constitutes one of the Community's main preoccupations in all areas (Article 151(4) EC), including its legislation in the audiovisual services field; it is ultimately an expression of the European Union's respect for the national identities of its Member States (Article 6(3) EU).'[200]

The CJEU followed this opinion and allowed the said cultural promotion through the increased financing of Spanish films, expressed via compulsory usage of the Spanish language, recognized by AG Kokott as a matter of national constitutional identity.[201]

The case indicates several elements. First, the close connection between language and culture. Second, the fact that cultural promotion can be articulated as a matter of identity justifying exceptions from EU law. Finally, as already highlighted concerning language, identity appears to be an appealing constitutional argument despite the absence of culture in the wording of the European identity clause and the abundance of other provisions specifically providing legal grounds for the protection and advancement of national cultural diversity.

3.10 Citizenship and Nationality

The last cluster of identity claims concerns citizenship and nationality. The following cases highlight how free movement of people in the EU challenged the old perceptions of Member States concerning the nationality and citizenship prerequisite for certain types of work, closely connected with the national constitutional identity argument. Finally, the last case relates to the competence of the Member States to deprive a person of their nationality as a matter of national constitutional identity.

In Luxembourg, the qualifications to become a teacher had been conditional on Luxembourg nationality. Luxembourg justified the said prerequisite by arguing that teachers must be Luxembourg nationals in order to

200 Case C-222/07 *UTECA* [2008] ECLI:EU:C:2008:468, Opinion of AG Kokott, para 93.

201 Case C-222/07 *UTECA* [2009] ECLI:EU:C:2009:124.

'transmit traditional values and that, in view of the size of the country and its specific demographic situation, the nationality requirement is therefore an essential condition for preserving Luxembourg's national identity'.[202]

In the second case, Luxembourg similarly argued that the profession of notary requires a bond which is manifested by the individual's loyalty to a given political community and, in this case, takes the form of a nationality requirement. Moreover, the use of the Luxembourgish language is necessary for the performance of notarial activities, and the nationality condition at issue is intended to 'ensure respect for the history, culture, tradition and national identity of Luxembourg within the meaning of Article 6(3) EU'.[203] The CJEU rejected both claims:

> 'Whilst the preservation of the Member States' national identities is a legitimate aim respected by the Community legal order, [...] the interest pleaded by the Grand Duchy, can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States. [...] [They] must, like Luxembourg nationals, still fulfil all the conditions required for recruitment, in particular those relating to training, experience and language knowledge.'[204]

Finally, in the well-known *Rottman* decision, AG Maduro created a link between the competence of the Member States to deprive a person of nationality with its legitimate aim to protect national constitutional identity;[205] although this concurrently deprives a respected person of their EU citizenship. In Maduro's argument, any other solution would produce a paradoxical situation where the secondary EU citizenship would determine the primary. He further argued:

> 'Such a solution would also contravene the duty, imposed on the Union by Article 6(3) EU, to respect the national identities of the Member

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

203 Case C-51/08 *European Commission v Grand Duchy of Luxembourg* [2011] ECLI:EU:C:2011:336, para 72.

204 Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxembourg* [1996] ECLI:EU:C:1996:263, para 35.

205 Case C-135/08 *Janko Rottman gegen Freistaat Bayern* (*Rottmann*) [2009] ECLI:EU:C: 2009:588, Opinion of AG Maduro.

States, of which the composition of the national body politic is clearly an essential element.'[206]

While in the end, the CJEU came to the same conclusion on the merits, it did not justify, or refer to, the argument of national constitutional identity.

3.11 Interim Conclusions

This section introduced ten distinctive clusters of identity claims. They were grounded on distinctive underlying rationales which rendered claims of national constitutional identity different from legitimacy and strength in the EU.

The purpose of distinguishing among different types of identity claims promotes a better understanding and evaluation of them. The practical examples, as explicated above, indicated their shortcomings, interconnectedness and eventually also their occasional effectiveness.

The nature of the introduced clusters is twofold. First, their existence speaks on its own about the wide variety of identity claims concerning their underlying rationales. Hence, identity has an unbearable lightness of meaning. Furthermore, the presented clusters are not mathematical equations capable of exactly incorporating every claim of national constitutional identity. The section rather demonstrated how the arguments of identity overlap with other constitutional arguments concurrently. Moreover, it showed how claims of identity often simultaneously refer to different clusters. To put it differently, while claiming identity, one often tries to apply different arguments: protection of culture, language, history, national fundamental structures, etc. It is for the CJEU to pick the most persuasive one and extend an exception from EU law.

Finally, the section explicated the strength and legitimacy of various clusters of identity as follows. Starting from the latter, the most intuitive and frequently raised claims of national constitutional identity proved to be often overheard by the CJEU. In other words, the sociological aspects of identity,[207] which allude towards culture, history, nationality and other sensitive areas, were not just rejected but often simply ignored by the

206 Ibid. para 25.

207 See also Etienne Balibar and Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (Verso 1991) 54. Zoltán Szente, 'Constitutional Identity as a Normative Constitutional Concept' (2022) 63 Hungarian Journal of Legal Studies 3, 16.

CJEU. It is too soon to completely dismiss the said clusters, but the CJEU rarely acknowledges claims of national constitutional identity in the sense of *national* identity.[208]

The assessment above does not cover respect for language diversity. The CJEU repeatedly and undoubtedly recognizes the protection and advancement of the Member States' languages under Article 4(2) TEU.

Finally, clusters of identity concerning institutional diversity and shared general principles with idiosyncratic expressions are also frequently recognised by the CJEU. They enjoy high legitimacy, subject to other considerations and proportionality assessment.[209]

The chapter now turns to yet another cluster of identity claims. The following section explicates claims of national constitutional identity, which go beyond the legitimate space for drawing red lines against the EU – undermining illiberal identity claims.[210]

208 See also Burgorgue-Larsen (n 13) 304.
209 de Witte (n 12) 559.
210 See also Scholtes (n 57) 550.

4 Undermining Illiberal Identity Claims

This section separately highlights another cluster of identity claims: claims of national constitutional identity concerning rationales which undermine common European values and principles.[211] In other words, this cluster of identity claims stands at odds with liberal commitments of constitutionalism, properly so-called.[212]

The section here proceeds differently from the other clusters of identity above. It does not focus on specific judicial decisions across the Member States, but rather investigates two Member States and their trajectories of 'liberal backsliding'.[213] The reason is the following. The section does not explicate individual instances where the identity argument was arguably conflicting with fundamental rights, the rule of law and the principles of democracy. Such individual instances were occasionally observed already in the examples above. Rather the section investigates the general attitude, legal and political, concerning national constitutional identity. It illustrates how the argument of national constitutional identity reflects and promotes the undermining tendencies which exist, and would exist, despite the language of identity. To identify these trajectories, the research must take a broader outlook beyond mere case law analysis.

