

Special Issue

Constitutional Identity in the Age of Global Migration

Constitutional Identity as a Constructed Reality and a Restless Soul

*By Monika Polzin**

Abstract

The notion of constitutional identity is a recent and enigmatic notion in constitutional law and theory. This Article demonstrates that constitutional identity—understood as a certain constitution-related self-identity of a nation or people—can be constructed from the text of a constitution, its interpretation and its application. However, constitutional identity is nothing more and nothing less than a constructed reality that can be regarded as a constitutional state's restless soul. It exists only as a constructed, simplified, imagined reality that will most likely also be contested and subject to change. Constitutional identity and the reliance on it in particular by national courts should therefore not be regarded as something sacred and absolute that can be compared to an imagined stable heart. Instead, constitutional identity should be treated with caution.

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A. Introduction

If a special issue of the German Law Journal were to be published in 1818, legal philosophers and lawyers would not have discussed the concept of constitutional identity. They would have discussed other concepts of identity, such as the concept of a national character (“*character national*”) developed by the French philosopher, Rousseau,¹ the concept of “*genie d’une nation*”² proposed by Montesquieu, or the idea of a “*Volksgeist*” as expressed by the German philosopher, Hegel.³ Based on these concepts, a discussion around identity would primarily have focused on an imagined national identity or character of a nation or community based on the assumption that every people has its own unique national characteristics determined, among other things, by its religion, its climate or morals.⁴ One would guess that any discussion on immigration and identity in 1818 would have focused broadly on the question of whether immigration was compatible with the perceived national character of a given nation.

As we near the year 2018, we are discussing constitutional identity in the age of migration. Constitutional identity is a relatively recent and enigmatic notion in constitutional law and theory. Even though there is no universal and uniform definition or scope of application of constitutional identity,⁵ the concept of constitutional identity differs in one important respect from the concepts of identity spoken of two hundred years ago. The concept of constitutional identity is intimately connected with the constitution of a given state. It

¹ See JEAN-JACQUES ROUSSEAU, PROJET DE LA CONSTITUTION DE LA CORSE (1765); Les classiques des sciences sociales, La gaza scienza, Apr. 2012, at 22, http://www.ac-grenoble.fr/PhiloSophie/old2/file/rousseau_corse.pdf.

² CHARLES LOUIS DE SECONDAT MONTESQUIEU, PENSEES 348 (2013), <https://www.unicaen.fr/services/puc/sources/Montesquieu/index.php> (“J’appelle genie d’une nation les moeurs et le caractere d’esprit de differens peuples dirigés par l’influence d’une même cour et d’une même capitale.”).

³ See GEORG WILHELM FRIEDRICH HEGEL, 14 GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE § 274 (reprint 2009) (1821).

⁴ For the correct criticism, see JOHANN GOTTFRIED HERDER, UNE AUTRE PHILOSOPHIE DE L’HISTOIRE 166 (1774)

Niemand in der Welt fühlt die Schwäche des allgemeinen Charakterisierens mehr als ich. Man mahlet ein ganzes Volk, Zeitalter, Erdstrich- wen hat man gemahlt? . . . Endlich fasst man sie doch in Nichts, als ein allgemeines Wort zusammen, wo jeder vielleicht denkt und fühlt, was er will – unvollkommenes Mittel der Schilderung) wie kann man missverstanden werden! . . . Charakter der Nationen! Allein Data ihrer Verfassung und Geschichte müssen entscheiden.

⁵ Cf. Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 756, 756 (Michel Rosenfeld & Andrés Sajó eds., 2012) [hereinafter Rosenfeld, Oxford Handbook]; José Luis Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION, 17, 18–19 (Alejandro Saiz Arnaiz & Carina Alcobarro Llivina eds., 2013).

relates generally either to a constructed identity of the “self” in relation to the constitution, or to the identity of a constitution itself.⁶ However, apart from this very general definition of constitutional identity, the concept of constitutional identity can have different meanings, as there are five different and largely independent discourses on constitutional identity.

The first and most famous discourse is a European legal discussion. It is centered on Art. 4, Para. 2 TEU, which states that the Union shall respect the Member States’ national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. The main point of discussion is whether this national identity, also framed as constitutional identity, can serve as a justification for the violation of EU law.⁷

The second discourse relates to the first and is not as extensive. It concerns the relationship between important constitutional values, described as constitutional identity,⁸ and public international law. The question is whether these constitutional values can justify the violation of public international law⁹ and/or the extent to which international organs, particularly international courts, must take into account important national constitutional norms and/or values. In this context, constitutional identity is also discussed as a theory of judicial self-restraint.¹⁰

The third discourse is composed of different national discourses on constitutional identity. In these discourses, constitutional identity is primarily understood as the identity of the constitution itself and is a purely normative concept.¹¹ This understanding is particularly widespread in Germany. It has gained significant momentum in the jurisprudence of the

⁶ Martí, *supra* note 5, at 17.

⁷ See, e.g., FRANÇOIS-XAVIER MILLET, *L’UNION EUROPEENNE ET L’IDENTITE CONSTITUTIONNELLE DES ÉTATS MEMBRES* (L.G.D.J. ed., 2013); NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013); L’IDENTITE CONSTITUTIONNELLE SAISIE PAR LES JUGES EN EUROPE (Laurence Burgorgue-Larsen ed., 2011); for a recent opinion of Advocate General Pedro Cruz Villalón, see also Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:7, paras. 58-61 (Jan. 14, 2015); Faraguna chapter in this volume 18 GERMAN L.J. PAGE (2017).

⁸ See, e.g., Anne Peters, *Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse* 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZÖR] 3, 54 (2010).

⁹ See *id.* at 59–61.

¹⁰ See Christian Walter & Markus Vordermayer, *Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen*, 63 JAHRBUCH DES ÖFFENTLICHEN RECHTS [JÖR] 129, 165 (2015).

¹¹ For France, see, e.g. Frédérique Coulée, *En quoi les engagements internationaux de la France en matière de droits de l’homme nous-rendent-ils sur son identité constitutionnelle*, 118 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 541, 542 (2014); Michel Troper, *Behind the Constitution? The Principle of Constitutional Identity in France*, in CONSTITUTIONAL TOPOGRAPHY, VALUES AND CONSTITUTIONS 187, 190 (András Sajó & Renáta Uitz eds., 2010); see also Monika Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power*, INT’L J. CONST. L., 411, 433–38 (2016).

