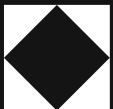


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Jakob Gašperin Wischhoff

National Constitutional Identity

Judicial Resistance in the EU
As Civil Disobedience and Conscientious Objection



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to rosanna

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Contents

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

Detailed Table of Contents

List of Abbreviations	21
1 Introduction: Identity as Kandinsky	
<i>Objectives, Contextualisation, the Outline</i>	23
1 Setting the Scene – Identity as Kandinsky	25
1.1 Research Questions and Objectives	27
1.2 Methodology and Terminology	32
1.3 Existing Identity Research and Scholarly Interlocutors	34
2 Contextualisation	38
2.1 Delimitation of Competences and National Constitutional Identity	38
2.1.1 Functional Characteristics of the EU’s Competences and its Consequences	39
2.1.2 Retained Exclusive Member States’ Competences	41
2.1.3 Actions Explicitly Prohibited by the EU: Reserved Member States’ Competences	42
2.1.4 Interim Conclusion	44
2.2 European Constitutional Pluralism	45
2.2.1 Competing Claims to Authority	45
2.2.2 Complementing Visions of Constitutional Pluralism: A Point of Departure	47
3 Outline	50
2 A Deconstructive Account	
<i>Genesis and Critical Assessment of Constitutional Identity in Germany</i>	59
1 Introduction	61
2 Theoretical Framework: Constituent Power and Constitutional Form	65
	11

Detailed Table of Contents

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

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

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

4.1.3	Identity Decision – Historical Constitution	184
4.1.4	National Constitutional Identity and Migration	185
4.1.5	Interim Conclusions	186
4.2	Structures of Judiciary	187
4.2.1	Contextualizing the Struggles of Former One-Party Systems	188
4.2.2	The Trajectory of Changes – Undermining the Judiciary	190
4.2.3	The CJEU’s Milestone Protecting Judicial Independence – ASJP	192
4.2.4	Introduction of Identity to Safeguard Judicial Reform	194
4.2.5	The CJEU Further Strengthens National Judicial Independence	195
4.2.6	Legal Polexit as Climax of the Constitutional Conflict	197
4.2.7	Interim Conclusions	198
5	Conclusion	200

4 Forgetting Fundamental Rights Identity Claims

The New Constitutional Paradigm in Multilevel Fundamental Rights Standards

1	Introduction	203
2	National and Supranational Fundamental Rights Standards	205
2.1	Multilevel Constitutional Design of Fundamental Rights Protection	207
2.2	The Scope of Fundamental Rights Application – A Disputed Matter	209
2.3	Three Levels of Fundamental Rights Protection – Turning Minimum Protection into a Final Norm	211
3	Identity as Protection of National Fundamental Rights Standards	214
3.1	European Identity Clause and Fundamental Rights – Going Beyond	214
3.2	Identity as Commitments, Interpretations and Unique Fundamental Rights	216
3.3	Treating Fundamental Rights Identity Claims Differently	218

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

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

Detailed Table of Contents

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

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

Detailed Table of Contents

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

List of Abbreviations

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

Introduction: Identity as Kandinsky

Objectives, Contextualisation, the Outline

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

(Dworkin, *Taking Rights Seriously*)

1 Setting the Scene – Identity as Kandinsky

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1 Research Questions and Objectives

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

These questions concern the EU citizen as *homo politicus*; they are fundamental to the further political development of the European project, and are articulated legally – thus making them the subject of constitutional considerations. The EU is a flexible supranational polity, created as an ever closer Union.¹³ Accordingly, the European constitutional architecture intrinsically denotes an inner tension. On the one hand, the Member States as the Masters of the Treaties aim to preserve a considerable amount of political control over the EU. On the other hand, the progressive development of the Union via its autonomous legal system¹⁴ is increasingly challenging

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

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

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

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

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

From the European perspective, Article 4(2) TEU, the European identity clause, states:

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’¹⁷

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

From the national perspective, the Member States’ apex courts occasionally refuse to apply EU law, arguing that it conflicts with their national constitutional identity. The Italian *Frontini* decision in 1973¹⁸ and the German

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

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

17 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 Wischmeyer (n 25) 433.

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

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

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

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

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

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

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

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

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

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

1.2 Methodology and Terminology

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

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

33 Kumm (n 30) 239.

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

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

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

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

Finally, the last chapter applies interdisciplinary methods, delving into the legal theories of civil disobedience and conscientious objection. The research in that respect aligns the findings of the legal theory concerning civil disobedience and conscientious objections with the national and CJEU's identity case law in the EU.³⁸ Notably, it adopts a distinctive method of structural comparison³⁹ which does not correspond to traditional comparative law focusing on functional methods.⁴⁰

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

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

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

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

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

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

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

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

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

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

1.3 Existing Identity Research and Scholarly Interlocuters

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

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

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

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

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

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

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

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

45 Aristotle, *The Politics of Aristotle* (Ernest Barker tr, Oxford University Press 1962) 98.

46 Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 7.

47 *ibid.*

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

49 Millet (n 15).

50 Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015).

51 Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, *National Constitutional Identity and European Integration* (Intersentia 2013).

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

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

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

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

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

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

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

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

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

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

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

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

2 Contextualisation

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

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

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

2.1 Delimitation of Competences and National Constitutional Identity

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

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

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

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

62 Kumm (n 23) 384.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.2 Retained Exclusive Member States' Competences

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

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

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

79 Ibid.

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

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

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

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

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

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

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

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

83 Ibid. paras 69, 70.

84 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 68.

85 Azoulai (n 70) 196.

86 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 60.

87 Bruno de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The division of competences between the EU and its Member States* (Hart Publishing 2017) 69.

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

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

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

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

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

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

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

89 Ibid. para 14.

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

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

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

93 Ibid. para 49.

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

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

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

2.1.4 Interim Conclusion

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

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

95 Ibid. para 40.

96 Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers' (2015) 35 Oxford Journal of Legal Studies 55.

97 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 233.

98 See Neil Walker, 'When Sovereigns Stir' (2018) Paper No. 2019/01 Edinburgh School of Law Research 6.

99 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 61; BVerfG, 2 BvR 1390/12 *ESM* 18 March.

100 Bobić (n 53) 75ff.

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

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

2.2 European Constitutional Pluralism

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

2.2.1 Competing Claims to Authority

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

101 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 87) 73.

102 Federico (n 60) 370.

103 Miguel Pólares Maduro, 'Three CLaims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 70.

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

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

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

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

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

107 *Ibid.*

2.2.2 Complementing Visions of Constitutional Pluralism: A Point of Departure

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

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

Neil Walker suggested a constitutional pluralism which is obedient to an 'axiom of epistemic incommensurability'.¹¹¹ Every system should be seen only as self-referential, and is therefore only plausible due to its own internal episteme.¹¹² When there is a collision of several systems, no one can claim superiority over the other. There can be no external perspective to mediate between colliding claims, since a quasi-external system functions in accordance with the same self-absorbed validity, claiming its own epistemological crestedness. Walker argued that true constitutional pluralism must remain open and undecided¹¹³ when it comes to the question of superiority and final say.

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

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

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

111 Jaklic (n 108) 32.

112 Ibid. 33.

113 Ibid. 36.

Moreover, Miguel Maduro explored how constitutional pluralism functions in the practice of the EU, as ‘interpretive and participative pluralism’.¹¹⁴ Searching for underlying principles to establish a common value nominator, he argued that ‘there must be some kind of meta-methodological agreement between the actors of the different systems’,¹¹⁵ recognizing the competing claims of each other and therefore ‘signalling that they are ready to mutually defer but also to establish the conditions for that mutual deference’.¹¹⁶ Here it must suffice to highlight that his ‘harmonious-discursive constitutionalism’¹¹⁷ focuses on the question how pluralism can operate in practice, based on framework principles¹¹⁸ and participatory dimension.¹¹⁹

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

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

114 Jaklic (n 108).

115 Avbelj and Komárek (n 30) 17.

116 *ibid.*

117 *Ibid.* 3.

118 Maduro identified self-identity determination which has to be left to a ‘self’, meaning that each subject can only define its identity itself, otherwise an identity could be lost; coherence of a legal system vertically and horizontally; and the principle of universability, which has to anticipate that every national decision taken can and possibly will be *mutatis mutandis* adopted by the other national courts in comparable circumstances.

119 The participative element includes constitutional interpretation, which expects from a constitutional court to identify and defend idiosyncratic national traditions; subjective universalism, which takes into account also the interests of the other (the EU) but from the first-person-singular perspective, meaning to understand the interests of the other from the subjective standpoint of the observer; and inter-subjective universalism, which accepts a fiction, that both standpoints of a first-person-singular and of a second-person-singular are equally valid. See also Jaklic (n 108).

120 Avbelj and Komárek (n 30) 12.

121 *Ibid.*

122 *Ibid.* 17.

a better conceptualization of constitutional practice in the EU.¹²³ Constitutional pluralism encapsulates conceptually what is carried out according to existing case law. The source of authority is not only ‘we the people’, but also commitment and realization of basic constitutional principles, namely democracy, the rule of law, and human rights. The legitimacy of the claim for authority of the EU normatively depends on the actual (empirical) realization of these principles by the EU’s institutions.¹²⁴ The main objective of his account of constitutional pluralism is to find legal coherence and constructive mutual engagements¹²⁵ among legal orders within the EU and the EU itself. According to Kumm, the law of a more expansive community should be respected. This presumption can nevertheless be rebutted by the fact that a more expansive community violates countervailing principles of legality, the jurisdictional principle of subsidiarity, the procedural principle of due process and the substantive principle of respect for human rights and reasonableness.¹²⁶

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

123 Ibid. 23.

124 Kumm (n 30) 234.

125 Ibid. 217.

126 Ibid. 233.

127 Armin von Bogdandy and Stephan W Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1417, 1419.

128 See also R Daniel Kelemen et al., ‘National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order’ (*Verfassungsblog*, 26 May 2020) <<https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>> accessed 24 February 2023.

3 Outline

The research unfolds in the following sequence. It first identifies and critically assesses the origins¹²⁹ and development of identity claims, starting with German jurisprudence and constitutional case law (Chapter 2).¹³⁰ Then it expands the scope of survey, and it analyses all claims of national constitutional identity across the Member States, differentiating them into several varying types – or clusters of identity claims (Chapter 3). Moreover, it specifically addresses identity claims concerning fundamental rights (Chapter 4). The research subsequently explores various dimensions of identity (Chapter 5) while rejecting the construction of the European constitutional identity (Chapter 6).¹³¹ Finally, it reconstructs identity claims through a structural comparison with civil disobedience and conscientious objection (Chapter 7).¹³²

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

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

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

131 Cf van der Schyff (n 56).

132 Kumm (n 30) 239.

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

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

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

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

133 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 99.

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

135 BVerfGE 73, 339 *Solange II* 22 October 1986.

136 BVerfGE 89, 155 *Maastricht* 12 October 1993.

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

138 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

139 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.

140 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.

141 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

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

143 BVerfG, 2 BvR 1685/14 *European Banking Union* 30 July 2019; BVerfG 2 BvR 859/15 *PSPP* 5 May 2020.

144 Lenaerts, Gutiérrez-Fons and Adam (n 14) 133–136.

145 See also Christoph Möllers, '“We Are (Afraid of) the People”: Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 102ff.

of identity claims, due to their considerable differences. Accordingly, the research identifies several distinctive *clusters* of identity claims, each of them having a distinctive normative basis. It distinguishes among the identity claims which protect the general commitment of the Member States to liberal constitutionalism¹⁴⁶ – a controlling mechanism that the EU does not deteriorate into an undemocratic Leviathan, without any meaningful control mechanism and accountability. Another type of identity claims concerns common principles, which the Member States understand differently: such as separation between church and state, human dignity, and equality.¹⁴⁷ The chapter further distinguishes among the identity claims which regard specific standards of shared fundamental rights, refer to national sovereignty,¹⁴⁸ or protect national political and constitutional fundamental structures.¹⁴⁹ Additionally, one separately categorises identity claims which refer to sensitive national areas, explicitly beyond the conferred competences: most notably, protection of national languages¹⁵⁰ and identity claims in relation to history,¹⁵¹ culture,¹⁵² citizenship and nationality.¹⁵³ Finally, the chapter focuses on identity claims which undermine shared and common liberal values and principles, the prerequisites for sustainable European cooperation.¹⁵⁴ It follows from the said differentiations among the clusters

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- 146 Helle Krunke, 'Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 125–127.
 - 147 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (Egenberger)* [2018] ECLI:EU:C:2018:257; Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.
 - 148 Mattias Wendel, *Permeabilität Im Europäischen Verfassungsrecht*, vol 4 (1st edn, Mohr Siebeck 2011) 574.
 - 149 de Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (n 41) 559.
 - 150 Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others (Cilevičs)* [2022] ECLI:EU:C:2022:638.
 - 151 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66.
 - 152 Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA)* [2008] ECLI:EU:C:2008:468, Opinion of AG Kokott, para 93.
 - 153 Case C-473/93 *Commission of the European Communities v Grand Duchy of Luxembourg (Commission v Luxembourg)* [1996] ECLI:EU:C:1996:263, para 32.
 - 154 Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 *German Law Journal* 1703, 1720.

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

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

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

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

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

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

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

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

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

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

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

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

158 de Witte, 'Exclusive Member State Competences: Is There Such a Thing?' (n 61) 60.

159 Guastaferrro (n 53) 308.

160 Daniel Sarmiento, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 178.

161 Fabbrini and Sajó (n 55).

162 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66; Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631, para 302.

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

Chapter 6 is a plea against the Sisyphean endeavour to imagine the constitutional identity of the EU. Recent case law by the CJEU¹⁶³ and various scholarly contributions argue for a constitutional identity for the EU.¹⁶⁴ This chapter takes a reserved position towards such an artificial construction, asking the questions: What is the purpose of such an endeavour? According to what methodology can one imagine such an identity? And what are the pitfalls of this undertaking?

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

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

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

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

165 Cf Drinóczi and Faraguna (n 56).

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

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

These two types of judicial resistance, having different objectives, reflect the structural characteristics of civil disobedience and conscientious objection as exemplified in legal theory and judicial practice. Accordingly, the chapter dwells on the legal theories behind the said conceptions, most notably but not solely by Joseph Raz,¹⁶⁹ Ronald Dworkin¹⁷⁰ and John Rawls.¹⁷¹ The objective of the last chapter is to highlight the basic characteristics of civil disobedience and conscientious objection, as well as their ambiguities, and *transplant* their structural similarities into European constitutional law accordingly. As quickly becomes evident, the nature of both concepts purposely remains enigmatic, escaping positive legal definitions and unilateral solutions. Thus, one is left without a magic and straightforward formula

166 Kumm (n 30) 239.

167 See also Føllesdal (n 34) 335; Isiksel (n 35) 551.

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

169 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprint edition, Oxford University Press 1983) 277–81.

170 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 210–215.

171 John Rawls, *A Theory of Justice: Revised Edition* (2nd edn, Harvard University Press 1999) 319–23.

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

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

A Deconstructive Account

Genesis and Critical Assessment of Constitutional Identity in Germany

Only where things can be seen by many in a variety of aspects without changing their identity, so that those who are gathered around them know they see sameness in utter diversity, can worldly reality truly appear.

(Hannah Arendt, *The Human Condition*)

1 Introduction

The concept of national identity has its place in the primary law of the EU.¹ Nowadays, it is often presented as a tool which can accommodate potential conflicts between national and supranational (constitutional) law.² Nevertheless, thinking in terms of national constitutional identity is older than the EU and has deep roots in German constitutional jurisprudence.³ Starting with famous *Solange I*⁴ decision, the German Federal Constitutional Court (FCC) continuously developed a rich case law concerning the relationship between national and constitutional law and the parameters for potentially reviewing EU law via identity and ultra vires review, without yet reaching its final mode. The said case law was highly influential and has strongly resonated among the other Member States' apex courts, which often followed their lead.⁵ This chapter aims to investigate how the concept initially emerged, and how it was doctrinally developed over the last few decades. It will question the established dogmatic assumptions underlying national constitutional identity jurisprudence and observe how the meaning of identity developed dynamically in parallel with the progressive evolution of the European constitutional framework.

The chapter starts with a short theoretical framework, aiming to highlight three distinctive issues. First, the paradox of constituent power and

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

2 Gerhard van der Schyff, 'The Constitutional Relationship between the European Union and Its Member States: The Role of National Identity in Article 4(2) TEU' (2012) 37 European Law Review 563. François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 European Public Law 571.

3 Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 International Journal of Constitutional Law 411, 415.

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

5 Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 7 European Constitutional Law Review 96, 99.

its constituted form.⁶ This foundational assumption enables the underlying justification of the Eternity Clause,⁷ which gives rise to an absolute claim of national constitutional identity against EU law, even though the EU is committed to the same liberal principles and values that the FCC protects. Second, the said paradox can be translated into so-called *constitutional populism*,⁸ denoting the constituent power which is not fully consumed by the constitution. German historical and sociological circumstances, especially the downfall of the Weimar Republic, tend to explain why the *popular* power to navigate and manage European integration ended up with the highly influential FCC, based on legal expertise. The historical fear of the almighty executive paradoxically became more real than one may be willing to admit,⁹ since the FCC turned into the creative interpreter of the Eternity Clause and the ultimate controller of the limits of European legal integration. Finally, the section explores the initial application of constitutional identity terminology, which can be traced back to Schmitt¹⁰ and Bilfinger.¹¹ The section shows that Schmitt's voluntaristic account of a constitution in the material sense – beyond a written constitution – must be disassociated from the contemporary understanding of national constitutional identity (Section 2).

The chapter then continues with an analysis of FCC case law concerning national constitutional identity – a tool to review and potentially disapply EU law. It critically engages with identity case law, such as *Solange I*,¹²

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- 6 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.
 - 7 Matthias Herdegen, 'GG Art. 79' in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (69th edn, C. H. Beck 2013).
 - 8 Christoph Möllers, '“We Are (Afraid of) the People”: Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 87.
 - 9 Möllers (n 8).
 - 10 Christian Calliess, 'Constitutional Identity in Germany: One for Three or Three in One?' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 155.
 - 11 Polzin (n 3) 416.
 - 12 BVerfGE 37, 271 *Solange I* 29 May 1974.

Solange II,¹³ *Maastricht*,¹⁴ *Lisbon*,¹⁵ *Honeywell*,¹⁶ *OMT I*,¹⁷ *OMT II*,¹⁸ *ESM*,¹⁹ *EAW*,²⁰ and others.²¹ The chapter aims to demonstrate the trajectory of the FCC's case law, claiming to have the right to review EU law, as well as the constant changes in its argumentation and interpretation.

In *Solange* jurisprudence, the FCC did not primarily justify the refusal to apply EU law on national constitutional identity. However, it did raise the concept for the first time, mentioning it only in passing. The definition of national constitutional identity was different in *Solange I* and *Solange II*. While in both cases identity concerned only fundamental rights, the former stated that national constitutional identity is part of the Basic Law dealing with fundamental rights,²² whereas the latter defined it as the legal principles underlying the provisions of Basic Law²³ (Section 3).

The chapter then critically explicates the *Maastricht*²⁴ decision, which set the argumentative foundations for the contemporary identity review, although not using the terminology of identity whatsoever (Section 4). The subsequent *Lisbon* decision extensively defined two distinctive constitutional reviews – national constitutional identity review and ultra vires review – together with the highly criticised theory of the state. The section summarises the decision and its underlying assumptions, and highlights how the decision differentiates between both constitutional reviews (Section 5).

As a response to the highly disputed *Lisbon*²⁵ decision, the FCC made one step back and issued its most balanced and self-reserved decision concerning ultra vires review. In the *Honeywell*²⁶ decision, the FCC established high qualitative standards to potentially review EU law. The violation must

13 BVerfGE 73, 339 *Solange II* 22 October 1986.

14 BVerfGE 89, 155 *Maastricht* 12 October 1993.

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

16 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

17 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.

18 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.

19 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

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

21 BVerfG, 2 BvR 1685/14 *Banking Union* 30 July 2019; BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

22 Andrew Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (Cambridge University Press 1994) 447.

23 Ibid. 485.

24 BVerfGE 89, 155 *Maastricht* 12 October 1993.

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

26 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

be manifest and structurally significant, and the CJEU must first have an opportunity to issue a preliminary decision, thereby creating an obligation of dialogue between the courts. The *Honeywell* decision is arguably the most appropriate balance, aiming to provide limits to an unrestrained power of the CJEU, but at the same time tolerating the CJEU's own methods and errors²⁷ (Section 6).

The subsequent section addresses changing interpretations of identity and ultra vires review in relation to fiscal independence, the OMT programme, and the overlapping relationship between fiscal and economic policy. It shows how the FCC is still trying to find the best way of justifying ultra vires and identity review, thereby shifting back and forth in its continuously changing interpretations. Moreover, the section demonstrates how the FCC separated the connection between national identity from the EU perspective and national constitutional identity from the German perspective, determining the absoluteness of its claims and reverting to national exceptionalism rather than constitutional tolerance (Section 7).

Finally, the last section outlines the curious revisit of the FCC in the *EAW*²⁸ decision, where the FCC decided that it would once again review EU law against national fundamental rights standards, should the EU standards fall below the minimum level of protection. While the FCC in the end did not find any violation of the human dignity by EU law, the said review has been abolished in *Solange II*. As further explicated in Chapter 4, the question remains whether the said case designates only a single deviation or a new normal (Section 8). The chapter wraps up with brief concluding remarks (Section 9).

27 Ibid. para 66.

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

2 Theoretical Framework: Constituent Power and Constitutional Form

Before a critical analysis of the case law concerning national constitutional identity, justified by the unamendable constitutional amendment, this section highlights the underlying paradox of *pouvoir constituant* and *pouvoir constitué* which enables and facilitates the respective constitutional argument (2.1). Moreover, when searching for the roots of national constitutional identity, one cannot evade the writings of Carl Schmitt. Nonetheless, in a holistic survey of his account of constitutional identity, one must emphasize a substantially different meaning of identity, irreconcilable with liberal constitutional commitments (2.2). Finally, in understanding the pivotal role of the FCC in managing and controlling legal integration from the German perspective, a reflection of *constitutional populism* offers some insights (3.3). All three sub-sections are a necessary overture, setting the stage for the later case law analysis.

2.1 Pouvoir Constituant and Pouvoir Constitué as Ideal Paradox

The state's power, which determines its functions and institutions and regulates people's interactions and which ultima ratio coerces its citizens and thereby limits their freedom, necessarily must have, or claim to have, some legitimate authority.²⁹ Whereas the earlier have approaches usually linked a state's power or authority to theological or natural sources of legitimacy, the secularized (liberal) state aims to justify itself without these external references.

The basis of a democratic liberal state, based on the ideas of Enlightenment thinkers and as realized in the French and American Revolutions, is twofold. First, a political order needs legitimation by the subjects it co-

29 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprint edition, Oxford University Press 1983). 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).

erces or over which it claims authority. Second, the exercise of authority is subordinated to, or in compliance with, universal moral principles as concretely articulated by fundamental rights, designed in a system of checks and balances between different branches of power. The tension between the constituted 'Form' and the people's free will therefore is constantly present.³⁰

One can observe a similar tension in the ideal theory, which aims to explain the construction of a constitution and its potential limits. The constituent power is the legitimate source of authority that can create the political order. The power of the people (in ideal terms) expresses itself through the constitution's creation. At the time of the constitution's creation, the constituent power immediately transforms itself into the constituted power, which then determines the rules and conditions for how public authority within the newly established state can be exercised.³¹ In other words, the political power of the people establishes the system, which is transformed into the legal system at the very moment of its constitution, putting constitutional limitations on its creators, the people. That is the beginning of the constitutional paradox.³² Moreover, this begs the question: How can a representation of subjects happen without first establishing the content which defines the subjects? Yet, if one needs to define the content first, then it is not the subjects who define their constitution, but rather the constitution which defines their subjects – known as the paradox of representation.³³

Constituent power can be seen as a power that is ultimately outside the constitutional framework and cannot play any further role once the constitution is created. It is replaced by the constituted power and is thus exhausted by its creation. Only a new (revolutionary) constitutional moment could reawaken the constituent power and create an entirely new

30 Mattias Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018) 244.

31 Tamara El Khoury, 'Pouvoir Constituant' in Rainer Grote et al. (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford Constitutional Law 2017).

32 Martin Loughlin, 'Introduction' in Neil Walker, Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

33 Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

political order with the new constitution.³⁴ The idea behind this outlook is that the constituent power can be seen only as an external element that, after the constitution's creation, cannot interfere with or impact on the legal and political life of the constitutional state. The internal constitutional system operates in a conceptually utterly separate space from the political one.³⁵ To put it differently, one only presupposes the legal validity of the creation of constitution.³⁶

However, one may also argue that constituent power does not simply disappear with the constitution's creation. The people, who are the ideal source of constituent power, remain present, and they (can) continue to give legitimacy to the constitutional system and its potential changes. Perhaps it is the next generation of constitutional participants who need to reaffirm and renew the commitments of the previous generation. Or is the legitimation of power a matter which should be reaffirmed continuously through the very existence of its subjects?

Constituent power can legitimately express itself through the existing constituted institutions and constitutional mechanisms: for example, a referendum or plebiscite, where the citizens can directly participate in and decide on questions of public importance or proposed changes to the constitution. Moreover, direct election of a president can manifest the majoritarian political will of the people.

On the contrary, constituent power can latently express itself indirectly through alternative forms, much less unambiguously. In that sense one understands *constitutional populism*,³⁷ which designates democratic practices which are 'specifically orientated towards constitutional procedures and institutions without formally being part of them'.³⁸ Constituent power is constantly present without having a specifically defined constituted form, so it can reveal itself and act through alternative forms of power.

If one follows the neo-Kantian account, as articulated most radically by Kelsen, and understands constituent power as legally irrelevant and, above all, as external to the constitutional system, one would evidently overlook the obvious. The law cannot isolate itself from the political as

34 Richard Tuck (ed), 'Preface', *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press 2016).

35 Lindahl (n 33) 238.

36 Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, Ltd 2005).

37 Möllers (n 8) 87.

38 Ibid.

a purely scientific discipline where the judges carry out subsumptions of the facts to the norms and where the sociological, historical and cultural aspects remain irrelevant for constitutional adjudication. In the neo-Kantian perspective, the constitutional state is seen as a universal moral person, unaffected and distinct from the natural and social facts, giving primacy only to reason. It independently deducts universal moral principles and sees politics only as technical and executive components of the constituted constitutional apparatus.³⁹ The politics are only justified if in compliance with the universal laws entrenched by the constitution, which is legitimate due to the representation of a hypothetical pure will or universal human interests.⁴⁰

However, this account is strongly contested.⁴¹ Institutions are historically and socially produced, and the constitutional personality is not external to the state but rather the consequence of concrete political will and true politics.⁴² Legality, therefore, cannot be simply a formal condition, but it must be given meaning and content by the prior structure of legitimacy, which is obtained through representation.⁴³ In other words, the law cannot constitute legitimacy on its own, and thus politics comes before the law.⁴⁴

The above-described theoretical and highly abstract paradox of *pouvoir constituant* and *pouvoir constitué* is relevant concerning an unamendable constitutional amendment, or unchangeable constitutional core, which is the underlying presupposition of national constitutional identity, to which we will return in the following sections.

2.2 Constitutional Populism and Constitutional Form – the Power of the FCC

Contemporary constitutional thinking acknowledges the paradox of constituent power on the one hand and the liberal constitutional *form* on the

39 Ellen Kennedy, 'Foreword' in Carl Schmitt (ed), Jeffrey Seitzer (tr), *Constitutional Theory* (Duke University Press 2008).

40 Ibid.

41 JM Balkin, 'Deconstructive Practice and Legal Theory', *Derrida and Law* (Routledge 2017); Michel Foucault, *Ethics: Subjectivity and Truth*, vol 1 (New Press 1997).

42 Chantal Mouffe, *The Return of the Political* (Revised ed, Verso Books 2006).

43 Kennedy (n 39) 10.

44 Carl Schmitt, Leo Strauss and Tracy B Strong, *The Concept of the Political* (George Schwab tr, Reprint edition, University of Chicago Press 1996).

other – not as a critique but as its essential feature.⁴⁵ The ‘form’ tames the political democratic power and is, in turn, interpreted and co-shaped in accordance with political and social developments – determining the highly abstract constitutional principles and the system of checks and balances.⁴⁶ Christoph Möllers, among others,⁴⁷ argued that the said paradox expresses itself through so-called *constitutional populism*.⁴⁸ In that sense, one recognizes a constituent power which is not fully consumed by the constitution and not entirely covered by the constituted institutions and forms. According to Ernesto Laclau, that legitimate power cannot be fully absorbed with democratic political practices as constituted in the constitutional forms of self-government. It shows itself as democratic practice beyond the legal form.⁴⁹

Considering *constitutional populism* as defined above, Möllers analyzed different constitutional periods in Germany, trying to identify how the democratic political practice beyond constitutional form had been realized or expressed. He argued that German constitutional history lacks strong majoritarian parliamentarism, effectively reflecting *constitutional populism*. In the German Reich (*Kaiserreich*), organized as a federal constitutional monarchy from 1871 until 1918, the parliament (*Reichstag*) played an essential role in the political discussion of various issues, channelling social movements and their contradictions, and limiting the power of monarchical government. Yet, despite being influential, it was not an institution of democratic self-governing with a parliamentary government.⁵⁰ On the contrary, its power was more informal: ‘as a populist organ, one that expressed the people’s voice in an emerging mass democracy’.⁵¹ The parliament was reflecting *constitutional populism* without being formally transposed into constitutional forms of self-governing.

The subsequent Weimar Republic was occupied with tremendous political and philosophical antagonisms and dissent in society, consequently producing mixed results in parliamentary elections, with volatile and divided coalitions. The instability and inability of the parliamentary power

45 El Khoury (n 31).

46 Nico Krisch, ‘Pouvoir Constituant and Pouvoir Irritant in the Postnational Order’ (2016) 14 International Journal of Constitutional Law 657.

47 Ernesto Laclau, *On Populist Reason* (Reprint edition, Verso Books 2007).

48 Möllers (n 8) 87.

49 Ibid.

50 Ibid.

51 Ibid. 89.

arguably shifted decision-making towards the executive branch, with a soon to become chronic activation of the president's emergency powers due to the creative interpretation of the legal form.⁵² The president, who was directly elected by the popular vote, slowly became the holder of the 'informal democratic legitimacy [...] sharply contrasted with the undemocratic liberalism of parliament'.⁵³ National Socialism arguably exacerbated the role of the Führer as the subject of popular legitimacy by the German people. According to Möllers, critical attitudes towards the form made the 'circumvention of legalism [...] not only legitimate but also legal'.⁵⁴

After the Second World War, a new constitution for West Germany was commissioned by the Allied Powers.⁵⁵ West Germany adopted the Basic Law, a constitution with a peculiar name. Contrary to the Weimar Constitution, the Basic Law relinquished the possibility of referendums and direct elections of the Federal President. Moreover, the Basic Law focused firmly on protecting fundamental rights – interpreted and guaranteed by the FCC. The latter became increasingly influential, and even today it holds transformative power.⁵⁶ Which partially explains the trust of German citizens – the FCC, according to periodic studies, is continuously considered to be one of the most trustworthy political institutions.⁵⁷

Möllers argues that *constitutional populism* likely shifted from a strong executive to the FCC,⁵⁸ finding its expression in arguably depoliticized judicial discourse. In that light one can understand the influential Habermasian account of constitutional patriotism:⁵⁹ trying to bring together the 'Form' and the constituent power, thereby formalizing the public sphere, which is

52 Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Illustrated edition, Duke University Press 1997) 114.

53 Möllers (n 8) 92.

54 Ibid. 93.

55 Donald P Kommers, 'The Basic Law: A Fifty Year Assessment' (2019) 20 *German Law Journal* 571.

56 Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism' (2014) 12 *International Journal of Constitutional Law* 626, 640.

57 André Brodacz and Hans Vorländer, 'Das Vertrauen in das Bundesverfassungsgericht' in Hans Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (Verlag für Sozialwissenschaften 2006).

58 Möllers (n 8).

59 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New edition, Blackwell Publishers 1997) 491–515.

by its nature the very place where the voluntarism of the populist account of the constitutional order finds its fore.⁶⁰

As will be shown in the following, the Basic Law contains an unamendable constitutional core, which the FCC creatively interpreted and developed into a constitutional review of EU law.⁶¹ Considering Möllers' argument of *constitutional populism* above, one could understand the far-reaching interpretation by the FCC as an attempt to formalize and tame the constituent power by the constituted power itself. Moreover, public acceptance may be genuinely connected with the thesis above that the counter-majoritarian constitutional court inhabits *constitutional populism* and is able to define by itself, without any radical contestation, the future limits of self-determination within the EU by determining the meaning of the principle of democracy, due to the formal authorization of the Basic Law.

To conclude, *constitutional populism* in German constitutional history was, according to Möllers, identified as anti-parliamentarist and expressed through charismatic executive characters, which has led to historically well-known abuses. The logical response of the formalistic and dogmatic approach of legal scholarship and judiciary, trying to incorporate legitimacy questions into the constitution itself,⁶² is therefore not unreasonable. However, in evading strong executive power, which contrasts with democratic parliamentarism, the FCC might come closer to the object of departure than one would like to think.

2.3 Carl Schmitt and Identity of the Constitution – A Voluntaristic Account

One of the most eloquent defenders of this voluntaristic account of the constitution, which gives primacy to political authority, was Carl Schmitt, a highly problematic figure in German history. As a legal and political theorist, he actively participated in, and offered his advice and support to, the conservative politics during the final crisis of the Weimar Republic. Moreover, he did not just strongly criticize liberal parliamentary government and advocate for the possibility of instituting a constitutional dictatorship; he

60 Craig Calhoun (ed), *Habermas and the Public Sphere* (1st edn, The MIT Press 1993).

61 Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 95, 203.

62 Möllers (n 8) 105.

also joined and collaborated with the Nazis after their ascension to power until 1936. He had offered support and authored several essays in support of some of the most brutal policies, and even served on the Prussian State Council under Hermann Goering.⁶³ Furthermore, after the war, Schmitt 'refused to submit to the denazification process or to admit any guilt concerning the regime's actions'.⁶⁴ He lost his university post, but could continue to publish his texts and exert 'a considerable influence on young conservative legal thinkers'.⁶⁵

Schmitt is frequently cited⁶⁶ and referred to as the one (sometimes with Bilfinger)⁶⁷ who first introduced the concept of constitutional identity in German constitutional legal theory. He argued that 'the authority for constitutional amendments contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself'.⁶⁸ Constitutional provisions can be substituted 'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved'.⁶⁹ As examples of implied limits of constitutional amendments, Schmitt mentioned the right to vote, the federal elements of the state or a change from democracy back to a monarchy, without trying to work out a comprehensive theory of essential constitutional elements which cannot be amended.

However, the notion of constitutional identity, as elaborated by Schmitt, has to be put into perspective and contextualized adequately according to his overall theory of constituted and constituent powers, if one is to refer continuously to his account as the origin of constitutional identity in German constitutional history.⁷⁰ Schmitt identified the implied limits to constitutional amendments in his account, but he never concretely defined them in detail, referring solely to the constituted powers. The implied limits

63 Kennedy (n 39) 10.

64 Ibid. 2.

65 Ibid.

66 Polzin (n 3); Calliess (n 10).

67 Karl Bilfinger, *Der Reichssparkommissar* (De Gruyter 1928) 17; Polzin (n 3) 418.

68 Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press Books 2008) 150.

69 Ibid.

70 Polzin (n 3) 418. The difference between fundamental and non-fundamental constitutional provisions was already acknowledged in the Constitution of the German Reich of 1871, concretely referring to the federal principle which could only be amended by the original 'contractors' – the 'Länder' – as the drafters of the constitution, as argued by Georg Meyer.

of constitutional amendments were extended to the established constitutional institutions and procedures in accordance with their constitutionally conferred powers.

Yet, for Schmitt, there was another understanding of *the constitution*, which ‘cannot be broken down into norms and normative elements’;⁷¹ it presented the political unity of the people prior to any norm. This *constitution* could be protected even if that would result in constitutional norms being invalidated or ignored.⁷² He argued that the decision over the type and the form of political existence is the matter of constituent power (constitution-making power), which precedes any foundational norm and remains alongside and above the constitution. Moreover, constituent power does not exhaust itself with the creation of one constitution.⁷³ ‘No constitutional law, not even a constitution, can confer a constitution-making power and prescribe the form of its initiation.’⁷⁴ And even though he made a clear distinction between an amendment to the constitution and its elimination, the latter could be replaced by the same constituent power. He wrote:

‘A constitution that originated as an act of the constitution-making power is derived from this power and can, therefore, not in itself bear the continuity of the political unity. [...] The political unity as an entirety can continue despite changes in and changes of the constitution. If a constitution is eliminated [...] that is unconstitutional [...], for a constitutional law cannot violate itself or eliminate itself under its own power. However, the constitution-making power need not be abolished in the process. If it activates itself anew in response to the new condition, the new constitution rests on the same principles as the previous one [...] and is the product of the same constitution-making power as this earlier constitution. The continuity lies in the common foundation, [...]’⁷⁵

71 Schmitt (n 68) 166.

72 Ibid. 158. See his account on the state of exception, high treason, state of war or state of siege; where he argued that there is a significant difference between protecting every single constitutional provision and *the constitution*. ‘Where every single constitutional provision becomes “inviolable”, even in regard to the powers of the state of exception, the protection of the constitution in the positive and substantial sense is sacrificed to the protection of the constitutional provision in the formal and relative sense. [...] In other words, the individual constitutional provision is an insurmountable obstacle to an effective defense of the constitution.’

73 Ibid. 125–6.

74 Ibid. 132.

75 Ibid. 141.

In a nutshell, due to Schmitt, constitutional identity or the spirit of a constitution may be the implied limit of constitutional amendments, but only for a constituted power defined according to positive constitutional law. Yet, in addition to constituted power, constituent power constantly remains present and is not eliminated from the equation with the constitution's creation. According to the principle of the political, which is his first legitimization factor, the political unity of people can always find its form of existence and, therefore, change or replace the existing constitution.

The main question for Schmitt was not the identity of an existing (written) constitution, but the identity of *the constitution* – the political unity of people prior to any (constitutional) norm. 'The word identity is useful for defining democracy because it denotes the comprehensive identity of the homogeneous people.'⁷⁶ Any reference to Schmitt regarding the terminal constitutional identity, therefore, must be read together with his voluntaristic account of *the constitution* and his understanding of the political unity of people as a homogeneous unity. This is a very different account compared to normative prerequisites of a liberal state, based on universal moral principles.

The theoretical account above likely resulted in, or at least overlapped with, an executive, non-pluralistic and authoritarian statist vision of the state. And the historical events at least took advantage of such a vision, if not being indirectly encouraged by the said political thinking. Yet, his critique of the legal system, which ignores society's social and historical facts and political aspects, is sharp and well-reasoned. It is not surprising that up to this day constitutional and political thinkers find it a powerful critical stimulus for their observations.⁷⁷

⁷⁶ Ibid. 264.

⁷⁷ Ibid. 44.

3 Identity Finds its Way into Case Law – The Part and the Legal Principles Underlying Fundamental Rights

German Basic Law contains the so-called Eternity Clause, which prohibits any constitutional amendment capable of changing the protected constitutional core. However, Basic Law omits any specific reference to national constitutional identity (3.1). With the well-known *Solange* case law, the FCC introduced the terminology of national constitutional identity. According to *Solange I*, identity is the part of Basic Law that deals with fundamental rights (3.2). In *Solange II*, the FCC slightly changed the definition of identity to the legal principles underlying fundamental rights (3.3). Although the FCC started reviewing EU law already in *Solange I*, what is nowadays the effect of the identity review, in both cited decisions, national constitutional identity did not play a decisive role. It was mentioned only in passing.

3.1 The Eternity Clause – Identity Terminology Omitted

Basic Law limits the possibility of amending or changing its essential core.⁷⁸ Article 79(3) of the Basic Law stipulates the following.⁷⁹ First, the amendments affecting the division of federal states and their participation in the legislative processes shall be inadmissible. Second, amendments shall not affect the principles laid down in Articles 1 and 20 of the Basic Law, namely the inviolability of human dignity and human rights as the basis of every community and the constitutional principles of democracy, the social federal state (welfare state), the exercise of the state authority from the people through elections and the separation of powers.⁸⁰

78 Otto Ernst Kempfen, 'Historische und Aktuelle Bedeutung der „Ewigkeitsklausel“ des Art. 79 Abs. 3 GG. Überlegungen zur Begrenzten Verfassungsautonomie der Bundesrepublik' (1990) 21 Zeitschrift für Parlamentsfragen 354.

79 Michael Sachs, 'GG Art. 79 Änderungen Des Grundgesetzes' in Michael Sachs (ed), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2018) paras 1–85.

80 *Article 1 of the Basic Law* [Human dignity – Human Rights – Legally binding force of basic rights]

The cited Eternity Clause prohibits constitutional amendments limiting the essential principles and commitments of the Basic Law and thereby introducing a two-level hierarchy of constitutional norms. However, the Eternity Clause does not mention *identity*, national or constitutional. The constitutional identity review was introduced solely to case law by the FCC in the context of an ongoing, gradually progressive European legal integration.⁸¹

3.2 Identity: The Part of the Basic Law Dealing with Fundamental Rights

At the beginning of the European project, the Basic Law did not have a special constitutional provision which would set any special conditions for limiting the scope of the transfer of competences to the supranational European Community. The only relevant constitutional provision was Article 24 of the Basic Law, which generally anticipated Germany's active participation in international organizations in general. The said article provided a legal ground for a transfer of sovereign powers to the EU.⁸²

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 20 of the Basic Law [Constitutional principles – Right of resistance]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.

Paragraph 4, the right to resist, is usually not seen as a principle and is thus not immune to change. See also Bernd Grzeszick, 'GG Art. 20' in Theodor Maunz et al. (eds), *Grundgesetz-Kommentar* (C.H. Beck 2022) Rn. 3-12.

81 Matthias Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' (2021) 27 *European Public Law*.

82 Rudolf Streinz, 'GG Art. 24 Zwischenstaatliche Einrichtungen; Kollektives Sicherheitssystem' in Michael Sachs (ed), *Grundgesetz Kommentar* (8th edn, 2018).

As the familiar narrative goes, the ECJ firmly established the principle of primacy and direct effect of EU law through case law,⁸³ and the FCC, among other apex courts,⁸⁴ soon challenged this progressive development. The relationship between the rules of secondary Community Law of the EEC vis-à-vis fundamental rights under the Basic Law was contested by the famous *Solange I* decision in 1974.⁸⁵ The decision concerned the Common Agricultural Policy, which demanded that exporters with licence deposit money beforehand. In case of a violation, the deposit could be forfeited. The German company *Internationale Handelsgesellschaft mbH* challenged that system, claiming, inter alia, that this licensing system violated their right to conduct business, because the burden of a deposit and potential forfeiture was not necessary for the objectives at hand. The German Administrative Court consequently issued a preliminary reference procedure to the ECJ. It argued that the current system of deposits contradicted structural principles of national constitutional law. Namely, it ran counter to the principles of freedom of action and economic liberty and proportionality arising from Articles 2(1) and 14 of the Basic Law.⁸⁶

The ECJ found that the system of deposits did not violate the right to conduct business or any other right of a fundamental nature.⁸⁷ Moreover, it reiterated that ‘respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the community.’⁸⁸ It also re-emphasized the importance of the primacy of EU law for the uniformity and efficacy of Community Law, and that all Community measures could only be judged in the light of Community Law.⁸⁹ ‘Therefore, the validity of a community measure or its

83 Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (van Gend en Loos)* [1963] ECLI:EU:C:1963:1. Case 6-64 *Flaminio Costa v E.N.E.L. (Costa ENEL)* ECLI:EU:C:1964:66.

84 Giacomo Delledonne and Federico Fabbrini, ‘The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence’ (2019) 44 *European Law Review* 178.

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

86 Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Internationale Handelsgesellschaft)* [1970] ECLI:EU:C:1970:114, para 2.

87 Ibid. para 20.

88 Ibid. para 4.

89 Ibid. para 3.

effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.⁹⁰

After obtaining the decision from the ECJ, the German Administrative Court asked the FCC to issue a ruling on the matter to avoid a conflict between the supranational secondary and national constitutional law.⁹¹ In its reply, the FCC invented its famous *Solange* sentence. As long as the Community does not receive a catalogue of fundamental rights, a democratically legitimate parliament elected directly by general suffrage which possesses the legislative power and politically accountable Community organs, the guarantee of fundamental rights under the Basic Law prevails.⁹²

In *Solange I* the FCC, for the first time, applied the terminology of constitutional identity, although only briefly in passing. Concerning the above-cited Article 24 of the Basic Law, it determined that transferring sovereign rights to inter-state institutions cannot be taken literally – that is, without any limitation. Article 24 must be understood and construed in the overall context of the Basic Law as a whole. That means that Article 24 ‘does not open the way to amending the basic structure of the Basic Law, which forms its identity, without a formal amendment. It does not open any such way through the legislation of the inter-state institution.’⁹³ The FCC furthermore wrote: ‘The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law [...] and one which forms part of the constitutional structure of the Basic Law.’⁹⁴

Notably, the reason for the self-acclaimed limited acceptance of the primacy of the secondary Community Law was not a loss of national self-determination and state-centred conception of democracy, but the lack of democratic structures and institutions on the side of the Community.⁹⁵ The limitation of transfer of sovereign powers due to Article 24 was not on

90 Ibid.

91 Oppenheimer (n 22) 422.

92 Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany: Third Edition, Revised and Expanded* (Duke University Press 2012) 326.

93 BVerfGE 37, 271 *Solange I* 29 May 1974, 279: ‘Das heißt, er eröffnet nicht den Weg, die Grundstruktur der Verfassung, auf der ihre Identität beruht, ohne Verfassungsänderung [...] ändern’.

94 Oppenheimer (n 22) 447.

95 In comparison with the subsequent case law concerning identity, such as *Maastricht* and *Lisbon* decisions.

the part of the German state – because it would transfer too much – but due to the (yet) insufficiently established fundamental rights protection on the part of the Community. As the FCC wrote, the ‘current status of the integrative process play[ed] the decisive role’.⁹⁶

The *Solange I* decision was heavily contested in scholarly writings in Germany⁹⁷ and by the sitting judges. The majority decision was accompanied by three sitting judges dissenting from the above-cited position. ‘The basic structure of the constitution on which its identity is based is not at stake’,⁹⁸ the dissenting judges wrote. ‘The protection of fundamental rights afforded within the Community does not differ in its nature and structure from the fundamental rights system of the national constitution.’⁹⁹ The community’s fundamental rights are ‘based on the constitutional traditions common to the Member States – their recognition is based on the same values and concepts. That is enough. No Member State can demand that fundamental rights be guaranteed at the Community level precisely in the form the national constitution guarantees them.’¹⁰⁰

The dissenting judges also clearly wrote that the majority’s objections were mistaken when asserting that Article 24(1) of the Basic Law opened the way to change ‘the basic structure of the constitution on which its identity is based’¹⁰¹ by the legislation of intergovernmental institutions. Article 24(1) of the Basic Law does not permit the transfer of sovereign rights without any restrictions, which must be interpreted consistently with the Basic Law’s system of values which aims to preserve a liberal and democratic order, but also with the ‘commitment to a united Europe in the preamble’.¹⁰² The integration into a supranational community is therefore permissible if it is subject to the same fundamental and indispensable principles as provided by the Basic Law: ‘this includes, in particular, the protection of the core element of fundamental rights’.¹⁰³ The dissenting judges argued that this requirement was already fulfilled in the case of the EEC. The position of the majority, they wrote, led to unacceptable results.

96 BVerfGE 37, 271 *Solange I* 29 May 1974, p 280.

97 Robert Christian van Ooyen, *Die Staatstheorie des Bundesverfassungsgerichts und Europa* (2nd edn, Nomos 2008) 11–18.

98 BVerfGE 37, 271 *Solange I* 29 May 1974, p 297.

99 Ibid.

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid. 296.

The secondary legislation of the Community simply could not be subject to national constitutional scrutiny.¹⁰⁴

To sum up, the central message of *Solange I* was the following. Sovereign competences might be freely transferred to the supranational European Community, providing that through the legislation of the intergovernmental institution, the basic structure of the constitution – on which its identity was based – was not changed.¹⁰⁵ As long as the European political and constitutional structures cannot sufficiently guarantee that condition, the potential conflict between the Community secondary rules and the national constitutional fundamental rights has to be resolved in favour of the latter. The opposition in the minority, however, already in that early stage of the EU development (before the Maastricht Treaty), refused the possibility that the structure of the Basic Law and, thereby, its identity could be affected due to the existing safeguard of common constitutional traditions of the Member States upon which the Community is based.

Finally, when the FCC made the connection between the scope of the transfer of competences due to Article 24 of the Basic Law and the unamendable constitutional structure which defines its unchangeable constitutional identity, no reference was made to the Eternity Clause (Article 79, referring to Articles 1 and 20 of the Basic Law). Identity was only connected with the part of the Basic Law dealing with fundamental rights. Although Christian Calliess argued that German national constitutional identity was initially understood in a much broader sense, incorporating all fundamental rights and not just the principle of human dignity under the Eternity Clause,¹⁰⁶ one can alternatively interpret the meaning of national constitutional identity under *Solange I* not as *all* fundamental rights, but merely as a general commitment to fundamental rights protection.¹⁰⁷

3.3 Identity: The Legal Principles Underlying Fundamental Rights

Political accountability and commitment to fundamental rights in the EU gradually but steadily increased. Since 1979, EU citizens directly elect their

104 Ibid. 299.

105 Ibid. 280.

106 Calliess (n 10) 159.

107 The BVerfG did attach these commitments to a substantive meaning of fundamental rights. But that was not the basic essence of identity, only mentioned in passing.

representatives in the European Parliament, and the ECJ has considerably strengthened their commitment to the protection of fundamental rights.¹⁰⁸ In the *Nold* decision,¹⁰⁹ it was reassuring that ‘fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States. It cannot, therefore, uphold measures incompatible with fundamental rights recognized and protected by the Constitutions of those States.’¹¹⁰

The FCC consequently acknowledged this essential shift and unanimously withdrew from the possibility of fundamental rights review as reserved and established in *Solange I*. In the no less famous *Solange II*¹¹¹ decision, it then decided that ‘as long as the European Communities, in particular, the case law of the ECJ, generally guarantee an effective protection of fundamental rights which is to be regarded as essentially equivalent to the protection required by the Basic Law as indispensable, the FCC will no longer review the Community law against the national standards of fundamental rights; especially since the ECJ generally guarantees the essence of fundamental rights.’¹¹²

Solange II also mentioned, in an *obiter dictum*, the national constitutional identity of the Basic Law, but the given description was not precisely the same. *Solange I* defined national constitutional identity as an essential part of the constitutional structure, specifically the part on fundamental rights. *Solange II* redefined national constitutional identity as the basic structure of the Basic Law, specifically the legal principles underlying fundamental rights.

The FCC stated: ‘The power conferred by Article 24(1) [...] does not confer a power to surrender [...] the identity of the prevailing constitutional order [...] by breaking [...] into the structure which makes it up. [...] That [...] would undermine essential structural parts of the Basic Law. [...] An essential part which cannot be dispensed with and belongs to the basic

108 William Phelan, ‘The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini’ [2020] TRiSS Working Paper Series.

109 Case 4-73 J. *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (Nold)* [1974] ECLI:EU:C:1974:51.

110 *Ibid.* para 13.

111 BVerfGE 73, 339 *Solange II* 22 October 1986.

112 *Ibid.* 387. See also Oppenheimer, who translated ‘im Wesentlichen gleich zuachten’ as ‘substantially similar’. Oppenheimer (n 22) 494.

framework of the constitutional order in force is constituted in any event by the legal principles underlying the provisions of the Basic Law on fundamental rights.¹¹³

Finally, although both decisions, *Solange I* and *II*, concern domestic judicial power which presupposes potentially reviewing EU law, they did not justify it with the argument of national constitutional identity or with a referral to the Eternity Clause as their main rationale. Rather they mentioned identity only in passing, the first time as the part of the Basic Law dealing with fundamental rights,¹¹⁴ and the second time as the legal principles underlying the provisions of the Basic Law on fundamental rights.¹¹⁵

113 Ibid. 485.

114 Calliess (n 10) 159.

115 Ibid. 160.

4 The Birth of the Contemporary Constitutional Review of EU Law

With the new institutional step in the European integration, the Maastricht Treaty, the Member States had to amend their constitutions. This section explains the constitutional change with the European Article in Germany (4.1). Consequently, the FCC reviewed the said amendment and the compatibility of the Maastricht Treaty with the Basic Law. In doing so, the FCC established a new constitutional review of EU law (4.2).

4.1 *The Maastricht Treaty and the European Article*

In 1992, with the adoption of the Maastricht Treaty,¹¹⁶ the German Basic Law was amended to provide a specific constitutional authorization to a much deeper European integration – the Community being called the European Union ever since. Indeed, the Maastricht Treaty made a giant leap forward for European integration. Among many other aspects, it introduced European citizenship and allowed people to move and reside freely within the EU; it also established a common foreign and security policy, and closer cooperation between police and the judiciary in criminal matters.¹¹⁷

Accordingly, the Member States assumed it necessary to provide a more concrete constitutional authorization for the anticipated enhanced integration. An explicit constitutional endorsement would acknowledge the evident transformation of the EU beyond the classical international cooperation as an international organization, and it would give the EU the necessary constitutional legitimation to fulfil its purpose.¹¹⁸ Germany

116 Treaty on European Union (*Maastricht Treaty*) [1992] OJ C191/1.

117 Robert Schütze, 'Constitutional History: From Paris to Lisbon' in Robert Schütze (ed), *European Constitutional Law* (2nd edn, Cambridge University Press 2015).

118 Kommers (n 55) 577.

amended its Basic Law with Article 23¹¹⁹ – the European Article,¹²⁰ which can be summarized in five steps.

First, Germany shall participate in the development of the EU, committed to the principle of democracy, welfare, principles of federalism, the rule of law and subsidiarity, which guarantee a comparable level of fundamental rights protection. Second, to this end, Germany can transfer its sovereign powers to the EU. Third, the EU and its future development must be subject to the Eternity Clause – Article 79(2)(3) of the Basic Law. Fourth, the parliament has the right to challenge European legislation for infringing the principle of subsidiarity before the CJEU. Fifth, parliament shall actively participate and be heard in matters concerning the EU as further regulated by the national legislation.

The new constitutional amendment confirmed two crucial issues. First, it incorporated the FCC's *Solange II* jurisprudence in the Basic Law: not as an authorization to review EU law, but as a confirmation that the EU guarantees an essentially comparable level of fundamental rights protection.¹²¹ Hence, a national review of EU law from the fundamental rights perspective by the FCC would no longer be an option, in line with *Solange I*, which is now also codified in the Basic Law. The constitutional amendment acknowledged that the EU is committed to the same universal basic principles as the Basic Law.

One can understand the new constitutional amendment as a convergence between the various constitutional systems dedicated to the same principles and values. The commitments of the EU overlap with the commitments of Articles 1 and 20 of the Basic Law. Yet, the FCC did not take that path. In its view, the principle of democracy as a commitment of the EU cannot be compared to the narrowly understood state-centred democracy in Germany.¹²² The legitimacy of the EU is only derivative,¹²³ and the European Article's reference to the Eternity Clause enabled the FCC to present a new jurisprudential account to review EU law, as further explained thereafter.

119 In addition to the other constitutional changes. Art 28 (1), Art. 52 (3a), and Art. 88 (second sentence).

120 Horst Dreier (ed), *Grundgesetz Kommentar*, vol 2 (2nd edn, Mohr Siebeck 2006).

121 Art 23(1) GG: '[...] die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet.'

122 Calliess (n 10) 161.

123 Ulrich Everling, 'Das Maastricht-Urteil des Bundesverfassungsgerichts und seine Bedeutung für die Entwicklung der Europäischen Union' (1994) 17 *Integration* 165, 168.

4.2 The Maastricht Decision: The New Constitutional Review of EU Law

In the *Maastricht* decision,¹²⁴ challenging the European Article and the incompatibility of the Maastricht Treaty with the Basic Law, the FCC developed a new constitutional review of EU law. The *Maastricht* decision in 1993 established the constitutional basis and the meticulous dogmatics for the contemporary German constitutional review of EU law.¹²⁵ The FCC created for itself a power to examine ‘whether legal acts of the European institutions and bodies remain within the limits of the sovereign rights granted to them or break out of them’.¹²⁶ At the same time, the *Maastricht* decision did not yet *call* the newly established constitutional review identity review.

This section briefly outlines the basic arguments of the *Maastricht* decision – in the name of national democracy and the right to vote (4.2.1). Moreover, it illuminates the factual and normative assumption underlying the decision (4.2.2), as well as the inner contradictions of the theory of national democracy (4.2.3). Finally, it addresses the neologism of the newly introduced concept of *Staatenverbund* (4.2.4).

4.2.1 The Principle of National Democracy and the Right to Vote

The FCC construed the *Maastricht* review of EU law around two basic norms: the right to vote and the principle of national democracy.¹²⁷

The right to vote under Article 38(1) of the Basic Law plainly states: ‘Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.’ Based on this norm, the FCC developed the ‘fundamental democratic content of this right’,¹²⁸ arguing that every citizen gets to coop-

124 BVerfGE 89, 155 *Maastricht* 12 October 1993.

125 Steve J Boom, ‘The European Union after the Maastricht Decision: Will Germany Be the “Virginia of Europe?”’ (1995) 43 *The American Journal of Comparative Law* 177.

126 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 156.

127 Karl M Meessen, ‘Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany’ (1993) 17 *Fordham International Law Journal* 511, 514.

128 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 171.

erate in legitimizing state power and to co-influence its concrete implementation.¹²⁹ In other words, citizens must be able to exercise a substantial political influence on public authorities.

In the second step, the FCC connected the right to vote with the principle of democracy, arguing that ‘it is the inviolable element of the principle of democracy that the performance and the exercise of the state functions and power derive from the people and must be justified to that people’.¹³⁰ Because the European Parliament is, under the Maastricht Treaty, merely a supplementary and advisory body, without serious political influence and democratic accountability, its legitimation is primarily incumbent upon the sovereign nation states and therefore its national parliaments.¹³¹

Consequently, if only the citizens, via their national elections through the national parliaments within the Member States, can fulfil the legitimation of public authority and exercise political influence on it, only the national parliaments can carry out and complete this function also within the EU. Hence, the German parliament must retain its predominant political influence concerning EU legislation. Moreover, the principle of democracy ‘sets limits for the expansion of the functions and competencies of the European Union’¹³² and ‘by the principle of democracy the limits are imposed on the extension of the functions and powers of the European Communities’.¹³³

The FCC creatively built a dogmatic chain: every German citizen has the right to vote; the right to vote means that the public authority is legitimized by the voters and they retain the power to substantially influence the public authority; the legitimation of public authority by the citizens is an element of the principle of democracy; the principle of democracy is a constitutive part of the Eternity Clause; one cannot impact the Eternity Clause – even by EU law, having the primacy over national constitutional law.

Henceforth, the FCC ‘must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits’.¹³⁴ To put it simply, the FCC claimed to have the power to review EU law.

129 Ibid.

130 Ibid. 172.

131 Ibid.

132 Ibid. 187.

133 Ibid.

134 Ibid. 189.

4.2.2 Maastricht's Empirical and Normative Assumption

The *Maastricht* decision contains an empirical and normative assumption: the legitimacy of public authority in the EU, at that time, could only come from the Member States.¹³⁵ In other words, European democracy was empirically too weak, and normatively not possible.

As to the latter – European democracy did not exist. Despite apparent imperfections of the democratic features of the EU in 1993,¹³⁶ its perceived distance from ordinary citizens and still predominantly local public sphere, it would still be erroneous to reduce the democratic legitimacy in the EU solely to its Member States. The Maastricht Treaty introduced common Union citizenship and granted those citizens the right to vote and stand as a candidate at elections to the directly elected European Parliament. Due to the Maastricht Treaty, the European Parliament already at that time had the power to scrutinize the executive power relating to budgetary issues, the right to consent to several legislative areas, where the Council acts by unanimous decision, and the right to cooperate in most areas of legislation where the Council acts by majority. Furthermore, the European Parliament had the right of a legislative initiative, even if only limited: it can ask the Commission to put forward a proposal.¹³⁷ Finally, the European Parliament also got the right of investiture within the Commission. Before the appointment of the President and the Members of the Commission as a collegiate body, the approval of the European Parliament was required. If all legitimation of the EU solely came from the Member States, what was the nature of all these mechanisms of checks and balances, supported by the direct election of the European Parliament?

As to the normative assumption, as a matter of principle, why could the principle of democracy not work beyond a national state, and function, *mutatis mutandis*, among many peoples?¹³⁸ The power and influence of one people may be reduced in the supranational EU. However, working together in accord with many peoples also strengthens the position and power of the said individual people in the globalized world. In other words, acting together may increase the benefits even if it is counterbalanced with

135 Everling (n 123) 168.

136 Roland Bieber and Elizabeth Kopp, 'The EC's Democratic Deficit: Maastricht Is Only a Step in the Right Direction' (2019) 40 *Harvard International Review* 44.

137 Sergio Fabbrini, 'Between Power and Influence: The European Parliament in a Dual Constitutional Regime' (2019) 41 *Journal of European Integration* 417.

138 Christoph Möllers, 'Multi-Level Democracy' (2011) 24 *Ratio Juris* 247.

necessary compromises, which one could avoid in solely national self-governance.

In addition, the claim of the legitimate authority of the EU could be based on an entirely different normative account, perhaps shared among the EU and the Member States.¹³⁹ One could understand the normative power of the EU from the normative awareness of every state that interconnectivity and mutual dependence requests integration into a larger community.¹⁴⁰ Measuring and evaluating the political entity and its legitimacy, as the EU, with the tools developed for the sovereign nation states, likely misses the genuine features of the object of inquiry.

4.2.3 Inner Contradiction of the Maastricht Argumentation

The FCC created a contradiction between the principle of national democracy and the anticipated trajectory of the EU's democratic evolvement. It recognized that 'it is anticipated that enhancement of the principle of democracy [of the EU] will improve the functioning of all institutions on a Community level'.¹⁴¹ Moreover, 'the principles of democracy upon which the Union is based are extended in step with its integration and that [until then] a living democracy is retained in the Member States while the process of integration is proceeding'.¹⁴²

Accordingly, the FCC did not overlook the commitment to the principle of democracy on the Union level. The quality and intensity of supranational democracy was just not adequate yet. In the words of the FCC: 'These functions and powers [of the Union due to the Maastricht Treaty] have not, as yet, been supported at the treaty level by a corresponding intensification and extension of the principles of democracy'.¹⁴³

However, a more democratic Union needs more competences for the European Parliament, more accountability of the executive, and inevitably less governmental decision-making by the Member States. But that would directly contradict the main line of argumentation due to the *Maastricht*

139 Joseph HH Weiler, 'Der Staat "über Alles" Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts' (Jean Monnet Chair 1995) 7.

140 Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907.

141 BVerfGE 89, 155 *Maastricht* 12 October 1993.

142 Ibid.

143 Ibid.

decision, which suggests that the national principle of democracy in Germany requires that the state *retains* functions and powers of substantial importance.¹⁴⁴ Even if the EU could establish and exercise the best democratic practice, that could not remedy the reservations of the FCC that the principle of national democracy requires a certain amplitude of powers.

The *Maastricht* decision committed itself to the (insufficient) status quo. One can have legitimate power if being more democratic, yet one cannot become more democratic because that would remove substantial powers from the national parliaments. Hence, the *Maastricht* decision was a de facto commitment to maintain the state of affairs, which contradicted the constitutional commitment of the Basic Law as well as the aim of the Union: to progressively develop an ever-closer Union.¹⁴⁵

4.2.4 Neologism of Staatenverbund

In light of the principle of national democracy, requiring from the Member States to maintain substantial political influence, the *Maastricht* decision introduced the neologism of *Staatenverbund*,¹⁴⁶ broadly translated as a ‘compound of states’. The EU as *Staatenverbund* resonated widely in Germany among the legal scholars, and it slowly became the terminological tool which described the nature of the EU.¹⁴⁷

144 BVerfGE 89, 155 *Maastricht* 12 October 1993.

145 Matthias Herdegen, ‘Maastricht and the German Constitutional Court: Constitutional Restraints for an “Ever Closer Union” and Document “Extracts from: Brunner v. The European Union”’ (1994) 31 Common Market Law Review 235.

146 Its implied understanding is likely just to have ‘a certain form of merger or cooperation among the units’ or ‘a connection of parts, similar to a unit’. See Duden: 1. bestimmte Form des Zusammenschlusses bzw. der Zusammenarbeit von Unternehmen; 2. feste Verbindung von Teilen, Werkstoffen o. Ä. zu einer Einheit.

147 Bruno Kahl, ‘Europäische Union: Bundesstaat–Staatenbund–Staatenverbund? Zum Urteil des BVerfG vom 12. Oktober 1993’ (1994) 33 Der Staat 241; Johannes Schwelm, *Theorie und Kontext: Reflexionen über Demokratie und Frieden zu Beginn des 21. Jahrhunderts* (Nomos 2008) 58–75; Jürgen Bast and Armin von Bogdandy (eds), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (2nd edn, Springer 2009); Georg K Kampfer, *Die Europäische Union auf dem Weg zu einem Bundesstaat? Von der föderalen Struktur der Europäischen Union und der Europäisierung der Außenpolitik* (Nomos 2010) 72–74; Stefan Oeter, ‘Bundesstaat, Föderation, Staatenverbund - Trennlinien und Gemeinsamkeiten föderaler Systeme’ (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,

One could understand this description as a prelude to subsequent decisions, where the FCC tried to develop a theory of a state, as explicated further below. At this point in the *Maastricht* decision, it only paved the way for this by emphasizing the nature of the EU as a cooperation of *states* and its prerequisites to remain that. With the reference to Heller, the FCC wrote: ‘The States require sufficient areas of significant responsibility of their own [...] to give legal expression to those matters which concern the people on a relatively homogenous basis spiritually, socially, and politically.’¹⁴⁸ And also: ‘Germany is therefore maintaining its status as a sovereign State in its own right’, and ‘the authority of the *Staatenverbund* is derived from the Member States and has binding effect in German sovereign territory only by virtue of the German command to apply the law. Germany is one of the Masters of the Treaties.’¹⁴⁹

Heidelberg Journal of International Law 733. Johannes Schwehm, ‘Die EU als „Staatenverbund“’, *Theorie und Kontext* (Nomos 2008).

148 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 186.

149 Ibid. 191.

5 Constitutional Identity and Ultra Vires Review: National Democracy and Five Essential Areas of State

This section outlines the *Lisbon* decision¹⁵⁰ (5.1), which introduced constitutional identity and ultra vires review (5.2). Furthermore, it explicates how the FCC developed a new theory of state, based on five essential areas under national control (5.3), excluded the possibility of any democratic legitimacy by the EU (5.4), and determined that the EU can never reflect the federal state (5.5).

5.1 The Lisbon Decision

In reviewing the constitutionality of the Lisbon Treaty in 2009,¹⁵¹ which is still the European constitutional basis of the EU today, the FCC issued its notorious and lengthy *Lisbon* decision.¹⁵² This decision reflected the arguments from the *Maastricht* decision considerably, while introducing two arguably distinctive constitutional reviews: constitutional identity and ultra vires. Moreover, it newly determined five areas of essential state functions which Germany cannot confer on the EU.

Much ink has been spilt on this decision.¹⁵³ The focus here is not to summarize the decision in detail nor to outline all the critical responses within

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

151 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

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

153 Philipp Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures' (2009) 10 German Law Journal 1287; Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 German Law Journal 1201; Stefan Theil, 'What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?' (2014) 15 German Law Journal 599; Elisabetta Lanza, 'Core of State Sovereignty and Boundaries of European Union's Identity in the Lisbon – Urteil' (2010) 11 German Law Journal 399; Matthias Niedobitek, 'The Lisbon Case of 30 June 2009 - A Comment from the European Law Perspective' (2009) 10 German Law Journal 1267; Cornelia Koch, "Bis hierher sollst du kommen und nicht weiter": The German Constitutional Court and the Boundaries of the European Integration Process' in Gabrielle Appleby, Nicholas

and beyond German academic scholarship. This section solely presents the main arguments of the decision in so far as they relate to the new constitutional identity and ultra vires review, as developed by the FCC. Moreover, this section also highlights some of the most convincing critical observations concerning the theory of a state and its essential areas, which cast serious doubts on the plausibility of the arguments in the said decision.

In the *Lisbon* decision, the FCC confirmed the constitutional conformity of the Lisbon Treaty with the German Basic Law. However, the argumentation was far from furthering the constitutionally placed commitment of Germany to participate actively in the progressive development of the EU. The FCC argued that the EU had too little democratic legitimacy to constitute independently the public authority on its part. At the same time, in line with the *Maastricht* decision, it also claimed that the EU cannot and shall not democratically improve and evolve further, since that would violate the State's sovereign ability to shape its own political and social living conditions and, in addition to that, the German constitutional identity.

According to the FCC, the EU remains and must remain solely 'an association of sovereign states'.¹⁵⁴ The EU is a derived constitutional order,¹⁵⁵ where the exercise of public authority is subjected to the Member States, which are the only subjects of democratic legitimation.¹⁵⁶

5.2 Constitutional Identity and Ultra Vires Review Introduced

The FCC established the foundations for the constitutional review of EU law already in the *Maastricht* decision, as illustrated above.¹⁵⁷ As seen from the German perspective, reviewing EU law is possible, when the FCC deter-

Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press 2012); Möllers (n 8); Wendel, 'Lisbon Before the Courts' (n 5).

154 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 229.

155 Ibid. para 231.

156 Ibid. para 229.

157 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 188: 'Die deutschen Staatsorgane wären aus verfassungsrechtlichen Gründen gehindert, diese Rechtsakte in Deutschland anzuwenden. Dementsprechend prüft das Bundesverfassungsgericht, ob Rechtsakte der europäischen Einrichtungen und Organe sich in den Grenzen der ihnen eingeräumten Hoheitsrechte halten oder aus ihnen ausbrechen (vgl. BVerfG 58, 1 [30 f.]; 75, 223 [235, 242]).'

mines that the ‘Community and Union institutions transgress the boundaries of their competences [...] accorded to them by way of conferral’.¹⁵⁸

In the *Lisbon* decision, the above-cited review got two new names. The FCC asserted that it would carry out an *ultra vires* and identity review. In the former review, it ‘examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral [...] whilst adhering to the principle of subsidiarity under Community and Union law’.¹⁵⁹ In the latter, the identity review, the FCC protects and ‘preserve[s] the inviolable core content of the Basic Law’s constitutional identity’¹⁶⁰ under Article 23(1) in conjunction with Article 79(3) of the Basic Law. This ensures, argued the FCC, that ‘the primacy of application of Union law only applies by virtue and in the context of constitutional empowerment that continues in effect’.¹⁶¹

In addition, the FCC openly suggested and invited the German legislature to provide a statute which would directly empower the FCC to carry out both reviews as tailored in the *Lisbon* decision.¹⁶²

5.3 Five Essential Areas of a State – A Theory of State Introduced

The *Lisbon* decision straightforwardly defined five areas of national democratic formative action which are particularly sensitive and thus must remain under the exclusive control of the State. In other words, the FCC worked out nothing less than a constitutional theory of necessary state functions.¹⁶³ The following sub-section outlines these five essential areas (5.3.1), and demonstrates the ambiguity as to whether a state must retain exclusive or merely substantial control over the said areas (5.3.2).

158 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 240.

159 Ibid.

160 Ibid.

161 Ibid.

162 Ibid. para 241.

163 Christoph Schönberger, ‘Identitäterä: Verfassungsidentität zwischen Widerstandsförmel und Musealisierung des Grundgesetzes’ (2015) 63 Jahrbuch des öffentlichen Rechts der Gegenwart 41, 60.