211 Zsolt Körtvélyesi, 'The Illiberal Challenge in the EU: Exploring the Parallel with Illiberal Minorities and the Example of Hungary' (2020) 16 European Constitutional Law Review 567, 571.

212 See Mattias Kumm, 'The Rule of Law, Legitimate Authority and Constitutionalism' in Christoph Bezemek, Michael Potacs and Alexander Somek (eds), *Legal Positivism, Institutionalism and Globalisation*, vol 1 (Hart Publishing 2018) 122.

213 R Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52 Government and Opposition 211, 221, 227. Tímea Drinóczi and Agnieszka Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022) 17ff.

The section is twofold. It starts with 'illiberal democracy'[214] and ethnocultural and historical identity in Hungary (4.1).[215] It concludes with the rule of law crisis concerning Poland's disputed and illegal judicial reform (4.2).[216]

4.1 Hungarian Illiberal Democracy – I Threw My Hat in the Air

'I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity.'[217] These words of the Hungarian Prime Minister underline the symbolic and functional importance of claims of national constitutional identity for political and legal control vis-à-vis the EU and for consolidation of power.

This section unfolds as follows. It explains the new beginnings of Hungarian constitutionalism built on the notion of illiberal democracy (4.1.1). It continues with the refugee allocation saga and an attempt to introduce national constitutional identity into constitutional law (4.1.2). Moreover, it presents the Constitutional Court's milestone decision[218] which invented Hungarian national constitutional identity relating to the 'historical consti-

214 Miklos Haraszti, 'A Discussion of Péter Krasztev and Jon Van Til's The Hungarian Patient: Social Opposition to an Illiberal Democracy' (2017) 15 Perspectives on Politics 545, 545.

215 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.

216 Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal on the Rule of Law 1, 2ff.

217 Gábor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity' (*Verfassungsblog*, 10 January 2017) <https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/> accessed 24 February 2023. See also 'Orbán: Brüsszel meg akarja szüntetni a rezsicsökkentést' *HVG Kiadó* (2 December 2016) <https://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel> accessed 5 February 2023: 'Az Alkotmánybíróság csütörtöki döntéséről Orbán azt mondta, először megemelte a kalapját, majd feldobálta az égig, mert ezzel a döntéssel olyan támogatást kapott az Ab-tól, amely tovább erősíti az amúgy is erős népszavazás felhatalmazását.'

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

tution' in a Schmittian sense (4.1.3).[219] Additionally, it highlights the connection between national constitutional identity and matters of migration, exploring why the said argument is so compelling here (4.1.4). Finally, the section ends with a few concluding observations (4.1.5).

4.1.1 Constitutional Transformation and Illiberal Democracy

After the Hungarian parliamentary elections in 2010, the alliance between Fidesz and the Christian Democratic People's Party (KDNP) achieved a two-thirds majority.[220] That led to the swift consolidation of the Hungarian Constitutional Court, increasing the number of judges from eleven to fifteen[221] and adopting a completely new constitution without (refused) cooperation of opposition parties.[222] The peculiarities of the language in the Preamble,[223] despite not being enforceable and justiciable, were eye-catching:

> 'We recognize the role of Christianity in preserving nationhood'. […] 'We hold that the family and the nation constitute the principal framework of our existence, and that our fundamental cohesive values are fidelity, faith and love.' […] 'We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation.' […] 'We hold that after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal.' […] 'We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.'[224]

219 See also Gábor Halmai, 'Populism or Authoritarianism? A Plaidoyer Against Illiberal or Authoritarian Constitutionalism' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press 2022) 369.

220 Kriszta Kovács and Gábor Attila Tóth, 'Hungary's Constitutional Transformation' (2011) 7 European Constitutional Law Review 183, 183.

221 András L Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge 2019) 20.

222 Kovács and Tóth (n 220) 197.

223 András Jakab and Pál Sonnevend, 'Continuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 European Constitutional Law Review 102, 137.

224 Hungary's Constitution of 2011with Amendments through 2013, Preamble.

In 2013, the fourth amendment to the constitution annulled the entire case law of the Hungarian Constitutional Court from 1990 until 2011.[225] In the closing and miscellaneous provisions in point 5, one reads:

> 'The decisions of the Constitutional Court prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.'

The above-highlighted actions clearly signalled a new start, a different constitutional understanding.[226] Moreover, as highlighted by the Venice Commission, the cited change was not the only questionable provision. The amendment also introduced protection of the 'dignity of the Hungarian nation'. The paradigm change from individual to communal dignity speaks for itself.[227]

Finally, the following political speech of the Hungarian Prime Minister in 2004 illustrates the above-described incremental changes, political and constitutional, which slowly but steadily, as described by many scholars,[228] alluded to a different kind of democracy.

> 'The Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc… But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.'[229]

The described trajectory of liberal decline is a value-alternative. Remarkably, the illiberal vision is not the reason to abandon the EU as the

225 Opinion 720 / 2013 'Opinion On The Fourth Amendment To The Fundamental Law Of Hungary, Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013)' [2013] CDL-AD(2013)012, 20. See also Drinóczi and Bień-Kacała (n 213) 155.

226 Several fundamental rights have been determined by case law, as for example the inspirational decision on the abolition of the death penalty.

227 Opinion 720 / 2013 'Opinion On The Fourth Amendment To The Fundamental Law Of Hungary, Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013)' [2013] CDL-AD(2013)012, 31.

228 Tímea Drinóczi and Agnieszka Bień-Kacała, *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (Routledge 2021). Beáta Bakó, *Challenges to EU Values in Hungary: How the European Union Misunderstood the Government of Viktor Orbán* (Routledge 2023).