German Federal Constitutional Court since the famous Lisbon Judgment, which defined constitutional identity expressly as a legal concept that describes the core of the German constitution which is not capable of amendment.¹² The historical background is the work of Carl Schmitt¹³ and Carl Bilfinger¹⁴, during the time of the Weimar Republic. Schmitt and Bilfinger used the notion of the identity of the constitution to construct implicit, material constitutional limits on constitutional amendment.¹⁵ The major question in this context is whether a constitution remains the same despite any amendments made to it, or whether it is fundamentally altered by those amendments, so that it becomes an entirely different one? Constitutional identity is therefore seen as the ultimate legal limit on constitutional amendment and thus also specifically on European integration.¹⁶ The notion of constitutional identity in German constitutional thought is used, at least in relation to formal constitutional amendments,¹⁷ more or less as a synonym for the “basic structure doctrine” applied in other jurisdictions, such as India¹⁸ and the United States¹⁹.

The fourth discourse is one on constitutional identity understood as a special collective identity of a people or a nation that is also expressed, determined and shaped by the constitution.²⁰ This discourse focuses, at an abstract level, on the relationship between a

¹² The leading case was the Lisbon Judgment. See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], June 30, 2009, 123 BVerfGE 267. For more detailed on the development, see Polzin, *supra* note 11, at 424–29.

¹³ CARL SCHMITT, CONSTITUTIONAL THEORY, in particular 125–30 (Jeffrey Seitzer trans., 2008) (1928).

¹⁴ See CARL BILFINGER, DER REICHSSPARKOMMISSAR (1928); Carl Bilfinger, *Verfassungsfrage und Staatsgerichtshof*, 20 ZEITSCHRIFT FÜR POLITIK [ZfP] 81 (1931).

¹⁵ For a detailed account, see Polzin, *supra* note 11, at 418–21.

¹⁶ See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Dec. 15, 2015, 140 BVerfGE 317 (*Identity Control*), para. 41.

¹⁷ For an example of the rare use of the notion of “basic-structure doctrine” in German law, see Jürgen Bast, *Don’t Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review*, 15 GERMAN L.J. 167, 168 (2014).

¹⁸ See, e.g., SUDIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM (2009); Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6 DELHI LAW REVIEW 1 (1977/78); Virandra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance*, 49 J. INDIAN L. INST. NEW DELHI 365 (2007). However, Indian case-law also refers to the notion of constitutional identity. See, e.g., Indian Supr. Ct., *Minerva Mills Ltd. v. Union of India (Uoi)*, (1980) 1 S.C.R 206 para. 21 (India), <http://indiankanoon.org/doc/1215719/> (“[T]he Constitution is a precious heritage; therefore, you cannot destroy its identity.”); see also GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 53 *et seq.* (2010).

¹⁹ See Manoy Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441 (2014).

²⁰ See JACOBSON, *supra* note 18; MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT (2010); see also Rosenfeld, *Oxford Handbook*, *supra* note 5, at 760.

given national culture and its own constitution.²¹ Connected with this discourse is the fifth discourse on constitutional identity and immigration. The main idea here is that immigration policies in particular also contribute to the self-definition of a nation or community.²²

The present Article is founded on the assumption that constitutional identity can only be understood as an abstract, constructed—and therefore, to some extent, imagined, simplified and fictitious—specific understanding by a people or nation of itself²³ in relation to its constitution,²⁴ in other words its constitution-related, constructed, collective self-identity (see Part B.). It then focuses on the question of how this special self-identity can be defined (see Part C.). The conclusion is dedicated to the limited function of the concept of constitutional identity (see Part D.).

B. The Definition of Constitutional Identity

The origin of the definition of constitutional identity as a special, constructed, collective self-identity is the primarily US-based understanding of constitutional identity as the special identity of a nation/people that is also expressed, determined, and shaped by the constitution. Generally speaking, this constitutional identity is determined and shaped by the fact that a community has a written constitution, the content of the constitution itself and the context in which the constitution operates.²⁵ Based on this general approach,

²¹ For the perspective of Robert Post, see Robert Post, *The Supreme Court, 2002 Term-Forward: Establishing the Legal Constitution: Culture, Courts and Law (2003)*, 117 HARV. L. REV. 8 (2003–04) (“[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”).

²² See LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS* 234 (2015).

²³ I use in the following the terms nation or people interchangeably. They refer to an imagined political community. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (rev. ed. 1991). I mainly use these terms to refer to the citizens of a given state. The idea behind this formal approach is that the subjects of the constitution are the citizens of a state. On a theoretical level the people, meaning the citizens of a state, have the constitution-making power. Therefore, they also define their community within their constitution. Although, in every state non-citizens and citizens live together, the percentage of non-citizens varies from one country to another. In Germany roughly about 12% of the population are foreigners. Cf. Statistisches Bundesamt, *Mehr als 10 Millionen Ausländer in Deutschland*, DSTATIS (June 2017), https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2017/06/PD17_227_12521.html. Thus, the self-definition of every nation is also influenced by the non-citizens living in a particular country. The extent to which foreign citizens are included in the self-image of a particular nation depends on an abstract level on the willingness of a nation to include non-citizens and on the willingness of non-citizens to be included.

²⁴ Constitution in the sense of the present article refers to those written or unwritten constitutional documents that establish a basic democratic and constitutional order.

²⁵ See Rosenfeld, *Oxford Handbook*, *supra* note 5, at 757

Three distinct general meanings of constitutional identity emerge. First, there is an identity that derives from the fact of having a constitution – polities with a constitution differ from those that do not; secondly, the content of a constitution provides distinct elements

different interpretations of this concept of constitutional identity exist, namely by Habermas, Rosenfeld and Jacobsohn. Below, the Article outlines the different approaches of Habermas, Rosenfeld, and Jacobsohn in section I, and then goes on to explain further the definition of constitutional identity as a special, constructed, collective self-identity in section II.

I. The Different Approaches of Habermas, Rosenfeld, and Jacobsohn

For Habermas, the idea of constitutional identity is not an independent theoretical concept in itself, but a corollary to the idea of a "*Verfassungspatriotismus*,"²⁶ namely that the identity of a nation of citizens is only related to the essential constitutional principles, such as human rights, democracy and the rule of law. Habermas explains different interpretations and understandings of these more or less uniform constitutional norms by different nations with dissimilar constitutional histories and cultures²⁷ and thus different constitutional identities.²⁸

Habermas' approach is therefore much more limited than the very abstract approach to constitutional identity developed by the US constitutional lawyer, Michel Rosenfeld. Rosenfeld understands constitutional identity as belonging to an imagined community that must carve out a distinct self-image.²⁹ Rosenfeld's work is primarily focused on describing, at a very abstract level, how this constitutional identity is and should be formed in order to foster a functioning constitutional order. According to him, "all constitutions depend on elaboration of a constitutional identity that is distinct from national identity and from all

identity – a federal constitution sets up a different kind of polity than one establishing a centralized unitary state; and thirdly, the context in which a constitution operates seems bound to play a significant role in the shaping of its identity – different cultures envision fundamental rights in contrasting and even sometimes contradictory ways.

