

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 supra-national 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.