229 Orbán (n 52).

Union of shared and common values – quite different from the description above; but rather as a viable alternative,[230] a necessary antidote to 'morally confused western liberalism'.[231] In the cited speech, he further referred to the contemporary challenges of the EU, analyzing them as twofold: 'the abandonment of Europe's Christian culture'.[232] Moreover, migration meant 'the destruction of the Europe that we knew as Europe'.[233]

Kristzta Kovács called this vision the ideology of exclusionary nationalism, particularism and historicism.[234] It is important to outline this political account here to acknowledge that the subsequent introduction of the illiberal proposition into the constitutional sphere was not a single isolated judgement or the product of a rebellious judiciary, but rather the consequence of a fairly coherent political and legal trajectory of a liberal decline.

4.1.2 Relocation of Refugees and Identitarian Constitutional Defence

The following sub-section highlights three further landmarks: the adoption of EU legislation concerning relocation of refugees among the Member States; the Hungarian referenda in response to the said legislation; and the seventh amendment to the Hungarian constitution introducing the concept of national constitutional identity.

In 2015, the Council adopted a decision regarding the relocation of asylum seekers from Greece and Italy to other Member States – the Relocation Decision.[235] The Relocation Decision was adopted by the qualified majority, with the Czech Republic, Hungary, Romania and the Slovak Republic voting against it (and the Republic of Finland abstaining).

230 Neil Walker, 'Liberal Nationalism's Precarious Prospects' in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press 2020) 314.

231 E.g., the Hungarian Prime Minister Viktor Orbán does not see himself as the European *enfant terrible* but, rather presumptuously, as the European alternative.

232 Orbán (n 52). See also Pap (n 221) 69.

233 Orbán (n 52).

234 Kovács (n 215) 1710. See also Kriszta Kovács, 'Introduction: Identity, the Jurisprudence of Particularism and Possible Constitutional Challenges' in Kriszta Kovács (ed), *The Jurisprudence of Particularism* (Bloomsbury 2023) (forthcoming).

235 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

In a nutshell, the Relocation Decision provided for the allocation of 160,000 asylum seekers over the next twenty-four months according to a distribution key, taking into account the following elements: the size of population, GDP, number of average asylum applications and already resettled refugees, and unemployment rate. The relocation effectively failed – in eighteen months, less than 12,000 asylum seekers had been relocated and even that only by two countries, Germany and France.[236]

Hungary was strongly against the said proposition. Apart from refusing to relocate any asylum seekers, it filed an action for annulment against the Council, aiming to invalidate it.[237] Moreover, the Hungarian government organised a referendum.[238] It asked the people of Hungary the following:

> 'Do you want to allow the EU mandating the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?'[239]

Strikingly, 98% of all the valid votes were against the adopted legislation. It was only pursuant to the relatively low turnout, around 40%, that the referendum was not legally binding due to the prerequisite of a minimum turnout of at least 50%.[240]

In 2016, after the unsuccessful referendum, the Hungarian government adopted another, the seventh amendment to the constitution. The amendment also introduced national constitutional identity:

> 'We hold that the protection of our constitutional identity rooted in the historical constitution is a fundamental obligation of the State.[241]

236 Ibid.

237 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.

238 The Hungarian government spent approximately 48.6 million EUR for the referendum, which is more than seven times more than the costs of the Brexit campaign. See also Gábor Halmai, 'The Invalid Anti-Migrant Referendum in Hungary' (*Verfassungsblog*, 4 October 2016) <www.verfassungsblog.de/hungarys-anti-european-immigration-laws> accessed 24 February 2023.

239 Ibid.

240 Drinóczi and Bień-Kacała (n 213) 166.

241 Proposed Seventh Amendment to the Hungarian Fundamental Law, art 1(2). See also Yaniv Roznai, 'Constitutional Transformation: Hungary' in David S Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022) 153.

> Exercise of competences [of the EU] shall not limit Hungary's inalienable sovereignty over its territorial integrity, population, form of government and state structure.[242]
>
> The protection of the constitutional identity of Hungary shall be an obligation of every organ of the State.'[243]

The official justification of the amendment further elaborated how a migratory wave of unforeseen proportions had significantly increased the danger of terror, and that due to the message of the cited referendum, the new amendment prohibited the resettlement of a foreign population.

The justification cited the European identity clause, Article 4(2) TEU, and the duty of the EU to respect national identities. It argued:

> 'the interpretation of the relationship of national and Union law in light of the constitutional identity of the respective states is constantly on the agenda of the constitutional courts of European countries. No state choices of value in terms of policy and society represented by the constitution can be brought into question under EU law, if these are considered significant as regards the national and political identity of the respective Member States.'[244]

The proposed seventh amendment was not adopted.[245] The introduced national constitutional identity in the cited amendment had one clear purpose – to redefine the relationship between the EU and the Member States and to take control over EU law.

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242 Proposed Seventh Amendment to the Hungarian Fundamental Law, art 2(2).

243 Proposed Seventh Amendment to the Hungarian Fundamental Law, art 3(2). See also 'About Hungary - Proposed Seventh Amendment to the Fundamental Law' *About Hungary* (19 October 2016) <https://abouthungary.hu/news-in-brief/proposed-seventh-amendment-to-the-fundamental-law-full-text-in-english> accessed 24 February 2023.

244 Ibid.

245 The amendment failed due to the political conflict with the extreme-right Jobbik party. The government did not satisfy Jobbik's demand for repeal of the Hungarian Investment Immigration Program, which grants permanent residence in Hungary to citizens of foreign countries who purchase 300.000 EUR in government residency bonds. See also Renáta Uitz, 'National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades' (*Verfassungsblog*, 11 November 2016) <https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/> accessed 24 February 2023.

4.1.3 Identity Decision – Historical Constitution

Shortly after the unsuccessfully enacted seventh amendment, the Hungarian Constitutional Court provided national constitutional identity instead. The Constitutional Court deliberated in the *Refugee Allocation*[246] decision concerning the above-described scheme under the Relocation Decision, requiring transferring 1,295 persons to Hungary. It argued that it might examine whether the EU or its acts violated 'human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution'.[247] The Constitutional Court explained:

> 'The protection of constitutional self-identity may be raised in the cases having an influence on the living conditions of the individuals, in particular their privacy protected by fundamental rights, on their personal and social security, and on their decision making responsibility, and when Hungary's linguistic, historical and cultural traditions are affected.'[248]

> 'The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. [...] Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.'[249]

Gábor Halmai argued that the decision could not be considered as ultra vires or an identity review, but rather an announcement of what the court could review in the future.[250] Apart from that, the underlying rationale resembled the Schmittian account of identity, rooted in ethnic and political homogeneity, prior to any constitutional norm, as explicated in Chapter

246 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016.
247 Ibid. para 95.
248 Ibid. para 66.
249 Ibid. para 67. See also Kovács (n 215) 1712.
250 Gábor Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 Review of Central and East European Law 23, 39.