[Emphasis omitted.].

²⁶ On theoretical concept of constitutional patriotism (*Verfassungspatriotismus*), see, e.g. JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 642–43 (1992); JÜRGEN HABERMAS, EINE ART SCHADENSABWICKLUNG 173–74 (1987); DOLF STEINBERGER, VERFASSUNGSPATRIOTISMUS (1982); for an account regarding the criticism, see, e.g. Josef Isensee, *Staatsrepräsentation und Verfassungspatriotismus in: STAATSREPRÄSENTATION* 223, 237–39 (Jörg-Dieter Gauger & Justin Stagl eds., 1992).

²⁷ See Jürgen Habermas, *Anerkennungskämpfe im demokratischen Rechtsstaat*, in *MULTIKULTURALISMUS UND DIE POLITIK DER ANERKENNUNG* 147, 178 (Charles Taylor ed., 1993).

²⁸ See expressly Frank I. Michelman, *Morality, Identity and "Constitutional Patriotism"*, 76 *Denv. U.K. Rev.* 1009, 1025–26 (1998); cf. JAN-WERNER MÜLLER, *VERFASSUNGSPATRIOTISMUS* 70 (2010) (using instead the notion *Verfassungskultur* (constitutional culture); cf. HABERMAS, *supra* note 26, 642-43 (without using the notion constitutional identity).

²⁹ See Rosenfeld, *Oxford Handbook*, *supra* note 5, at 759.

other relevant pre-constitutional and extra-constitutional identities.”³⁰ Constitutional identity must preserve enough of the national identity and all other identities within a given community to secure acceptance.³¹ This special, collective self-identity is—as Rosenfeld has aptly emphasized—ideally determined by a process which can abstractly be characterized as a reconciliation process between the different identities, conflicts, and tensions within a state or community.³² This ideal constitutional identity is developed through a process that emphasizes simultaneously certain common identities in a society and suppresses or reduces the importance of divergent identities.³³ For him, the constitutional identity of the United States is to be found, at the highest and most abstract level, in the following sentence in the Preamble to the US Constitution, “We, the People” as it expresses the foundational notion that all people are equal.³⁴ This constitutional identity is formed and shaped by the text of a written constitution itself, constitutional interpretation by the judiciary, and the culture of a society, which ultimately means the citizenry.³⁵

Another recent US author writing on the theoretical aspects of constitutional identity is Gary Jeffrey Jacobsohn. For him, the concept of constitutional identity is primarily a tool for analyzing and describing constitutional development and change; constitutional law is always about interpretation.³⁶ The difficult theoretical question for him is then: “How does one come to know the identity of a constitution?”³⁷ He then provides the abstract answer

³⁰ ROSENFELD, *supra* note 20, at 10.

³¹ See Rosenfeld, Oxford Handbook, *supra* note 5, at 761.

³² See *id.* at 761

As I conceive it in its broadest terms, the place and function of constitutional identity is determined by the need for dialectical mediation of existing, evolving, and projected conflicts and tensions between identity and difference – or, more precisely, identities and differences – that shape the dealings between self and other within the relevant polity committed to constitutional rule and favorably disposed toward the aims of constitutionalism. At its most abstract, constitutional identity figures in relation to the threshold decision of whether to pursue constitutionalism or to reject it altogether as would be the case in the context of a pure theocracy.

³³ Michel Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, in: CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 3, 6 (Michel Rosenfeld ed., 1994) [hereinafter Rosenfeld, Modern Constitutionalism].

³⁴ See *id.*

³⁵ Rosenfeld, Oxford Handbook, *supra* note 5, at 771–73.

³⁶ See JACOBSON, *supra* note 18, at 7.

³⁷ *Id.*

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 that are expressive of a nation's past, as well as a determination of those within the society who seek in some ways to transcend this past.³⁸

Thus, for Jacobsohn, constitutional identity is not only shaped by the judiciary,³⁹ but also by the political process itself. The process of shaping a constitutional identity is driven by disharmony, either in the text of the constitution or in the society itself—in particular historical changes or political contestations.⁴⁰

II. Constitutional Identity as a Special, Constructed Self-identity

This Article argues that the concept of constitutional identity consists of two aspects. The first is theoretical and constructed. The second is more a question of empirical enquiry.

The constructed aspect is found in a certain abstract and theoretical perspective on a given national constitution, and its interpretation and application within its specific national culture.⁴¹ Some constitutional norms, and particularly their authoritative judicial interpretation and application, can be construed as the expression of a certain constitution-related identity of a people. The classic example is the narrow interpretation of the freedom of speech laid down in the German constitution, the Basic Law, which excludes denying the Holocaust.⁴² In this view, constitutional identity is an imagined, constructed, simplified, and, to some extent, fictitious “constitutional self-image.”⁴³ This constructed self-image is—as the Article lays out in more detail in the next section—always an approximation that will

³⁸ *Id.* For Jacobsohn, constitutional disharmony is very important for developing this constitutional identity. *See id.* at 4, 13).

³⁹ For a particularly clear example of this, see *id.* at 351.

⁴⁰ *See, e.g.,* Jacobsohn, *supra* note 18, at 4, 13, 351–55; *see also* Rosenfeld, Oxford Handbook, *supra* note 5, at 760.

⁴¹ See in more detail *infra* Part B.

⁴² *See* Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Apr. 13, 1994, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1779, 1780 (1994).

⁴³ I borrow this term from Robin West. *See* Robin West, *Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity*, in: CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 245, 251 (Michel Rosenfeld ed., 1994).

most likely also be contested and only be temporary. The struggle within a community or state to find the correct and best meaning of a vague and indeterminate constitutional norm is never quite complete. There will always be new generations, circumstances, challenges, and knowledge.

The “real” aspect of the concept of constitutional identity is firstly that constructed constitutional identity is also determined and influenced by a perceived national identity or the real national peculiarities of a given country. Secondly, the constitution itself, or a particular interpretation, can also influence collective self-identity.⁴⁴ The importance of this aspect also depends on the extent to which a relevant national identity is marked by the constitution itself.⁴⁵ The difficulty behind this “real” aspect is that the concept of national identity itself remains a vague and unclear idea. It is very difficult to determine what national identity really is.⁴⁶ An example is the debate in 2017 after the refugee crisis in Germany as to the existence of a German “*Leitkultur*” and the ten-point proposal by the German Minister of the Interior, Thomas De Maizière, describing his view of German culture.⁴⁷ It was disputed whether the cultural characteristics named by De Maiziere were really part of German identity—for example, the handshake⁴⁸—and also whether the “*Leitkultur*” really could be something distinct from the German Basic Law.⁴⁹ This “real” aspect can only, if at all, be empirically determined through, for example, actual enquiries as to how a constitution determines the identity of a given state’s citizens, or how constitutional judges, members of a constitutional assembly or members of parliament understand the national identity of a people.