5.3.1 Five Essential Areas ‘Since Always’ (seit jeher)

The *Lisbon* decision determined five essential areas which have to remain under national control and must not be conferred to the EU: first, substantial and procedural criminal law; second, monopoly on the use of force by the police and the military – war and peace; third, taxation, public revenue and expenditures, and fiscal decisions; fourth, social policy considerations or welfare; and finally, culture, education and religion.¹⁶⁴

Conspicuously, the cited areas almost fully overlap with the competences which, under the Lisbon Treaty, still remain under national control. As Halberstam and Möllers argued, it is ‘a negative reading of the European Treaties’.¹⁶⁵ Moreover, the theory of state is substantiated with nearly no serious normative arguments.¹⁶⁶ The FCC merely argued that these areas ‘are important’¹⁶⁷ and that it always has been that way: that cultural, historical and religious practices are so sensitive and rooted in tradition that only the people themselves can regulate these issues.¹⁶⁸ These types of political decisions, where sufficient space must be left to the Member States for the political formation of economic, cultural and social living conditions,¹⁶⁹ have to ‘rely especially on cultural, historical and linguistic perceptions [...] within public discourse in the party political and parliamentary sphere of public politics’.¹⁷⁰

Concerning criminal liability and penalization of anti-social behaviour, the FCC argued that the respective legal norms can only partially be derived from values and moral premises shared Europe-wide. For the rest, they must be left to the democratic decision-making process, which depends on ‘cultural processes of previous understanding that are historically grown and also determined by language’.¹⁷¹

164 Ibid. paras 249, 252.

165 Daniel Halberstam and Christoph Möllers, ‘The German Constitutional Court Says “Ja zu Deutschland!”’ (2009) 10 German Law Journal 1241, 1251.

166 Calliess (n 10) 164. Christoph Ohler, ‘Herrschaft, Legitimation und Recht in der Europäischen Union – Anmerkungen zum Lissabon-Urteil des BVerfG’ (2010) 135 Archiv des öffentlichen Rechts 153, 176.

167 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 249.

168 Ibid.

169 Ibid. para 4.

170 Ibid.

171 Ibid.

Finally, the FCC stated that democratic self-determination needs ‘to assert oneself in one’s own cultural area’¹⁷² concerning education, family law, language, media regulation and the status of churches or ideological communities. In that area, ‘fundamental political decisions are closely connected to the cultural roots and values of every state; [and...] affect established rules and values rooted in specific historical traditions and experience [hence]; democratic self-determination requires that a political community bound by such traditions and convictions remains the subject of democratic legitimation’.¹⁷³

It is not clear why these sensitive areas could not be addressed within the European accord, if so preferred. Moreover, why is democratic self-determination bound by historical traditions, cultural roots and values? Why can a democratic legislative body not choose to determine these areas anew, perhaps in cooperation and in concert with other Member States within the established European institutions, including the European Parliament?

Additionally, none of the given reasons explains the choice of those specific five areas or clarifies why the required conditions cannot not be, at least partially, satisfied within the EU. The FCC explicitly justified the five essential areas of state by historical argument: they have *always* been a state’s functions. It stated that the five chosen areas are particularly sensitive for a constitutional state to democratically shape itself ‘since always’ (*seit jeher*).¹⁷⁴ And elsewhere: ‘[C]riminal law has always been a central duty of state authority’.¹⁷⁵

Scholars were quick to show that this implied historical argument is not persuasive, especially in the light of the already constitutionally confirmed Maastricht and Lisbon Treaties. For example, according to the said treaties, the EU already holds control over the common euro currency, although coining the money has traditionally been understood, *since always*, as one of the classical prerogatives of a state.¹⁷⁶

172 Ibid. para 260.

173 Ibid.

174 Ibid. paras 252, 355. The English translation curiously omits the translation of ‘*seit jeher*’.

175 Ibid. para 355.

176 Halberstam and Möllers (n 165) 1250.

5.3.2 Exclusive Control or Substantial Freedom of Action

Must a state exercise absolute control over the cited essential areas, or does it suffice to have a substantial freedom of national democratic action to influence them? The *Lisbon* decision is somehow ambiguous on that issue.

The argument that named five specific areas which must remain under the exclusive control of a state is inconsistent in several places. Sometimes the FCC briefly, and as it seems exhaustively, named all five areas reserved solely for national democratic regulation; at other times the FCC argued only about ‘sufficient space’¹⁷⁷ for Member States to (co-)shape these areas. The signals are mixed and ambiguous.

The FCC stated: ‘The safeguarding of sovereignty, demanded by the principle of democracy, [...] does not mean that a pre-determined number or certain types of sovereign rights should remain in the hands of the state.’¹⁷⁸ And also: ‘[T]he participation of Germany in developing the European Union [...] also comprises a political union. [...] Political union means the joint exercise of public authority, including legislative authority, even reaching into the traditional core areas of the state’s area of competence.’¹⁷⁹

Elsewhere, the FCC suggested quite the opposite: ‘Accordingly, the *essential* decisions in social policy must be made by the German legislative bodies on their own responsibility.’¹⁸⁰ Or: ‘What is decisive, however, is that the overall responsibility, with *sufficient* political discretion regarding revenue and expenditure, can still rest with the German Bundestag.’¹⁸¹ Along with: ‘In this area, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required.’¹⁸² And lastly: ‘In this important area for fundamental rights any transfer of sovereign rights beyond intergovernmental cooperation may only lead to harmonization for specific cross-border situations on restrictive conditions; in principle, substantial freedom of action must remain reserved to the Member States here.’¹⁸³

One could explain the cited inconclusive statements as due to the length of the document, which undoubtedly results in repetitive and somewhat

177 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 249.

178 Ibid. para 248.

179 Ibid.

180 Ibid. para 259 (emphasis added).

181 Ibid. para 256 (emphasis added).

182 Ibid. para 251.

183 Ibid. para 253.

unclear language. Alternatively, the inconsistent statements may be the consequence of the lack of a persuasive theory,¹⁸⁴ which may offer substantial normative arguments as to why the chosen areas must remain under exclusive national legislative control.

5.4 The Lack of Democratic Legitimacy of the EU

Regardless of the numerous new empowerments of the European Parliament according to the new Lisbon Treaty to elevate its political and legislative influence in the EU, the FCC categorically rejected the European Parliament's independent source of legitimation.¹⁸⁵ The argumentation is similar to that in the *Maastricht* decision, although the FCC notably disregarded the progressive institutional development and the newly conferred competences on the European Parliament under the Lisbon Treaty.

The European Parliament cannot, and need not, fulfil the conditions of one national system of democratic representation. Due to the lack of electoral equality in the European elections and the non-existing European people, the European Parliament fails to achieve its democratic legitimation of public authority exercised within the EU, according to the FCC. It wrote: 'there can be no independent subject of legitimation for the authority of the European Union which would constitute itself, so to speak, on a higher level, without being derived from an external will, and thus of its own right'.¹⁸⁶

According to the FCC, the EU's legitimation of authority is exercised predominately through the Member States via their national parliaments. The principle of democracy requires that people, via their democratic representation in the respective parliament(s), effectively influence political decisions and hold their representatives accountable through periodic elec-

184 The BVerfG explicitly determined the culture, or decisions of particular cultural importance, as the fifth area of essential areas of a state. Elsewhere, however, it elaborated on this area as 'school and education system, family law, language, certain areas of media regulation, and status of churches and religious and ideological communities'. One can be easily puzzled as to where this classification and systematization of culture comes from, and whether one can simply reduce the complexities of media law, family law and the educational systems together with the relation of church and state to one simple buzzword, 'culture'. See BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 252, 260.

185 Ibid. para 271.

186 Ibid. para 232.

tions. Since the FCC declared the European Parliament unable to fulfil these requirements, the Member States, via their national parliaments, have to maintain this function concerning EU matters effectively. Henceforth, national parliaments must retain their political and social ability to shape citizens' living conditions by their own responsibility.¹⁸⁷

Indeed, the European Parliament is not elected by universal electoral equality – one person, one vote – since the seats are not designated by the number of European citizens eligible to vote. The European elections currently reflect the principle of equality of the Member States. Accordingly, they accord a smaller Member State a proportionately higher number of parliamentary seats, because even the smallest populations of Malta, Luxembourg and Cyprus get six MEPs each.

Scholars have convincingly argued that the FCC completely overlooked 'the particularities of democratic legitimacy in federal states [...] and lacks the categories to assess the particularity of democratic legitimacy in federal systems in general'.¹⁸⁸ The US Constitution, for example, guarantees to each state at least one Member in the House of Representatives. For instance, the small state of Vermont would otherwise not be accorded a Member according to population criteria.¹⁸⁹ The Swiss system similarly does not have a majoritarian parliamentary government, so the small states are over-represented in the second chamber of the Federal Parliament.¹⁹⁰ Yet it would be implausible to deny the political legitimacy of both these democracies. Even the German federal system has one body with egalitarian representation, the *Bundestag*, and the other, the *Bundesrat*, which represents the German federal states. Since both chambers often have to consent to new legislation, the 'egalitarian legitimacy necessary disappears in the joint decision-making procedure'.¹⁹¹

Finally, although the European Parliament certainly has a long way to go to establish itself as an important European institution which genuinely represents the European peoples and holds other European institutions accountable, the reasons for the FCC relating to electoral (in)equality appear weak and unpersuasive.

187 Ibid. para 226.

188 Schönberger (n 153) 1215.

189 Ibid. 1216.

190 Ibid. 1214.

191 Halberstam and Möllers (n 165) 1248.

5.5 Staatenverbund Intensified and Impossibility of the EU as a Federation

One of the core elements of the German constitutional identity is to remain a state. In turn, that means that the EU cannot become one. The EU must not replace the national state and hollow out its essential state features. Consequently, the EU design cannot correspond to the level of federalism. The FCC derived this argument under the Eternity Clause. It determined: '[I]f the extent of competences, the political freedom of action and the degree of independent opinion-formation on the part of the institutions of the Union reached a level corresponding to the federal level in a federal state, i.e. a level analogous to that of a state, because for example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level,¹⁹² a structural democratic deficit would be unacceptable.

The necessity to remain a state corresponds with the *Staatenverbund*, which the FCC in the *Lisbon* decision evolved further. It stated: 'The concept of *Verbund* covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States.'¹⁹³ Then the FCC connected the term with the Basic Law, arguing that Article 23(1) underlines that the EU is 'designed as a *Staatenverbund* to which sovereign powers are transferred'.¹⁹⁴

Then the president of the FCC explained in a scholarly article why he finds the concept useful: 'The term *Verbund* makes it possible without oversimplistic spatial and hierarchic concepts such as "superiority" and "subordination". Instead, it opens up the possibility of a differentiated description based on different systematic aspects such as unity, difference and diversity, homogeneity and plurality, delimitation, interplay and involvement. The idea of *Verbund* equally contains autonomy, consideration and ability to act jointly.'¹⁹⁵

192 Ibid. para 264.

193 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 229.

194 Ibid.

195 Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review 175, 184.

5.6 Concluding Remarks

The *Lisbon* decision further disregarded the possibility of democratic realization beyond the nation state, and it introduced two constitutional review mechanisms: ultra vires and the constitutional identity review.¹⁹⁶ The ultra vires review examines whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral. The constitutional identity review protects and preserves the inviolable core content of the Basic Law's constitutional identity. Both reviews are based on the principle of democracy, which is part of the Eternity Clause.

To give the constitutional identity concrete meaning, the FCC further specified five essential areas of the state's functions that must remain under national exclusive control. Criminal law, war and peace, taxation and spending, social policies, and culture (including education and religion). Furthermore, it refused the possibility that the EU would institutionally and empirically evolve into the Union corresponding to the federal level.¹⁹⁷

Finally, the *Lisbon* decision fortified the arguments from the *Maastricht* decision and even more firmly established its general, self-acclaimed competences to scrutinize and review EU law. For the FCC, the EU must remain a merely derivative system of cooperation of the sovereign states, without its own legitimacy and subordinated to the Masters of the Treaties.¹⁹⁸

196 Bobić (n 61) 98.

197 Koch (n 153) 199.

198 Lanza (n 153); Koch (n 153); Erich Vranes, 'German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis' (2013) 14 German Law Journal 75.

6 Finding Appropriate Self-Restraint – The Criterion of Manifest and Structurally Significant Violations

After the *Lisbon* decision, the FCC took one step back and re-evaluated its position. While it did not yield its judicial resistance against the EU, it also revised the attitude and dogmatics expressed in *Lisbon* (6.1). The opportunity occurred concerning the *Mangold* decision, where the CJEU arguably erred (6.2). The FCC developed a new approach, stating that it will only exercise an ultra vires review of EU law should the violations of conferred competences occur manifestly and in a structurally significant matter, and only after first referring to the CJEU (6.3). The sub-section wraps up with some preliminary conclusions (6.4).

6.1 Introduction – Continuity and Revisions

As explicated in Chapter 1 concerning the questions of constitutional pluralism,¹⁹⁹ national constitutional identity has a role in managing the relationship between utmost important national constitutional law on the one side, and on the other, European constitutional law which is based on the principle of primacy.²⁰⁰ That means that EU law, within the scope of conferred competences, trumps every legal norm, even constitutional, and even if enacted as *lex posterior*. The proponents of national constitutional identity believe that identity can mitigate, balance and eventually resolve any constitutional tensions within the multilevel constitutional orders, if only applied in constructive and dialogic way.²⁰¹

199 Miguel Poiarés Maduro, ‘Three CLaims of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

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

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

The *Lisbon* decision cannot qualify as a dialogic and constructive mechanism in the light of constitutional pluralism.²⁰² While the FCC has always been a strong court with its own indomitable spirit, and not a stranger to judicial resistance against the CJEU, as illustrated by the *Solange I* decision in 1974, the said decision occurred in a historically different context. The EU was genuinely without adequate fundamental rights protection, a codified charter of human rights or a directly elected parliament.

Can we observe the respective FCC's case law as a coherent trajectory of resistance against EU law? On the one hand, the FCC has always reviewed EU law – it just shifted from fundamental rights protection in the 1970s to the protection of national democratic institutions. As Huber argued, 'the FCC's approach to European integration have remained unaltered: national legislation as a basis of European integration, the principle of conferral as an emanation of national sovereignty and the maintenance of the national constitutional identity'.²⁰³ On the other hand, the *Lisbon* decision encountered opposition from all sides – the main point being that rather than constitutional openness, German sovereignty became the leitmotif for European integration.²⁰⁴

The first German case law reviewing EU law after having forcefully criticized the *Lisbon* decision was thus a step back from *Lisbon* – but a step forward for European integration. In what followed, the FCC developed its best case law in relation to EU law – a plausible, balanced and constructive solution.²⁰⁵

202 Giuseppe Martinico, 'What Lies Behind Article 4(2) TEU?' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013).

203 Peter M Huber, 'The Federal Constitutional Court and European Integration' (2015) 21 *European Public Law* 83, 83.

204 Christian Tomuschat, 'The Defence of National Identity by the German Constitutional Court' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National constitutional identity and European integration* (Intersentia 2013) 211.

205 Torsten Stein, 'Always Steering a Straight Course? The German Federal Constitutional Court and European Integration' (2011) 12 *ERA Forum* 219, 227.

6.2 Mangold and the Right to Err

The *Mangold* decision²⁰⁶ is often quoted as proof of how the CJEU overstepped its boundaries and, with its overstretching teleological and legally questionable arguments, gave the EU more competences as initially conferred and agreed upon.²⁰⁷ What should be the reaction of the Member States and their apex courts in a situation where the CJEU evidently goes too far?

Moreover, what is *evident* in the legal argumentation, and what kind of criteria can one apply to be able to call a judgment evidently wrong and arbitrarily overstepping the tolerable? The *Mangold* decision gave the FCC an opportunity to try to find an answer to these questions.

In preliminary ruling proceedings, referenced by the German Labour Court in Munich in 2005, the CJEU decided that the national provision authorizing the conclusion of fixed-term contracts of employment, once a worker reaches the age of 52, has to be precluded. The CJEU based its decision on the general principle of non-discrimination on the grounds of age as a general principle of Community Law and according to Article 6(1) of Directive 2000/78, establishing a general framework for equal treatment in employment and occupation.²⁰⁸ The transposition of the Directive 2000/78 at the time in question had not yet expired. However, the CJEU argued that the Directive exceptionally provided the Member States an additional period of three years to transpose the directive, and in the meantime report annually to the Commission on the concrete measures taken to tackle age discrimination and towards implementing the directive. Accordingly, 'that obligation would be rendered redundant if the Member States were to be permitted, during the period allowed for the implementation of the

206 Case C-144/04 *Werner Mangold v Rüdiger Helm (Mangold)* [2005] ECLI:EU:C:2005:709.

207 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 229. Matthias Mahlmann, 'The Politics of Constitutional Identity and Its Legal Frame – the Ultra Vires Decision of the German Federal Constitutional Court' (2010) 11 German Law Journal 1407, 1408; Malte Beyer-Katzenberger, 'Judicial Activism and Judicial Restraint at the Bundesverfassungsgericht: Was the Mangold Judgement of the European Court of Justice an Ultra Vires Act?' (2011) 11 ERA Forum 517, 518.

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

directive, to adopt measures²⁰⁹ incompatible with the objectives pursued by that act'.²¹⁰

Although the question of prohibition of discrimination, based on age, was firmly set before the CJEU in several cases,²¹¹ the decision was forcefully debated and criticized.²¹² The general principle of non-discrimination on the grounds of age was not yet formally established by the Treaties, since the EU Charter formally came into force only in December 2007. The said principle was therefore binding only in the light of common constitutional traditions and the EU Charter as the soft law. Finally, the said principle had been neither explicitly named in binding applicable international treaties nor enacted in a significant number of constitutions of the Member States, including the Basic Law. The latter does not include age as one of the qualifying characteristics pursuant to Article 3(3).²¹³

Henceforth, despite the conflicting arguments, one can understand the claim that the CJEU decided inadequately. In that light, what is the reaction of national apex courts, when the CJEU presumably errs? Concerning the *Mangold* decision, the FCC decided on the constitutional complaint, carrying out an ultra vires review of EU law.

6.3 Ultra Vires Only as Manifest and Structurally Significant Violations

The German Federal Labour Court respected the CJEU's *Mangold* decision and disapplied the respective national provisions accordingly. The latter decision was challenged by constitutional complaint. Almost five years later, the FCC issued a response in the *Honeywell* decision.²¹⁴

209 The new 'measure' here refers to the change of legislation in 2003 which had reduced the age of workers from 58 to 52 in relation to a conclusion of a fixed-term employment contract.

210 Case C-144/04 *Mangold* [2005] ECLI:EU:C:02005:709, para 72.

211 Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECLI:EU:C:2007:604; Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (Bartsch)* [2008] ECLI:EU:C:2008:517; Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG (Küçükdeveci)* [2010] ECLI:EU:C:2010:21.

212 Marlene Schmidt, 'The Principle of Non-Discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* Judgment' (2006) 7 German Law Journal 505.

213 Lerke Osterloh and Angelika Nußberger, 'GG Art. 3 Gleichheit Vor Dem Gesetz' in Michael Sachs (ed), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2018).

214 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

Honeywell is the first constitutional complaint since the *Lisbon* decision, where the FCC conducted an ultra vires review of EU law. On the merits, the claimed breach of competences was unfounded. Nonetheless, the FCC used this opportunity to define in more detail under what conditions it can render EU law inapplicable. It put the bar considerably higher and showed mature self-restraint, known from the *Solange II* jurisprudence.²¹⁵

It determined three concrete conditions for ultra vires review leading to disapplication of EU law in Germany, which sufficiently qualify the scope of potential breaches. First, it established a necessary condition to engage in dialogue with the CJEU via preliminary reference procedure prior to any EU law review. The CJEU must be afforded the opportunity to interpret the Treaties or to rule on the validity and interpretation of the legal acts in question in the context of preliminary ruling proceedings before any national constitutional review.²¹⁶

Second, the breach of competences must be manifestly violated.²¹⁷ A breach of competences is only manifest if the EU acts are taken outside the transferred competences ‘in a manner specifically violating the principle of conferral’;²¹⁸ in other words, if the breach of competences is ‘sufficiently qualified’.²¹⁹ The FCC further qualified what it means by a *manifest* transgression, referring to several scholarly writings: namely, drastic acts and considerable transgressions of competence (Kokott),²²⁰ the case of a gross, manifest transgression of competences (Isensee),²²¹ evident errors (Ukrow),²²² grievous, manifest and across-the-board offences (Pernice),²²³

215 Stein (n 205) 227.

216 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 60.

217 Ibid. para 61.

218 Ibid. para 61.

219 Ibid. para 61.

220 Juliane Kokott, ‘Deutschland im Rahmen der Europäischen Union – Zum Vertrag von Maastricht’ (1994) 119 Archiv des öffentlichen Rechts 207, 220.

221 Josef Isensee, ‘Vorrang des Europarechts und Deutsche Verfassungsvorbehalte: Offener Dissens’ in Joachim Burmeister (ed), *Verfassungsstaatlichkeit: Festschrift für Klaus Stern zum 65. Geburtstag* (C.H. Beck 1997) 1255.

222 Jörg Ukrow, *Richterliche Rechtsfortbildung durch den EuGH* (Nomos 1995) 283.

223 Ingolf Pernice, in Horst Dreier (ed), *Grundgesetz Kommentar*, vol 2 (2nd edn, Mohr Siebeck 2006) art 23 para 32.

complete departures from the basis of the Treaties (Oeter),²²⁴ and acts which are manifest, consistent and grievous (Scholz).²²⁵

Finally, the impugned act must be ‘highly significant in the structure of competences between the Member States and the Union concerning the principle of conferral and to the binding nature of the statute under the rule of law’.²²⁶ A manifest and evident shortcoming is therefore not enough – it would have to be structurally significant.

The revised *ultra vires* review departs from the *Lisbon* decision, and it significantly increases the threshold for national constitutional courts to review EU law and potentially declare it inapplicable in their respective legal orders. Moreover, one can observe it as a promising approach which could serve as an additional safety net to protect democratic commitments from the national perspective, while applied only as the *ultima ratio* measure. Finally, the potential manifest and structurally significant breach of competences by the CJEU, remedied by the national constitutional review, seems a proportionate response against the principles of effectiveness and unity of EU law.

The *Honeywell* decision raised the question of how *ultra vires* and constitutional identity review relate to one another. Calliess writes that the exact relationship remains blurred; it is therefore not clear if the FCC must submit a preliminary reference question before conducting an identity review.²²⁷ Concerning the relations between both reviews, the FCC stated that the expansion of competences does not apply only for ‘areas which are counted among the constitutional identity of the Member States or depend particularly on the process of democratic discourse in the Member States, albeit any transgression of competence weights particularly heavily here’.²²⁸

One way of understanding this line of argument is that the qualified *ultra vires* review could be either within the previously defined reserved areas or without, but the transgression of conferred competences must be qualified in either way. In that way, a review of EU law is not limited to

224 Stefan Oeter and Franz Merli, ‘Vierter Beratungsgegenstand: Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte’ in Stefan Kadelbach et al. (eds), *Bundesstaat und Europäische Union zwischen Konflikt und Kooperation*, vol 66 (De Gruyter 2007) 361.

225 Rupert Scholz, in Günter Dürig and Theodor Maunz (eds), *Grundgesetz Kommentar*, vol 55 (C.H. Beck 2009) art 23 para 40.

226 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 61.

227 Calliess (n 10) 171.

228 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 65.

the reserved essential areas of national constitutional identity. From this understanding it would logically follow that any review of EU law must be qualified according to the *Honeywell* decision, even if it concerns national constitutional identity. The FCC would not otherwise say that ultra vires review can also concern constitutional identity areas, but rather that in these essential areas the respected qualified conditions do not need to be applied.

If this reading is correct, then there is essentially no difference between both constitutional reviews, because they both must fulfil the qualifying conditions from *Honeywell*. One can argue that ultra vires review concerns structural violations of conferred competences and national constitutional identity relates to essential or sensitive areas of the Member States,²²⁹ but in practice – according to the reading above – the said differentiation would be legally irrelevant.

Finally, *Honeywell*'s change of heart is a welcome departure from the *Lisbon* decision. The dissenting opinion of Justice Landau acknowledged the change well.²³⁰ Landau rightfully observed that 'excessive requirements on the finding of an ultra vires act [...] deviates from the Senate's judgment on the Treaty of Lisbon'.²³¹ Moreover, the *Honeywell* decision 'contradicts the core statement of the Senate's judgment'²³² because the majority went beyond the consensus on which the *Lisbon* judgment was based, requiring a sufficiently qualified violation of competences which is not only manifest but which also leads to a structurally significant shift in the structure of competences between Member States and a supranational organization.²³³ Thereby, he claimed, 'instead of making these means an effective control instrument, the court practically returned to the status quo of the *Solange II* ruling'.²³⁴

229 Bobić (n 61) 23; Calliess (n 10) 169.

230 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, Dissenting opinion of Justice Landau, para 96.

231 Ibid. para 96.

232 Ibid. para 102.

233 Ibid. para 102.

234 Ibid. para 104.

6.4 Concluding Remarks

With the qualifications of manifest and structurally significant transgression of conferred competences to carry out an ultra vires review, the FCC found a new balance. It displayed self-restraint vis-à-vis the Union and thereby unequivocally acknowledged ‘respect for the Union’s own methods of justice’ and ‘a right to the tolerance of error’.²³⁵ German national constitutional ultra vires review was no longer defined as an absolute claim of the last arbiter – having the final say – nor enforcing upon the CJEU the parochial national understandings of hair-splitting legal approaches.

As Paul Craig put it, every polity with limited power faces an endemic problem of the scope of intra vires action.²³⁶ The tacit existence of external control of the EU is thus, in principle, accorded, if not welcomed. The normative rationale of resistance due to the manifest transgression of conferred powers, violating the principle of conferral and acting outside the given competences, is plausible.

The important question is, however, under what kind of conditions? The German *Honeywell* decision arguably found a plausible, balanced and constructive solution. In exceptional circumstances, an apex court may declare a judgment of the CJEU as inapplicable if the following conditions are fulfilled: first, the respective court has expressed its concerns and issued a preliminary question to the CJEU;²³⁷ second, the matter must be *structurally important*, ‘highly significant in the structure of competences between the Member States and the Union’;²³⁸ third and most important, the CJEU would have to *manifestly* violate the competences ‘in a manner specifically violating the principle of conferral’.²³⁹

The strong responses and criticism concerning the *Lisbon* decision influenced the reserved approach in the *Honeywell* case, but the attitude did not last long. Regrettably, the FCC soon de facto softened the introduced qualifications, as will be shown in the following.

235 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para. 66.

236 Paul Craig, ‘The ECJ and Ultra Vires Action: A Conceptual Analysis’ (2011) 48 *Common Market Law Review* 395, 436.

237 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para 60.

238 Ibid. para 61.

239 Ibid.

7 The OMT Saga and Fiscal Independence – About Money

The new qualifying standards for an exceptional review of EU law as the ultima ratio as determined in the *Honeywell* decision did not prevent the FCC from exercising its previous (rebellious)²⁴⁰ attitude before long. The following section analyzes the FCC's case law concerning the national constitutional identity and ultra vires reviews in relation to fiscal autonomy: namely, the first FCC referral for a preliminary ruling concerning the Outright Monetary Transactions, *OMT I*,²⁴¹ and the response to the CJEU's ruling in the *Gauweiler* decision,²⁴² *OMT II*;²⁴³ also, the FCC's decision on the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Stability Treaty).²⁴⁴ The survey does not include yet the *Banking Union*²⁴⁵ decision responding to the CJEU's *Weiss*,²⁴⁶ and the recent *PSPP*²⁴⁷ decision, which is addressed in Chapter 7.

This section first outlines the context of the sovereign debt crisis and the corresponding Outright Monetary Mechanism (7.1). It continues with the first preliminary reference procedure by the FCC (7.2) and the shifting relationship between identity and the ultra vires review (7.3). Moreover, this section illustrates the unsurmountable differences between national identity under Article 4(2) TEU from the European perspective and national constitutional identity according to FCC (7.4). It concludes with the intensely criticized dogmatic approach concerning the right to vote in relation to ultra vires review, varying through the case law of the *OMT I*,

240 Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About It' (2014) 15 German Law Journal 203.

241 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.

242 Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag (Gauweiler)* [2015] ECLI:EU:C:2015:400.

243 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.

244 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

245 BVerfG, 2 BvR 1685/14 *Banking Union* 30 July 2019.

246 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others (Weiss)* [2018] ECLI:EU:C:2018:1000.

247 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

ESM and OMT II decisions (7.5), and wraps up with concluding remarks (7.6).

7.1 The Context of the Outright Monetary Mechanism

The global financial crisis, starting in 2007–8, was remedied by many states through enormous financial capital increases in the banks. Due to incredibly high ‘injections’, the financial crisis had by 2010 been transformed into a sovereign debt crisis for several Member States of the euro area. In 2012, many investors lost confidence in the survival and further existence of the euro area. Moreover, the financial difficulties of several Member States in maintaining further sustainable access to financial markets, and their ability to issue government bonds due to the pressures on price, led to a negative spiral. Uncertainty about the further existence of the euro area resulted in higher prices of bonds, which had, in turn, worsened the respective Member States’ financial positions and ‘seemed destined to become a self-fulfilling prophecy’²⁴⁸ that the individual Member States of the euro area would return to their previous national currencies and thus impair the euro area.

The famous and bold response to this deteriorating situation by the then-president of the European Central Bank, Mario Draghi, is widely known. ‘Whatever it takes.’²⁴⁹ The political or institutional commitment to restore confidence in the single euro currency was meant, in practice, to be implemented by the announcement of the Outright Monetary Mechanism. In the press release issued on 6 September 2012, the Governing Council of the European Central Bank shared its decision on the technical features of the Eurosystem’s outright transactions in secondary bond markets to protect the single monetary policy and safeguard appropriate monetary policy transmission.²⁵⁰ The Outright Monetary Transactions (OMT) were a commitment of the European Central Bank, within the scope of the conferred monetary policy mandate, to undertake outright transactions (mak-

248 Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, Opinion of AG Villalón, para 3.

249 Mario Draghi, Speech by Mario Draghi, President of the European Central Bank (Global Investment Conference, London 26 July 2012) < <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> > accessed 24 February 2023.

250 ECB, Eurosystem, Technical features of Outright Monetary Transactions (6 September 2012) < https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html > accessed 24 February 2023.

ing purchases) of sovereign bonds issued by the Eurozone Member States on the secondary markets under specific conditions. The respective states would have to be in the bail-out programme due to the established European Financial Stability Facility/European Stability Mechanism programme (EFSF/ESM). Furthermore, they would have to comply with the thereby agreed structural reforms – macroeconomic adjustment or precautionary programme – and have regained access to the bond markets.²⁵¹

The OMT programme was, up to this day, never executed. The robust commitment to the irreversibility of the euro and the explicit readiness to do ‘whatever it takes’ were enough to regain trust and calm the markets. Many economists post-festum confirmed the programme’s effectiveness in its own right.²⁵² And indeed, soon after, the spread of government bonds decreased considerably.

7.2 OMT I – FCC’s First Reference ‘Dictate’ to the CJEU

Concerning the unconventional and disputed OMT programme, in particular in Germany,²⁵³ the FCC issued the preliminary reference procedure to the CJEU under Article 267, *OMT I*.²⁵⁴ The FCC asked the CJEU whether the OMT programme’s conditionality, selectivity, parallelism, bypassing, volume, market pricing, interference with the market logic, default risk and debt cut exceeded the ECB’s monetary policy mandate under Article 119 and 127 TFEU and violated the prohibition of monetary financing under Article 123 TFEU.

Rather than a question of interpretation, the *OMT I* reads as a dictate:²⁵⁵ the FCC ‘considers the OMT [Programme] incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because it

251 ECB, Eurosystem, Technical features of Outright Monetary Transactions, Press release (6 September 2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 24 February 2023.

252 Carlo Altavilla, Domenico Giannone and Michele Lenza, ‘The Financial and Macroeconomic Effects of OMT Announcements’ (2014) 1707 ECB Working Paper. Elena Elena, Orkun Saka and Ana-Maria Fuertes, ‘How Did the ECB Save the Eurozone without Spending a Single Euro?’ *Centre for Economic Policy Research (CEPR)* (26 March 2015).

253 ‘Anleihekäufe: Kassiert Schäuble die Wunderwaffe der EZB?’ *FAZ* (24 May 2014).

254 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.

255 Matthias Goldmann, ‘Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review’ (2014) 15 *German Law Journal* 265,

exceeds the mandate of the European Central Bank [and ...] incompatible with the prohibition of monetary financing of the budget [...].²⁵⁶ The FCC argued that the OMT programme, as a decision about purchase of government bonds, which is politically motivated, aimed at reducing the interest rates of these bonds in the selected Member States and thus infringed the responsibility of the Member States for their own sound economic policies.²⁵⁷ The lower interest rates would benefit the individual Member States, which in turn remedied and supported the inadequate economic policy for which the Member States were alone responsible.

According to the Treaties, the competences in the area of economic policy mainly rested with the Member States. The EU has in this area only limited special competences, which enable the EU to take measures to ensure that the EU countries coordinate their economic policies at the EU level.²⁵⁸ Moreover, the European System of Central Banks (ESCB) shall only support the general economic policies in the Union to contribute to the achievement of the objectives of the Union under Article 3 TEU.²⁵⁹ The main concern for the FCC was, therefore, how to understand the monetary measures that concurrently and partially impacted the economic area. Since the Treaties do not define the term ‘monetary policy’, the FCC referred to the CJEU’s *Pringle* decision²⁶⁰ and argued that monetary stability should be determined due to its primary objective to maintain price stability, the

265. Franz C Mayer, ‘Rebels Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference’ (2014) 15 German Law Journal 111, 119.

256 Ibid. para 55.

257 Ibid. The BVerfG also argued that the government bonds of other Member States are eventually placed at a disadvantage (para 73). That was however not the case as the research on financial effects on OMT has indicated. See above Altavilla, Giannone and Lenza (n 252) 164.

258 See Art 127(1), 119(1), 5(1), 2(3) TFEU.

259 Art 3(2) (sent. 2) TEU: ‘It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.’ Art 3(2) (para. 3) TEU: ‘It shall promote economic, social and territorial cohesion, and solidarity among Member States.’ Art 3(4) TEU: ‘The Union shall establish an economic and monetary union whose currency is the euro.’

260 C-370/12 *Thomas Pringle v Government of Ireland and Others (Pringle)* [2012] ECLI:EU:C:2012:756, paras 53, 56, 60, 97. The situation was reversed. The ECJ held that ‘an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro’.

instruments applied, and the link to other provisions.²⁶¹ The FCC concluded that the OMT programme exceeded the ESCB’s competence to support general economic policies and was probably not covered by the mandate of the ECB.

The second of the FCC’s objections concerned the prohibition of monetary financing of the budget as determined in Article 123 TFEU. The Article forbids the purchase of government bonds directly from the Member States – buying on the primary markets. If purchases on the secondary markets, as anticipated by the OMT programme, become functionally equivalent measures, the programme would circumvent the prohibition of monetary financing of the budget due to the teleological interpretation of Article 123 TFEU.

Finally, the FCC argued that any limitation on the right to independent decisions on the budget or any assumption of financial liability for other Member States constitutes an element of German national constitutional identity. The argument was not entirely new in the *OMT I* decision, but it goes back to 2011, when the FCC deliberated on financial aid to Greece as part of the EU’s coordinated bilateral loans.²⁶²

The FCC then wrote that budget sovereignty politically determines the correlation between the burdens and privileges specified by the state, and thus must be kept under parliamentary control. ‘The German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration.’²⁶³ The FCC further stated that the principle of democracy could only be observed if the parliament remained autonomous, even concerning international and European commitments; and that the necessary condition to preserve ‘the core of identity of the constitution [...] is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently “the master of its decisions”’.²⁶⁴

In the *OMT I* decision, the FCC once again pronounced budgetary autonomy and budgetary responsibility as guaranteed by Article 20(1)(2)

261 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 63.

262 Währungsunion-Finanzstabilitätsgesetz vom 7. Mai 2010 (BGBl. I S. 537).

263 BVerfG, 2 BvR 987/10 *Euro-Rettung* 7 September 2011, para 124.

264 Ibid. para 127. The BVerfG in the end did not find the respective measures affecting the welfare principle and consequently infringing on national constitutional identity.

in conjunction with Article 79(3) of the Basic Law, subsequently forming the content of national constitutional identity. ‘The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself [...]. The German Bundestag must therefore make decisions on revenue and expenditure with the responsibility to the people. Insofar, the right to decide on the budget is a central element of the democratic development of informed opinion.’²⁶⁵

Concerning financial liability for other Member States, the FCC stated that the OMT programme ‘could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate’.²⁶⁶

7.3 Relationship Between Constitutional Identity and Ultra Vires Review

The FCC redefined the relationship between national constitutional identity review and ultra vires review as determined in the *Lisbon* decision. In *OMT I*, it argued that every substantial change of the conferred competences from the EU would violate the principle of conferral and, thereby, the German Constitution; whereas identity review did not examine whether the competences were transgressed or not.

Relating to ultra vires, Article 23(1) of the Basic Law ‘sets out the programme of integration’.²⁶⁷ ‘An essential element of this programme of integration is the principle of conferral under Article 5(1)(2) TEU’.²⁶⁸ This implies that the Act of Assent²⁶⁹ no longer covers subsequent substantial changes of the programme of integration, and therefore would not be legally binding within the area of German sovereignty.²⁷⁰ Henceforth, the FCC ‘examines whether the legislative instruments of European agencies and institutions remain within the limits of the sovereign powers conferred

265 Ibid. para 28.

266 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 102.

267 Ibid. para 20.

268 Ibid.

269 Zustimmungsgesetz zum Vertrag über die Europäische Union und zum Vertrag über die Arbeitsweise der Europäischen Union [2008] OJ C115/01.

270 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 21.

upon them or whether they transgress those limits’,²⁷¹ concluding that ‘the precedence of Union law [...] cannot be comprehensive’.²⁷²

In the next step, the FCC connected the qualifying condition of *structurally significant* transgression of competences with the essential areas of national constitutional identity. It stated: ‘Transgressions of the mandate are structurally significant especially (but not only) if they cover areas that are part of the constitutional identity of the Federal Republic of Germany, which is protected by Art. 79 sec. 3 of the Basic Law or if they particularly affect the democratic discourse in the Member States.’²⁷³ And elsewhere, concerning ultra vires review: ‘This applies not only if independent expansions of powers affect areas which are part of the constitutional identity of the Member States or particularly depend on the process of democratic discourse in the Member States [...], though transgressions of powers weigh particularly heavy here.’

Responding to *OMT I*, the AG Villalón wrote that ultra vires and identity review ‘converge in the main proceedings [and ...] are inextricably linked’.²⁷⁴ The FCC then clarified its position, separating both reviews even more.²⁷⁵ Reacting to CJEU’s *Gauweiler* decision,²⁷⁶ which clarified the *OMT I* preliminary questions, the FCC wrote in its *OMT II* decision: ‘Unlike the ultra vires review, the identity review does not examine whether the transferred competencies were exceeded or not. Rather, it examines the respective act of the European Union in a substantive sense as to whether the “ultimate limit” of the principles of Arts. 1 and 2 of the Basic Law has been exceeded.’²⁷⁷

7.4 Article 4(2) and National Constitutional Identity by the FCC

As mentioned above, several scholars saw national constitutional identity as a mechanism for balancing national and supranational tensions, a tool

271 Ibid. para 22.

272 Ibid. para 26.

273 Ibid. para 37.

274 Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, Opinion of AG Villalón, paras 55, 57.

275 Andreas Voßkuhle, “European Integration Through Law”: The Contribution of the Federal Constitutional Court’ (2017) 58 *European Journal of Sociology* 145, 154.

276 Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:400.

277 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, para 153.

to resolve European constitutional disputes.²⁷⁸ Although Article 4(2) TEU has not yet played a significant role in that regard, as Millet acknowledges despite his further advocacy for its bolder use,²⁷⁹ national constitutional identities of the Member States and the requirement of the EU to respect national identities under Article 4(2) TEU shall be recognized as one and the same thing from two perspectives, two sides of the same coin: a Member State which claimed its national constitutional identity, and the EU, under Article 4(2) TEU, would potentially recognize that claim.

The FCC similarly recognized the said connection between identity from a national, and identity from a European perspective in the *Lisbon* decision. It stated: The ‘guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area’.²⁸⁰

Nonetheless, the FCC completely changed its attitude in *OMT I*. It argued that the EU’s obligation to respect national identities under Article 4(2) TEU must be seen only ‘as a “legitimate aim” which must be taken into account when legitimate interests are balanced against the rights conferred by Union law’.²⁸¹ On the contrary, German national constitutional identity under Article 79(3) of the Basic Law sets an ‘ultimate limit’ which cannot be balanced against any other legal interests. German national constitutional identity does not correspond to the duty of the EU to respect national identities.²⁸²

The absoluteness of the cited understanding of national constitutional identity deviates from the primacy principle of EU law: the commitment of the FCC to seek dialogue via preliminary reference procedure in the light of loyal cooperation as the guiding principle of EU law, and the possibility that identity would indeed manage and potentially solve European constitutional conflicts.

278 Anita Schnettger, ‘Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System’ in Christian Callies and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019); Pietro Faraguna, ‘Constitutional Identity in the EU – A Shield or a Sword?’ (2017) 18 *German Law Journal* 1617; Giacomo Di Federico, ‘The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards’ (2019) 25 *European Public Law*, 347.

279 Millet (n 2).

280 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 240.

281 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, para 29.

282 Ibid.

Finally, one cannot overlook the inner inconsistencies of the cited argumentation of the FCC, even beyond the highlighted change of the case law. National constitutional identity is dogmatically construed via the principle of democracy. The principle of democracy is a highly abstract principle, the realization of which is always a matter of context and degree. The FCC recognized that itself when it acknowledged the need for an effective monetary policy, independent from political independence which ‘needs to rely on short-term approval by political forces’,²⁸³ although the cited independence ‘affects the principle of democracy’.²⁸⁴ Despite the absolute nature of Article 79(3) of the Basic Law and the principle of democracy, the FCC accepted this compromise and concluded that this limitation ‘satisfies the constitutional requirements according to which the principle of democracy may be modified’.²⁸⁵

7.5 The Right to Vote and Constitutional Review – OMT I, ESM and OMT II

In the German constitutional review of EU law, the right to vote under Article 38 of the Basic Law plays a decisive role, opening the possibility of accepting a constitutional complaint directed against EU law²⁸⁶ (*Integrationsverfassungsbeschwerde*).²⁸⁷ In *OMT I* the FCC expanded the right to vote, also in relation to ultra vires review, which caused sharp criticism among scholars²⁸⁸ as well as among the sitting judges.²⁸⁹ The section shows how the FCC afterwards seemingly took a step back in the subsequent *ESM* decision,²⁹⁰ but subsequently in the *OMT II* decision found a new way to keep ultra vires review under Article 38(1) of the Basic Law.

283 Ibid. para 32.

284 Ibid. para 59.

285 Ibid. para 32.

286 Dietrich Murswiek, ‘Art. 38 GG Als Grundlage eines Rechts auf Achtung des Unabänderlichen Verfassungskerns’ (2010) 65 *JuristenZeitung* 702.

287 Roman Lehner, ‘Die “Integrationsverfassungsbeschwerde“ nach Art. 38 Abs. 1 S. 1 GG’ (2013) 52 *Der Staat* 535.

288 Mattias Wendel, ‘Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference’ (2014) 10 *European Constitutional Law Review* 263, 265. Mayer (n 255) 145.

289 Two dissenting opinions by justices Gerhardt and Lübke-Wolff.

290 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

According to *OMT I*, every German citizen can challenge an allegedly unlawful act of EU law in front of the FCC, if the European institutions supposedly acted beyond their conferred competences. The ultra vires review is justified by the right to vote, because the FCC determined that the said right also contains a substantive right, which enables citizens not just to legitimize the state power, but also to ‘influence the political formation of opinions with his or her vote and to have an impact on them’.²⁹¹ The right to vote is especially violated when ‘the vital political decisions can no longer be made independently’.²⁹²

The decision was criticized because it equates the admissibility criteria concerning the right to vote for both identity and ultra vires review.²⁹³ The difference between the two reviews is as follows. In an identity review, the respective competences concerning the essential areas can *never* be transferred to the EU. Accordingly, when the EU acts in these areas, it directly violates the substantive element of the right to vote. Whereas in an ultra vires review, when the EU allegedly acts beyond the conferred competences, these competences might not have been transferred to the EU, but they could have been. In other words, the EU violates the rights of the German parliament, rather than the substantial right to vote.

The violation of conferred competences – which could have been transferred to the EU, but might not have been – cannot be substantiated on the grounds of Article 38(1) of the Basic Law, because the said article only reassures that the ‘legitimation and influence on state authority is not depleted by a transfer of power to a degree, that the democratic principle is violated’.²⁹⁴ That was also the main argument of both dissenting justices, Gerhardt and Lübke-Wolff.

Justice Lübke-Wolff strongly highlighted the need for the FCC's self-restraint in light of what is elsewhere understood as a political question of doctrine or recognition of the margin of appreciation.²⁹⁵ She wrote that the admission of challenges of ultra vires acts based on Article 38(1) of the Basic Law is ‘a novelty without a basis in earlier case law’.²⁹⁶ Finally, she ended her dissenting opinion with strong words: ‘That some few indepen-

291 Ibid. para 51.

292 Ibid. para 52.

293 Wendel, ‘Exceeding Judicial Competence in the Name of Democracy’ (n 288) 279.

294 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2013, para 17.

295 Mayer (n 255) 115.

296 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, Dissenting opinion of justice Lübke-Wolff, para 16.

dent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competencies of the ECB following from this interpretation, and our reading of Article 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the eurozone and the national economies depending on it appears as an anomaly of a questionable democratic character.²⁹⁷

In the light of the criticism above, the FCC concluded the next decision unanimously, taking into consideration the expressed inconsistencies and narrowing the scope of the right to vote. The *ESM* decision²⁹⁸ concerned an amendment of the TFEU in Article 136, which provided a treaty authorization for a stability mechanism to safeguard the stability of the euro area as a whole, while granting financial assistance subject to conditionality; the establishment of the European Stability Mechanism²⁹⁹ (ESM) as an intergovernmental organization under public international law, to replace the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM); and establishing the Fiscal Stability Treaty.³⁰⁰

The FCC stated: ‘The substantive content of the right to vote is protected by Article 38 [...] of the Basic Law *only* [to the extent that it is in danger of being rendered ineffective] in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the

297 Ibid. para 28.

298 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

299 The European Stability Mechanism (ESM) was set up as an international financial institution by the euro area Member States to help euro area countries in severe financial distress. It provides emergency loans, but in return, countries must undertake reform programmes. With a paid-in capital of more than €80 billion, the ESM is one of the largest international financial institutions in the world. The ESM is the only official institution of the euro area. It is one of the largest issuers of euro-denominated debt in the world. No taxpayer money is spent in ESM or EFSF assistance programmes. Both institutions obtain their funds in financial markets. Since they are financially backed by euro area countries, they can borrow money at very favourable rates. These are then passed on to programme countries. See European Stability Mechanism <<https://www.esm.europa.eu>> accessed 24 February 2023.

300 The Fiscal Stability Treaty is an intergovernmental treaty which was introduced as a new and stricter version of the previous Stability and Growth Pact. The ‘Fiscal Pact’ is part of the treaty which requires that all national budgets have to be in balance or surplus. This means that a general budget deficit cannot exceed a certain percentage of the gross domestic product (GDP), and a structural deficit cannot exceed respective budgetary objectives.

people is permanently restricted in such a way that vital political decisions can no longer be made independently.³⁰¹ The argumentation suggests that one can only trigger the right to vote in a constitutional complaint against EU law concerning the issues which cannot be transferred to, or regulated by, the EU.

The suggested limitation of the right to vote in the *ESM* decision did not last long. In the subsequent *OMT II* decision,³⁰² when both previously dissenting justices had already left the senate, the BVerG found a new way to connect the right to vote and ultra vires review. It argued that constitutional complaint is ‘admissible to the extent that it challenges unconstitutional inaction on the part of the Federal Government regarding a possible impairment of the overall budgetary responsibility of the *Bundestag*’.³⁰³ This includes, in particular, the Federal Government bringing legal actions before the CJEU, exercising veto rights, proposing treaty amendments, adopting its voting policy etc.³⁰⁴ The *Bundestag* can, in particular, debate, exercise its right to ask, bring legal actions etc.³⁰⁵ This specific ‘duty to act’³⁰⁶ can be reviewed by the FCC via constitutional complaint under the right to vote, if the particular requirements of ultra vires are met.³⁰⁷

7.6 Concluding Remarks

The red thread of outlined case law establishing highly specific considerations to justify reviewing EU law is twofold. First, apart from *Solange II*, the FCC never entirely gave up the self-acclaimed right to review EU law and reject its application in Germany. In that sense one observes a strong continuity of judicial resistance. Second, the exact contours of identity and ultra vires review are not yet settled. In fact, as highlighted above, they are

301 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014, para 125 (emphasis added).

302 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.

303 Ibid. para 94.

304 Ibid. para 171.

305 Ibid.

306 Ibid. para 172.

307 Ibid. paras 167, 171.

changing in every single decision, shifting back and forth, and searching for the most appropriate justification.³⁰⁸

Moreover, in all the cited cases, the FCC only prepared the ground for actually disapplying EU law. In *OMT II*, the FCC still stated that the CJEU ‘has a right to tolerance of error’.³⁰⁹ It was only in the latest *PSPP* decision³¹⁰ concerning the CJEU’s *Weiss*,³¹¹ as further illustrated in Chapter 7, that the FCC fulfilled its threats.

Finally, as noted above, the *Honeywell* decision could have served as a reasonable and self-restrained approach. However, in *OMT II* the FCC softened its qualifying conditions. While it reiterated that the tolerance of error ‘reaches its limit only when an interpretation of the Treaties is manifestly utterly incomprehensible and thus objectively arbitrary’,³¹² it immediately thereafter relativized the condition of *manifest* violation. It stated: ‘An exceeding of competences can be “manifest” even if it results from a careful and meticulously reasoned interpretation.’³¹³

308 Mehrdad Payandeh, ‘The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture’ (2017) 13 European Constitutional Law Review 400, 401.

309 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, para 149.

310 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

311 Case C-493/17 *Weiss* [2018] ECLI:EU:C:2018:1000.

312 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, para 149.

313 Ibid. para 150.

8 Since Solange II

Thirty years after the *Solange II* decision, the FCC once again argued in the *EAW* decision that it can review EU law against the national fundamental rights standards in the name of identity review (8.1). While it did not find any conflict at the end, the identity review in the name of fundamental rights standards raises serious concerns. Yet, as explained in Chapter 5, the new constitutional paradigm directly applying the EU Charter redefines and challenges the cited regressive attempt (8.2).

8.1 EAW – Human Dignity and the Principle of Individual Guilt

In 2015, the FCC unequivocally departed from the *Solange II* decision, deciding in the *EAW* decision³¹⁴ to once again review EU law against German standards of fundamental rights. The decision concerned a request for extradition from Germany to Italy of the US national R., convicted *in absentia* with a sentence of 30 years' imprisonment for participating in a criminal organization and possessing cocaine. According to the European Arrest Warrant under the Framework decision,³¹⁵ the convicted person shall *in absentia* have the right to request a retrial or an appeal if the person was not personally served with the decision. That shall include the right to participate in, and present fresh evidence at, the trial, which allows the case's merits to be examined and may lead to the original decision being reversed.³¹⁶

The convicted R. argued that the Italian legal system would only allow him to file an appeal, which would only in exceptional circumstances allow him to present new evidence and be heard. Moreover, the convicted R. was also likely to have to carry the burden of proof at the appeal proceedings

314 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015. Note that in one of the earlier decisions concerning European Arrest Warrant the FCC only interpreted national law, avoiding declaring EU law as incompatible with the German Basic Law. See BVerfG, 2 BvR 2236/04 *Citizen D* 18 July 2005. See also Bobić (n 61) 49.

315 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States: Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

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

relating to the reasons for his absence, which set additional conditions for a retrial or an appeal. That would limit his procedural rights as guaranteed under the European Arrest Warrant.

8.2 Reviewing EU Law Against German Fundamental Rights Standards

In the *Solange II* decision, the FCC stated that as long as the ECJ guarantees adequate protection of fundamental rights, which is to be regarded as essentially equivalent to the Basic Law, the FCC will no longer review the Community Law against the national standards of fundamental rights.³¹⁷ Moreover, the Basic Law specifically states in Article 23(1) that the EU ‘guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law’.³¹⁸

Yet, in the *EAW* decision, the FCC changed its position established in 1986, while clearly recognizing the turn: ‘The constitutional complaint is admissible [...] notwithstanding its past jurisprudence declaring inadmissible both constitutional complaints and referrals in specific judicial review proceedings that assert a violation of fundamental rights under the Basic Law by secondary Community law or Union law respectively.’³¹⁹

In the name of constitutional identity review, the FCC once again claimed the right to review and disapply EU law, specifically to protect fundamental rights in every individual case if the standards fall below the minimum threshold required by the Basic Law. The FCC wrote: ‘The FCC, by means of the identity review, guarantees without reservations and in every individual case the protection of fundamental rights³²⁰ [and that is] also protected against interferences by public authority exercised supranationally.’³²¹

Under *Solange II* jurisprudence, the FCC could not review a particular case, even if the matter at hand exceptionally went below the standards of protection in Germany. The CJEU would have a tolerance of error in an individual case. But that is no longer the case in the name of national

317 BVerfGE 73, 339 *Solange II* 22 October 1986, p 388.

318 Rupert Scholz, ‘GG Art. 23’ in Theodor Maunz and Günter Dürig (eds), *Grundgesetz-Kommentar* (69th edn, C.H. Beck 2013).

319 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, para 34.

320 Ibid. para 49.

321 Ibid. para 53.

constitutional identity, even though at the end the FCC stated that '[i]n the case at hand, there is no conflict between Union law and the protection of human dignity under Article 1(1) of the Basic Law'.³²²

To conclude, reviewing EU law against national fundamental rights standards in the name of national constitutional identity does not stop here. As will be elaborated in Chapter 4, the first senate of the FCC recently issued a new case law, *Right to be forgotten I and II*, which constructively offers a new constitutional paradigm and challenges the above cited identity review of EU law.

322 BVerfG, 2 BvR 2735/14 EAW 15 December 2015, para 125.

9 Conclusion

This chapter started with theoretical considerations regarding constituent power and constitutional form. The constitutional paradox concerning *pouvoir constituant* and *pouvoir constitué* justifies a constitutional limitation to amend the essential constitutional core.³²³ Yet, in the light of the common and shared constitutional commitments in the Member States and in the EU, namely, the protection of fundamental rights, the rule of law, and the commitment to democracy, how can a national constitutional court plausibly argue that it would disapply EU law to protect these same values?

The said paradox of constituent power, invested in the people, may express itself through so-called *constitutional populism*, the power which is not fully consumed by the constitution. Drawing on the argument of Möllers,³²⁴ the FCC as the body of legal experts at least partially embodies *constitutional populism* in Germany, which explains the considerable trust that it enjoys and the self-acclaimed managing role concerning the scope of European integration from the German perspective. Accordingly, it is the FCC, together with its highly meticulous scientific dogmatics, which is the object of inquiry when searching for the meaning of national constitutional identity, understood as the limits of European legal integration.

Finally, the first section on theoretical considerations concluded with the likely progenitor of the account of national constitutional identity in (German) constitutionalism since the Weimar Republic: the controversial and historically problematic Carl Schmitt. The section illustrated the context of his identity account, and on that account dissociated the contemporary national constitutional identity therefrom.³²⁵

The subsequent sections analyzed the case law concerning the conditions for reviewing EU law by the FCC. Section 3 demonstrated the beginnings of the FCC's resistance against the primacy of EU law and the CJEU. In the famous case law *Solange I* and *II*, the FCC mentioned national constitutional identity in passing, but it did not justify its resistance on these grounds.

323 El Khoury (n 31).

324 Möllers (n 8).

325 Schmitt (n 68) 140–150. See also Martin Mlynarski, *Zur Integration Staatlicher und Europäischer Verfassungsidentität*, vol 37 (1st edn, Mohr Siebeck 2021) 148–55.

Rather it simply argued that the EU lacks the necessary democratic features and equivalent protection of fundamental rights. Notably, even in the two mentioned decisions, the FCC defined national constitutional identity in different terms: first, as the ‘part of the Basic Law dealing with fundamental rights’;³²⁶ second, as the identity of the prevailing constitutional order, by ‘the legal principles underlying the provisions of the Basic Law on fundamental rights’.³²⁷

The *Maastricht* decision marked the birth of contemporary argumentation concerning a review of EU law, though without mentioning national constitutional identity terminology just yet.³²⁸ To justify the said review, the FCC introduced the principle of (national) democracy and the right to vote. Comparing with the *Solange* jurisprudence, where the focus of the FCC relied on democratic features of the EU, or lack of them, the *Maastricht* decision shifted the focus back to the nation state. The FCC meticulously interpreted the principle of democracy as setting the ‘limits for the expansion of the functions and competencies of the European Union’.³²⁹ Finally, the section highlighted the factual and normative assumptions underlying the new identity review, as well as the inner contradictions accompanying the said argumentation. On the one hand, the EU could only have more competences if it was democratically more advanced; on the other hand, we cannot democratically develop the EU further, because that would in turn endanger the democratic powers of the Member States.

The new Lisbon Treaty brought about considerable structural reforms of the EU. The following section thus examined the *Lisbon* decision, which introduced two specific constitutional reviews: constitutional identity review and ultra vires review. The section showed how the underlying basic normative assumptions of the FCC’s reasoning stayed essentially the same as in the *Maastricht* decision. Nevertheless, the *Lisbon* decision went one step further and introduced what one may call a theory of state.³³⁰ It introduced five essential areas of state which cannot be conferred on the EU, allegedly constituting the national constitutional identity. The section highlighted the

326 Oppenheimer (n 22) 447.

327 Ibid. 485.

328 The BVerfG addressed identity only as the responsibility of the EU to respect national identities.

329 BVerfGE 89, 155 *Maastricht* 12 October 1993, p 187.

330 Schönberger (n 153) 60.

criticism of the said account and outlined the main differences between both newly introduced constitutional reviews.³³¹

In response to the tough criticism concerning the *Lisbon* decision, the subsequent *Honeywell* decision articulated arguably the most constructive and Europe-friendly contours of potential review of EU law, in the case of manifest and structurally significant transgression of conferred competences by the CJEU. Understood as a highly exceptional mechanism preventing the EU from deteriorating into a non-democratic, unaccountable or abusing Leviathan, the new qualifications for ultra vires review exhibited a balanced and self-restrained approach vis-à-vis the EU, where the FCC respects ‘the Union’s own methods of justice’ and ‘a right to the tolerance of error’.³³²

As Section 7 demonstrated, the above-celebrated attitude did not last for long: the questions concerning national fiscal independence and potential financial liabilities for the other Member States in the light of economic and subsequent sovereign debt crisis raised the stakes. In the series of decisions concerning the OMT programme, fiscal independence, and the overlapping relationship between monetary and economic policy, namely, the *Euro-Rettung*,³³³ *OMT I*,³³⁴ *ESM*³³⁵ and *OMT II*³³⁶ decisions, the FCC once again strengthened its position in relation to EU law. This section showed how the relationship between both reviews, identity and ultra vires, continuously shifted back and forth, and how the FCC broke a previously assumed connection between the EU’s responsibility under Article 4(2) TEU to respect national identities and German national constitutional identity. The section argued that the said identity account, indicating parochial exceptionalism rather than constitutional tolerance, cannot plausibly serve as an archetypical comprehensive account across the Member States.

Finally, the last section briefly explained how the FCC in the *EAW*³³⁷ decision reverted to its pre-*Solange II* position, asserting to review EU law even against the German fundamental rights standards in the name

331 Calliess (n 10) 164.

332 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, para. 66.

333 BVerfG, 2 BvR 987/10 *Euro-Rettung* 7 September 2011.

334 BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014.

335 BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014.

336 BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016.

337 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015. See also Robert Pracht, *Residualkompetenzen des Bundesverfassungsgerichts ultra vires, Solange II, Verfassungsid-entität* (1. edn, Mohr Siebeck 2022) 386.

of national constitutional identity, should the EU standards fall below the minimum standard of protection. Yet, in the light of the recently issued case law *Right to be Forgotten I* and *II* by the first senate of the FCC, it remains to be seen whether the above-mentioned case law will entirely change the paradigm – omitting fundamental rights identity claims from identity review – or continue the contours of the *EAW* decision, as will be explained in more detail in Chapter 4.

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 connote 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 Identity: identity of the Constitution v. Identity of the People' in Alejandro Saiz Arnaiz and Carina Alcobarro 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 indeterminate.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 Alcobarro 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 Callies and Gerhard van der Schyff, ‘Constitutional Identity Introduced’ in Christian Callies 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 sociálního 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 Bonn (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

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 Televisiónes 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-chancellor-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 Tușnad), 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 changes⁶⁰ 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-

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 also Treaty 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

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 Zeitmann (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 disagreements¹¹² 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 adoptee¹¹⁶ 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

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 integration¹³⁴ – 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* case¹³⁶ 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 Treatment¹⁴¹ 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 Tanchev¹⁴² 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 Xavier 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

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 ‘Małgożata 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* decision¹⁷³ 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) III.

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* preliminary 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 review¹⁷⁹ 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, interconnect-edness 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 ethno-cultural 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 decision²¹⁸ 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 Halmi, ‘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 fifteen²²¹ 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 2011 with 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.

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 Decision²⁵⁴ 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 historical²⁶⁷ 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 Juizes 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

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 Juizes 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 Dmitry 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

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-64/16AS/P [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 dissolved³²⁶ 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 ethno-cultural 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

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

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.'

Forgetting Fundamental Rights Identity Claims

The New Constitutional Paradigm in Multilevel Fundamental Rights Standards

A man's conscience and his judgment is the same thing; and as the judgment, so also the conscience, may be erroneous.

(Thomas Hobbes)

1 Introduction

This chapter explores convergences and divergences in the field of multi-level fundamental rights protection across the EU and Member States.¹ In an attempt to navigate an ever closer European harmonization and the protection of national constitutional diversity, the accommodation of various fundamental rights standards puts forward the pivotal challenge of the European multilevel system.² On the one hand, unifying European legislation increasingly requires some form of common and shared fundamental rights standards under the EU Charter, going beyond mere minimal protection. On the other hand, the protection of national constitutional idiosyncrasies is often accompanied by the highly volatile concept of national identity,³ which is to be understood here as unique interpretations of fundamental rights, potentially challenging the primacy of EU law and its unified and effective application.

The chapter firstly explicates and contextualizes the landscape of national and supranational fundamental rights standards relating to national constitutional identity claims. It analyzes the disputed scope of fundamental rights application and critically demonstrates how minimum protection may become the final norm (Section 2).

Moreover, the chapter engages with the specific type of national constitutional identity claims concerning fundamental rights standards and idiosyncratic interpretations (Section 3). The following section then highlights an alternative approach adopted by the German Federal Constitutional Court (FCC). In the *Right to be Forgotten I*, the FCC held that in the constitutional complaint which falls within the scope of application of EU law, but where the subject matter is not fully harmonized, it will

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- 1 Andreas Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 *European Constitutional Law Review* 175.
 - 2 Dieter Grimm, 'The Various Faces of Fundamental Rights' in David Dyzenhaus, Jacco Bomhoff and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press 2020) 426.
 - 3 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 *European Law Journal* 457; Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 *German Law Journal* 534.

directly apply the fundamental rights under the Basic Law. The section critically scrutinizes the said case law, especially in the light of claims of national constitutional identity (Section 4). Furthermore, in the *Right to be Forgotten II*, the FCC presented a true change, arguing that it will directly apply the EU Charter should the matter fall within the scope of EU law, which is fully harmonized. The section highlights the challenges as well as the opportunities of the new constitutional paradigm for the further constitutionalization of the EU (Section 5).⁴

Finally, the chapter concludes with an assessment of how the new shift of paradigm in the *Right to be Forgotten* opens possibilities for the national apex courts to leave behind highly volatile identity claims in the field of fundamental rights protection, while at the same time maintaining their idiosyncratic fundamental rights interpretations within the scope of application of EU law, which is not entirely harmonized. Hence, the new paradigm could indicate the end of identity – forgetting fundamental rights identity claims (Section 6). The chapter wraps up with short concluding remarks (Section 7).

4 Johannes Masing, 'Das Bundesverfassungsgericht' in Matthias Herdegen et al. (eds), *Handbuch des Verfassungsrechts* (1st edn, C.H. Beck 2021) 1043.

2 National and Supranational Fundamental Rights Standards

This section contextualizes the challenges and open questions of the multi-level fundamental rights protection in the Union and its Member States.⁵ It first explores the European constitutional design of fundamental rights protection together with identity claims (2.1). Moreover, it explicates the disputed scope of fundamental rights application (2.2). Finally, it demonstrates how minimum protection can become the final norm (2.3).

2.1 Multilevel Constitutional Design of Fundamental Rights Protection

The European Union is commonly regarded as a Community of values⁶ in light of its commitment to democracy, the rule of law, human dignity, equality and respect for human rights. The CJEU recently stated that ‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member State’.⁷

However, the national constitutional identity argument and the resisting national apex courts,⁸ most notably the German FCC with its *Solange I* jurisprudence,⁹ prompted the resourceful ECJ to introduce the protection

5 Due to the specific focus of the research questions, the ECHR is not directly taken into account here.

6 Matteo Bonelli, ‘From a Community of Law to a Union of Values’ (2017) 13 European Constitutional Law Review 793; Jan Wouters, ‘From an Economic Community to a Union of Values: The Emergence of the EU’s Commitment to Human Rights’ in Manfred Nowak et al. (eds), *The European Union and Human Rights Law and Policy* (2020).

7 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

8 William Phelan, ‘The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini’ [2020] TRiSS Working Paper Series.

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

of fundamental rights at the Community level. In the cases of *Stauder*,¹⁰ *Internationale Handelsgesellschaft*¹¹ and *Nold*,¹² the ECJ established the protection of fundamental rights as a part of general principles of EU law¹³ while openly acknowledging that its derivative source is dependent on Member States' legal cultures and common constitutional traditions.¹⁴

After a gradual but continuous development of fundamental rights protection in the Union,¹⁵ the current EU Charter of Fundamental Rights finally¹⁶ and formally became part of EU primary law.¹⁷ Yet, the multilevel protection of fundamental rights remains designed and interpreted ambiguously. While Article 53 of the EU Charter promises not to affect any standard or level of protection elsewhere,¹⁸ the Court's interpretation in *Melloni* prohibits the application of higher national standards when the subject matter is fully harmonized by EU law – thus possibly affecting higher national standards.¹⁹ Moreover, the EU Charter concurrently protects in two distinctive ways: first, as the only fully adequate protection in fully harmonized areas; second, as the minimum level of protection in non-fully harmonized areas. That in itself already bears a risk of contradict-

10 Case 29-69 *Erich Stauder v City of Ulm (Stauder)* [1969] ECLI:EU:C:1969:57.

11 Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Internationale Handelsgesellschaft)* [1970] ECLI:EU:C:1970:114.

12 Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (Nold)* [1974] ECLI:EU:C:1974:51.

13 The argument was first made by Walter Hallstein in parliamentary discussions. Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 365.

14 Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (4th edn, Cambridge University Press 2019) 237.

15 Case C-173/99 *The Queen v Secretary of State for Trade and Industry (BECTU)* [2001] ECLI:EU:C:2001:81, Opinion of AG Tizzano, para 27; Case C-540/03 *European Parliament v Council of the European Union* [2006] ECLI:EU:C:2006:429, para 58.

16 Although in 1953 the European Community wanted to include the Convention for the Protection of Human Rights and Fundamental Freedoms into the Statute, that was rejected by France, the Community nevertheless rejected Francoist Spain's EU membership due to different ideological commitments.

17 Daniel C Thomas, *The Limits of Europe: Membership Norms and the Contestation of Regional Integration* (Oxford University Press 2021).

18 Article 53 of the EU Charter fully corresponds to the wording of Article 53 ECHR, but the former has a different role—at times it has to provide the only fundamental rights protection, not just minimum standards.

19 Case C-399/11 *Stefano Melloni v Ministerio Fiscal (Melloni)* [2013] ECLI:EU:C:2013:107, paras 63, 65.

ing standards.²⁰ The constitutional tensions relating to fundamental rights standards thus continue to exist. And once again, and in the absence of a more predictable and concretized mechanism for accommodating different (national and supranational) standards of protection, identity claims continue to undertake that functional role.

2.2 The Scope of Fundamental Rights Application – A Disputed Matter

An additional challenge is the disputed scope of the application of fundamental rights. In a nutshell, there are two distinct cases where the EU Charter ought to apply: first, when the Member States are *implementing* Union law; second, when national legislation *falls within the field or scope* of Union law.²¹

Before the EU Charter formally came into force, the CJEU had extensively defined its jurisdiction concerning fundamental rights protection.²² For example, in *Grogan*,²³ the Court stated that it had jurisdiction ‘to assess the compatibility of that legislation with the fundamental rights [...] where national legislation *falls within the field of application* of Community law’.²⁴ Moreover, in the *ERT*²⁵ case, it similarly decided that ‘where such rules do *fall within the scope of* Community law’,²⁶ European fundamental rights apply. Henceforth, the ECJ firmly established its jurisdiction to scrutinize

20 Eleanor Spaventa, ‘Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU’ in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 29.

21 Marjan Kos, ‘Constitutional Diversity and Differentiation in the EU: What Role for National Constitutional Demands under EU Law?’ in Maja Sahadžić et al. (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023) (forthcoming). See also Christopher Bilz, *Margin of Appreciation Der EU-Mitgliedstaaten*, vol 164 (1st edn, Mohr Siebeck 2020) 55ff.

22 Xavier Groussot, Laurent Pech and Gunnar T Petursson, ‘The Scope of Application of Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication’ (2011) 1 The Eric Stein Working Papers.

23 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.

24 Ibid. para 31 (emphasis added).

25 Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (*ERT*) [1991] ECLI:EU:C:1991:254.

26 Ibid. para 42 (emphasis added).

the subject matter through the lens of EU fundamental rights every time the relevant national legislation ‘falls within the field or scope of application of the EU laws’.

The constructed jurisdiction is, however, exceedingly general and far-reaching. A lot of frustration from the Member States, as well as critique from legal scholars, relate precisely to a too widely construed European jurisdiction.²⁷ Accordingly, the EU Charter introduced a more limited scope of fundamental rights application.²⁸ Article 51(1) EU Charter states that EU fundamental rights apply only when the Member States are ‘implementing Union law’. Henceforth, the *scope of the application* was replaced by the *implementation*.

Yet, the CJEU has not given up its previously defined broader jurisdiction. Due to the Explanations,²⁹ soft law which provides guidance relative to the interpretation of the EU Charter,³⁰ ‘the requirement to respect fundamental rights [...] is only binding on the Member States when they act *in the scope of Union law*’ (emphasis added).³¹ Moreover, the Explanations directly refer to cases such as *Wachau*,³² *ERT*³³ and *Annibaldi*³⁴, which all specifically established the broader application of fundamental rights.³⁵ The scope of application of fundamental rights remains a disputed matter among scholars, subject to dissent and controversy,³⁶ while the CJEU continues to apply the same jurisdiction as construed at the beginning.

27 Mark R Freedland and Jeremias Adams-Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2015).

28 Michael Dougan, ‘Judicial Review of Member State Action under the General Principles and the Charter: Defining the “Scope of Union Law”’ (2015) 52 Common Market Law Review 1201, 1205.

29 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

30 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 52(7).

31 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

32 Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft (Wachauf)* [1989] ECLI:EU:C:1989:321.

33 Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254.

34 Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio (Annibaldi)* [1997] ECLI:EU:C:1997:631.

35 Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 European Constitutional Law Review 375.

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

2.3 Three Levels of Fundamental Rights Protection – Turning Minimum Protection into a Final Norm

The last challenge concerns the concurrent coexistence of minimum and fully adequate levels of protection of fundamental rights in multilevel constitutional systems. One may observe the levels of protection from three perspectives.

First, from the perspective of the Member States, national constitutional systems usually consider themselves adequate and self-sufficient. However, the systems of protection and the adjudicative outcomes in the 27 Member States are considerably diverse.

Second, when national laws are fully harmonized by EU law, usually in the form of a Regulation, the CJEU interprets the EU Charter as the only standard of protection; nevertheless, not as the minimum standard, but as the adequate standard of protection. Yet, these standards cannot fully overlap with *all* the national standards.³⁷ That logically derives from the fact that the national fundamental rights adjudications differ considerably. A typical example is the well-known landmark *Melloni* decision, where the CJEU firmly rejected the Spanish Constitutional Tribunal's suggestion that the Member States should be able to apply their higher national standards, if they provide higher protection than the one awarded by the CJEU under the EU Charter.³⁸

Finally, in the areas of law which have not yet been fully harmonized, only minimum protection of fundamental rights is provided. Concurrently the Member States are allowed to apply their own (higher) national standards of fundamental rights protection, as stated in the *Åkerberg Fransson* decision. Where the matter falls 'within the scope of European Union law', but 'in a situation where the action of the Member States is not entirely determined by European Union law', Member States 'remain free to apply national standards of protection of fundamental rights', provided that the level of protection due to the EU Charter and the primacy, unity and effectiveness of the EU law are not thereby compromised.³⁹

37 Francesco de Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 Common Market Law Review 9.

38 Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

39 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (*Åkerberg Fransson*) [2013] ECLI:EU:C:2013:105, paras 21, 29.