2.[251] Yet, the argumentation of the Constitutional Court is not a surprise. On the contrary, it reflects and resembles the described illiberal trajectory reflected in documents of the executive, cited in the referendum query, constitutional amendments and elsewhere.[252] Accordingly, one can no longer strictly separate politically laden (illiberal) speeches from constitutional texts and adjudications. Claims of national constitutional identity are not the cause for the described trajectory. However, they serve the means well.

4.1.4 National Constitutional Identity and Migration

Claims of national constitutional identity serve exceptionally well in the area of migration.[253] Although the overview of the clusters of identity claims above explicated the CJEU's restraint connecting national constitutional identity with sociological elements, except for language, that does not stop the Member States.

The above-cited Relocation Decision[254] was challenged before the CJEU, which in 2017 dismissed the actions by rejecting all the pleas as unfounded.[255] Furthermore, since 2015 the European Commission has launched several further infringement procedures against Hungary in relation to migration and asylum-seeking.[256] On 17 December 2020, the CJEU found

251 See Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press Books 2008) 141. See also Zsolt Körtvélyesi and Balázs Majtényi, 'Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary' (2017) 18 German Law Journal 1721, 1734.

252 See also Pap (n 221) 47.

253 See also Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (n 250) 26.

254 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

255 The matter did not end with the Hungarian disregard of the decision. The saga continued with the infringement proceedings, and the CJEU issued a judgement on 2 April 2020 deciding that Poland and Hungary had failed to fulfil their relocation obligations. Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others* [2020] ECLI:EU:C:2020:257.

256 See also Nóra Chronowski and Attila Vincze, 'The Hungarian Constitutional Court and the Central European University Case: Justice Delayed Is Justice Denied: Decision of the Hungarian Constitutional Court of 6 July 2021 and the Judgment of the ECJ of 6 October 2020, Case C-66/18' (2021) 17 European Constitutional Law Review 688.

Hungary's legalization of mass police pushbacks at the Serbian–Hungarian border (over 50,000 since 2016) in breach of EU law.[257] In the preliminary ruling procedure, the CJEU on 14 May 2020 delivered its judgement declaring the transit zone at the Hungarian–Serbian border an unlawful detention.[258] In an infringement procedure against the so-called 'Stop Soros'[259] package of laws, AG Rantos issued an Opinion on 25 February 2021.[260] He held that the criminalization of assistance to asylum seekers violated EU law.[261] The CJEU came to the same conclusion.[262]

The ongoing fierce contestations concerning the questions and challenges of migration are closely connected with national constitutional identity.[263] In the outlined sense, identity feeds on conceptions of *we* versus *them*.[264] Naturally, migration highlights this divide and exacerbates the need for identity.

4.1.5 Interim Conclusions

One must categorically reject claims of national constitutional identity which feed on homogenous perceptions of political society, protect the dignity of a state before the dignity of every individual person, and refer to religious, cultural and other ethnic historical narratives; in other words, illiberal identity claims that undermine society. While these sociological considerations should be explored elsewhere, there is little room for them as legal, constitutional arguments.[265]

Furthermore, the above-described way of resorting to national constitutional identity departs from the respectful, loyal and constructive equilibrium between the EU and the Member States, as further elaborated in Chapter 5. Illiberal and undermining identity claims function as national

257 Case C-808/18 *European Commission v Hungary* [2020] ECLI:EU:C:2020:1029.
258 Ibid.
259 Drinóczi and Bień-Kacała (n 213) 132.
260 Case C-821/19 *European Commission v Hungary* [2021] ECLI:EU:C:2021:143, Opinion of AG Rantos.
261 Ibid. para 57.
262 Case C-821/19 *European Commission v Hungary* [2021] ECLI:EU:C:2021:930.
263 Körtvélyesi and Majtényi (n 251) 1733. Pap (n 221) 57. Drinóczi and Bień-Kacała (n 213) 96.
264 See also Körtvélyesi and Majtényi (n 251) 1743.
265 See also Szente (n 207) 17.

constitutional parochialism,[266] which distort and subvert any constructive aspect of national constitutional identity.

4.2 Structures of Judiciary

Another aspect of undermining illiberal claims of national constitutional identity differs from Hungarian ethnocultural and historical[267] views. It concerns the ongoing structural reform of the judiciary: what many observers in the last few years described as constitutional backsliding and the rule of law crisis.[268]

The section first contextualizes the underlying motivation for judicial restructuring as it connects with the peculiar history of the communistic one-party system (4.2.1). Then it briefly presents the most blatant elements of judicial reform, highlighting its trajectory and objectives (4.2.2). As a response to the said development, it shows the CJEU's reaction, starting with the *ASJP*[269] decision (4.2.3). The section then explicates how the Polish government introduced national constitutional identity to further pursue its cause (4.2.4). Once again, the CJEU only strengthened the case law dedicated to protecting the independence of national judicial independence (4.2.5). The described constitutional conflict, ongoing through many years, climaxed with the legal 'Polexit' – the Polish Constitutional Tribunal declaring EU primary law contrary to the Polish Constitution.[270] Regardless, the CJEU firmly continued its set course, and Poland eventually yielded some of the most disputed judicial reforms (4.2.6). The section concludes with the assessment of the undermining illiberal claims of national constitutional identity in the light of their anticipated objectives (4.2.7).

266 Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, vol 14 (Hart Publishing 2012) 51.

267 Kovács (n 215) 1714.

268 Richard Bellamy and Sandra Kröger, 'Countering Democratic Backsliding by EU Member States: Constitutional Pluralism and "Value" Differentiated Integration' (2021) 27 Swiss Political Science Review 619. Pech, Wachowiec and Mazur (n 216). Kelemen (n 213). Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

269 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (*ASJP*) [2018] ECLI:EU:C:2018:117.