My framing of constitutional identity is expressly limited to the formal and constructed aspect outlined above for the following two reasons: (a) Constitutional identity is a special, constructed identity related to the constitution itself, so this identity can only be expressed

⁴⁴ See Armin von Bogdandy, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, 62 VERÖFFENTLICHUNG DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER [VVDSTRL] 156, 170 (2002).

⁴⁵ See ROSENFELD, *supra* note 20, at 76.

⁴⁶ See the recent German debate on the proposal of the German Interior Minister de Maizière of a ten-point proposal on the German *Leitkultur*. See, e.g., Jürgen Habermas, *Keine Muslima muss Herrn de Maizière de Hand geben*, RHEINISCHE POST [RP] (Mar. 3, 2017), <http://www.rp-online.de/politik/deutschland/leitkultur-das-sagt-juergen-habermas-zur-debatte-aid-1.6793232> [hereinafter Habermas, *Muslima*].

⁴⁷ See *Das ist De Maizières Zehn-Punkte-Plan*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] (May 2, 2017), <http://www.faz.net/aktuell/politik/inland/de-maizieres-zehn-punkte-plan-14994262.html>.

⁴⁸ See, e.g., *CDU-Mann Geißler nimmt de Maizières ‚Leitkultur‘ auseinander*, MÜNCHNER MERKUR (May 5, 2017), <https://www.merkur.de/politik/cdu-mann-geissler-verspottet-de-maizi-res-leitkultur-zr-8259204.html>.

⁴⁹ See Habermas, *Muslima*, *supra* note 46.

and found in the process of making, applying and interpreting the constitution itself⁵⁰—this is the main difference between a constitutional identity and a national identity; and (b) the “real” aspect of the concept of constitutional identity, namely its actual relationship with a perceived national identity can only, if at all, be determined through empirical enquiry and is therefore not within the scope of this article.

C. Defining the Constructed Constitutional Identity

The process of defining the constructed constitutional identity in any given country is a delicate task and the proposed universal methodology can only be an approximation, which might have to be adjusted in individual cases. I will nevertheless argue for a universal methodology, as my concept of constitutional identity is limited to the constructed, and therefore abstract and universal, aspect of constitutional identity.⁵¹ The constructed understanding of constitutional identity is therefore independent of factual, national peculiarities, such as the extent to which a constitution is anchored in the national identity of a given country or not. The starting point for defining a constructed constitutional identity is—if it exists—⁵² the national written constitution including its preamble, which is discussed in detail in Part I., in authoritative interpretations of universal constitutional norms, which is discussed in detail in Part II., or in other legal sources, for example penal codes or citizenships laws,⁵³ which is discussed in detail in Part III. These legal sources are of particular importance in countries with no written constitution.

I. Constitutional Identity and Constitutional Norms

This Section will demonstrate that a constructed constitutional identity can be found in those essential constitutional norms that are also important for the collective identity of citizens. First, these norms are constitutional norms that can be traced back to, or explained by; distinct national peculiarities that are also important for the collective identity of citizens, which will be discussed in Part 1. In addition to these distinct norms relating to national peculiarities, a constitutional identity can be constructed from the essential norms of a constitution that give rise to its basic character, in the sense that they form the identity of the constitution itself. This Section will show that these norms should not be equated with constitutional provisions that are not capable of being amended. Even though some authors argue that constitutional provisions which contain express material limits on constitutional amendment—also called “eternity clauses”—point to the identity of a nation or

⁵⁰ See in detail *infra* Part C.

⁵¹ See *supra* Part B II.

⁵² Countries without a written constitution are for example Israel or the United Kingdom.

⁵³ See Strumia & Kaushal chapter in this volume, 18 German L.J. PAGE, PINCITE (2017).

community,⁵⁴ this Section will demonstrate that, at a normative level, constitutional identity cannot and should not be equated with eternity clauses, which will be discussed in Part 2.

1. *Constitutional Norms Explained by Distinct National Peculiarities*

Constitutional identity can primarily be constructed from those constitutional norms that can be explained by distinct national peculiarities in a given state. A pertinent example of these norms is often the preamble to a constitution.⁵⁵ Preambles often refer to a specific constitutional understanding of the “self” determined by a distinctive national history and other national conditions, such as religious understanding. A recent example is the Preamble to the Tunisian Constitution of 2014.⁵⁶ This unusually long and detailed preamble starts by referring to constitutional history, in particular the recent revolution of December 17, 2010 through January 14, 2011. It then refers specifically to an Islamic-Arab identity, the commitment to human rights,⁵⁷ “a national unity that is based on citizenship, fraternity, solidarity, and social justice” and also contains international and universal goals. It refers *inter alia* to the commitments

⁵⁴ See Ulrich K. Preuß, *The Implications of “Eternity Clauses”: The German Experience*, 44 *ISR. L. REV.* 429, 445 (2011). Such an understanding of eternity clauses is also widespread in the German literature on Article 4 para. 2 TEU. A majority of German authors argue that in particular the German eternity clause covers those constitutional provisions that are the expression of the national identity in the sense of article 4 para. 2 TEU. See, e.g., Armin von Bogdandy & Stephan Schill, *Art. 4 EUV, in 1 DAS RECHT DER EUROPÄISCHEN UNION* para. 22 (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 58. Actualization 2016); Armin Hatje, *Art 4 EUV, in EU-KOMMENTAR* para. 12 (Jürgen Schwarze ed., 2012); Rudolf Streinz, *Art. 4, in EUV/AEUV* para. 14 (Rudolf Streinz ed., 2012); for examples from the non-German literature, see also Constanze Grewe, *Methods of Identification of National Constitutional Identity, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION* 37, 39 *et seq.* (Alejandro Saiz Arnaiz & Carina Alcobero Llivina eds., 2013); 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*, 37 *EUR. L. REV.* 563, 576 (2012); cf. Leonard F. Besselink, *National and Constitutional Identity Before and After Lisbon*, 6 *UTRECHT L. REV.* 36, 48–49 (2010).