The described system is generally known among legal scholars.⁴⁰ What is largely overlooked, however, are the *consequences* of these double standards of protection. This sub-section demonstrates only one of the most problematic outcomes: namely, how even the minimum protection in non-fully harmonized legislation might turn into an ultimate (final) standard.⁴¹

When thinking about the problem of combining the European minimum protection of fundamental rights with higher national standards, one should consider the following. A particular standard for a fundamental right often results from a balancing exercise between two or more colliding or conflicting rights. For example, the scope of privacy is often counter-balanced by the question of security standing. Labour and social protection stand in conflict with the freedom to conduct business, and freedom of speech with personality rights. Hence the question of whether minimum protection of a particular fundamental right is possible without determining the scope and limits of its opposing right. The case *AGET Iraklis*⁴² might help us to understand the above-raised query better.

According to the Collective Redundancies Directive,⁴³ workers enjoy minimum protection against collective lay-offs. However, the Directive specifically states that the Member States may afford additional higher protection to workers.⁴⁴ Accordingly, the Greek legislator provided more extensive regulation in favour of the workers. Specifically, before authorizing (some of the) collective redundancies, the Ministry of Labour would have to consider factors such as the market conditions, the situation of the company and the interests of the national economy.⁴⁵

In the case at hand, the Greek Ministry of Labour refused to authorize the projected redundancies of *AGET Iraklis* because ‘there was no plan for relocating the workers concerned to other plants belonging to *AGET*

40 Spaventa (n 20).

41 Spaventa (n 36).

42 Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis (AGET Iraklis)* [2016] ECLI: EU:C:2016:972.

43 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16; Corrigendum to Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ L 225, 12.8.1998) [2007] OJ L59/84.

44 Ibid. art 4(3) and art 5.

45 Law (N.) 1387/1983 *Control of Group Dismissals and Other Provisions* (FEK A' 110/18-19.8.1983), 19 August 1983, art 5(3).

Iraklis,⁴⁶ combined with the existence of a high unemployment rate in the state. Moreover, ‘the projected redundancies had not been substantiated by concrete and detailed evidence, and [that] the arguments relied on by *AGET Iraklis* appeared too vague’.⁴⁷

The decision was challenged before the CJEU, which found the measures in question to be ‘liable to impede the exercise of freedom of establishment or render it less attractive’.⁴⁸ Furthermore, under the EU Charter, ‘the establishment of a regime imposing a framework for collective redundancies, such as the regime at issue [...], entails a limitation on the exercise of the freedom to conduct a business enshrined in Article 16 of the Charter’.⁴⁹ Accordingly, the CJEU decided that the required authorization was contrary to EU law, due to the vagueness of the established conditions for exercising the discretionary power in question.

To sum up, although the Directive only established the minimum level of protection, the fact that it conflicted with the freedom to conduct business enabled the CJEU to determine the relationship between two conflicting fundamental rights. Effectively, the minimum European labour standard of protection became the ultimate standard.

46 Case C-201/15 *AGET Iraklis* [2016] ECLI:EU:C:2016:972, para 17.

47 Ibid. para 18.

48 Ibid. para 48.

49 Ibid. para 69.

3 Identity as Protection of National Fundamental Rights Standards

The above-described challenges of multilevel fundamental rights protection stand in correlation with (certain types of) claims of national constitutional identity. To protect national interpretations of fundamental rights, Member States occasionally claim they are part of their constitutional identity. This section first examines whether the requirement of the Union pursuant to Article 4(2) TEU to respect national identities intends to encapsulate the issue of fundamental rights *interpretation* (3.1). Moreover, it analyzes the national judicial practice as to how national identity claims relate to fundamental rights in particular. Identity claims refer to the general commitments to fundamental rights,⁵⁰ their idiosyncratic national interpretations,⁵¹ or even specific and unique constitutional rights⁵² (3.2). Finally, national constitutional identity is a much broader phenomenon than its specific relation to fundamental rights. Accordingly, one should treat and evaluate identity claims concerning fundamental rights as a separate and normatively specific issue (3.3).

3.1 European Identity Clause and Fundamental Rights – Going Beyond

If a claim of national constitutional identity is to be ‘successful’ in challenging EU law, the CJEU must accept it. Hence, national constitutional identity requires participation on both levels, national and supranational. Only national authorities are to determine and/or interpret the meaning of respective national identities. In the same way, the CJEU alone is competent to interpret the Treaties, whereby Article 4(2) TEU articulates the meaning and scope of national identity. Accordingly, does the cited European iden-

50 Italian Corte Costituzionale, Case 1146/1988, 15 December 1988, para 2.1; Takis Tridimas and Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ (2019) 20 German Law Journal 794, 800.

The Italian Constitutional Court pointed to supreme constitutional principles as implicit constraints on the exercise of the power to amend the constitution.

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

52 Case C-159/90 *Grogan* [1991] ECLI:EU:C:1991:378.

tity clause encapsulate (national) fundamental rights *standards* as part of national identity?

A meticulous reading of the European identity clause suggests no recourse to specificities of national *interpretations* of fundamental rights.⁵³ De Witte supports that view. He argues that ‘Article 4(2) TEU does not refer to fundamental rights as a component of constitutional identity, and the Court of Justice tends to steer from dealing with fundamental rights questions in the language of national constitutional identity.’⁵⁴

Moreover, when the FCC yielded to review EU law in *Solange II* due to sufficient protection of fundamental rights on the level of the Union – previously carried out in the name of constitutional identity – it never demanded that fundamental rights standards both at a national and at a European level be *the same* to recognize the primacy of EU law over national, even constitutional law. On the contrary, the FCC has explicitly recognized that the standards of protection will naturally differ. However, the decisive point is that the essence of fundamental rights is not hollowed out.⁵⁵ Fundamental rights protection at the Union level is regarded as *essentially equivalent* to national fundamental rights protection. The FCC has explicitly stated that it ‘will no longer review the Community law against the national *standards* of fundamental rights; especially since the essence of fundamental rights is generally guaranteed by the ECJ (emphasis added).’⁵⁶ In the same decision, the FCC also wrote that the adherence of the Union to the ECHR, which guarantees only minimum protection of fundamental rights, although not formally binding, in principle already satisfies the conditions which the German Basic Law demands.⁵⁷

To sum up, while the general *commitment* to fundamental rights may plausibly constitute national constitutional identity (and the lack of it even

53 Art 4(2) TEU: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

54 Bruno de Witte and Diane Fromage, ‘National Constitutional Identity Ten Years on: State of Play and Future Perspectives’ (2021) 27 European Public Law 411, 420.

55 BVerfGE 73, 339 *Solange II* 22 October 1986, p 363.

56 Ibid. p 388.

57 Ibid. p 386.

justified the refusal of the EU primacy principle by the FCC), the specific national *interpretations* or *standards* of fundamental rights cannot.⁵⁸

3.2 Identity as Commitments, Interpretations and Unique Fundamental Rights

Despite the suggested scholarly interpretation of the European identity clause above, the CJEU's case law, as well as some of the more recent claims of national constitutional identity by the apex courts, occasionally suggest otherwise.

First, Member States often argue that the general commitment to fundamental rights forms part of their national constitutional identity.⁵⁹ The German eternity clause,⁶⁰ Czech eternity clause,⁶¹ or Italian *Controlimiti* doctrine⁶² exemplify this. In that sense, identity as a general commitment to fundamental rights could only be plausible if the Union manifestly disregarded its own duty to respect fundamental rights.⁶³ Identity in that regard plays a role as the ultimate guardian of liberal values. Mere reasonable disagreement on the *interpretation* of fundamental rights does not fulfil that standard.⁶⁴

Second, identity claims can serve to secure the concrete *procedural* level of fundamental rights protection in general. For example, the Czech Constitutional Court has argued that 'no amendment to the Constitution can

58 See also Giacomo Di Federico, 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards' (2019) 25 European Public Law 347, 348.

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

60 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009; Sabine Blömacher, *Die Menschenwürde als Prinzip des deutschen und europäischen Rechts: Kohärenz der Konzepte?* (1st edn, Duncker & Humblot 2016).

61 Czech Ústavní Soud, Case Pl. ÚS 19/08 *Treaty of Lisbon I* 26 November 2008, paras 109, 215.

62 Italian Corte Costituzionale, Case 1146/1988, 15 December 1988, para 2.1.

63 Luke D Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021).

64 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others (Weiss)* [2018] ECLI:EU:C:2018:1000; BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms'.⁶⁵ Hence, the Czech eternity clause or the identity of a constitution protects not only the general commitments to, but also the concrete procedural level of protection of fundamental rights. In that light, one can also observe an Italian *Taricco* saga. Articulated as national constitutional identity, Italy argued that the statute of limitations in Italian criminal law constitutes a matter of material rather than procedural law. Accordingly, it is subsumed under the principle of legality, which prohibits any retroactive action in criminal law.⁶⁶

Third, national constitutional identity can relate to human dignity. Human dignity may be understood as the normative general guiding principle among the fundamental rights or a concrete right with a specific idiosyncratic meaning. For example, whereas the EU itself complies with human dignity, as articulated in Article 1 of the EU Charter and Article 2 TEU as the common foundational value, in the *Omega* decision, the CJEU nevertheless accepted the German claim that the particular German interpretation of human dignity justified disapplication of the respective EU norms.⁶⁷

In addition, and apart from the issues of national language(s),⁶⁸ which should be treated as a separate phenomenon, concrete constitutional norms or principles might be seen as part of national identity: for example, the French principle of secularism (*la laïcité républicaine*, freedom of conscience, as distinct from the right to manifest religion or belief),⁶⁹ the

65 Czech Ústavní Soud, Case Pl. ÚS 36/01 *Bankruptcy Trustee* 25 June 2002, para 10; David Kosař and Ladislav Vyhnánek, 'The Constitutional Court of Czechia' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (2020) 166.

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

67 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (Omega)* [2004] ECLI:EU:C:2004:614.

68 French Conseil Constitutionnel, Case 2004-505 DC *Constitutional Treaty* 19 November 2004; 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, para 84.

69 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) 149.

former constitutional protection of the right to life in Ireland,⁷⁰ or the Romanian claim (supported by the Latvian government and refused by the CJEU) that marriage only between persons of the opposite sex forms part of national identity.⁷¹

3.3 Treating Fundamental Rights Identity Claims Differently

Contrary to the suggested interpretation of Article 4(2) TEU, excluding fundamental rights (standards), the above-cited examples show that in practice fundamental rights often connect with claims of national identity. Accordingly, one should examine and evaluate these types of identity claims separately.

Identity claims in general cover a wide variety of issues: from general commitments to democracy and the rule of law,⁷² to political and constitutional structures, essential elements of a state, security, migration, fiscal policy,⁷³ national sovereignty,⁷⁴ territorial integrity,⁷⁵ protection of languages,⁷⁶ religious questions⁷⁷ and many others. However, *fundamental rights identity claims* deserve special scholarly attention due to their specific normative foundation.

70 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L060/131; Kos (n 21).

71 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, para 42.

72 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).

73 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L060/131.

74 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, para 38; 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).

75 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) 238.

76 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.

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

First, in contrast to other insurmountable differences, fundamental rights identity claims are often shallow constitutional disagreements revolving around shared basic liberal constitutional commitments. Moreover, occasional idiosyncratic interpretations and tolerance towards constitutional interpretations can hardly undermine the principle of primacy, effectiveness and unity of EU law. Finally, the constitutional *interpretation* of fundamental rights is subject to change by its very nature. Even the highest courts may err. Contrary to some understandings of identity as sameness⁷⁸ – which grants the argument of identity an additional normative strength – idiosyncratic interpretations of fundamental rights as national identity are subject to constant and continuous change by their very nature.

In addition, one may perceive fundamental rights identity claims as a mechanism to mitigate potentially conflicting multilevel fundamental rights standards. In that sense, the argument of identity undertakes a different, more functional⁷⁹ role to navigate the constitutional tensions. I call it the *functional aspect of identity*, which counter-balances the increasing European trajectory of unification and harmonization of fundamental rights standards. The national apex courts are occasionally better suited to determine the concrete considerations of conflicting fundamental rights, locally more sensitive to the specificities of the respective community, and with a higher democratic legitimacy. In light of the foregoing, it would be unwise to force the same standards developed by the CJEU on all the Member States. Fundamental rights identity claims thus have the potential to open a dialogue where one settles the right equilibrium between the ‘ever closer Union’ and national diversity.

In conclusion, the special nature of fundamental rights identity claims requires that we give them special consideration, and in turn raises the following question: Is this special type of identity claim the best way to navigate multilevel fundamental rights standards, or does the connection of fundamental rights and identity rather create more problems than it promises to solve?

78 Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010); Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010); Pietro Faraguna, ‘Constitutional Identity in the EU – A Shield or a Sword?’ (2017) 18 *German Law Journal* 1617, 1625; Tímea Drinóczi, ‘Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach’ (2020) 21 *German Law Journal* 105, 112.

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

The following sections highlight the new case law which addresses both previously outlined challenges: the lack of a consistent and foreseeable constitutional design concerning multilevel fundamental rights standards, and consequently the problematic adherence to identity claims to manage constitutional conflicts. The research outlines two recent landmark decisions by the FCC, the *Right to be Forgotten I*⁸⁰ and *II*,⁸¹ which signal a significant change of paradigm.⁸²

80 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019.

81 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019.

82 Pieter Aertgeerts, 'Between Unity and Diversity: EU Data Protection Legislation as a Catalyst for a Constitutional Trilogue' in Maja Sahadžić et al. (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023) (forthcoming).

4 *Right to be Forgotten I* – National Standards of Review

This section presents the new case law *Right to be Forgotten I* (4.1) and continues with a critical analysis of the new approach – directly applying national fundamental rights standards under the Basic Law within the scope of application of EU law which is not fully harmonized (4.2). It then critically evaluates whether the said case law embraces or rather facilitates fundamental rights diversity in the EU (4.3). It concludes with an assessment of how the said case law partially marginalizes the EU Charter, but concurrently offers a solution of fundamental rights diversity without adhering to fundamental rights identity claims (4.4).

4.1 To be Forgotten I – Reviewing the Basic Law's Standards

In the case *Right to be Forgotten I*,⁸³ the FCC addressed the matter of fundamental rights standards in the context of a national constitutional complaint concerning legislation which was *not* fully harmonized by Union Law.⁸⁴ The question raised was whether the FCC could apply its national standards of fundamental rights protection, although the matter ‘falls within the scope of the EU law’.

The Complainant had murdered two people and heavily injured the third on the high seas in 1981, a story extensively covered by the media. In 1999 the magazine *Spiegel Online* decided to make its entire archive of articles available online. In 2002, when the Complainant had been released from prison and was trying to reintegrate into society and start a new life, every Google search of his name quickly revealed his notorious past. The Complainant argued that he could not establish and cultivate social contacts in society when he was continuously associated with his previous crimes. The considerable elapse of time and his full legal redemption for the committed actions should give him the right to exercise some control over the easily obtained information online about him. The right to person-

83 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019.

84 The same question was addressed by CJEU in the Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 29.

ality should entitle him to obtain some protection regarding his name: in particular, the right to be forgotten.⁸⁵

The FCC decided that the amount of time which had passed should be considered as the decisive factor when determining the proper balance between the affected person's private life on the one hand, and on the other hand the freedom of expression and freedom of the press, as well as the right to access information for the purpose of learning and public debate in a democratic society.⁸⁶ It concluded that upon the Complainant's notification, at least some protection relating to his name, without unduly restricting the access to the articles as such, should have been applied.⁸⁷

4.2 The Basic Law as the Standard of Review in EU Matters

The subject matter fell within the scope of EU law, but was not fully regulated by EU law – allowing the Member States leeway as to concrete legislative conditions of the freedom of expression and information, including the processing of personal data for journalistic purposes ('media privilege').⁸⁸ Concretely, the General Data Protection Regulation (GDPR)⁸⁹ affords the subject the right to obtain the erasure of personal data, but concurrently under Article 85(1) enables the Member States to reconcile the right to the protection of personal data with the right to freedom of academic, artistic and literary expression and for journalistic purposes.

The FCC determined:

'The standard of review applicable to the constitutional complaint are the fundamental rights of the Basic Law. This applies irrespective of whether in the challenged decision the Federal Court of Justice had to

85 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 1.

86 Ibid. para 113.

87 Ibid.

88 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/88, art 85.

89 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L119/1.

take into consideration provisions of ordinary domestic legislation that constitute an implementation of EU law within the meaning of Art. 51(1) first sentence of the Charter of Fundamental Rights of the European Union.⁹⁰

With this decision, the FCC challenged the established application of the EU Charter according to the CJEU's previous case law. The FCC acknowledged the change, specifically stating that it 'reviews domestic law and its application against the standard of the fundamental rights of the Basic Law even where the domestic law *falls within the scope of application of EU law* but is not fully determined by it'.⁹¹ The FCC justified this turnaround with the argument that the 'binding effect of fundamental rights is a corollary of the political responsibility for decision, and thus corresponds to the respective responsibilities of the legislator and the executive'.⁹² In other words, the concrete standards of fundamental rights are attached to concrete political bodies. If the Member States have the possibility for independent domestic regulation of one particular issue within EU law, this particular matter is the subject of the national fundamental rights standards.

In accordance with the *Åkerberg Fransson*⁹³ decision, in a situation where action of the Member States is not entirely determined by EU law, national courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection under the EU Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law are not thereby compromised.⁹⁴ While the respective case law allows for application of national standards, subject to the above-cited conditions, the FCC's decision to apply the Basic Law directly as the *default* standard of review within the scope of application of EU law arguably stretches the *Åkerberg Fransson* formula to its ultimate limits, if not beyond.⁹⁵

Aware of these considerations, the FCC introduced another layer of argumentation. It determined that concurrently to the Basic Law, 'the EU

90 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 41.

91 Ibid. para 42 (emphasis added).

92 Ibid.

93 Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

94 Ibid. para 29.

95 For a critique of the so-called Russian doll-like 'standards within standards', see Karsten Schneider, 'The Constitutional Status of Karlsruhe's Novel "Jurisdiction" in EU Fundamental Rights Matters: Self-Inflicted Institutional Vulnerabilities' (2020) 21 German Law Journal 19, 25.

fundamental rights are applicable in addition to the fundamental rights guarantees of the Basic Law⁹⁶ as well. While applying national fundamental rights standards, the FCC made a presumption that the level of protection of the EU Charter is simultaneously ensured.

4.3 *Embracing or Facilitating Diversity of Fundamental Rights in the EU*

The *Right to be Forgotten I* is not a self-absorbed and parochial decision, despite giving to the national fundamental rights standards within the scope of EU law more significance than ever before. On the contrary, it has a reconcilable tone, innovative approach, and non-hierarchical understanding of multilevel constitutional orders. It seeks dialogue in acknowledging the need for frequent preliminary reference procedures, and it does not posit absolute claims against EU law. Finally, it seeks more diversity in the fundamental rights field – recognizing the existing national differences in fundamental rights standards, as well as institutional complexities in providing adequate protection by regional, national, supranational and international institutions and courts.

Matthias Goldmann wrote that the *Right to be Forgotten* decisions are ‘opening a new chapter in judicial dialogue’.⁹⁷ Mattias Wendel similarly argued that the said decision made a considerable step further towards European pluralism of fundamental rights, moving away from dualistic and exclusivist understandings of *Åkerberg Fransson* and fixation on the separation of the federal levels in fundamental rights protection.⁹⁸ However, although the said jurisprudence resonated positively among the European pluralists,⁹⁹ the default interpretation of the Basic Law in light of the EU Charter does not come without ambiguities and challenges.

As highlighted by Karsten Schneider, the FCC did not acknowledge the underlying reasons for the respective constitutional change concerning the legal basis for constitutional complaints.¹⁰⁰ Moreover, the FCC pushed the

96 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 44.

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

98 Mattias Wendel, ‘Das Bundesverfassungsgericht Als Garant Der Unionsgrundrechte’ (2020) 75 *JuristenZeitung* 157, 160.

99 Matej Avbelj, ‘The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism’ (2020) 21 German Law Journal 27, 27.

100 Schneider (n 95) 21.

concept of fundamental rights diversity quite far. Schneider argued that the ‘very idea of versioning – i.e. distinguishing between a European version of EU fundamental rights and some kind of Karlsruhe version of EU fundamental rights – runs contrary to safeguarding the unity and coherence of Union law’.¹⁰¹ For example, the FCC argued:

‘[I]nterpretation [of the Basic Law’s fundamental rights] is in part informed by Germany’s historical experiences and must take into account the specific structures of the legal order and the social realities in the Federal Republic of Germany. An interpretation that is open to European and international law, takes into consideration other supranational fundamental rights catalogues and draws inspiration from their interpretation does not require–based on the open wording of the fundamental rights–every interpretation made by international or European courts to be adopted.’¹⁰²

Hence the FCC’s aim in not seeking to merge the various standards of interpretation *within the scope of EU law*, but rather openly embracing the differences.¹⁰³ Moreover, in the described scenario, the EU Charter only serves as the minimum level of protection generally committed to fundamental rights. To use a metaphor, the EU Charter is the highway, and the national apex courts are the cars winding left and right within.

Finally, as will be explained in the following, the EU Charter’s role and nature is twofold. Concerning fully harmonized EU law, the EU Charter ordinarily serves as the only and fully encompassing standard of review in regard to fundamental rights protection. In that role it determines concrete standards and solutions when several conflicting or colliding fundamental rights must be balanced. Alternatively, in the scenarios of the *Right to be Forgotten I*, when EU law is not entirely harmonized and the Member States have some leeway for diverse solutions, the EU Charter still applies, but only as the general framework, providing the minimum level of protection. That raises the following question: Can the same legal source concurrently fulfil two distinctive roles which are somewhat contradictory? In other words, the latter application of the EU Charter would necessarily limit the concrete standards of the EU Charter from the former role. The FCC did not clarify whether the described bi-functional EU Charter may produce

101 Ibid. 22.

102 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 62.

103 Ibid. para 61.

inconsistent and contradictory case law, or predict what kind of legal consequences there might be for the development of fundamental rights in the EU.

4.4 *Marginalizing the EU Charter but Forgetting Constitutional Identity*

Concerning the *Right to be Forgotten I*, the sub-section highlights three further considerations. It illustrates how the said case law may potentially marginalize the EU Charter;¹⁰⁴ it warns against a disintegration of fundamental rights standards in Europe; and aims to explicate what are the consequences of the said case law for claims of national constitutional identity concerning fundamental rights.

First, if the Member State's apex courts no longer apply the EU Charter as the primary standard of review in non-fully harmonized EU law, that renders the EU Charter of secondary importance. In a way, it marginalizes its significance. While the respective approach obviously does not further unity and coherence of EU law,¹⁰⁵ it also reduces the EU Charter to a secondary level of protection of general nature – according to Wendel, a potential 'marginalisation of the European fundamental rights'.¹⁰⁶ to a mere 'inspiration', as the FCC literally wrote.¹⁰⁷ Considering the impressive development of fundamental rights protection in the EU in the last decades,¹⁰⁸ they must not change trajectory and regress from the importance of the EU Charter.

Second, while the decision signals cooperation with the CJEU, it also encourages application of diverse standards. The Basic Law as a starting point embraces national doctrinal solutions and focuses on national peculiarities rather than European similarities. After all, the respective case law concerns European legislation. Searching for points of convergence in the light of the

104 Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21 German Law Journal 1, 13.

105 Ibid. 22.

106 Wendel (n 98) 165.

107 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 62.

108 Thomas Kleinlein, *Grundrechtsföderalismus*, vol 287 (1st edn, Mohr Siebeck 2020) 60ff. Armin von Bogdandy and Christoph Krenn, 'Zur demokratischen Legitimation von Europas Richtern eine vergleichende Rekonstruktion der Richterauswahl zu EGMR und EuGH' (2014) 69 JuristenZeitung 529, 530.

EU Charter may be a better attitude than justifying a direct application of national standards, which can facilitate disintegration of fundamental rights standards. Moreover, the legislative leeway is a result of legislative choice considering the European principle of subsidiarity – the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.¹⁰⁹ The said approach can facilitate a wrong dilemma: either to fully harmonize more European legislation as necessary, to avoid application of national standards, thereby reducing national diversities; or to further applications of national fundamental rights standards within the scope of application of EU law. To apply the latter scenario in the case at hand: Is it appropriate that in the same scenario under the GDPR the German Claimant successfully achieved that his name was erased from online articles concerning his previously committed crimes; whereas a Spanish Claimant, for example, in a comparable scenario under the same GDPR, could not demand that? Or to put it differently, what has the said case law of the FCC achieved for the Claimant, if he should move to Austria, where he would not be successful with his constitutional complaint before the Austrian constitutional court? People in Austria would then continue to have access to *Spiegel Online* articles.

Third, the *Right to be Forgotten I* has significant consequences for the claims of national constitutional identity concerning fundamental rights standards, as highlighted also by Goldmann.¹¹⁰ If the above-outlined German approach spreads among the Member States' apex courts and eventually becomes the European approach, the courts could no longer claim that the EU Charter's fundamental rights standards, in the non-fully harmonized areas of EU law, violate their national constitutional identities; because the courts would no longer apply these European standards, but their own. The fundamental rights identity claims in this respect would become redundant. Henceforth, the new approach of the first senate of the FCC has substantially challenged the previously established identity review by the second senate.¹¹¹

109 Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 224.

110 Goldmann (n 97) 52.

111 BVerfG, 2 BvR 2735/14 EAW 15 December 2015, paras 49, 53.

5 *To be Forgotten II* – The Change of Paradigm

The second decision, the *Right to be Forgotten II*,¹¹² introduced a true novelty. It addressed the question of constitutional complaints relating to the fully harmonized legislation by EU Law.¹¹³ In this context, the FCC ruled that it would no longer scrutinize potential fundamental rights violations against the Basic Law, but directly apply the EU Charter as the only relevant standard of fundamental rights review.

The section presents the *Right to be Forgotten II* decision (5.1) and analyzes it in the light of constructive constitutional pluralism in action (5.2). It further elaborates on the inner tensions of the said decision: inter alia, the difference between applying and interpreting the EU Charter (5.3). Finally, the chapter evaluates how the *Right to be Forgotten II* co-shapes the multilevel landscape of fundamental rights protection, creates a shield against the rising illiberal tendencies, and thereby contributes to active constitutionalization of the EU (5.4).

5.1 *Direct Application of the EU Charter in Constitutional Complaints*

The *Right to be Forgotten II* decision concerned a CEO of a company (Claimant) who wanted to remove a search result from Google which linked her to a file containing a transcript of the broadcast. In a TV magazine article of 2010, titled ‘Dismissal: the dirty practices of employers’, the Claimant was accused of unfair treatment towards her employee and was portrayed in a negative light. The TV magazine also included an interview with the Claimant, who explained from her perspective the circumstances of the particular termination of the contract of employment. After several years the Google machine still showed the link to this file among the top searching results when entering the full Claimant’s name in the search engine. The Claimant thus sought an injunctive relief against the search engine operator to remove the link from the search results.

112 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019.

113 The same question was addressed by CJEU in the Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, paras 56–8.

The Claimant argued violation of her right to personality and her right to informational self-determination.¹¹⁴ The TV magazine's title of 'dirty practices' misleadingly portrayed her in a negative light which had affected her private life. Finally, the Claimant contended that due to time having passed, the public no longer enjoyed legitimate interest in this information.¹¹⁵

On the first level, the district court ordered a removal of the link, while the appellate court on the second level overruled this decision. Both courts referred to the *Google Spain*¹¹⁶ case law by the CJEU, since the matter fell entirely within the scope of EU law. While the district court followed the main tenor of the *Google Spain* decision, the appellate court argued that the circumstances in the respected case fundamentally differed.¹¹⁷ The dispute ended up at the FCC, which received a constitutional complaint, arguing that the fundamental right of the Claimant had been violated.

In contrast to *Right to be Forgotten I*, the matter was fully harmonized by the GDPR. Traditionally, the FCC is only competent to interpret the Basic Law. However, in the case at hand, the FCC radically changed its previous position and introduced a new paradigm. It stated that '[r]egarding the application of legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from the fundamental rights of the Basic Law, but solely from EU fundamental rights'.¹¹⁸

The FCC construed this new competence from the previously developed *Solange II* condition that the fundamental rights protection in the EU is 'essentially equivalent'¹¹⁹ to the national constitutional protection guaranteed by the German Basic Law.¹²⁰ The German constitutional system warrants to every individual who believes that her fundamental rights are being violated to turn to the FCC, which has the power and obligation to scrutinize whether the fundamental rights of an individual are being

114 BVerfG Press Release No. 84/2019, 27 November 2019, para 2.

115 Ibid.

116 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (Google Spain)* [2014] ECLI:EU:C:2014:317.

117 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 10.

118 Ibid. para 42.

119 BVerfGE 73, 339 *Solange II* 22 October 1986, p 387.

120 Andrew Oppenheimer, *The Relationship between European Community Law and National Law: The Cases* (Cambridge University Press 1994) 494. The translation 'im wesentlichen gleichzuachten' is inaccurately translated as 'substantially similar' here.

properly accorded or not. On the EU level one does not have a functional equivalence in protecting fundamental rights of individuals through the process of individual constitutional complaint. Accordingly, when the matter falls within the fully harmonized EU law, an individual is left with comparatively less protection in an operational sense. From this protection loophole (*Schutzlücke*)¹²¹ the FCC developed its competence to carry out an individual constitutional complaint – but instead of reviewing the national Basic Law, it decided that it should directly review the EU Charter. The argumentation was strengthened with reference to Article 23(1) of the Basic Law, which foresees the participation of Germany and its institutions in any further integration in the EU. This participation (*Mitwirkung*) bestows the FCC with the competence to review the EU Charter. The FCC established that it is competent and called upon to carry out constitutional complaints which fall within the scope of application of EU law with fully harmonized legislation. Accordingly, the FCC reviews the application of fundamental rights by domestic specialized courts, while using the EU Charter as the only relevant standard of fundamental rights review.¹²²

The FCC recognized equivalent, not identical fundamental rights standards. It stated:

‘It cannot be assumed that the Charter, insofar as uniform fundamental rights protection is to apply in all Member States to fully harmonised EU law, corresponds with the Basic Law and is congruent with its guarantees in all details [...] This holds true all the more given that fundamental rights protection in Germany is based on a long tradition of comprehensive case-law on fundamental rights that gives specific shape to the fundamental rights on the basis of the broad procedural powers of the Federal Constitutional Court within the German legal order. An interpretation of fully harmonised EU law in light of the fundamental rights of the Basic Law would thus run the risk of prematurely applying to EU law the standards developed domestically–this would then imply that these standards would also have to apply to the other Member States.’¹²³

The FCC acknowledged that domestic fundamental rights standards reflect differences among the Member States. It stated that these differences re-

121 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 61.

122 Ibid. paras 51, 61.

123 Ibid. para 45.

flect various factors and different country-specific historical experiences.¹²⁴ Accordingly, domestic and EU fundamental rights ‘must be regarded as distinct regimes’.¹²⁵ The explicit recognition of so-called *fundamental rights diversity* (*Grundrechtsvielfalt*)¹²⁶ among the Member States recognizes the challenges of the multilevel constitutional landscape as highlighted at the beginning of this chapter. However, as shown in the following, even a direct application of the EU Charter does not eliminate these differences entirely, but rather gives the apex courts the means for proactively and constructively co-shaping the meaning of the EU Charter.

5.2 Constructive Pluralism in the Field of European Fundamental Rights

The FCC retreated from a confrontational and resisting attitude towards the CJEU, symptomatic to the previous case law.¹²⁷ It explicitly and unequivocally committed itself to applying the EU Charter in ‘close cooperation’¹²⁸ with the CJEU. Moreover, it reassured that it will only apply fundamental rights due to the EU Charter when the CJEU would already clarify their interpretation, or when their application would be clear from the outset based on established principles of interpretation and case law by the ECtHR. If not, the FCC would submit a preliminary question to the CJEU.¹²⁹

The new dogmatic position of the FCC increased the importance of the EU Charter and the primacy of EU fundamental rights. It awarded the EU Charter much broader scope of application procedurally, since it now enabled individuals to invoke it directly in front of the national (constitutional) court. Should the other apex courts follow this paradigm and apply the EU Charter as the only standard of review in fully harmonized European legislation, the EU Charter would gain in significance. In that

124 BVerfG, 1 BvR 276/17, Press Release No. 84/2019, 27 November 2019, sec I(2)(a).

125 Ibid.

126 Moritz Schramm, “Grundrechtsvielfalt” als Allzweckwaffe im Rechtsprechungsverbund: Anmerkungen zu der Recht auf Vergessen I-Entscheidung des BVerfG’ (*Verfassungsblog*, 5 December 2019) <<https://verfassungsblog.de/grundrechtsvielfalt-als-allzweckwaffe-im-rechtsprechungsverbund/>> accessed 24 February 2023.

127 Cf BVerfGE 73, 339 *Solange II* 22 October 1986; BVerfGE 89, 155 *Maastricht* 12 October 1993; BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009; BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

128 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 68.

129 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 70.

light one can understand the comments of the CJEU's president noting that the case law *Right to be Forgotten* is eventually strengthening the EU Charter.¹³⁰

Additionally, were the national apex courts increasingly and directly applying the EU Charter in their constitutional complaints,¹³¹ that would in turn bring national constitutional standards together, as well as convergently influencing the CJEU's further development of the EU Charter, still as the ultimate and final interpreter.¹³² With the presented paradigm the apex courts could more actively cooperate in the development of the European fundamental rights standards – in the light of the constructive constitutional pluralism which 'demonstrates how a pluralist-minded court elevate itself from and above the constitutional confines of its own legal order'.¹³³

5.3 The Tensions of the Right to be Forgotten II – Applying and Interpreting

One of the challenges of the new approach is the difference between applying and interpreting the EU Charter. As the present sub-section shows, the FCC claimed that the relevant subject matter was already clarified by the CJEU's previous case law and therefore did not need to issue a preliminary reference procedure.¹³⁴ Concurrently, it also stated that the respective matter differs fundamentally from the facts of the case in the matter of *Google Spain*, which was the legal basis for the respective decision.¹³⁵ The FCC consequently developed a solution which de facto departed from the cited

130 Thomas Kleinlein, 'Neue starke Stimme in der europäischen Grundrechts-Polyphonie' (*Verfassungsblog*, 1 December 2019) <<https://verfassungsblog.de/neue-starke-stimme-in-der-europaeischen-grundrechts-polyphonie/>> accessed 24 February 2023.

131 Note that not all the Member States have the system of individual constitutional complaint.

132 The national apex courts would co-define common European values. See also Mattias Wendel, 'Taking Up the European Mandate: The Charter Before German Courts' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 182, 194.

133 Avbelj (n 99) 30.

134 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 137. The BVerfG went on in length explaining why the matter is already sufficiently clarified and therefore does not need an additional involvement of the CJEU.

135 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 141.

decision and created a distinctive new interpretation of the fundamental rights involved.

The sub-section first outlines the *Google Spain* decision. In the next step it explains how the FCC differentiated its outcome from the said case law. The details of both decisions serve to illustrate how application of allegedly clear case law quickly, if not always, became its interpretation.

In the *Google Spain*¹³⁶ decision, a Spanish Claimant requested the internet search engine Google Spain SL to remove his personal data, so that after entering his name in a search engine he would no longer appear in the links to a daily Catalan newspaper, *La Vanguardia*. This newspaper's articles from 1998 kept mentioning the Claimant's name in relation to a real-estate auction for the recovery of his social security debts.

In the preliminary proceeding the CJEU had to determine the scope of the right to be forgotten under Directive 95/46,¹³⁷ considering that the information in question had been lawfully published by the third parties. The CJEU had to achieve balance between the following conflicting rights and interests: the economic interests of the search engine operator; respect and sensitivity of information regarding the Claimant's private and family life; protection of personal data under Articles 7 and 8 of the EU Charter; the nature of information in question; and the interest of the public in accessing and having the respective information –varying according to the role of the Claimant in public life.¹³⁸

The CJEU determined that the rights of the Claimant under Articles 7 and 8 of the EU Charter, respect for private and family life and protection of personal data, as a rule override¹³⁹ economic interests of the operator as well as the interest of the general public in having access to that information – provided that there are no reasons justifying such an interference: for example, the role played by the data subject in public life.¹⁴⁰

Some scholars have heavily criticized the cited outcome of this milestone decision by the CJEU.¹⁴¹ In particular, the reporting judge in the *Right to*

136 Case C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317.

137 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

138 Case C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317, para 81.

139 Ibid. 97.

140 Ibid. para 99.

141 Claes G Granmar, 'Global Applicability of the GDPR in Context' (2021) 11 International Data Privacy Law 225, 232. Peggy Valcke and Simon Verschaevé, 'Going Dark

be Forgotten case law, Johannes Masing, allegedly the intellectual father of the respective new paradigm,¹⁴² already in 2014 published his critical scholarly observations concerning the *Google Spain* decision.¹⁴³ He advocated for a different, more holistic and nuanced approach. Concretely, he found the cited arguments unconvincing, namely that data protection and privacy of an individual categorically outweigh the interests of the internet search engine, which the CJEU detached from the freedom of speech. In his observations, such separation insufficiently and artificially divides two spheres which are intrinsically connected and mutually independent. He argued that the limitation of the internet search engine limits not only the economic freedom of the internet provider, but concurrently impacts and limits the freedom of expression. The publishers are freely expanding and casting their media content via the internet, and readers are freely obtaining the information online.¹⁴⁴

Right to be Forgotten II departs from the *Google Spain* decision precisely in that regard. The FCC argued that in the matter of informational self-determination, one cannot omit the third party's freedom of expression in the balancing test, since the prohibition of data processing by the internet search engine operator inescapably to some extent also deprives the third party from an important platform for disseminating its publication.¹⁴⁵ Moreover, due to the freedom of, and access to information under Article 11 of the EU Charter, the 'balancing must also take into account Internet users' interest in having access to the information in question'.¹⁴⁶

or Living Forever: The Right to Be Forgotten, Search Engines and Press Archives' in Elisa Stefanini et al. (eds), *The Cambridge Handbook of Information Technology, Life Sciences and Human Rights* (Cambridge University Press 2022) 189ff. Oskar J Gstrein, 'The Right to be Forgotten in 2022: Luxembourg judges keep surfing the legislative void' (*Verfassungsblog*, 20 December 2022) <<https://verfassungsblog.de/rtbf-2022/>> accessed 24 February 2023.

142 Marten Breuer, 'Wider das Recht auf Vergessen ... des Bundesverfassungsgerichts!' (*Verfassungsblog*, 2 December 2019) <<https://verfassungsblog.de/wider-das-recht-auf-vergessen-des-bundesverfassungsgerichts/>> accessed 24 February 2023.

143 Johannes Masing, 'RiBVerfG Masing: Vorläufige Einschätzung der „Google-Entscheidung“ des EuGH' (*Verfassungsblog*, 14 August 2014) <<https://verfassungsblog.de/ribverfg-masing-vorlaeufige-einschaetzung-der-google-entscheidung-des-egh/>> accessed 24 February 2023.

144 Ibid.

145 BVerfG, 1 BvR 276/17, Press Release No. 84/2019, 27 November 2019, sec II(2)(b).

146 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 110.

The FCC created its own holistic approach, which purposely ignored the fact that the European legislator deliberately decided to empower individuals with the specifically formulated right to be forgotten which (with the exception of the media privilege), under the Article 17(1)(a)(c) GDPR, states that ‘data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her [...] where the personal data are no longer necessary in relation to the purposes for which they were collected [...] and there are no overriding legitimate grounds for the processing’.¹⁴⁷ The FCC consciously acknowledged its departure from the CJEU’s case law, stating the following: ‘Therefore, it cannot be presumed that protecting the right of personality takes precedence; rather, the conflicting fundamental rights must be balanced on an equal basis.’¹⁴⁸ It concluded that the Higher Regional Court appropriately undertook the balancing test between three fundamental rights: the right to personality, freedom to conduct business, and freedom of expression. The decision to refuse the Claimant’s injunctive request that the internet engine cease to display the respective link was within the margin afforded to ordinary courts.¹⁴⁹

As Schneider pointed out, the application of constitutional norms is inevitably and mainly its interpretation. ‘There is no question of “right application”¹⁵⁰ of EU fundamental rights that cannot turn into a question of “interpretation of fundamental rights”’.¹⁵¹ Whereas the FCC asserted that it is solely applying the EU Charter, in fact it introduced its own interpretative standards.

5.4 Co-Shaping the Process of Constitutionalization of the EU

As illustrated above, despite paying lip service to cooperation and primacy of EU law, the FCC did not issue a preliminary reference procedure, nor did it directly follow the previous case law of the CJEU. This may entail some dangerous implications. However, the case law still counts as a valu-

147 GDPR, art 17(1)(a)(c).

148 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 121.

149 Ibid. para 136.

150 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 69.

151 Schneider (n 95) 23.

able change of direction, signalling considerable advantages in the process of constitutionalization of the European Union.¹⁵²

The *Right to be Forgotten II* moves away from strictly dividing spheres of national and supranational law, merging both worlds together.¹⁵³ It is precisely the critique in the previous section, the introduction of national differences directly under the EU Charter, which helps to bridge the various standards. After all, the CJEU remains the final interpreter of the EU Charter, and if the interpretation of the respective principles moves too far away from its initial interpretation, the CJEU can quickly remedy that.

Furthermore, the new paradigm enables the national apex courts not only to impact on the interpretation of the EU Charter, but also indirectly to take part in the constitutionalization of the Treaties.¹⁵⁴ The EU Charter contains provisions which go beyond human rights and reassert some provisions from the Treaties. For example, prohibition of discrimination under Article 18 and freedom of movement under Article 21 TFEU are duplicated in the EU Charter in Articles 21 and 45. It remains to be seen whether the national apex courts could also through direct application of the EU Charter influence and co-shape the other rights under the Treaties, for example the principle of discrimination, freedom of movement, or EU citizenship.

A direct application of the EU Charter by the FCC and potentially other national apex courts offers a correcting mechanism to the interpretative outcome of the CJEU's decisions, which may lead to a constructive competition of best constitutional practices. The local and context-specific constitutional peculiarities would have to prove their value in the broader perspective, showing why an alternative approach might be preferred.

Additionally, the FCC broadened the scope of the EU Charter's applicability. It remedied the lack of a European constitutional complaint, enabling individuals to directly invoke violations of fundamental rights, even when the matter is fully harmonized by EU law. In light of *Solange I*, this development could encourage European institutional architects to consider

152 Masing (n 4) 1043.

153 Francesco Saitto, 'Do Not Forget Solange I: The Protection of Fundamental Rights in Europe and the Struggle Over the Concretisation of the European Legal Order' (forthcoming).

154 See also Wendel (n 98) 166.

introducing a European constitutional complaint under the EU Charter for all European citizens.¹⁵⁵

In addition to increased institutional power by the FCC relating to European fundamental rights and European constitutionalization in general, as well as strengthening individual access to fundamental rights protection under fully harmonized EU law, the respective case law has another effect. *Right to be Forgotten II* has been seen as an intelligent stand against rising authoritarian and illiberal tendencies.¹⁵⁶ The said illiberal trajectories are trying to exploit the normative argument of constitutional pluralism, and thereby abusing the inherent limits of the EU primacy principle. The said case law put both, national and supranational, fundamental rights systems heterarchically¹⁵⁷ on an equivalent level. Thereby it fully acknowledged the democratic legitimacy of the EU Charter. As Goldmann put it: ‘The simple recognition that the Charter may at times offer superior protection to the citizens than the one afforded by the domestic constitution makes the whole authoritarian constitutionalist edifice collapse.’¹⁵⁸ The applicable fundamental rights standards are therefore those which offer the most comprehensive and robust protection to individuals. That is a brilliant way to ensure that any national constitutional backsliding can be remedied by directly applying the EU Charter.

155 See also Jud Mathews, ‘Some Kind of Right’ (2020) 21 German Law Journal 40.

156 Goldmann (n 97) 46.

157 See also Ana Bobić, ‘Developments in The EU-German Judicial Love Story: The Right To Be Forgotten II’ (2020) 21 German Law Journal 31.

158 Goldmann (n 97) 53.

6 Forgetting Fundamental Rights Identity Claims

Both decisions can be seen as a constructive proposal addressing the interplay between various fundamental rights standards. Yet, without denying the powerful voice of the FCC, the suggested new paradigm is still predominantly a national (German) approach. Although the apex courts of Spain and Austria have already examined questions regarding the direct applicability of the EU Charter as the relevant yardstick (*Prüfungsmaßstab*) in national constitutional proceedings,¹⁵⁹ the outcome has not been as clear as the above-cited German decisions.

However, the proposed change of paradigm is not without its own problems. Three main points will be made in this respect. As long as the new approach remains solely a German solution, not followed by the other Member States, national constitutional complaints based on the EU Charter do not extend to all European citizens. This leads to an unequal status among EU citizens, although bound by the same EU rules.¹⁶⁰ Moreover, the approach by the FCC of directly *applying* the EU Charter raises the question of transparency of national case law in applying the EU Charter, as well as equal application or interpretation of EU law. Finally, it has the inherent potential to enable national apex courts to assume the role of de facto interpreters of the EU Charter, which is reserved for the CJEU only.

Most importantly, how does the above-described case law relate to fundamental rights identity claims? The suggested paradigm change may signal the end of fundamental rights identity claims, or at least a significant decline. When areas of the law are not fully harmonized, Member States may directly apply their own fundamental rights standards. Hence, their national constitutional identity relating to idiosyncratic national fundamental rights standards cannot be challenged – because EU law is reviewed only and directly against national standards. Fundamental rights identity claims are thus no longer needed.

159 Austrian Verfassungsgerichtshof, Case U 466/11 ua, 14 March 2012.

160 A potential solution could be to create a new procedural remedy in the form of a common ‘European individual complaint’ in front of any national apex court, but directly pertaining to the EU Charter – an improvement perhaps to be seen in the future.

Otherwise, when EU law is fully harmonized, the apex courts would directly apply the EU Charter. Accordingly, national fundamental rights (standards) would no longer be applicable as the yardstick of constitutionality. Because national standards would no longer be relevant for constitutional review, the apex courts would have no reason to claim that these national standards must be applied – in the name of national constitutional identity.

The described change of paradigm leaves us with numerous questions, one of which concerns the FCC's attestation in the *EAW*¹⁶¹ decision to carry out an identity review in the name of human dignity and fundamental rights. Will the FCC maintain this line of reasoning, despite the new paradigm and highly disputed¹⁶² reasoning in the said decision? For example, the FCC itself acknowledged that the admissibility of *EAW* stands in contrast to the 'past jurisprudence declaring inadmissible both constitutional complaints and referrals in specific judicial review proceedings that assert a violation of fundamental rights under the Basic Law by secondary Community law or Union law respectively'.¹⁶³ However, even though in the identity review the FCC scrutinized EU law against German fundamental rights, it also relied heavily on fundamental principles as enshrined in Article 6 TEU and reflected in the EU Charter.¹⁶⁴ Accordingly, the new right to be forgotten framework can close that chapter on the German identity review, focusing onwards directly and solely on human dignity and fundamental rights as guaranteed directly under the EU Charter.

The new framework offers and enables the possibility to consign to the past the identity review of EU law in the name of national fundamental rights (interpretations). The question remains, however, whether the damaging nature of identity claims is sufficiently recognized: the lack of transparency, diverse national understandings of identity, identity's confusing terminology, assumptions of unchangeability and democratic irreversibility, and the introduction of a constitutional hierarchy and its immense potential for abuses, to name a few.¹⁶⁵ Only then would there be sufficient

161 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, paras 49, 53.

162 Mathias Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' (2016) 12 European Constitutional Law Review 549.

163 BVerfG, 2 BvR 2735/14 *EAW* 15 December 2015, para 34.

164 Ibid. paras 93, 98, 102, 104.

165 Christoph Schönberger, 'Identitätärer: Verfassungsidentität zwischen Widerstandsförmel und Musealisierung des Grundgesetzes' (2015) 63 Jahrbuch des öffentlichen

motivation to use the potential of the new paradigm in light of the right to be forgotten. If not, and in the absence of a more suitable mechanism,¹⁶⁶ national claims of constitutional identity may carry on mitigating the tensions of fundamental rights standards between the Union and the Member States.¹⁶⁷

Finally, this new framework offers both diversity and collective unity without adhering to fundamental rights identity claims. In the first scenario, while allowing the application of diverging national standards, the Union remains committed to nurturing national diversity without forcing the Member States to apply the same standards. As the FCC lucidly stated, ‘differences in domestic fundamental rights frameworks reflect factual differences between the Member States resulting from various factors, including country-specific historical experiences’.¹⁶⁸ The diversity of Member States, also concerning fundamental rights standards, constitutes the value of the Union.¹⁶⁹ Nurturing diversity enriches reality and offers a multitude of solutions that most adequately address a particular community’s linguistic, cultural, historical and political characteristics.

In the second scenario, applying the EU Charter by all national apex courts could enhance the judicial dialogue and the competition of the best judicial practices, inviting all Member States to cooperate in shaping the interpretation of the common standards of the EU Charter, led by the CJEU. However, one should not overlook the motivation of the apex courts to be seen as equal interlocutors with the CJEU.¹⁷⁰ That inclination has an inherent danger of taking control over the development of the European

Rechts der Gegenwart 41, 60; 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; Fabbrini and Sajó (n 3) 469; Scholtes (n 3); Pietro Faraguna and Tímea D Drinóczi, ‘Constitutional Identity in and on EU Terms’ (*Verfassungsblog*, 21 February 2022) <<https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>> accessed 24 February 2023. Fabbrini and Sajó (n 4) 466, 469.

166 Pietro Faraguna, ‘Taking Constitutional Identities Away from the Courts’ (2016) 41 *Brooklyn Journal of International Law* 492.

167 Wetz (n 79).

168 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 44.

169 Spaventa (n 36).

170 Christoph Grabenwarter et al., ‘The Role of the Constitutional Courts in the European Judicial Network’ (2021) 27 *European Public Law* 43.

legal system. Moreover, it would question the effectiveness and the unity of the Union law, as well as the equality of the Member States.¹⁷¹

Finally, while identity claims, in general, will no doubt exist in the future, the above-suggested paradigm has the potential to diminish the least convincing *type* of identity claims: namely, claims of national constitutional identity as idiosyncratic fundamental rights standards or specific fundamental rights interpretations. Fundamental rights identity claims should serve only, if at all, to protect the general commitment to liberal constitutional principles and values. Used in that way, they can guarantee mutually for the Member States and the Union that the basic principles of constitutionalism are respected.

171 Koen Lenaerts, 'No Member State Is More Equal than Others' (*Verfassungsblog*, 8 October 2020) <<https://verfassungsblog.de/no-member-state-is-more-equal-than-others/>> accessed 24 February 2023.

7 Conclusion

The multilevel landscape of fundamental rights protection among the Union and its Member States occasionally creates constitutional disputes, partially explained by the gradual historical development of fundamental rights protection in the Union and its ambiguous contemporary constitutional design. The matter is complex, and cannot be solved simply with one stroke of the pen. To overcome these tensions, Member States at times claim highly volatile national constitutional identity in the field of fundamental rights. This chapter explicated the context of identity claims in the field of overlapping multilevel fundamental rights protection. Moreover, it outlined a specific type of identity claims, namely, identity claims which are derived from common and shared fundamental rights.

The chapter then presented the new case law from the FCC. It explained how the first decision, *Right to be Forgotten I*, introduced a new approach. In the proceedings of national constitutional complaint within the scope of application of EU law which is not fully harmonized, the FCC decided that it would directly apply the fundamental rights of the Basic Law as the primary standard of review, while at the same time assuming that EU fundamental rights were concurrently applicable.¹⁷² The section critically scrutinized the new approach and concluded that *Right to be Forgotten I* embraces fundamental rights diversity, which in turn challenges fundamental rights identity claims and the centrality of the EU Charter.

The following section explicated the second decision, *Right to be Forgotten II*. As a true change of paradigm, the FCC decided that it would directly apply the EU Charter as the sole standard of review in areas fully harmonized by EU law.¹⁷³ The new turn could serve as a framework to mitigate convergence and divergence of various idiosyncratic standards of fundamental rights. Moreover, the section showed that despite the intellectually innovative and constructive solution by the FCC, the new understanding does not come without its own challenges and contradictions.

172 BVerfG, 1 BvR 16/13 *Right to be Forgotten I* 6 November 2019, para 41.

173 BVerfG, 1 BvR 276/17 *Right to be Forgotten II* 6 November 2019, para 33.

Finally, the chapter concluded with an assessment of what the new *Right to be Forgotten* case law means for fundamental rights identity claims.¹⁷⁴ It argued that the new paradigm enables the national apex courts to put aside fundamental rights identity claims, while at the same time still maintaining an adequate level of diversity concerning fundamental rights interpretation.

174 Cf Monica Claes, ‘National Identity and the Protection of Fundamental Rights’ (2021) 27 *European Public Law* 517, 521. Claes argued that fundamental rights should not be part of identity under Article 4(2) TEU anyway.

Dimensions of Identity

Functions, Protagonists, Deficiencies

New opinions are always suspected, and usually opposed, without any other reason but because they are not already common.

(John Locke)

1 Introduction

Chapter 3 demonstrated a wide variety of case law, proving that it is impossible to construct one coherent account of identity claims. It therefore viewed identity claims according to their distinctive underlying justificatory reasons, thereby creating different identity clusters.

This chapter changes that perspective. It no longer views identity claims according to their underlying rationales, but rather explores their dimensions. If the previous chapter focused more on the substance, the objective here concentrates on the features of identity itself: its relation to changeability, idiosyncrasy, sameness and collectiveness;¹ the embeddedness of identity in EU law; the function of managing multilevel constitutional relations among the EU and the Member States,² using identity as the ultimate limit to further integration,³ and identity's dangerous potential.⁴ The chapter unfolds around three major dimensions: the functions of identity, the protagonists of identity, and the potential deficiencies of the concept of identity.

The chapter starts with the dimension of national constitutional identity from the EU's perspective. It explores the meaning of the European identity clause, outlines its origins and development through different EU Treaties, and explains why one finds such a disparity between the wording of the European identity clause and its application by the CJEU in practice (Section 2).

It then addresses in more detail the apparent question: What is the difference between national and constitutional identity, and why is there no strict delineation between these two expressions to differentiate between extra-legal sociological elements and legal and constitutional matters, con-

1 Pietro Faraguna, 'Constitutional Identity in the EU—A Shield or a Sword?' (2017) 18 German Law Journal 1617, 1625.

2 François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 European Public Law 571, 584.

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

4 Kriszta Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts' (2017) 18 German Law Journal 1703, 1708.

cerning purely the content of constitutions. The section demonstrates how these two expressions are interconnected and often interchangeably applied in an incoherent way (Section 3).⁵

The next section highlights the function of identity as a general principle of EU law⁶ and explores the limits of the EU's obligation to respect national identities in relation to other EU general principles. Concretely, it investigates how Article 2 TEU arguably sets the inherent restriction to respect national identities,⁷ should the national identities undermine the common and shared values of the said article.⁸ Moreover, it stresses how identity as a general principle, managing the relationship between the EU and the Member States, must be observed in accord with the other EU principles concurrently operating to find an appropriate balance and resolve potential constitutional tensions (Section 4).

Accordingly, claims of national constitutional identity undertake various degrees of engagement. Investigated from their functional perspective, they can be red flags to avoid a constitutional dispute in the first place.⁹ Moreover, they can search for a dialogue and engagement, highlighting the overlooked sensitive issues and suggesting solutions from the domestic perspective on how to avoid constitutional conflicts. Furthermore, the section shows how identity claims occasionally demonstrate open dissent and resistance, refusing to accept the authority of the CJEU concerning the interpretation of EU law. The section aims to investigate these functions in relation to their effects, showing that the higher degree of resistance does not necessarily relate to the higher degree of success (Section 5).

Identity has further multifarious functions. It can introduce pre-constitutional elements to legal reasoning, associated with national identity, be-

5 See Tímea Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) 21 German Law Journal 105, 107: 'Member States refer to their constitutional identity, while the CJEU prefers to use the term "national identity." The two terms, however, refer to the same obligation of the EU institutions—respect—and the same core element of the constitutional setting of the particular Member State—to be respected.'

6 Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 205.

7 Case C-490/20 *V.M.A. v Stolichna obshtina, rayon „Pancharevo“* (Pancharevo) [2021] ECLI:EU:C:2021:296, Opinion of AG Kokott, para 101.

8 Luke D Spieker, *EU Values Before the Court of Justice Foundations, Potential, Risks* (Oxford University Press 2023) 231 (forthcoming).

9 Ingolf Pernice, 'Der Schutz Nationaler Identität in der Europäischen Union' (2011) 136 Archiv des öffentlichen Rechts 185, 193.

longing and majoritarian narratives.¹⁰ The section scrutinizes how these extra-legal arguments potentially influence constitutional adjudication at the expense of full realization of individual fundamental rights.¹¹ Moreover, identity can only address the core constitutional commitments, as explicated in Chapter 2, which again renders these claims improbable given the fact that the Union and the Member States all share the same essential values (Section 6).¹²

The subsequent section focuses on the agents of identity. It investigates whether the courts are and ought to be the only agents identifying and creating the meaning of national constitutional identity. It shows that other agents, the legislature and the executive, also contribute to the development of identities, although in a distinctive way and often with different objectives. Finally, legal scholarship is also an important element in the evolution and pertinence of identity. As the section shows, legal scholarship occasionally facilitates the meaning of national constitutional identity beyond the classical confines of legal norms' interpretation and case law analysis (Section 7).¹³

Finally, the section concludes with the potential deficiencies of national constitutional identity: being prone to misuse and abuse. It explicates the similarities between public policy and national constitutional identity, analyzing the similarities and the shortcomings when the latter interchangeably substitutes for the former.¹⁴ Furthermore, it considers the reasons to abandon the identity concept altogether, given the lack of a coherent theoretical account and identity's capacities for misuse.¹⁵ Additionally, it investigates how identity invites considerations in the light of tradition, history and

10 Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534, 549.

11 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015.

12 José Luis Martí, 'Two Different Ideas of Constitutional Identity: identity of the Constitution v. Identity of the People' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 34.

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

14 Leonard FM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 Utrecht Law Review 36, 1449.

15 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457, 472.

culture; and rejects the application of the said concepts in legal reasoning under the pretext of national constitutional identity (Section 8).¹⁶

In a broader sense, the objective of the chapter is to demonstrate the exceedingly complex and indeterminable nature of the identity concept, undertaking a multitude of functions. As part of the well-established constitutional canon, national constitutional identity maintains part of the constitutional discourse, despite its complex and indeterminable nature.¹⁷ The chapter highlights its manifestations, functions and layers to help legal practice and scholarship to avoid its most apparent abuses and to find an appropriate yardstick to determine its legitimate scope and meaning.

16 Kovács (n 4) 1720.

17 Drinóczi and Faraguna noted that identity is a 'polysemic concept', explored within and by many different social sciences. See also Fabbrini and Sajó (n 15) 467. Zoltán Szente, 'Constitutional Identity as a Normative Constitutional Concept' (2022) 63 *Hungarian Journal of Legal Studies* 3, 7.

2 National (Constitutional) Identities from the EU's Perspective

This section investigates the evolution of the European identity clause under the various EU Treaties (2.1), and shows how the said clause attained its final wording, which in turn explains the disparity between the wording and the CJEU's practice (2.2).

2.1 Evolution of European Identity Clause under the EU Treaties

Protection of national identities was first introduced by the Maastricht Treaty of 1992 among the then-twelve Member States, together with the new introduction of the euro currency and European citizenship. Article F(1) of the Maastricht Treaty¹⁸ stated:

'The Union shall respect the national identities of its Member States, whose systems of government are found on the principles of democracy'.¹⁹

The Treaty of Amsterdam²⁰ in 1999 and later the Treaty of Nice in 2003 omitted the second sentence of the article. Article 6(3) read:

'The Union shall respect the national identities of its Member States'.²¹

The attachment of the Member States to the 'principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'²² was written only in the Preamble in the Maastricht Treaty, whereas the Treaty of Amsterdam additionally and specifically included the commitment to these principles into the same Article 6 as the protection of national identities. Article 6(1) stated that the 'Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Mem-

18 Treaty on European Union (Maastricht Treaty) [1992] OJ C191/1.

19 Ibid. art F(1).

20 Consolidated Version of the Treaty on European Union (Amsterdam Treaty) [1997] OJ C340/145.

21 Ibid. art 6(3).

22 Maastricht Treaty [1992] OJ C191/1, Preamble.

ber States'. That specific inclusion of the shared principles explains why the commitment to the principles of democracy was omitted in the cited sentence on protection of national identities in the Treaty of Amsterdam as compared with the Maastricht Treaty.

The Treaty Establishing a Constitution for Europe,²³ signed in 2004 but never fully ratified, due to its rejection by France and the Netherlands, drafted the identity article in a new and more complex way. Article I-5(1), titled as 'Relations between the Union and the Member States' read:

'The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'²⁴

The current Treaty on European Union (TEU)²⁵ has kept the text from the Treaty Establishing a Constitution for Europe, but added one sentence relating to national security at the end. Article 4(2) TEU states:

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'²⁶

The EU's commitment to respect national identities from the beginning has been a political counter-statement in relation to further European integration, not reviewable under the CJEU's jurisdiction.²⁷ The Maastricht Treaty

23 Treaty establishing a Constitution for Europe (Constitution for Europe) [2004] OJ C 310/1.

24 Ibid.

25 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13.

26 TEU [2012] OJ C326/13, art 4(2).

27 Article 46 TEU of the Nice Treaty had defined the provisions over which the CJEU had jurisdiction. The Lisbon Treaty has removed that article. See also Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 Yearbook of European Law 298, 315.

introduced European citizenship and the right to vote for the EU citizens in local elections; a new European currency; and enhanced cooperation in the spheres of foreign policy, justice and home affairs. The respective areas have been traditionally associated with the core competences of a nation state.²⁸ As a response to counter-balance this competence shift, the drafters also acknowledged respect for national identities.²⁹

2.2 Identity as a Core National Responsibility

To make the European identity clause more transparent, the European Convention entrusted the Working Group V (WG V) to set out the EU's competences in more detail by clarifying the areas of core national responsibilities.³⁰ The WG V divided them into two areas: first, fundamental structures and essential functions of a Member State; second, basic public policy choices and social values of a Member State.³¹

The first area included: (a) political and constitutional structure, including regional and local self-government; (b) national citizenship; (c) territory; (d) the legal status of churches and religious societies; (e) national defence and the organisation of armed forces; (g) choice of languages.

The second area included: (a) policy for distribution of income; (b) imposition and collection of personal taxes; (c) system of social welfare benefits; (d) educational system; (e) public health care system; (f) cultural preservation and developments; (g) compulsory military or community service.³²

Notably, the WG V specifically mentioned that the European identity clause 'was not a derogation clause. The Member States will remain under a duty to respect the provisions of the Treaties. The article would therefore not constitute a definition of Member State competence, thereby wrongly

28 Giuseppe Martinico, 'What Lies Behind Article 4(2) TEU?' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 100.

29 Blanke and Mangiameli (n 6) 194.

30 Ibid. 195.

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

32 Ibid. 11.

conveying the message that it is the Union that grants competence to the Member States, or that Union action may never impact on these fields.³³

Finally, the WG V recommended how to articulate more transparently in the Treaties the essential elements of national identity, which include, among others: 'Fundamental structures and essential functions of the Member States, notably their political and constitutional structures, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces.'³⁴

Although the WG V specifically identified the second area of the core responsibilities of the Member States, namely the basic public policy choices and social values, it consciously decided not to mention the second area of core responsibilities in the European identity clause. This decision has its own logic due to the further recommendations of the WG V.

In relation to various types of competences, the WG V defined three types of competences: exclusive competences, shared competences, and the so-called 'supporting measures'. Supporting measures is another name for the 'Union measures in fields where Member States are fully competent'.³⁵ The Union would carry out its supporting measures in the fields of employment, education and vocational training, culture, public health, trans-European networks, industry, and research and development. Hence, considering that the Treaties would specifically address the cited supporting measures, the WG V saw no reason to add a mention of these basic policy choices in the European identity clause.³⁶

The proposed supporting measures are essentially the 'actions to support, coordinate or supplement the actions of the Member States' under Article 2(5) TFEU.³⁷ Pursuant to Article 6 TFEU, they relate to the policy areas of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection, and administrative cooperation. The idea of supporting competences is to support, coordinate and complement. Whereas the EU acts shall not force the Member States to harmonize these areas, it does not mean that they are not essentially important for the EU, or that the EU should not be involved therein within the limits of the

33 Ibid.

34 Ibid. 12.

35 Ibid. 1.

36 Ibid. 11.

37 Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States* (Hart Publishing 2017) 6.

conferred competences. The Erasmus programme is just one example of the symbolic and actual significance of the supporting competences from the EU perspective.

Finally, the WG V stated in the cited report that the principle of primacy of Community Law should be included in the Treaties.³⁸ Considering the cited report as the matter of the *travaux préparatoires*, the European identity clause was never considered as providing carte blanche exception to the Member States to ignore or disregard the *acquis Communautaire*.

The WG V identified the second area of core national responsibilities, basic public policy choices and social values, but nevertheless omitted them in the identity clause due to the fact that they would be mentioned as areas for supporting EU measures, where the EU continues to be active. Henceforth, the sole identification of core national responsibilities was never the reason in itself that the EU should not co-shape, support, coordinate and complement the matter together with the Member States.

The second argument is the specific and unequivocal statement of the WG V, that the European identity clause is 'not a derogation clause' and does not convey the message that the 'Union action may never impact on these fields'.³⁹ Hence, the European identity clause from the perspective of the EU shall not be understood as an absolute prohibition to the EU to touch upon the core national responsibilities, but rather as a sign that the EU shall not be oblivious concerning the differences among the Member States.⁴⁰

The same legal conclusion concerning the non-absolute or relative nature of the European identity clause follows from the textual and systematic interpretation of the respective clause. Article 4(2) TEU states that the EU 'shall respect [...] national identities, inherent in their fundamental structures, political and constitutional, [...], their essential State functions, [...] In particular, national security remains the sole responsibility of each Member State.' The last sentence, different from the beginning of the clause, includes the wording *in particular* and *the sole responsibility*. It creates a difference between matters of national identity in the beginning, which

38 Final Report of the Working Group V 14 on Complementary Competencies (2002) CONV 375/1/02 REV 1, pp 13–14.

39 Ibid. 11.

40 Julia Villotti, 'National Constitutional Identities and the Legitimacy of the European Union – Two Sides of the European Coin' (2015) 4 Zeitschrift für Europarechtliche Studien 475, 501.

are *not the sole responsibility* of a Member State, and matters of national security. Hence, only national security is the *exclusive* competence of a Member State, while the other areas *a contrario* fall within the identity concept but are not exclusive powers of a Member State. Consequently, the subject matters under Article 4(2) TEU, except for national security, are not absolute national exclusive competences.⁴¹

Moreover, it would even be incorrect to conclude that the wording concerning national security completely excludes any EU measures whatsoever. A conclusion like that would ignore the fact that the Treaties themselves provide a further framework for security cooperation.⁴² For example, under Article 4(2)(j) TFEU, which bestows on the EU shared competences in the area of, *inter alia*, freedom, *security* and justice. Moreover, in the light of the European Agenda on Security, one can find numerous reports, evaluations, proposals and recommendations in relation to terrorist financing, firearms trafficking, anti-corruption, drugs, trafficking human beings, European critical infrastructure, asset recovery and confiscation, exchange of personal data, etc.⁴³

Moreover, just recently, as a response to the Russian invasion and war in Ukraine, the EU's foreign and defence ministers agreed on a common security strategy which includes establishing a rapid response force of up to 5,000 troops that can be deployed in a crisis.⁴⁴ The respective European Union Rapid Deployment Capacity is precisely the type of collective European endeavour to strengthen and improve the ability to protect the Union and its citizens, and thereby secure national security as well. National security may thus be the sole responsibility of the Member States; but once again, that does not mean that the Union, via its institutions, remains inactive even in this core area of national responsibilities.⁴⁵

41 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) 71.

42 de Witte (n 41).

43 See Commission, 'Recommendation for a Council Decision to authorise the opening of negotiations for an Agreement between the European Union and Japan for the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and other serious transnational crime' COM (2019) 420 final. Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council' COM (2019) 552 final.

44 Council, 'Foreign Affairs Council meetings on 21 March 2022' (2022) Background Brief, p 4.

45 de Witte (n 41) 69.

Finally, in the ZZ⁴⁶ decision concerning the matter of public security, the CJEU stated: '[A]lthough it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable.'⁴⁷ Accordingly, even under the strongest language of national security as the *sole responsibility* of a Member State, the matter is still not an exclusive competence of the Member States, which would in itself justify an absolute absence of the Union's supportive activities.

To conclude, the current European identity clause does not specifically mention all the core responsibilities of the Member States. Moreover, the explicitly written core elements, as well as the ones which are omitted, were never meant to justify an absolute passivity of the Union, especially in its capacity of supportive actions.⁴⁸ Moreover, the European identity clause cannot in itself justify an absolute absence of EU law for the Member States in the respective areas.⁴⁹ From the EU's perspective, the European identity clause rather enables the EU and its institutions, particularly the CJEU, exceptionally to allow a particular Member State to disapply EU law, subject to the other EU principles and rights and according to the rules of proportionality.

46 Case C-300/11 ZZ *v Secretary of State for the Home Department* (ZZ) [2013] ECLI:EU:C:2013:363.

47 Ibid. para 38.

48 Cf Anita Schnettger, 'Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 14.

49 Loïc Azoulay, 'The European Court of Justice and the Duty to Respect Sensitive National Interests' in Bruno de Witte, Elise Muir and Mark Dawson (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Pub 2013) 172.

3 National Constitutional Identity: National or Constitutional

The terminological difference between *national* and *constitutional* identity, and their interchangeable application in scholarship and judicial practice,⁵⁰ creates much confusion.⁵¹ This section aims to explain their interchangeability and the unsuitability of both when addressing identity claims in European constitutional law.

The Member States' apex courts sometimes speak about national *constitutional* identity,⁵² sometimes only about *national* identity,⁵³ and sometimes they connect both of them together, as for example the Polish Constitutional Tribunal stating that 'the constitutional identity remains in a close relation with the concept of national identity'.⁵⁴ However, the European identity clause in the Treaties specifically and exclusively promises to protect *national* identities. Nevertheless, the European identity clause does not really refer to national identity, but rather to the fundamental (constitutional) structures and essential functions, within or outside a national constitution, as cited above. Hence, neither national nor constitutional identity really corresponds to the intended meaning of the European identity clause. Accordingly, the following sub-section posits the question: How to differentiate between national and constitutional identity?

What is the meaning of *national identity*? Generally speaking, there is no commonly accepted definition. More broadly, one can pinpoint two distinctive approaches: the historical and the liberal one. The former definition of national identity was most notably defended by Max Weber in *The*

50 Carina Alcoberro Llivina and Alejandro Saiz Arnaiz (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013); Fabbrini and Sajó (n 15) 465.

51 Pietro Faraguna, 'On the Identity Clause and Its Abuses: "Back to the Treaty"' (2021) 27 *European Public Law* 427, 445.

52 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

53 Case C-391/09 *Małgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others (Runevič-Vardyn)* [2011] ECLI:EU:C:2011:291, paras 84, 86.

54 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010.