270 Bobić (n 169) 68.

4.2.1 Contextualizing the Struggles of Former One-Party Systems

Democratic backsliding and the crisis of liberal values are not limited to Central Eastern Europe.[271] Contestations of liberalism occur everywhere across the globe.[272] However, developments within the former one-party communistic and socialistic systems do exhibit some common patterns,[273] which need to be briefly highlighted to improve understanding of political and constitutional changes in the respective states.[274]

The essential problem is the tension between the continuity of the previous political system and the need to introduce radical political and legal changes in order to establish a new democratic constitutional system based on different values and principles. These political entities often call this tension the problem of 'lustration'.[275] It extends beyond formal constitutional changes, because it encapsulates people, institutions, practices and other sociological elements.[276]

To put it differently, people who are the motor of change are the product of the previous political system, which was not built on plurality, accountability and meritocracy. The dilemma is expressed through the question of how radically one pursues political and legal change. On the one hand, reforming every aspect of the previous political entity necessarily includes the people who were the holders of the previous institutions. That leads inevitably to retiring the whole generation. On the other hand, continuation necessarily results in the continuation of old practices and furthering

271 Michael W Bauer et al. (eds), *Democratic Backsliding and Public Administration: How Populists in Government Transform State Bureaucracies* (Cambridge University Press 2021).

272 Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press 2022).

273 Bojan Bugarič, 'The Rise of Nationalist-Authoritarian Populism and the Crisis of Liberal Democracy in Central and Eastern Europe' in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press 2020) 33.

274 See also Bernd Stöver, 'Eastern Europe' in Richard H Immerman and Petra Goedde (eds), *The Oxford Handbook of the Cold War* (Oxford University Press 2013) 174ff.

275 Natalia Letki, 'Lustration and Democratisation in East-Central Europe' (2002) 54 Europe-Asia Studies 529. Barbara A Misztal, 'How Not to Deal with the Past: Lustration in Poland' (1999) 40 European Journal of Sociology 31.

276 Bugarič (n 273) 35.

previous intellectual elites,[277] who came to their positions under different value systems.

The problem was exacerbated when the initial reforms in the newly introduced democratic polities were relatively modest, aiming to politically align the respective political entity in order to carry out the transition to a new political system. Thirty years later, one notices that the people have not changed enough, the institutions have not changed enough, and one feels the need to address the issue of (dis)continuation once again.

The first problem of such an undertaking is the question of genuine motivation. One can claim the above-presented reasons, but in fact it only aims to consolidate current political power.[278] Moreover, even if one could assume that the motivation behind this is genuinely to democratize the respective political society, it is nearly impossible to assess who got their position based on meritocratic principles and who did not. To illustrate this argument, in the words of the Venice Commission assessing the Polish judiciary reform: 'While the Memorandum speaks of the "de-communization" of the Polish judicial system, some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites.'[279]

The sociological excursus above is twofold. It explicated why any radical political transformation within a democratic society, aiming to lustrate and discontinue patterns from the past, cannot succeed without concurrently creating more injustice as it aims to remedy.[280] Second, it explained why the

277 Cynthia M Horne and Margaret Levi, 'Does Lustration Promote Trustworthy Governance? An Exploration of the Experience of Central and Eastern Europe' in János Kornai and Susan Rose-Ackerman (eds), *Building a Trustworthy State in Post-Socialist Transition* (Palgrave Macmillan US 2004) 53ff.

278 Susanne YP Choi and Roman David, 'Lustration Systems and Trust: Evidence from Survey Experiments in the Czech Republic, Hungary, and Poland' (2012) 117 American Journal of Sociology 1172. See also the same dilemma from Ukraine; Kanstantsin Dzehtsiarou, 'Lustration in Ukraine: Political Cleansing or a Tool of Revenge?' (*Verfassungsblog*, 26 June 2015) <https://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge/> accessed 24 February 2023.

279 European Commission for Democracy Through Law (Venice Commission) Poland Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (113th Plenary Session, December 2017) Opinion No. 904/2017, para 89.

280 Cynthia M Horne, 'The Impact of Lustration on Democratization in Postcommunist Countries' (2014) 8 International Journal of Transitional Justice 496, 500. Tyler Cowen, 'How Far Back Should We Go? Why Restitution Should Be Small' in Jon

topic remains highly emotional, feeding on easily found injustices from the previous political system.[281]

4.2.2 The Trajectory of Changes – Undermining the Judiciary

Political and institutional changes, or their attempts, have been thoroughly recorded by many scholars.[282] This is not the place to outline again the Polish institutional changes concerning the judiciary. Yet, the present research still needs to highlight briefly the main contours of the Polish judicial reform to show its seriousness and its ambit. The sub-section shortly illustrates the respective institutional changes in three waves. The first wave concerns the Polish Constitutional Tribunal, and the second wave addresses the Polish Supreme Court. The third wave focuses on the other essential institutional changes.

In 2015-2016 the Polish government reshaped and subordinated the Constitutional Tribunal. It shortened the mandates of the sitting judges and afterwards, when the respective law was declared unconstitutional, nevertheless nominated new judges to the respective court.[283] It introduced disciplinary proceedings against the sitting judges, which could be initiated by the President of the Republic or the Minister of Justice.[284] After the law had been declared unconstitutional, the government declined to publish the respective decision in the official journal. After the constitutional tribunal's president refused to allow the unconstitutionally appointed judges to take up their functions, the public prosecutor launched a criminal investigation against the president of the Constitutional Tribunal. Moreover, the President of the Republic appointed another judge as the president of the Constitutional Tribunal, who immediately admitted the said unconstitutionally nominated judges to the court. In the view of the European Parliament,

Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge University Press 2006) 17.

281 On the balance between justice and revenge, see Adam Michnik and Václav Havel, 'Confronting the Past: Justice or Revenge?' (1993) 4 Journal of Democracy 20.

282 Pech, Wachowiec and Mazur (n 216).

283 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 64.

284 Ibid. 73. See also Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 Hague Journal on the Rule of Law 63, 73.

the Commission, the CJEU and many scholars, the Polish Constitutional Tribunal can no longer be considered an independent constitutional court, providing effective judicial review.[285]

Relating to the Supreme Court, the government introduced compulsory retirement of its judges by lowering the retirement age from seventy to sixty-five years, thereby issuing mandatory retirement to 37% of the judges, if not otherwise decided by the President of the Republic.[286] The CJEU held that change was no longer compatible with the judicial independence principle and judges' irremovability.[287] Finally, it introduced two new chambers, the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs, both de facto above other chambers at the Supreme Court and filled solely by judges appointed under the new regime.[288]

The government also replaced the president and vice-president of the ordinary courts. The Minister of Justice has the power to appoint and dismiss the president of the courts without any concrete criteria and without the possibility of the decision being challenging.[289] It can even mark the presidents of the lower courts, which results in the reduction of the post allowance by up to 50%. Furthermore, the government changed the National Council of Judiciary (NCJ) responsible for appointing and promotion judges.[290] It changed all fifteen members and replaced them with new ones.[291]

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285 Pech, Wachowiec and Mazur (n 216) 7.