⁵⁵ See also Orgad Liav, *The preamble in constitutional interpretation*, 8 *INT’L OF CONST.L* 714, 717, 738 (2010).

⁵⁶ See Constitution of Tunisia, preamble (2004), English version available at: https://www.constituteproject.org/constitution/Tunisia_2014.pdf.

⁵⁷ It states that:

Expressing our people’s commitment to the teachings of Islam and its aims characterized by openness and moderation, and to the human values and the highest principles of universal human rights, and inspired by the heritage of our civilization, accumulated over the travails of our history, from our enlightened reformist movements that are based on the foundations of our Islamic-Arab identity and on the gains of human civilization, and adhering to the national gains achieved by our people

Id.

to strengthening Maghreb unity as a step towards achieving Arab unity, (...), defending the peoples' right to determine their own destiny, to supporting all just liberation movements, at the forefront of which is the movement for the liberation of Palestine, and opposing all forms of colonization and of racism.

Another example is the Preamble to the German Basic Law, which refers to the determination of the German people "to promote world peace as an equal partner in a united Europe" in order to express German commitment to European and Western values, thus making a clean break with the Nazi regime. The US Constitution begins with the famous expression "We the People in the United States" to demonstrate the constitutional self-image of a nation of equal human beings.⁵⁸

Furthermore, these norms can be found in other constitutional provisions, such as provisions relating to national languages⁵⁹ or the federal organization of a state.⁶⁰ The common characteristic of these norms is that they can be traced back to, or explained by, national, cultural, or historic peculiarities that are also important for a national collective identity. An instructive example of how these constitutional norms can be determined is the jurisprudence of the European Court of Justice on Art. 4, Para. 2 TEU. Even though the Court has not, perhaps not yet, adopted a general definition of what is meant by the expression, "national identities, inherent in their fundamental structures, political and constitutional" in Art. 4, Para. 2 TEU, there are some instructive individual decisions. Their common feature is that the Court concentrates on those national constitutional norms that are regarded as an expression of cultural and historical national peculiarities.⁶¹ The Court has, for example, accepted the reference by national courts to constitutional provisions on the protection and

⁵⁸ See also Rosenfeld, *Modern Constitutionalism*, *supra* note 33.

⁵⁹ See, e.g., Constitution [CONSTITUTION], June 3, 1958, art. 2 (France).

⁶⁰ See, e.g., BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18 1999, SR 101, art. 3 (Switz.).

⁶¹ For an accurate analysis, see also 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 NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 275, 304 (Alejandro Saiz Arnaiz & Carina Alcoberro Llivina eds., 2013).

promotion of national languages;⁶² on the principle of republic⁶³ and on the federal structure.⁶⁴ Moreover, the Court—in its jurisprudence on Art. 4, Para. 2 TEU—has not drawn an analogy between the content of national eternity clauses and national identity, even though such a view is frequently advanced in the literature.⁶⁵ The most pertinent example is *Case Digibet et al.*, where the Court qualified the allocation of competences between the German “*Länder*” and the “*Bund*” as part of the German national identity within the meaning of Art. 4, Para. 2 TEU, without making any reference to Art. 79, Para. 3 GBL.⁶⁶

2. *Identity of a Constitution, Eternity Clauses, and Constitutional Identity*

Additionally, a constitutional identity can be constructed from those constitutional norms that are the essential norms of the constitution itself and determine the identity of the constitution itself. These essential norms can be used to construct a constitutional identity as, due to their normative importance, they will most likely be affected by a certain constitutional self-image and will, in turn, be able to influence the current constitutional understanding of the “self.” The constitutional norms that form the identity of a constitution

⁶² For the first decision, see Case C-379/87, *Groener v. Minister for Education and City of Dublin Vocational Educational Commit.*, 1989 E.C.R. I-3987, para. 18-19. This case-law was confirmed and repeated within Article 4 para 2 sentence 2 TEU. See Case C-391/09, *Runevič-Vardyn & Wardyn v. Vilnius miesto savivaldybės administracija*, 2011 E.C.R. I-03787, para. 86-87. The previous Opinion of Advocate General Niilo Jääskinen consented. See Case C-202/11, *Anton Las v. PSA Antwerp NV*, ECLI:EU:C:2012:456, para. 26-27 (Dec. 16, 2010); cf. Opinion of Advocate General Miguel Poiares Maduro, Case C-160/03, *Kingdom of Spain v. Eurojust*, 2005 E.C.R. I-02077, para. 24 (Dec. 16, 2004) (“Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC.”); Opinion of Advocate General Juliane Kokott, Case C-222/07, *UTECA*, 2009 E.C.R. I-01407, para. 90 *et seq.* (Sept. 4, 2008).

⁶³ See Case C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693, para. 92; Case C-438/14, *Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe*, 2003 E.C.J. I-11613, para. 73.

⁶⁴ Case C-156/13, *Digibet Ltd & Albers v. Westdeutsche Lotterie GmbH & Co. OHG*, ECLI:EU:C:2014:1756, para. 34 [hereinafter *Digibet*]; cf. Opinion of Advocate General Juliane Kokott, *Joined Cases C-428-434/06, Unión General de Trabajadores de La Rioja v. Juntas Generales del Territorio Histórico de Vizcaya (UGT/Rioja)*, para. 54 (May 8, 2008)

First of all, I would like to mention that under Article 6(3) EU the European Union must respect the national identities of its Member States. This means that the Union cannot encroach on the constitutional order of a Member State, whether it is centralist or federal, and does not in principle have any influence on the division of competences within a Member State. The revision of that provision by the Treaty of Lisbon expressly mentions respect for the constitutional structures of the Member States by the Union.

For further confirmation, see Case C-51/15, *Remondis v. Region Hannover*, 2009 E.C.J. I-8127, para. 40.

⁶⁵ See *Strumia & Kaushal*, *supra* note 53.