Protestant Ethic, loosely based on language and ethnography,⁵⁵ and more contemporarily by Walker Connor, who regards nationality as 'a belief in common ancestry or ethnicity'.⁵⁶ Whereas an ethnic group may be defined from the outside, the nation must be self-defined. This self-identification consists of the perception of ancestral ties, the sense of uniqueness, and the politically orientated consciousness to achieve some political expression.⁵⁷

The liberal approach sometimes completely rejects an attempt to have a clear definition of national identity, as for example Eric Hobsbawm,⁵⁸ who 'views nationality as a malleable term without fixed properties'.⁵⁹ Others like Benedict Anderson, Ross Pool and Paul Gilbert define the nation as an 'imagined political community' or 'a group which [...] has a right to independent statehood by virtue of being the kind of group it is'.⁶⁰

Moreover, one may differentiate between a nation and a state, as the following questions indicate.⁶¹ 'Is there a Swiss nation, a people, or just a state? Could there be several (language-based) nations within Switzerland, e.g. German, French, or Italian ones? Are there people(s) who have (or states that contain) no nation(s) at all?'⁶²

The present research observes the meaning of national identity from the following three perspectives. The first perspective concerns national identity from the perspective of the individual; that national identity is then multiplied by the number of respective individuals who are sharing this narrative; national identity is a multitude of individuals who all believe that they somehow share a similar or even common commitment to one another and to a community which encloses the respective individuals. It does not matter whether the respective individuals really share the narrative; it is enough that they believe so. This creates an imaginary linkage

55 Harry Liebersohn, 'Weber's Historical Concept of National Identity' in Guenther Roth and Hartmut Lehmann (eds), *Weber's Protestant Ethic: Origins, Evidence, Contexts* (Cambridge University Press 1993) 124.

56 Omar Dahbour, 'National Identity: An Argument for the Strict Definition' (2002) 16 *Public Affairs Quarterly* 17, 17.

57 Walker Connor, *Ethnonationalism: The Quest for Understanding* (Princeton University Press 1994) 104, 197, 202.

58 Eric J Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (2nd edn, Cambridge University Press 1992).

59 Dahbour (n 56).

60 Ibid. 19.

61 Bernhard Peters, 'A New Look at "National Identity": How Should We Think about "collective" or "National Identities"?' (2002) 43 *European Journal of Sociology* 3, 4: 'A dichotomous typology between the 'Kulturation' and 'Staatsnation'.

62 Ibid. 21.

which arguably binds them together and enables a willingness to show and exercise an actual solidarity and (political) cooperation. The actual solidarity and cooperation then in turn nurture and further stimulate that identity, together with political dialogue, art, literature, culture.

The second perspective concerns the creation of a (nation) state which presupposes a sort of distinctive community, and the members of which arguably share some kind of national identity. This pre-constitutional state of the art needs an existing linkage, a connection, or a national identity in order to justify its particular creation according to specific characteristics: for example, a language which connects them, a common historical narrative, or geographical specificities, or a belief in shared ethnic ties, and any various combinations thereof.⁶³ Upon the creation of a (national) state, these elements cease to have a legal and a constitutional relevance. Speaking strictly in a legal sense, the previous connecting factor is replaced by the constitution and its expressions. The people may still believe in and feel the previous pre-constitutional sentiments and inclinations, but this national identity no longer carries a decisive legal relevance.⁶⁴ In other words, national identity from a legal and constitutional perspective is relevant only as the empirical factor in a pre-constitutional period.⁶⁵

Finally, a constitution itself contains national identity elements which have a double nature.⁶⁶ On the one hand, a constitution incorporates concrete elements which are expressions of a connecting factor among the respective people: for example, a historical narrative, a song or anthem, a historical flag, or language.⁶⁷ On the other hand, these symbols serve more

63 Liebersohn (n 55) 131.

64 See also Barbara Oomen, 'Strengthening Constitutional Identity Where There Is None: The Case of the Netherlands' (2016) 77 *Revue interdisciplinaire d'études juridiques* 235, 248.

65 Will Kymlicka, 'Modernity and National Identity' in Shlomo Ben-Ami, Yoav Peled and Alberto Spektorowski (eds), *Ethnic Challenges to the Modern Nation State* (Palgrave Macmillan 2000) 11.

66 See Lithuanian Respublikos Konstitucinis Teisimas, Case 102/2010 *State Pension* 22 February 2013: 'it is obvious that not only the continuity of the State of Lithuania, but also the identity thereof is upheld: having restored its independence, the Republic of Lithuania, from the viewpoint of international and constitutional law, is a subject of law identical to the State of Lithuania against which the aggression of the USSR was perpetrated on 15 June 1940; such constitutional sameness of the State of Lithuania is confirmed inter alia through the Republic of Lithuania's Law.'

67 Aistė Mickonytė, 'The Right to a Name Versus National Identity in the Context of Eu Law: The Case of Lithuania' (2017) 42 *Review of Central and East European Law* 325, 330, 333.

abstractly as the symbols of identification.⁶⁸ They serve as elements with which the individual may or ought to identify in the future. The (future) members of the respective society or nation state will learn to recognize these symbols as the expressions of their connection to the respective community. These symbols may be a vehicle to express their figurative belonging, their national identity; although the actual articulation of the particular national identity among the individuals could never be defined in one coherent narrative.

If a state protects and supports a national language, this is not protection of national identity, although the respective language may be a constitutive element of that national identity. The state protects this language because it is the constitutional language of the given state or society and has a great constitutional value to be protected. To put it simply, although a constitutional state consists of several features which are constitutive for the respective national identity, a state itself does not and cannot protect the respective national identity itself.⁶⁹ If one considers these pre-constitutional social elements as the prerequisite for the existence and effectiveness of a liberal democratic state, then one recalls the famous Böckenförde dictum: 'A free and secular state lives under conditions which it cannot guarantee itself.'⁷⁰

National identity is not a constitutional principle which could justify potential limitations on other constitutional rights and principles, or legitimately shape and motivate its legislative solutions; although some isolated

68 Drinóczi (n 5) 119: 'Post-socialist states emphasize their national historical traditions, morals, and values as a reaction to the decades-long oppression by the Soviet Union. The preambles of Spain and Portugal also show a clear contrast to the previous authoritarian regimes.'

69 See Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 203: 'constitutions cannot be thought of exclusively as the purely internal expression of a polity that coheres as a unified whole. As mentioned, constitution-making requires a break with the past, thus setting the future polity against the past polity, shattering the temporal unity of the whole. Perhaps even more importantly, constitution-making as an act of negation also requires a break with the polity's prevailing conceptions of collective identity. In other words, it is not enough to overthrow the ancien régime, it is also necessary to differentiate the constitutional "we" from the preconstitutional and extraconstitutional "we". See also Mark Tushnet, 'How Do Constitutions Constitute Constitutional Identity?' (2010) 8 International Journal of Constitutional Law 671, 672.

70 Anna Katharina Mangold, 'Das Böckenförde-Diktum' (*Verfassungsblog*, 9 May 2019) <<https://verfassungsblog.de/das-boeckenfoerde-diktum/>> accessed 24 February 2023.

cases indicate otherwise.⁷¹ Yet, the statement here is made in a normative sense and not as an empirical observation.

That brings us to the second part of the question. What is the meaning of *constitutional identity*? It seems logical that constitutional identity derives its meaning from a constitution;⁷² hence, it is a constitutional matter. In that light, one can find the content and meaning of constitutional identity in the constitution, or in the case law which gives the constitution its concrete meaning. While any deduction of meaning from textual and historical materials cannot exist in a viewpoint-free way,⁷³ several definitions of constitutional identity indicate yet another dimension, more closely connected with identity of the people. For Rosenfeld, constitutional identity encapsulates three general meanings: the fact of having a constitution, the content of a constitution, and the context in which it operates.⁷⁴ He argued that constitutional identity plays an ‘important and multifaceted role in constitutional interpretation’,⁷⁵ and not the other way around: namely, that constitutional interpretation determines what is the identity of constitution. Martí expanded the notion of constitutional identity to being the identity of the constitution and the identity of the people ruled by such a constitution.⁷⁶ Troper argued that ‘constitutional identity results from a process of extraction of certain principles which can be posited as essential and as such distinguishable from other constitutional norms and which can be relied upon to protect the integrity of the constitution in cases in which it confronts threats that might erode its vital bond to the people or nation which it is meant to serve’.⁷⁷ Jacobsohn wrote that constitutional identity ‘represents a synthesis of political aspirations and commitments that are

71 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015, para 15.2: ‘The national flag, as the symbol of the State, is an indispensable element in the constitutional and international identity of the State’.

72 Martí (n 12) 22.

73 Laurence H Tribe, ‘A Constitution We Are Amending: In Defense of a Restrained Judicial Role’ (1983) 97 *Harvard Law Review* 433, 440.

74 Michel Rosenfeld, ‘Constitutional Identity’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 737.

75 Ibid. 771.

76 Martí (n 12) 19.

77 Michael Troper, ‘Behind the Constitution? The Principle of Constitutional Identity in France’ in András Sajó and Renata Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven 2010) 202.

expressions of a nation's past, as well as the determination of those within the society who seek to transcend the past'.⁷⁸

All the cited descriptions indicate that constitutional identity closely relates to national identity; which suggests that constitutional identity cannot be solely a descriptive tool to present the most important or the most idiosyncratic features of the particular constitution.

Yet, while the European identity clause speaks about *national* identities, it clearly does not refer to national identities in the classical sociological sense.⁷⁹ It rather concerns fundamental political structures and essential state functions (core responsibilities of a state), which again does not subsume well under the above given definitions of constitutional identity.⁸⁰ For that reason, neither of the terminological alternatives, *national* and *constitutional*, fit well with the European identity clause. For that reason, de Witte recently called the European identity clause 'protection of *institutional* diversity', arguing that the said article only guarantees constitutional structures of the Member States against the broader notion which understands identity as protection of national diversities in general.⁸¹

Another view on the European identity clause concerns the question of cultures and languages: Does the said clause include cultural and linguistic identities?⁸² The Opinion of AG Kokott in *UTECA*⁸³ suggests the affirmative. Kokott argued: '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 [...]. Respect for and promotion of the diversity of its cultures constitutes one of the Community's main preoccupations [...] it is ultimately an expression of the European Union's respect for the national identities of its Member States (Article 6(3) EU).'⁸⁴ Furthermore, in relation

78 Gary J Jacobsohn, 'Static and Dynamic: Comments on the Misuse of Constitutional Identity' [2021] Round Table: Constitutional Identity: Universality of Constitutionalism vs. National Constitutional Traditions? 2.

79 Drinóczi (n 5) 107.

80 Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2016) 41 Brooklyn Journal of International Law 492, 495.

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

82 Blanke and Mangiameli (n 6) 200.

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

84 Ibid. para 93.

to linguistic diversity, AG Maduro in *Spain v Eurojust*⁸⁵ argued in a similar direction: 'Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States.'⁸⁶ Finally, the CJEU determined in several cases that linguistic protection falls within the scope of Article 4(2) TEU.⁸⁷

Despite these opinions and decisions, the prevailing legal opinion leans towards a different conclusion.⁸⁸ The identity clause does not mention language, culture, history or tradition, even though these elements do appear in the Treaties elsewhere. The Preamble to the TEU states: 'respecting their history, their culture and their traditions'; Article 3(3)(4) TEU guarantees that the Union 'shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'; in Article 22 of the EU Charter one reads that the Union 'shall respect cultural, religious and linguistic diversity'; in Article 167(1) TFEU states that 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.'

Furthermore, the Preamble of the EU Charter differentiates between the three following values: first, diversity of cultures and traditions; second, national identities of the Member States; and third, organization of their public authorities at national level.⁸⁹ Hence, the grammatical and systematic interpretation both suggest viewing these elements as autonomous from one another. Finally, applying comparative textual interpretation, in contrast to the German text which states '*zum Ausdruck bringen*',⁹⁰ the French, English, Spanish, Romanian, Bulgarian, Estonian, Maltese and Slovenian language versions of Article 4(2) TEU use the word *inherent/inhérente/ne-*

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

86 Ibid. para 24.

87 Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, paras 84, 86; Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others (Cilevičs)* [2022] ECLI:EU:C:2022:638, para 87.

88 Fabbrini and Sajó (n 15) 468.

89 Blanke and Mangiameli (n 6) 201.

90 'Die Union achtet die Gleichheit der Mitgliedstaaten vor den Verträgen und ihre jeweilige nationale Identität, die in ihren grundlegenden politischen und verfassungsmäßigen Strukturen einschließlich der regionalen und lokalen Selbstverwaltung zum Ausdruck kommt.'

ločljivo povezan.⁹¹ The difference is not insignificant. The German text sees the identities *expressed* in the fundamental structures, whereas the other cited translations perceive identities as the structures itself.⁹² The latter formulation protects the fundamental structures as identity, whereas the German formulation primarily protects the identities which are *expressed* by the fundamental structures, which invites extra-legal or cultural considerations into the scope of the European identity clause.⁹³

Accordingly, the scope of the European identity clause from the EU perspective corresponds neither to the meaning of *national* identity nor to the meaning of *constitutional* identity, considering the variety of definitions. It does not refer to individual relation(s) which the individuals of a Member State intuitively and intimately feel and experience as their national identity towards the respective state. The European identity clause is also not concerned with the connecting identity links between the people and the state. On the contrary, the European identity clause as a legal norm is descriptive in the sense that it is concerned with the essential core responsibilities and fundamental structures of Member States.

As a result, many scholars call the claims of the Member States under the European identity clause the claims of *national constitutional identity*.⁹⁴ In that way one can signal the special constitutional meaning of the European identity clause, which goes beyond a national constitution in a strict sense but is not directly concerned with national identity in its classical, socio-cultural meaning.⁹⁵

91 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' See also Blanke and Mangiameli (n 6) 200.

92 Armin von Bogdandy and Stephan W Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1427.

93 Leonard FM Besselink, 'The Persistence of a Contested Concept: Reflections on Ten Years Constitutional Identity in EU Law' (2021) 27 European Public Law 597, 602.

94 See Alcobarro Llivina and Saiz Arnaiz (n 50); Julia Villotti, 'National Constitutional Identities and the Legitimacy of the European Union – Two Sides of the European Coin' (2015) 4 Zeitschrift für Europarechtliche Studien 475.

95 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2016) 5.

The present research similarly applies the terminology of *national constitutional* identity. However, this is not the only view.⁹⁶ From the national German judicial perspective, the German Federal Constitutional Court (FCC) made clear that it differentiates between national and constitutional identity.⁹⁷ National identity is a matter for the CJEU under Article 4(2) TEU, whereas the FCC is the only one who can define German *constitutional* identity (*Verfassungsidentität*), which cannot be balanced against any other legal right or interest.⁹⁸ Moreover, concerning the difference between constitutional and national identity, Leonard F.M. Besselink argued in a similar fashion that due to the fact that the CJEU cannot interpret national constitutional law, the national apex courts have the top competence to determine the meaning of their *constitutional* identities, whereas the CJEU subsequently determines the meaning of *national* identity under Article 4(2).⁹⁹

To conclude, if one simply follows the terminological distinction between national and constitutional identity in European legal discourse, that in itself does not solve any of the highlighted ambiguities. It does not help to differentiate between the legitimate and illegitimate identity claims. Moreover, due to the above-cited definitions of constitutional identity, it also does not differentiate between strictly descriptive legal constitutional features and pre-constitutional conceptions of people's bonds, aspirations and identifications. Furthermore, calling identity claims from a national perspective either national or constitutional does not affect the substantive evaluation of their foundational justification in relation to the scope of the European identity clause. Finally, the terminological differentiation does not delineate between legal and sociological matters. Some of the national apex courts as well as the European identity clause apply the word *national*, whereas the substance clearly refers to the legal and political features of a constitutional system. On the other hand, the strict meaning of the word *constitutional* unjustly restricts the scope of the European identity clause. Henceforth, focusing on the differentiation between national and constitu-

96 Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 205.

97 Giuseppe Martinico, 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU' (2021) 27 *European Public Law* 449.

98 BVerfG, 2 BvR 2728/13 OMT I 14 January 2014, para 29.

99 Besselink, 'National and Constitutional Identity before and after Lisbon' (n 14) 10.

tional identity from the perspective of the EU only blurs and convolutes the subject matter in question.

4 Mutual Constraint between Identity and other Values and Principles

This section investigates the connection between national constitutional identity and the common and shared values under Article 2 TEU. It explores the argument that an obligation of the EU to respect national constitutional identities finds its inherent limitation in respecting shared commitments under Article 2(4.1). Moreover, it highlights the special function of identity as a general principle of EU law. It explains that identity in the said capacity functions to manage the relationship among the multi-level constitutional orders together with the other general EU principles in accord (4.2).

4.1 Protecting National Identity to Sacrifice Common European Values

The scope of the European identity clause remains relatively open and in the hands of the CJEU, which up to now has not yet seriously engaged with the respective provision beyond some rather uncoherent platitudes.¹⁰⁰ In other words, the normative potential of the clause is not yet exhausted. As Millet argued, the CJEU has not handled the identity clause very differently ‘than cases involving derogations to free movement or other types of exceptions to EU rules provided for in secondary law’.¹⁰¹ However, in the light of increasing attempts to misuse and abuse the respective clause from the national perspective of the Member States,¹⁰² and due to the relative

100 Laurence Burgogues-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 Alcobarro Llivina (eds), *National Constitutional Identity and European Integration* (1st edn, Intersentia 2013) 275.

101 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) 573.

102 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; 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,

indeterminacy of the clause on its own, one ought to determine at least the absolute semantic boundaries thereof from the EU's perspective; in particular, the boundaries concerning the structure of the Treaties and the EU's normative commitments. In other words, this section engages with the question of mutual coexistence between Article 2 and 4(2) TEU, and the limits thereof.¹⁰³

Article 2 TEU highlights common European values, shared among and common to the Union and its Member States. Hence, Article 2 defines the ideological and constitutional (substantially speaking) common ground for the respective supranational cooperation. It states:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

What is the relationship between both norms and how their mutual coexistence impact and shape the meaning and the scope of the European identity clause? To put it differently, can the EU respect national identities even if that would be at the same time at odds with the respective common values? Moreover, can a Member State claim its national constitutional identity against the values to which it is itself committed under Article 2?¹⁰⁴

Contrary to some (initial) scholarly observations,¹⁰⁵ the respected values are not only programmatic and ideological statements; they are increasingly

Tusnádfürdő (Băile Tușnad), Romania, 27 July 2019) <www.miniszterelnok.hu/pri-me-minister-viktor-orbans-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp> accessed 24 February 2023.

103 Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (n 2) 591.

104 Daniel Sarmiento, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 178. Gerhard van der Schyff, 'Constitutional Identity of the EU Legal Order: Delineating Its Roles and Contours' [2021] *Ancilla Iuris* 1, 6.

105 Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 *German Law Journal* 956, 963. Christoph Möllers and Linda Schneider, *Demokratiesicherung in Der Europäischen Union* (1st edn, Mohr Siebeck 2018) 125. Christian Calliess, 'Europa Als Wertegemeinschaft – Integration und Identität durch Europäisches Verfassungsrecht?' (2004) 59 *JuristenZeitung* 1033. Dmitry Kochenov,

considered as justiciable and judicially enforceable legal principles, at least when further elaborated by the European legislation within the conferred competences.¹⁰⁶ The Treaties do not draw a strict normative distinction between these two categories of principles or values,¹⁰⁷ but they are slowly becoming the subject of the CJEU's deliberations.¹⁰⁸ While the CJEU has not fully and judicially developed all of the stated values in the said article, it has already given concrete and powerful meaning to the principles of the rule of law, democracy, solidarity, and freedom and equality, connecting them with other norms in the Treaties.¹⁰⁹

Starting with the decision of the Portuguese judges, *ASJP*,¹¹⁰ the CJEU stated that 'the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law'.¹¹¹ The CJEU continued this trajectory in the *Celmer*¹¹² decision, where it stated that 'the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.¹¹³

Moreover, concerning the Polish judicial reform, the CJEU stated that the 'requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial

'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed' (2013) 33 *Polish Yearbook of International Law* 145–65.

106 Tom L Boeckestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values' (2022) 23 *German Law Journal* 431–44.

107 Christian Calliess and Matthias Ruffert, 'EUV Art. 2 Die Werte der Union', *EUV/AEU* (4th edn, 2011) Rn. 7-11.

108 Luke D Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal* 1182. Cf Giulio Itzcovich, 'On the Legal Enforcement of Values. The Importance of the Institutional Context' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 28.

109 Spieker, 'Breathing Life into the Union's Common Values' (n 108).

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

111 *Ibid.* para 36.

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

113 *Ibid.* para 48.

protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.¹¹⁴

Finally, relating to the newly introduced regime of conditionality for the protection of the European Union budget, the CJEU recently argued that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States'.¹¹⁵

All the cited cases demonstrate the prerequisite of common basic values and principles for successful European (legal) cooperation and integration, where the competences are shared, and their delimitation remains intertwined.¹¹⁶ The European supranational system designed in that way is only possible if all agents, the Union and the Member States, adhere to the same principles and values, because the character of the European legislation is not designed as a separate and parallel legal system, but rather integrated in a way that the national and supranational legislative solutions coexist. The same (national) judges carry out concurrently national and supranational law, thus having a double role. Such a system must be built on common values and principles in order to function. In other words, neither the EU nor the Member States can renounce these values and principles, because that would undermine the conditions of European integration as it stands today.

How can one resolve a constitutional dispute when a Member State claims a national constitutional identity which allegedly conflicts with the common values and principles under Article 2 TEU? Can the EU respect and protect one value to lose the other?

114 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, para 120.

115 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

116 Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers' (2015) 35 *Oxford Journal of Legal Studies* 55.

Considering recent case law developments,¹¹⁷ as briefly stressed above, scholars argue that the European identity clause has its boundaries in the narrowly interpreted Article 2 TEU.¹¹⁸ National differences must be confined within the ambit of common values. That is not a radical supposition. When the Member States joined the EU, they had to comply with and commit themselves to the Copenhagen criteria,¹¹⁹ the accession conditions for the new members. As currently stipulated in Article 49(1) (first sentence) TEU, any ‘European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union’. These criteria were initially established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. They demand stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of, minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law; and adherence to the aims of political, economic and monetary union.¹²⁰ Consequently, all Member States committed to the common values and principles as stated above upon their accession to the Union.¹²¹

This view is confirmed by case law as well. AG Kokott argued in the *Pancharevo* decision:

‘It follows from the foregoing considerations that, where the fundamental expression of national identity in accordance with Article 4(2) TEU is at issue, the Court must confine itself to a review of the limits of the

117 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.

118 Pietro Faraguna and Tímea D Drinóczi, ‘Constitutional Identity in and on EU Terms’ (*Verfassungsblog*, 21 February 2022) <<https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/>> accessed 24 February 2023. Faraguna, ‘On the Identity Clause and Its Abuses’ (n 51) 445.

119 European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, DOC/93/3.

120 Ibid.

121 Christophe Hillion, ‘The Copenhagen Criteria and Their Progeny’ in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 5ff.

reliance on that principle, in particular respect for the values enshrined in Article 2 TEU.¹²²

A potential claim of a Member State, that EU law disregards its national constitutional identity, which would be concurrently a deviation from the common values under Article 2 TEU, would still be possible in rare circumstances. A Member State could consciously depart from the common values, claiming that it has acquired or developed a new constitutional identity: for example, should Hungary amend its constitution in a way that would stipulate a political vision of illiberal democracy, as has been politically advocated by the current government; or de facto becoming one.

Member States cannot regress from the common values under Article 2 and then subsequently argue that they obtained a new anti-democratic or illiberal identity, which the EU has to respect. The CJEU confirmed that view in the recent *Repubblica*¹²³ decision, where it stated that a Member State ‘cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU’.¹²⁴

Similarly, the CJEU stated that ‘[o]nce a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected [...]’.¹²⁵ The laws and practices of Member States must continue to comply with the common values on which the Union is founded.

Finally, and most challenging, a Member State can claim that it fully commits to the common and shared basic values and principles, but argue that it understands and interprets these principles in a substantially different manner from the institutions of the EU and other Member States.

122 Case C-490/20 *Pancharevo* [2021] ECLI:EU:C:2021:296, Opinion of AG Kokott, para 101.

123 Case C-896/19 *Repubblica v Il-Prim Ministru (Repubblica)* [2021] ECLI:EU:C:2021:311.

124 Ibid, para 63.

125 Case Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454, para 168.

Accordingly, it argues that a subject which is allegedly incompatible with EU law, due to national constitutional identity, complies with its national idiosyncratic interpretation of the common and shared values; they are just understood and interpreted differently.¹²⁶ Adam Czarnota argued that regional understanding of the principle of the judiciary ‘is going far beyond institutional guarantee of the independence of the judge in the adjudication process but is rather interpreted as the principle of organization of the judiciary, namely its self-organization and autonomy.’¹²⁷

One example of this is the recent constitutional dispute between the Union and Poland concerning Polish judicial reform. Poland claimed that it is fully committed to the general principle of the rule of law,¹²⁸ but it is the Union which has politicized the principle according to its recent interpretation of the CJEU.¹²⁹ Moreover, the Republic of Poland and Hungary have argued in the case concerning the newly introduced regime of conditionality for the protection of the EU budget in the case of breaches of the principles of the rule of law in the Member States:¹³⁰

‘[T]he contested regulation breaches the principles of legal certainty and legislative clarity, which are recognised as general principles of EU law,

126 Boeckstein (n 106) 450. Armin von Bogdandy and Luke D Spieker, ‘Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges’ (2019) 15 European Constitutional Law Review 391, 422.

127 Adam Czarnota, ‘Rule of Lawyers or Rule of Law?: On Constitutional Crisis and Rule of Law in Poland’, *Governance and Constitutionalism* (Routledge 2018) 61.

128 Ibid. 51: ‘No doubt some consensus has been destroyed and new, tectonic movements are taking place. The outcome of these changes could be new constitutionalism in the region. This constitutionalism will be based not only on meaningless mimicking of the institutional solutions imported from the West but will be based as well on a conscious reflection upon the identity of societies in the region.’ See also Adam Czarnota, ‘The Constitutional Tribunal’ (*Verfassungsblog*, 3 June 2017) <<https://verfassungsblog.de/the-constitutional-tribunal/>> accessed 24 February 2023; Adam Czarnota, ‘[Reforma sądów] Ruch w kierunku demokratycznego państwa prawa? Polemika’ (*Kultura Liberalna*, 24 February 2017) <<https://kultura.aliberalna.pl/2017/02/24/polemika-demokratyczne-panstwo-prawa-czarnota/>> accessed 24 February 2023.

129 Spieker, *EU Values Before the Court of Justice Foundations, Potential, Risks* (n 8) 192.

130 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1.

on the ground that the concepts in that regulation, on the basis of which a Member State may be found to have breached the principles of the rule of law, have no uniform definition in the Member States. [...] in particular, that the concept of ‘the rule of law’, as defined in Article 2(a) of the contested regulation, reveals serious conceptual uncertainties and serious inconsistencies which could jeopardise the interpretation of EU values and lead to that regulation being applied in a way that is contrary to those values.’¹³¹

Although the CJEU firmly rejected that argument, the underlying question extends beyond the concrete legal dispute. As shown in Chapter 4, some reasonable disagreement concerning an appropriate interpretation of the respective principles and basic rights cannot be avoided, and is not *ab initio* illegitimate; but not when a Member State simply attempts to circumvent the common rules, as the quite straightforward example of the judicial reform in Poland demonstrated.

To conclude, there are strong normative arguments and a considerably developed judicial practice to support the presupposition that the European identity clause must be read in accord with and subject to the common values and principles stipulated under Article 2 TEU.¹³² If claims of national constitutional identity cannot go beyond these values, that in itself eliminates the abusive potential of undermining identity claims, as illustrated in Chapter 3.¹³³ The recent case law by the CJEU, declaring Article 2 as part of the identity of the European legal order, must be read from that perspective. A national identity cannot be protected on account of European identity.

131 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

132 Cf Christian Calliess, ‘The Transnationalization of Values by European Law’ (2009) 10 *German Law Journal* 1367; Andrew T Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29 *Oxford Journal of Legal Studies* 549; Armin von Bogdandy, ‘Founding Principles’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/C.H. Beck 2011) 21; Egils Levits, ‘Die Europäische Union Als Wertegemeinschaft’ in Thomas Jaeger (ed), *Europa 4.0?* (Jan Sramek Verlag 2018).

133 Joseph HH Weiler, ‘Taking (Europe’s) Values Seriously’ in Rainer Hofmann and Stefan Kadelbach (eds), *Law Beyond the State* (Campus Verlag 2016); Koen Lenaerts, ‘Die Werte der Europäischen Union in der Rechtsprechung des Gerichtshofs der Europäischen Union: Eine Annäherung’ (2017) 21 *Europäische Grundrechte-Zeitschrift* 639.

While introducing the same terminology, calling Article 2 identity,¹³⁴ the CJEU strengthened that connection of mutual constraint, as confirmed in the public speech by the CJEU's president Koen Lenaerts.¹³⁵ That rightfully narrows the scope of the European identity clause, although the next Chapter 6 critically rejects the general proposition of creating identity for the EU.

4.2 National Constitutional Identity and the Other EU Principles in Accord

The identity clause is not solely complementary with the basic values pursuant to Article 2 TEU, but it has to be interpreted alongside the other general principles of EU law, most notably with the principle of equality, the principle of presumed Member States' competences,¹³⁶ and the principle of sincere cooperation. In addition, the principles of proportionality, the principle of subsidiarity, and the principle of conferral have a substantial influence on the understanding of respect of national identities.

Not just as mere rules, the principles help us to answer the question why.¹³⁷ According to Dworkin, rules stipulate answers, whereas the general nature of principles provides us with a direction for where to go without necessitating a concrete result.¹³⁸ Principles help us to understand the nature of the legal order, the logic behind its more abstract ideological commitments, and the structural milestones as to how the rules function together, as well as how to resolve their inner contradictions.¹³⁹

134 Tímea Drinóczi and Pietro Faraguna, 'The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States' in Jurgen de Poorter et al. (eds), *A Constitutional Identity for the EU?* (TMC Asser Press 2022) (forthcoming).

135 Konferenz aus Anlass des 70-jährigen Bestehens des EuGH, 'Der EuGH und die nationalen Gerichte – Kooperation vor aktuellen Herausforderungen, Berlin (9. September 2022).

136 Barbara Guastaferrro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order*, vol 1 (Oxford University Press 2018) 308.

137 Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' in Académie de Droit International de la Ha (ed), *Collected Courses of The Hague Academy of International Law*, vol 92 (Brill Nijhoff 1968); Juan B Etcheverry, 'An Approach to Legal Principles Based on Their Justifying Function' (2019) 32 Canadian Journal of Law & Jurisprudence 321, 321.

138 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 24.

139 See also Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2007) 29.

In general, Article 4 TEU offers an inside view into the nature of the constitutional relationship between the Member States and the Union.¹⁴⁰ Or to put it differently, the pluralistic, constitutional relationship between the Union and its Member States is regulated and constituted by the principles contained in Article 4 TEU. Together with the principle of identity, the cited article contains four basic principles.¹⁴¹

First, the principle of conferral. Although the said principle is redefined in the subsequent Article 5, Article 4 needs to introduce it, due to its function of regulating the *federal* relationship. Barbara Guastaferro calls it ‘the principle of presumed Member States’ competences’,¹⁴² which presents striking similarities with the clauses existing in some federal orders, such as the 10th amendment to the US Constitution.¹⁴³

Second, the principle of equality. The first sentence in Article 4(2) states that the ‘Union shall respect the equality of Member States’. This is not the principle of equality in EU law, but the principle of equality among the Member States as a structural EU principle. Equality of the Member States is the opposite from respect for national identity, which eventually leads to a disapplication of respective EU law. Granting an exemption just to one, although well justified, is still a differentiation or a different treatment among the Member States.¹⁴⁴ Accordingly, any claim of national constitutional identity should be considered in relation to its opposite principle of equality of the Member States.¹⁴⁵

Finally, the principle of sincere cooperation. Accordingly, the Union and the Member States have to mutually respect, assist and carry out the tasks which flow from the Treaties. The principle of sincere cooperation is a pivotal principle which demands a constructive role from any agent and expresses the gravitational force of the EU law.¹⁴⁶ Where the delimitation

140 Constitution for Europe [2004] OJ C 310/1, art I-5(1): ‘Relations between the Union and the Member States’.

141 Lucia S Rossi, ‘The Principle of Equality Among Member States of the European Union’ in Lucia S Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 25.

142 Guastaferro (n 136) 308.

143 *ibid.*

144 Jan Wouters and Pierre Schmitt, ‘Equality Among Member States and Differentiated Integration in the EU’ in Lucia S Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017).

145 Rossi (n 141) 26.

146 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 20.

of competences due to its nature leaves room for reasonable disagreement, the Union and the Member States have to approach potential disputes according to the principle of sincere cooperation. It is a glue and a mechanism which emphasizes cooperation, compliance and complementarity;¹⁴⁷ and without it, it would not be possible to entrust the Member States to facilitate the objectives of the Union.¹⁴⁸

The principle of sincere cooperation pushes towards closer integration, uniformity,¹⁴⁹ and the avoidance of discrepancies.¹⁵⁰ Accordingly, the Member States cannot enact domestic legislation against EU law. The CJEU established that long ago in *Costa ENEL*, stating that it would jeopardise the objectives of the EU.¹⁵¹ Moreover, the principle of sincere cooperation goes hand in hand with the principle of the primacy of EU law. AG Mancini stated, in relation to the Treaty of Rome, that in the absence of specifying the primacy principle in the Treaty, the principle of loyal cooperation is a hortatory provision to the same effect.¹⁵² It has the capacity to solve constitutional disputes if applied in a meaningful way, as the case law of the CJEU indicates as well.¹⁵³

Henceforth, it is not a coincidence that the identity clause stands together with the principle of sincere cooperation in the same article. Many claims of national constitutional identity would have difficulties in sustaining their validity and legitimacy if meaningfully reviewed against the principle of sincere cooperation.¹⁵⁴

147 Cf 23/02/2023 15:25:00

148 See also Guastaferrero (n 136) 382. Eleanor Sharpston, 'Preface' in Elke Cloots, Geert De Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012) viii.

149 Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403, 2416.

150 Guastaferrero (n 136) 377.

151 Ibid.

152 G Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595, 599. See also Marcus Klamert, 'Loyalty and the Constitutionalization of EU Law', *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 70.

153 Klamert (n 152) 69–70.

154 Francesca Strumia, 'When Managed Recognition Turns into Outright Denial' (*Verfassungsblog*, 18 May 2020) <<https://verfassungsblog.de/when-managed-recognition-turns-into-outright-denial/>> accessed 24 February 2023; Marjan Kos, 'The PSPP Judgment of the Bundesverfassungsgericht and the Slovenian Constitutional System' (2021) 2 *Central European Journal of Comparative Law* 93.

Finally, the European identity clause is also shaped by the general principles of proportionality, subsidiarity and conferral. The applicability of the first principle automatically signals that national constitutional identity in EU law does not have the nature of a trump. The same as any other principle, the European identity clause must be counter-balanced against the other rights and principles as well,¹⁵⁵ as stated by the CJEU many times.¹⁵⁶ Additionally, the principle of conferral and the subsidiarity principle are crucial to keeping the competence–delimitation balance stable and within the confines of reasonable legal argumentation. The Member States must not argue identity (as *ultra vires*), but rather the violation of subsidiarity and conferral, should the CJEU overstep its boundaries.

To conclude, when the Member States claim their national constitutional identity against EU law under the European identity clause, one should evaluate these claims in accord with other cited principles governing the relationship between the national and supranational constitutional orders. As Guastaferrero wrote, only together can they offer a full picture of how to navigate potential constitutional tensions.¹⁵⁷

155 Hermann-Josef Blanke and Stelio Mangiameli, *Treaty on the Functioning of the European Union - A Commentary, Volume 1: Preamble, Articles 1-89* (Springer 2021) 189.

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

157 Guastaferrero (n 136) 378.

5 Multilevel Constitutional Relations – From Engagement to Resistance

The following section explores identity claims' different degrees of cooperation and resistance. First, it starts with identity, which serves as a pre-emptive deterrence and constructive engagement (5.1). Furthermore, it analyzes identity claims which communicate open dissent and even directly exhibit resistance against CJEU and EU law (5.2). The section demonstrates that the degree of resistance does not always correspond with its success in accommodating the respective identity claims.

5.1 Deterrence and Engagement

From the functional perspective concerning multilevel constitutional relationships between the EU and the Member States, identity serves as both deterrence and engagement. The sub-section highlights both functions, and demonstrates where engagement of the national and supranational courts may find its limits.

The previous section explained the structure of Article 4 TEU and its four basic principles in navigating the relationship between the EU and the Member States, to illustrate that identity serves also as a general principle. In that sense the identity clause does not serve solely as a judicial remedy, but rather as a pre-emptive signal to avoid constitutional conflicts. Respect for national identities is directed towards all institutions and bodies in the EU.¹⁵⁸ According to the commentators of the European identity clause, the said principle must be taken into account by the institutions, bodies, offices and agencies of the EU as addressees 'at any stage of the decision-making processes in the EU'.¹⁵⁹ If the national sensibilities of the Member States were taken seriously, the majority of potential constitutional disputes could be resolved beforehand: through the adoption of less harmonized legislation in the form of a directive, via sensitive drafting of the respective provisions, or by excluding some provisions from the applicability for the

158 Pernice (n 9) 193.

159 Blanke and Mangiameli (n 155) 189.

respective Member State by individual declaration or reservation. The special status of Gibraltar, the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, or the Irish Protocol (No 35) concerning abortion are all examples of national sensibilities, recognized beforehand.¹⁶⁰

Moreover, identity as deterrence to avoid constitutional conflicts comes also from the national apex courts. Many decisions by the highest national courts in relation to ratification of the Lisbon Treaty have exactly this effect – anticipating potential constitutional conflicts in order to avoid them.¹⁶¹ As highlighted in Chapter 2, the German *EAW*¹⁶² decision similarly raised awareness: reviewing EU law without ultimately declaring it as inapplicable. Deterrence of identity speaks through the words of former judge Voßkuhle, that identity review works best when it is not applied;¹⁶³ or, as some scholars put it, ‘all bark and no bite’.¹⁶⁴

In addition to deterrence, identity can work as engagement.¹⁶⁵ The Member States’ apex courts can signal their considerations concerning EU law or specific interpretation of the CJEU relating to their essential or sensitive

160 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L60/131. See also

Consolidated version of the Treaty on the Functioning of the European Union, 55. Declaration by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland [2016] OJ C202/356 or alternatively Consolidated version of the Treaty on the Functioning of the European Union, 56. Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C202/356. Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland [2016] OJ C202/320.

161 Mattias Wendel, ‘Lisbon Before the Courts: Comparative Perspectives’ (2011) 7 European Constitutional Law Review 96, 123.

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

163 Andreas Voßkuhle, ‘Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund’ (2010) 6 European Constitutional Law Review 175, 195: “Emergency brake mechanisms” are most effective if they do not have to be applied. Precisely because of their existence – and not despite their existence – it has never “come to the crunch”.

164 Christoph U Schmid, ‘All Bark and No Bite: Notes on the Federal Constitutional Court’s “Banana Decision”’ (2001) 7 European Law Journal 95; Niels Petersen, ‘Karlsruhe Not Only Barks, But Finally Bites – Some Remarks on the OMT Decision of the German Constitutional Court’ (2014) 15 German Law Journal 321.

165 Millet, ‘Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way’ (n 2) 595.

constitutional provisions. The preliminary reference procedure provides the perfect forum for exchange and constructive engagement.

As explained in Chapter 3, the *Taricco II*¹⁶⁶ decision presents a powerful example of how a constructive judicial engagement overcomes specific constitutional tensions. In the *Taricco I*¹⁶⁷ decision, the CJEU firstly rejected the Italian claim, arguing that Italian national courts could no longer apply national provisions on limitation periods since that would prevent Italy from effectively countering illegal activities and thus affecting the financial interests of the Union. As a response, the Italian Constitutional Court in the second preliminary reference procedure patiently explained again the specificities of the Italian (constitutional) legal system according to which the statute of limitations forms part of substantive criminal law. The Italian Constitutional Court argued that ‘Article 4(2) TEU allows the national court to disregard the obligation laid down by the Court in the judgment in *Taricco* and *Others*, in so far as that obligation breaches an overriding principle of its constitutional order and, consequently, is capable of affecting the national, and in particular the constitutional, identity of the Italian Republic.’¹⁶⁸ And indeed, the second time the CJEU acknowledged the problem, it consequently reversed its previous decision, allowing Italy as an exception.¹⁶⁹

Concerning the constructive engagement of the courts in dialogue, one is faced with the following dilemma. Does a dialogue and engagement require an equal footing, an equivalent stand? The question connects with the broader narrative of constitutional pluralism, where the constitutional systems function heterarchically.¹⁷⁰ The following scholarly initiative

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

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

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

169 The French case law is also an example of cooperative and constructive dialogue. Wetz (n 3) 352.

170 Neil Walker, ‘Constitutionalism and Pluralism’ in Matej Avbelj and Jan Komárek (eds), *The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism* (Hart Publishing 2012) 18; Andreas Voßkuhle, ‘Der Europäische Verfassungsgerichtsverbund’ [2010] *Neue Zeitschrift für Verwaltungsrecht* 1, 1; Cf 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) 243.

highlights this dilemma and concurrently indicates the inherent limits of engagement on an equal footing.

Four constitutional judges from four Member States' jurisdictions – Austria, Germany, Slovenia and Latvia – have recently published a scholarly proposition of the reversed preliminary reference procedure.¹⁷¹ They argued that the CJEU should have the possibility and duty to turn to the national apex courts when an issue at hand needs clarification from a national perspective.¹⁷² The reversed preliminary reference procedure would in their opinion enhance the element of constructive engagement, because it would establish a true dialogue on an equal footing.¹⁷³ Justice Huber argued similarly in a newspaper interview concerning the *PSPP*¹⁷⁴ decision, stating that the courts 'are players on an equal footing'.¹⁷⁵

The proposition is daring and has the inherent danger of undermining the fact that the CJEU alone has the competence to interpret EU law. In other words, it is an attempt to move from engagement into renegotiating the relationship between the national and supranational courts. While the judges argue for cooperation to 'reach the conclusion jointly',¹⁷⁶ they also stated the following:

'The cooperation between the constitutional courts and the CJEU [...] is in fact a dialectic process in which the constitutional (and supreme) courts of the Member States will wrangle with the CJEU over the true understanding of the allocation of competences, and in which they - i.e., the constitutional (and supreme) courts - have the final say regarding the determination of their own national constitutional identity.'¹⁷⁷

The presented argument is subtle but clear. Concerning national constitutional identity, the national apex courts shall have the final say. Or in the words of the authors, 'the cooperation between the constitutional courts

171 Christoph Grabenwarter et al., 'The Role of the Constitutional Courts in the European Judicial Network' (2021) 27 European Public Law 43.

172 Ibid.

173 Ibid. 57.

174 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

175 Wolfgang Janisch and Stefan Kornelius, 'Spieler auf Augenhöhe: Interview mit Richter Peter Michael Huber' *Süddeutsche Zeitung* (13 May 2020) <<https://sueddeutsche.de/politik/ezb-urteil-bundesverfassungsgericht-anleihenkaeufer-peter-michael-huber-1.4905311>> accessed 24 January 2023.

176 Grabenwarter et al. (n 171) 60.

177 Ibid. 51–2.

and the CJEU in safeguarding [...] the respective constitutional identity must not be a one-way street which enables the latter to enforce solely its own perceptions'.¹⁷⁸

According to the cited understanding, the CJEU no longer decides on validity, proportionality and justifiability of the national claims of identity, but rather the national apex courts in a one-way street to enforce solely its own perceptions.¹⁷⁹ An identity claim then no longer serves as engagement, but has a rather different agenda. It aims to recalibrate the European design and the relationship between the apex courts of the Member States and the CJEU. While it is framed in a dialectic and cooperative manner, at the same time it aims to renegotiate the role of the CJEU as the interpreter of EU law. Identity is thus no longer an engagement, but rather a dissent.

5.2 Identity as Dissent and Resistance

As highlighted above, identity can serve as a tool to signal national sensibilities, or as a general principle of EU law to avoid potential future constitutional conflicts. However, identity can also undertake the role of expressing dissent and even open resistance. The following section outlines these further functions of identity as dissent and resistance.

The recent *PSPP* decision is a good example of judicial dissent and soft resistance. In the said decision, the FCC declared the CJEU's decision on *Weiss*¹⁸⁰ ultra vires and argued that the CJEU had overstepped its conferred competences due to its insufficient interpretation. Namely, the CJEU's argumentation was not 'tenable from a methodological perspective'¹⁸¹ and 'not comprehensible and thus objectively arbitrary'.¹⁸² Accordingly, the FCC prohibited the German Central Bank from cooperating in the actions of the European Central Bank in the form of its Secondary Markets Public Sector Asset Purchase Programme (PSPP).

178 Ibid. 51.

179 Ibid.

180 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others (Weiss)* [2018] ECLI:EU:C:2018:1000.

181 Ibid. para 116.

182 Ibid. para 118.

As some scholars argued, the decision could be read as a plea for more transparency and accountability¹⁸³ relating to fiscal policies,¹⁸⁴ more democratic control by the national parliaments, and perhaps even as an incentive to the CJEU to strengthen its argumentation.¹⁸⁵ Yet, the scholarly discussion was far more concerned with the legal controversy and legitimacy of the said decision itself.¹⁸⁶ Many argued that the FCC's decision demonstrates a parochial¹⁸⁷ and self-absorbed view that the only acceptable application of the legal methods is to reflect German understanding of proportionality as the universal one.¹⁸⁸

Furthermore, after the European Commission had launched the infringement proceeding against Germany, the matter was essentially politically resolved, and the infringement procedure closed due to the political assurance by Germany's government to respect the principles of primacy, effectiveness and uniform application of EU law, as well as the values laid down in Article 2 TEU.¹⁸⁹ Additionally, the government considered that 'the legality of Union institutions cannot be made subject to the examination of

183 Jakob de Haan and Sylvester CW Eijffinger, 'The Democratic Accountability of the European Central Bank: A Comment on Two Fairy-Tales' (2000) 38 *Journal of Common Market Studies* 393.

184 Matej Avbelj, 'The Right Question about the FCC Ultra Vires Decision' (*Verfassungsblog*, 6 May 2020) <<https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision/>> accessed 24 February 2023: 'The ruling warns us that we have a major constitutional problem with the constitutional role of the ECB.'

185 Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 *German Law Journal* 1090.

186 Sven Simon and Hannes Rathke, '“Simply Not Comprehensible.” Why?' (2020) 21 *German Law Journal* 950; Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 *German Law Journal* 979.

187 Toni Marzal, 'Is the BVerfG PSPP decision “simply not comprehensible”?' (*Verfassungsblog*, 9 May 2020) <<https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>> accessed 24 February 2023.

188 Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 18 May 2020) <<https://verfassungsblog.de/germanys-failing-court/>> accessed 24 February 2023.

189 European Commission, December Infringements Package, 2 December 2021. See also Deutscher Bundestag, Referat PE 2, Nr.09/21, 'Aktueller Begriff Europa, Vertragsverletzungsverfahren gegen die Bundesrepublik Deutschland aufgrund des PSPP-Urteils des Bundesverfassungsgerichts'. Cf Matthias Ruffert, 'Verfahren eingestellt, Problem gelöst?: Die EU-Kommission und das Bundesverfassungsgericht' (*Verfassungsblog*, Dezember 2021) <<https://verfassungsblog.de/verfahren-eingestellt-problem-gelost/>> accessed 24 February 2023.

constitutional complaints before German courts'.¹⁹⁰ Finally, it has pledged to 'use all the means at its disposal to avoid, in the future, a repetition of "ultra vires" finding, and take an active role in that regard'.¹⁹¹

In comparison to *Taricco II* as active engagement and *PSPP* as dissent and soft resistance, the latest Polish decision demonstrates much more radical resistance. Quickly learning from their German peers, except in the degree of legal sophistication, the Polish unconstitutionally packed Constitutional Tribunal on 7 October 2021 declared Articles 1, 2 and 19 of the TEU (conferred competences, an ever closer Union, shared and common values and the jurisdiction of the CJEU) to be unconstitutional, if interpreted as established by the CJEU.¹⁹² The decision not only contrasts with previous Polish case law;¹⁹³ the reasoning is unprecedented, and the reactions thereto from the whole spectrum of European observers – politicians, journalists, legal scholars¹⁹⁴ and (even Polish constitutional) judges¹⁹⁵ – demonstrate the united response of the illegitimacy of such a judicial act. In fact, the decision has been called a *Polexit*,¹⁹⁶ and it is a clear 'breach of the general principles of autonomy, primacy, effectiveness and uniform application of Union law and the binding effect of rulings of the Court of Justice of the European Union'.¹⁹⁷

190 European Commission, December Infringements Package, 2 December 2021.

191 Ibid.

192 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

193 Polish Trybunał Konstytucyjny, Case K 18/04 11 May 2005.

194 Marta Lasek-Markey, 'Poland's Constitutional Tribunal on the Status of EU Law: The Polish Government Got All the Answers It Needed from a Court It Controls' (*European Law Blog*, 21 October 2021) <<https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/>> accessed 24 February 2023.

195 Stanisław Biernat et al., '26 sędziów TK w stanie spoczynku: wyrok z 10.03.2022 r. jest gorszącym ekscesem orzecznictwem zbliżającym nas do Rosji' (*Konstytucyjny.pl*, 13 March 2022) <<https://konstytucyjny.pl/26-sedziow-tk-w-stanie-spozynku-wyrok-z-10-03-2022-r-jest-gorszaczym-ekscesem-orzecznictwem-zblizajacym-nas-do-r osji/>> accessed 13 February 2023: '26 retired judges of the Constitutional Tribunal: the judgment of March 10, 2022 is a scandalous jurisprudence that brings us closer to Russia.'

196 Jakub Jaraczewski, 'Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal' (*Verfassungsblog*, 12 October 2021) <<https://verfassungsblog.de/gazing-into-the-abyss/>> accessed 24 February 2023.

197 Press Release 'Rule of Law: Commission Launches Infringement Procedure against Poland for Violations of EU Law by Its Constitutional Tribunal' (*European Commis-*

The decision unequivocally stated that insofar as the national ‘Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application’,¹⁹⁸ the EU primary law provisions, namely Article 1(1)(2) in conjunction with Article 4(3) TEU, are inconsistent with the provisions of the Polish Constitution (Article 2, Article 8 and Article 90(1). In other words, the Polish Constitutional Tribunal has directly rejected the principle of primacy and the established case law of the CJEU.

This example of open resistance against the EU without any constructive engagement is seen as an identity phenomenon due to its context. As stated by Jakub Jaraczewski, the case was initiated by Prime Minister Morawiecki, who issued 129-page application which ‘amounted to a treatise on constitutional identity and pluralism, with a misleading bevy of selective quotes from Polish and foreign academics writing on various aspects of separation between EU law and domestic legal orders of EU Member States. One important strand of the Prime Minister’s argumentation were the multiple references to laws and constitutional court judgments coming from the other EU Member States, with the German FCC’s 2020 *PSPP* judgment being most prominent.’¹⁹⁹ Henceforth, identity argument has been instrumentalized as a mechanism for constitutional conflicts in the capacity of constitutional resistance.

A national apex court cannot unilaterally and unconditionally declare a particular interpretation of the Treaties by the CJEU as unconstitutional.²⁰⁰ The European Commission started an infringement procedure against the cited actions, and the CJEU issued a daily penalty of 1 million EUR to Poland, as it had not suspended the application of the provisions of national legislation relating, in particular, to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court, which violated the ruling of the CJEU.²⁰¹ Just recently, in July 2022, the chamber was dissolved to unlock

tion, 22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070> accessed 16 January 2023.

198 Polish Trybunał Konstytucyjny, Case K 18/04 11 May 2005.

199 Jaraczewski (n 196).

200 R Daniel Kelemen et al., ‘National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order’ (*Verfassungsblog*, 26 May 2020) <<https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>> accessed 24 February 2023.

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

the frozen EU funds and end the penalties levied by the CJEU.²⁰² While more than 35 billion EUR as pandemic recovery funds for Poland remain frozen – until all the requirements of independence of the judiciary are fulfilled²⁰³ – Poland demonstrated a considerable change of heart. While it is too soon to determine conclusively all the consequences of the said decision, one can say that the Constitutional Tribunal's resistance did not change the CJEU's firmly settled case law²⁰⁴ on the required independence of the national judiciary as a matter of EU law under Article 19(1) TEU in relation to Article 2 TEU. Moreover, it did not shield the Polish judicial reform from European expectations and demands. Accordingly, the cited judicial resistance did not achieve the desired results, despite the confrontational level of resistance.

To conclude, identity can serve as a confrontational argument of dissent and resistance by the national apex courts against the CJEU. The above-cited examples demonstrate various degrees of dissent and resistance in the name of identity. However, these are by no means the only examples of national judicial resistance. One can find similar patterns in the past, starting with the famous *Solange I* decision, as demonstrated in Chapter 2, but also decisions such as the Lithuanian *Runevič-Vardyn*,²⁰⁵ the Danish *Ajos*,²⁰⁶ the Czech *Slovak Pensions*,²⁰⁷ the Hungarian *Refugee Allocation*²⁰⁸ decision, and others.²⁰⁹ This sub-section has demonstrated how the intensity of resistance

202 Pawel Marcisz, 'A Chamber of Certain Liability' (*Verfassungsblog*, 31 October 2022) <<https://verfassungsblog.de/a-chamber-of-certain-liability/>> accessed 24 February 2023.

203 Wojciech Sadurski, 'The Disciplinary Chamber May Go – but the Rotten System will Stay' (*Verfassungsblog*, 11 August 2021) <<https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/>> accessed 24 February 2023.

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

205 Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291, paras 84, 86.

206 Danish Højesteret, Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A (Ajos)* 6 December 2016.

207 Czech Ústavní soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012.

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

209 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (Egenberger)* [2018] ECLI:EU:C:2018:257; Martijn van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' (2022) 1 European Law Open 89, 90. The *Egenberger* saga still awaits for its final chapter. The CJEU's decision has been challenged via constitutional complaint

in the name of identity is not necessarily directly proportional in relation to the desired result.

in front of the BVerfG, allegedly violating the German constitutional identity and going ultra vires.

6 Multifarious Identity Functions

Identity has a further multitude of functions,²¹⁰ most notably its sociological or pre-constitutional aspect, which allegedly define the respective community (6.1). This section explores how these majoritarian and imagined narratives enter the classical constitutional adjudication and impact on the full realization of individual fundamental rights, at odds with liberal constitutional commitments (6.2). Additionally, it shows how the said *identitarian adjudication* consolidates illiberal trajectories, as evident examples beyond the EU explicitly indicate (6.3). Finally, it highlights how the opposite view, the narrow strictly legal understanding of national constitutional identity, merely as the core of a constitution, has its own inconsistencies. The said understanding and application of identity has little value if it is applied against the EU, which shares the same common values and principles as the said identity protects (6.4).

6.1 Identity as a Pre-Constitutional Conception to Define the Community

A national state presupposes a nation (or nations) as a prerequisite. Where the states have been artificially created by the colonial and imperial drawing of lines, that often resulted in unstable communities.²¹¹ After all, every state collects and distributes its economic means and thus requires a certain level of solidarity among its members. This is even more important in relation to democratic self-governing processes, which require dialogue, mutual respect and eventually compromises among the various interests.

As stressed above, belonging and interconnectedness are usually designated as national identity.²¹² National identity in this sense denotes a relative cohesive entity which is represented, connected and shaped by a distinctive language, history, traditions and culture. The identity of a

210 Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 *Archiv des öffentlichen Rechts* 415, 418.

211 Parker Shipton, 'Relationships between Ethnicity and Stability' in Frances Stewart et al. (eds), *Ethnic Diversity and Economic Instability in Africa: Interdisciplinary Perspectives* (Cambridge University Press 2012).

212 Hobsbawm (n 58) 14; Anderson (n 95).

particular society is then translated into a constitutional framework. The specific language or languages become the official languages of a state. The preambles often speak about the common elements of national identity which reflect and further fortify the cohesiveness and identity of the respective communities or states.

National identity can be seen as a pre-constitutional prerequisite to create a political entity, but it can also continue to exist within the respective community even after the community is legally constituted into its political form. Moreover, it can refer to the identity of majority or to specific minorities within the state. Accordingly, what is the legal and constitutional significance of national identity, given its undeterminable features? Additionally, does identity still shape the legal contours, and how is that notion at odds with a liberal understanding of constitutionalism, properly so called?

The Slovenian Constitution in its preamble speaks about the creation of the state 'from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood'.²¹³ The Croatian Constitution similarly states: 'The millenary identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience within different forms of states and by the preservation and growth of the idea of a national state, founded on the historical right of the Croatian nation to full sovereignty'.²¹⁴ Both examples presuppose national identity in a political sense as a pre-constitutional element, regardless of and in addition to the current political form.

At the same time, nation states conversely apply the terminology of national identity in their constitutions also in relation to minorities. The Irish Constitution states that it is the 'will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions'.²¹⁵ The Slovenian Constitution includes a similar statement in relation to the special rights of the autochthonous Italian and Hungarian national communities, guaranteeing 'the right to use their national symbols freely and, in order

213 Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16, Preamble.

214 The Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia, No. 41/01 of May 7, 2001, 'Narodne novine' No. 55 of June 15, 2001.

215 Constitution of Ireland, Enacted by the People 1st July, 1937, In operation. As from 29th December, 1937, art 3(1).

to preserve their national identity, the right to establish organisations and develop economic, cultural, scientific, and research activities'.²¹⁶ Along the same lines the Constitution of Montenegro includes Article 79: Protection of identity, referring to 'persons belonging to minority nations and other minority national communities' and entitles them to the right to publicly exercise and develop their national, ethnic, cultural and other particularities, language, symbols, associations, etc. The Romanian Constitution similarly states, in Article 6 Right to identity, that the state recognizes and guarantees national minorities 'the preservation, development and expression of their ethnic, cultural, linguistic and religious identity'.²¹⁷ Similar provisions can be found in many other constitutions.²¹⁸

While these provisions are mainly political statements, there is a risky tendency to ascribe to them some legal relevance. The following two judgements from Lithuania exemplify these tensions, at odds with a liberal understanding of political entity in the sense of Schmittian pre-constitutional understanding.

After the Republic of Lithuania restored its independence, overtaken by the USSR in 1940, the Constitutional Court of Lithuania wrote in one of its judgements on the constitutional continuity of the previous and current state of Lithuania: '[I]t is obvious that not only the continuity of the State of Lithuania, but also the identity thereof is upheld'.²¹⁹ The identity argument above was used to indicate the identity of Lithuanian society beyond the formal or legal parameters of the state.

In another Lithuanian example, the Lithuanian Constitutional Court defined its language and identity as follows: '[T]he Lithuanian language is a special constitutional value, it is the basis of ethnic and cultural distinction of the Lithuanian nation, the guarantee of the identity and survival of the nation; the Lithuanian language protects the identity of the nation, integrates the civil society, ensures the integrity and indivisibility of the state,

216 Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13 and 75/16, art 64(1).

217 Constitution of Romania, The Official Gazette of Romania, Monitorul Oficial, Part I, No. 233 dated 21 November 1991, art 6(1).

218 The Constitution of The Republic Of Poland of 2nd April, 1997, published in Dziennik Ustaw No. 78, item 483, art 35(2).

219 Lithuanian Respublikos Konstitucinis Teismas, Case 102/2010 *State Pension* 22 February 2013.

the normal functioning of state [...].²²⁰ This example exhibits once more that identity here refers to distinctive ethnic and cultural elements of the Lithuanian nation.²²¹ It serves to describe the community as a whole under the common denominator of identity, whereas language here constitutes just one element of this ethnic identity, purportedly a prerequisite for the survival of the nation and consequently the state.

One must be cautious when identity here denotes a homogenous society, in order to *legally* justify a particular political decision.²²² As history shows, the parallels of Schmittian legal observations and the politics of German national socialism must not be dismissed as a mere coincidence.²²³ Whereas national identity presupposes a coherent narrative, a liberal and free society based on freedom of expression will never be able to articulate one common and coherent account. The creation of one narrative necessarily endangers the pluralistic nature of a society, and could facilitate autocratic tendencies.²²⁴ For every minority and every individual who does not fit into the majoritarian imagination of the common national identity is by definition excluded. Accordingly, when identity takes on the meaning of a pre-constitutional society and claims legal relevance, it may stand at odds with liberal constitutional commitments and the protection of individual and minority rights, as the following sub-section reveals.

220 Lithuanian Respublikos Konstitucinis Teismas, Case 14/98 *Name Spelling* 6 November 2009.

221 See also Laurianne Allezard, 'Identité(s) et Droit Constitutionnel' (These de doctorat, Université Clermont Auvergne 2021) 135 <<https://www.theses.fr/2021UCFAD009>> accessed 24 February 2023.

222 Kovács (n 4) 1712.

223 Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press Books 2008) 141.

224 R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59, 61.

6.2 Identity as a Constitutional Argument – Identitarian Adjudication

Identity argument is not only a federative tool to manage multilevel constitutional conflicts,²²⁵ national claims against the application of EU law,²²⁶ or a general principle of EU law,²²⁷ but also it operates domestically within a constitutional system. This sub-section illustrates how national constitutional identity influences national constitutional adjudication concerning fundamental rights. Consequently, a simplified majoritarian understanding of national constitutional identity can lead to constitutional disputes where the interests of the majority trump the rights of minorities and individuals.

The following case in Latvia²²⁸ demonstrates the role of identity argument within the national constitutional adjudicative practice. According to the Latvian statute concerning the national flag,²²⁹ citizens were obliged to place the Latvian flag on residential buildings on certain days of festivities and mourning. The provision included an administrative sanction for non-compliance with the respective obligation. An applicant challenged this provision, claiming that it violated her constitutional (negative) right to freedom of expression, which included the right to freely receive, keep and distribute information and to express her views. The Constitutional Court of the Republic of Latvia recognized that the respective obligation restricted the applicant's freedom of expression, but noted that the restriction was justifiable and necessary for the benefit of public interest. The national flag as the symbol of state was of great importance in creating and consolidating awareness of statehood. The respective obligation consolidated this awareness and therefore also the democratic Republic of Latvia. The Court stated:

225 Luke D Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57 Common Market Law Review 361, 380.

226 Wischmeyer (n 210) 427.

227 Pernice (n 9) 193.

228 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015.

229 Law on the National Flag of Latvia, Section 7:

(1) The national flag of Latvia shall be placed on public buildings, buildings of legal persons governed by private law and associations of persons, as well as on residential buildings, on 1 May, 4 May, 21 August, 11 November and 18 November.
(2) The national flag of Latvia in mourning presentation shall be placed on public buildings, buildings of legal persons governed by private law and associations of persons, as well as on residential buildings, on 25 March, 14 June, 17 June, 4 July and on the first Sunday of December.

‘The Latvian national flag as a symbol of the state is also an integral element in the constitutional and international identity of the Latvian state. The obligation to place the Latvian national flag on residential buildings strengthens the awareness of statehood and, thus, also the democratic Republic of Latvia, where fundamental rights can be effectively exercised. Stable awareness of the statehood shows that citizens perceive their state as a value per se, and such awareness of the statehood can develop only under democracy, when citizens can freely express their views.’²³⁰

The Court annulled the administrative sanction as inadmissible and not proportional, but found the respective obligation compliant with the Latvian Constitution.²³¹ The Court was balancing a negative aspect of the individual right to freedom of speech against the public interest: specifically, the consolidation of awareness of statehood through the obligation to raise the national flag as the symbol of state that should protect Latvia’s democratic state order.²³² Furthermore, the flag was perceived as a national constitutional identity which had the role of strengthening the democratic state order. Additionally, the Court implied that only an awareness of statehood and belonging to the state as such enables and facilitates liberal commitments such as the protection of fundamental rights.

Another example of national identity argument against individual rights in a domestic framework is illustrated by the scholarly lecture by the president of the Hungarian Constitutional Court, Dr. Tamás Sulyok at an international conference in 2018 titled ‘Universal Human Rights and National Identity’. In his speech Sulyok raised the question ‘when do individual rights prevail and when do we have to give priority to national identity’. He argued that human rights violations can be justified in the name of national or constitutional identity, subject to certain conditions. He stated:

‘The protection of human rights must be guaranteed not only at the individual level [but] we must respect national identity in cases where the normative acts of the EU affect such attributes of human beings with

230 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015, para 15.2.

231 The Court made an unusual distinction between the norm and its enforcement. It is odd that the Court found the respective obligation compliant with the constitution, yet it refused the possibility of enforcing this provision.

232 Latvian Satversmes tiesa, Case 2015-01-01 *Flag of Latvia* 2 July 2015, para 16.4.

equal dignity who have no or little choice and will be bound by the decision in such cases (concerning ethnicity, religion or history).²³³

The tendencies of *identitarian adjudication* can hinder the full realization of individual fundamental rights.²³⁴ Identity is presented as a new constitutional argument which stands on an equal footing with other fundamental rights, although its legal nature and purpose fundamentally differ from fundamental rights. In that way it introduces majoritarian argumentation into liberal adjudication through the back door.

6.3 Identitarian Adjudication Beyond the EU

The significance of the following example from the Russian Federation is twofold. First, it once again demonstrates the inherent tensions between fundamental rights and national constitutional identity, indicating how identity argument limits the protection of individual rights. Second, it indicates the trajectory of liberal decline in relation to international legal orders. In other words, identity argument is the perfect tool for autocratic tendencies,²³⁵ because it comprises three functions in one: it entails the mystical narrative of national exceptionalism;²³⁶ it is a legal concept, which makes it legitimate and more objective; and finally, it has the power to yield the entrance of international law into the domestic system, thereby detaching it from external scrutiny.²³⁷

The lack of democratic features and mutual checks and balances in the Russian Federation are currently well known. Other consequences of the long trajectory of democratic decline are the changes to the Russian Consti-

233 Constitutional Court of the Slovak Republic, International Conference ‘Constitutional Justice: Challenges and Perspectives’ on the occasion of the 25th Anniversary of the Constitutional Court of the Slovak Republic, Slovakia, Košice, 10 April 2018, Tamás Sulyok, Universal Human Rights and National Identity.

234 E.g., Latvian Satversmes tiesa, Case 2005-02-0106, 14 September 2005, para 15.3.

235 R Daniel Kelemen and Laurent Pech, ‘Working Paper: Why Autocrats Love Constitutional Identity and Constitutional Pluralism’ (Reconnect 2018) 17.

236 Julian Erhardt, Steffen Wamsler and Markus Freitag, ‘National Identity between Democracy and Autocracy: A Comparative Analysis of 24 Countries’ (2021) 13 European Political Science Review 59.

237 Cf Dimitry Vladimirovich Kochenov and Petra Bárd, ‘The Four Elements of the Autocrats’ Playbook’ (*Verfassungsblog*, 18 September 2018) <<https://verfassungsblog.de/the-four-elements-of-the-autocrats-playbook/>> accessed 24 February 2023.

tution in 2020,²³⁸ and the current war in Ukraine following the military invasion in February 2022, unprecedented in Europe since the Second World War, in blatant violation of international law.²³⁹

However, the Russian Federation did have an epoch of engaging with liberal values. As a member of the Council of Europe, it often struggled with the judgements of the European Court of Human Rights.²⁴⁰ The following shows how the identity argument helped the Russian Constitutional Court to contest the enforceability of the ECtHR's judgements and redefine the relationship between the European Convention on Human Rights (ECHR) and national constitutional law; in other words, how the identity argument relativized the commitment and obligation to respect international human rights and its binding case law.

In the case of *Anchugov and Gladkov v. Russia*,²⁴¹ when the ECtHR declared Russia's automatic and non-discriminatory prohibition of prisoners' voting rights disproportionate and in violation of Article 3 of the Protocol 1 of the ECHR, the Russian Constitutional Court declared the ruling as not enforceable.²⁴² The Russian Constitutional Court stated:

'The participation of the Russian Federation in any international treaty does not mean giving up national sovereignty. Neither the ECHR, nor the legal positions of the ECtHR based on it, can cancel the priority of the Constitution. Their practical implementation in the Russian legal

238 Jakub Sadowski, 'Amendments of 2020 to the Russian Constitution as an Update to Its Symbolic and Identity Programme' (2022) 35 *International Journal for the Semiotics of Law* 723, 723; Lauri Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (2021) 115 *American Journal of International Law* 78, 84; William Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Analysis' (2021) 23 *Cambridge Yearbook of European Legal Studies* 311, 316.

239 Ingrid (Wuerth) Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future World Order' (2022) 116 *American Journal of International Law* 687, 688.

240 Anatoly I Kovler, 'Russia: European Convention on Human Rights in Russia: Fifteen Years After' in Ineta Ziemele and Iulia Motoc (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016) 351ff. Sergey Marochkin, 'ECtHR and the Russian Constitutional Court: Duet or Duel?' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press 2017) 93ff.

241 *Anchugov and Gladkov v Russia* App no 11157/04 and 15162/05 (ECtHR, 9 December 2013).

242 Russian Конституционный суд, Case 12-П/2016, 19 April 2016.

system is only possible through recognition of the supremacy of the Constitution's legal force.²⁴³

'The effectiveness of norms of the Convention for the Protection of Human Rights and Fundamental Freedoms in the Russian legal order in many respects depends on the respect of the European Court of Human Rights for the national constitutional identity.'²⁴⁴

Wischmeyer lucidly wrote, 'one who says identity, means sovereignty and remains mentally in the era of statehood'.²⁴⁵ The Russian Constitutional Court created a condition to respect human rights only if these obligations did not violate Russian national constitutional identity as defined by the respective court. This understanding of identity, although not limited to the Russian Federation, is even more vividly expressed in the writings of the current Chair of the Constitutional Court of the Russian Federation, Valery Dmitrievich Zorkin. In his book *Legal Path of Russia* he dedicated one chapter to the constitutional identity of Russia, where he wrote:

'The constitutional identity as a concept means the essence (ethos) of the nation-state in the sociocultural context of regularities and specificities of the country's historical development expressed primarily in the fundamentals (principles) of the constitutional system. The concept of national constitutional identity allows to determine the most significant provisions of the Constitution and the national legal order based on them serves as deterrent, a legal obstacle to unpredictable activist expansion of supranational regulation.'²⁴⁶

Behind this understanding of national constitutional identity, one can unequivocally observe the relativization of human rights in the name of com-

243 Lauri Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgment of 14 July 2015, No 21-П/2015' (2016) 12 European Constitutional Law Review 377, 383. Maria Smirnova, 'Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions' (*UK Constitutional Law Association*, 17 July 2015) <<https://ukconstitutionallaw.org/2015/07/17/maria-smirnova-russian-constitutional-court-affirms-russian-constitutions-supremacy-over-ecthr-decisions/>> accessed 24 February 2023.

244 Opinion 832/2016 'Russian Federation Judgment No. 12-II/2016 of 19 April 2016 of the Constitutional Court, Venice Commission (Strasbourg, 6 May 2016)' [2016] CDL-REF(2016)033, 5.

245 Wischmeyer (n 210) 427.

246 Valery Zorkin, *Legal Path of Russia* (Norma Publishing House 2019) 252.

munal values and the critique of the ‘Western’ rights of the individual.²⁴⁷ The relativization is evident in his further observation:

‘In the West, the common good has traditionally been viewed as a condition for the good of each individual. [...] But in the Russian cultural matrix the concept of the common good has always occupied a much more significant place. [...] human and civil rights and freedoms may be limited by law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State. Thus according to the Constitution, it is not only the rights of others, but also constitutional values that can be designated as values of the common good that serve as the basis for restricting human freedom. Our society’s understanding of these specific values is the main semantic content of the concept of constitutional identity of the people and the state.’²⁴⁸

Zorkin understands the protection of fundamental rights as subject to other majoritarian and self-ascribed values. The doctrine of national constitutional identity has a significant role in justifying limitations of fundamental rights. He goes so far as to write that ‘minority rights can be protected to the extent that the majority agrees’.²⁴⁹

As already indicated above, the tacit interconnectedness between national identity and constitutional identity is constantly present.²⁵⁰ In other words, the pre-constitutional elements at odds with liberal principles are continuously entailed in the legal reasoning concerning constitutional identity.²⁵¹ What is more, the argument of national constitutional identity directly justifies violations of individual rights.²⁵² It introduces into the constitutional adjudication the extra-legal arguments of majoritarian self-perception, developed from the historical, cultural and social self-image

247 Mikhail Antonov, ‘Philosophy behind Human Rights: Valery Zorkin vs. the West?’ in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press 2017).

248 Zorkin (n 246) 253.

249 Ibid. 254.

250 Fabbrini and Sajó (n 15) 465.

251 Joseph HH Weiler, ‘Der Staat “über Alles” Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts’ (Jean Monnet Chair 1995) 7.