286 Sadurski (n 283) 81.

287 Pech, Wachowiec and Mazur (n 216) 9. See also Case C-619/18 *European Commission v Republic of Poland* (*Supreme Court Retirements*) [2019] EU:C:2019:531, para 96.

288 Sadurski (n 283) 113; Pech, Wachowiec and Mazur (n 216) 9; Laurent Pech, 'Protecting Polish Judges from the Ruling Party's "Star Chamber": The Court of Justice's interim relief order in Commission v Poland (Case C-791/19 R)' (*Verfassungsblog*, 9 April 2020) <https://verfassungsblog.de/protecting-polish-judges-from-the-ruling-partys-star-chamber/> accessed 24 February 2023.

289 Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 German Law Journal 1839, 1846.

290 Piotr Bogdanowicz and Maciej Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, European Commission v Republic of Poland' (2020) 16 European Constitutional Law Review 306, 323; Anne Sanders and Luc von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy' (2018) 19 German Law Journal 769, 776.

To sum up, while the limited scope of the research here cannot do justice to the complexities and details concerning the judicial reform in Poland, the above-sketched outline illustrates the trajectory of their intense and ferocious judicial reform over the years.[292]

4.2.3 The CJEU's Milestone Protecting Judicial Independence – ASJP

In light of the blocked Article 7 TFEU Procedure,[293] the CJEU took the lead and paved the way to establishing a robust system under EU law protecting common and shared values under Article 2 TEU, most notably the rule of law. It issued a landmark *ASJP*[294] decision concerning the independence of judges in relation to EU law.

The *ASJP* decision in Portugal concerned the temporary reduction of remuneration to the court's members, including the judges, there. It was adopted as a mandatory requirement linked to eliminating Portugal's excessive budget deficit in the context of the EU financial assistance programme.[295] The CJEU took this opportunity to define the principle of independence of the judiciary.

One must read the *ASJP* decision as a direct response to the above-described development in Poland.[296] The CJEU specifically addressed struc-

291 Śledzińska-Simon (n 289) 1842. See also Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* (*AK*) [2019] ECLI:EU:C:2019:982, paras 143-145.

292 Sadurski (n 283); Drinóczi and Bień-Kacała (n 228); Drinóczi and Bień-Kacała (n 213). Regarding the terminology of *reform*, Kim Lane Scheppele and Laurent Pech, both indefatigable critical observers of the deteriorating circumstances in Hungary and Poland, suggested that speaking of judicial reform is misguided and deceitful. The research applies the word *reform* without implying any legitimacy to the respective changes.

293 Kim Lane Scheppele and Laurent Pech, 'Was the Commission Right to Activate pre-Article 7 and Article 7(1) Procedures Against Poland?' (*Verfassungsblog*, 7 March 2018) <https://verfassungsblog.de/was-the-commission-right-to-activate-pre-article-7-and-art-71-procedures-against-poland/> accessed 24 February 2023.

294 Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117.

295 The CJEU in the case at hand did not find respective general salary reduction measures contrary to Article 47 of the EU Charter (the right to an effective remedy and to a fair trial) and Article 19(1) TFEU (Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law).

296 Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses' (2018) 14 European Constitutional Law

tural changes and reforms of the judiciary and stated that the Union could only function under mutual trust among the Member States, which is particularly based on the common values in Article 2 TEU, such as the rule of law.[297] It argued:

> '[The] guarantee of independence, which is inherent in the task of adjudication […], is required not only at EU level […] but also at the level of the Member States as regards national courts. The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism […] that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.'[298]

> 'The body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.'[299]

The CJEU established two crucial elements in relation to the independent judiciary and the rule of law. First, national judges or adjudicative bodies have to be independent regardless of whether they are applying EU law or not in a particular case. In other words, the basis for mutual trust and the independent functioning of the judiciary cannot be provided only 'in the morning' when applying EU law, but not 'in the afternoon' when adjudicating on domestic matters, because for both tasks there is the same judge and the same judicial institution.

Moreover, the CJEU introduced a further element. It read the values under Article 2 TEU, specifically the rule of law, not just as programmatic or ideological guidelines, but as a justiciable, enforceable and indispensable legal norm.[300]

Review 622, 635; Sébastien Platon and Laurent Pech, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827, 1849.

297 Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117, para 30.

298 Ibid. paras 42–3.

299 Ibid. para 44.

300 Platon and Pech (n 296) 1836.

Hence, one cannot carry out a national judicial reform if it does not comply with the principle of judicial independence, which is part of the rule of law under Article 2 TEU.

4.2.4 Introduction of Identity to Safeguard Judicial Reform

One week after the above-cited *ASJP* decision, the Polish government issued a White Paper on the Reform of the Polish Judiciary (White Paper), trying to 'explain that the criticism of the reform is unfounded'.[301] The following sub-section focuses predominantly on the arguments of national constitutional identity. The White Paper stated:

> 'The European legal system is founded on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union which also guarantees that each member state may shape its own judicial system in a sovereign manner, as long as it does not threaten judicial independence. Tensions between the executive and the judiciary lie in the nature of democratic systems, yet their very existence does not mean that judicial independence is endangered. The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence, which means that reforms of the judiciary should be assessed at the national level by competent authorities.'[302]

> 'Constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities, but also sets the limit for regulatory intervention of the European Union.'[303]

The Polish government connected the institutional reform of the judiciary with its exclusive competences, alluding that the EU does not have any say in the matter.[304] The context of the identity argument indicates how

301 The Chancellery of the Prime Minister (n 51) 5.
302 Ibid. 206–7.
303 Ibid. 170.
304 Anna Śledzińska-Simon and Michał Ziółkowski, 'Constitutional Identity in Poland: Is the Emperor Putting On the Old Clothes of Sovereignty?' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 263–6.

national constitutional identity became a tool to prevent any potential intervention of the EU and its CJEU with the said judicial reform.[305]

Finally, as briefly elaborated in the introductory Chapter 1, claiming exclusive competence does not resolve multilevel constitutional tensions. Polish judicial reform undoubtedly exhibits that, and it opens a new level of interdependence between the Union and its Member States, regardless of the competences of the latter. The question is not whether Poland enjoys unlimited exclusive freedom to reshape its judiciary system due to the lack of competences in this area of the Union, but rather to what extent a national judicial reform influences the functioning of the Union in guaranteeing effective and independent judicial protection, based on mutual trust.