⁶⁶ See Case C-156/13, *Digibet*, ECLI:EU:C:2014:1756, para. 34.

should be determined by the interpretation of the constitution. They cannot and should not be equated with constitutional provisions which cannot be amended and which are protected by so-called eternity clauses.⁶⁷

That constitutional identity and the content of eternity clauses should not be equated follows from the following arguments: First, the primary function of eternity clauses is to protect certain constitutional provisions from amendment and not to protect or express a certain constitutional self-image. Second, the content of eternity clauses varies. Due to varying historical experiences and/or envisaged purposes of eternity clauses, they are framed differently. Some eternity clauses are very broadly framed—for example, the oldest one in the Norwegian Constitution of 1814 generally protects the spirit of the constitution itself⁶⁸—others protect only the Republican principle⁶⁹, while others contain more detailed lists of constitutional provisions that are not capable of amendment.⁷⁰ The reason why the German eternity clause is framed quite broadly is explained by the intent to prevent the legal rise to power of another dictatorial system.⁷¹ The French eternity clause was initially introduced in 1884⁷² as part of a revision of the French Constitution of 1875 to safeguard the republican system against a reintroduction of the monarchy,⁷³ and was then retained in the French Constitution of 1946⁷⁴ and 1958. Thus, limiting constitutional identity to the content of an eternity clause would be one-dimensional and overly simplistic. This assertion is reinforced by the fact that not every constitution has an eternity clause. The US Constitution, for example, has no eternity clauses and only 8⁷⁵ of the (still) 28 constitutions

⁶⁷ See JACOBSON, *supra* note 18, at 6 (“In theory, these textual barriers to certain kinds of constitutional change are designed to preserve a preexisting identity by obstructing the removal of those attributes without which the object in question, as in the case of the pool table, would become something very different.”).

⁶⁸ See Norwegian Const., art. 121, para. 1, sentence 2 (“Such an amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution, and two thirds of the Storting must agree with such an amendment.”).

⁶⁹ See, e.g., Art. 139 Costituzione [Cost.] (It.); French Const. Art. 89 para. 5.

⁷⁰ See, e.g., Turkish Const. Art. 4; GBL Art. 79 para. 3; Maroc. Const. Art. 175.

⁷¹ See *infra*, last section.

⁷² For a reprint, see JACQUES GODECHOT, LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, 337 (1995) (“Loi du 10 Août 1884, portant révision partielle des lois constitutionnelles . . . Le paragraphe 3 de l’article 8 de la même loi du 25 février 1875 est complété ainsi qu’il suit: -.La forme républicaine du gouvernement ne peut faire l’objet d’une proposition de révision.”).

⁷³ See Bruno Genevois, *Les limites d’ordre juridique à l’intervention du pouvoir constituant*, 5 REVUE FRANCAISE DE DROIT ADMINISTRATIF 909, 912 (1998).

⁷⁴ See 1946 Const. art. 125 (Fr.) (reprinted in GODECHOT, *supra* note 72, at 389); see also Polzin, *supra* note 11, at 437.

⁷⁵ For the only countries in the European Union that have express material limits for constitutional amendments, see 1958 Const. art. 89, ¶ 5 (Fr.); Art. 139 Costituzione [Cost.] (It.); Ústava ČV [Constitution] art. 9, ¶ 2 (Czech Rep.);

of the EU Member States have a provision containing explicit material limits on constitutional amendment.⁷⁶

Moreover, the focus on eternity clauses is in some instances too broad and too narrow at the same time. The focus is too broad on the one hand in the sense that constitutional provisions which protect the core of a constitution sometimes focus on the protection of absolute universal values, such as democracy and/or the rule of law. The classic example is the German eternity clause. The purpose is to protect universal values for their own sake—and also against potential constitutional identities.⁷⁷ On the other hand, the focus is too narrow, as the relevant eternity clause may not protect all norms relating to the identity of the constitution itself. Thus, for example, Art. 79, Para. 3 of the German Basic Law prohibits “[a]mendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20.”⁷⁸ Nevertheless, these provisions do not cover all provisions of the German Basic Law that form the identity of the German Basic Law and that are of particular importance for the constitution-related identity of the German people. They do not protect the strong position of the German Federal Constitutional Court in the framework of the Basic Law, the constitutional commitment towards European integration or specific interpretations of certain fundamental rights.⁷⁹ Thus, constitutional provisions that are not capable of amendment can only be a first indicator in the process of constructing the identity of a constitution, which in turn can be used to construct a constitutional self-image.

This does not mean, however, that the existence of an eternity clause cannot be an expression of a constructed constitutional identity. An example is the German eternity clause, which is also the expression of the constructed constitutional identity. It expresses the constitutional self-image of a nevermore of the Nazi Regime. Art. 79, Para. 3 of the Basic

1975 Syntagma [Constitution] art. 110, ¶ 1 (Greece); Cyprus Const. art. 182, ¶ 1; Port. Const. art. 288; Rom. Const. art. 148; *cf.* Grewe, *supra* note 54, at 40.

⁷⁶ The constitutions of the other nineteen-member states do not contain material limits for constitutional amendments. However, two Member States have special provisions for constitutional amendments during a Regency. *See* Belg. Const. art. 197 and Lux. Const. art. 115. Six Member states have special procedural rules for certain constitutional amendments. *See* Est. Const. Ch. XV, § 162; Lat. Const. art. 77; Lith. Const. art. 148; Spain Const. art. 168; Pol. Const. art. 23,5 ¶ 6; *see also* Bundesverfassungsgesetz [B-VG] [Constitution] article 44, ¶ 3 (containing a special procedure for a complete revision).

⁷⁷ For the relation to art. 79, ¶ 3 of the German Basic Law, see UDO STEINER, VERFASSUNGSGEBUNG UND VERFASSUNGSGEBENDE GEWALT DES VOLKES, 211–12 (1966); Hans-Ulrich Evers, *Art. 79 Abs. 3* (2nd rev. Oct. 1982), *in* BONNER KOMMENTAR para. 88 (Wolfgang Kahl, Christian Walter & Christian Waldhoff eds., 45th Actualization).

⁷⁸ German Basic Law translated by: Prof. Christian Tomuschat and Prof. David P. Currie (Translation revised by: Prof. Christian Tomuschat and Prof. Donald P. Kommers in cooperation with the Language Service of the German Bundestag), available at https://www.gesetze-im-internet.de/englisch_gg/ (14 June 2017).

⁷⁹ For more detail, see *infra* Part C. II.

Law was introduced as a result of the historical events that occurred during the Weimar Republic and the rise to power of the Nazi party. The main argument in favor of the eternity clause adopted by the Bonn Parliamentary Council⁸⁰ was to deny potential future revolutions their legitimacy—in accordance with the yardsticks of the German Constitution.⁸¹ Its principal proponent, Thomas Dehler, wanted to prevent the situation arising where a new revolutionary movement could, as the Nazis had done, rely on a constitution to gain legitimacy for their movement. Consequently, he came to utter the oft-quoted words that an eternity clause is necessary to “destroy a revolution’s mask of legitimacy.”⁸²

II. *Constitutional Identity and Constitutional Interpretation*

A constructed constitutional identity can also be derived from constitutional interpretations by national constitutional courts. The idea behind this approach is that the constructed meaning of an often vague and indeterminate constitutional norm is also influenced in some instances by an imagined or perceived national, constitutional self-image.⁸³ Furthermore, authoritative judicial decisions are in turn able to influence the collective self-image of a community.⁸⁴ Authoritative constitutional decisions by national constitutional courts are therefore frequently used to construct a constitutional identity. The Article will now detail the circumstances under which a particular authoritative interpretation can be regarded as an expression of a constitutional identity, which will be elaborated on in section II.1, and demonstrate the three main ways in which a constitutional identity is constructed by judicial

⁸⁰ For a detailed account of the Parliamentary Council (Parlamentarischer Rat) and its history, *see, e.g.*, 1 DER PARLAMENTARISCHE RAT 1948–1949, AKTEN UND PROTOKOLLE, VORGESCHICHTE, Introduction (Deutscher Bundestag/Bundesarchiv eds., 1975).