252 *Anchugov and Gladkov v Russia* App no 11157/04 and 15162/05 (ECtHR, 9 December 2013).

as determined by the respective courts. Such a normative constitutional framework departs considerably from the essence of the universal protection of human rights and liberal constitutionalism, properly so called. Accordingly, one should acknowledge the trajectory of constitutional development connected with *identitarian adjudication* as described above. The Member States within the EU are not immune from illiberal backsliding under the auspices of national constitutional identity.²⁵³

6.4 Protecting the Core of the Constitution

As demonstrated in Chapter 2, many Member States' national apex courts understand national constitutional identity as the core of their constitutions, their national constitutional essentials. This sub-section demonstrates how raising the argument of national constitutional identity does not correlate with whether the Member States have specific constitutional provisions concerning unconstitutional constitutional amendments²⁵⁴ or whether the concept of national constitutional identity follows solely from their established judicial practice. It further illustrates how the national apex courts enjoy relative leeway concerning the intensity and absoluteness of their respective identity reviews.

Eight Member States have a specific constitutional provision which sets the limit to a constitutional change, usually called an eternity clause. These are Germany, Italy, France, Czech Republic, Greece, Portugal, Romania and Cyprus.²⁵⁵ Moreover, some Member States additionally developed constitutional doctrines which set ultimate conditions to EU law in order to protect these essentials. For example, according to the Italian *controllimiti*²⁵⁶ doctrine, the Italian Constitutional Court safeguards that the EU

253 R Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies 59, 67; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

254 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2019) 236ff.

255 Spieker, 'Framing and Managing Constitutional Identity Conflicts' (n 225) 361–398.

256 See i.e. Alessandro Bernardi, *Controlimiti: Primato delle norme europee e difesa dei principi costituzionali* (Jovene, 2017), 91ff.

respects the ‘fundamental principles of our constitutional order’.²⁵⁷ The Court developed the doctrine further in relation to fundamental rights interpretations, as illustrated by Martinico and Repetto.²⁵⁸ Additionally, the German doctrine of the eternity clause was described in Chapter 2. Accordingly, the FCC has the right to review EU law via identity and ultra vires review.

Furthermore, Hungary and Poland have developed a constitutional review which aims to protect a constitutional core or constitutional essentials despite the absence of any specific constitutional provision.²⁵⁹ Conversely, among eight Member States with an eternity clause, only four have actually juridically developed constitutional identity review mechanisms.²⁶⁰

The examples indicate that the right to conduct a judicial review of EU law in the name of national constitutional identity or to protect the constitutional essentials is not necessarily conditional on the existence of specific provisions in the national constitutions. National constitutional identity as a normative argument alone can serve as justification to protect a constitutional core without a specific constitutional norm which authorizes such limitation.

The typology of national constitutional identity review by the national apex courts differs considerably, as demonstrated by Spieker.²⁶¹ He differentiated between soft and hard conflicts²⁶² (absolute and relative constitutional limitations) concerning identity review on the one hand, and the universality and idiosyncrasy of constitutional principles on the other.

Protection of core constitutional commitments is plausible and normatively desirable. However, in the light of common values under Article 2

257 Italian Corte Costituzionale, Case 183/1973 *Frontini* 27 December 1973; Italian Corte Costituzionale, Case 170/84 *Granital* 8 June 1984.

258 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.

259 See also Joël Rideau, ‘The Case-Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the “German Model”’ in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 250–54.

260 Spieker, ‘Framing and Managing Constitutional Identity Conflicts’ (n 225) 376.

261 Ibid. 374.

262 See e.g. Monika Polzin, ‘Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law’ (2016) 14 *International Journal of Constitutional Law* 411, 431.

TEU, when it is directed towards EU law, it no longer serves its purpose. Protecting core commitments is necessary only when it is directed towards an entity with different core commitments. Accordingly, when the Member States protect their core commitments against the Union, as explicated in Chapter 4, what they really do is protect their concrete interpretations of these core commitments, what can no longer be subsumed under the same constitutional category.²⁶³

263 See also Monica Claes, 'National Identity and the Protection of Fundamental Rights' (2021) 27 *European Public Law* 517, 535.

7 Identity Protagonists

The following section raises the *who* question. Apart from creating meaning and role of identity claims in the hands of the courts (7.1), the section further investigate the potential agents of national constitutional identity. In light of the genuine meaning of the European identity clause, the legislator has a decisive role to define the national fundamental structures and essential functions. However, when the courts declare a subject matter as national constitutional identity, the legislator finds itself in a precarious position. It remains unclear how much the legislator remains bound by the courts' proclamation of the respective matter as national constitutional identity, and whether it can challenge the court on the matter (7.2). Moreover, the executive concurrently develops the meaning of national constitutional identity. For one, governments as interveners may, and frequently do, submit their observations, among other things, also concerning national constitutional identity in the preliminary proceedings. Moreover, politicians like to apply identity terminology for their own political reasons, sometimes even engaging with the courts to strengthen their views on national constitutional identity (7.3). Finally, legal scholarship is an important agent in facilitating the pertinence of national constitutional identity. One should not overlook their role in shaping and creatively constructing the meaning of national constitutional identity (7.4).

7.1 The Courts

As is clear by now, the national apex courts are the main driver for developing and determining the meaning and scope of national constitutional identity. Chapter 2 scrutinized the German FCC's case law,²⁶⁴ while Chapter 3 highlighted several other national decisions concerning national

264 BVerfGE 37, 271 *Solange I* 29 May 1974, BVerfGE 73, 339 *Solange II* 22 October 1986, BVerfGE 89, 155 *Maastricht* 12 October 1993, BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010, BVerfG, 2 BvR 2728/13 *OMT I* 14 January 2014, BVerfG, 2 BvR 2728/13 *OMT II* 21 June 2016, BVerfG, 2 BvR 1390/12 *ESM* 18 March 2014, BVerfG, 2 BvR 2735/14 *EAU* 15 December 2015, BVerfG, 2 BvR 1685/14 *Banking Union* 30 July 2019, BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

constitutional identity as determined by the national apex courts.²⁶⁵ This sub-section investigates whether the courts ought to be the only identity protagonists; and if not, why not?

One way to look at this query is to see the national apex courts as the only agents with the competence to interpret a constitution. Consequently, if one understands national constitutional identity as a constitutional concept which is inherent to a constitution, the national apex courts are the only agents who can define, deduce or interpret the meaning of a national constitutional identity.²⁶⁶ Considering that national constitutional identity goes beyond the basic constitutional commitments, shared among the Member States and the EU, the national apex courts determine concrete expressions and interpretations of constitutional norms. While national constitutional courts usually balance two or more conflicting rights in a concrete case, determination of the concrete meaning of national constitutional identity derived from the general principles *in abstracto* is a different type of judicial task. Because the national apex courts do not have a transparent and common methodology for how to determine highly general principles as concrete expressions of national constitutional identity,²⁶⁷ the results differ considerably²⁶⁸ and are prone to critique.

De Boer argued that judicial determination of these essential abstract principles leaves too much room for reasonable disagreements, referring to arguments by Waldron and Bellamy concerning the constitutional review of fundamental rights.²⁶⁹ Accordingly, he suggested that it should be the national legislator who would resolve these reasonable disagreements and

265 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012, Danish Højesteret, Case Ugeskrift for Retsvæsen 1998.800H [1998], French Conseil Constitutionnel, Decision 2004-505 DC *Constitutional Treaty* 19 November 2004, Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010, Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, Danish Højesteret, Case 15/2014 *Ajos* 6 December 2016, Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

266 Armin von Bogdandy and Stephan W Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1417, 1430.

267 Spieker, 'Framing and Managing Constitutional Identity Conflicts' (n 225).

268 von Bogdandy and Schill (n 92) 1440.

269 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).

politically co-determine the meaning and scope of national constitutional identity as derived from general constitutional principles.²⁷⁰

In addition, the essential protagonist of national constitutional identity is also the CJEU. Although without the competence to define the meaning of national constitutional identity according to national constitutions, it is the only agent to decide on the effectiveness of domestic identity arguments; at least, when we are examining identity concept in relation to and within the scope of the European Union. When the CJEU accepts a national identity claim, the subject matter inevitably becomes recognized as identity. In that way the claims of national constitutional identity *become* identity, legitimized by the CJEU.

It is clear that the mere proclamation of the subject matter as national constitutional identity, despite the fact that it may cover an unchangeable core of a constitution, cannot suffice for a Member State to be exempt from common EU rules. The national constitutional identity argument must be balanced against all the other rules and principles at hand, and only if proportionality allows may the matter be potentially resolved in favour of protection of national constitutional identity.²⁷¹

The CJEU has not yet developed any meaningful doctrinal framework to deal with claims of national constitutional identity.²⁷² The review of existing case law, where the CJEU has been faced with the argument of national (constitutional) identity and where the CJEU has granted an argument of identity the strength and legitimacy to justify an exception from the unified application of EU law, indicate an inadequate level of predictability, clarity and coherence.²⁷³ Several attempts by legal scholars in the last decade have similarly failed to provide an account which would either explain or help with a navigation of the CJEU and its identity decisions.²⁷⁴ While the CJEU does not adhere to the rather narrow textual boundaries of Article 4(2)

270 Ibid.

271 Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 111.

272 Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (n 2) 571. Robbert Bruggeman and Joris Larik, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) 35 *Utrecht Journal of International and European Law* 20, 31.

273 Fabbri and Sajó (n 15) 470. Burgorgue-Larsen (n 100) 304.

274 See Bosko Tripkovic, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017); Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press

TEU, for example referring to the issues of language, completely absent from the cited article,²⁷⁵ it has also not risen to the grand hopes of the proponents of constitutional pluralism who saw identity provision as the key to and door between national plurality and supranational harmonization.²⁷⁶

Finally, the CJEU itself recently invented the identity of the European legal order.²⁷⁷ According to numerous scholarly appeals,²⁷⁸ the CJEU stated that ‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of *the very identity of the European Union as a common legal order*, values which are given concrete expression in principles containing legally binding obligations for the Member States’.²⁷⁹ The subsequent Chapter 6 will critically engage with the attempt to create constitutional identity for the EU. Here it must suffice to say that the CJEU explained no better than the national apex courts how and according to what methodology it arrived at this conclusion.

7.2 The Legislator

What is the role of a legislator in determining national constitutional identity? The dilemma is the following. If national constitutional identity denotes unchangeability in relation to EU law based on the principle of primacy, then the legislator cannot change it, via constitutional amendment or statute, after the national constitutional court were to declare it part

2019); Spieker, ‘Framing and Managing Constitutional Identity Conflicts’ (n 225); Scholtes (n 10).

275 Case C-391/09 *Runevič-Vardyn* [2010] ECLI:EU:C:2010:784, Opinion of the AG Jääskinen, para 80.

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

277 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232. See also Jurgen de Poorter et al. (eds), *A Constitutional Identity for the EU?*, vol 4 (TMC Asser Press 2022) (forthcoming).

278 van der Schyff (n 104). Sarmiento (n 104) 177. Titutlional identity Wojciech Sadurski, ‘European Constitutional Identity?’ (European University Institute 2006) Working Paper <<https://cadmus.eui.eu/handle/1814/6391>> accessed 13 February 2023.

279 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232 (emphasis added).

of national constitutional identity.²⁸⁰ However, if national identity can be changed by a legislator even after it is declared an identity by the respective court, then the court cannot effectively protect it against EU law.²⁸¹ Accordingly, it would also make little sense to even declare a respective constitutional norm as national constitutional identity if the respective subject matter can always be changed by a legislator.

From the European perspective, national constitutional identity does not need to be an unchangeable constitutional matter.²⁸² As highlighted above, Article 4(2) TEU refers to fundamental structures and essential functions of the Member States. These structures and functions are subject to democratic self-governance and change. The Member State's legislature is free to modify the rules concerning elections, political institutions and essential functions. If not provided otherwise, according to domestic constitutional rules, Member States can create new federal or regional structures, abandon constitutional monarchy, adopt new ways for political parties to be organized. The limits concerning potential change are only the basic commitments to protect human rights, democracy and the principle of rule of law,²⁸³ in compliance with existing EU law. Hence, according to the EU's perspective, it is (also) the legislative branch which essentially determines the national constitutional identity of Member States as it follows from their political and fundamental structures. A legislature does not usually call this national constitutional identity. For example, Ireland defined its limits concerning abortion rights in its Constitution, and together with Malta²⁸⁴ they both negotiated a Protocol on the Treaty of Lisbon to reassure them that EU law would not interfere with these policies.²⁸⁵ However,

280 Some scholars have observed that in the *Tarico II* decision, after the CJEU recognized the statute of limitation as Italian national constitutional identity, the legislator faced the problem of amending these norms in the light of European rules, now proclaimed as identity and thus allegedly unchangeable.

281 Roznai (n 254) 105.

282 de Witte (n 81) 561.

283 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97.

284 Protocol No 7 on abortion in Malta [2013] OJ L 236/947.

285 Protocol on the concerns of the Irish people on the Treaty of Lisbon [2013] OJ L 60/131. See also Consolidated version of the Treaty on the Functioning of the European Union (TFEU) Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland [2016] OJ C202/320.

Ireland eventually change its Constitution concerning abortion rights.²⁸⁶ This exemplifies how the legislature can define and re-define constitutional identity without interference from the courts and without specifically calling it identity either.

Another example is the Hungarian attempt to enact the seventh amendment to the new Hungarian constitution, which explicitly mentioned constitutional identity.²⁸⁷ At the end of the day, the amendment has not been adopted due to lack of political support.²⁸⁸

Accordingly, the legislative branch additionally controls and potentially shapes the meaning of national constitutional identity. However, if the legislative branch can always change the identity of the national constitution, the value of identity in relation to EU law merely highlights national sensitive or essential constitutional elements. It would be completely up to the CJEU to decide whether the respective identity ultimately outweighs EU law, subject to balancing and proportionality,²⁸⁹ because the identity argument would no longer indicate the *inability* of a Member State to comply with EU law, but rather its reluctance and unwillingness to do so. The legitimacy and strength of the latter is, however, substantially reduced.

7.3 The Executives

The courts and the legislature are not the only protagonists in creating national constitutional identity. The executives and governments have proved to be loud proponents of shaping the meaning of national constitutional identity as well, as the present sub-section will demonstrate.

Member States are invited to be directly involved in the preliminary reference proceedings in front of the CJEU. In accordance with the rules of

286 David Kenny, 'Abortion, the Irish Constitution, and Constitutional Change' (2018) 5 *Revista de Investigações Constitucionais* 257.

287 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.

288 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.

289 Fabbrini and Sajó (n 15) 470.

procedure of the CJEU,²⁹⁰ they can participate in proceedings as interveners, or simply submit observations²⁹¹ when they are not directly involved. The content of the legal submissions of the Member States in the cited circumstances are usually determined by the respective governments or the executive branches and their legal services. Hence, in these circumstances they can define the meaning and scope of national constitutional identity.

For example, when Hungary and the Slovak Republic initiated annulment proceedings against the Council of the EU and sought to annul the Council Decision which provided provisional measures to the benefit of Italy and Greece concerning relocation quotas for asylum seekers,²⁹² the Republic of Poland as an intervener argued that the relocation of asylum seekers had a greater cultural impact on the virtually homogeneous population of Poland, whose population differed from a cultural and linguistic perspective.²⁹³ The statement implied that the realization of the contested decision would potentially have an impact on the identity of Polish society. This reflected that the statement was made in relation to the plea from Hungary, which stated time and again that the ‘problem’ of migration was having an impact on the identity of Hungarian society: for example, when in February 2018 the Hungarian justice minister László Trócsányi filed another petition to the Hungarian Constitutional Court asking whether Hungary could argue constitutional identity, to avoid having to take in refugees.²⁹⁴

Moreover, in the famous *Sayn-Wittgenstein* decision, it was the Austrian government which argued that the provisions at issue ‘are intended to protect the constitutional identity of the Republic of Austria’.²⁹⁵ Furthermore, in the preliminary proceedings concerning definition of a ‘spouse’

290 Rules of Procedure of the Court of Justice [2012] OJ L265/1.

291 Article 96(1)(b) of the Rules of Procedure of the Court of Justice.

292 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 (OJ 2015 L 248, p. 80).

293 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.

294 László Trócsányi, ‘Ministry of Justice to Seek Position of Constitutional Court Regarding Mandatory Quotas’ (*Hungarian Ministry of Justice*, 1 March 2018) <<https://2015-2019.kormany.hu/en/ministry-of-justice/news/ministry-of-justice-to-seek-position-of-constitutional-court-regarding-mandatory-quotas>> accessed 24 February 2023.

295 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien (Sayn-Wittgenstein)* [2010] ECLI:EU:C:2010:806, para 74.

and the recognition of marriage between persons of the same sex, it was the Latvian government which submitted an observation in the *Coman*²⁹⁶ decision wherein it stated that a refusal to recognize marriage between persons of the same sex concluded in another Member State, despite being a restriction of Article 21 TFEU, was justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU.²⁹⁷

In addition, the governments of the Member States are not shaping the meaning of national constitutional identity solely within the scope of the judicial proceedings, but also independently in their political capacity beyond the legal sphere in the strict sense. The speeches of the Hungarian Prime Minister Orbán as to national constitutional identity are a well-known example.²⁹⁸ The Polish White Paper on the Reform of the Polish Judiciary by the Polish government, drafted in the capacity of the Chancellery of the Prime Minister, is another.²⁹⁹ The paper aimed to define the meaning and functions of national constitutional identity as a feature which can justify resistance against the regulatory intervention of the EU.³⁰⁰ Finally, it was the Polish Prime Minister who asked the Polish Constitutional Tribunal to assess the constitutionality of the CJEU's judgement on the Polish judicial reform, arguing that it violated Polish national constitutional identity.³⁰¹

To conclude, while political agents do not have any formal competence to define the content of national constitutional identity, they still participate in deliberations as to the said concept. They can submit observations in preliminary proceedings before the CJEU. Moreover, in some legal systems

296 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.

297 Ibid. para 42.

298 Orbán (n 102). See also Benjamin Novak, 'Hungary's Constitutional Identity Is Whatever Viktor Orbán Says It Is' *The Budapest Beacon* (2 April 2018) <<https://budapestbeacon.com/hungarys-constitutional-identity-is-whatever-viktor-orban-says-it-its/>> accessed 24 February 2023.

299 The Chancellery of the Prime Minister, 'White Paper on the Reform of the Polish Judiciary' <<https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chancellor-white-paper-3-18.pdf>> accessed 24 February 2023.

300 Ibid. 170.

301 Anna Wójcik, 'On the PM Morawiecki Motion to the Constitutional Tribunal Regarding EU Treaties Conformity with the Polish Constitution (Case K 3/21)' (*Rule of Law*, 27 April 2021) <<https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/>> accessed 24 February 2023.

they are allowed to initiate domestic constitutional proceedings and thus navigate the legal discussion on the concept of identity.³⁰² Finally, they can shape the meaning of identity through their political speeches, working documents and political reforms.³⁰³ While none of the stated undertakings have a formal authoritative power to define the concept, these contributions still indirectly inform and co-shape the meaning and scope of the national constitutional concept.

7.4 Legal Scholarship

Apart from the identity protagonists above, legal scholarship significantly facilitates the significance of the national constitutional identity concept, as well as its meaning. It is not the purpose of this contribution to empirically assess and evaluate the influence of scholarly writings on the development and relevance of national constitutional identity, but to highlight its contribution as such.

The recent book *Constitutional Identity in a Europe of Multilevel Constitutionalism*³⁰⁴ can serve as illustration of the scholarly resourcefulness concerning the meaning of national constitutional identity. In the contribution concerning Denmark, the author stated:

‘Danish case law, academic literature, and other sources do not refer directly to “constitutional identity”. This absence of the term does not necessarily mean that Denmark has no constitutional identity. What it does mean is that we will have to extract it ourselves from an interpretation of the Constitution, case law, and other sources in the light of this book’s understanding of constitutional identity.’³⁰⁵

302 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.

303 Orbán (n 102); Novak (n 298); Constitutional Court of the Slovak Republic, International Conference ‘Constitutional Justice: Challenges and Perspectives’ on the occasion of the 25th Anniversary of the Constitutional Court of the Slovak Republic, Slovakia, Košice, 10 April 2018, Tamás Sulyok, Universal Human Rights and National Identity.

304 Calliess and van der Schyff (n 274).

305 Krunke (n 13) 114.

The cited example demonstrates how the meaning of national constitutional identity was fully constructed by a legal scholar in the absence of any legal norm or judicial case law. In that sense, national constitutional identity acquires a much broader definition. The constructed meaning of national constitutional identity by legal scholarship in the absence of any case law is not a priori wrong. But it shows how legal scholarship facilitates the development of a national constitutional identity discourse.³⁰⁶ Accordingly, scholarly contributions significantly develop the meaning and scope of national constitutional identity and must be accordingly considered as a protagonist.³⁰⁷

To sum up, there are several protagonists of national constitutional identity, creating and defining its meaning and scope. While the national apex courts and the CJEU are the most important and predominant agents of interpreting and construing the meaning of constitutional identity,³⁰⁸ they only partially explain the development of identity meaning. In addition to the courts, where the CJEU plays the final role, one should not forget the legislative and executive branches. Finally, legal scholarship additionally facilitates the development and co-determines the meaning of national constitutional identity. Since all the agents together influence and shape the meaning of national constitutional identity, one must holistically observe all of them when assessing the legitimacy of claims of national constitutional identity.³⁰⁹

306 See i.e. Kos (n 154) 93: ‘the court explicitly left the question of absolute primacy open. The substantive preconditions for the transfer of sovereign rights [...] have been interpreted in different ways in academia. However, considering the inalienable right to self-determination, in exceptional cases of serious encroachment on fundamental constitutional values, the SCC *would probably adopt* its version of the BVerfG’s doctrines’ (emphasis added).

307 Cf Fabbrini and Sajó (n 15) 458.

308 See also Leonard FM Besselink, ‘Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010.’ (2012) 49 Common Market Law Review 671, 685.

309 See also Oreste Pollicino, ‘The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?’ (2010) 29 Yearbook of European Law 65, 111.

8 Deficiencies of National Constitutional Identity

This section starts by drawing parallels between national constitutional identity and the much older concept of public policy or public order. It shows how one occasionally applies both concepts interchangeably due to their similarities, but it also explores their differences and the inherent shortcoming of identity undertaking that role (8.1). It continues with national constitutional identity's potential for misuse and abuse, and it considers whether one should omit the concept altogether due to its tensions with liberal principles (8.2). Finally, it highlights the arguments of tradition, culture and history concerning the meaning of national constitutional identity (8.3).

8.1 From Public Policy to National Identity – Connections and Shortcomings

National constitutional identity is a new legal concept which has emerged as the answer to older questions. Throughout conceptual legal history, one can observe national constitutional identity in relation to other concepts addressing similar underlying tensions.³¹⁰ Concerning the multilevel federal tensions between the EU and the Member States, identity to a certain extent replaces the argument of sovereignty.³¹¹ In relation to domestic social and pre-constitutional considerations, identity resembles the old concept of public policy.³¹² This sub-section first explores the similarities and interconnectedness between these concepts. It then turns to their divergences, and critically assesses the shortcomings of identity undertaking the functions of public policy considerations.

310 Dobbs (n 27) 314.

311 Wischmeyer (n 210) 427. Albert Bleckmann, 'Die Wahrung der „nationalen Identität“ im Unions-Vertrag' (1997) 52 *JuristenZeitung* 265, 266. Cf Pernice (n 9) 195. Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 *Netherlands Journal of Legal Philosophy* 82, 92. See also Tribunal Constitucional de España, Case 1/2004 *Declaración Constitutional Treaty* 13 December 2004, paras 37, 47, 50 and 58.

312 Besselink, 'National and Constitutional Identity before and after Lisbon' (n 14) 46; von Bogdandy and Schill (n 266) 1449.

Public policy concerns so-called extra-legal considerations thereby becoming legally relevant. Public policy considerations protect the public moral, community values, and the usual forms of behaviour among the members of a particular society. In that way public policy, like national constitutional identity, protects majoritarian values.³¹³ The argument is an old one: already in Roman civil law, contractual relations lost their validity and were considered void should they contravene *good morals*.³¹⁴

Similarly to identity, public policy does not have a clear and predictable definition.³¹⁵ Tim Corthaut tried to define public policy as ‘the complex of norms at the very heart of a political entity expressing and protecting the basic options taken by that entity in respect of its political, economic, social and cultural order’.³¹⁶ According to Ghodoosi, public policy protects ‘public interest, public morality as well as public security’.³¹⁷ However, public policy is usually defined by the courts considering the context, time and specificities of a society. In other words, public policy is time and context contingent, and is constantly changing according to its society.

Some scholars argued that the public policy argument is gradually losing strength and importance in the European legal sphere.³¹⁸ Considered as a matter of ethical and moral perception, the liberalisation and secularisation of society weakened its legitimate value. Prostitution, drugs, homosexuality, nudity and other typical examples of areas of public policy or public order prohibitions are nowadays either abandoned or specifically regulated by a statute.

However, public policy still has an important role when it comes to incorporation of foreign laws and contractual agreements into the domestic legal system, namely, due to the rules of private international law. In that sense public policy considerations aim to protect the domestic legal system

313 See also Floris de Witte, ‘Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law’ (2013) 50 Common Market Law Review 1545, 1560.

314 Pacta, quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati iuris est.

315 Kanstantsin Dzehtsiarou (ed), ‘Defining European Public Order: An Impossible Task’, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge University Press 2021) 66ff.

316 Tim Corthaut, *EU Ordre Public* (New edition, Wolters Kluwer 2012) 11.

317 Bram Akkermans, ‘Public Policy (Orde Public): A Comparative Analysis of National, Private International Law, and EU Public Policy’ (2019) 8 European Property Law Journal 260, 263.

318 Catherine Kessedjian, ‘Public order in European law’ (2007) 1 Erasmus Law Review 25, 35.

against incorporation of any foreign element which would be radically at odds with the orientations and commitments of the said legal order. For instance, matrimony with a minor concluded elsewhere would not be recognized in a liberal constitutional order.³¹⁹ Surrogate motherhood and consequent adoption might be a matter of public policy consideration with different outcomes.³²⁰ Accordingly, public policy shields the domestic legal order without a comprehensive definition of its meaning. In that sense it is similar to identity argument, which enables flexibility of meaning and protects the national legal order against the supranational EU law, when the latter may redefine basic societal norms and conventions.

Besselink argued that identity claims were nothing more than national public order considerations.³²¹ Accordingly, it comes as no surprise that the CJEU occasionally understands identity and public policy as almost interchangeable concepts. For example, in the *Omega*³²² decision, what is widely considered by the scholars as an identity classic,³²³ one would search in vain for identity terminology. The CJEU omits any reference to identity, but states:

‘Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting *public policy* by reason of the fact that that activity is an affront to human dignity.’³²⁴

319 Claire Fenton-Glynn, ‘Freedom from Violence and Exploitation’ in Claire Fenton-Glynn (ed), *Children and the European Court of Human Rights* (Oxford University Press 2020) 36: ‘The domestic courts refused to recognise their marriage [...] as it was manifestly incompatible with the Swiss *ordre public*, where having intercourse with a child under 16 is a crime’.

320 Martha A Field, *Surrogate Motherhood: The Legal and Human Issues* (2nd edn, Harvard University Press 1990) 78ff.

321 Besselink, ‘National and Constitutional Identity before and after Lisbon’ (n 14) 46; von Bogdandy and Schill (n 266) 1449.

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

323 Pollicino (n 309) 94; Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) 74; Julien Sterck, ‘Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law’ (2018) 24 *European Law Journal* 281, 289.

324 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614, para 41 (emphasis added).

Moreover, in the *Coman*³²⁵ decision, concerning recognition of same-sex marriages, the CJEU directly applied public policy and national identity as two fully interchangeable concepts. The CJEU stated:

‘[E]ven on the assumption that a refusal, in circumstances such as those of the main proceedings, to recognise marriages between persons of the same sex concluded in another Member State constitutes a restriction of Article 21 TFEU, such a restriction is justified on grounds of *public policy* and *national identity*, as referred to in Article 4(2) TEU.’³²⁶

These are not the only examples. In the recent *Steiermark*³²⁷ and *La Quadrature du Net*³²⁸ decisions, one finds further connections of public policy with the last sentence of the European identity clause: namely, public policy and maintaining law and order and safeguarding internal security as national identity.

Regardless of the similarities in light of the above-cited theory and praxis, the concepts differ. First, in contrast to public policy considerations, national constitutional identity is a constitutional concept, which qualifies its standpoint, gives it its own normativity, and makes it harder to rebut. Accordingly, national constitutional identity may influence classical fundamental rights adjudication, as highlighted above. Finally, public policy considerations are by definition much more contingent: it is completely common for certain public order considerations from past decades no longer to fulfil that legal standard today.³²⁹ By contrast, national constitutional identity assumes a constitutional rank and thereby some kind of unchangeability. Moreover, while public policy openly admits that it reflects current conventions of a respective society, national constitutional identity lacks that flexibility and openness.

325 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385. See also Máire Ní Shúilleabháin, ‘Cross-Border (Non-)Recognition of Marriage and Registered Partnership: Free Movement and EU Private International Law’ in Elena Bargelli and Jens M Scherpe (eds), *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change* (Intersentia 2021) 17.

326 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, para 42 (emphasis added).

327 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.

328 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 134–138.

329 See e.g. BGH, Case XII ZB 463/13 10 December 2014.

To conclude, if national constitutional identity aims to tacitly replace or at least partially substitute for public policy considerations, that conceptual alternative entails its own challenges, as briefly highlighted above. From the other perspective, considering context and circumstances, national constitutional identity can occasionally be best understood as a substitute for public policy considerations.

8.2 Possibilities for Misuse and Considerations of Abandoning the Concept

The following sub-section highlights the considerations of some legal scholars who recently raised the question as to whether we might be better off abandoning the multifarious concept of national constitutional identity.³³⁰ On the one hand, the ambiguity of the concept and recent attempts at abuse for illiberal purposes suggest its omission.³³¹ On the other hand, one can abuse any legal concept, and in the light of the progressive European harmonization, the Member States need a legal tool to protect their essential national features.³³²

Fabbrini and Sajó argued that ‘legal scholars should abandon the fascination for this concept.’³³³ The above explored connection between national constitutional identity and the nationalist and nativist ideas speaks for this argument. Kelemen and Pech similarly suggested that national constitutional identity is inherently dangerous, and it should ‘not be released in the marketplace of ideas.’³³⁴

Other scholars, like Kovács and Scholtes, also recognize the inherent dangers of identity, but aim to develop theoretical accounts which would exclude the abusive and ethno-cultural elements of the said concept.³³⁵ Scholtes aimed to identify the various abusive avenues of the concept which might provide guidance on differentiating between the genuine and acceptable meaning of identity and its abused and misused components. In his attempt to develop an account of abusive identity claims, he identified three forms of identity misuse. On the substantive level, identity claims which

330 Fabbrini and Sajó (n 15) 472.

331 Kelemen and Pech, ‘The Uses and Abuses of Constitutional Pluralism’ (n 224).

332 Cf Wetz (n 3) 347.

333 Fabbrini and Sajó (n 15) 472.

334 Kelemen and Pech, ‘Working Paper’ (n 235) 7.

335 Kovács (n 4).

are substantively at odds with the implicit normative expectations of the constitutionalism. Moreover, his conceptual plane, the generative content of identity claims, aims to explore how the claims have come about – through politically packed courts, illegitimate constitutional drafting processes, or quite simply reaching beyond a constitution.³³⁶ And finally, a relational content of abusive identity claims explores how the identity claims are being advanced. That is, broadly speaking, how constitutional arguments provide the reasons to situate its authority, i.e. how the claims engage and relate to competing constitutional claims in good faith.³³⁷

What is common to the three views above is the awareness that the concept of national constitutional identity carries an inherent danger of being misused and abused. The possibility of misuse and abuse is not only an implicit potential, but has become reality time and time again.³³⁸ The main options between scholarly observations are thus either to abandon the concept altogether, or to delineate the scope of its meaning and the elements of its abuse in a way that would decrease the potential for abuse.

As is highlighted above, national constitutional identity serves as a federal mechanism to balance multilevel constitutional tensions. However, the concept of national constitutional identity cannot by itself provide a meaningful and sustainable balance between the progressive European harmonization and protection of national diversities. That balance must be achieved through continuous enquiries by all institutions and other agents in the respective Member States as a matter of substantive consideration, as well as due to the political agreements among Member States and the EU to find a common stance. These substantive considerations cannot be achieved via absolute and purely judicial positions of the national apex courts, simply by invoking a subject matter as identity issue.

To sum up, the abusive potential of identity claims must be recognized and closely monitored, when the Member States claim national constitutional identity. Moreover, the concept itself, subject to ambiguities and inherent dangers, cannot provide a final answer on the appropriate balance between Member States and the Union. Moreover, the said tensions would not disappear if the identity concept were abandoned. It is the underlying

336 Scholtes (n 10) 551.

337 Ibid.

338 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66; Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631, para 302.

rationale which will eventually determine the outcome of multilevel constitutional tensions in each individual case.

8.3 Identity in the Light of Tradition, History and Culture

We use the language of tradition when we aim to describe the relevance of the past for the present. Tradition ‘is the power of the past-in-the-present’.³³⁹ Martin Krygier has identified three constitutive elements of tradition: pastness, authoritative presence and transmission. Tradition stems from the elements of the past – real or imagined. But ‘the past speaks with many voices’.³⁴⁰ One must therefore decide which parts of the past ought to enter into tradition, which requires an authoritative presence. In relation to the reasons why English Law is unwritten, Maitland suggested that ‘what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts’.³⁴¹ Finally, traditions depend on connecting the past and the present, either in a formalized and institutionalized fashion as in the institutions of law and religion, or in the absence of it.³⁴²

Traditions, or more concretely, constitutional traditions are thus nothing more than connecting to the past and applying the optional elements of the past in the present. However, traditions do not equal the past, but extracting and adopting it. The following example presents an illustrative model of constitutional tradition which can bring us to different results, all in the name of constitutional tradition.

The traditional understanding of the institution of marriage was always as the union between a man and a woman. For example, in Germany the Basic Law stated, without any concrete reference to man and woman, that under Article 6(1) ‘marriage and family enjoy the special protection of the state’.³⁴³ The FCC stated that in 1949, when the respective article was

339 Massimo Fichera and Oreste Pollicino, ‘The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?’ (2019) 20 German Law Journal 1097, 1118.

340 Martin Krygier, ‘Law as Tradition’ (1986) 5 Law and Philosophy 237, 242.

341 Ibid. 249.

342 Ibid. 250.

343 German Basic Law, art. 6(1): ‘Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung.’

drafted, nobody could potentially have in mind that this norm would also include same-sex marriages.³⁴⁴ However, a different interpretation is also entirely plausible. Since marriage has always been an intimate and legal connection between two persons who are closely connected, deciding to share some parts of their life together, mutually respecting one another and sharing their affection, then it is this core which is the essence of the tradition of marriage, not the gender of it. In other words, same-sex marriage still respects the tradition of marriage.³⁴⁵

What follows from the example above? It illustrates how the argument of tradition includes the above-cited authoritative presence, which is inherently subjective. Traditions are not objective narratives which have a defined and static form. On the contrary, traditions are subjectively made connections with the past; one adopts a historical narrative of one's own choosing.³⁴⁶

National constitutional identity is often understood in the light of tradition. Tradition justifies the meaning of it. However, as indicated above, tradition cannot by itself explain decisions in the present. Accordingly, when one argues that national constitutional identity reflects the elements of (legal) tradition, that clearly signals that one authoritatively defines the identity concept by constructing the elements of the past by personal choice.

In addition, when we speak about tradition and history, we cannot refer to *an absolute* tradition and history, because every observer selects their own historical facts to carry forward into the present. Every historical observation is a particular narrative which remains highly subjective and embedded in the preconceptions of the observer. Equally, culture means ideas, social behaviour, the way of life of a social group or community.³⁴⁷

344 Daniel Toda Castán, 'Marriage Equality and the German Federal Constitutional Court: the Time for Comparative Law' (*Verfassungsblog*, 11 July 2017) <<https://verfassungsblog.de/marriage-equality-and-the-german-federal-constitutional-court-the-time-for-comparative-law/>> accessed 24 February 2023.

345 This example was mentioned by M. Rosenfeld at the Roundtable of IACL - Constitutional Identity, St Petersburg, Russia 10-13 June 2021.

346 Cf Michaela Hailbronner, 'Value Formalism' in Michaela Hailbronner (ed), *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015) 99ff.

347 Werner Delanoy, 'What Is Culture?' in Guido Rings and Sebastian Rasinger (eds), *The Cambridge Handbook of Intercultural Communication* (Cambridge University Press 2020) 17: 'culture is a multifaceted concept, which makes it hard to run a tightly unified case about it.'

There is no way to define a collective body with a single, objective narrative, because there are multitudes of dimensions.

National constitutional identity as a legal concept cannot encapsulate one history, one culture and one tradition of a given society. Yet, the terminology of history, culture and tradition appears constantly in national constitutions and Treaties. For example, the sixth recital in the Preamble to the Treaty on European Union states that the Member States respect ‘their history, their culture and their traditions’. Furthermore, Article 6(3) TEU states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States, shall constitute the general principles of the Union’s law.³⁴⁸

One should be cautious when referring to history,³⁴⁹ culture and traditions; not because they do not exist, nor to relativize their sociological role, but in order to reject the temptation to adopt them judicially as single narratives which allegedly, objectively and actively shape and influence the interpretation of constitutional law. For example, in the words of Kirchhof:

‘The Basic Law is the expression and memory of the German people (Volk) that is formed by inherited morality. As a result constitutional identity becomes open to components which refer and include pre-legal elements: the constitution relies not only on decisions, but “on cultural tradition and responsibility to reality”.’³⁵⁰

To sum up, when the apex courts determine the meaning of national constitutional identity by referring to historical narratives, cultural specificities and traditions, one cannot accept these justifications as objective and given. Rather, these arguments are a pretext and a cloak for value-based decisions, creating the meaning of identity.

348 TEU [2012] OJ C326/13, art 6(3).

349 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, para 75: ‘restrictions on the rights of free movement which would result for Austrian citizens from the application of the provisions at issue in the main proceedings are therefore justified in the light of the history’.

350 Fabbrini and Sajó (n 15) 465. See also Paul Kirchhof, ‘Die Identität der Verfassung’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts Band II: Verfassungsstaat* (3rd edn, CF Müller 2004) § 19.

9 Conclusion

Identity is a highly complex and multifarious concept which eludes clear definition and evaluation by predictable, coherent and objective criteria.³⁵¹ One of the reasons for evading clarity is because of identity's multi-layered nature and its numerous dimensions concerning its meaning and function. This complexity at the same time allows the concept of identity to be flexible, complementary and open to new meanings being ascribed to it. In that sense identity offers certain advantageous possibilities, which can also be seen as identity's deficiencies.

To explicate the many dimensions of the concept of identity, this chapter started by peeling back the onion, addressing every layer of the dilemma. First, it analyzed the meaning of national constitutional identity strictly from the EU's perspective. The first section outlined the genesis of the European identity clause from the Maastricht Treaty to the Treaty of Amsterdam, Treaty of Nice, the proposed Treaty Establishing a Constitution for Europe, to the current Lisbon Treaty. It showed how the initial programmatic diction evolved into a concrete norm regulating the relationship between the Union and Member States. Moreover, the section demonstrated how the WG V group, entrusted to investigate the issues of delimitation of competences, investigated the core national responsibilities and eventually proposed the current diction of the European identity clause by concisely omitting the second part of the core Member States' competences, the basic public policy choices and social values of the Member States. The explanatory value of the cited *travaux préparatoires* is twofold. It explained the broad application of the European identity clause by the CJEU, for example including the issue of national language, completely absent from the clause and mentioned elsewhere in the Lisbon Treaty. Furthermore, it showed how the European identity clause was never meant to be a dero-

351 Uwe Pörksen, *Plastic Words: The Tyranny of a Modular Language* (Penn State University Press 2004) 22, 26, 41; Cf Wischmeyer (n 210) 420.

gation clause which justifies a complete prohibition of the EU's measures impacting on these core areas of the Member States' responsibilities.³⁵²

The following section then explained the terminological interchangeability between national and constitutional identity and their incoherent application in theory and practice.³⁵³ While national identity alludes to sociological dimensions, usually excluded from legal relevance, the European identity clause only mentions national identities. Concurrently, the meaning of the said clause suggests something else.³⁵⁴ Moreover, national apex courts are variously and sometimes interchangeably using both terms. The section showed how the mere application of national or constitutional identity does not solve the problem of its undeterminable meanings.

The subsequent section situated the European identity clause in the broader context of the Lisbon Treaty, and investigated the recent case law developments by the CJEU as identity's inherent limits. Concretely, it showed how the EU cannot protect one value to lose another;³⁵⁵ in other words, how the respect for national constitutional identities is inherently limited by the common commitments as articulated under Article 2 TEU. Moreover, the section situated respect for national constitutional identity as a general principle of EU law,³⁵⁶ which must be read and applied only together with the other EU principles, regulations, the relationship between the EU and the Member States, in accord.³⁵⁷

Moving away from a strictly EU perspective, the chapter continued by assessing national constitutional identity claims in the light of their degree of constructiveness. It highlighted how identity can serve as a pre-emptive deterrent and sign of constructive engagement. However, its application may signal a much stronger disagreement, showing dissent and even open resistance. The section demonstrated how the level of intensity of disagreements within the multilevel constitutional orders does not necessarily correspond with the identity claims' objectives. On the contrary, a constructive

352 Matteo Bonelli, 'National Identity and European Integration Beyond "Limited Fields"' (2021) 27 *European Public Law* 557. Final Report of the Working Group V, WG V 14, CONV 375/1/02, REV 1, p. 11.

353 Faraguna, 'Taking Constitutional Identities Away from the Courts' (n 80) 499.

354 See also Schnettger (n 48) 16.

355 Case C-490/20 *Pancharevo* [2018] ECLI:EU:C:2021:296, para 101.

356 Pernice (n 9) 193.

357 Blanke and Mangiameli (n 6) 205.

engagement with the CJEU can even motivate the CJEU to change its previous position and accommodate the respective identity claims.³⁵⁸

The chapter then highlighted further multifarious functions of identity.³⁵⁹ It illustrated how identity terminology invites the so-called pre-constitutional features into the constitutional narrative. This Schmittian understanding of national constitutional identity stands at odds with liberal constitutional commitments and the protection of individual and minority rights. Moreover, identity argument may hide the majoritarian argumentation and directly influence the established constitutional adjudication, based on the protection of individual fundamental rights. The so-called *identitarian adjudication* posits identity on an equal footing with human rights, which skews and hinders the full realization of fundamental rights.³⁶⁰ Finally, one can understand national constitutional identity only as a protection of core constitutional commitments. The section showed how the said understanding carries little value in relation to EU law, since the Member States and the EU share the same basic commitments.³⁶¹

Identity is not created only by the national apex courts, although they are the primary agents, but occasionally also by others. The section illustrated the contributions of the legislature, the executive and legal scholarship, which often facilitate the relevance and development of national constitutional identity.

The last section's objective was to unveil the deficiencies of national constitutional identity. The section demonstrated the connectedness of public policy with identity and its shortcoming in potentially replacing one with another. Furthermore, it highlighted several arguments why identity is prone to misuse and abuse, and investigated scholarly appeals to abandon the concept altogether. Finally, it critically rejected the frequently made connections between national constitutional identity and the notions of tradition, culture and history, exposing how these arguments are a pretext for subjective determination of the meaning of identity.

The chapter critically exhibited many dimensions of identity – its functions, protagonists and deficiencies. The many facets and modalities of identity do not hinder the increasing popularity of the concept. Since national constitutional identity as a legal concept remains the reality of

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

359 Wetz (n 3) 39.

360 Cf Zorkin (n 246) 253.

361 Besselink, 'The Persistence of a Contested Concept' (n 93) 600.

contemporary constitutional law, the critical observations above aim at a constructive illumination of the potentials and shortcomings. The chapter's objective was to contribute to a scholarly assessment of how to conduct a proper understanding and evaluation of identity in constitutional law, and how not to.

Constitutional Identity for the EU

Against the Sisyphean Endeavour to Imagine an Identity for the EU

Things of this world are in so constant a flux that nothing remains long in the same state.

(John Locke, *The Second Treatise of Government*)

1 Introduction

What is the purpose of artificially construing the possible meanings around the conceptual conundrum of the constitutional identity of the European Union? Why would the EU need to imagine its constitutional identity? And what are the potential and real pitfalls of such an undertaking? This chapter argues against the misguided and artificial Sisyphean attempt to invent a constitutional identity for the European Union, while developing the following five considerations.

First, identity as knowing thyself.¹ As the Oracle of Delphi from Ancient Greece suggests,² knowing thyself is not an easy task. But knowing the identity of the European Union may be even more problematic, due to the various possible narratives and characteristics. Moreover, should one only understand identity in legal terms, as ‘the essential constitutional features of a legal entity’,³ then what is the purpose of identifying it for the EU? Is it to be able to compare and differentiate itself from the ‘other’? And if so, with what and for what purpose should the EU compare itself? Or alternatively, should knowing the essence of itself only serve as a symbolical strengthening of the EU’s constitutional commitments, and perhaps even limit the Member States from a potential departure from common and shared constitutional values (Section 2)?

Second, identity is a conceptual substitute for sovereignty – *nihil novum sub sole*. Since the Lisbon Treaty⁴ completely omitted the word sovereignty and introduced an obligation to respect the national identities of the Member States, conceptually the latter have somewhat replaced it. Yet, bringing the conceptual substitute for sovereignty to the level of the Union may upset the Member States, as well as imply global ambitions for the Union, which are at odds with its current constitutional design (Section 3).

1 Tímea Drinóczi, ‘Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach’ (2020) 21 German Law Journal 105, 119.

2 Robin Hard, *The Routledge Handbook of Greek Mythology* (8th edn, Routledge 2019) 146–165.

3 Gerhard van der Schyff, ‘Constitutional Identity of the EU Legal Order: Delineating Its Roles and Contours’ [2021] *Ancilla Iuris* 1, 3.

4 Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community (Lisbon Treaty) [2007] OJ C306/1.

Third, identity as a relation. In the legal sphere, identity vocabulary is generally misunderstood in its full scope. Consequently, one of the essential meanings of the word *identity* is usually overlooked when implanting the concept into the constitutional arena. Identity is not just a characteristic or a feature of a subject (uniqueness or collective sameness), but mostly a relation between a specific subject⁵ and what it is not, which is firstly *identified* and then internalized, practised and potentially rejected. Moreover, the semantics of identity reveal that its construction requires an active agent, capable of creating a relationship. Hence, application of identity as a descriptive measure is manifestly unsuitable for constitutional law, generally producing mystification, incoherence and confusion (Section 4).

Fourth, there is a deep tension between democracy and identity. Designating a subject in terms of identity implies an essential nature which is so paramount that it is immune to any potential challenge or change. Democracy, on the other hand, is open to constitutional contestation and modification.⁶ Tension between democracy and identity is, thus, inevitable, though constitutional identity often paradoxically claims to safeguard the very principles of democracy.⁷ Proclaiming and thus *conserving* a constitutional identity for the EU would potentially halt the very essence of the Union itself – its constant evolution.⁸ The EU is perpetually changing, not only with respect to its institutional design and membership but also as a matter of its *raison d'être* – towards forming an ever-closer Union. There is hardly any persuasive reason to sustain the current status quo and to immunize some of its parts from further progressive development. In addition, a designation of some norms as the real constitutional identity for the EU can introduce a hierarchy set of constitutional norms.⁹ If so, that may radically modify constitutional adjudication practices beyond the established practice and the initial intention of the Member States and the Treaties (Section 5).

5 Alexandra Troitskaya, 'Constitutional identity, and Where (and Why) to find it' (12 June 2021) <https://www.youtube.com/watch?v=pG_uNXI5y0U> accessed 24 February 2023.

6 Jakob Hohnerlein, *Recht und Demokratische Reversibilität*, vol 36 (1st edn, Mohr Siebeck 2020) 11–73.

7 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 249.

8 Consolidated version of the Treaty on European Union (TEU) [2012] OJ C326/13, art 1(2): 'the process of creating an ever closer union among the peoples of Europe [...]'.
 9 Cesare Pinelli, 'Theories Concerning the Hierarchy of Norms', *Max Planck Encyclopedia of Comparative Constitutional Law* (2016).

Finally, let us call the essential constitutional principles by their name. If one aims to declare the EU's constitutional essentials to be the EU's identity, in order to strengthen our commitments to them, there is perhaps a better approach to take. Let us simply call them by their names: human dignity, freedom, the rule of law, democracy, fundamental rights, pluralism, solidarity and equality. 'Elevating' them into an identity does not equate them with any further and more compelling normative standards. These values are, properly understood, already imperative and transcendent,¹⁰ and need to be taken seriously in their own right (Section 6).

10 John Rawls, *Political Liberalism* (Columbia University Press 1993).

2 The Oracle of Delphi

The following section challenges the notion that one can objectively determine a constitutional identity for the European Union (2.1). Additionally, the European (constitutional) identity could be construed due to its contrastive methodological narratives (2.2). Furthermore, constitutional identity is itself an evasive and disputed concept (2.3). Finally, in the absence of any clear methodological guidance, one would merely project one's own idea of constitutional identity and thus create a meaning according to one's own ideological aspirations (2.4). In addition, identity serves as a comparison, whereas the Member States and the Union share their essential constitutional commitments (2.5).

2.1 *Know Thyself*

Pythia, the famous oracle in Delphi, was consulted about the most important decisions in ancient Greece. Carved into the stone above her temple, one could read the maxim: 'Know thyself'.¹¹ Pythia knew that knowing oneself is not an easy task, since everything and everyone is constantly changing. And nothing is isolated, coherent and indivisible in itself. Thus, can one ever truly know one's own identity? So is it possible to articulate an identity for Europe, the subject of abundant and highly complex relations, achievements, nations, peoples, histories and aspirations? And, as lawyers, are we capable of determining a *constitutional* identity for the European Union?

Think of the following three perspectives regarding an identity for the Union:

- The European Union was built on the principle of a common market and four fundamental freedoms. With capital and labour intrinsically connected via the states and nations of the Union, wars and conflicts would no longer be profitable, if at all possible. Economic cooperation has brought peace and material prosperity. Henceforth, the basic con-

11 There were apparently three carved maxims: Know thyself, nothing to excess, and certainty brings insanity. See also Hard (n 2) 146–165.

stitutional identity for the Union is a liberal market, as provided for and protected in the Treaties. Everything else is simply an appendix, constitutional accessories. After all, the majority of the most important decisions are (still) taken by heads of states behind closed doors, guided mainly by the demands of the common currency and common market, notwithstanding the limitations of the Treaties. The identity of the EU is, then, not primarily linked to democracy, human rights and the rule of law, but rather the economic cooperation of the Member States to facilitate the common market and thereby the enhancement of the economic advantages it provides.

- Alternatively, the European Union would never be possible if one were simply to put together 27 nation states and prescribe them specific forms of cooperation. The very prerequisite for such a successful and unique supranational union has been European history as seen from a broader perspective: including hundreds of years of common ideas, exchanging cultures, shared literature, education, wars and peaceful trading. The perpetual movement of borders and peoples, the immense intellectual force of the Ancient Greek and Roman philosophies and ideas, the unifying political and religious authority of the Church(es) and Judeo-Christian traditions, the Enlightenment and the French Revolution have all contributed. Consequently, the constitutional identity of the EU comprises all these *European* traditions and values, based on Christianity, humanism and ideas of human dignity. As Pope John Paul II wrote: ‘In order to build Europe on solid foundations it necessarily has to be based upon authentic values, rooted in the common moral law, as inscribed in the heart of every human. [...] The Christian inspiration may turn a political, cultural and economic gathering into a community in which every European would feel at home and create a family of nations, that could be a fruitful impulse for other regions of the world.’¹² Hence, the European constitutional identity is based on (legal) values derived from genuine European religious and humanistic traditions.
- Finally, the European Union can be first and foremost seen as a *legal* community, based on the Treaties, the autonomy of EU law,¹³ and de-

12 John Paul II, *Ecclesia in Europe* (Catholic Truth Society 2003) 116, 121.

13 Theodor Schilling, ‘The Autonomy of the Community Legal Order: An Analysis of Possible Foundations’ (1996) 37 *Harvard International Law Journal* 389; JHH Weiler and Ulrich R Haltern, ‘The Autonomy of the Community Legal Order-Through the Looking Glass’ (1996) 37 *Harvard International Law Journal* 411.

veloped further through the progressive jurisprudence of the CJEU and the occasional resistance of the national apex courts. It is a community of law¹⁴ which shares the common constitutional traditions of the Member States. Accordingly, it is also a Union of principles and values,¹⁵ as currently articulated in Article 2 of the Treaty on European Union (TEU) but initially established already by the Copenhagen criteria of 1993.¹⁶ From this perspective, European constitutional identity is solely a legal concept which, arguably, does not have anything to do with any necessary connecting links of identification among the people(s) of the Union. After all, the membership of the Union is constantly changing, and there is no need for the kind of communal feeling of belonging and solidarity which is often considered a prerequisite for successful democratic participation and contestation – the component which enables and facilitates the collective self-governing of a nation state. Hidden and distanced from the political, European constitutional identity enjoys the privileges of a legal concept being determined and interpreted by the courts for reasons of adjudication of constitutional conflicts alone. Hence, the constitutional identity of the EU is considered to be solely a legal matter, articulated as essential liberal constitutional principles, as reflected, *inter alia*, in Article 2 of the TEU.

Most readers would probably subscribe to at least one of the above examples of what a potential European constitutional identity should consist of, not to mention many other possibilities which are not broached here. However, it would be categorically wrong to simply project one's own ideological preferences regarding the Union and its potential status according to one's personal (here, legal) intuition under the pretext of seemingly scientific, objective, legal, deductive interpretation.¹⁷ A lack of predictably

14 Walter Hallstein, 'Speech at the University of Padua' (March 1962): 'The European Economic Community is a community of law [...] because it serves to realize the idea of law. The founding treaty, which may not be terminated, forms a kind of a Constitution for the Community.'

15 Armin von Bogdandy, Carlino Antpöhler and Michael Ioannidis, 'Protecting EU Values: Reverse Solange and the Rule of Law Framework' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

16 European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, DOC/93/3, p 12.

17 See also Gráinne de Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) 20 *International Journal of Constitu-*

valid methods, as well as the enigmatic meaning of (constitutional) identity, should compel us to be cautious when setting off on the uncharted journey of discovering and imagining a constitutional identity for the European Union.¹⁸

2.2 European (Constitutional) Identity – Two Contrasting Methodological Narratives

The idea of articulating a European identity is not new;¹⁹ but it is certainly ambiguous. One can construe the European and consequently the European *constitutional* narrative from at least two distinctive methodological perspectives. One is closely connected with and limited to the birth of the European Union as an ‘institution’. The second narrative is more holistic and goes beyond the mere institutionalized project of European cooperation.

The European Union (as it is called today) initially connected the steel industries of the two biggest continental European powers with the objective of preventing another devastating war on the European continent or beyond. As a response to World War II, the EU project commenced with the Treaty of Paris (1951), the creation of the European Coal and Steel Community, and especially with the Schuman declaration,²⁰ declaring two European core principles: peace and solidarity; or in the words of Robert Schuman: ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de

tional Law 13, 16: ‘to ask whether there is any reason to doubt the assertion in the EU treaties that it is these values, and not others such as economic liberalization or market integration, that are core to the EU’s identity and *raison d’être* today.’

18 Federico Fabbrini and András Sajó, ‘The Dangers of Constitutional Identity’ (2019) 25 *European Law Journal* 457, 469.

19 Dirk Jacobs and Robert Maier, ‘European Identity: Construct, Fact and Fiction’ in Marja Gastelaars and Arie de Ruijter (eds), *A United Europe: The Quest for a Multifaceted Identity* (Shaker Publishing 1998); Jeffrey T Checkel and Peter J Katzenstein, ‘Conclusion - European Identity in Context’ in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (Cambridge University Press 2009) 213–227; Alex Drace-Francis, *European Identity: A Historical Reader* (Macmillan International Higher Education 2013); Viktoria Kaina, Ireneusz Pawel Karolewski and Sebastian Kuhn (eds), *European Identity Revisited: New Approaches and Recent Empirical Evidence* (Routledge 2017); Stephanie Bergbauer, *Explaining European Identity Formation* (Springer 2018).

20 The Schuman Declaration (Paris, 9 May 1950).

facto solidarity.²¹ And also: '[T]he establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.' That was the birth of Europe as a political entity, 'laying the true foundation of an organised Europe'.²²

Since the initial practical perspective, with regard to the economic terms among the six founding Member States, it has become a progressive and sophisticated political project of today with 27 members. Every new treaty or its revision has brought the Member States closer, and at the peak of its optimism, the European Union had its own draft of a European Constitution and 28 Member States. Today, the EU has its own EU Charter of Fundamental Rights, a provision in the Treaties where the basic values are articulated, and a formal commitment²³ to be open to new memberships. In principle, it is open to any state that is willing and ready to adhere to the common European constitutional values. Or at least for the 'enlargement countries' from the Western Balkans – although 'Realpolitik' demonstrates immense reservations about any further expansion at this particular stage.²⁴ However, the first identity narrative was constructed around the legal and economic story of the gradual and progressive evolution of the European Union and its current state.

The second narrative is broader. European history, in all its political, economic and historical aspects, dates back over hundreds of years; it was only comparatively recent events, like the rivalry of Germany and France, which propelled the foundation of the Union. Therefore it's worth tracing at least some of the most important milestones in Europe's intertwined narratives. Of course Ancient Greek philosophy and mythology from the 6th century BC has influenced our thinking until today; one could say that '[t]he European philosophical tradition consists of a series of footnotes to Plato'.²⁵ The Roman Empire defined and spread the application of civil law at a level of unprecedented sophistication; in fact, even today we are mostly applying the same rules and principles as developed by the Roman

21 Ibid.

22 Joint Declaration of the Ministers signatory to the Treaty establishing the European Coal and Steel Pool (18 April 1951).

23 European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, DOC/93/3.

24 See the political reservations concerning Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Kosovo and Serbia.

25 Alfred North Whitehead, *Process and Reality* (Free Press 1978) 39.

jurists.²⁶ In the 6th century AC, in the Eastern Roman Empire, Justinian the Great codified a collection of fundamental jurisprudence in the *Corpus Iuris Civilis*, considered to be the encyclopaedia of the writings of the Roman jurists, and the foundation of the Western civil legal tradition. The oldest university in the world, the University of Bologna (founded in 1088), first taught Justinian's code, and it remained the dominant centre for law studies through the High Middle Ages. Then, the Napoleonic Code, mostly still in force, was the next biggest pan-European project with its attempt to modernize and defeudalize the member countries; it had vast influence throughout the Napoleonic Wars, and is considered one of the few documents to have influenced the entire world.²⁷

But there are many additional European narratives which have strongly impacted and connected Europe: the role of the Church and religion in particular. But it does not conflict with Europe's own identity building, as the writings of Erasmus of Rotterdam convey: he wrote in the *Querela pacis* (1521): 'How very wrong this is! A geographical name of no importance divides them... In earlier times the Rhine divided the French and the Germans, but it does not separate one Christian from another. The Pyrenees separate Spaniards and Frenchmen, but they do not undo the communality of the church. The sea flows between the English and the French but can in no way split the unity of faith.'²⁸

Furthermore, some authors argue that the fierce religious wars following the Reformation and the period of Westphalian 'sovereignty' created the modern myth of a nation state,²⁹ which continues to remain until today the predominant political entity.

Finally, it cannot be overemphasized how the era of the Enlightenment, with the French and American Revolutions and nation building, have fundamentally changed Europe. The principles of individual freedom, solidarity and equality, even if de facto at first only for some, established the values which have remained our inspiration and commitment to this very day. The

26 Reinhard Zimmermann, 'Roman Law in the Modern World' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press 2015) 452–80.

27 Robert B Holtman, *The Napoleonic Revolution* (Louisiana State University Press 1981).

28 Desiderius Erasmus, *The Complaint of Peace. Translated from the Querela Pacis (A.D. 1521)* (The Open Court Publishing Co 1917) 60.

29 William T Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (1st edn, Oxford University Press 2009) 142–80.

will of the people, as expressed through and via the notion of a nation, has secured the highest legitimacy, and remains the only and the highest authority even today.

In addition, the Bill of Rights (1689), the Declaration of the Rights of Man and of the Citizen (1789), and finally, after two shattering world wars, the Universal Declaration of Human Rights (1948) are ground-breaking documents, exhibiting the political achievements of their time. Despite opposition, they have all significantly influenced and co-shaped the self-image that we hold of ourselves today, both politically and legally.

These aspects of European history, along with gradual and mutual integration, are crucial to constructing European (constitutional) identity. But equally one could debate to what extent one should include or omit them when defining the *legal* aspect of constitutional identity.

To sum up, both narratives are not mutually exclusive. But is there a clear answer as to which one is stronger? Or what kind of combination of them? For they surely impact on one another. But within the scope of constitutional law, what kind of role do these historical, political, philosophical and economic aspects play in the anticipated endeavour of articulating a constitutional identity for the European Union? There is no absolute methodological approach as to how to define a constitutional identity for the Union.

2.3 (*Constitutional*) Identity as an Evasive Concept

An alternative approach to defining a constitutional identity for the EU is to scrutinize scholarly theoretical accounts and the national jurisprudence of the Member States – containing the arguments of national constitutional identity and defining the meaning of constitutional identity accordingly. Subsequently, one would simply apply such a definition to the Union.

Yet, the survey of claims of national constitutional identity among the Member States exhibits quite diverse case law, as explicated in Chapter 3: from identity claims which are in deep contrast even with basic liberal commitments,³⁰ to the extra-legal arguments of culture and history.³¹ Constitutional identity can be a peculiar and idiosyncratic interpretation

30 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 66; Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534.

of fundamental rights,³² or a general commitment to human rights and democracy.³³ It can be a different name for sovereignty,³⁴ or an argument as to how to legalize the political question of the scope and intensity of the European integration process.³⁵ Finally, national apex courts may adhere to identity argument simply because it gives them flexibility to extend their competences against EU law, due to its conceptual vagueness. As argued by Fabbrini and Sajó, once 'identity is left to the constitutional courts, the scope, content and sphere of applicability becomes a matter of identity conjecture'. '[I]ts application becomes unforeseeably and easily arbitrary in the hands of constitutional judges.'³⁶

Henceforth, there is little we can learn from the Member States concerning a potential all-encompassing definition and content for the concept of constitutional identity. Due to case law, one is almost more confused than at the beginning of the journey. Is constitutional identity just the most essential 'DNA' of the political system? Is it the essentials of political community, like the principle of democracy, the rule of law, human rights, solidarity, welfare state and the prohibition of discrimination? One could call these 'essentials' a constitutional identity.³⁷ Although, if every Member State were the same, there would be no need to claim an identity. Is constitutional identity then something unique, something which makes every Member State a special and idiosyncratic case? A way to differentiate itself from others? Or the other way around, is the aim of identity to include everyone who shares the same constitutional identity?

31 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.

32 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien (Sayn-Wittgenstein)* [2010] ECLI:EU:C:2010:806; Case C-42/17 *Criminal proceedings against M.A.S. and M.B. (Taricco II)* [2017] ECLI:EU:C:2017:936.

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

34 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon Treaty* 24 November 2010, pp 23, 38, 41.

35 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 249, 252.

36 Fabbrini and Sajó (n 18) 471.

37 Daniel Sarmiento, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds), *National Constitutional Identity and European Integration*, vol 4 (Intersentia 2013) 177ff, 187.

Some scholars have called the different faces of identity *sameness*; others have defined identity as *differentiation*.³⁸ But then again, is constitutional identity just the peculiar and special, context-specific, and locally sensitive *interpretation* of the shared values of liberal constitutionalism? Is constitutional identity only a unique understanding of *universal* human rights in a concrete case?³⁹ Or is constitutional identity the fragments which are within the scope of common values, but completely new and different, with no variation among other Member States? Or, after all, all of the above?⁴⁰

As already highlighted in Chapter 3, the Aristotelian understanding of identity conflates national identity with the identity of the polis, which no longer corresponds to contemporary liberal understanding of a state and liberal constitutionalism.⁴¹ Francis Fukuyama argued that national identity covers both legal and sociological aspects of a state. It is embodied in formal laws and institutions, in language, but it also extends into the realm of cultures and values, the stories that people tell about themselves and their shared historical memories.⁴² J. H. H. Weiler wrote that ‘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’.⁴³ Or even more poetically, in his influential book on constitutional identity, Jacobsohn argued that ‘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

38 Michel Rosenfeld, ‘Constitutional Identity’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 762–66.

39 Against this view, see e.g. Monica Claes, ‘National Identity and the Protection of Fundamental Rights’ (2021) 27 *European Public Law* 517, 517.

40 See also Jürgen Habermas, ‘The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship’ (1996) 9 *Ratio Juris* 125; Mattias Kumm, ‘The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History’ in Helle Porsdam and Thomas Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities*, vol 3 (De Gruyter 2012) 323.

41 Aristotle, *The Politics of Aristotle* (Ernest Barker tr, Oxford University Press 1962) 99.

42 Francis Fukuyama, ‘Why National Identity Matters’ (2018) 29 *Journal of Democracy* 5, 8.

43 Joseph HH Weiler, ‘On the Power of the Word: Europe’s Constitutional Iconography’ (2005) 3 *International Journal of Constitutional Law* 173, 184.

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.⁴⁴

Considering the varying definitions above, it seems to me that the methodology of transferring the meaning of constitutional identity from the various theoretical accounts as well as from national examples to the supranational EU level does not bring us a single, uncontestable result. For there is simply no unified, coherent and persuasive meaning of national constitutional identity.⁴⁵

2.4 An Endeavour of Numerous Projections – Following Intuition and Creating Meaning

If neither scholars, nor the national apex courts and the Court of Justice of the European Union (CJEU) have come up with a clear and unambiguous definition of constitutional identity, is it viable to pursue the aim of articulating a European constitutional identity?

There are still other avenues of pursuit. According to Faraguna, the main pillars of constitutional identity for the EU are the principles of primacy of EU law and direct effect.⁴⁶ For Calliess and van der Schyff, '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'.⁴⁷ Or constitutional identity as essentials, which are not and cannot be subject to change.⁴⁸ Or alternatively, the constitutional identity of the Union is the common and shared constitutional traditions or values of

44 Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 7.

45 Martin Belov, 'The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States' (2017) 9 *Perspectives on Federalism* 72, 79. See also François-Xavier Millet, 'Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way' (2021) 27 *European Public Law* 571.

46 Pietro Faraguna, 'Constitutional Identity in the EU—A Shield or a Sword?' (2017) 18 *German Law Journal* 1617, 1624.

47 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.

48 About the account of unchangeability, see Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 18 *German Law Journal* 1595.

all its Member States. Or else the constitutional identity of the Union will rather be developed and articulated by the CJEU, as the recent application of identity terminology by the CJEU indicates. ‘The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.’⁴⁹ Or again, this time in a negative sense, the constitutional identity of the Union, as it differentiates itself from the other ideological and political regimes in the world, is one where individuals are not the supreme authority of legitimate power, but one where democracy (if at all) is exercised together with the freedom of press and respect for minorities and human rights.

These are but a few projections which can be more or less legitimately ascribed to the identity concept. For the conception still lacks an absolute theoretical and normative account, which would be generally shared among legal scholars and supported by case law practice.⁵⁰ But as indicated above, one can go further, beyond the alleged limits of strict legal confines. European constitutional identity could be construed around both fundamental freedoms and the common market. One could plausibly make the case for this and evaluate the *constitutional* case law of the CJEU with an economic and market application to human rights and other constitutional principles. This might pacify the German Federal Constitutional Court (FCC) and its *Solange* jurisprudence,⁵¹ or so the argument goes. So a cynical projection could articulate the *constitutional* identity of the Treaties as the practical advancement of the market and the preservation of some of the geo-strategic powers, which only a select few of the Member States could boast in the past.

The current dilemma is threefold. First, if one is to imagine a constitutional identity for the European Union, whom would that concern? The scholars, the CJEU, or rather the Member States as the ‘Masters of the Treaties’? Furthermore, according to what kind of methodology? As we have seen, the meaning of constitutional identity cannot be straightforwardly extracted from the judicial practices of the national apex courts, nor

49 Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para 145.

50 Fabbrini and Sajó (n 18) 471.

51 BVerfGE 37, 271 *Solange I* 29 May 1974. See also Monika Polzin, *Verfassungsidentität*, vol 272 (1st edn, Mohr Siebeck 2018) 199–209.

from the CJEU.⁵² Second, would that endeavour not necessarily privilege a specific normative projection of the observer on the Union, an action which is predominantly political by nature?

Finally, is the articulation of a constitutional identity for the European Union a legal or a political task? Does ‘legalization’ by the apex courts turn disputed political issues into a legal matter?⁵³ Or the other way around – does the legal intervention of articulating constitutional identity for the Union rather politicize the issues, which beforehand were not on the political agenda as matters of political dispute?⁵⁴ In my opinion, one should avoid both avenues, regardless of which of the two potential interpretations is analytically better suited.

2.5 Shared Constitutional Traditions – Comparison and Differentiation

Let us assume, even if just for the sake of argument, that the constitutional identity of the European Union has the following meaning: the European Union as a community of values (*Wertgemeinschaft*)⁵⁵ in the light of recent case law of the CJEU. According to the CJEU,

‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.’⁵⁶

52 Calliess and van der Schyff (n 47). Even the recent case law of the CJEU which applies the terminology of identity avoids connecting it with ‘constitutional’ or ‘national’. See Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para 145.

53 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

54 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

55 Christian Calliess, ‘Europa als Wertgemeinschaft — Integration und Identität durch europäisches Verfassungsrecht?’ (2004) 59 *JuristenZeitung* 1033; Armin von Bogdandy, ‘Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States’ in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer 2021) 73–97.

56 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

These values have an important feature – they are ‘common to the Member States’:⁵⁷ human dignity, freedom, democracy, equality, the rule of law, respect for human rights, protection of minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. All these values are concurrently the values of the Member States and the Union.⁵⁸ Consequently, the constitutional identity of the European Union is the same as the constitutional identity of the Member States. That follows basic logic. However, alas, that cannot be; something in this equation must be wrong?

The function of identity usually serves to create a distinction between *I/we* and *they*. If one knows thyself, then one is able to see the differences as well as the similarities in relation to the other. The same identity of the subjects connects them, and it also divides them in relation to everybody else who does not share the same identity. In other words, identity serves as both comparison and differentiation.⁵⁹

In the European constitutional context, the (national constitutional) identity argument has the same role. Moreover, the very reason why identity was, and perhaps still is, celebrated so much is the conciliatory role that it might have in the light of potential conflicts among the heterarchical constitutional orders, national and supranational,⁶⁰ in the light of constitutional pluralism.⁶¹ It was a promised tool which would have the capacity to

57 TEU [2012] OJ C326/13, art 2.

58 The meaning of values and principles should not be understood in Habermasian sense (Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New edition, Blackwell Publishers 1997) 255ff.), where the values as opposed to principles lack the legal normativity, but rather as similar and interchangeable concepts in the sense of Alexy (Robert Alexy and Julian Rivers, *A Theory of Constitutional Rights* (Oxford University Press 2009) 86ff, 91, 378.).

59 Faraguna (n 46) 1632.

60 Anita Schnettger, ‘Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System’ in Christian Callies and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 16; Giacomo Di Federico, ‘The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards’ (2019) 25 *European Public Law* 347, 378.

61 Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond*, vol 14 (Hart Publishing 2012); Matej Avbelj, ‘Pluralism and Systemic Defiance in the EU’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford University Press 2017) 44–61; Mattias Kumm, ‘Rethinking Constitutional Authority: On the Structure

articulate important constitutional issues and bring them to the fore in the frame of engagement. Why? Because a national constitutional identity is inherently a *national* matter, subject to determination solely by the respective Member State and its (judicial) institutions, but at the same time subject to evaluation and potential acceptance by the CJEU in the light of its duty to respect national identities; naturally, weighted and balanced with all the other relevant principles and rights in the respected situation. Or to put it simply, the identity tools were the doors between the supranational and national constitutional systems for the rare and exceptional circumstances when unforeseeable constitutional conflicts might arise.

From that functional perspective of identity argument, one can critically reflect on the current endeavour to articulate the constitutional identity of the European Union from two viewpoints: from the perspective of sameness, and from the perspective of distinctiveness. But both perspectives are inherently problematic.