4.2.5 The CJEU Further Strengthens National Judicial Independence

Despite the White Paper and the use of national constitutional identity, among other arguments, the CJEU set the course straight. It only reiterated and strengthened the commitments expressed in the cited *ASJP*.[306]

In 2018, it issued another landmark decision, *Celmer.*[307] The High Court in Ireland asked the CJEU whether it could refuse the execution of a European arrest warrant due to the systematic and general deficiencies of the rule of law, namely, the independence of the judiciary in Poland. Relying heavily on the *ASJP* and *Aranyosi,*[308] the CJEU further developed the two-step test,[309] which allowed for a refusal in the case of systemic

305 See also Drinóczi and Bień-Kacała (n 213) 55–70; Sadurski (n 283) 219; Michał Ziółkowski and Barbara Grabowska-Moroz, 'Enforcement of EU Values and the Tyranny of National Identity – Polish Examples and Excuses' (*Verfassungsblog*, 26 November 2019) <https://verfassungsblog.de/enforcement-of-eu-values-and-the-tyranny-of-national-identity-polish-examples-and-excuses/> accessed 24 February 2023.

306 Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' [2021] Swedish Institute for European Policy Studies 33ff.

307 Case C-216/18 PPU *Request for a preliminary ruling from High Court (Ireland)* (*Celmer*) [2018] ECLI:EU:C:2018:586.

308 Joined Cases C-404/15 and C-659/15 *PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (*Aranyosi*) [2016] ECLI:EU:C:2016:198.

309 Wouter van Ballegooij and Petra Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU' (*Verfassungsblog*, 29 July 2018) <www.verfassungsblog.de/the-cjeu-in-the-celmer-case-o

deficiencies concerning the independence of the judiciary, indicating a real risk of breach of the fundamental right to a fair trial.[310]

Furthermore, in the infringement procedure against Poland relating to the compulsory premature retirements, as mentioned above, the CJEU held:

> 'The application of the measure lowering the retirement age of the judges […] is not justified by a legitimate objective. Accordingly, that application undermines the principle of the irremovability of judges, which is essential to their independence.'[311]

The judgement, following the same conclusion from the interim measure from 2018,[312] disregarded the Polish arguments that national rules concerning the organization of the national justice system constitute a competence reserved exclusively to the Member States and thus cannot be the object of a review.[313] The CJEU replied as always that although the organization of justice falls within the competences of the Member States, the fact remains that when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.[314]

Additionally, in a preliminary ruling requested by several Polish courts, including the Supreme Court and the Supreme Administrative Court, the CJEU issued another rather noteworthy decision. In *AK*,[315] it developed the framework for the national courts to define the necessary characteristics of an independent and impartial tribunal, including the method for appointments. It stated that any direct or indirect influence of the legislature or executive might lead to a dependent and partial court.[316] It is for the national courts to determine whether that is the case. But if so, based on

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ne-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu> accessed 24 February 2023.

310 Having regard to a personal situation, the nature of the offence and the factual context that that person will run such a risk if surrendered to that State. See Case C-216/18 PPU *Celmer* [2018] ECLI:EU:C:2018:586, para 80.

311 Case C-619/18 *European Commission v Republic of Poland* (*Supreme Court Retirements*) [2019] ECLI:EU:C:2019:531, para 96.

312 Case C-619/18 R *European Commission v Republic of Poland* [2018] ECLI:EU:C:2018:852.

313 Case C-619/18 R *European Commission v Republic of Poland* [2018] ECLI:EU:C:2018:852, paras 37–8.

314 Ibid. para 52.

315 Joined Cases C-585/18, C-624/18 and C-625/18 *AK* [2019] ECLI:EU:C:2019:982.

316 Ibid. para 171.

'the principle of the primacy of EU law',[317] the provisions of national law must be disapplied.

The CJEU is continuously issuing further decisions concerning judicial independence,[318] strengthening protection from the EU's perspective.[319] For example, in the latest case, the CJEU issued an interim measure staying and suspending disciplinary proceedings against the judges based on the newly established Disciplinary Chamber of the Supreme Court,[320] despite Poland arguing that the CJEU does not have the jurisdiction to decide on the national constitutional structures of the judiciary competences.[321] Henceforth, the CJEU firmly placed the national judicial architecture within the CJEU's scrutiny, requiring adherence to the principle of judicial independence.[322]

4.2.6 Legal Polexit as Climax of the Constitutional Conflict

The above-described trajectory of the decline of judicial independence climaxed in 2021 when the Polish Prime Minister formally requested the Constitutional Tribunal to issue a ruling confirming the supremacy of Polish over EU law and to review the primacy principle of EU law against the Polish Constitution.[323]

The Constitutional Tribunal issued a decision stating that the CJEU's interpretation of Article 19 (1) TEU as a guarantee of the independence of (national) judges is inconsistent with the Polish Constitution.[324] The desired result to justify the said judicial reform was not enough. The

317 Ibid.

318 Sébastien Platon and Laurent Pech, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827. See also Case C-64/16*ASJP* [2018] ECLI:EU:C:2018:117.

319 Pech and Kochenov (n 306) 93.

320 Case C-791/19 European Commission v Republic of Poland [2021] ECLI:EU:C:2021:596.

321 See also Armin von Bogdandy, 'How to protect European Values in the Polish Constitutional Crisis' (*Verfassungsblog*, 31 March 2016) <https://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/> accessed 24 February 2023.

322 Mathieu Leloup, 'An Uncertain First Step in the Field of Judicial Self-Government: ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A.K., CP and DO' (2020) 16 European Constitutional Law Review 145.

323 Bobić (n 169) 68.

324 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021. See also Jakub Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of

European Commission started an infringement procedure against the cited decision, and the CJEU issued a daily penalty of 1 million EUR until Poland stopped suspending the disciplinary chamber, which existence violated the ruling of the CJEU.[325] In July 2022, the chamber was dissolved[326] to unlock the frozen EU funds and end the levied penalties by the CJEU.[327] While more than 35 billion EUR as pandemic recovery funds for Poland remain frozen – until all the requirements of independence of the judiciary are fulfilled – Poland demonstrated a considerable change of heart.