⁸¹ *See also* HORST DREIER, GILT DAS GRUNDGESETZ EWIG? 59 (2008); Paul Kirchhof, *Die Identität der Verfassung*, in 2 HANDBUCH DES STAATSRECHTS [HANDBOOK OF CONSTITUTIONAL LAW] §21, rn. 42 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004). For more detail, *see* Polzin, *supra* note 11, at 421–24.

⁸² Translation provided by the author. *See* 14/2 PARLAMENTARISCHER RAT 1948–1949, HAUPTAUSSCHUSS, 1094, 1118 no. 36 (Deutscher Bundestag/Bundesarchiv eds., 2009).

⁸³ *Cf.* George Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 737 (1992)

When constitutional language fails to offer an unequivocal directive for decision, the recourse of the judge is not always to look “outward” toward overarching principles of political morality. In an illuminating array of cases, the acceptable way to resolve the disputes and to explain the results is to turn “inward” and reflect upon the legal culture in which the dispute is embedded. The way to understand this subcategory of decisions is to interpret them as expressions of the decision makers’ constitutional identity.

See also George Fletcher, *Constitutional Identity*, in: CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 223 (Michael Rosenfeld ed., 1994).

⁸⁴ *See* Rosenfeld, Oxford Handbook, *supra* note 5, at 771.

decisions. This could be the aspirational⁸⁵, majoritarian or morally-preferable one based on historic experiences, which will be elaborated on in section II.2.

1. *The Crucial Question: Under what Circumstances is a Judicial Interpretation an Expression of a Constitutional Identity?*

As the present understanding of the concept of constitutional identity is a construction, it is not necessary to determine whether a particular constitutional interpretation was, in the absence of an express statement in the relevant judgment, in fact adopted by some constitutional judges due to a certain imagined or perceived national understanding of the “self” in relation to the constitution. This could only be ascertained by looking into the judges’ heads—which is impossible—or perhaps by empirical enquiry. For the present understanding of constitutional identity, an external view is more appropriate. It is necessary to examine whether a concrete constitutional interpretation and its reasoning/justification can also be construed as an expression of a constitutional self-identity of a given people or nation. The crucial question is, can the judgment also be read and construed as expressing a particular constitutional self-image?

An authoritative interpretation can be understood as also being an expression of a constitutional identity if, first, the subject-matter concerns an important constitutional, moral and/or societal conflict, such as questions on the permissibility of abortion, gay marriage, and the religious freedoms of minority groups. In this case, an authoritative judicial interpretation will most likely also be influenced by a certain imagined constitutional self-image and the interpretation has the potential to influence the real constitutional self-image, as it relates to an important moral and societal question and not merely a technical issue. In such a case, the judgment also relates to the question: Who are we?⁸⁶ National peculiarities relevant to the constitutional-self-image can be, among other things, constitutional history, philosophical foundations, social attitudes and beliefs, national

⁸⁵ For a view relying on this aspect, see Robert A. Shapiro, *State Constitutional Law*, 84 VA. L. REV. 389, 455 (1998)

The community that matters, though, is not an actual pre-existing community, but the aspirational community represented in the constitution. It is a community constituted by the political process of constitution-making, by democratic politics, not by blood or history. This view allows for a more heterogeneous notion of constitutional identity, one that may well accord with the situation in the states of the United States. These states may have had little preexisting moral unity, and free migration . . . Their population and their culture may well reflect great national or international diversity. Nevertheless, through their constitution, the people of the state give rise to a value structure.

⁸⁶ For an opinion regarding the recent headscarf judgment of the German Constitutional Court, see also Uwe Volkmann, *Dimensionen des Kopftuchstreits*, JURA 1083, 1084 (2015).

aspirations or the composition of a population—for example, its religious diversity or lack of diversity.

Second, indicators for an authoritative interpretation as an expression of a constitutional identity also exist if the judgment or its reasoning refers expressly to a specific national, constitutional understanding of the “self.”

The particular difficulty in determining whether a certain authoritative interpretation can be construed as an expression of a constitutional identity derives from the fact that the relevant national peculiarities and corresponding imaginings of a collective identity are themselves vague, indeterminate, fluid, and changeable.⁸⁷ Moreover, their importance, interpretation and constitutional relevance will often be contested. Thus, a discerned constitutional self-image is generally a subjective, temporary and contested approximation.

2. *The Three Main Ways to Construct a Constitutional Identity*

At a general level, constitutional identity can be constructed in different ways. It can be majoritarian—the morally-preferable one based on historic experiences—or it can be aspirational.

First, constitutional identity can be constructed as the prevalence of a perceived or imaginary majority, constitutional understanding of the “self.” An example is the decision of the French Constitutional Council (“*Conseil constitutionnel*”) on the constitutionality of the French law prohibiting concealing one’s face in public—for example, the burka ban.⁸⁸ This decision can be understood as a constitutional self-image of the French people as the free and equal *citoyen*.⁸⁹

Second, constitutional identity can be constructed as the imagined or perceived morally-preferred, imaginary understanding of the “self” based on constitutional history. An example is the first judgment on abortion by the German Federal Constitutional Court in 1975. George Fletcher describes this decision as a “self-definitional constitutional decision.”⁹⁰ In this judgment, the Constitutional Court underlined the importance of protecting the right to life in the German Basic Law as an explicit reaction to the annihilation of life by the State during

⁸⁷ For a view on this aspect, see Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519 (1996).

⁸⁸ See Conseil Constitutionnel decision no. 2010-613 DC, Oct. 7, 2010, Rec. 276.

⁸⁹ The European Court of Human Rights accepted the burka ban due to a wide margin of appreciation accorded to France. See ECHR, *S.A.S. v. France* (App. No. 43835/11), paras. 153–59 (July 1, 2014).