The former perspective is the question of sameness in an inwards direction. In the light of the above assumed fundamental values pursuant to Article 2 TEU, as the assumed constitutional identity for the EU, there is simply no differentiation among the Member States and the Union. The value of the European constitutional identity for the purpose of active engagement with the potential differences among the heterarchical constitutional systems within the EU is therefore considerably limited; except in one scenario, where a Member State would distance itself from the fundamental principles of liberal democracy. This scenario might indeed slowly become a painful reality.⁶² This might even be the underlying reason for the scholarly attempts to create a European constitutional identity. However, such a ‘Reverse *Solange*’⁶³ against the ‘rouge State’ requires, in my opinion, more than a scholarly account of constitutional identity. It needs a robust and fully transparent mechanism, as foreseen in the Article 7 TEU⁶⁴ procedure. The political sensibility to ‘punish’ one of your own is just too

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) 39ff.

62 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.

63 ‘Reverse *Solange*’, see von Bogdandy, Antpöhler and Ioannidis (n 15).

64 Leonard Besselink, ‘The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of*

gargantuan to include in a scholarly notion like identity, as will be further suggested in the last section.

The second perspective, distinctiveness, is construed in an outwards direction. The constitutional identity of the EU, as liberal fundamental principles and values, must be contrasted with the actuality of the regimes, states and political actors which are pursuing different ideological commitments: religious, autocratic, communistic, monarchic, military, etc. It is in that sense that the EU may exhibit its distinctiveness. Hence the question: To what extent do European values limit and guide the EU when it conducts, trades, communicates, and acts with others? This question opens up a completely new avenue of exploration, which exceeds the scope of this chapter. But probably in order to answer this question, one would first have to define the constitutional identity of the Union.

To summarize, even if we agree on the most apparent definition of the constitutional identity of the European Union, namely the shared fundamental values as articulated in Article 2 TEU, that in itself still does not prove of benefit to the engagement relationship between the Member States and the Union, as well as with others.

EU Law and Values: Ensuring Member States' Compliance (Oxford University Press 2017).

3 Identity as Conceptual Substitute for Sovereignty – *Nihil Novum Sub Sole*

The underlying issue behind constitutional identity is firstly explored through conceptual history (3.1). Furthermore, sovereignty has not been fully replaced, but rather used together with identity, either as a substitute or an addition (3.2).⁶⁵ Finally, applying the concept of sovereignty to the level of the European Union might imply neo-colonial delusions and create tensions with the Member States (3.3).

3.1 Conceptual History

The underlying issue behind the (new) conception of constitutional identity is essentially an old and well-known issue: the quest to justify and maintain the supreme importance of the political order in relation to others, and at the same time the necessary coordination of and commitment to essential cooperation, constitutional conflict solving and solidarity. The story is as old as the political systems.⁶⁶

The advent of the rhetoric of national constitutional identity in the last ten years⁶⁷ has only reframed and conceptualised the underlying problem differently.⁶⁸ Ergo, *nihil novum sub sole*.

The first attempt to develop a concept of the respective multileveled constitutional structures was undertaken by the ECJ: as a simplified vision that all constitutional orders of the Member States would simply fall into the ideal, geometrical pyramid of norms; a perfect Kelsenian monistic order,

65 Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 Netherlands Journal of Legal Philosophy 82, 92; Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 Archiv des öffentlichen Rechts 415, 427.

66 See also 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) 219.

67 Fabbrini and Sajó (n 18) 471.

68 Weiler (n 43) 173–84.

where EU law would have undeniable primacy and supremacy. The push was strong enough, because it was built on the practical implications of (dis)functionality, where the EU norms remained only as a ‘buffet’, an open invitation to freely choose and select. Every Member State would take what it pleased and when it pleased, and there would be no common, effective, binding rules across the Union.⁶⁹ The idea was in principle accepted by the Member States, but it soon became too absolute, considering the early and underdeveloped constitutional design of the Union.⁷⁰

Henceforth, the apex courts of the Member States have asserted an alternative approach: partially because they were afraid of the ever-increasing competence gain of the Union through progressive adjudication, and partially due to the fear that the national highest courts would consequently no longer be the most important judicial actors; or would at least have to share the highest judicial powers. The Union was therefore alternatively interpreted, and thus reduced, to be the subject of the Member States, *Herren der Verträge*, which in itself does not possess any legal autonomy and democratic legitimacy. It is a derivative structure, which is fully subordinated to the sovereign control of the Member States; with the emphasis on the principle of sovereignty.

But the Member States (and their apex courts) have forgotten about the nature of sovereignty, which is not a black-or-white concept with solely two categories, having it or not, but rather a linear conception: a concept where the degree of its realization always correlates to normative and factual circumstances; a concept which cannot be blind to the fact that nobody is alone in this world, and that without the principle of *pacta sunt servanda*, no fair cooperation is possible.

Accordingly, the Union could not accept this conceptual alternative either. Disrespecting the primacy would severely endanger the legal order of the EU, its *raison d'être*, which could become an existential problem for the

69 Case 26/62 *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (van Gend en Loos)* [1963] ECLI:EU:C:1963:1; Case 6-64 *Flaminio Costa v E.N.E.L. (Costa ENEL)* [1964] ECLI:EU:C:1964:66.

70 Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Mattias Kumm, ‘How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law’ in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (Oxford University Press 2011).

Union. It is not a coincidence, after all, that throughout the 145 pages of the Lisbon Treaty, the word sovereignty is not mentioned a single time.

Public international law demands compliance with freely undertaken international obligations, regardless of inner constitutional requirements, which leaves the States with only two options: to withdraw, or to change their national constitutional requirements in order to achieve compliance with international law. Not to mention that the nature of the Union goes far beyond those of any international organization.⁷¹ The autonomous legal system of the Union, the Union's foundations of shared constitutional traditions, and its democratic features, although with no doubt still many shortcomings, are demanding more than just compliance with the Treaties. The Treaties have become *constitutionalized*⁷² and they are directly applicable across every Member State, in parallel to national constitutions and within the scope of the conferred competences.

While accepting this, the only questions remaining are who has the last word; the concerns of the ultra vires dilemma; and the refusal to confer on the Union the power to determine its own competences, the so-called *Kompetenz-Kompetenz*.⁷³ But, as the FCC correctly stated in the *Honeywell* decision,⁷⁴ the Member States can only refuse to comply with EU law should the violation of conferred competences appear *manifest* (obvious and not a question of reasonable legal disagreement), structurally significant, and only after they engage into a dialogue with the CJEU concerning the respective subject matter, issuing preliminary reference proceedings.

Finally, the alternative conceptual attempt to navigate the heterarchical constitutional relationships was the identity concept: praised at the begin-

71 Neil Walker, 'Post-Constituent Constitutionalism? The Case of the European Union' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 247–67.

72 Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press 2006) 192–197; Maurizio Arcari and Stefania Ninatti, 'Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights' Case Law' (2017) 11 Vienna Journal on International Constitutional Law 11.

73 Markus W Gehring (ed), 'Ius Obstacles to European Constitutionalization', *Europe's Second Constitution: Crisis, Courts and Community* (Cambridge University Press 2020).

74 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

ning⁷⁵ as an engagement mechanism that would bring the two misleading perspectives together, away from absolute primacy, but also away from the complete control of the Member States. And in the light of heterarchical constitutional pluralism, which is only *shallow* and based on the basic common commitments, it would promise to bridge the constitutional systems in a unique and context-sensitive way.

3.2 Sovereignty and Identity Together

The engagement tool of (constitutional) identity has yet to fulfil its potential promise adequately; perhaps because the concept never had any comprehensive meaning which would be subject to a clear definition; or because it was too often applied in *mala fide*; or rather, due to the reserved and quite cautious adjudications of the CJEU, it did not dare to embrace the term and define its limits. Be that as it may, the Member States have slowly realized that identity vocabulary might be worth a shot, but also it has only rarely been picked up by the CJEU anyway. As a consequence, they have started to identify other vocabulary and other concepts, notably the notion of sovereignty, all with the aim of being successful in claims to be allowed to apply EU law. Or as Fabbrini and Sajó wrote, the use of constitutional identity ‘signals that certain courts uttering “identity” are really reclaiming sovereignty’.⁷⁶

The Polish Constitutional Court, in its *Lisbon* decision, simply merged the significance of constitutional and systemic identity with the sovereignty of the Member States, while allegedly summarizing the common characteristics of the other national apex courts’ adjudications.⁷⁷ The Lithuanian Court connected protection of the state language with the preservation of the nation’s identity, which, inter alia, ensures the expression of national sovereignty.⁷⁸ The Hungarian Constitutional Court stated that ‘Hungary

75 Constitutional identity as a tool of convergence. See François-Xavier Millet, *L’Union européenne et l’identité constitutionnelle des États membres* (Lextenso editions et Karine Roudier 2013) 239–56.

76 Fabbrini and Sajó (n 18) 471.

77 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010.

78 Case C-391/09 *Małgożata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others (Runevič-Vardyn)* [2011] ECLI:EU:C:2011:291, paras 84, 86; Lithuanian Respublikos Konstitucinis Teismas, Case 14/98 *Name Spelling* 6 November 2009.

can only be deprived of its constitutional identity through the final termination of its sovereignty [...] Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.⁷⁹ Additionally, apart from the specific identity review in France, the French Conseil examined the compatibility of the EU treaties with the French Constitution according to the criterion of ‘the essential conditions for the exercise of national sovereignty’:⁸⁰ a condition which refers to matters which limit national sovereignty, such as monetary policy, immigration, foreign policy, defence; plus any condition that also limits national sovereignty in procedural terms, such as for example qualified majority voting.⁸¹ Similar is the Danish example, where the Danish Constitution (subject to potential change) limits the scope of transfer of sovereignty, which is in practice then concretely articulated by the legislative branch, stating specific exemptions from European integration: namely security, defence, criminal law, migration and asylum, citizenship, and fiscal policy, which can all be understood as matters of core national sovereignty, but in the words of Helle Krunke also as the expression of national constitutional identity.⁸² Furthermore, the Czech Constitutional Court in the *Lisbon* decision understood the identity of the Czech Constitution in relation to the limited transfer of sovereignty to the Union.⁸³

Finally, the German FCC similarly developed the notion of the European Union as ‘an association of sovereign states (*Staatenverbund*)’, which can only remain *sovereign* by retaining specific essential areas of national control within a nation state. The guarantee to remain sovereign, according to the FCC, is even reflected in the Treaties, pursuant to Article 4(2) TEU. Concretely, the German legislature has to claim control over substantial and procedural criminal law; a monopoly on the use of force by the police

79 Hungarian Magyarország Alkotmánybírósága, Case 22/2016 (XII. 5.) *Refugee Allocation* 5 December 2016, para 67.

80 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) 139.

81 Ibid.

82 Helle Krunke, ‘Constitutional Identity in Denmark’ in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 132.

83 Czech Ústavní Soud, Case Pl. ÚS 19/08 *Lisbon Treaty* I 26 November 2008, paras 107–109.

and the military (war and peace); taxation, public revenue, expenditures and fiscal decisions; social policy considerations or welfare; and culture, education and religion.⁸⁴

The examples above demonstrate that the argument of identity often share the space with sovereignty; sometimes as an additional element, other times as a substitute. Henceforth, one cannot think of (national constitutional) identity without an awareness that many apex courts have already made substantial steps either to connect the concept with national sovereignty, or even to replace the sovereignty principle with identity vocabulary, while addressing the same underlying challenges.

3.3 European Sovereignty and Neo-Colonial Delusions

What would happen if we assumed that the connection between sovereignty and identity, as depicted above, continued to exist even when construing European constitutional identity? Would that not in turn award European sovereignty to the Union? And if so, how would that impact on the relationship between the Union and the Member States?⁸⁵

The argument will be explored from two perspectives. What does it mean for the EU to assume its own sovereignty in a legal sense? Moreover, how can this rhetoric bring about imperial tensions from a political perspective?⁸⁶

If constitutional identity is nothing other than a different pretext for sovereignty, then imagining European constitutional identity logically assumes its sovereignty. The European legal order is already legally estab-

84 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, paras 249, 252.

85 See also Adam Tomkins and Damian Chalmers (eds), 'Sovereignty and Federalism: The Authority of EU Law and Its Limits', *European Union Public Law: Text and Materials* (Cambridge University Press 2007) 196ff; Richard Bellamy, 'Sovereignty, Republicanism and the Democratic Legitimacy of the EU' in Richard Bellamy (ed), *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019) 83; Willem T Eijssbouts and Jan-Herman Reestman, 'Editorial: European Sovereignty' (2018) 14 *European Constitutional Law Review* 1: 'Emmanuel Macron, then still only a candidate for the French presidency, seized the opportunity to lay out his plans for building 'A Europe of Sovereignty'. In an op-ed article in the Financial Times two weeks later, he was even more outspoken: 'Sovereignty has become the great cause of our time.'

86 Bruno de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' in Neil Walker (ed), *Relocating Sovereignty* (1st edn, Routledge 2006).

lished as autonomous,⁸⁷ and there is a close and complicated link between autonomy and sovereignty.⁸⁸ But what would the creation of European sovereignty mean? Is it that the EU could no longer give away some of its attained competences and powers, if European integration in the future took the road back to a more disconnected and loose cooperation? Or that it must have the power to determine its own powers, the *Kompetenz-Kompetenz*?

The European Union has the legal subjectivity to be the holder of rights and obligations in the public international sphere. Would the notion of sovereignty increase the power and legitimacy of the Union? Would it facilitate relationships with other international subjects? Would it enhance the current integration process?

And in turn, how would the Member States, the *Herren der Verträge*, respond to this notion? The Union does not have its own territory, its Member States are constantly changing, and European citizenship has only an auxiliary nature. Yet, the Union assumes to have constitutional characteristics resembling the sovereignty of a state.

As Mattias Kumm argued, thinking of the European Union in terms of 'Legal Monism',⁸⁹ state-developed conceptions would seriously undermine the purpose and nature of the Union as it *is* and as it *ought to be*. However, can one avoid that trap if one is determined to summon identity vocabulary to describe the Union? Can constitutional identity on the level of the Union be completely detached from the underlying sovereignty concept, which constitutional identity is only half-heartedly trying to replace?

In addition, sovereignty assumes a certain scope of independence. It assumes its own power. And since it is clear that in the 21st century the European countries wield only a small and almost insignificant reflection of their previous global influence, often obtained due to dubious moral and legal standards, and even the biggest members can no longer independently shape global politics and economy, then the European Union can at least

87 Joseph HH Weiler and Ulrich R Haltern, 'The Autonomy of the Community Legal Order-Through the Looking Glass' (1996) 37 Harvard International Law Journal 411.

88 Christina Eckes, 'The Autonomy of the EU Legal Order' (2020) 4 Europe and the World: A Law Review 1.

89 Kumm, 'How Does European Union Law Fit into the World of Public Law? Costa, Kadi, and Three Conceptions of Public Law' (n 70) 130; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 Indiana Journal of Global Legal Studies 605.

partially correct that picture. The Union can lend sufficient size and capacity to warrant a say in the world once again.

But that should not be the case, in any possible way: neither the *raison d'être*, nor the by-product of European integration. And every time that people talk about Europe losing influence, or wanting to (re)gain a primary seat among the big powers once more, the EU has been instrumentalized as a vehicle for neo-colonial delusions, expressed only in a different form. Equally, the argument for imagining European constitutional identity and underlying European sovereignty follows the same distorted narrative; instead of its true path of simply engaging with fundamental rights, the rule of law, and democracy from within.

4 Identity as a Relation

According to Newman, ‘We are all safer when language is specific; it improves our chances of knowing what is going on.’⁹⁰ In brief, language matters. If jurisprudence were to be more like a natural science, perhaps we could get away without words, dealing solely with numbers and symbols. Yet, legal science is intrinsically connected with language and its interpretation. Hence, one must first determine the meaning of a legal term in order to use it justly.

But what is the meaning of a legal concept? As Danny Crane famously put it: ‘The Constitution says whatever the Supreme Court says it says.’⁹¹ That is certainly true. But words still have meanings on their own. Without words, the courts would have no means to articulate what the given words are supposed to mean. In reality, we can discuss H.L.A. Hart’s ‘vehicles in the park’⁹² problem as long as we please, but one fact remains: a common, regular car is definitely included under the definition of ‘vehicles’. In other words, even in the world of legal language, where everything can be disputed and misinterpreted, some basic ‘rules of gravity’ cannot be denied.

This brings us to a discussion about the meaning of identity and its transposition in the era of identity politics, from the social and psychological spheres into constitutional law. Despite the courts and legal scholarship trying to imagine and artificially construe the *legal* meaning of (constitutional) identity, the merciless rules of gravity have the last word, meaning that certain content of the original meaning of identity cannot be ignored. For it is not the creation of new meanings that bewilders me, but rather the purposeful ignorance of a discernible core of identity.

Hence, I put forward an argument that, due to its intrinsic original meaning, the use of identity vocabulary regarding constitutional identity for the European Union misguides and convolutes such efforts. First, be-

90 Edwin Newman, *A Civil Tongue* (1st edn, Bobbs-Merrill Co 1976).

91 Susan Dickens and David E. Kelley, ‘*Dances With Wolves*’: Boston Legal (6 October 2008) Season 5, Episode 3.

92 HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Review 593, 607.

cause identity is a relational and not descriptive concept (4.1).⁹³ Second, an idea such as the European Union, as an identifying subject of the many, cannot be objectively and accurately articulated according to just one narrative (4.2). Lastly, an identity concept is never single, but actually comprises a chord of multitudes (4.3).

4.1 Identity as Relational, not Descriptive

Identity is a relational concept.⁹⁴ And that has two distinctive consequences: firstly, it requires an active agent that is capable of creating a *connection*; and secondly, identity is the connection itself, the belonging, rather than the identifying subject matter.⁹⁵

Two small examples can illustrate this point. If one were to say: I have German and Christian identity, the identity would not be the Federal Republic of Germany or Christianity itself. Rather, it would be the connection that one is able and willing to make to the mentioned subject matter. German identity is not Germany itself; it is the relation to Germany. Henceforth, an identity concept is not simply a matter that one can describe and depict, but rather a relation to a specific matter of identification.

Or again, what is the identity of a particular car? It may be diesel, red, with luxurious leather seats and a rearing horse logo on the bonnet. You might confidently say it's a Ferrari, but the answer would be wrong. A car has no identity. It has a name, one can describe its main features, and one can even relate to it. But the car itself cannot: it is not an agent, it cannot identify itself with anything, it is not capable of creating an active connection.

Arguably, an identity concept cannot be used as a substitute for descriptive endeavours with the aim to characterize the subject. A constitution has no identity, because it is not capable of creating a relation. Constitutional identity could only be, theoretically, a Habermasian constitutional

93 See also Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 37: 'the subject is defined not in relation to its objects, but in terms of its interaction with other subjects.'

94 Christopher JF Williams, 'Is Identity a Relation?' (1979) 80 *Proceedings of the Aristotelian Society* 81.

95 See also Anna Śledzińska-Simon, 'Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland' (2015) 13 *International Journal of Constitutional Law* 124, 124.

patriotism (*Verfassungspatriotismus*),⁹⁶ which would describe the identity of the respective constitutional subjects of those who identify themselves with the constitution. But to the best of my knowledge, no one has tried to ascribe the meaning of constitutional identity in this manner. Alternatively, a constitution could articulate the national identity of the people. But then we should be talking about *national* identity as potentially *described* in the constitution. But that meaning has even less sense when one is trying to describe the common identity of the peoples of 27 nations. The conventional assumption of constitutional identity rather refers to the constitution, which has its own identity, like that of a Ferrari.

Accordingly, the use of the word identity when *describing* a constitution, a lifeless legal text, creates confusion and misleading expectations. It ignores the basic gravity rule that the core meaning of identity requires an *agent*, one capable of creating an active *relation*.

4.2 Identified Subject Matter as Idea or Narrative

When one identifies with a subject matter, the subject matter inherently influences the identifying agent in turn – somewhat like a circle. The identity relation is not just *liking* the subject matter, but partially, and to a certain degree, rediscovering the identified subject matter in some form also in itself.

The situation however changes when the identified subject matter is no longer in a materialized form, but represents an idea or a narrative.⁹⁷ The identified idea is then adopted by the agent as its own version. In a society of many individuals, that process is multiplied, and suddenly one has the feeling of belonging to the idea, and of others belonging to this idea, simply by sharing this same narrative.⁹⁸ Yet, with the multitude of processes of adopting an idea, the idea itself is no longer singular. It lives in every single individual on its own, and it no longer has only one

96 Jürgen Habermas, 'Address: Multiculturalism and the Liberal State' (1995) 47 Stanford Law Review 849, 851.

97 See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 1991) 204: 'These narratives, like the novels and newspapers discussed in Chapter 2, are set in homogeneous, empty time. Hence their frame is historical and their setting sociological. This is why so many autobiographies begin with the circumstances of parents and grandparents, for which the autobiographer can have only circumstantial, textual evidence.'

98 See also Śledzińska-Simon (n 95) 141.

proper form and context. The identity in this form is then by definition lacking coherence. And even if one tried to identify the true definition of the idea and empirically asked the multitude of individuals about it, the answers would be neither the initial idea itself, nor something which would overlap among the interlocutors. Rather, one would get a thousand versions of identity; like a children's game of Chinese Whispers, where the initial message always becomes garbled along the way.

The nature of an identity concept, as described above, illustrates the tensions of the concept with legal science, where expectations and rules are radically different. The entire legal undertaking is dedicated to making language and its meaning as clear and predictable as possible. The introduction of identity vocabulary, on the other hand, is by definition the opposite: a meaning which cannot be encapsulated in one single narrative;⁹⁹ the toothpaste which cannot be squeezed back into the tube.

4.3 Singleness and Multitude of Identities

Finally, the conventional legal knowledge of (national) constitutional identity somehow assumes that one agent bears just one identity: in other words, the assumption that there *is* a constitutional identity; one German, one Italian, one European. Yet, due to the initial meaning of identity, nothing could be further from the truth.¹⁰⁰

Every agent has a multitude of identities; identities *are*, whether European, national, regional, local, professional, etc. One agent can have it all; or if it pleases, none. Yet, the legal constitutional discourse consistently assumes that a constitutional identity is just one concept, only waiting to be discovered and articulated; as if it was only due to the lack of good scholarship and case law that we are still missing the final, unified and coherent theoretical account of it.¹⁰¹

The question of compatibility between the multitude of identities in sociological and psychological meaning on the one hand, and the assumed sin-

99 Fabbrini and Sajó (n 18) 467.

100 Eric Hobsbawn, 'Language, Culture, and National Identity' (1996) 63 *Social Research* 1065, 1067: 'Human mental identities are not like shoes, of which we can only wear one pair at a time.'

101 Sorina Doroga, 'Understanding Constitutional Identity Through the Language of Courts' in Alexandra Mercescu (ed), *Constitutional Identities in Central and Eastern Europe* (Peter Lang 2020).

gleness of constitutional identity on the other, is not a trivial one. If national constitutional identity, or the European constitutional identity, could have several identities, what would be the purpose of construing them? How would they relate to one another? For example, fundamental rights identity as incorporated in the EU Charter; common market identity as developed due to fundamental freedoms; weak democratic identity according to the current design of institutions, etc. And then we could compare them, or make combinations of them. But is that really the intended purpose when trying to construe European constitutional identity? And if there has to be just one main identity, how is that compatible with the initial meaning, which was clearly never intended to monopolize just one relation?

Once again, the invited identity vocabulary brings to lawyers far more difficult questions than the guiding answers. Does it really make sense to raise all these dilemmas up to EU level?

5 Tensions Between Identity and Democracy

The construction of identity is especially delicate regarding the question of permanence and change. Is identity a *perpetuum mobile*, a constant reinvention of itself? Or a stable and unchangeable feature, a subject matter which simply cannot be alternated (5.1)? Moreover, how does conventional constitutional understanding of constitutional identity relate to this particular feature of identity change (5.2)? And accordingly, what kind of tensions then arise between the principle of democratic reversibility and the notion of unchangeable constitutional identity (5.3)?

5.1 Identity as *Perpetuum Mobile*

Heraclitus stated, about 2,500 years ago: ‘You cannot step into the same river twice.’¹⁰² The beautiful metaphor is perfect to describe the whimsicality of every moment, ever-changing human nature, the inevitability of change in time and space, and thereby of one’s identity.

Judith A. Howard put it more fittingly: ‘The basic premise of symbolic interaction is that people attach symbolic meaning to objects, behaviours, themselves, and other people, and they develop and transmit these meanings through interaction. People behave toward objects on the basis not of their concrete properties, but of the meanings these objects have for them. Because meanings develop through interaction, language plays a central part. [...] Identities locate a person in social space by virtue of the relationships that these identities imply, and are, themselves, symbols whose meanings vary across actors and situations.’¹⁰³

Identities in their initial meanings are thus scarcely a stable and fixed concept. They are not motionless or finished products, but rather ‘the problematic ongoing process of access to an image of totality’.¹⁰⁴ Finally,

102 Plato, ‘Cratylus’ (Benjamin Jowett tr, 360AD) para 402a <<http://classics.mit.edu/Plato/cratylus.html>> accessed 24 February 2023.

103 Judith A Howard, ‘Social Psychology of Identities’ (2000) 26 Annual Review of Sociology 367, 371.

104 Homi K Bhabha, *The Location of Culture* (2nd edn, Routledge 2004) 73.

identities are never a priori absolute and isolated in the ivory tower, but rather continuously forced to adapt in accordance with societal notions of narrative, intelligibility and accountability.¹⁰⁵

The character of Meursault in Camus' novel *L'Étranger* is a powerful example of this duality of identity:¹⁰⁶ on the one hand, what somebody *is* in relation to the outside evaluation; on the other, how society demands from an individual to adapt to social standards and norms. Meursault, while on trial because he was not crying at his mother's funeral, is a *stranger* to society, as much as society is *strange* to him. 'What Meursault displays is a passive threat to society, albeit what society does is a major threat to his individuality.'¹⁰⁷ Thus, understanding as well as navigating one's 'identity is highly depended on the social construction a person hails from'.¹⁰⁸

5.2 (Dis)Ability to Change and the Hierarchy of Norms

Constitutional identity, on the other hand, assumes the opposite. Constitutional identity often imitates unchangeability. The very reason why the Member States are putting so much into the claims of constitutional identity, against the application of EU law, is the nature of the argument which assumes inability to change. The argument of constitutional identity is only strong when the Member States can say: 'Sorry, but we are simply not able to change this feature of our constitutional law, because it is our identity. It is not *possible* to change it'.

For example, when German Basic Law conflicted with the application of the EU law directive on equal treatment within employment,¹⁰⁹ because the German constitutional provision provided only for men to serve in the army, Germany had to change its respective constitutional norm.¹¹⁰

105 Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Reprint edition, Harvard University Press 1992) 218.

106 The reference to Camus' character in relation to identity (change) was made at the WZB Colloquium Global Constitutionalism by Mattias Kumm.

107 Bhumika Devi, 'Negotiating Identity in Albert Camus's *The Outsider*' (2020) 12 *Journal of Interdisciplinary Cycle Research* 351, 355.

108 *Ibid.* 351.

109 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

110 Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECLI:EU:C:2000:2.

This was not seen as a constitutional problem, because the constitutional norm was not declared as a matter of constitutional identity. But when a constitutional norm which is also a constitutional identity conflicts with the EU, a Member State cannot simply change it. Because it is identity, and identity cannot simply be changed by new legislation. And this is precisely the power of the constitutional identity argument: it gives the Member States grounds to refuse compliance within EU law; not because they don't want to comply, but because they supposedly cannot.

The unamendable core of the constitution, or such constitutional identity, has two important consequences. First, it is not subject to change.¹¹¹ That is a highly problematic notion in the light of the democracy principle, as will be further elaborated below. The national apex courts are then able to navigate and block constitutional changes in their society. And as far as this 'safety brake' may primarily aim to prevent a potential escalation into an autocratic or undemocratic catastrophe, it can also circumvent democratic decision-making, enabling judges to gain powers beyond the constitutional confines of the judiciary. And second, more importantly, that creates a constitutional hierarchy of norms.¹¹² Declaring something as constitutional identity eventually creates a constitutional hierarchy¹¹³ which clearly privileges some constitutional norms over others.¹¹⁴

5.3 Law and Democratic Reversibility

The initiative of scholars to designate the values of Article 2 TEU as European constitutional identity will potentially create two significant problems.

The first one is the problem of reversibility. To use the vocabulary of identity, the identity of the European Union and European legal integration is most likely 'the change' itself. The famous metaphor of the EU and its

111 Wischmeyer (n 65) 435.

112 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2019) 105ff.

113 See also Julia Villotti, 'National Constitutional Identities and the Legitimacy of the European Union – Two Sides of the European Coin' (2015) 4 *Zeitschrift für Europarechtliche Studien* 475, 480.

114 Reijer Passchier and Maarten Stremmer, 'Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5 *Cambridge Journal of International and Comparative Law* 337, 355; See also Frank Schorkopf, 'Value Constitutionalism in the European Union' (2020) 21 *German Law Journal* 956, 967.

reforms is illustrative in that regard: they are like a bicycle which has to be continuously pushed forward if it is not to fall on its side. Every crisis brings new challenges which demand new solutions. That is translated into the new treaties, which bring about new institutional designs. Or, as cited at the beginning, the actual connection of economies and the creation of a common market will create real and tangible results and establish connections; these connections will create solidarity, and the solidarity will lead to a more integrated and successful society.

But declaring some articles of the current Treaties as a constitutional identity could freeze this process. It would be wrong to presume that the EU has reached its final stage, no longer open to progressive change. That is, after all, the most important feature of democracy: the ability to stay agile and flexible in order to evolve with time. European constitutional identity could well stop that process. It could freeze the current modest level of protection of human rights as sufficient; it could signal that we are satisfied with the current state of the art, where social rights are only articulated as soft law,¹¹⁵ where the European Parliament for example has a position which is almost only as a mere observer or a correcting mechanism, without any real power to initiate a legislative process on its own. It would signal that we can be satisfied with the current level of democratic participation.

On the other hand, if European constitutional identity is articulated broadly and in general terms, as for example a commitment to democracy, human rights and the rule of law,¹¹⁶ what could that general articulation of European constitutional identity offer in the legal sense? For what purpose of differentiation, since those commitments are already shared among the Member States?¹¹⁷

The second problem concerns the hierarchy of norms.¹¹⁸ If Article 2 TEU is declared as European constitutional identity, how would that elevation of the norm impact on the adjudicative process of the European judiciary in relation to other constitutional principles and norms? Would that give

115 Interinstitutional Proclamation on the European Pillar of Social Rights [2017] OJ C428/10.

116 Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232.

117 See e.g. Faraguna (n 46) 1625: 'Identity as difference and identity despite difference. In the first sense, constitutional identity is based on differences distinguishing one constitution from another.'

118 See also Villotti (n 113) 480.

the CJEU the possibility to give clear priority to the rule of law over the other principles, such as the principle of sincere cooperation, or respect for national identity, or the principle of conferral?¹¹⁹ Would the principle of prohibition of discrimination as part of Article 2 TEU thereby automatically outweigh fundamental freedoms because of its higher rank as identity? Or over the principle of ‘freedom to conduct business’?

Constitutional law is cautious not to prioritize among constitutional norms. It requires the judges to exercise real work; to put all the elements into the equation and to balance them; to find the least intrusive way of limiting one’s right so as to enable the widest possible exercise of another. Designating some norms with the label of constitutional identity could demolish that fragile equilibrium of constitutional adjudication. And once again, it would arguably create more problems than it promised to solve.

119 See Luke D Spieker, ‘Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision’ in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions* (Springer 2021).

6 Call the Essential Constitutional Commitments by their Name

Confucius was once asked what is the beginning of wisdom; his reply was: 'Call things by the right names.'¹²⁰ In his *Analects* one reads: 'If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success.'¹²¹

At the beginning, we asked the question what is the purpose of construing European constitutional identity? Various answers could be: to strengthen the essential constitutional commitments of the Union; to give them true legal meaning; to make them judicially applicable;¹²² to be able to enforce them; and thereby to protect the Union as a community of values.¹²³

One way of identifying the basic constitutional values of the Union is to refer to Article 2 TEU. 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'¹²⁴

Additionally, many other principles could also qualify as 'essential constitutional commitments of the Union': most notably, the four fundamental freedoms of the common market as the pivotal practical reason of the Union's existence. Furthermore, the special *sui generis* nature with no comparable constitutional structure in the world could also qualify as an essential constitutional element: principles of primacy, of subsidiarity, of conferral, and of sincere cooperation, to name but a few.

Yet, there is a missing link when one aims to answer the initial research question. Why would the denomination of identified (potentially *these* particular) essential constitutional values of the Union as *European constitu-*

120 Confucius, *The Analects* (DC Lau tr, 1st edn, Penguin Classics 1998).

121 Ibid.

122 Spieker (n 119).

123 For a somewhat more balanced approach against the Schmittian 'Tyranny of Values', see von Bogdandy (n 55) 74–97.

124 TEU [2012] OJ C326/13, art 2.

tional identity in any way contribute to the gravity and significance of their existence? Truly, would such a denomination *elevate* them normatively? Would it qualify them as the highest normative standards and thus improve their protection and enforcement?

Here, I argue the opposite, or at least raise cautious concerns about the potential pitfalls of such an endeavour. As indicated above, there are many reasons why identity vocabulary might bring about more confusion and additional challenges, apart from the lack of any intelligible methodology to identify and create such a (constitutional) identity, henceforth subjectively projecting and *imagining*¹²⁵ it. In fact, the semantics of identity terminology suggest the complete omission of the concept as unsuitable for the purposes of *describing* the essential elements of constitution.

But even more importantly, there are no reasons why such a denomination would in fact enhance respect for essential constitutional values. Whereas facilitating the argument of constitutional identity from the Member States at least makes sense, due to the fact that the Union itself is bound to respect national identity. And thus, it gives the Member States some leverage in negotiating the potential constitutional tensions, as there is no such reference for the identity of the EU.

Alternatively, I suggest following the advice of Confucius. Let us call things by their right names. Let us take the essential constitutional commitments of the EU seriously, simply by using their names as they have them already. In the light of the ongoing backsliding by some Member States, respect for the rule of law has already been taken more seriously by the CJEU.¹²⁶ Initially, in the *ASJP*¹²⁷ decision by the Portuguese judges, in the *obiter dictum*, the CJEU boldly introduced protection of the rule of law not just as programmatic or ideological guidelines which allegedly cannot be enforced, but as indispensable legal structures that enable the functioning of the EU. It recognized that ‘effective judicial review [...] is of the essence of the rule of law.’¹²⁸ Subsequently, it has only strengthened

125 Anderson 1991.

126 See also Luke D Spieker, ‘Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis’ (2019) 20 German Law Journal 1182.

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

128 Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117, para 36.

the initial position further. Just a few months later, it issued the *Celmer*¹²⁹ decision, thus confirming the chosen trajectory to give life to the rule of law as an enforceable principle, not just a programme-based phrase. In addition, the CJEU has not only started to develop the content of the rule of law, but also of other values pursuant to Article 2 TEU, as for example the principle of democracy within the latest case law concerning the Catalan politicians and their immunities.¹³⁰ Finally, the most recent case law of the CJEU, concerning the infringement proceedings by the Polish judiciary *reform*, has only confirmed the true dedication of the CJEU to securing and protecting the principles and values pursuant to Article 2 TEU.¹³¹

In my opinion, this is a much better way of ensuring a robust commitment to the essential constitutional principles and values of the EU. And if the CJEU continues to take these legal values seriously, that in itself is the preferred route to constitutionalization¹³² of the Union without clinging to equivocal terminology of identity,¹³³ because these principles and values are already properly understood, imperative and transcendent. We just have to take them seriously and simply call them by their names.

129 Case C-216/18 PPU *Request for a preliminary ruling from High Court (Ireland) (Celmer)* [2018] ECLI:EU:C:2018:586, paras 48–51.

130 Case C-502/19 *Criminal proceedings against Oriol Junqueras Vies* [2019] ECLI:EU:C:2019:1115, paras 63, 83.

131 Pech, Wachowiec and Mazur (n 62); Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97, para 232; Case C-157/21 *Republic of Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98, para 145.

132 Kumm, ‘The Cosmopolitan Turn in Constitutionalism’ (n 89). See also Christian Joerges, ‘Law, Economics and Politics in the Constitutionalisation of Europe’ (2003) 5 Cambridge Yearbook of European Legal Studies 123; Cf Gehring (n 73) 166.

133 For a more nuanced view on the limits of the CJEU’s jurisprudence to solve the current democracy and the rule of law crisis, see Linda Schneider, ‘Responses by the CJEU to the European Crisis of Democracy and the Rule of Law’ (2020) 2 re:construction Working Papers, Forum Transregionale Studien 1, 4–28.

7 Concluding Remarks

Imagining a constitutional identity for the European Union is much like Alice going down the rabbit hole: entering unknown territory, and not knowing how deep the rabbit hole goes.

This chapter has therefore been a five-step plaidoyer, to highlight the potential traps of the arguably misguided Sisyphean endeavour to imagine a constitutional identity for the EU while asking the following question: What is the purpose, the additional value, and the pitfalls to artificially construing a meaning around this conceptual conundrum?

The task is Sisyphean, because it is pointless and interminable. The denomination of essential constitutional values of the EU, to the qualifying standard of constitutional identity, elevates the respective principles. That in itself creates a subjective hierarchy of constitutional norms and therefore generates tensions with the democratic principle of reversibility. Moreover, it invites confusion as to the methods, consequences and meaning of constitutional identity.

Furthermore, the semantics of the identity concept strongly argue for the omission of any correlation with the term in the field of constitutional law. This is due to its specific nature, which presupposes an agent, capable of establishing a *relation* with the respective subject matter as an undertaking of identification.

In conclusion, rather than constitutional identity, one should embrace the principles and values of the Union by their names. Already imperative and transcendent, they might present a more useful way of reaching a true constitutionalization of the Union and the potential qualitative evolution of European integration, as well as its democratic standards.

A Reconstructive Account

A Structural Comparison of Identity Claims with Civil Disobedience and Conscientious Objection

Human history began with an act of disobedience, and it is not unlikely that it will be terminated by an act of disobedience. [...] The act of disobedience set Adam and Eve free and opened their eyes. [...] 'Original sin,' far from corrupting man, set him free; it was the beginning of history; man had to leave the Garden of Eden in order to learn to rely on his own powers and to become fully human.

(Erich Fromm, *A Matter of Life*)

1 Introduction

Previous chapters have challenged and deconstructed the concept of national constitutional identity in a rather critical way. The present chapter, however, aims to set the tone constructively, searching how best to understand and evaluate identity claims in the EU. Despite their challenges, claims of national constitutional identity are the existing constitutional reality. Our critique will not make them disappear; on the contrary. And as empirical observation shows, their frequency is increasing as a result of an ever closer European legal harmonization.

Accordingly, this chapter aims to identify the essential benchmarks which can guide us to a better understanding and evaluation of the meaning and scope of identity claims as a legitimate space for judicial challenge, contestation and resistance against the absolute primacy of EU law. In doing so, the research first identifies the structural similarities and differences of identity claims in the EU when structurally compared with conscientious objection and civil disobedience in political and legal theory and practice. Second, it explores these structural similarities to find essential elements that may be beneficially applied to European constitutional law. Finally, due to the identified similarities, the chapter draws several preliminary conclusions, subject to necessary further research, which one should consider when interpreting and evaluating the validity, acceptance and legitimacy of identity claims in relation to the EU legal order.

The chapter unfolds in the following steps. First, it explains the initially recognized structural similarities which have prompted this research, the applied methods in this chapter, and the caveats thereof (Section 2). Next, it outlines the various accounts of conscientious objection as understood in legal theory and practice (Section 3). Moreover, it identifies several ‘transplants’ that one may apply when elaborating on identity claims (Section 5). The chapter then proceeds with the concept of civil disobedience as understood in practice and in legal and political theory (Section 6). It adopts a modest approach, identifying what kind of ‘transplants’ we could apply in European constitutional law (Section 7). Furthermore, it analyzes the existing identity case law in the light of ‘constitutional conscientious objection’ and ‘institutional civil disobedience’ (Section 8). Finally, it outlines the major lessons of drawing on the structural comparison between the

1 Introduction

national constitutional identity claims on the one side, and conscientious objection and civil disobedience on the other (Section 9). It closes with brief concluding remarks (Section 10).

2 Points of Departure – Structural Similarities, Previous Research, Methods and Caveats

This section explains the birth of the idea of respective structural comparison (2.1). Then it outlines the existing scholarly research, which has already made some preliminary connections between civil disobedience alongside conscientious objection and acts of state alongside its institutions (2.2). Moreover, it explicates two scholarly accounts which understand the state's institutions: namely parliament and the courts, as institutional civil disobedience (2.3). Furthermore, the section explains the structural similarities between civil disobedience alongside conscientious objection and claims of national constitutional identity in the EU (2.4). Additionally, it clarifies the application of interdisciplinary methods for the respective structural comparison (2.5), and concludes with potential caveats of the said research (2.6).

2.1 On Structural Similarities: The Birth of the Idea

The roots of the initial idea to explore the structural similarities between claims of national constitutional identity as acts of judicial resistance against EU law on the one hand, and on the other hand acts of civil disobedience and conscientious objection go back to the following two scholarly contributions: *Four Visions of Constitutional Pluralism*¹ edited by Matej Avbelj and Jan Komárek, and the chapter on 'The Moral Point of Constitutional Pluralism'² by Mattias Kumm.

At the symposium at EUI in 2008 on constitutional pluralism, Julio Baquero Cruz, Mattias Kumm, Miguel Poiarés Maduro and Neil Walker put forward four different perspectives. According to the transcript of the

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- 1 Matej Avbelj and Jan Komárek, 'Four Visions of Constitutional Pluralism', *EUI Working Paper LAW No. 2008/21* (European University Institute 2008) <<https://cadmus.eui.eu/handle/1814/9372>> accessed 24 February 2023.
 - 2 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).

symposium and to the best of my knowledge, Cruz and Kumm for the first time came up with the idea of treating the judicial resistance by the national apex courts against the unconditional primacy of EU law as a matter of ‘political disobedience’ and ‘civil disobedience’.³ Cruz stated that one could accept a moderate version of pluralism, where the courts would have to first refer to the CJEU, but thereafter, ‘as a very exceptional escape’, and having ‘extremely powerful reasons not to follow the law’, they could exercise ‘a sort of political disobedience’.⁴

As a follow-up, Kumm critically questioned the basic assumption about the Rule of Law that ‘justifies giving it absolute priority over other principles, perhaps because without it, other principles would become unintelligible. That position has a long pedigree in Western legal thought. The idea has been central to the discussion of civil disobedience’.⁵ Moreover, Kumm then explored the situation where a citizen disobeys the law because they think the government should not act the way it does. They want to change and improve that law. Thus, the question, ‘under which circumstances might you legitimately be engaged in such a [disobedient] practice’?⁶ Kumm argued that an answer ‘never, because the Rule of Law is undermined’ cannot be entirely convincing.

The scholarly discussions at that symposium, however, did not go any further than what is recalled and described above. The idea was being mentioned more in passing, and only at a highly abstract and undetermined level.

The second scholarly contribution referring to judicial disobedience as a comparison with civil disobedience, and for the first time with conscientious objection,⁷ was Kumm's chapter in *Philosophical Foundations of European Union Law*⁸ in 2012. Titled indicatively ‘Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection’, he argued that

3 Avbelj and Komárek (n 1) 19.

4 Ibid.

5 Ibid. 29.

6 Ibid.

7 Victor Ferreres Comella brought the respective analogy to Kumm's attention. See Kumm (n 2) 238.

8 Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

‘the kind of resistance by courts to the claims to authority by the more comprehensive legal orders is best understood as a form of either institutionalized civil disobedience or identity-based conscientious objection demanding asymmetric accommodation.’⁹

Kumm further wrote:

‘To the extent that such [national constitutional] commitments are understood as part of national constitutional identity, the claim made by a court in the name of constitutional identity is structurally equivalent to a person demanding to be exempt from a generally applicable rule as a conscientious objector: it is a demand to accommodate a specific addressee of a legal obligation because of deeply held commitments that it would, on balance, be unreasonable for the legal order to require the addressee to give up. Unlike civil disobedience, conscientious objection is not directed towards legal reform. The claim is mere to be left alone regarding an obligation whose appropriateness for others is not put into question. When a national court invokes the constitutional identity of the national community as an argument not to comply with a legal obligation, it is thus not implausible to understand this claim as the democratically ‘constitutionalized’ version of what on an individual basis would be recognized as conscientious objection.’¹⁰

The result of striking the appropriate balance between competing principles of constitutionalism in a concrete context ‘is a doctrinal framework that defines the conditions under which either institutionalised civil disobedience or constitution-based conscientious objection are justified’.¹¹

Finally, he argued that

‘[w]hen the courts develop doctrines managing the interference between different legal orders, [...] we might say that they are seeking to lay down the jurisdictional, procedural, and substantive conditions for the exercise of institutionalized civil disobedience or conscientious objection [which] provides a good way of capturing the moral point of constitutional pluralism.’¹²

9 Kumm (n 2) 233.

10 Ibid. 238.

11 Ibid.

12 Ibid. 244.

The present research takes up the above-explained idea of a structural comparison between judicial resistance in the EU framework and the jurisprudential notions of civil disobedience and conscientious objection. It connects national judicial resistance with the claims of national constitutional identity, and it asks the following research question: Can the findings of civil disobedience and conscientious objection, as understood in legal theory and applied in judicial practice, help us better understand and evaluate claims of national constitutional identity?

2.2 Existing Scholarly Connections of Civil Disobedience and Conscientious Objection with the Acts of State and its Institutions – State Civil Disobedience

Apart from the contributions by Cruz and Kumm described above, other scholars previously established a similar connection between civil disobedience and disobedient acts of a state. The analogous link between the civil resistance of citizens – civil disobedience and conscientious objection – and the acts of state institutions was explored in political theory and public international law, although not focused concretely on the European Union and the acts of the national judiciary.

In the field of international law, for example, Robert E. Goodin proposed in 2004 how to differentiate plain law-breaking from would-be law-making in international public law concerning customary international law.¹³ To determine which moral standards one should apply in international conduct, he argued for the use of analogous standards ‘to the ordinary standards for distinguishing civil disobedience from ordinary law-breakers’.¹⁴ Goodin suggested applying knowledge and principles of civil disobedience when the ‘would-be law-makers [are] breaking customary international law genuinely with a view to remaking it’.¹⁵ Concretely, he claimed that when a state wants to change international customary law, it should violate the norms publicly, convinced that it offers morally correct interpretation of the customary law, accept the consequences of its breach, and embrace the generalizability of these acts – allowing others to act reciprocally in

13 Robert E Goodin, ‘Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers’ (2005) 9 *The Journal of Ethics* 225.

14 *Ibid.* 225.

15 *Ibid.* 246.

the same way.¹⁶ In this manner, he argued, Britain's unilateral suppression of piracy led to international agreements on piracy on the high seas, and Truman's unilateral declaration to extend territorial waters from three miles to the Continental Shelf in 1945 created a change of rules accordingly, as reflected nowadays in the Convention on the Law of the Sea. Similarly, one may hope that Belgium's decision to prosecute violations of universal human rights happening anywhere in the world might encourage others to follow their lead.¹⁷

Moreover, in an attempt to construe a theoretical model of fairness in international relations, Nancy Kokaz published an article in 2005 that established a link between law and morality concerning international institutional practice with an argument of civil disobedience. Concretely, she argued that the operation of international institutions in relation to fairness must be connected with a conceptual space for civil disobedience. 'This is because all practices, even generally just ones, can at times become the perpetrators of injustice.'¹⁸ For example, she stated that 'the Brazilian decision to produce and export generic HIV medications in defiance of intellectual property rights proved to be an instance of civil disobedience'.¹⁹

In addition, the connection of civil disobedience with a state's institutions also appears in political science. Jonathan White directly advocated drawing on criteria inspired by theories of civil disobedience adapted to the transnational context, specifically to disobedience on a multilevel order.²⁰ Ronnie Hjorth argued similarly, elaborating on state civil disobedience as an instrument for the moral improvement of institutions by challenging established laws and conventions on shared moral conceptions.²¹ Against this view, William Scheuerman argued in a recent article that political institutions could not commit civil disobedience. Instead, he proposed to focus

16 There are some parallels with the rule of the persistent objector in international law which cannot be explored here due to the limited scope. See also James A Green, *The Persistent Objector Rule in International Law* (Oxford University Press 2016) 59ff.

17 Goodin (n 13) 245.

18 Nancy Kokaz, 'Theorizing International Fairness' (2005) 36 *Metaphilosophy* 68, 79.

19 Ibid. 80.

20 Jonathan White, 'Principled Disobedience in the EU' (2017) 24 *Constellations* 637, 641.

21 Ronnie Hjorth, 'State Civil Disobedience and International Society' (2017) 43 *Review of International Studies* 330, 344.

on civil servants and people in respected institutions who are exercising civil disobedience as individuals.²²

Moreover, drawing on the works of Goodin,²³ Buchanan²⁴ and Hoag,²⁵ Antonio Franceschet expanded the theory of state civil disobedience in international politics, introducing an additional type of disobedience by less powerful states. With the help of Giorgio Agamben's concept of *destituent* power, he developed an additional conceptual framework of state civil disobedience for weak states that involves withdrawing from the obligations of a particular set of international institutions as a legitimate form of self-protection.²⁶ As an example, he explicated Uruguay's recent decision as the first country to legalize the production, sale and consumption of cannabis for non-medical purposes against the International Convention on Drug Control, followed by legalization by Colorado and Washington. It has to be stressed that Uruguay challenged the said Convention beyond the rules of public international law, such as for example the concept of the persistent objector or the clause *rebus sic stantibus*.

Most illuminatingly, Franceschet differentiated in his contribution between the disobedient state act which aims to change a particular international norm for all states, and the act of state which only demands an individual exemption from international norms; a distinction which most closely resembles the focus of this research – institutions resisting in order to change the law – i.e. civil disobedience; or demand only to be excluded themselves from the respective norm – i.e. conscientious objection.

Instead of conscientious objection, Franceschet applied the terminology of *destituent* power. He wrote: 'Some might reject such disobedience be-

22 William E Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (2020) 82 *The Review of Politics* 269.

23 Goodin (n 13).

24 Allen Buchanan, 'From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform' (2001) 111 *Ethics* 673; Allen Buchanan, 'Reforming the International Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press 2003); Allen Buchanan, 'The Morality of International Legal Reform' in Allen Buchanan (ed), *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2003).

25 Robert W Hoag, 'Violent Civil Disobedience: Defending Human Rights, Rethinking Just War' in Michael W Brough, John W Lango and Harry Van Der Linden (eds), *Rethinking the Just War Tradition* (State University of New York Press 2007).

26 Antonio Franceschet, 'Theorizing State Civil Disobedience in International Politics' (2015) 11 *Journal of International Political Theory* 239, 251.

cause it does not aim to improve political and legal systems; instead, it seeks to withdraw states from such systems or to suspend the negative effects these systems have on weaker states.²⁷ 'Perhaps like Gandhi and the Indian independence movement, Uruguay is asking to be 'left alone' and to be allowed to try something on its own.'²⁸

Finally, Gerald Neubauer presented the most elaborated theoretical framework of state civil disobedience in international law, stating that morally justified violations of international law should be considered civil disobedience.²⁹ He argued that 'the concept of individual civil disobedience which is widely accepted in political philosophy has to be applied to violations of international law by state actors'.³⁰ He advocated for the introduction of civil disobedience terminology in particular to create an 'early warning system for moral deficits and as a factory for reform alternatives'.³¹ While recognizing that the progress of international law tends to create more international justice, some international rules fail to be just.³² 'In order to prevent international institutions from developing towards a global Leviathan, we need a basic right for states to disobey unjust international rules.'³³

Neubauer presented two examples of state civil disobedience in international law. In his view, the Argentinians' largest-ever sovereign debt cut against the rules of international law should be seen as state civil disobedience. A large part of the debt had a criminal character, and it mostly served the enrichment of corrupt elites, which essentially led to a dramatic economic crisis, mass protests, rising unemployment and the collapse of the peso.³⁴

Similarly, Bolivia's refusal to respect international investment law under the BIT should also count as state civil disobedience. Bolivia was pressured to privatize public water enterprises in exchange for a World Bank loan.

27 Ibid.

28 Ibid. 250.

29 Gerald Neubauer, 'State Civil Disobedience: Morally Justified Violations of International Law Considered as Civil Disobedience' (TranState Working Papers 2009) Working Paper 86.

30 Ibid. 24.

31 Ibid. 25.

32 Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 158–90.

33 Neubauer (n 29) 24.

34 Ibid. 12.

The private investor in Cochabamba raised the water rates drastically up to 300%, which led to massive protests and eventually terminated the private company's licence. In the lawsuit at ICSID, the private company required enormous compensation from Bolivia, due to their violation of the bilateral investment treaty with the Netherlands.³⁵ Neubauer also acknowledged some essential conjectures on the causes and effects of the 'state civil disobedience'. He addressed the challenges of connecting individuals with states, the criteria for illegalities, the problem of conscientiousness of states, publicity, motivation, and non-violence.³⁶

To sum up, the above-cited scholars in the fields of political science and public international law already recognized the structural similarities between civil disobedience (and indirectly, conscientious objection) and acts of states resisting against unfair or unjust international law. Moreover, they directly addressed numerous challenges of the theoretical framework of 'state civil disobedience', for example, the question of prohibition of violence and the challenges of ascribing to a state a subjective motivation for its actions.

However, the existence of the above-cited academic literature leaves many relevant issues overlooked and underexplored, prompting further research, specifically concerning the European multilevel constitutional framework, with an emphasis on the actions of state institutions, most notably the apex courts.

2.3 Institutions as Agents of Civil Disobedience – Parliaments and Courts

Decisively, two additional essential legal scholarly contributions most evidently support and justify this research inquiry: Andreas Føllesdal's theory of parliamentary civil disobedience against international human rights courts,³⁷ and N. Türküler Isiksel's article which analyzes CJEU's *Kadi*³⁸ decision against the UN Security Council's misapplication of fundamental

35 Ibid. 19.

36 Ibid. 7–10.

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

38 Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi)* [2005] ECLI:EU:T:2005:332.

principles of the international order as ‘best understood as an act of civil disobedience’.³⁹

In 2015, Føllesdal presented a theory stating that parliamentary disobedience against, or non-compliance with, decisions of the international courts may be justified in some cases. Moreover, he argued that ‘we can bring some light on the issues by understanding these acts as a form of civil disobedience’.⁴⁰ Føllesdal directly applied Rawls’ framework of civil disobedience and laid out six characteristics and four conditions for a disobedient parliamentary act to be justified. As to the former, the act should be contrary to law;⁴¹ it should be political and conscientious; it should aim to bring about change; take place publicly; in a non-violent manner; and the agent should accept the consequences. Moreover, the act would be justified when the respective injustice violates the appropriate normative principles; when other normal appeals have already failed; the amount of civil disobedience in general remains within limits; and finally, the injury of the innocent is avoided.⁴²

Although not directly mentioning ‘conscientious objection’, Føllesdal also distinguished between two types of disobedience against international courts. In the light of conscientious objection, he wrote: ‘Some non-compliance appears largely as claims to be *exempt* from a generally accepted rule—without any claim that the rule itself should change.’⁴³ The second variety of non-compliance is a deliberate disobedience ‘in an ultimate effort to correct its interpretation’,⁴⁴ where Føllesdal referred to the *Solange* jurisprudence as an example.

Finally, Føllesdal applied his account of parliamentary civil disobedience against international human rights courts to two concrete examples in the United Kingdom against the ECtHR’s judgements. The *Hirst*⁴⁵ case relates to the blanket ban on prisoners voting, and the *Animal Defenders*⁴⁶ case

39 N Türküler Isiksel, ‘Fundamental Rights in the EU after Kadi and Al Barakaat’ (2010) 16 *European Law Journal* 551.

40 Føllesdal (n 37) 335.

41 ‘Contrary to law’ refers to a violation of a specific positive legal norm, which is challenged by the objector. If the claim to civil disobedience is legitimate, the legal system may eventually still accommodate this illegal act as justifiable under some higher principles of justice, hence, it may essentially become ‘legal’.

42 Føllesdal (n 37) 339.

43 *Ibid.* 332.

44 *Ibid.* 331.

45 *Hirst v UK App no 74025/01* (ECtHR, 6 October 2005).

46 *Animal Defenders International v UK App no 48876/08* (ECtHR, 22 March 2013).

concerns freedom of expression in relation to the political advertisement on TV and radio denied by an NGO. He concluded that due to his account, one can assess the legitimacy of such illegal acts under international law as sincere attempts at more legitimate international law-making, although with some inherent dangers.⁴⁷

Føllesdal's methods of employing a Rawlsian theoretical account thus come closest to the methodological approach of this research – applying the theoretical understandings of conscientious objection and civil disobedience from legal theory to the area of judicial resistance within the European multilevel constitutional landscape, as structurally comparable controversies.

The second contribution by Isiksel, dating from 2010, comes the closest to the *subject* of the respective research, the behaviour of courts. While focusing specifically on the behaviour of the CJEU, rather than the national apex courts of the Member States, Isiksel observed in a similar manner that the *Kadi* decision of the CJEU should 'best [be] understood as an act of civil disobedience'.⁴⁸ Once again, she understood civil disobedience by the CJEU as closing the gap between what is legal and what is legitimate as perceived by those bound by law.

To qualify the CJEU's defiant act as justifiable, Isiksel suggested five criteria. First, the court's motivation must not be self-serving, but rather dedicated to upholding the basic principles and higher norms of justice which underpin the errant legal system.⁴⁹ Second, the act must be public and dialogical. Isiksel wrote: 'The actors must be able to plead with their peers and publicly justify their reasons for breaking the law in terms that all could, in principle, agree to.'⁵⁰ Third, the disobedient party's 'ostensible aim cannot [...] be a private or business advantage: it must have *some* reference to a conception of justice or the common good'.⁵¹ Lastly, the court's stance ought to be beneficial for the legal order rather than corrosive of its long-term cohesiveness and effectiveness. 'The aberrant act of breaking the law in the name of more fundamental standards of justice should stop short of jeopardising the basic conditions that make legality possible.' Civil

47 Føllesdal (n 37) 351.

48 Isiksel (n 39) 551.

49 Ibid. 568.

50 Ibid. 563.

51 Christian Bay, 'Civil Disobedience: Prerequisite for Democracy in Mass Society' in Jeffrie G Murphy (ed), *Civil disobedience and violence* (Wadsworth Pub Co 1971) 76; Isiksel (n 39) 567.

disobedience ‘may challenge a particular law but must not threaten the very fabric of the law’.⁵²

Isiksel did not overlook the connection between the *Kadi* argumentation with the special type of judicial defiance in the *Solange* case. On the contrary, she raised the concern that the ‘Solange formula’ and *Kadi* decision might encourage the apex courts to further contest the constitutionality of the European measures. According to Isiksel, the *Kadi* decision by the CJEU was an ‘example that it is acceptable for a court to remedy extreme denials of justice in another legal system by taking the law into its own hands’.⁵³ The German Federal Constitutional Court (FCC), accordingly, quickly picked up this line of argumentation. In the *Lisbon* decision it referred specifically to *Kadi* to justify a potential disapplication of EU law. It stated that in the same way as the CJEU, which in a borderline case placed the assertion of its own identity as a legal community above the commitment that it otherwise respects, the FCC can equally declare EU law inapplicable in Germany.⁵⁴

To sum up, the above-cited contributions together established a satisfactory methodological framework, which even on its own already sufficiently justifies the basic contours of the present research. While Føllesdal’s research persuasively articulated and justified the reasons to apply the theoretical account of civil disobedience from legal theory, specifically the Rawlsian justificatory conditions for civil disobedience in relation to state institutions, Isiksel’s research directly scrutinized the CJEU in that light. Seen together, these two scholarly contributions serve as a methodological starting point and basic justification as to why one scrutinizes and evaluates identity claims as structurally comparable to civil disobedience and conscientious objection. However, both contributions only outlined the basic contours of the said structural comparison, leaving the majority of queries underexplored, especially concerning the EU. The objective of the following contribution aims to supplement that aspect.

2.4 Structural Similarities Explained

This section highlights the major contours of the said structural comparison. First, it draws a connection between *Solange I* and civil disobedience

52 Isiksel (n 39) 567.

53 Ibid. 570.

54 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 340.

as resistance to change (2.4.1). Second, it connects the *Sayn-Wittgenstein* decision with conscientious objection as a plea for exemption (2.4.2).

2.4.1 Civil Disobedience and Solange I – Resistance to Change

Before trying to answer the main research question above, we should start by explaining the main features of the structural comparison. What is civil disobedience, and how do some claims of national constitutional identity seem to reflect its main structural features?

Think of the famous words of Martin Luther King: ‘One has not only a legal, but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.’⁵⁵ Civil disobedience is usually directed towards arguably unjust or severely inadequate laws by openly and publicly violating these or some other rules to trigger political change. As Joseph Raz put it, civil disobedience is a ‘moral right to break the law for moral or political reasons’.⁵⁶

For example, in March 1955, Claudette Colvin defied American segregation laws and refused to give up her seat to a white passenger on a bus in Montgomery, Alabama. Colvin, a pregnant 15-year-old teenager, was manhandled off the bus, handcuffed and put in an adult jail.⁵⁷ Nine months later, Rosa Parks committed the same defiance, being arrested and fined. These disobedient acts against the segregation laws led the Women's Political Council, a group of black women working for civil rights, to call for a boycott of the bus system. As a result, shortly after, 40,000 African Americans boycotted the bus system; they organized taxi drivers for the same price as the bus fare; they protested and demanded changes to the existing system. Their 13-month mass protest ended with the US Supreme Court ruling in *Browder v Gayle* that segregation on public buses was unconstitutional under the Equal Protection Clause of the 14th Amendment to the US Constitution and it must end.⁵⁸

A public act of defiance against the existing valid laws, in the name of justice and the principles of equality and fairness, prompted a massive

55 Martin Luther King Jr., *Letter from Birmingham Jail: Martin Luther King* (1st edn, Penguin Classics 2018) 10.

56 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprint edition, Oxford University Press 1983) 262.

57 Phillip Hoose, *Claudette Colvin: Twice Toward Justice* (Reprint edn, Square Fish 2010).

58 *Browder v Gayle* 352 US 903 (1956).

public reaction in support of that defiant action. Consequently, the legal rules on segregation were changed accordingly.

It is important to highlight the elements of the respective civil disobedience, which are fundamentally different from a mere disregard for laws. First, civil disobedience does not hide but is carried out publicly, for everyone to see. Moreover, it adheres to a higher principle of justice. Furthermore, it aims to achieve a political or legal change. What is more, an action of one individual often reverberates among the many, and it creates a collective (political or civil) force which has a higher legitimacy and is more difficult to ignore or dismiss. Finally, it creates a kind of double position: while civil disobedience acts *against* the law, outside formally binding rules, it also embodies a fidelity to law, namely, it adheres to higher ‘first order’ principles.

As a structural comparison, let us study the well-known German *Solange I* case law. As more thoroughly explained in Chapter 2, the FCC refused to accept the absolute primacy of EU law until the Community received a codified catalogue of fundamental rights, a democratically legitimate European Parliament, directly elected by the general suffrage and equipped with legislative powers, and Community organs which were politically accountable.⁵⁹

Although the case of *Solange I* by the FCC is nowadays often praised as a generator of the advancement of European constitutionalism and supranational democracy,⁶⁰ it was also a clear case of judicial resistance and disobedience.⁶¹ *Solange I* was not just a violation of the well-established primacy of EU law at that time, and for roughly ten years according to *Costa ENEL*⁶² in general, and against the concrete case law *Internationale Handelsgesellschaft*⁶³ issued by the CJEU specifically, but was also considered as illegal domestically by three dissenting judges.⁶⁴

59 BVerfGE 37, 271 *Solange I* 29 May 1974, p 281.

60 Peter Hilpold, ‘So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European “Popular Spirit” in Markus Gehring (ed), *Cambridge Yearbook of European Legal Studies*, vol 23 (Cambridge University Press 2021) 164.

61 Andreas Haratsch, *Europarecht* (12th edn, Mohr Siebeck 2020) 323.

62 Case 6-64 *Flaminio Costa v E.N.E.L. (Costa ENEL)* [1964] ECLI:EU:C:1964:66.

63 Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Internationale Handelsgesellschaft)* [1970] ECLI:EU:C:1970:114.

64 Franz Mayer, ‘The European Constitution and the Courts - Adjudicating European Constitutional Law in a Multilevel System’ in Joseph HH Weiler and Armin von

One does not dispute the correlation between the respective judicial resistance and the advancement of the European constitutional design. The disobedient and resistant act of the strong national apex court contributed, together with other causes,⁶⁵ to European constitutional change. To accommodate the reasons for dissent, both the European constitutional design and European judicial awareness regarding the protection of fundamental rights have been improved. In other words, the respective change, which was co-prompted by the judicial resistance, has brought a considerable advancement of the legal system as such. The judicial resistance stirred the waters tremendously at that time, and seriously questioned the primacy of Community law, which eventually only improved the EU.

The essential elements of the *Solange I* saga are as follows. The underlying justificatory reason of the FCC was legitimate and equitable, namely, to reassure the adequate fundamental rights protection of individuals as governed by EU law. Regardless of any other unknown or speculative motivations that the FCC might have had, one can hardly distrust its stated reasons; especially in retrospect, as the cited judicial resistance proved to be constructive. Moreover, with its reasoning, *Solange I* appealed to and connected to other courts, scholars and institutions. It publicly expressed the concerns of many, which had already been raised before.⁶⁶ In that sense, one cannot see the FCC as an isolated and self-absorbed actor, longing for power and conflict, but rather as one among many on the common and shared path to making the EU more democratic, politically accountable, and committed to fundamental rights. It came as no surprise that the given reasons resonated among many other national apex courts.⁶⁷

The structural similarities with the above-cited example of civil disobedience are astounding. Both actions at the beginning operated against the (legal) system itself, but only until they gained enough momentum not to be overlooked or ignored. Their arguments have been eventually addressed by changing the system towards which they were initially directed. Due to the

Bogdandy (eds), *European Integration: The New German Scholarship* (9/03 edn, The Max Planck Institute for Comparative Public Law and International Law and Jean Monnet Center at NYU School of Law) 20.

65 William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini' [2020] TRiSS Working Paper Series.

66 Italian Corte Costituzionale, Case 183/1973 *Frontini* 27 December 1973.

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

persistent, transparent and decisive resistance, the legal system recognized and amended its own deficiencies. Moreover, both resisting actions were justified by the universally shared principles of human dignity, equality, prohibition of discrimination, freedom, and a fair cooperation system,⁶⁸ on the ground of principles which claim to be universal across the globe, regardless of our cultural and historical differences. To rephrase Dworkin slightly,⁶⁹ Rosa Parks was no less right in her refusal to comply with the segregation laws before the *Browder v. Gayle*⁷⁰ decision of the Supreme Court than she was afterwards.

Henceforth, national judicial resistance against EU law notably resembles the inherent tensions one is able to observe in civil disobedience. The structural comparison may lead us to a better understanding of how to respond properly to such claims of judicial resistance.

2.4.2 Conscientious Objection and Sayn-Wittgenstein – Asking for Exemption

The aim of disobedience is twofold: either to change the respective law, or to be (individually) exempt from it.⁷¹ Contrary to the above-described civil disobedience, which challenges the norms of a legal system in the name of justice and adheres to commonly shared political principles, the second type of disobedience, conscientious objection, concerns only a disobedient person themselves. Conscientious objection is based on the essential human condition: a conscience. It does not claim universality nor adhere to commonly shared principles of justice. The conscientious objector only claims that their genuine commitment to their individual conscience in exceptional circumstances justifies an exception from the respective legal obligation.

Conscience, a sense of individual morality of what is morally right and wrong, is the compass which navigates, controls and informs one's life decisions. If one were forced to disregard it entirely, it would create an inner conflict which would degrade one's dignity and personal autonomy. Moreover, the force of individual conscience may be so strong that it drives an

68 John Rawls, *A Theory of Justice: Revised Edition* (2nd edn, Harvard University Press 1999) 321.

69 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 211.

70 *Browder v Gayle* 352 US 903 (1956).

71 Rawls (n 68) 320.

individual into an unbearable position, where they must inevitably choose between their own convictions and the legal rules.

Liberal constitutional systems are primarily based on individual autonomy, respect for human dignity and individual freedom. All limitations and obligations must be necessary and proportionate, and the rule of law, despite the generality of legal norms, is not entirely blind to specific individual circumstances. So, under what conditions might an individual refuse to comply with respective legal norms which conflict with their own beliefs and conscience? And under what conditions might a legal authority tolerate such an objection and thus extend an exception to generally applicable legal norms?

The following example on abortion helps illuminate the complexity of the matter at hand. From the 1960s onward, many European countries liberalized abortion laws, allowing and ensuring that women had access to legal abortion services in the first trimester, according to various legal structures and requirements.⁷² However, not all countries: Malta still fully prohibits abortion under any circumstance, even if the life of the pregnant woman is in danger; and Poland only recently introduced an almost-full prohibition of abortion rights, even for malformed fetuses.⁷³

Together with abortion rights, many countries also introduced the legal possibility of raising a conscientious objection to performing the respective procedures. But not all legal systems have *legislated* the right to conscientious objection to carrying out an abortion. Sweden, Finland and Iceland generally do not permit healthcare professionals to refuse their service as part of their professional duties in the name of conscientious objection.⁷⁴ In Norway, for example, health professionals may refrain from assisting in abortion, whereas general practitioners do not have this right.⁷⁵ However, some of the general practitioners ‘silently refused to refer for abortions’.⁷⁶

72 Wendy Chavkin, Laurel Swerdlow and Jocelyn Fifield, ‘Regulation of Conscientious Objection to Abortion’ (2017) 19 Health and Human Rights 55, 56.

73 Polish Trybunał Konstytucyjny, Case K 1/20, 22 October 2020.

74 Christian Fiala et al., ‘Yes We Can! Successful Examples of Disallowing “Conscientious Objection” in Reproductive Health Care’ (2016) 21 The European Journal of Contraception & Reproductive Health Care 201.

75 Eva M Kibsgaard Nordberg, Helge Skirbekk and Morten Magelssen, ‘Conscientious Objection to Referrals for Abortion: Pragmatic Solution or Threat to Women’s Rights?’ (2014) 15 BMC Medical Ethics 15.

76 Ibid. 7. Note that in Norway only general practitioners, not gynaecologists, refer abortions.

From a legislative perspective, different solutions have been provided. However, the practice shows that a lack of legal possibility to raise a conscientious objection does not solve the issue at hand, and the right to conscientious objection cannot be absolute when the immediate termination of pregnancy is essential for the life of the pregnant woman. That is clear from the recent case law by the ECtHR, which rejected a case from Sweden concerning the prohibition of conscientious objection relating to abortion as inadmissible,⁷⁷ yet nevertheless stated in passing that conscientious objection must give way to the right to health of women seeking to have an abortion.⁷⁸

The matter thus boils down to the concrete circumstances of any individual case. Liberal constitutions generally respect the right to thought, conscience and religion, which under certain conditions translates into the right to conscientious objection. Raising a conscientious objection is thus not a priori illegal. However, concrete circumstances can reduce or even prohibit that right, subject to proportionality and appropriate adjudication, taking into account all relevant interests and colliding fundamental rights. Accordingly, conscientious objection is essentially an open-ended situation where no general output can be determined as an absolute rule.

Turning to judicial resistance in the EU, constitutional conflicts among the Member States and the Union have a surprisingly similar structure. The EU primary law specifically states that the Union respect the national identities of the Member States, but the CJEU never understood this provision as an absolute *carte blanche* for the Member States to declare EU law as inapplicable unilaterally,⁷⁹ but as a vehicle for the Member States to explain why a particular EU norm might conflict with national constitutional essentials and peculiarities.⁸⁰ If the respective constitutional essentials qualify as being of utmost importance, then the CJEU would assess whether the Member State would be allowed exceptionally to disapply EU law, subject to proportionality with the other respective rights and principles in question. Since any *ex tunc* exception concurrently limits the principle of equality

77 *Grimmark v Sweden* App no 43726/17 (ECtHR, 11 February 2020).

78 Wojciech Brzozowski, 'The Midwife's Tale: Conscientious Objection to Abortion after *Grimmark* and *Steen*' (2021) 10 *Oxford Journal of Law and Religion* 298, 300.

79 Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 *Archiv des öffentlichen Rechts* 415, 441.

80 Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 *Cambridge Yearbook of European Legal Studies* 195.

of the Member States, their effectiveness and the unity of EU law, these exceptions are rare and subject to strict scrutiny.