4.2.7 Interim Conclusions

The described trajectory is completely different from the Hungarian examples, yet there are many parallels.[328] The danger of homogenous and ethnocultural tendencies was most inhumanly expressed in the history of the 20th century. Hungary's undermining, illiberal claims of national constitutional identity reflect that aspect of danger.[329] The majority's will must never rule over the humanistic value of human dignity, guaranteed to every individual, regardless of colour, religious background, language or place of birth.[330]

The Polish trajectory entails a different kind of danger, not per se less alarming. The described contestations indicate how difficult it is to solve the national constitutional dimension from the outside. These claims of national constitutional identity are sabotaging the project of the EU as such. As a wolf in sheep's clothing, they are cleverly articulated in the constitutional language of fundamental constitutional and political structures, which are truly, in principle, legitimately situated within the national ambit. Yet, in the case of judicial independence, when these structures change

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the Polish Constitutional Tribunal' (*Verfassungsblog*, 12 October 2021) <https://verfassungsblog.de/gazing-into-the-abyss/> accessed 24 February 2023.

325 Case C-204/21 R. *European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:878.

326 Sadurski, Wojciech: 'The Disciplinary Chamber May Go – but the Rotten System will Stay', (Verfassungsblog, 8 August 2021) <https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/> accessed 24 February 2023.

327 Marcisz, Pawel: A Chamber of Certain Liability: A Story of Latest Reforms in the Polish Supreme Court, (Verfassungsblog, 31 October 2022) 2022/10/31, <https://verfassungsblog.de/a-chamber-of-certain-liability/> accessed 24 February 2023.

328 See i.e. Drinóczi and Bień-Kacała (n 213) 10ff.

329 Balibar and Wallerstein (n 207) 86ff. Kovács (n 215) 1714.

330 Drinóczi and Bień-Kacała (n 213) 36.

their fundamental nature from independence into being subordinated to the executive, that can shake the whole legal system of the Union.

This section showed how undermining claims of national constitutional identity could not effectively justify an attack on common principles and values, even when the danger comes from domestically defined fundamental structures.

Furthermore, similar to the Hungarian example, the Polish national constitutional identity does not protect identity, but rather an attempt to independently restructure national judicial architecture. Calling it identity just serves the latter objective.

Once again, the case law of the CJEU showed that alleged national exclusive competences and national fundamental structures, political and constitutional, which are directly protected under Article 4(2) TEU, have not changed the outcome.[331] The CJEU requires respect for the EU's fundamental principles and values, especially if the effectiveness of the EU's system, based on mutual trust, depends on it.

This is not a tyranny of EU values,[332] but a demonstration that supranational cooperation can only operate if national diversities are bound by common and shared principles. Undermining illiberal claims of national constitutional identity no longer fulfil that prerequisite.

331 Pech, Wachowiec and Mazur (n 216).

332 Armin von Bogdandy, 'Tyrannei Der Werte? Herausforderungen Und Grundlagen Einer Europäischen Dogmatik Systemischer Defizite' [2019] Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 503, 550.

5 Conclusion

This chapter did not analyze one single jurisdiction, one single theoretical understanding, or one single dimension of identity claims, but highlighted all identity claims together. To encompass the widest variety of identity claims, it adopted a fairly general understanding of identity claims, as developed by Calliess and van der Schyff.[333]

The analyzed theoretical and practical examples of national constitutional identity showed the scale of variation which went beyond one potential single and coherent theoretical account of identity. Accordingly, the chapter suggested another approach. It investigated the underlying various normative foundations and rationales of divergent identity claims and introduced several clusters of identity claims. These clusters were differentiated from one another by their underlying justifications.

The chapter presented ten different clusters. While many of them partially overlap, the suggested framework nevertheless explained the differences between the identity claims and their (un)successful applications in relation to EU law.[334]

The chapter presented the following clusters of identity claims:

- Identity claims concerning fundamental rights and their idiosyncratic interpretations. This type will be further elaborated in the following Chapter 4.
- Identity claims which refer to common and shared values and principles – identity as sameness. The said identity can only be addressed against the other international political entities, based on different ideological foundations, or to guarantee that the EU does not deteriorate below the common and shared principles and values to which it is committed.
- Identity claims demanding an exclusive control over the Member States' essential areas, often articulated as sovereignty.
- Identity claims which refer to institutional diversities.

333 Calliess and Schyff (n 15) 7.

334 While the Member States and their apex courts often concurrently claim several aspects of national constitutional identity, that in itself does not weaken the presented normative framework.

- Identity claims as the expressions of common and shared principles, such as human dignity and equality.
- Identity claims referring to sensitive political and legal areas, like questions of relationship between church and state, and determinations of sex and family status.
- Identity claims concerning protection and advancement of languages, historical specificities, cultural issues, and questions of nationality and citizenship.
- The chapter studied undermining illiberal identity claims, adopting a different, more holistic methodology, and argued that they must be rejected. Furthermore, it explicated how these illiberal claims occur as a welcome vehicle to pursue the objectives which reflect the broader ongoing political and legal developments in the respective Member States.

While the chapter introduced one cluster of undermining illiberal identity claims, it showed how the undermining identity claims could differ considerably. The first example highlighted the dangers of historical and ethnic considerations, while the second one presented the necessity of independent judicial structures in the Member States as a prerequisite for the functioning of the whole EU. Both aspects of undermining illiberal identity claims are comparably dangerous and are by no means limited to the Member States, which were the subject of the present inquiry.[335]

This chapter showed how one should think of identity not as a single concept, but rather according to its various underlying rationales as presented in the proposed framework above. It explicated these normative differences, and finally presented where the legitimate space for judicial resistance in the name of national constitutional identity undoubtedly ends, drawing the red lines against the EU.[336]

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335 Bugarič (n 273) 25. See i.e. also the rule of law crisis in Romania; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* (*Euro Box*) [2021] ECLI:EU:C:2021:1034.

336 Julian Scholtes, 'Populism and the Crisis of Constitutional Pluralism' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge University Press 2022) 414: 'It seems that the "constitutional tolerance" that characterises the pluralistic practice of European law, like all forms of tolerance, is constrained by its own paradoxes. Just as Karl Popper observed that extending "unlimited tolerance even to those who are intolerant" means accepting that "the tolerant will be destroyed, and tolerance with them", so does extending unlimited constitutional tolerance to those that reject constitutionalism contribute to constitutionalism's destruction.'