⁹⁰ Fletcher, *supra* note 83, at 739.

the time of the Nazi regime.⁹¹ On this basis, the majority of the Constitutional Court adopted a restrictive approach to the permissibility of abortions. George Flechter aptly wrote: “The stigma of Hitler's Final Solution required the court to take a stand in favor of protecting life. The unborn were the beneficiaries of this free-floating anxiety about whether Germans are really sensitive to the value of human existence.”⁹² The minority view criticized this reasoning sharply. It argued—in my mind correctly—that the special protection of the right to life as a reaction to the Nazi regime has no relevance to the question of whether an abortion must be a punishable offense or not.⁹³ Thus, this judgment also indicates very clearly one inherent weakness in the concept of constitutional identity. It makes visible that the construction and understanding of a constitutional identity is highly subjective. Joseph Weiler has already aptly described this phenomenon with the following words: “Defending the constitutional identity of the state and its core values turns out in many cases to be a defence of some hermeneutic foible adopted by five judges against four.”⁹⁴

Third, constitutional identity can be an aspirational constitutional identity. An example is the recent head-scarf decision of the German Federal Constitutional Court. The judgment dealt with the question of whether teachers can wear headscarves in public schools. The Constitutional Court decided that a teacher can only be obliged not to wear the headscarf if a concrete danger exists to peace at the school or to the neutrality of the state.⁹⁵ The Constitutional Court therefore relied in this decision on a perceived constitutional identity that is determined by religious plurality, tolerance, and individual religious self-expression. It tried to balance the different religious and non-religious identities in Germany by focusing on a constitutional-self-image of religious self-expression and tolerance. The constitutional self-image can be described with the words: “We are all free to express freely our beliefs as long as the societal peace is not disturbed.”⁹⁶ The subjectivity and potential temporality of this constitutional self-image is shown in the fact that this decision was not unanimous, but only a majority decision,⁹⁷ and its aspirational constitutional self-image is also contested in

⁹¹ See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 1975, 39 BVerfGE 1, 36–37.

⁹² Flechter, *supra* note 83, at 738.

⁹³ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 1975, 39 BVerfGE 1, 76–77.

⁹⁴ J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE US AND THE EU* 54, 65 (Kalypso Nicolaidis & Robert Howse eds., 2001).

⁹⁵ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Jan. 27, 2015, *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1359, 1364–65.

⁹⁶ Uwe Volkmann describes the decision as a demand for serenity. See Volkmann, *supra* note 86, at 1092.

⁹⁷ See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Jan. 27, 2015, *NJW*, 1359, 1369–73 (Schluckebier, J. & Hermanns, J., dissenting).

German society.⁹⁸ The legal difficulty with an aspirational constitutional self-image is that the relevant constitutional court might be overstepping its legal competence vis-à-vis the legislature.⁹⁹ This might be the case in particular if a court overrules a parliamentary decision due to an aspirational constitutional self-image. The difficulty in establishing such an act is first that it is very difficult to determine whether the court really has adopted an aspirational constitutional self-image or whether it is arguably an interpretation of a constitutional norm that is only constructed afterwards as an aspirational self-image. In addition, an aspirational constitutional self-image is not unconstitutional *per se*; it can be justified due to the aspirational content of the constitution itself or the necessary protection of minorities.

III. Constitutional Identity and Non-Constitutional Legal Norms and Sources

Further insight into a relevant constructed constitutional identity can also be found in formal, non-constitutional norms, such as civil or penal codes or national laws on official languages. The first reason is that formal, non-constitutional norms can also constitute constitutional norms from a concrete perspective. Such legislation is of particular importance in states without a written constitution.

The second reason is that the constructed, constitutional understanding of the “self” can also be expressed in the work of the legislature, which involves enacting certain norms that can also be constructed as a certain constitutional understanding of the “self.” The idea behind this approach is that the application of the constitution itself and the enactment of a law deemed constitutional can also be expressions of a certain collective self-identity and constitutional self-image. Laws can also be indicators of the self-definition of a given nation. This will be first the case, if the subject-matter of the relevant law concerns an important constitutional, moral, and/or societal conflict and it is therefore relevant for the constitutional self-image. Examples are the adoption of the burka-ban in France,¹⁰⁰ national laws on abortion, marriage, or the abolishment or introduction of the death penalty. Second, a law itself, like in particular immigration laws,¹⁰¹ can rather explicitly define who we are.¹⁰²

⁹⁸ See, e.g., Reinhard Müller, *Die Schule ist keine religiöse Erziehungsanstalt*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] (Mar. 13, 2015); cf. also Josef Isensee, *Toleranz stiften*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] (Jan. 27, 2010), <http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-toleranz-stiften-1911558-p3.html>.

⁹⁹ I am very grateful to the comments by Ruud Koopmans on this point.

¹⁰⁰ For more detail, see *supra* Part C II.

¹⁰¹ See ORGAD, *supra* note 22, 85–131, 234.

¹⁰² See Strumia & Kaushal, *supra* note 53.

D. Conclusion: Constitutional Identity as a Constructed and Restless Soul

Constitutional identity exists only as a constructed reality and should not be treated as something sacred or absolute. As shown above, the construction of a certain constitutional identity is always a simplified, subjective approximation and can only be an ephemeral snapshot in the endless process of finding out who we are in relation to our constitution. It is subject to change and will also often be contested. Constitutional identity can therefore only be compared to an intangible restless soul of a nation, and not an imagined stable heart. In addition, the concept of constitutional identity itself is inherently fragile. There is always a risk that a constructed constitutional identity does not represent the overall picture, but only a subjective view.

Thus, constitutional interpretations, constitutional norms or other legal norms framed and construed as an expression of a constitutional identity should be treated with caution and not as absolute truths. This is particularly true for constitutional interpretations. If a certain constitutional interpretation is regarded as an expression of a constitutional identity and is therefore given a sacred and absolute status—such as the principle of individual guilt and its particular interpretation adopted by the German Constitutional Court as part of human dignity¹⁰³—a particular interpretation is made absolute and is labelled as morally superior. The consequence is that all other possible constitutional interpretations are regarded as morally inferior and not part of the right constitutional self-image. This is generally desirable if certain core values, such as the prohibition of torture, are concerned. However, such an approach can also be potentially dangerous, in particular in the event of an aspirational constitutional self-image, as it excludes all other possible constitutional interpretations as morally inferior and not as ours. It acts as a powerful tool to exclude proponents of different interpretations and may hinder the political process. Moreover, it negates all that we know of constitutional interpretation, namely that interpretation is to some extent an art, subjective and a process, not a way of finding absolute truth.

¹⁰³ For a recent opinion, see Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Dec. 15, 2015, 140 BVerfGE 317 (Identity-control), para. 53–55.