The well-known *Sayn-Wittgenstein*⁸¹ decision was highlighted in Chapter 3, Section 3.5.2. Here a brief recap of the subject matter must suffice, to explain the following example of constitutional conscientious objection. Ilonka Fürstin von Sayn-Wittgenstein, an Austrian citizen, born in Vienna and residing in Germany, had changed her name after moving to Germany. Later on, the Austrian authorities informed her that she must change her name due to the Austrian law on the abolition of the nobility. Sayn-Wittgenstein argued that her name had to be fully recognized in Austria as it was legally determined in another Member State, Germany, due to the freedom of movement under Article 21 TFEU. But the Austrian government contended that the respective law was intended to enable formal equality of treatment of citizens which, in the light of Austrian history, was a fundamental value of the Republic of Austria. Moreover, the respective law aimed to protect the constitutional identity of the Republic of Austria. The CJEU granted Austria an exception from fundamental freedom of free movement, accepting the Austrian claim that the abolition of the nobility constituted a matter of national identity which justified the violation of free movement.⁸²

In a structurally comparable manner to conscientious objection, the CJEU as the respective judicial authority recognized the unique constitutional commitment of Austria, arguably deeply embedded into the Austrian society, which was concurrently justified by the constitutional principle of equality. Accordingly, the CJEU extended to Austria an exception to disapply otherwise applicable EU norms.⁸³

In the case at hand, only the Austrian institutions could determine what elements of their constitutional structures and norms qualified as their national constitutional identity – just like a conscientious objector who alone can determine what their conscience demands. In the end, however, it is the CJEU which finally determines the matter; just as in the classical case of conscientious objection, where the objector's refusal cannot be one-sidedly determined, but must be examined by a court, taking into consideration all relevant circumstances and interests involved.

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

82 Ibid. para 80.

83 Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 44, 161.

As in the case of conscientious objection, where an objector does not want to challenge the rules in general, but is only concerned about their own situation, Austria did not want to challenge the general rules.⁸⁴ It merely asked for an individual treatment, which would allow the subject to keep her highly sensitive and important, constitutionally self-viewed idiosyncrasies.

2.5 Methods of Research – Interdisciplinary Aspect

This chapter also applies interdisciplinary methods which correspond to the specific research inquiry.⁸⁵ Since the research question explores the structural similarities with civil disobedience and conscientious objection – both extensively researched and addressed in legal and political theory – the research here correspondingly relies on the main theoretical accounts of the respective conceptions. Methodologically speaking, the research aligns jurisprudence and legal theory with constitutional practice concerning the limits of European integration and legal disputes among the multilevel constitutional orders in the ‘European multilevel Constitutional Verbund’.⁸⁶

The second distinctive element of the research methods concerns comparison. In constitutional research, one often compares constitutional practices, constitutions and institutional characteristics from different political systems. One compares constitutional case law on similar legal issues, or different historical and sociological backgrounds which have influenced different constitutional outcomes. Comparative constitutional law is a vibrant field, including analytical, empirical, dogmatic, theoretical and other methods that aim to illuminate the respective research questions. The research here also includes a comparative element in a more indirect way. It does not theoretically compare the same concepts from different

84 Ibid. 45.

85 See also Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 224; Mathias Siems, *Comparative Law* (Cambridge University Press 2018) 369; Uwe Kischel, ‘The Comparative Method’ in Uwe Kischel and Andrew Hammel (eds), *Comparative Law* (Oxford University Press 2019) 102ff.

86 ‘European Constitutional Verbund’ refers to all constitutional systems together, the EU and the 27 Member States. See also Birgit Schlütter, ‘Principles of European Constitutional Law’ (2011) 22 *European Journal of International Law* 605. Ingolf Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (De Gruyter 2011).

constitutional orders, but structural similarities among different subjects. The methods of the research are thus a conceptual legal approach with comparative elements from legal theory and constitutional practice.⁸⁷

2.6 Caveats

The present inquiry is necessarily limited in scope and depth, and cannot explore all the divergent theories of civil disobedience and conscientious objection (2.6.1). Moreover, one could question comparing considerably different subjects; individuals with constitutions and civil society with judicial institutions; or anthropomorphically perceiving the states as having collective consciousness (2.6.2). Finally, the unconventionality of the research methods bears the question of the potential productivity of the undertaken journey (2.6.3).

2.6.1 The Scope of the Survey – Explored and Overlooked Theories

The methodological approach of the research requires a closer examination of the theoretical account(s) of civil disobedience and conscientious objection. However, after a preliminary examination of legal theory, it became obvious that legal scholars and philosophers have developed considerably divergent accounts. They range from the distinctively practical and case law-orientated argumentative approach developed by Dworkin, to the rather theoretically narrow and highly abstract approach by Rawls. Accordingly, one is faced with a dilemma: Which theoretical account should serve as a basis for the said structural comparison? Should one choose the most convincing account, the most elaborated one, or the one which seems to be the most promising regarding the envisaged comparison? As we have seen above, Føllesdal directly applied the Rawlsian account without any explanation as to why he chose this particular theoretical view. There is nothing wrong per se with the Rawlsian account, but it stands in contrast with many other theoretical accounts, which Føllesdal disregarded without explaining why.

Concerning civil disobedience, contemporary literature broadly distinguishes between three main threads: religious-spiritual civil disobedience,

87 P Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2019).

liberal civil disobedience, and radical democratic civil disobedience.⁸⁸ Religious disobedience can be traced back to the distant past, seen as the divine and sacred duty by the God(s). However, Mohandas K. Gandhi and Martin Luther King, Jr. also viewed their movements as religiously and spiritually inspired.⁸⁹ The liberal account of civil disobedience is a 'corrective to overbearing political majorities', and the radical-democratic view 'helps overcome far-reaching democratic deficits and leads to extensive reforms'.⁹⁰ Naturally, all threads share several elements and objectives.

The research here extends beyond one author to observe several different accounts simultaneously, while acknowledging their differences and similarities. Drawing on the work of William E. Scheuerman, the presuppositions, justifications and political aspirations 'are grasped best when situated in the context of rival political (and philosophical) traditions'.⁹¹

Accordingly, the research holistically views several competing theoretical accounts and focuses on their common denominators. To achieve that aim, one does not need to go through every existing theoretical account. It suffices to consider the major voices of civil disobedience and conscientious objection: namely, the jurisprudential theories of John Rawls, Joseph Raz and Ronald Dworkin, complemented by the writings of William E. Scheuerman and Kimberley Brownlee.

This choice and limitation of legal scholarship deserves a short explanation. The limited scope of the research simply does not allow for addressing the various conceptions of resistance in legal theory beyond the above-cited survey scope. Moreover, the respective scope of the survey should not limit or distort the potential outcomes. The survey represents two contemporary legal views from two distinctive legal understandings. Whereas Raz understands the law as best understood through social facts rather than moral principles, in the light of exclusive legal positivism,⁹² Dworkin has an 'interpretive' approach to law and morality, an approach which comes

88 Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (n 22) 274.

89 William E Scheuerman, *Civil Disobedience* (1st edn, Polity 2018) 11.

90 Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (n 22) 275.

91 Ibid. 274.

92 Brian H Bix, 'Joseph Raz's Approach to Legal Positivism' in Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021).

close to what one could call a contemporary (post)-natural understanding of law;⁹³ a law which is normative and based on moral principles.⁹⁴

Moreover, it is not wrong per se to decide subjectively on one or several comprehensive theoretical accounts, which are plausible, well-argued and widely recognized. Although this research cannot cover all angles, especially due to the supreme complexity of the said subject matter, this fact alone does not dismiss the respective findings hereinafter. Rather, it sets the initial foundations of the structural comparison, which will need further research. It is only the first step and an invitation to others to pick up the thread and complement the findings with further, more detailed studies.

2.6.2 Apples, Oranges, and Anthropomorphism – Comparing Individuals and Constitutions, Civil Society and Judicial Institutions

A serious critique of the research in the last chapter might be the selected subject of structural comparison. One could argue that the research compares apples and oranges, individual conscience with a constitution, and civil society with judicial institutions. Are these concepts suited to be compared with one another? Moreover, one may conclude that we are ending up ‘ascribing a dubious moral capacity to institutions themselves’.⁹⁵ Considering these potential critiques of arguably unrelated matters, can the anticipated research agenda remain relevant?

Furthermore, and even more severe, can we talk about the states as they would be *a persona*? Can we understand institutions as moral agents, not just viewed as reducible to the actions of their representatives?⁹⁶ Or would that be an entirely anthropological approach that, while trying to relate, would likely ascribe the meaning to a collective entity in a deeply erroneous way? For example, some scholars warn us to perceive a state in a personified manner, which reflects a fascist state.⁹⁷ Moreover, one cannot

93 James Donato, ‘Dworkin and Subjectivity in Legal Interpretation’ (1988) 40 Stanford Law Review 1517.

94 Ronald Dworkin, ‘Natural’ Law Revisited’ (1982) 34 Florida Law Review 165.

95 White (n 20) 642.

96 Toni Erskine, ‘Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States’ (2001) 15 Ethics & International Affairs 67, 75.

97 Alexander Wendt, ‘The State as Person in International Theory’ (2004) 30 Review of International Studies 289, 292.

understand a state as an organism, a form of life that possesses *collective consciousness* and subjective experiences.⁹⁸

Attributing an inner moral conscience to the states, or the capacity to have one, may be perceived as a far-fetched endeavour. Scheuerman critically argued that what makes civil society-based disobedience fundamentally different from a state's disobedience is that the latter privileges access to power and coercion.⁹⁹ Any organized and monopolized violence in a state creates a normative paradox – because it is prescribed by law, it is impossible to attribute a moral consciousness to it.¹⁰⁰ Finally, a state's institutions legally represent the citizens, whether one agrees or disagrees with their actions. Accordingly, when an institution acts 'illegally', this inevitably binds the citizens even if they disagree with the respective acts. One could argue that 'it seems strange and perhaps even perverse to interpret those acts as somehow doing justice to some notion of free and equal citizens'.¹⁰¹

The critical considerations above are of a serious nature and must be thoroughly addressed before going *in media res*.

As to the subject of comparison, the research does not claim that civil disobedience and conscientious objection *equal* resisting national judicial claims against the authority of the EU. What it does instead is recognize and explore the *structural* similarities between them. One can clearly identify similarities as to what the identity claims want to achieve, as well as their justificatory reasons. Thus, as a starting point of the research's hypothesis, one could assume that the established and well-analyzed scholarly accounts and observations in one field can illuminate how one should understand a structurally comparable situation elsewhere. The research is therefore not an immediate comparison in a narrow sense, aware of the distinctiveness of the observed subjects, but rather an inquiry into the structure of legal arguments and judicial responses of civil disobedience and conscientious objection, with the aim to assess *whether* (if at all), and to what extent, one could transplant and apply these arguments in the legal framework of the EU: namely, to correspondingly observe and evaluate claims of national constitutional identity as resistance against the authority of the Union.

The second consideration relating to the projected anthropological personification of a state is more difficult to address in its full complexity.

98 Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (n 22) 277.

99 Ibid.

100 Ibid. 282.

101 Ibid. 278.

A preliminary study of the intellectual history of a state quickly indicates that the perception of a state closely correlates with specific sociological and historical circumstances of a particular time period. For example, Hobbes significantly shaped Western political thinking, and in his words, a man's life is 'solitary, poore, nasty, brutish, and short.'¹⁰² Hence, in order to preserve ourselves, especially in the light of 17th century England's Civil War, we need an absolute power of a sovereign protector. The cover picture of *Leviathan* by a French artist Abraham Bosse illustrates this point: the cover picture was an important device for a reader in the 17th century, which mediates how to engage and understand the text according to the *paratexts*.¹⁰³ We see a crowned giant, clutching a crosier and a sword, emerging from a landscape made up of the bodies of thousands of people who all look up to him in allegiance. Or, in the words of Hobbes:

'A Multitude of men, are made One Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Representer, not the Unity of the Represented, that maketh the Person One.'¹⁰⁴

In other words, a personalized State under the full control of a sovereign.

Interestingly, correlating with the birth of psychology, the perception of a state becomes quite different, yet still *personified*. One perceives a state as an unpredictable and capricious agent, much like the new wave of intellectual thinking;¹⁰⁵ a collectiveness that one can analyze and understand. By contrast, in the period of increasing technical innovations, the perception of a state becomes increasingly scientific. A state is highly technical, objec-

102 Thomas Hobbes, *Leviathan* (Christopher Brooke ed, 1st edn, Penguin Classics 2017) pt 1, ch 13.

103 Gerard Genette, *Paratexts: Thresholds of Interpretation* (Jane E Lewin tr, Cambridge University Press 1997).

104 Hobbes (n 102) pt 1, ch 16.

105 See also Elizabeth Ann Danto, 'Three Roads from Vienna: Psychoanalysis, Modernism and Social Welfare' in Joy Damousi and Mariano Ben Plotkin (eds), *The Transnational Unconscious: Essays in the History of Psychoanalysis and Transnationalism* (Palgrave Macmillan UK 2009) 19ff; Alexander Wendt, 'The State as Person in International Theory' (2004) 30 *Review of International Studies* 289; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 18.

tive, and made from institutions; a state as a machine in the Weberian sense.¹⁰⁶

Moreover, as Wendt wrote, we are attributing to the state properties which we associate with human beings: rationality, identities, interests and beliefs; as found in the works of realists, liberals, institutionalists, Marxists, constructivists, behaviouralists, feminists, postmodernists, international lawyers and all those in between.¹⁰⁷ Hence, all these discussions assume 'that the idea of state personhood is meaningful and at some fundamental level makes sense'.¹⁰⁸

A deeper and more serious intellectual history of the personification of the state exceeds the scope of this research. Yet, these generalized examples indicate that the perception of a state changes through time and is an attractive placeholder for projections of our current understandings of time and society. Does a modern state have a character? Can we analyze a state as an agent with its own intentions, character or idiosyncratic features? Can we project our anthropological views on a collective entity which consists of thousands of opinions, communities and diverse institutions?¹⁰⁹

The questions above are perhaps too ambitious for the purposes of the present research. We will only assume that the constitution of a state articulates the main societal values and principles, and main institutions, and sets the basic framework of how the plurality of political opinions translates through political processes into applicable legal norms. The highest (constitutional) courts have the power to interpret the constitution and develop its contemporary meaning, whereby the apex courts – whose members in no way represent the plurality of the respective society – essentially determine what a state is, what it thinks, and what it protects. With the other branches of power, most notably the legislative power, the apex courts speak for a constitution that ties together its people; as Thucydides in 431 BC referred to the polis as a singularity representing the citizens, 'inscribing a corporate personality into the substance of the state is a tradition as old

106 Andreas Anter, 'The State as Machine' in Andreas Anter (ed.), *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (Palgrave Macmillan UK 2014).

107 Wendt (n 97) 289.

108 Ibid.

109 Peter Lomas, 'Anthropomorphism, Personification and Ethics: A Reply to Alexander Wendt' (2005) 31 *Review of International Studies* 349.

as international relations'.¹¹⁰ Pavlina Starski similarly highlighted a state's personhood concerning the unwilling and unable state in public international law as a 'metaphorical analogy' which contains fictional elements – from 'organic' to 'anorganic' perceptions of a state's personality.¹¹¹ In short, public international law builds on the fiction of anthropomorphization of the state, regardless of how misguided that construction may be.¹¹²

When we refer to claims of national constitutional identity by the apex courts as acts of resistance against the Union, we are aware that a particular judicial decision only formally and legally represents a state. Different benches of judges are likely to reach a different conclusion as to what is a national constitutional identity of a respective state. And all along, the legal fiction of determining the contents of what is supposed to be shared by all can never incorporate the hearts and minds of all the people, as *Leviathan's* book cover suggests. Yet, one can still observe states and their institutions as agents expressing arguments, intentions and social positioning. It is not the biological or human, but the social nature of the state which creates social and political reality, subject to the research at hand.¹¹³

To sum up, this research consciously rejects the vision of a state as a personalized agent with its own 'conscience'. It merely explores the legal reasoning of the national apex courts, founded on their respective constitutions, as a legal practice which resembles structural settings and justificatory reasons for civil disobedience and conscientious objection.

2.6.3 (Un)Productive Journey – What Can We Learn?

As a final caveat, it is impossible to predict with certainty whether the said inquiry will bring results that one can directly apply in the judicial praxis, going beyond the general and abstract observations as made by Føllesdal and Isiksel. Will the final conclusions find their way into judicial reasoning

110 Robert Oprisko and Kristopher Kaliher, 'The State as a Person?: Anthropomorphic Personification vs. Concrete Durational Being' (2014) 6 *Journal of International and Global Studies* 30, 31.

111 Paulina Starski, *The Unwilling or Unable State as a Challenge to International Law* (2023) 121 (forthcoming).

112 Cf Anna Sophia Tiedeke, 'Are We Taking the State (Too) Seriously? Anna Sophia Tiedeke' (Colloquium of the Center for Global Constitutionalism 2021) (forthcoming).

113 Oprisko and Kaliher (n 110).

by the CJEU when adjudicating the meaning and legitimacy of national identity claims?

From a dogmatic legal perspective, the anticipated research rather unconventionally applies the theories from legal theory and jurisprudence into concrete judicial practice. The challenge of the said interdisciplinary research is to determine whether, and to what extent, the present findings may truly help judicial practice. Only future developments will be the judge of that.

3 Conscience and Conscientious Objection

Conscience is the internal moral compass of each person, which guides and signals what is right and what is wrong, or what to do or not to do. Some people understand it as the personal source of morality, whereas some religious believers consider it a medium for God's voice. Conscience can reflect one's identity, values or beliefs. Sophocles' Antigone refused Creon's command and buried her brother's body in defiance of the King's edict.¹¹⁴ Socrates rejected both avoiding the death penalty and ceasing to 'corrupt' the youth of Athens.¹¹⁵ Henry David Thoreau refused to pay his taxes because he claimed that would make him an agent of injustice, thereby financing the ongoing Mexican–American war and slavery.¹¹⁶ They all followed their conscience before any other terrestrial authority. Conscience universally (co)defines human beings and is intrinsically connected to every person.

Conscience is legally acknowledged and legally relevant. Article 1 of the Universal Declaration of Human Rights states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and *conscience* and should act towards one another in a spirit of brotherhood.'¹¹⁷ Article 18 of the International Covenant on Civil and Political Rights says: 'Everyone shall have the right to freedom of thought, conscience and religion.'¹¹⁸ The Human Rights Committee adopted General Comment No. 22, relating to Article 18, where it stated: Although '[t]he Covenant does not explicitly refer to a right to conscientious objection, [but] the Committee believes that such a right can be derived from article 18'. And also: '[T]he obligation to use lethal force may seriously conflict with the freedom of

114 Sophocles and Edith Hall, *The World's Classics: Antigone; Oedipus the King; Electra* (HDF Kitto tr, Oxford University Press 1994).

115 Plato, *Plato: Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Harold N Fowler tr, Loeb Classical Library 1914).

116 Lewis Hyde and Henry David Thoreau, *The Essays of Henry D. Thoreau: Selected and Edited by Lewis Hyde* (North Point Press 2002).

117 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1 (emphasis added).

118 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 18(1).

conscience.¹¹⁹ It also asserted that ‘there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs’.¹²⁰

In addition, conscience is not only defined as a right, but also as a positive obligation. Principle IV (Superior Orders) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgement of the Tribunal states: ‘The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was, in fact, possible to him.’¹²¹

On the regional European level, Article 9 of the European Convention on Human Rights almost identically reiterates: ‘Everyone has the right to freedom of thought, conscience and religion.’¹²² The Council of Europe’s Parliamentary Assembly (PACE) adopted Resolution 337 (1967) on the Right of conscientious objection. The Resolution determines the right to refuse to perform armed service. This right ‘shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States’.¹²³

Furthermore, conscience or profound belief can arise from ‘religious, ethical, moral, humanitarian, philosophical or similar motives’.¹²⁴ Resolution 1763 (2010) on the right to conscientious objection in medical care invites its members, to ‘guarantee the right to conscientious objection in relation to participation in the medical procedure’ and to ‘ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider’, and to ‘receive appropriate treatment, in particular in cases of emergency’.¹²⁵ Resolution 1928 (2013) on Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence, calls to ‘ensure the right to well-de-

119 UNCHR ‘General Comment 22’ (1993) UN Doc C/21/Rev.1/Add.4, para 11.

120 Ibid.

121 ILC, ‘Report of the International Law Commission covering its 2nd Session’ (5 June–29 July 1950) UN Doc A/1316, principle IV, para 97.

122 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 9.

123 PACE (22nd Sitting) Res 337(1967) *Right of conscientious objection* 26 January 1967, para a(2).

124 Ibid.

125 PACE (35th Sitting) Res 1763(2010) *The right to conscientious objection in lawful medical care* 7 October 2010, paras 4.1–4.3.

financed conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education, [...], provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed'.¹²⁶

Finally, Resolution 2036 (2015) on Tackling intolerance and discrimination in Europe with a special particular focus on Christians, calls to 'uphold freedom of conscience in the workplace while ensuring that access to services [...] is maintained and the right of others to be free from discrimination is protected'.¹²⁷ Additionally, many states regulate specific aspects of conscience, for example in relation to military service,¹²⁸ medical procedures,¹²⁹ religious freedoms,¹³⁰ and even concerning the freedom of the parliamentary electors.¹³¹ However, this research does not address the

126 PACE (14th Sitting) Res 1928(2013) *Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence* 24 April 2013, para 9.10.

127 PACE (8th Sitting) Res 2036(2015) *Tackling intolerance and discrimination in Europe with a special focus on Christians* 29 January 2015, para 6.2.2.

128 See i.e. Derek Brett et al. (eds), European Bureau for Conscientious Objection, *Annual Report: Conscientious Objection to Military Service in Europe 2021* (Brussels, 21 March 2022).

129 Mark Campbell, 'Conscientious Objection and the Council of Europe: The Right to Conscientious Objection in Lawful Medical Care Resolution 1763 (2010) Resolution Adopted by the Council of Europe's Parliamentary Assembly' (2011) 19 *Medical Law Review* 467; Anna Heino and others, 'Conscientious Objection and Induced Abortion in Europe' (2013) 18 *The European Journal of Contraception & Reproductive Health Care: The Official Journal of the European Society of Contraception* 231; Emmanuelle Bribosia and Isabelle Rorive, 'Seeking to Square the Circle: A Sustainable Conscientious Objection in Reproductive Health Care' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 396ff; Valerie Fleming, Beate Ramsayer and Teja Škodič Zakšek, 'Freedom of Conscience in Europe? An Analysis of Three Cases of Midwives with Conscientious Objection to Abortion' (2018) 44 *Journal of Medical Ethics* 104. See also Ludovica Anedda et al. (eds), European Parliament, *Sexual and reproductive health rights and the implications of conscientious objection* (2018), pp 97ff.

130 Heiner Bielefeldt, Nazila Ghanea and Michael Wiener, 'Conscientious Objection', *Freedom of religion or belief: An International Law Commentary* (Oxford University Press 2016) s 1.3.11; Kavot Zillén, 'Religious Refusals in Health Care as a Matter of Freedom of Religion' in Hedvig Bernitz and Victoria Enkvist (eds), *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (Hart Publishing 2020) 181ff.

131 Bernd Grzeszick, 'GG Art. 20' in Theodor Maunz et al. (eds), *Grundgesetz-Kommentar* (C.H. Beck 2022).

scope of conscientious objection under positive law, but its scope in the lack of it.

In a socio-political sense, the emergence and constitution of the conscience in recent times can be seen through four significant historical moments, characterizing its different roles, as identified by Julie Saada and Mark Antaki.

First, Christianity constituted conscience as an essential part of religion. However, only the Church had the authority to shape and transmit the dogmatic truth of conscience. The Church was therefore the authority to guide an individual conscience,¹³² which played a central role in salvation through the practice of confession,¹³³ and it was embodied by the normative teaching of the institution.

Second, conscience was eventually de-institutionalized by Protestantism. Conscience had to be freed from any institutional impact¹³⁴ and become autonomous. Only in that way would it be able to connect with the transcendental and be a recipient and medium of the divine.

Third, while it is argued that it was freedom of conscience that 'paved the way for the concept of equality, representation and self-determination',¹³⁵ the concept was dissolved with the creation of the social contract. Pre-political rights of individuals and their conscientious consent in the state of nature were prerequisites to establishing the social contract. However, when constituted, the individual objections become reduced, and conscientious objection became absorbed by the collective will and legitimacy of the newly established political and legal order.¹³⁶

Finally, Saada and Antaki observe the last historical moment in the fusion of conscientious objection and civil disobedience. If conscientious objection cannot realize the underlying principle it invokes, it would essentially remain on the margins of political dimensions and thus remain insignificant.¹³⁷ However, if it (even unintentionally) mobilizes others and spreads and evolves as a political contestation, it can realize its goals.

132 Julie Saada and Mark Antaki, 'Conscience and Its Claims: A Philosophical History of Conscientious Objection' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 31.

133 Ibid.

134 Ibid. 41.

135 Ibid.

136 Ibid. 48.

137 Ibid. 49.

Hence, the difference between civil disobedience and conscientious objection may become tenuous.¹³⁸

Even today, conscientious objection as an intricate subject still deeply divides legal and philosophical views as to its nature, and the degree of tolerance it should enjoy in legal order. Some authors claim that it does not contribute to the legal order.¹³⁹ Conscientious objectors withdraw from democratic societies, want to be left alone, and enjoy an exception from the obligations that everyone else must comply with.¹⁴⁰ Furthermore, modern organized society cannot endure laws not being applied to all alike.¹⁴¹ The principle of equality which is the essence of the rule of law arguably demands that.

But there are many arguments supporting an individual's conscience. Locke and Mill both saw 'freedom of conscience and belief as the surest path to discovery of the truth in human affairs'.¹⁴² In recognizing a conscience, one recognizes humanism and personal autonomy, which enables self-respect and a sense of identity. Moreover, conscience might even contribute to the development of the currently established interpretation of fundamental rights. Or simply from a pragmatic point of view, it often proves to be contra-productive when forcing people to act against their strong commitments. Furthermore, from a rule of law perspective, the conscience of an individual remains a marginal deviation, and one can hardly claim that it would endanger a robust democratic system. For laws are constantly being violated without seriously putting the system in question. In addition, many states have incorporated specific conscientious objections in their domestic laws, legally allowing objectors to refuse to carry out specific tasks: for instance, to refuse to exercise an abortion, or to serve in the military. States can tacitly recognize some conscientious objections through the discretion of (non-)prosecution; and the courts can use it as attenuating circumstances while defining the scope of potential culpability and sanction.

138 Ibid. 55.

139 Marci A Hamilton, 'The Missing Children in Elite Legal Scholarship' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018).

140 Bernhard Schlink, 'Conscientious Objections' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 102.

141 Dworkin (n 69) 206.

142 John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Ian Shapiro ed, 1st edn, Yale University Press 2003) xv.

Conscientious objection (still) lacks a legally and theoretically comprehensive and commonly accepted definition. It is usually understood as a claim to refuse a legal obligation being at variance with one's conscience. Yet, it is not clear whether and to what extent a legal system should recognize such claims. On the one hand, democratic legal systems are not fully blind to the objections of the conscience. On the other hand, the scope and nature of the claim are heavily disputed in theory and practice. The consequences of conscientious objection are unclear, and the constituencies of the conscience can vary considerably. While conscientious objection is universally recognized and essential to all humans, it remains strikingly impalpable in the context of concrete legal acceptance in practice and theory.

4 Conscientious Objection in Legal Theory

The following section introduces three distinctive theories of conscientious objection in legal theory: first, a theory of conscientious refusal according to the political principles of justice by John Rawls (4.1); second, a theory of conscientious objection based on an individual's autonomy put forward by Joseph Raz (4.2); finally, a theory of civil disobedience by Ronald Dworkin (4.3).

4.1 Conscientious Refusal and Political Principles in the Theory of Justice

Conscientious refusal is often closely connected with civil disobedience (as discussed further below)¹⁴³ and drawing delineation lines between them may actually appear more blurred than one often assumes. John Rawls, however, clearly distinguishes between the two in his *Theory of Justice*.¹⁴⁴ For Rawls, conscientious refusal is, by its very nature, an individual matter which does not need collective support; it is not necessarily carried out in a public forum – although a conscientious refusal is likely known to authorities, or at least it does not try to hide; it does not appeal to (justice) convictions of the broader community; and finally, it is essentially not a political act.¹⁴⁵

Conscientious refusal, or conscientious evasion, according to Rawls is non-compliance to a direct legal injunction or administrative order which is being addressed to an individual, and which the latter refuses to fulfil due to political, religious or other principles being at variance with the constitutional order.¹⁴⁶ Rawls names some typical examples, such as the refusal by a Jehovah's Witness to salute the flag; early Christians performing certain acts of piety proscribed by a pagan state; the unwillingness of a pacifist to serve in the armed forces; a soldier disobeying a military order manifestly

143 Dworkin (n 69).

144 Rawls (n 68) 319, 323.

145 Ibid. 323.

146 Ibid. 324.

contrary to moral law; or a refusal to pay tax on grounds which would possibly establish an individual as an agent of grave injustice to another.¹⁴⁷

As to the possible justification of conscientious refusal, Rawls makes a relevant distinction relating to the reasons for refusal or evasion. It is self-evident to him that the law cannot and will not always respect the dictates of conscience.¹⁴⁸ For example, if conscience dictates that human sacrifice is a matter of religious belief, this clearly cannot be tolerated at all. Consequently, conscientious refusal may only be potentially valid if it is based on political principles underlying the constitution: for instance, when a pacifist soldier refuses to go to war because killing people constitutes a violation of life and human dignity. Nevertheless, if the war was just (if that is at all possible, and for the sake of argument) because it is fought for example in self-defence, participation in a just war would be compliant with constitutional principles: that is, the protection of life, dignity and freedom. These are the same principles as the agent claims to protect while raising their conscientious refusal.¹⁴⁹ Henceforth, in a situation where the political principles underlying the constitution justify both legal duty and conscientious objection, Rawls seems to deny the validity of conscientious objection. In a just war and due to a fair conscription system, all persons capable of fighting would be legally and morally obliged to carry out their military duties.

An agent would only legitimately exercise their claim of conscientious refusal if their claim were grounded in one of the principles of justice, and stand against an unjust or likely unjust conduct, contradicting those principles: for example, a war fought for economic or power reasons (as it usually is), or a soldier's refusal to engage in certain illicit acts of war.¹⁵⁰ In other words, one can legitimately oppose a direct legal injunction if the underlying principles of such an injunction are essentially in conflict with the principles of justice.

One may have some critical observations concerning Rawls' theory of conscientious refusal. First, the conscience as such does not seem to have a significant role when considering it as an essential element of conscientious objection. Whether a refusal is tolerated or not depends on the constitution's underlying political principles, which justify the refused legal injunc-

147 Ibid.

148 Ibid. 325.

149 Ibid. 334.

150 Ibid. 333.

tion, regardless of how strong one actually feels about it. In that, Rawls completely moves the sphere of conscience into the sphere of normative objection against the validity and coherence of a legal system, if a legal injunction is no longer in accordance with the fundamental principles of political justice. One can hardly see how Rawls' conscientious refusal is different or beyond the classical constitutional challenge of a legal norm, which is claimed to be potentially at variance with the constitution.

Second, even if one's own (conscientious) reasons completely resort to the principles of political justice (for example, the principle of human dignity or the protection of human life), and the challenged norm also complies with the same principles, it is not obvious why the default solution suggested by Rawls should lead to a priori rejection of the conscientious refusal. When two competing interests are based on the same principles of justice, the principled absolute rejection of the conscientious refusal does not appear to be entirely persuasive. Thus, in the case of reasonable disagreement, an absolute dismissal of conscientious refusal without further (judicial) investigation might overlook its essence.

Rawls barely addresses a conscientious refusal based on religious and other moral reasons being at variance with the constitutional order. He only offers guidelines that 'the degree of tolerance accorded opposing moral conceptions depends upon the extent to which they can be allowed an equal place within a just system of liberty'.¹⁵¹ However, this misses the point of conscientious objection, which is to seek an individual exemption from a legal duty or legal injunction due to one's conscience. An individual conscience disables a person from acting in accordance with the law. A person does not seek to propose a different general (legislative) solution which would more appropriately balance the conflicting issues. On the contrary, the person seeks an individual exemption for themselves, while in principle possibly already acquiescing to the general rules which currently accommodate the conflicting interests. The burning question is therefore not how to adjust the law, but how to perceive an individual refusal and due to what kind of standards.

Furthermore, Rawls' theoretical approach does not offer any guidelines for conscientious objection based on religious or other principles being at variance with the constitutional order. How would Rawls respond to the actual example of the conscientious religious objection presented by

151 Ibid. 325.

Joseph Raz, where one parent strongly objected that his daughter had to wear a skirt in school and was determined to emigrate rather than comply?¹⁵² Could one possibly accept this refusal, since the degree of tolerance conceivably corresponds to the extent to which others can be allowed an equal place within a just system of liberty? It seems that this jurisprudential account is relatively insufficient to be applied beyond the claims based on political principles of justice.

However, one can still understand Rawls' thin account of conscientious refusal as a legitimate way of refusing a legal obligation, when such an obligation is possibly in violation of basic principles of political justice, which are the foundational element of the constitutional system.

Lastly, how can we observe the claims of national constitutional identity to disapply EU law in a structural comparison with the Rawlsian position on conscientious refusal? What reasons and what kind of considerations could be possibly identified? Prima facie it can be stated that Rawls' position comes close to one specific type of claim of national constitutional identity – claims within shared liberal constitutional commitments. For example, if the CJEU was to severely disregard fundamental rights protection, despite the guarantees of the EU Charter, a Member State could potentially and in a legitimate way refuse to comply with this judgement. However, Rawls' theory unfortunately cannot offer a more persuasive answer to the situation where the constitutional conflict between the Member States and the EU arises out of two different *interpretations* of the same fundamental values or constitutional principles; or when one faces a conflict between two opposing constitutional principles, both embedded in the liberal constitution and based on the principles of political justice, for example in cases such as *Melloni*¹⁵³ or *Sayn-Wittgenstein*.¹⁵⁴ Consequently, one ought to examine an alternative, more comprehensive jurisprudential account of conscientious objection.

152 Raz (n 56) 278.

153 Case C-399/11 *Stefano Melloni v Ministerio Fiscal (Melloni)* [2013] ECLI:EU:C:2013:107.

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

4.2 Conscientious Objection in the Theoretical Approach of Joseph Raz

The theory of Joseph Raz on conscientious objection is more encompassing as compared with conscientious refusal above. His theory builds on the principle of humanism and respect for the individual,¹⁵⁵ which is the point of departure for the entire justification of conscientious objection. Respect for persons presupposes the value of personal freedom, which essentially constitutes the value of pluralism. Respect for persons or humanism pursuant to Raz 'calls for respecting the autonomy of persons, that is, their right and ability to develop their talents and tastes and to be able to lead the kind of life they are committed to'.¹⁵⁶

Raz believes that most people have a certain vision of themselves which is inevitably connected and built around some aspects and goals of their lives or personalities. Therefore, preserving those goals is crucial to their self-respect and sense of identity.¹⁵⁷ Hence, according to Raz, it would be wrong to force people to disregard their moral convictions or sacrifice their personal goals.¹⁵⁸ Apart from practical and utilitarian reasons which additionally support conscientious objection (for example, pacifists in the army would possibly make bad soldiers and would bring discord to the army),¹⁵⁹ Raz makes a moral argument for raising a conscientious objection even under the assumption of a good state, where the law is morally valid and one should in principle comply with it.¹⁶⁰

Conscientious objection according to Raz is a private act designed to protect the agent from interference by public authority,¹⁶¹ where the agent believes, although perhaps wrongly, that such an imposition is morally prohibited for that individual.¹⁶² However, in his view, conscientious objection is not absolute and must be balanced with other interests and values. In other words, the law should, in principle, not coerce a person to do what they think to be morally wrong (however misguided that may be), but

155 Raz (n 56) 277.

156 Ibid. 280.

157 Ibid. 281.

158 Ibid.

159 Ibid. 278.

160 Ibid. 277.

161 Ibid. 276.

162 Ibid. 277.

acknowledges that this principle can be overridden to protect other values and ideals.¹⁶³

Raz further works out several distinctive types of legal norms that are distinguished by considering the law's nature and purpose: namely, the type of law which imposes duties on a person in the interest of that person subjected to that legal burden; or the type of law which serves the public's interests; or finally, the kind of law which directly protects the interests of other identifiable individuals.¹⁶⁴

According to Raz, the claim to conscientious objection is considerably more potent in the following three scenarios. First, conscientious objection is more legitimate when an agent refuses to carry out the duties of a paternalistic law. Second, when the identifiable individuals consent to the violation of the law, which protects their interests. Finally, when an individual exemption from the public-interest law does not disproportionately impact the protected goods.

For example, when a Sikh with a turban refuses to wear a helmet when riding a motorcycle,¹⁶⁵ he is refusing to follow a paternalistic duty (if we leave the aspect of the social distribution of public healthcare costs aside). Paternalistic laws aim to protect the individuals in their interests, but it may overlook some exceptional individual cases where protected interests collide with other strong commitments. Hence, it seems paternalistically unconvincing to argue that a Sikh must wear a helmet instead of a turban, because that is supposedly in his interest, although he would prioritize his religious belief over his decreased safety. Hence, in the case at hand, the arguments for the justification of individual exemption appear to be stronger.

Another example refers to the assistance to carry out euthanasia¹⁶⁶ for a close family member or friend who asks for it. Although assistance to death is illegal, an individual might feel firmly obliged to violate that prohibition due to their conscience. The consent of the individual, which the law is trying to protect, invalidates the assumption of the law and strengthens the claim for conscientious objection.¹⁶⁷

163 Ibid. 281.

164 Ibid. 283.

165 Ibid.

166 Ibid. 285.

167 The research here cannot address all the modalities of euthanasia concerning other interests at stake, such as public interests and the value of life. See also the recent decision by the German FCC concerning self-determined death in the light of

In addition, an isolated and individual violation of the public-interest law scarcely makes a substantial change in relation to the protected common good. The following cases will make little discernible difference to the protected good: if one person refuses to pay taxes because they would be spent for morally wrong reasons; or one is exempt from conscription, claiming to be a pacifist; or one violates the cap on CO₂ emissions for whatever personal and (however misguided) moral reasons.¹⁶⁸ The money will still be collected and spent for the same planned reason; the army will conscript another person; and the pollution will continue to decrease or increase. Hence, the claim to conscientious objection in the circumstances of the public-interest law is strong.

By contrast, the legitimacy of tolerating an exemption is reduced where the law protects the direct interests of other identifiable individuals. In that scenario the exemption of one directly hurts the other.

Raz finds it unbalanced and unfair if one would simply allow for an exemption from the law. Thus, he argues for embracing legal sanction or compensation by the agent: not to force them to carry out their legal duty, but to bring something to the table instead. For example, he states that the liability to pay damages rightfully compensates an exemption from legal duty, although it is being carried out in the name of moral conviction.¹⁶⁹ Some other civil service should compensate the exempt from conscription by the objector (which is in fact often the case).

At last, Raz's theory of conscientious objection rejects a legal form of having a special and unified legal doctrine granting a *right* to conscientious objection.¹⁷⁰ He argues that it would be contra-productive to have a right to request an exception, objecting when being sued for a breach of law, or letting the judicial authority decide on it. He is convinced that the right to conscientious objection would expose the notion to grave abuse, since it is only the word of an agent which can count as evidence of the true conviction. Moreover, the right to conscientious objection would expect the agent to inspect their own personal motives, which are often mixed or even conflicting. That would encourage self-doubt, self-deception and other undesirable forms of introspection. Finally, the right to conscientious

personal autonomy and self-determination. BVerfG, 2 BvR 2347/15 *Self-determined Death* 26 February 2020.

168 Raz (n 56) 285.

169 Ibid. 284.

170 Ibid. 286.

objection would constitute a public intrusion into private affairs, since it would have to investigate, pry and demand from an individual to justify and prove their account for their moral life.¹⁷¹ Accordingly, one would have to compromise several aspects of autonomy, such as one's privacy, self-respect and dignity, to guarantee freedom of conscience.¹⁷²

To summarize, even if the moral belief of an agent is misguided and outside the normative constitutional principles, that would not necessarily remove the legitimacy of the conscientious objection. Moreover, the legitimacy of the claim of conscientious objection derives from the principle of humanism and respect for persons, which essentially leads to valuing personal freedom or autonomy as one of the leading values and principles. Furthermore, the essential element to evaluate the admissibility and legitimacy of conscientious objection is the law's nature and purpose, which is being contested. Paternalistic law, law protecting public interests, and law protecting the interests of the identified subjects, which are concretely consenting with the respective violation, should be treated differently from the law directly protecting other identifiable individuals.

In addition, an acceptable exercise of the conscientious objection does not exclude a person from their duty to compensate society or the other individual(s) for their breach of duty or disapplication of the law. Compensation can be a liability to pay damages, or alternatively to carry out some other deeds or services as appropriate. Finally, the preferred solution is the lack of a clear legal doctrine or the right to conscientious objection. The contrary would likely lead to countless cases of abuse and misuse of conscientious objection and its application in practice, as well as necessarily encroaching on the principles of privacy, self-respect and personal dignity.

4.3 *When the Law is Doubtful – Dworkin's Judicial Theory of Civil Disobedience*

A quite divergent view of individual resistance is offered by Ronald Dworkin. His approach does not differentiate terminologically between conscientious objection and civil disobedience, but only uses the terminology of civil disobedience. According to Rawls, Dworkin does not define civil disobedience as collective action, which – in his view – is the essence

171 Ibid. 288.

172 Ibid.

of civil disobedience.¹⁷³ For Dworkin, civil disobedience means acting in accordance with the law, but based on personal judgement of what the law requires or what is legally right.

He starts with the simple question, 'What should a citizen do when the law is unclear, and when he thinks it allows what others think it does not?'¹⁷⁴ In Dworkin's view, one must occasionally dismiss one's conscience when knowing clearly that the law commands it. But this is quite different from saying that one must dismiss one's conscience when reasonably believing that the law does not require it.¹⁷⁵ A disobedient agent is not simply refusing to comply with the law due to their conscience, but also ought to have plausible and convincing legal arguments that the current understanding of the law is incomplete.

Dworkin considers three distinctive possibilities for acting when one believes the law is doubtful. Option 1: when the law is doubtful, one should assume the most restrictive possible interpretation and act according to it. Option 2: when the law is doubtful, one should act according to one's own understanding; however, only as long as there is no judicial decision (of the final instance) to the contrary. Option 3: even if there is a final judicial decision of the last instance (by a constitutional or supreme court) contrary to what one believes the law requires, one should still act according to one's own judgement.¹⁷⁶

It is obvious that the first option cannot be the right one. It would be fundamentally wrong if society would self-limit its scope of action by assuming the worst. Freedom in society would be unnecessarily reduced. But far more importantly, society would voluntarily give away its vehicle to test the law through judicial practice. The courts would no longer be faced with opposing conflicting views, which would have to be adequately accommodated. Losing that, the development of the laws and policies would essentially decline. Only through actual reasonable disagreements and confrontations of the opposing arguments can one discover proportionate and fair policies.¹⁷⁷

Yet, Dworkin rejects the second option as well. Even if there is a final contrary decision of the last instance, an agent can still act due to their

173 Rawls (n 68) 323.

174 Dworkin (n 69) 210.

175 Ibid. 214.

176 Ibid. 211.

177 Ibid. 214.

own judgement. If there were no resistance against final judicial decisions, the highest courts would never change their rulings.¹⁷⁸ But even the highest courts are changing their decisions by reversing their judgements every so often. For instance, in 1943, the Supreme Court in the USA changed its decision from 1941, allowing objections to saluting the flag on grounds of conscience. Moreover, it decided, that '[saluting] was no crime after the first decision either'.¹⁷⁹ In other words, individuals who refused to comply with the cited prohibition by the first decision of the highest judicial authority, pursuant to their conscience, were not in fact, in the retrospective view of the highest court, acting unlawfully.

Henceforth, when the law is doubtful, the third option applies. When the law is doubtful, an individual shall follow their own judgement; regardless of the contrary judicial decision, even of the last instance, and even if it is unlikely that the last instance would reverse its decision any time soon.¹⁸⁰ For Dworkin, following one's own judgement simply cannot be unfair as long as one is taking into serious consideration the arguments of the judicial authority and still believing that their own judgement might be fundamentally and politically right. In Dworkin's words, one cannot simply assume that the constitution is what the Supreme Court says it is.¹⁸¹ Law at its core is an adversary process which needs constant contestation. There would never be any overruling should everybody simply comply with the existing interpretation. Without the pressure of dissent, the chance of the governance offending the principles we serve would be increased. Therefore, only through dissent can the existing law stay alive, develop itself further, and maintain its relevance. Consequently, disobedience should be treated with the necessary amount of tolerance.¹⁸²

178 Ibid. 215.

179 Ibid. 213.

180 Ibid. 214.

181 Ibid. 211.

182 Ibid. 214.

5 Transplants of Conscientious Objection

After revisiting these very different theoretical perspectives on conscientious objection, we will now return to the following question: What can we apply to the pluralistic European legal world from the various accounts of conscientious objection, as quite diversely understood in legal theory? The following section aims to identify some of the elements from the theories of conscientious objection and transfer them to European constitutional law. I call these features ‘the transplants’.

The transplants of conscientious objection may serve as supporting guidance when deciding on the legitimacy of national constitutional identity claims. The transplants, which are identified below, are structured based on specific aspects of the law: first, according to the nature and purpose of the law (5.1); second, pursuant to the spheres of law (5.2.); addressing the dilemma of (un)necessary compensation for conscientious objection (5.3); and finally, the reasons and consequences for the lack of a comprehensive legal doctrine of conscientious objection (5.4).

5.1 Nature and Purpose of the Law

The most vivid element in the outlook of conscientious objection by Raz is the focus on the nature and purpose of law.¹⁸³ Every legal norm pursues an implicit or explicit aim and has an effect in different spheres of society. If the legal norm fails to realize its purpose, its legitimacy (or even its legality) is decreased accordingly. The claims to disapply these norms in the name of conscientious objection, which hold their own normative value, in these cases are more powerful. The research therefore establishes different elements in relation to the nature and purpose of law.

5.1.1 Legal Paternalism and Self-Regarding Actions

Sometimes a norm regulates the conduct of individuals with the goal of fully or partially benefitting these individuals. However, concrete circum-

183 Raz (n 56) 283.

stances may prove this presumption wrong. The subjects may in fact pursue a different goal, which is not the same as the supposedly beneficial relevant norm. In simple terms, the norm is paternalistic, knowing better than the individual whom it claims to protect. How much alcohol should an adult person consume? How often should we exercise? What kind of choices should we carry out regarding our body? What kind of clothes should we wear? If there are no other strong interests from others, these types of norms are paternalistic. In these circumstances, for example, a Sikh who refuses to wear a helmet because his religious belief requires him to wear a turban, an objector has a stronger claim.

The situations described above are similar to the concept of so-called self-regarding actions,¹⁸⁴ the actions which only harm yourself, which can be traced back to John Stuart Mill.¹⁸⁵ He argued that 'society may only interfere with those actions of an individual which concern others and not with actions which merely concern himself'.¹⁸⁶ In these circumstances the authority of the respective norms has only a weak justification, especially when confronted with a genuine and strong conscientious commitment.

The same may apply in European constitutional law. A Member State has a stronger claim to refuse to apply EU law due to its constitutional commitments if the nature of EU law is paternalistic, as described above.

The following example illustrates this argument. Under the Economic and Monetary Union (EMU), the Member States designed a set of rules to ensure sound and public finances and to coordinate their fiscal policies. The rules are known as the Stability and Growth Pact (SGP). The SGP, pursuant to Articles 121 and 126 TFEU, regulates the fiscal discipline of the Member States and sets the maximum limit for government deficit (3% of GDP) and debt (60% of GDP). Under the cited provisions, the EU institutions may eventually sanction and fine the Member States, should they not comply with the required recommendations.¹⁸⁷

184 John Stuart Mill, *The Collected Works of John Stuart Mill: Essays on Ethics, Religion and Society*, vol 10 (Liberty Fund 2006) 153.

185 Michel Rosenfeld, 'The Conscience Wars in Historical and Philosophical Perspective: The Clash between Religious Absolutes and Democratic Pluralism' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 63.

186 CL Ten, 'Mill on Self-Regarding Actions' (1968) 43 *Philosophy* 29, 29.

187 Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Italy and delivering a Council opinion on the 2018 Stability Programme of Italy [2018] OJ C320/48.

At the end of 2018, Italy came close to the excessive deficit procedure pursuant to Article 126(3) TFEU, after the European Commission rejected Italy's submitted Draft Budget Plan for 2019 (DBP)¹⁸⁸ due to its extensive overreaching of the mandated thresholds as incorporated in the Two Pack Regulation No. 473/2013.¹⁸⁹ Italy's public debt, at 131.2% of GDP in 2017, is the second largest in the Union,¹⁹⁰ and exceeds the maximum of 60%. However, Italy was supposedly following the logic of supporting social inclusion and public investment. In particular, it provided for citizenship income, aiming to guarantee a monthly income of 780 EUR; and therefore, corresponding to the relative poverty threshold,¹⁹¹ it reformed its active labour market policies, increased the labour market participation of women by rationalizing family-support policies, and introduced a 15% flat tax on personal income etc.¹⁹² Moreover, when Italy joined the Euro system, it was already violating the Stability and Growth Pact and exceeding the GDP threshold for more than 40%.¹⁹³ In addition, many argued that the EMU and its rules are skewed towards the northern countries and that Italy never really fitted into the existing growth model.¹⁹⁴

In the light of this structural comparison, what are the rules' nature and purpose on the Stability and Growth Pact? A simplified answer could be deduced from its name: stability and growth. However, there are clearly other political visions as to the means of achieving these objectives. The EU institutions are bona fide trying to help Italy to achieve the common goal of stability and growth, and help Italy to save Italy from itself. However, there is an additional factor: the fear of failing and consequently its spilling

188 Report from the Commission, Italy, Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union [2018] COM(2018) 809 final, 21.11.2018.

189 Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

190 Report from the Commission, Italy, Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union [2018] COM(2018) 809 final, 21.11.2018.

191 Ibid. p 11.

192 Ibid. p 19.

193 Frederik Traut, 'Playing the chicken game: The conflict over Italy's draft budget reveals a construction flaw in the EMU' (*Verfassungsblog*, 2 November 2018) <<https://verfassungsblog.de/playing-the-chicken-game-the-conflict-over-italys-draft-budget-reveals-a-construction-flaw-in-the-emu>> accessed 24 February 2023.

194 Ibid.

effect.¹⁹⁵ But the possibility of failure is not eliminated simply by abiding by the rules of the SGP. Furthermore, Italy did not only intend to increase its GDP deficit to achieve the common goal of stability and growth, but also to materialize and fulfil its basic public policy choices and social values: namely, distribution of income, levying and collection of personal taxes, the distribution of social welfare benefits and ensuring the availability and functioning of public healthcare and education systems; in other words, its core constitutional commitments.

In the case above, the excessive deficit procedure was ultimately not (yet) launched due to an eleventh-hour agreement¹⁹⁶ reached between the Italian government and the EU Commission. However, the situation could and still can easily turn out differently. How could one assess the potential claim of Italy to disapply the specific deficit rules under the SGP in the light of the anticipated social policy reforms as indicated above? Can Italy question and reject the prevailing post-crisis northern narrative of fiscal responsibilities, supposedly in its own interest, in the light of the transplant of paternalism and due to its democratic social commitments?

While drawing on the theory of Raz concerning paternalistic law, national constitutional disobedience would have a high legitimacy in the case above, where EU law may jeopardise the minimum welfare standards.

5.1.2 Consent

Another criterion to consider when determining the law's nature and purpose is the consent of the person whom the law protects. Consent is an important element, which can be transferred into European constitutional jurisprudence. The law sometimes regulates the conduct of people in order to protect the interests of identifiable subjects. Yet, the identifiable subjects can unequivocally reject the extended protection and consent to the anti-

195 Paul Dermine, 'The Italian Budget Drama – Brussels and Rome on Collision Course' (*Verfassungsblog*, 27 October 2018) <<https://verfassungsblog.de/the-italian-budget-drama-brussels-and-rome-on-collision-course/>> accessed 24 February 2023.

196 The Italian government revised the 2019 GDP growth forecasts from 1.5% to 1%; deficit/GDP ratio was changed from 2.40% to 2.04% (optical illusion); also, there is no structural deficit/GDP ratio any more. Paolo Pizzoli, 'Italy: No Request (yet) for Excessive Deficit Procedure from the EU Commission' *ING Think* (19 December 2018) <<https://think.ing.com/articles/italy-no-request-yet-for-excessive-deficit-procedure-from-the-eu-commission/>> accessed 24 February 2023.

pated violation of the norm which protects them. If one refuses to comply with the respective norm due to the requirements of one's conscience, and the agent whom the law protects approves the action of the objector, the claim of the said conscientious objection would be strong.

The transplant of consent in European constitution law can be demonstrated with the EU asylum system and the secondary movements of asylum seekers. The EU institutions invested great efforts to unify the European asylum application system. One of the prerequisites for the proposed Common European Asylum System (CEAS) was a unified and comprehensive common European dactyloscopy database (Eurodac), where the initial registration and fingerprinting are stored and accessible to all Member States. The Member States were therefore obliged to register the fingerprints of all asylum seekers immediately on entry to the particular EU territory. In that way the Member States could determine the country of first entry and potentially return the 'secondary movements asylum seekers' back to the country of first arrival.

Italy and Greece were accused of apparently 'slipping in' more than two-thirds of asylum seekers without prior registration.¹⁹⁷ According to Dublin Regulation III,¹⁹⁸ any Member State (and any other contracting party) which undertakes the first registration must carry out the asylum application. Considering the absence of a compromise among the Member States to share the burdens of those most exposed to migration movements, and the severe problems of these states to sufficiently guarantee better conditions for the asylum seekers, the 'northern countries' have the option to voluntarily process the asylum applications themselves. By doing so, they would agree with the violation of Dublin Regulation III, which predomi-

197 Manuela Samek Lodovici et al., 'Integration of Refugees in Greece, Hungary and Italy Comparative Analysis' (European Parliament, Committee on Employment and Social Affairs 2017) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614194/IPOL_STU\(2017\)614194_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614194/IPOL_STU(2017)614194_EN.pdf)> accessed 24 February 2023; Bruno Waterfield, 'Italy and Greece "Let Migrants Slip In"' *The Times* (Brussels, 3 May 2018) <<https://thetimes.co.uk/article/italy-and-greece-let-migrants-slip-in-7870nmfl5>> accessed 24 February 2023.

198 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

nantly secures their own interests and does not really work in practice.¹⁹⁹ In light of the long-standing and continuous attempts to make the situation (more) sustainable, initiating infringement proceedings against the said Member States by the Commission would be a delicate matter. Should the 'northern' Member States tacitly agree with this open and defiant violation of Dublin Regulation III, the claims to disapply the respective provisions would be considerably stronger.

5.2 The Spheres of Law

A law can regulate different spheres of conduct or different types of relationships. The effect of an objection against law changes when it is directed only towards the state, or when it affects also other private individuals (5.2.1). When conscientious objection directly impacts on other private individuals, one should differentiate between two distinctive scenarios: first, when the objector acts on behalf of the state (5.2.2), and second, when the objection takes place solely between private citizens (5.2.3).

5.2.1 Objections Against the State and Beyond

Classic conscientious objections are directed against public authority: the refusal of a Jehovah's Witness to salute the flag,²⁰⁰ refusal to carry out an unjust order in the army, to participate in an unjust war, or to pay taxes which would be spent on an unjust cause. When objecting to the state's authority, no (private) person is directly affected or upset. If an individual objected to conscription, the army would still exist, and one individual objection against the state would not severely undermine the army and its goals.

While the distinction between the private and the public sphere is deeply ingrained in legal thinking, one observes an evolution of the said distinction. Globalization and privatization made the nexus between private and public law increasingly intertwined, and a delineation between them more

199 Rachel Garrett and Nicole Barrett, 'Dublin III in Practice: Synthesizing a Framework for European Non-Refoulement Cases at the Human Rights Committee' (2021) 13 *Journal of Human Rights Practice* 250.

200 *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

blurred than ever before.²⁰¹ The accumulation of information, size and power in the private sphere has grown considerably, thus one must extend the guarantee of fundamental rights beyond the traditional sphere of public authority.²⁰² Moreover, traditional public services, such as for example health, education and infrastructure, have been outsourced or moved to the private sphere. The field of fundamental rights protection, traditionally covering solely the relationship between the state and the individual, no longer exempts the private sphere from some fundamental rights obligations.²⁰³

Similar effects can be observed with conscientious objection, which is no longer intrinsically linked to the public sphere. For example, objections against unrestrained and ethically questionable private data collection on an unprecedented scale, whistleblowing about privacy violations,²⁰⁴ and many more. When one objects to private or semi-private relations, the addressee is not always a big corporation or private institution, which can be substituted for the state in some respects. It can be another private individual, a historically repressed minority, or a religious community. If a conscientious objection is raised directly against public law, it would claim nothing more than an exception for itself. By moving into the private sphere, a conscientious objection potentially directly affects and upsets the dignity of other individuals too.

Rosenfeld similarly identified that the shift from public to private relations affects society at large, because it has substantial consequences for a democratic constitutional design.²⁰⁵ Tensions can be multiplied when freedom of religion faces the protection of minorities (protection against discrimination) in the private sphere. A typical example is the case concerning a bed and breakfast reservation made by a same-sex couple, which

201 Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 *International Journal of Constitutional Law* 125.

202 David Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57 *Theoria: A Journal of Social and Political Theory* 1.

203 Martin Borowski, 'Drittwirkung', *Max Planck Encyclopedia of Comparative Constitutional Law* (2018).

204 William E Scheuerman, 'Whistleblowing as Civil Disobedience' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).

205 Susanna Mancini and Michel Rosenfeld, 'Introduction: The New Generation of Conscience Objections in Legal, Political, and Cultural Context' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 4.

was cancelled when the religious (private) owners learned about the sexual orientation of their anticipated guests.²⁰⁶

Hence, the spheres of the law in which conscientious objection is raised bring new unknowns into the equation. An objection has a different dimension when it affects private individuals and their fundamental rights.

5.2.2 Objection on Behalf of the State

A distinctive context for conscientious objection concerns a situation where an objector acts on behalf of the state. For example, the objector works for a public authority, but refuses to carry out some of the entrusted assignments. In that way the objection directly affects or upsets other individuals, vulnerable groups, or other minorities.

The most widely known and accepted conscientious objection in this setting is conscientious objection in medical care. For instance, while most of the Member States allow doctors to exercise the right to be exempt from performing an abortion, they at the same time guarantee effective access to legal abortion. Clarifying the interpretation of Article 9(1) ECHR, the ECtHR stated:

‘[T]he word “practice” used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief ‘States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.’²⁰⁷

The proper accommodation of all three distinctive factors, namely the conscience of the individual, effective access to abortion services, and a state’s duty to provide those services, is not an easy task. Thus, conscientious objection inevitably loses its sharpness when faced with other legitimate interests.

206 Helen Keller and Corina Heri, ‘The Role of the European Court of Human Rights in Adjudicating Religious Exception Claims’ in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 323.

207 *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012) para 106.

Medical care is not the only example where the interests of others may be directly affected. The case of *Ladele*,²⁰⁸ a black religious registrar worker who refused to officiate at a same-sex civil partnership due to her Christian belief, can serve as another example. Ladele was a member of a small Evangelical church and was working in Islington Council. When she started her job as a registrar worker, officiating at a same-sex partnership was not yet an option. When Ladele refused to officiate a same-sex civil partnership, she simultaneously discriminated against homosexuals on behalf of the state. Although some have argued that Islington Council was one of the most LGBT-friendly authorities, and it was Adele who was in the minority with her strong religious belief,²⁰⁹ the Court of Appeal, concerned with the matter refused her objection and stated that her task was purely secular, part of her job, and did not affect the core of her religious beliefs.²¹⁰

Eventually, and notably with two dissenting opinions, the ECtHR dismissed Ladele's complaint in the joint cases of *Eweida and Others*.²¹¹ In its judgement the ECtHR cited the Constitutional Court of South Africa:

'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful

208 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

209 Susanna Mancini and Michel Rosenfeld (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 96.

210 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, para 52: 'Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.'

211 *Eweida and Others v UK* App no 48420/10, 36516/10, 51671/10 et al. (ECtHR, 15 January 2013).

and intensely burdensome choices of either being true to their faith or else respectful of the law.²¹²

Conscientious objection in this specific context cannot and should not be blind to the fundamental rights and interests of others involved, especially when it is raised by a person acting on behalf of the state. This is not to say that in such circumstances the conscientious objection cannot be legitimately raised any more. Notwithstanding, the scope of objection in these circumstances appears to be considerably confined.

5.2.3 Conscientious Objection Among Private Individuals

A conscientious objection can be raised solely within the scope of private relations. One recent case brought before the UK Supreme Court illustrates well the complexity and confusion of the said scenario. In the case of *Lee v Ashers Baking Company*²¹³ the Supreme Court had to decide whether two private owners of a bakery shop could refuse Mr Lee, a gay man, his wish to order a cake. The cake was intended for an event by campaigners for same-sex marriage in Northern Ireland, and was ordered with a depiction of cartoon characters Bert and Ernie and the words ‘Support Gay Marriage’. The Court had to decide between the unlawful discrimination of homosexuals and the conscientious objection by the owners. Ashers were sincerely convinced that gay marriage is inconsistent with Biblical teachings and therefore unacceptable to God. Moreover, they claimed they could not produce that slogan in good conscience. The Supreme Court reversed two earlier court decisions, which found Ashers discriminating against Lee on grounds of sexual orientation. The Supreme Court argued that the legal question was essentially about freedom of expression, which includes the right not to be forced to express an opinion that one does not hold. The Supreme Court stated that Ashers could not refuse to make the cake because Mr Lee was gay, but they should not be obliged to supply a message with which they profoundly disagreed due to their freedom of expression. In the words of the Supreme Court, there is a ‘distinction between refusing to produce a cake conveying a particular message, for any customer who

212 *Eweida and Others v UK App* no 48420/10, 36516/10, 51671/10 et al. (ECtHR, 15 January 2013) para 60.

213 The Supreme Court of the UK, *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 2017/0020.

wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics'.²¹⁴

The cited case law indicates a more lenient approach of the Supreme Court among private individuals. It suggests that a conscientious objection has a higher legitimacy when it is applied directly among private individuals, when they do not act on behalf of the state.²¹⁵ Although the case could be compared with *Ladele*, which argued that having to officiate at a same-sex marriage could equally impact her (negative) freedom of expression,²¹⁶ yet her role as registrar worker acting on behalf of the state creates a difference, which explains the respective judicial differentiation.²¹⁷

5.3 Compensation or Substitute Services

It remains disputed whether a conscientious objector should compensate others for being exempt. One may be inclined to say that the willingness to accept the consequences of conscientious objection indicates the depth of the conviction and thus validates its authenticity. Moreover, it restores equal treatment because the objector, through the compensation, 'pays' for its privilege. In that sense, Raz believed that the principle of equality requires balancing the exemption with an alternative obligation.²¹⁸ Hannah Arendt ridiculed this popular (mis)understanding,²¹⁹ and Dworkin rejected it too.²²⁰ If one had to accept the sanction, the situation would be no different from an ordinary violation of law without any conscientious motive.

Moreover, conscience is the moral guide of an individual, which unwillingly puts them in conflict with the existing rules of society. Understood in that way, it is more of an impediment, which causes its holders to step out of line, expose themselves and pursue their own convictions. To have

214 Ibid. para 62.

215 Mancini and Rosenfeld (n 205) 5.

216 Schlink (n 140) 107.

217 Another set of cases concern the prohibition from wearing any visible signs of political, philosophical or religious belief in the private workplaces. See also Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV (Samira Achbita)* [2017] ECLI:EU:C:2017:203; Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA (Asma Bougnaoui)* [2017] ECLI:EU:C:2017:204.

218 Raz (n 56) 285.

219 Hannah Arendt, *Crises of the Republic: Lying in Politics. Civil Disobedience. On Violence. Thoughts on Politics and Revolution* (1st edn, Mariner Books 1972) 52.

220 Dworkin (n 69) 206.

a conscientious belief is not a conviction by choice. If taken seriously, it is a constitutive element of an individual, upon which one cannot exercise full control, if being honest with yourself. Hence, when a conscientious objection is recognized and legally granted, there would arguably be no need to burden the objector any more than they are already confined by its own moral compass.

Even if the willingness to compensate for exception cannot be normatively desirable, it can nevertheless demonstrate the genuine conviction of the objector. Accordingly, transferred to European constitutional law, one could argue that the resisting Member States should accept an alternative obligation to compensate for any granted exception of EU application. The idea is controversial and potentially even dangerous.

For example, when Hungary refused to comply with European legislation concerning the relocation of refugees in the name of its current illiberal constitutional commitment, could it simply pay off the other Member States instead?

The new Hungarian constitution specifically acknowledged their Christian religion and the preservation of Hungarian culture and tradition as the essential elements of Hungarian identity. Moreover, the Hungarian government held a referendum on the relocation of refugees, through which the majority rejected the proposed European legislation,²²¹ although the referendum itself did not achieve a minimum turnout of 50%.²²² The Council outvoted the opposition of Hungary, Slovakia, Czech Republic and Romania (with Finland abstaining) and adopted the relocation scheme for refugees from Greece and Italy. Hungary and Slovakia challenged the decision in court, but the CJEU dismissed the case.²²³ Nevertheless, Hungary continued to ignore and disapply the cited decision and has not relocated any of the foreseen refugees.

How plausible is the idea that Hungary could maintain its constitutional objection if it was willing to freely compensate the other Member States? Although the said exemption would not directly impact the rights of refugees – they would be accommodated by the other Member States

221 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration [2015] COM(2015) 240 final.

222 The result of the referendum was 90% against the scheme. The turnout was 43.7%.

223 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.

instead – the suggested pragmatic argument cannot be right. It would go directly against common European principles and values, such as the principle of non-discrimination and solidarity. Accordingly, I argue that even if a Member State would be willing to compensate for the requested exemption in the name of national constitutional identity, one could not accept it if concurrently it ran against common and shared principles.²²⁴

5.4 Away with a Comprehensive Legal Doctrine of Conscientious Objection

This section has identified some main features of conscientious objection, which could potentially be transplanted into European constitutional law. For example, when a conscientious objector refuses to comply with the norm, which is of a paternalistic, self-regarding nature; when the respected individual, protected by the challenged norm, consents to its violation; when the norm only protects the interests of the state; or when the norm regulates completely private interactions. In all these cases, the claim of the conscientious objector has a stronger stand.

Nevertheless, the section also showed and acknowledged that legal theory does not provide the grounds for one commonly accepted and sufficiently coherent doctrine of conscientious objection, which would be broadly endorsed and practised across jurisdictions.²²⁵ Some states have enacted rules allowing conscientious objection only in some rare, extraordinary situations, whereas others do not even recognize it as a legal institution.²²⁶ Members of the Council of Europe recognize freedom of conscience as one of the human rights under Article 9 ECHR. Yet, there is arguably more to conscientious objection than the moderate ambit of the ECtHR's case law suggests.²²⁷

224 Luke D Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021).

225 Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press 2012).

226 Hitomi Takemura (ed.), 'Right to Conscientious Objection in European Human Rights Law', *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Springer 2009).

227 Mark Campbell, 'Conscientious Objection, Health Care and Article 9 of the European Convention on Human Rights' (2011) 11 *Medical Law International* 284.

Despite the lack of a coherent doctrine of conscientious objection and the difficulties we are faced with when trying to determine its exact scope and character, the said structural comparison is neither redundant nor implausible. Just because one cannot clearly define conscientious objection according to positive law, the concept does not lose its meaning and value.

The rule of law is more complex and intelligent than we anticipate, as Dworkin once stated.²²⁸ If we take the legal landscape seriously, nothing that might impact it can be outside of it. Thus, just because a constitution or legal doctrine does not mention unambiguously what kind of role conscientious objection plays in the legal game, it does not mean that it is irrelevant, impotent, or even non-existent.

Additionally, a lack of comprehensive doctrine may follow purposely from the unique nature of the conscientious objection. It might appear at first sight as destructive, contra-legal and against the unified system that the law (or perhaps the lawyers) tries to construct and maintain. It may challenge the principles of predictability, foreseeability and equality. Yet, in that way, it diminishes the potential for misuse and abuse.²²⁹ It hides in the shadow and awaits a genuine agent. Finally, it offers to the judicial branch a kind of justice corrector. If used wisely, a restrictive application of conscientious objection can offer a balancing justice when appropriate and when all the other legal norms blindly require its acceptance.

In that sense, one should understand the presence of identified transplants being an indicator for a stronger claim of the objector. Due to the lack of comprehensive theory, these transplants can only serve as guiding references when the CJEU faces Member States' claims to disapply EU law, purportedly against the essential national constitutional commitments. The transplants are neither exhaustive nor decisive arguments, which could automatically predict the outcome. They offer a more structured and coherent way to think about national constitutional resistance in the EU.

228 Dworkin (n 69) 222.

229 Raz (n 56) 288.

6 Civil Disobedience

This section outlines two major accounts of civil disobedience. First, it presents the main defining characteristics of civil disobedience according to Rawls: it is the last resort, non-violent, and open to consequences (6.1). Second, it presents a slightly different view from Raz, focusing on moral justificatory reasons for civil disobedience (6.2). Despite the guidelines given by the cited legal theory, the last sub-section explicates how the real and contemporary examples of civil disobedience remain morally ambiguous, failing to provide clear-cut answers to what is morally right and wrong (6.3).

6.1 Defining Civil Disobedience – The Last Resort, Non-violence, and Openness to Consequences

The meaning of civil disobedience, too, must rely on scholarly writings because the positive law cannot describe when the law can be broken – that would be an oxymoron. One can only determine the conditions in retrospect, due to the highest constitutional principles and moral justice. As conscientious objection, civil disobedience lacks one coherent theoretical account.²³⁰ For the present contribution, it should suffice to limit ourselves to the main two currents in legal theory: the writings of John Rawls and Joseph Raz. In his account, Rawls canonically synthesized various academic views after the incendiary civil rights and anti-war movements in the US in the 1960s.²³¹ The late Raz explicated the second account of civil disobedience, specifically from his book *The Authority of Law*.²³²

For Rawls, civil disobedience is a ‘public, non-violent, conscientious yet political act contrary to law usually done to bring about a change in the law

230 William E Scheuerman, ‘Introduction: Why, Once Again, Civil Disobedience?’ in William E Scheuerman (ed.), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).

231 Max Muir, *Civil Disobedience: A Reasonable Polemic* (University of Oxford 2019) ii.

232 Raz (n 56).

or policies of the government'.²³³ Limiting us to liberal constitutionalism, or a 'nearly just society',²³⁴ as Rawls would put it, civil disobedience illustrates the nature and limits of majority rule. On the one hand, one has a duty to comply with the laws enacted by the majority. On the other hand, one has the right to defend one's liberties and the duty to oppose injustice.²³⁵ Hence, in a society where the conception of justice is commonly shared, the minority opposing the injustice 'addresses the sense of justice of the majority'.²³⁶

According to Rawls, not every reaction to injustice qualifies as civil disobedience. It must be an act against substantial and clear injustice, a 'serious infringement of the first principle of justice, the principle of equal liberty, and blatant violations of the second part of the second principle, the principle of fair equality of opportunity':²³⁷ for example, when certain minorities are denied the right to vote or hold office, or when certain religious groups are repressed and denied various opportunities. However, one does not have a *right* to civil disobedience, the right to disobey. Rather one justifies civil disobedience by 'the political principles underlying the constitution'.²³⁸

Rawls' definition of civil disobedience is a collective action of a minority to persuade the majority. A minority forces the majority to reconsider the legitimacy of their claims on the grounds of a shared sense of justice. In his view, civil disobedience can be either direct or indirect. Direct civil disobedience disobeys the laws it challenges, whereas indirect disobedience violates other (minor) rules only to draw attention to a disputed subject matter. There are two additional distinctive elements to Rawls' account. The first one is a willingness to accept the legal consequences of one's conduct.²³⁹ In that way, one shows fidelity to the law and sincerity at the respective conviction. Second, civil disobedience must remain non-violent, and it must be distinct from militant action and obstruction.

233 Hugo A Bedau, 'On Civil Disobedience' (1961) 58 *The Journal of Philosophy* 653; Rawls (n 68) 320.

234 Rawls (n 68) 319.

235 Alexander Kaufman, 'Liberalism: John Rawls and Ronald Dworkin' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).

236 Rawls (n 68) 319–20.

237 Ibid. 326.

238 Ibid. 339.

239 Ibid. 322.

In addition, Rawls understands that moral arguments are broad in meaning, open to interpretation, and it is hard to verify the true intentions of the dissenters. For example, he recognizes the critique that

‘moral sentiments are not a significant political force. What moves men are various interests, the desires for power, prestige, wealth, and the like. Although they are clever at producing moral arguments to support their claims,’ [...] their views are calculated to advance their interests.’²⁴⁰

But Rawls rejects these arguments. Once society is interpreted as a scheme of cooperation among equals, those injured by grave injustice need not submit. Although civil disobedience is, strictly speaking, illegal, it is morally correct, and it helps to maintain and strengthen just institutions. Rawls sees civil disobedience (and conscientious objection as well) potentially as one of the stabilizing devices of a constitutional system, although by definition illegal.²⁴¹ It lies somewhere between the legal right of freedom of association and entirely unacceptable and illegitimate militant action and obstruction.

6.2 Moral Justificatory Reasons from Raz

Joseph Raz presented an alternative account of civil disobedience. While he generally agrees with Rawls that there is no *right* to civil disobedience – one is not ‘entitled civilly to disobey’²⁴² – he refused Rawls’ considerations that civil disobedience must conform to a proper form. Rawls argued that civil disobedience must be an act of last resort, non-violent and submissive to prosecution and punishment. Yet, for Raz, civil disobedience so understood means to justify the *form* rather than the underlying reasons. The difference between being able to show that the act is right, or to show if one has a right to perform that act, is significant.²⁴³ Henceforth, why not have a *right* to civil disobedience? Raz claimed that having a right means that it can be exercised even in cases where one should not (morally) use it. For example, one has a right to lie, but lying is still usually not morally justifiable.

240 Ibid. 338.

241 Ibid. 336.

242 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 267.

243 Ibid. 273.

Moreover, why should one freely submit to punishment for exercising civil disobedience? As Arendt wrote, nobody puts themselves before a court with a demand to be punished.²⁴⁴ Raz similarly said that there is no reason why dissenters would have to make their identity known and voluntarily submit themselves to punishment.²⁴⁵ Furthermore, it is not apparent why civil disobedience must remain the last resort and avoiding violence. Raz stated, for example, that sometimes a miners' march on the streets of London, where the protesters commit minor offences, would be a preferred option, although not the last resort, over a lawful but lengthy miners' strike.²⁴⁶ Additionally, while causing harm directly to another individual cannot be acceptable, non-violent acts like a strike by ambulance drivers may also have severe consequences, sometimes even bigger than a minor act of violence.²⁴⁷ In other words, violence is sometimes relative in relation to different non-violent (legal) acts of dissent which may have a bigger impact on others.

Civil disobedience must remain 'an exceptional action, beyond the general right of political action', and one must shy away from an attempt to routinize it, making it 'a regular form of political action'.²⁴⁸ Hence, the legitimacy of and the moral claim for support, or non-interference in civil disobedience, depend solely on the rightness of one's cause, on the rightness of the political goal of the disobedient protester.²⁴⁹

To sum up, for Raz: 'designed to catch the public eye', 'civil disobedience is a politically motivated breach of law designed to contribute directly to a change of a law or a public policy or to express one's protest against, and dissociation from, a law or a public policy'.²⁵⁰ However, the question remains: Under what circumstances does one have the moral right to break the law for moral or political reasons?²⁵¹ Raz does not answer this satisfactorily and only states that the rightness of the act depends on the underlying reasoning – the moral conclusion of disobedience.

244 Arendt (n 219) 69–102.

245 Dworkin (n 69); Brownlee (n 225); Candice Delmas, *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press 2018).

246 Raz (n 242) 269.

247 Ibid. 267.

248 Ibid. 275.

249 Ibid. 268.

250 Ibid. 263.

251 Ibid. 262.

6.3 Determining What is Morally Right and Wrong – Conflicting Examples

If we accept Raz's account, then every single instance of disobedience must be scrutinized and evaluated individually. Yet, how can one determine which actions are right and which actions are wrong? While one should not adhere to absolute moral relativity, evaluating concrete actions through the vague eyes of political morality is challenging. Is there a difference between disobedient actions relating to climate,²⁵² pandemic restrictions,²⁵³ mandatory vaccination, abortion, animal protection or whistleblowing? Moreover, according to what kind of evaluative matrix? How difficult the distinction can be will be illustrated in the following by looking at some current examples.

In autumn 2022, a group of young climate protesters associated with the global climate strike movement Last Generation once again glued themselves to the streets of Berlin, saying that they wanted to cause peaceful friction. One activist noted: 'I really hoped something would change, that politicians would react and finally take us and the science of climate change seriously, but we are still heading for a world that's 3 to 4 degrees Celsius warmer.'²⁵⁴ The dissenters achieved the 'friction' and created a traffic jam, eventually leading to a total blockage of the streets, preventing ambulances and fire brigade from passing through without delay. As it happened, an ambulance arrived at the scene where a seriously injured person needed help, but too late.²⁵⁵

Another example refers to active disobedience over the Covid-19 pandemic and its mandatory measures. During the pandemic of 2020, in one of many demonstrations, 38,000 people gathered on the streets of Berlin to demand the immediate cancellation of all restrictive mandatory measures against Covid-19. The included a motley mixture of families with children,

252 Saskia Stucki, 'In Defence of Green Civil Disobedience' (*Verfassungsblog*, 30 October 2020) <<https://verfassungsblog.de/in-defence-of-green-civil-disobedience/>> accessed 24 February 2023.

253 Yoann Della Croce and Ophelia Nicole-Berva, 'Civil Disobedience in Times of Pandemic: Clarifying Rights and Duties' [2021] *Criminal Law and Philosophy* 1.

254 Frank Jordans, 'Activists Blocking Berlin's Roads Say They Aren't Here to Be Liked' *euronews* (15 July 2022) <<https://euronews.com/green/2022/07/15/climate-activists-sticking-themselves-to-berlins-roads-say-they-want-to-cause-peaceful-fri>> accessed 24 February 2023.

255 Maximilian Steinbeis, 'Not All Right' (*Verfassungsblog*, 11 November 2022) <<https://verfassungsblog.de/not-all-right/>> accessed 24 February 2023.

esotericists, pensioners, anti-vaxxers, *NPD* neo-Nazis, radical right extremists, people from the radical left, followers of the *QAnon* conspiracy theory group, members of the *Querdenken* movement, and many other individuals who claimed not to be affiliated to any group. They ignored the rules of social distancing and the obligation to wear a mask, demanding social life to be restored, the freedom to work, to go to schools, theatres, gyms, bars, hotels and restaurants.²⁵⁶

Furthermore, in the US, like many other countries, people continuously demonstrate and exercise civil disobedience concerning abortion. People are fighting both for its prohibition and for the right to have access to it. In the US, the Supreme Court in June 2022, overturned its long-standing *Roe v Wade* case law that made access to abortion in the United States a federal right.²⁵⁷ As a response, an activist group, including some members of the House of Representatives, protested and illegally blocked the intersection between the Capitol building and the Supreme Court. Many of them were arrested and fined. Moreover, shortly after the cited overruling, thousands of people across the whole country marched against the decision.²⁵⁸ Whereas on the other side, for decades there have been anti-abortion and pro-life protests, demonstrations and violence, including arson and bombings of abortion clinics or even murders and attempted murders of physicians and doctors, for example, by the extremist organization *Army of God*.²⁵⁹

One can observe a similarly divided society in Poland, where the government and the Constitutional Tribunal, after decades of permissive liberalized legislation, almost entirely prohibited access to abortion in 2021.²⁶⁰ Abortion in Poland is currently legal only in cases resulting from a criminal act or when the woman's life is in danger. For example, in September 2022, at the Human Rights Council Session in Geneva, the civic organization stated that even Ukrainian refugees in Poland, those who are survivors

256 'Proteste gegen Schutzmaßnahmen zur COVID-19-Pandemie in Deutschland' *Wikipedia* (22 November 2022, 2022) <https://de.wikipedia.org/w/index.php?title=Proteste_gegen_Schutzma%C3%9Fnahmen_zur_COVID-19-Pandemie_in_Deutschland&oldid=228193985> accessed 24 February 2023.

257 Sarah Katharina Stein, 'Dobbs kills Roe' (*Verfassungsblog*, 27 June 2022) <[https://verfassungsblog.de/dobbs-kills-roe/](https://verfassungsblog.de/dobbs-kills-ro/)> accessed 24 February 2023.

258 '2022 Abortion Protests' *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=2022_abortion_protests&oldid=1125964231#Protests_after_the_ruling> accessed 24 February 2023.

259 Patricia Donovan, 'The Holy War' (1985) 17 *Family Planning Perspectives* 5.

260 Marta Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon' (2022) 14 *Hague Journal on the Rule of Law* 73.

of sexual assault, face severe obstacles to access to abortion since the law requires a certificate from the Polish prosecuting authorities attesting to the crime. But it is almost impossible to obtain such a certificate due to the unclear procedures and high stigma accompanying pregnancy resulting from rape.²⁶¹ Tens of thousands of Polish women (and men) are continuously taking to the streets to protest against the new heavy restrictions; especially after the recent tragic incident, when a pregnant woman died due to a septic shock after a foetal demise because doctors waited too long, justifying their actions by the new abortion regulations.

Moreover, one pro-choice activist currently faces a three-year jail sentence for giving a woman a miscarriage-inducing pill. The woman was experiencing domestic violence and contacted the activist after her husband prevented her from travelling to Germany for the procedure.²⁶²

While observing this civil disobedience against the legal restriction to abortion, it is important to emphasize that the current legislation in Poland results partially from public pressure exercised by civil pro-life movements such as *Ordo Iuris* and the like, who have protested and lobbied for years to restrict the right of women to have complete control over their bodies.

In addition, many other civil disobedience movements appeal to liberal values and principles of justice. They advocate for animal rights,²⁶³ against the use of nuclear power,²⁶⁴ or for the support of acts of whistleblowing²⁶⁵ to disclose the practices of private or public companies concerning data and privacy (mis-)management – most notably the acts of Julian Assange via Wikileaks and Edward Snowden, who was simultaneously nominated

261 Karolina Kocemba, 'Pregnancy Registry in Poland' (*Verfassungsblog*, 22 June 2022) <<https://verfassungsblog.de/pregnancy-registry/>> accessed 24 February 2023.

262 Weronika Strzyżyńska, 'Polish Woman Is First Activist to Face Trial for Violating Strict Abortion Law' *The Guardian* (28 March 2022) <<https://theguardian.com/global-development/2022/mar/28/polish-woman-is-first-to-face-trial-for-violating-strict-abortion-law>> accessed 24 February 2023.)

263 Peter Singer, *Animal Liberation: The Definitive Classic of the Animal Movement* (Upd, Harper Perennial Modern Classics 2009); Tony Milligan, 'Animal Rescue as Civil Disobedience' (2017) 23 *Res Publica* 281.

264 Richard Norman, 'Civil Disobedience and Nuclear Protest: A Reply to Dworkin' (1986) 44 *Radical Philosophy* 24.

265 Scheuerman, 'Whistleblowing as Civil Disobedience' (n 204).

for the Nobel Peace Prize and denounced as a traitor deserving the death penalty.²⁶⁶

Finally, some contemporary movements such as *MeToo* and *Black Lives Matter* indicate that rather than appealing to public principles of political morality, civil disobedience ‘may, in fact, seek to transform the common sense of morality’.²⁶⁷

Considering the above examples, how should we determine which of them deserves to be recognized as justifiable civil disobedience, and which should be treated as an ordinary offence or crime? Do they all deserve to be tolerated and go unpunished? And if so, what level of disobedience and what degree of damage and upheaval would still be acceptable?

The examples above indicate the difficulty of creating *objective conditions* for legitimate civil disobedience. Accordingly, civil disobedience is an exception, not a rule. Moreover, it is embedded in society, which is itself subject to sociological and cultural change. In the latter sense, it will always depend on concrete circumstances whether a particular act of disobedience, all things considered, complies with the principles of justice.

266 David E Pozen, ‘CODA: Edward Snowden, National Security Whistleblowing, and Civil Disobedience’ in Kaeten Mistry and Hannah Gurman (eds), *Whistleblowing Nation* (Columbia University Press 2020).

267 Candice Delmas and Kimberley Brownlee, ‘Civil Disobedience’, *Stanford Encyclopedia of Philosophy* (Winter 2021 edition, 2021) para 3.2.

7 Transplants of Civil Disobedience – Modest Guidelines for Justification

Despite the initial optimism that legal theory concerning civil disobedience has all the answers, and that structural comparison would be straightforward, one remains modest in conclusively defining the justificatory reasons for civil disobedience. There is little that can be concluded apart from the following general observations.

Civil disobedience must be treated differently than a mere violation of law. Henceforth, when the apex courts engage in a serious confrontation with the CJEU, stating their reasons openly and perhaps even acting outside their competences to demonstrate their point, a structural comparison suggests that action deserves unique and differential attention.

Civil disobedience is a fairly frequent act in liberal societies. As Habermas argued, civil disobedience is a litmus test for the maturity and legitimacy of the political culture of democracy.²⁶⁸ Accordingly, one should not be overly radical when faced with it. Rather one should expect that a relatively free society will always produce contestation and disobedience. Opposition beyond the regular means of political contestation by institutions and political parties should serve constructively to question established and conventional practices. What is more, even if one rejects a particular civil disobedience, the mere existence of firm objections cannot effectively undermine the existence of a democratic legal order, except in extremely rare and extreme circumstances. Mature legal orders function with the permanent presence of disagreements, and are based on the plurality of narratives and convictions.²⁶⁹

If civil disobedience essentially depends on its justification, then one should pay attention to whether it improves justice for all, or only demands benefits for some. Moreover, would fulfilling the demands of disobedience take away the rights of others, or only improve the positions of the oppressed? As the recent Covid-19 pandemic illuminated, less draconian restrictions led to quicker spread of the virus, a higher number of infections

268 Jürgen Habermas, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 *Berkeley Journal of Sociology* 95.

269 Brownlee (n 225).

and eventually a higher death rate. Whereas whistleblowing demands more fair and transparent public policies, which do not directly limit the fundamental rights of others. The same goes for claims for more dignified animal care or omission of nuclear weapons – these demands do not radically restrict the rights of others.

Moreover, civil disobedience appeals to the majority with the call for justice.²⁷⁰ Many important and successful movements in the past understood well that achieving their goal requires wider social support. Although civil disobedience does not necessarily depend on numbers and usually remains a minority in political terms (if not, it can achieve change via regular legislative proceedings), the collectiveness of the cause and the scale of public support significantly add to the legitimacy of the movement. Public support plays a role when evaluating the justifiability of civil disobedience.

Furthermore, as Kent Greenawalt put it, what are the likely effects of civil disobedience?²⁷¹ Are the probable consequences of disobedience desirable or not? Will they, for example, reduce privacy for security or, vice versa, promote one value at the expense of another?²⁷² Civil disobedience opens a broader query regarding the appropriateness of current social values²⁷³ and a ‘conflict over what social ends are desirable’.²⁷⁴ Accordingly, one should focus less on a disobedient act as such, whether to punish the person or not, but rather on discussing the broader social issues that civil disobedience conveys.

Civil disobedience should engage with meaningful and important social questions, and not with trivialities such as food quality in the cafeteria.²⁷⁵ Not every social inconvenience or even injustice should qualify for justifiable civil disobedience.

Finally, when civil disobedience leads to the regression of fundamental rights, has anti-democratic features, stands at odds with basic liberal commitments, or increases discrimination and unequal treatment among citizens, one must remain cautious about embracing it. These are not the goals

270 Critical view on civil disobedience as anti-democratic concept: Daniel Weinstock, ‘How Democratic Is Civil Disobedience?’ (2016) 10 *Criminal Law and Philosophy* 707.

271 Kent Greenawalt, ‘A Contextual Approach to Disobedience’ (1970) 70 *Columbia Law Review* 48, 48.

272 Ibid.

273 Linda MG Zerilli, ‘Against Civility: A Feminist Perspective’ in Austin Sarat (ed), *Civility, Legality, and Justice in America* (Cambridge University Press 2014) 109.

274 Greenawalt (n 271) 51.

275 Ibid. 48.

of liberal democracies – not in compliance with the presumably shared values of the respective society.

In addition, civil disobedience's value is in bringing the subject matter to the public forum. It highlights the political question with higher stakes involved, thus presenting a different type of public consideration. It forces people to get involved with the disputed question; it causes public disturbance, and therefore a public reaction. As such, though peculiar and challenging, it proves to be a highly discursive practice,²⁷⁶ a 'plea for reconsideration'.²⁷⁷ As we know, democracies are built on discursive practices.

276 William Smith, 'Deliberative Democratic Disobedience' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).

277 Peter Singer, *Democracy and Disobedience* (Oxford University Press 1973) 84.

8 Identity Jurisprudence in the Light of Institutional Civil Disobedience and Constitutional Conscientious Objection

Resistance by the national apex courts to the EU legal order takes two distinctive forms: first, disobedience as an incentive to change via *ultra vires* review (7.1); second, resistance as constitutional conscientious objection in the language of identity claims, asking for an exemption (7.2).

8.1 Disobedience as Incentive to Change – *Ultra Vires* Review

As explicated above under sub-section 2.4.1, *Solange I* serves as the most persuasive example of how national judicial resistance in the name of the highest principles of justice – due to the effective and robust protection of fundamental rights – ameliorated the European architecture of fundamental rights. In the light of civil disobedience, the German FCC refused to comply with the European principle of primacy of EU law and demanded a change.

As we have learned, civil disobedience is a collective endeavour, not an individual act. It tries to persuade not only the respective authorities, but also society in general. Its disturbance highlights the matter, and the underlying reasons for justice aim to convince the majority of the rightness of the cause. Hence, the acceptance of the cause by society at large plays an important role. In that light one can contextualize *Solange I* as well – not as a capricious and lonely call, but as part of a collective effort, together with other agents, calling for change. As Ulrich Everling wrote in 1994:

‘In Germany, the story is believed that it was only under the pressure of *Solange I* that the Court of Justice assumed the role of protector of human rights. This is historically not correct since the relevant jurisdiction began long before.’²⁷⁸

278 Ulrich Everling, ‘The Maastricht Judgment of the German Federal Constitutional Court and Its Significance for the Development of the European Union’ (1994) 14 Yearbook of European Law 1, 14.

Delledonne and Fabbrini argued similarly in a recent article titled ‘The Founding Myth of European Human Rights Law’.²⁷⁹ They wrote: ‘[B]y the time the Italian and West German constitutional courts voiced their concerns against the supremacy of EU law on human rights grounds, the ECJ had already recognised the importance of human rights in the European legal order.’²⁸⁰

The CJEU stated in 1969 in its *Stauder*²⁸¹ decision that ‘fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court’²⁸² and reiterated this general idea in 1970 in *Internationale Handelsgesellschaft*, arguing that

‘[r]espect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community.’²⁸³

William Phelan argued that one could see similar calls for improving fundamental rights architecture in the other Member States.²⁸⁴ Moreover, the argumentation to construe fundamental rights protection by the CJEU through common constitutional traditions dates back to the first president of the Commission, Walter Hallstein, who argued in parliamentary discussions that the protection of fundamental rights must be part of the general principles of EU law.²⁸⁵

Solange I must be read accordingly: as a significant incident, but far from an isolated case. Allegedly the most powerful apex court in Europe,²⁸⁶ the FCC was certainly an important actor. Still, the message was successful not because of the FCC’s power, but because it conveyed and reverberated the idea, shared and raised by many. Moreover, it was not successful because many respective agents shared the attitude, so clearly and directly articulat-

279 Giacomo Delledonne and Federico Fabbrini, ‘The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence’ (2019) 44 *European Law Review* 178.

280 *Ibid.* 182.

281 Case 29-69 *Erich Stauder v City of Ulm (Stauder)* [1969] ECLI:EU:C:1969:57.

282 Case 29-69 *Erich Stauder v City of Ulm (Stauder)* [1969] ECR 1969, p 425.

283 Case 11-70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.

284 Phelan (n 65).

285 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 365.

286 Dieter Grimm, ‘A Long Time Coming’ (2020) 21 *German Law Journal* 944, 945.

ed by the FCC, but also due to the underlying justificatory reasons behind this disobedience. Arguing for more fundamental rights protection is one of the most legitimate goals one could have.

Solange I as a case of ‘institutionalized civil disobedience’ was based on a legitimate rationale – fundamental rights; it was discursive, because the FCC engaged with the CJEU; and it appealed with its reasoning to other contesters. Most importantly, it eventually facilitated gradual European constitutional change.²⁸⁷

Let us now move away from the historically significant *Solange I*, which was a decision taken under unique circumstances. As was shown in Chapter 4, one cannot compare the arguments of fundamental rights protection and fundamental rights standards. Arguing that a commitment to fundamental rights forms a national constitutional identity is a legitimate claim. However, arguing that a particular interpretation of fundamental rights infringes national constitutional identity is an entirely different thing, and a much less convincing one indeed. Although one could analyze a myriad of cases by the national apex courts in the light of institutionalized civil disobedience, we will limit our review to the following three recent ultra vires decisions: the Danish *Ajos*,²⁸⁸ the German *PSPP*²⁸⁹ and the Polish *K 3/21*²⁹⁰ decisions.

The *Ajos* decision by the Danish Supreme Court in 2016 rejected the application of EU law, stating that the CJEU acted ultra vires, beyond its conferred competences. The *Ajos* decision concerned the unwritten European principle of non-discrimination on the grounds of age, creatively constructed by the CJEU. The cited principle overrode a Danish statute that deprived an employee of a severance allowance upon the termination of their contract if they were entitled to receive a pension due to their age under Danish legislation.²⁹¹ The Danish Supreme Court decided that

287 Phelan (n 65).

288 Danish Højesteret, Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A (Ajos)* 6 December 2016.

289 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

290 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

291 Lars Hjortnæs, ‘A view from the Danish Supreme Court in light of the *Ajos* Judgment’ in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law* (Springer Professional 2019); 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

the ‘judge-made principle of EU law, such as the general principle of non-discrimination on the grounds of age, cannot be binding, because it did not have its origin in a specific Treaty provision’.²⁹² The Supreme Court further argued that the Danish Accession Act did not transfer to the EU competences to create such an unwritten principle. That would go directly against the principles of legal certainty and the protection of legitimate expectations.²⁹³

The Danish Supreme Court did not attack the principle of discrimination on the grounds of age as such, but rather the overly creative judicial reasoning by the CJEU. Moreover, when the Supreme Court decided the case, in 2016, the matter was settled at national and supranational levels. The Danish legislator amended the respective statute accordingly on the national level. On the supranational level, the said principle became formally binding with the EU Charter under Article 21(1). The judicial disobedience was therefore not grounded in any (unchangeable) constitutional identity, which must be forever protected against EU law, but rather a disobedient act with a simple message to the CJEU, which was a simple warning: Do not overstep your boundaries. The Danish Supreme Court ‘rebelled’, because it felt strongly that the CJEU was notably wrong; although the assessment itself cannot be immune to the critique of formalistic reasoning and activist and imprecise reasoning.²⁹⁴

As some commentators put it, the decision created a consequence where ‘every single national constitution of member state creates its own variation of EU law. This transforms EU law from an autonomous order into a residual one, contingent on national legal practice and specific constitu-

der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

292 Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, ‘Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS’ (*Verfassungsblog*, 30 January 2017) <<https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/>> accessed 24 February 2023.

293 Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, ‘Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court’s Decision in the Ajos Case and the National Limits of Judicial Cooperation’ (2017) 23 *European Law Journal* 140, 13.

294 Urška Šadl and Sabine Mair, ‘Mutual Disempowerment: Case C-441/14 Dansk Industri, Acting on Behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case No. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v The Estate Left by A’ (2017) 13 *European Constitutional Law Review* 347, 347.

tional provisions.²⁹⁵ On the contrary, the respective disobedience raised the issue of conflict between unwritten European principles which collide with formally binding and constitutionally sound national legislation. In the meantime, the conflict was addressed and resolved.

In the light of civil disobedience, in *Ajos* one can identify several important elements. A disobedient act aimed to improve the European legal system in general, directed towards the activist reasoning of the CJEU *in concreto*. It was based on the principles of the rule of law and legal certainty, which are legitimate principles of liberal constitutionalism and moral justice. Finally, the decision aimed to highlight the prerequisite in the European delineation of competences of maintaining a fair balance between national and supranational institutions. It did so, as Helle Krunke argued, in a dialogical and constructive manner, containing elements of institutionalized civil disobedience.²⁹⁶ The goal of the Danish Supreme Court was essentially achieved.²⁹⁷

Another recent disobedient decision was the German *PSPP*, which declared the CJEU's *Weiss*²⁹⁸ judgement ultra vires, not comprehensible and arbitrary from an objective legal perspective. The FCC argued that the CJEU failed to apply the proportionality test appropriately as a means for delimitating the competences: specifically the impact of the respective *PSPP* programme from the monetary to the fiscal area. Moreover, it argued that the CJEU 'methodologically untenably' carried out self-restraint in its judicial review over the ECB, and eventually declared the *PSPP* programme outside the domestic Act of Approval, directing the German Central Bank to participate in the said programme only subject to further procedural conditions.

295 Madsen, Olsen and Šadl (n 292).

296 Krunke (n 291) 117.

297 Urška Šadl, 'When is a Court a Court?' (*Verfassungsblog*, 20 May 2020) <<https://verfassungsblog.de/when-is-a-court-a-court/>> accessed 24 February 2023.

The *Ajos* decision later curiously and quietly disappeared from the website. It is not clear why. One reason could be that the rebellious decision was a one-time judicial faux pas, and the court did not want the whole legal academia of Europe continuously referring to this decision as a sign of a deeper understanding of constitutional pluralism in the EU. Or did the court remove the decision after it communicated and achieved its aim, reluctant to be further posited as an example of disobedience in the wider legal academia?

298 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others (Weiss)* [2018] ECLI:EU:C:2018:1000.

I do not want to speculate, as some scholars suggest,²⁹⁹ that the FCC motivation was to simply get rid of *Weiss* because it did not like the outcome. Giving the FCC the benefit of the doubt, it is possible that the said resistance wanted to achieve a more robust commitment to the rule of law, better and more dogmatically sound interpretative methods by the CJEU, and more transparency when it comes to the economic consequences of fiscal decisions. As Dieter Grimm argued, the CJEU did not hold onto its part of the bargaining: it ‘refrained from conducting effective oversight of the ECB and enabled the ECB to freely determine the extent and scope of its mandate’.³⁰⁰ The FCC, arguably, wanted to remedy this inadequacy.³⁰¹

Once again, in the light of civil disobedience, the decision effectively prompted a myriad of lively and contradictory academic discussions³⁰² about what a public disobedient act ought to do. However, contrary to what it hoped to achieve, it did not find wider public support, leaving aside the Polish reaction,³⁰³ to what we will come shortly hereafter. Mattias Wendel discernibly argued that the *PSPP* decision claimed *ultra vires* where there is none.³⁰⁴ ‘It may be a poor performance, an unlawful performance at most, but certainly not an *ultra vires* act.’³⁰⁵

299 Šadl (n 297).

300 Grimm (n 286) 948.

301 Giovanni di Lorenzo and Heinrich Wefing, ‘Andreas Voßkuhle: ‘Erfolg ist eher kalt’ *Die Zeit* (Hamburg, 13 May 2020) <<https://www.zeit.de/2020/21/andreas-vosskuhle-ezb-anleihenkaeufer-corona-krise>> accessed 24 February 2023.

302 Karsten Schneider, ‘Gauging “Ultra-Vires”: The Good Parts’ (2020) 21 *German Law Journal* 968; Mattias Wendel, ‘Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception’ (2020) 21 *German Law Journal* 979; Grimm (n 286); Mark Dawson and Ana Bobić, ‘Making Sense of the “Incomprehensible”: The PSPP Judgment of the German Federal Constitutional Court’ (2020) 57 *Common Market Law Review* 1953; Franz C Mayer, ‘To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court’s Ultra Vires Decision of May 5, 2020’ (2020) 21 *German Law Journal* 1116.

303 Stanisław Biernat, ‘How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland’ (2020) 21 *German Law Journal* 1104, 1105.

304 Franz C Mayer, ‘Auf dem Weg zum Richterfaustrecht?’ (*Verfassungsblog*, 7 May 2020) <<https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/>> accessed 24 February 2023; Ingolf Pernice, ‘Machtspruch aus Karlsruhe: „Nicht verhältnismäßig? – Nicht verbindlich? – Nicht zu fassen...“’ (2020) 12 *Europäische Zeitschrift für Wirtschaftsrecht* 508; Martin Nettesheim, ‘Das PSPP-Urteil Des BVerfG – Ein Angriff auf die EU?’ [2020] *Neue Juristische Wochenschrift* 1631; Heiko Sauer, ‘Substantive EU Law Review Beyond the Veil of Democracy’ (2020) 16 *EU Law Live* 2; Daniel Sarmiento, ‘Requiem for Judicial Dialogue’ (2020) 16 *EU Law Live* 9.

305 Wendel (n 302) 990.

The fierce legal discussions and reasonable disagreements among the German and European lawyers precisely indicate this: there is disagreement on the appropriate *interpretation*, but no consensus that the CJEU's *Weiss* decision went unambiguously too far. While the rationale to prevent the abuse of power by the CJEU can be normatively defended, the various reactions indicate that the *Weiss* decision is academically disputable at best.

Moreover, what was intended to be justified institutional civil disobedience against the CJEU turned into a discussion about the disobedient act itself: questioning the rationale and appropriateness of the respective *PSPP* decision.³⁰⁶ The general reception of the *PSPP* decision was not positive, with an awareness of the underlying risk that the other apex courts, perhaps less self-constrained and not acting *bona fide*,³⁰⁷ could quickly follow in the footsteps of the FCC. This general attitude culminated in the decision of the Commission to issue infringement proceedings against Germany, which was essentially resolved with the intervention of the German government pledging to respect the principle of primacy and stating that it would seek to do everything in its power to prevent its own national constitutional court from examining the legality of the acts of the EU institutions in the future.³⁰⁸

The described disobedience was not an advancement by any measure. While it potentially damaged the legitimacy of the FCC, it did not significantly change the architectural structure of the Eurosystem in general, or establish asset purchase programmes specifically. The German Central Bank continues to participate in the challenged programme, and the purchase of the *PSPP* has only increased.³⁰⁹ Moreover, the unconventional practices of the ECB – non-standard monetary policy measures – have even accelerated with the introduction of the additional pandemic recovery new *PEPP* programme. In retrospect, the challenge of the *PSPP* by the FCC did not alter the European monetary and fiscal architecture.

306 Sven Simon and Hannes Rathke, “‘Simply Not Comprehensible.’ Why?” (2020) 21 *German Law Journal* 950.

307 Biernat (n 303).

308 European Commission, Closing of the infringement case, INFR(2021)2114, 2 December 2021, Judgment of the German Constitutional Court concerning the joined constitutional complaints 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16.

309 Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (recast) (ECB/2020/9) [2020] OJ L39/12.

Finally, it remains unlikely that the CJEU would change its way of legal argumentation as a result of the *PSPP* decision. After all, the CJEU has to accommodate 27 legal cultures, which are considerably diverse, and the CJEU's European route through these legal traditions would always upset some national conventions.

To sum up, the described institutional civil disobedience was not entirely illegal, considering that it was still 'a disobedience', and not an act in accordance with national and supranational principles and rules. Yet, it did not resonate among the other institutions in the Union and the Member States in a way that would facilitate the desired change. The avalanche of critique has proved, domestically as well as internationally, that the matter is not yet ready to be remedied in the way the FCC suggested. Or in the words of the architect of the respective decision, 'the success is rather cold'.³¹⁰ Finally, the wide public critique could also partially explain the rather cautious and restrained recent decision of the FCC on the legality of the EU Recovery Package, the so-called Next Generation EU, which authorizes the European Commission to borrow up to EUR 750 billion on capital markets on behalf of the European Union. In what could be yet another ultra vires decision, the FCC finally rejected the attempt to challenge the ratified decision³¹¹ via constitutional complaint, arguing that it violates the principle of democracy – the right to democratic self-determination – because it arguably manifestly exceeds the integration agenda and thereby the budgetary responsibilities of the German Parliament (the Bundestag).³¹²

The last and the most radical disobedient decision we will examine comes from Poland and concerns the autonomy of the Polish judicial 'reform' and the lack of European competences. Since 2015, the Polish legislature has been gradually introducing several structural 'reforms' to the judicial system. In 2017, it most notably enacted a disciplinary chamber as an additional court chamber at the Supreme Court, which was supposed to improve and control the judiciary. In fact, the chamber served the govern-

310 di Lorenzo and Wefing (n 301).

311 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433I/23.

312 BVerfG, 2 BvR 547/2 NGEU 6 December 2022.

ment by holding in line and subduing the judges who refused to follow the expectations and instructions of the ruling party.³¹³

The reform was heavily criticized nationally and internationally, despite the fierce political campaign by the Polish government to demonstrate its legality and legitimacy: namely, disconnecting the judicial system and its members from their communist past,³¹⁴ and arguing that judicial reform falls within the exclusive competences of the Polish state, where the Union does not have anything to say.³¹⁵ Yet, the existence of the disciplinary chamber was challenged before several national and international courts. First, the Polish Supreme Court (notably a different chamber) declared that the disciplinary chamber is neither a court in the EU sense nor is it national law.³¹⁶

When concerned with the matter, the ECtHR came to the same result, stating that the disciplinary chamber is not a tribunal established by law within the meaning of the ECHR.³¹⁷ Finally, the CJEU declared that the disciplinary chamber violates the principle of an independent judiciary guaranteed under EU law.³¹⁸ The matter was, one would assume, thereby legally settled.

Notwithstanding, the government did not want to acquiesce to the outcome. Instead, it turned to the ‘packed’³¹⁹ Constitutional Tribunal to try

313 Wojciech Sadurski, ‘The Disciplinary Chamber May Go – but the Rotten System will Stay’ (*Verfassungsblog*, 11 August 2021) <<https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/>> accessed 24 February 2023.

314 Anna Wójcik, ‘Keeping the Past and the Present Apart’ (*Verfassungsblog*, 26 April 2022) <<https://verfassungsblog.de/keeping-the-past-and-the-present-apart/>> accessed 24 February 2023. See also Mateusz Morawiecki, ‘Prime Minister Mateusz Morawiecki: Why My Government Is Reforming Poland’s Judiciary’ *Washington Examiner* (13 December 2017) <<https://washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary>> accessed 24 February 2023: ‘All year, we have struggled with the widespread misunderstanding of our plans to reform Poland’s deeply flawed judicial structure.’

315 Biernat (n 303).

316 Polish Sąd Najwyższy, Case III PO 7/18, 5 December 2019, paras 78, 79.

317 *Reczkowicz v Poland* App no. 43447/19 (ECtHR, 22 November 2021).

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

319 The Polish Constitutional Tribunal was ‘packed’ because the judges were nominated under the law which was declared unconstitutional and in violation of the principle of judicial independence and the rule of law. See also Tomasz Tadeusz Koncewicz, ‘Court-packing’ in Warsaw: The Plot Thickens’ (*Verfassungsblog*, 18 December 2015) <<https://verfassungsblog.de/court-packing-in-warsaw-the-plot-thickens/>> accessed 24 February 2023.

to achieve its political aim via the judiciary. No one other than the Polish Prime Minister asked the Polish Constitutional Tribunal to assess the constitutionality of the CJEU's judgement. Although the Polish Constitutional Tribunal had ruled in 2010 that the Lisbon Treaty in general complies with the Polish Constitution,³²⁰ it took a different road in the respective decision. It found that the CJEU's interpretation of Article 19(1) TEU as a guarantee of the independence of (national) judges is non-compliant with the Polish Constitution.³²¹ Moreover, the CJEU's request concerning the independence of the national judiciary fell outside the scope of the CJEU's conferred competences and thus effectively constituted an *ultra vires* decision.

The cited disobedient decision was clearly against the well-established rules and principles on the level of the Union, as well as in contrast to the previous Polish case law, as was explained by numerous Polish scholars and judges immediately after the Tribunal decision.³²² A national apex court does not have the competence to declare a particular interpretation of the Treaties by the CJEU as unconstitutional.³²³ In that way, one can look at it as an example of institutionalized civil disobedience comparable to the other examples previously addressed. However, there are several differences. Whereas the German *PSPP* bet on the intellectual sophistication of more than 100 pages and its renown in the legal sphere, the Polish Constitutional Tribunal did not even bother to try to persuade with serious arguments. After issuing the tenor in 2021 – the operative part of the judgement, we are still waiting for substantial justification, which will probably never see the light of day. Moreover, few (if any) are intellectually defending the said decision. In contrast to the range of various interpretations concerning the German *PSPP* decision, the Polish act of disobedience remains an isolated instance; not to mention the dubious legitimacy of the 'packed' court.³²⁴

320 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010.

321 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

322 Stanisław Biernat et al., 'Statement of Retired Judges of the Polish Constitutional Tribunal' (*Verfassungsblog*, 11 October 2021) <<https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/>> accessed 24 February 2023.

323 R Daniel Kelemen et al., 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020) <<https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>> accessed 24 February 2023.

324 Koncewicz (n 319).

In response, the EU Commission started an infringement procedure against Poland, and the CJEU issued a daily penalty of 1 million EUR until Poland was to suspend the activities of the disciplinary chamber, which directly violated the ruling of the CJEU.³²⁵ In 2022, the Polish authorities dissolved the chamber to finally unlock the frozen EU funds and to end the penalties levied by the CJEU.³²⁶

While it is too soon to determine conclusively all the consequences of the said decision, it is fair to say that the Constitutional Tribunal's resistance did not change the CJEU's firmly settled case law³²⁷ on the required independence of the national judiciary, also a matter of the EU law under Article 19(1) TEU in relation to Article 2 TEU. Additionally, it did not shield the Polish judicial 'reform' from European expectations and demands. Accordingly, the cited judicial disobedience did not achieve noteworthy results when evaluated solely from the perspective of its actual consequences.

However, the argument that the EU has no competences to interfere with the national judiciary of its Member States under articles 19(1) and 2 TEU, which (interestingly) the Polish Constitutional Tribunal never explicitly made, points to a possible avenue to be explored further.

While it might be normatively desirable, politically necessary, and while it was already quite firmly established in several recent decisions,³²⁸ this argument requires a considerable amount of judicial creativity and activism. The resistance of the Polish Constitutional Tribunal could be, in that light, at least intelligible. However, the Polish Constitutional Tribunal did not engage in dialogue with the CJEU via preliminary reference proceedings, disregarding the discursive element of institutional civil disobedience. Nor did it try to persuade with moral and legal arguments that the case law of the CJEU went too far and has to be revised. Finally, the circumstances of the case were just too ambiguous. The decision was exploited by the Polish government to achieve their own political aims, and the argument

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

326 Paweł Marcisz, 'A Chamber of Certain Liability' (*Verfassungsblog*, 31 October 2022) <<https://verfassungsblog.de/a-chamber-of-certain-liability/>> accessed 24 February 2023.

327 Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (ASJP) [2018] ECLI:EU:C:2018:117; Case C-896/19 *Repubblika v Il-Prim Ministru (Repubblika)* [2021] ECLI:EU:C:2021:311.

328 Case C-64/16 ASJP [2018] ECLI:EU:C:2018:117; 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.

of ultra vires was overshadowed by actual ‘legal realism’, the fact that the Polish Constitutional Tribunal wanted to prevent the guarantee of judicial independence. Seen all together, the circumstances rendered this act of institutional civil disobedience fruitless.

8.2 Identity Claims as Constitutional Conscientious Objection – Asking for Exemption

The second cluster of identity claims resembles the structure of a conscientious objection. A Member State is not trying to change the Union and its legal norms and political institutions, but only wants to be exempt from a norm which potentially conflicts with the Member State’s constitutional essentials or its national constitutional identity. As we shall see in the following, these objections are not always successful, depending on the values they are trying to protect and the potential consequences the respective exception may have for the Union and for the other Member States.

Considering the claims of national constitutional identity as ‘constitutional conscientious objection’, the research identifies which claims were successful, and it distinguishes the underlying rationales that prompted the CJEU to allow and tolerate an exception from the unified application of EU law. The most established objections concern the idiosyncrasies of national languages, and other successful objections refer to specific expressions of common constitutional principles. Lastly, the CJEU frequently rejects objections which would concurrently lead to discrimination. The following three cases from Ireland, Lithuania and Latvia aim to protect and promote their national languages against European fundamental freedoms, which demanded the liberalization of national rules.

In 1998, the CJEU accepted the Irish claim to impose an obligation on lecturers in public vocational education schools to have a certain knowledge of the Irish language. However, that might infringe the free movement of workers under EU law. The CJEU accepted the objection while acknowledging that the Irish government actively promoted the use of Irish ‘as a means of expressing national identity and culture’.³²⁹

The CJEU similarly accepted the Lithuanian claim in 2011 that the national authorities can demand to enter a person’s surname and forenames

329 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.

on the certificates of civil status ‘only in a form which complies with the rules governing the spelling of the official national language’.³³⁰

Moreover, in a recent decision in 2022, the CJEU similarly accepted the claim of Latvia to disregard the European freedom of establishment due to its national rules which oblige ‘higher education institutions to provide teaching solely in the official language of that Member State, 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’.³³¹

Additional national objections, articulated as claims of national constitutional identity and accepted by the CJEU as legitimate exceptions from the unitary application of EU law, concern specific expressions of common constitutional principles. Cases such as *Omega*, *Sayn-Wittgenstein* and *Taricco II* are the three examples in point.

In *Omega* the CJEU accepted the German claim that the level of protection of human dignity, as it is understood in Germany with its high degree of sensitivity due to historical injustices, must outlaw the laser game in which the objective of the game is ‘to fire on human targets’ and thus ‘play at killing people’,³³² although this would limit the freedom to provide services and is accepted in other Member States.

Similarly, the CJEU accepted the Austrian claim in *Sayn-Wittgenstein*, where it tolerated the prohibition of nobility titles, despite the said objection restricting freedom of movement. The CJEU acknowledged the said prohibition of nobility in the context of Austrian constitutional history, accepting that it constitutes ‘an element of national identity’.³³³

Finally, in the *Taricco II* decision, the CJEU eventually accepted the objection of the Italian Constitutional Court that it could not retroactively change the statute of limitations for criminal proceedings affecting the financial interests of the Union, as initially required by the CJEU, because that would violate the principle of legality in Italy: namely, that all offences and penalties must be defined by law beforehand. Contrary to other juris-

330 Case C-391/09 *Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn v Vilniaus miesto savivaldybės administracija and Others (Runevič-Vardyn)* [2011] ECLI:EU:C:2011:291, para 94.

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

332 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (Omega)* [2004] ECLI:EU:C:2004:614, para 39.

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

dictions, Italian legal scholarship idiosyncratically understands the statute of limitations as a matter of material rather than procedural law, which qualifies it under the said principle of legality.³³⁴

In all three cited cases, the national objections aimed to protect a specific national expression of shared fundamental rights: human dignity, the principle of equality and the principle of legality. While the CJEU tolerated that EU law was not unified across all Member States and extended the respective exceptions, it did so only as long as these exceptions did not directly and substantially undermine the common European principles. In that way the respective judicial constitutional objections resemble a kind of constitutional conscientious objection.

At this point it is important to note that in contrast to what these cases might suggest, the Member States and their courts are not always successful with their objections. In the following instances the CJEU ignored or rejected claims of national constitutional identity, arguing for exception from EU law due to the requirements of their constitutions: the *Landtová*,³³⁵ *Egenberger*³³⁶ and *Coman*³³⁷ decisions all explicate constitutional conscientious objections, which the CJEU considered but eventually rejected.

In the first case, as more thoroughly explained in Chapter 3, Section 3.8.2, the CJEU rejected a claim for special treatment of Czech citizens vis-à-vis other EU citizens, despite their unique historical situation.³³⁸ According to the rules of dissolution of the previous common state of Czechoslovakia, some Czech citizens were receiving considerably lower pensions from the Slovak Republic because they were employed by companies that had their official seat in the Slovak Republic at the time of dissolution,

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

335 Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení (Landtová)* [2011] ECLI:EU:C:2011:415.

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

337 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, para 46.

338 Ladislav Vyhnánek, 'The Eternity Clause in the Czech Constitution as Limit to European Integration' (2015) 9 *Vienna Journal on International Constitutional Law* 240.

although the workers might never actually live there.³³⁹ To remedy that, the Czech Republic provided pension supplements that did not comply with the EU principle of non-discrimination. However, the Czech Supreme Court rejected the CJEU's ruling and declared the *Landtová* decision ultra vires.³⁴⁰

The second decision is no less explosive, concerning the appropriate balance between the prohibition of discrimination as required (also) by EU law, and the considerable independence and self-determination of the churches as constitutionally guaranteed in Germany since 1919. The CJEU rejected the claim that the German courts can conduct only a limited review of employment matters by the churches as employees.³⁴¹ The saga is not yet fully completed, and we are still awaiting the final reaction by the FCC.³⁴²

In the *Coman* decision, the Romanian authorities refused to legally recognize the marriage of a gay couple who had married in Belgium and subsequently moved to Romania for work. Because Romanian constitutional law does not recognize marriage between two persons of the same sex, the legal recognition of such marriage concluded in any other Member State, as required under EU law due to the freedom of movement, would in the eyes of Romanian institutions contradict the said national constitutional commitments.³⁴³ The CJEU once again refused this objection and stated that 'an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not

339 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54.

340 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012.

341 Martijn van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' (2022) 1 European Law Open 89.

342 The German churches have recently, in November 2022, changed their labour law. See Gitta Kharraz, Britta Schultejan 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.

See also Hans Michael Heinig, 'Why Egenberger Could Be Next' (*Verfassungsblog*, 19 May 2020) <<https://verfassungsblog.de/why-egenberger-could-be-next/>> accessed 24 February 2023.

343 Marjan Kos, 'The Relevance of National Identity in European Union Law and Its Potential for Instrumentalisation' (2019) LXXIX Zbornik znanstvenih razprav 53.

undermine the national identity or pose a threat to the public policy of the Member State concerned'.³⁴⁴

While all cited cases have their own specificities and context, one common thread connects them: namely, the unwillingness of the CJEU to compromise on the principle of non-discrimination, despite the importance, and obligation, to respect national constitutional identities under EU law. In all three cases, if one tolerated national constitutional objections, the respective exceptions would directly cause discrimination. The CJEU was not willing to compromise on that principle, even if the national apex courts refused to accept these outcomes in the light of constitutional conscientious objection.

344 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, para 46.

9 A Reconstructive Account of National Constitutional Identity

This last section highlights the basic contours of the undertaken structural comparison, aiming to provide reconstructive elements for the evaluation of identity claims in the EU. First, it recognizes the importance of identification of motivation for action to define the type of resistance – serving either the interest of one individual Member State or the collective (9.1). Moreover, it differentiates between the undermining and constructive types of resistance (9.2). Additionally, it distinguishes resistance which is discursive or articulated in absolute terms, unwilling to compromise (9.3). Finally, it emphasizes the importance of underlying rationales, or the justificatory reasons for resistance as the decisive element in evaluating the legitimacy of identity claims (9.4).

9.1 *The Motivation for Action – Individual v Collective Interests*

Knowing *the kind* of resistance can provide guidance in answering the question how to respond appropriately. When a Member State raises the claim of national constitutional identity against the application of EU law, that alone does not determine the matter. First, one should examine what kind of motivation stands behind the respective claim of identity. Does a Member State argue identity to obtain an exception for itself, or does it oppose a norm in general, stating its incompatibility with European and national shared constitutional principles more generally?

After determining the goal and motivation of the claim of national constitutional identity, one can focus appropriately on the relevant subject of review. If a Member State raises ‘constitutional conscientious objections’, the focus will lie on the respective national constitution. One will have to examine whether the respective constitution genuinely consists of the subject matter claimed to be about national constitutional identity. Is there a previous case law which can support such an interpretation by the national apex court?³⁴⁵ Are there any circumstances which shed serious

345 Federico Fabbrini and András Sajó, ‘The Dangers of Constitutional Identity’ (2019) 25 *European Law Journal* 457.

doubt as to the good faith of the claim, suggesting that the principle of sincere cooperation has not been observed?³⁴⁶ How would the respective exemption impact on other Member States, the effectiveness and unity of EU law, and the fundamental rights of EU citizens? Would the exemption be proportionate?³⁴⁷

By contrast, the motivation for action may aim to change the EU as such, objecting to the respective norm, or the CJEU's interpretation of EU law, not just for itself, but for all Member States. An act *ultra vires* – the CJEU acting manifestly beyond the conferred competences – concerns all Member States, even if it is only one which raises the objection.³⁴⁸ It does not point to national constitutional idiosyncrasies, but to the European principles of justice. It is an objection in the light of Dworkin's account of civil disobedience, believing and arguing that the law, properly interpreted, requires something else.³⁴⁹ In these circumstances one must evaluate the justificatory reasons for objection, and investigate whether, and to what degree, the other Member States also share this view or elements of it.

9.2 Constructive and Undermining Consequences of Resistance – Time will Judge

Resistance will always create trouble, disturb the legal tranquillity and create tensions. As Isaiah Berlin put it well, when explaining that David Hume was right that

‘stability in 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

346 Barbara Guastafarro, ‘Sincere Cooperation and Respect for National Identities’ in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018).

347 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, 937.

348 Bobić (n 83) 75.

349 Dworkin (n 69) 211.

are truth, or love, or friendship, or freedom, or art, or justice, or equality, or life itself.³⁵⁰

However, one ought not to forget that laws are being violated all the time. Yet, democracies are not destroyed by mere law-breaking. On the contrary, every legal system accepts and anticipates law-breaking as part of its ordinary existence. If ordinary violations of law do not destroy and not even endanger a democratic political system, the occasional toleration of conscientious objection and civil disobedience pose an even lesser threat. In fact, both commence their claims by acknowledging the existence and validity of the legal system before justifying their claim for deviation. Furthermore, the European legal system by now has become almost a synonym for individually tailored exceptions, reservations and opt-outs. Daniel Thym pointed out that European supranational integration should more aptly be described as supranational *differentiation*.³⁵¹ The cherry pickings and examples of enhanced cooperation are to be found everywhere, in the field of justice and home affairs, defence policy, monetary union, Schengen rules, foreign affairs, European public prosecution, etc. Integration is happening at great speed and the general mechanism for enhanced cooperation is a European reality by design, which should prevent us from thinking too rigidly about individual claims for exceptions and objections to EU law.³⁵²

Despite the reasonable tolerance towards institutional and constitutional objections, it is important to differentiate between constructive and undermining objections. Keeping in mind that the supranational law of the European Union also fulfils a stabilizing function, accordingly the number of acts of disobedience must be kept within limits to prevent the unravelling of its basic structure.³⁵³ Furthermore, and as discussed at length in Chapter 3, claims of national constitutional identity, which aim to undermine the common European project and contradict common and shared constitutional principles and values, must be rejected. When the Member State's

350 Isaiah Berlin, 'A Matter of Life' in Clara Urquhart (ed.), *A Matter of Life* (Jonathan Cape 1963) 39.

351 Daniel Thym, 'Supranational Differentiation and Enhanced Cooperation' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018).

352 Marjan Kos, 'Constitutional Diversity and Differentiation in the EU: What Role for National Constitutional Demands under EU Law?' in Maja Sahadžić et al. (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023) (forthcoming).

353 Føllesdal (n 37) 346.

conduct endangers the principle of democracy,³⁵⁴ the principle of judicial independence,³⁵⁵ prohibition of discrimination,³⁵⁶ or any other essential value enshrined in Article 2 TEU,³⁵⁷ one should no longer tolerate the resistance, even in the name of national constitutional identity.

However, distinguishing is not an easy task in this context either. One cannot always tell whether tolerating a particular judicial resistance may stabilize the multilevel constitutional orders, or rather if it may open a Pandora's box of idiosyncrasies and eventually lead to the dissolution and disintegration of the Union. The *Solange I* decision was heavily disputed at the time of its delivery, equipped with three dissenting opinions and accompanied by heavy critiques from European and German scholars providing ample opportunity for (public) debate. Interestingly, the CJEU never openly accepted the rejection of the principle of primacy of EU law in *Solange I*. Yet, in retrospect, the Union progressed because of the decision not in spite of it, a development which was impossible to predict at the time of the respective resistance.

9.3 Discursive or Absolute Resistance

Resistance, especially in the light of institutionalized civil disobedience, must be discursive rather than articulated in absolute terms. Civil disobedience always appeals to the public: first, aiming to disturb the public discourse just enough to get the necessary attention; and second, to convince the public to support, or at least tolerate their cause. Civil disobedience seeks empathy and persuades with the arguments of what is morally and legally right.

In European constitutional law, due to the discursive nature of disobedience, the preliminary reference procedure according to article 267 TFEU plays an essential role in institutional civil disobedience. Via identity arguments, the preliminary reference procedure is the framework where the national apex courts highlight their national sensibilities, objections and

354 Case C-896/19 *Repubblika* [2021] ECLI:EU:C:2021:311.

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

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

357 Luke D Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford University Press 2023) (forthcoming).

concerns.³⁵⁸ It provides publicity and a forum to advance legal arguments from a national perspective. In the German *Honeywell* decision, it was held that the national apex courts could not declare EU law ultra vires before first submitting the matter to the CJEU via a preliminary reference procedure, in which they would raise their arguments and concerns.³⁵⁹

As one former judge at the CJEU wrote, ‘the judges are never impressed if national courts even of the highest level threaten to ignore their obligations under the Treaty. But of course, they are highly interested in their opinions, and they are always ready to be convinced by better arguments.’³⁶⁰ Or in the words of White, disobedient institutions must show ‘a readiness to submit actions to public approval’.³⁶¹

In trying to persuade others of the importance of one’s cause, a disobedient agent has several (potential) addressees. As mentioned, the most obvious interlocutor is the CJEU via a preliminary reference procedure. Refusing to engage in dialogue already at this stage openly demonstrates defiance without any readiness for a compromise. As cited above, the last Polish Constitutional Court’s *K 3/21* decision exhibits this kind of absolute resistance.³⁶² By contrast, in *Tarico*, the Italian Constitutional Court adhered to the established rules of dialogue and even presented the issue to the CJEU twice, before it was able to persuade them and obtain an exception from the CJEU.³⁶³ The second group of addressees concerns European and domestic legal scholarship; whereas the national apex courts have the power to speak for all citizens in a respective Member State – constitutional courts have an exclusive power to interpret constitutions. In this context the legal scholarship often compensates this limited scope of review by critically revealing the context of the respective disobedient decision, by evaluating the given arguments, and in that way representing a litmus test of how genuine and legitimate the respective objection is.³⁶⁴ For example, the arguments which were put forward in *Ajos*, *PSPP* and *K 3/21* all failed to persuade domestic and international scholars of their cause.

358 Guastaferrero (n 346).

359 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.

360 Everling (n 278) 15.

361 White (n 20) 646.

362 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

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

364 Habermas (n 268).

9.4 Normative Justificatory Reasons for Action – The Rationale

Perhaps the most important element of institutional civil disobedience and constitutional conscientious objection is, not surprisingly, the underlying rationale. The described structural comparison teaches us the importance of a distinctive assessment of any individual case. Understanding conscientious objection and civil disobedience does not offer a simple template for appropriately resolving all the instances of judicial resistance in the EU. Rather it demonstrates that the said conceptions remain outside the positively defined legal norms with a reason – they are exceptions. As such they require individual case-by-case assessments.

When a disobedient action or conscientious objection directly causes the discrimination of other individuals, the chances of success are close to zero. When it goes directly against the common and foundational values of social liberal democracies, undermining society's and the polity's very fabric, the chances of success are small. White argued similarly, that the rule-breaking actions of agents of disobedience in a transnational polity must be irreducible to the pursuit of local interests.³⁶⁵ Henceforth, when the argument of national constitutional identity is applied solely to serve your own interests in a self-absorbed manner – so-called abusive identity claims³⁶⁶ – one must not tolerate them. In the words of Raz, conscientious objection is 'moral objection, not an objection in the name of one's interest in preserving one's basic lifestyle and one's fundamental plans for the future'.³⁶⁷

On the contrary, matters of national language,³⁶⁸ national security³⁶⁹ and specific expressions and interpretations of shared and common fundamental rights enjoy a higher level of legitimacy and thus potential toleration.³⁷⁰ Moreover, when identity claims are embedded in the basic principles of

365 White (n 20) 642.

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

367 Raz (n 56) 277.

368 Case C-379/87 *Groener* [1989] ECLI:EU:C:1989:599; Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291; Case C-391/20 *Cilevičs* [2022] ECLI:EU:C:2022:638.

369 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 89, 135.

370 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614; BVerfG, 2 BvR 2735/14 EAW 15 December 2015.

justice, exhibiting manifest deficiencies of the European legal order, arguing for a general change, and procuring a wide acceptance from the other apex courts as well as from domestic and international scholarship, the legitimacy of such claims is high; especially since the European project does not merely want to generate wealth, but ought to be understood as a new supranational way of organizing political power, based on human dignity and individual rights.³⁷¹

Understanding and evaluating identity claims as judicial disobedience in the light of conscientious objection and civil disobedience, the underlying rationales play a decisive role. Suppose the normative justificatory reasons comply with and reflect the common and shared principles of social liberal constitutionalism, and the limitation of other rights and interests in the respective case proves to be proportionate. In that case, one may occasionally tolerate these identity claims. Rawls stated similarly that while disobedience is admittedly contrary to the law, it nevertheless expresses fidelity to the law and appeals to the fundamental political principles of a democratic regime.³⁷² Or, as White put it, disobedience must express its ‘underlying commitment to a genuine constitutional order’.³⁷³

371 Isiksel (n 39) 576.

372 Rawls (n 68) 338.

373 White (n 20) 646.

10 Conclusion

This research introduced a structural comparison between the claims of national constitutional identity in the EU on the one hand, and civil disobedience and conscientious objection on the other. It aimed to look for potential structural similarities and apply them to European constitutional law: specifically how to improve understanding and evaluation of claims of national constitutional identity.

Between identity claims and conscientious objection and civil disobedience, as this chapter has revealed, there exist several structural parallels which can offer guidance in evaluating identity claims. The respective unconventional, comparative undertaking has, as such, proven productive and insightful. However, the very nature of resistance, like understanding constitutional pluralism in the EU,³⁷⁴ avoids and escapes hierarchical and strictly defined rules of application. Accordingly, one can and should not expect to find the magic formula which would straightforwardly provide the means to assess and evaluate every instance of national judicial resistance vis-à-vis the CJEU. In and of itself, that is not a surprise; the law rarely works these kinds of miracles.

Despite the difficulty of firmly determining the conditions of legitimate conscientious objection and civil disobedience, the structural comparison allows us to draw several preliminary conclusions. First, it was helpful in determining what kind of elements one should observe closely. Second, we were able to categorize them according to the type of resistance; according to different underlying rationales; by looking at whether the resistance engaged in a discourse; and with a view to what were the potential consequences of resistance for the other individuals and the EU legal order in general. Third, the ‘transplants’ which were identified through a detailed and serious engagement with different theoretical conceptions of civil disobedience and conscientious objection and constitutional practice have provided us with guidance to be able to ask the right kind of questions and to be conscious of different aspects of justification and effects of resistance.

374 Miguel Poiarés Maduro, ‘Three CLaims of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

Accordingly, one can regard identity claims in the EU as ‘institutional civil disobedience’ and ‘constitutional conscientious objection’.

Finally, and before concluding this chapter, one caveat is in order. The present research should be understood as the first step to a better and more nuanced understanding of identity claims. Necessary further research, carrying out a comprehensive analysis of *all* case law across the Member States and the Union, would be required to explore further, and more thoroughly, the comparative yardsticks outlined in this contribution.

Conclusion

We will not escape from thinking about ourselves and our society in identity terms. But we need to remember that the identities dwelling deep inside us are neither fixed nor necessarily given to us by our accidents of birth. Identity can be used to divide, but it can and has also been used to integrate. That in the end will be the remedy for the populist politics of the present.

(Francis Fukuyama, *Identity*)

1 Closing Insights

This research started by suggesting Kandinsky's painting as a metaphor for identity. It proposed the thinking of identity as uncontrollable, overlapping and complex shapes and lines, rather than a monolithic, descriptive and objective concept encapsulated by a coherent understanding. The claims throughout this research have corroborated the initial supposition: that one cannot easily tame and encapsulate the concept of identity.

The research then took on the question of how one could properly understand the meaning and scope of national constitutional identity claims in the light of shared constitutional commitments and beyond, and how best to accommodate them within EU law.

The answer is twofold. On the one hand, claims of national constitutional identity demonstrate the scope of variety, preventing us from determining one coherent theoretical account; that is both the appeal and the magic of identity. On the other hand, the research provided a contextualization for identity's complex dimensions and numerous yardsticks, as well as how to understand and evaluate them properly, and how not to. The main conclusions are summarized in the following.

2 Key Takeaways

1. The genesis and the state of the art of national constitutional identity argument in German case law proved itself doctrinally and normatively unwarranted to serve as an archetypical proposition mitigating the constitutional tensions among the Member States and the EU.

The research commenced with the roots and origins of national constitutional identity. After rejecting the Schmittian proposition that national constitutional identity mirrors the respective (homogenous) people even in the absence of any (written) constitution, it analyzed the decades-long gradual development of German identity case law.

First, it showed how the argument of conditional primacy of EU law from a national perspective did not emerge from identity considerations, but from normative justifications concerning the equivalent protection of fundamental rights. While the German Federal Constitutional Court (FCC) mentioned identity in passing, the said concept did not serve to justify the respective judicial resistance. Only the Maastricht decision first established the principal theoretical grounds for reviewing EU law based on national constitutional identity. From there, the FCC further developed the identity and *ultra vires* review incrementally in the subsequent judicial practice.

To sum up, it was not identity which initially instituted a national defence mechanism against EU law, but it eventually became a primary and useful argumentative tool to strengthen and continue with the described practice. The research critically deconstructed this evolution and rejected the respective meaning of identity as dogmatically and normatively unsound, as evaluated from an outside view.

2. Designating a subject matter as identity explains little, whereas discovering the underlying rationale of identity claims reveals their genuine objectives. Accordingly, one must differentiate identity claims due to their justificatory reasons to assess the degree of their legitimacy.

The research further analyzed identity claims across the Member States, providing an inclusive and broad understanding. Since identity claims are so diverse, there is no point in trying to construct one coherent theoretical account. Instead, a new framework of claims of national constitutional

identity was introduced, gathered around various clusters. The clusters signal the divergent underlying rationales of identity claims.

While the clusters' exact number and kind of characterization could be contested and potentially improved, the principal idea of normative differentiation remains the research's core claim. Identity claims' legitimacy depends substantially on their various underlying rationales.

The research essentially differentiated among the following claims of national constitutional identity: different expressions of common and shared principles; institutional diversities; sovereignty as control and independence over essential areas; politically sensitive areas of self-governance; language; and other sociological considerations such as history, culture and nationality.

Finally, the research showed how identity as special expressions of common principles, institutional diversities and protection of language enjoy wider recognition in the CJEU's case law compared to identity as essential and sensitive to Member States' areas, history, culture and nationality. Hence, the CJEU concedes claims of national constitutional identity in a confined manner.

3. The legitimate space for drawing red lines against EU law ends when claims of national constitutional identity undermine common and shared values and principles. They can either allude to illiberal nationalism and exclusionary historicism; or justify a subjection of independent national institutions, which are the prerequisite for the functioning of the EU.

One cannot accommodate claims of national constitutional identity when they undermine common and shared principles and values. The EU can only function when all the Member States and the EU share basic ideological commitments. While plurality and constitutional pluralism provide room for contestation on how best to articulate and realize these values and principles in concrete cases, their general rejection as such cannot be an option.

The research illustrated two ways to depart from common values and principles. The first example concerned Schmittian homogeneous understanding of political community prior to a constitution and construed on ethnic, historical and religious foundations. Protecting the dignity of a nation state in the light of an illiberal democracy stands at odds with liberal constitutional values built around the core idea of protecting the dignity of individuals.

The second example highlighted the need for independent national judicial structures to maintain the functioning of the EU. The EU's foundational principles of mutual trust and loyal cooperation are destroyed when the Member States no longer guarantee the independence of their judiciary and other independent institutions.

4. Claiming national constitutional identity as idiosyncratic interpretations of fundamental rights is intelligible, considering the lack of an appropriate mechanism to mitigate various overlapping fundamental rights standards among the Member States and the EU, but unjustifiable as a matter of identity. The newly presented change of constitutional paradigm – directly applying the EU Charter by the national apex courts – offers an alternative to move away from fundamental rights identity claims.

The research highlighted the background of the current fundamental rights landscape in the European multilevel constitutional Verbund. The unified application of the EU Charter in fully harmonized areas inevitably challenges (higher) national fundamental rights standards. The Member States have responded to the said challenge by connecting their idiosyncratic fundamental rights standards with the claims of national constitutional identity. The research argued that national constitutional identity cannot be plausibly interpreted in that way.

Furthermore, it presented a new constitutional paradigm which gives way to solving the highlighted challenges. It explicated the potential of new case law by the German FCC.

In the *Right to be Forgotten I* concerning fully harmonized EU law, the FCC directly applied the German Basic Law as the primary standard of review, although the matter fell within the scope of the application of EU law. Accordingly, there was no need for an identity argument because the FCC had already applied national standards.

In the *Right to be Forgotten II* concerning fully harmonized EU law, the FCC introduced a true novelty and directly applied the EU Charter as the only relevant yardstick. The possibility to argue identity also diminished because the national Basic Law no longer serves as the relevant and applicable standard of review.

Although not without its own challenges, the new *Right to be Forgotten* case law facilitates the change of identity claims paradigm in the area of fundamental rights, enabling the Member States to forget identity claims and follow the suggested approach.

5. Identity claims have multifarious dimensions, protagonists and functions. Given the great potential for misuse and abuse due to identity's ambiguous indeterminacy, its contested role in constitutional adjudication, and various degrees of (constructive) engagement vis-à-vis EU law, one must apply the argument of identity in constitutional law restrictively.

In contrast to the various underlying rationales of claims of national constitutional identity, the research further focused on identity's dimensions and functions. It explored the protection of national constitutional identity from the EU's perspective, showing the evolution of the European identity clause from a mere programmatic provision to its current role as a counterbalance against the primacy principle.

Moreover, it explained through the *travaux préparatoires* that the European identity clause never intended to incorporate all core national responsibilities, nor to designate them an exclusive status, immune against any obligation of EU law. The research further investigated tensions concerning the terminological confusion between national and constitutional identities, both insufficiently encapsulating identity claims.

Furthermore, it explicated how protection of national identity as the European principle is complementary to other European principles, and how claims of national constitutional identity are mitigating and managing the relationships among the Member States and the EU, undertaking different degrees of constructive and dialogical engagement.

Additionally, the research explored another dimension of identity, namely its protagonists. It illustrated that the national apex courts are not the only creators of national constitutional identity's meaning. Other branches of power, legislative and executive, politics and legal scholarship, also add their part.

Finally, it illustrated the problematic dimension of identity and its deficiencies. It highlighted the connections of identity with public policy, the possibilities of its misuse and abuse, and the implicit dimensions of identity alluding to tradition, history and culture.

6. An artificial construction of the EU's (constitutional) identity is a misguided undertaking, lacking a defensible methodology and exporting deficiencies of the concept of (national) constitutional identity to the EU.

Many scholars have argued that the EU has or needs its own (constitutional) identity. The said identity would counter the abusive potential of

national constitutional identities. Moreover, after the research had already positioned itself against this endeavour, the CJEU recently issued a new landmark decision following these voices and declared Article 2 TEU as the identity of the European legal order.

The research exposed this flawed construction, highlighting several challenges of creating an identity for the EU. Most notably, the creation of EU identity lacks any established methodology to discover an identity of supranational constitutional order. If identity means the EU's essential features, the fundamental freedoms should have been part of it. If it means sameness with the Member States, there is little that one can gain from this new construction.

The research exposed the overlooked relational nature of the identity concept. Furthermore, it highlighted the dangers of halting the European constitutional development while declaring some parts as identity, thus implying their unchangeability, and warned against the introduction of the hierarchy of EU primary law.

It argued that one could respect common values and principles without declaring them as identity. Finally, any arbitrary declaration of the EU's identity would necessarily produce subjective projections concerning the genuine nature of the EU, subject to unavoidable but unnecessary contestations.

Finally, the research showed how little one could gain in construing identity for the EU, while this endeavour opens itself up to numerous critiques. Namely, it raises questions of changeability, democratic reversibility, tensions with national sovereignty, and the multitude meanings of identity. The research argued that one should rather protect common and shared values by their real names.

7. The most illuminating way to understand and evaluate identity claims is generated through a structural comparison with civil disobedience and conscientious objection. The said conceptions are assessed according to their objectives, discursiveness, moral justifiability and consequences for others. In a structurally comparative way, these findings navigate a better understanding of identity claims in the EU.

After a deconstructive and critical approach at the beginning of the research, the final chapter offered a completely new outlook on understanding and evaluating identity claims. Drawing on the preliminary observations of Kumm, Cruz, Isiksel and Føllesdal, it further developed a structural

comparison of identity claims with civil disobedience and conscientious objection.

Civil disobedience is a public and collective act of resistance challenging an unjust law. In a structurally comparative way, the Member States refuse to comply with EU law when they consider it unjust. Their resistance aims to change the system for all in the same manner as the *Solange* jurisprudence co-induced the EU's fundamental rights system to improve.

By comparison, conscientious objection is an act of individual resistance that refuses to comply with a generally just law that conflicts with the objector's moral convictions. In a structurally comparative manner, a Member State refuses to abide by a law that conflicts with its specific and deeply rooted constitutional commitments.

The research explicated these structural similarities and offered preliminary guidelines on how to improve understanding and evaluation of identity claims accordingly. Drawing on several contributions from legal theory concerning civil disobedience and conscientious objection, most notably from Rawls, Raz and Dworkin, it presented several yardsticks to determine the degree of legitimacy of the respective claims of national constitutional identity.

While the new reconstructive account of identity claims based on the said structural comparison guides us in evaluating identity claims, it is not a silver bullet. Like any other act of resistance, identity claims depend profoundly on their normative justifications and the relevant circumstances. Accordingly, as the research suggests, one cannot avoid individual evaluation and the need for proper balancing in every individual case.

3 Looking Ahead

The protection of national identity is part of the EU's primary law, which makes it a European legal concept for the foreseeable future. Moreover, I doubt that fascination with identity in general will disappear any time soon. From Aristotle to contemporary identity politics, where repressed and subordinated entities struggle for equal worth and recognition, identity intrinsically remains a human condition. It is a recognition of an individual's dignity and the expression of one's belonging, as Fukuyama's quote above suggests.

Moreover, questions of collective identity and belonging are further stimulated when conventional political entities redefine their confines. In other words, the EU as an alternative political entity accelerates these considerations of (new) identities, even though it is (still) far from a melting pot of cultures and peoples.

From here, two final conclusions unfold. First, the ever-closer European integration will inevitably fortify the questions of national (constitutional) identities and other unique divergences. The question of an appropriate balance between national and supranational entities will remain an ever-green subject of dispute, dynamically changing according to the current integration stage. Identity will remain a conductive tool to articulate these contestations.

Second, the research showed the limited and precarious role of identity as a legal mechanism to define and control the scope and limits of national integration in the EU in the hands of the (apex) courts. Translating these political considerations into a legal concept of national constitutional identity arguably overreaches the role and capacities of legal considerations. This is also the underlying tenor of the research – arguing for a narrow interpretation of national constitutional identity in European constitutional law.

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Arguments of Chapter 3 and Chapter 6 of this research in part coincide with two other contributions, written exclusively by the author of this research. Chapter 3 in small parts reflects the arguments of a contribution: Gašperin Wischhoff J, 'Forgetting Identity Claims – The New Constitutional Paradigm in Multilevel Fundamental Rights Standards' in Maja Sahadžić and others (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023). Chapter 6 significantly draws on the contribution: Gašperin Wischhoff J, 'A Plaidoyer Against the Sisyphean Endeavour to Imagine the Constitutional Identity for the EU' in Jurgen de Poorter and others (eds), *A Constitutional Identity for the EU?*, vol 4 (TMC Asser Press 2023).