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Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law

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Abstract
Identity is a central theme in contemporary politics, but legal academia lacks a rigorous analysis of this concept. The aim of this article is twofold: (i) firstly, it aims to reveal presumptions on identity in human rights law by mapping how the European Court of Human Rights approaches identity and (ii) secondly, it seeks to analyse these presumptions using theoretical insights on identity. By merging legal and theoretical analysis, this article contributes a reading of the Court's case law which suggests that the tension between the political and apolitical is visible as a common thread in the Court's use of identity. In case law concerning paternity, the Court appears to hold a specific view of what is presented as an unquestionable part of identity. This ostensibly pre-political notion of identity becomes untenable in cases where the nature of an identity feature, such as the headscarf, is contended or a minority has adopted a national identity that conflicts with the majoritarian national identity. The Court's approach to identity in such cases reflects a paradox that is inherent to identity; identity is personal while simultaneously constituted and shaped by overarching power mechanisms.

Keywords
Bhabha, Derrida, European court of human rights, fatherhood, headscarf, identity

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> The insistence [in human rights law] that minorities should 'preserve' their cultural identity rather than emerge as new formations of minoritization, or 'partial cultural milieux', emphasizes the fact that minorities, amongst others, are regulated and administered into a position of having an excess of 'identity', which can then be assimilated and regulated into the state's conception of 'the common good'.
>
> Homi Bhabha, *On minorities*

Introduction

The shift to the populist right in the United States and Europe has caused questions of identity to dominate public debates. Unlike political, social and cultural studies, however, identity has had a relatively under-theorized role in law (Douzinas, 2002: 379). As identity is politicized everywhere, it is imperative that human rights law, as a central moral and political reference point, has a thorough understanding of identity. Not only do human rights regulate how institutions engage with identity issues, they also shape public attitudes toward these issues and are themselves a major reference point for people's identities.

This article seeks to address the role of identity in the case law of the European Court of Human Rights (hereafter: Court). The focus on the Court is motivated by its rich set of case law where identity often plays a role but which lacks a systematic approach to this important notion. Thus, the aim of the article is twofold: (i) firstly, the article aims to bring to light presumptions on identity in human rights law by mapping how the European Court of Human Rights (hereafter: Court) approaches identity and (ii) secondly, it seeks to analyse this approach using theoretical insights on identity, drawing inspiration from Jacques Derrida's figure of *différance* and Homi Bhabha's postcolonial reading of the Universal Declaration of Human Rights (UDHR).

The article continues as follows. The first section provides an overview of literature on identity from critical legal scholarship. The second section gives an overview of the Court's use of identity in its case law. The third section zooms in on three cases in order to relate the theoretical discussion from the first section to the Court's use of identity. It is argued that a tension between the political and the apolitical which is inherent to the notion of identity is a common thread in the Court's case law on identity. As such, the Court tends to construct a notion of identity that abides by a state's accepted norms and assesses the applicant's claim through that construct. Identity features that deviate from the state's conventional identity are considered excesses of identity, which have to be accommodated into the state system. At times, this may obstruct the recognition of certain identity features.

Law and Identity

Différance *and Excess*

Identity refers to those attributes and qualities that enable us to recognize an individual or collective from others. The cultural theorist Stuart Hall distinguished two ways of

thinking about identity (Hall, 1990). The first model assumes that there is an intrinsic content to identity which constitutes the 'truth' or 'essence' of a person or group (ibid.: 223). For instance, in a collective, this essence can be shaped by a perceived common origin or shared history which endows that collective with a stable frame of reference. The second model, favoured by Hall, emphasizes the impossibility of such fully constituted and distinct identities. In this model, identities are always incomplete and in process, undergoing constant transformation. Rather than being fixed in some essence, identities are subject to the continuous 'play' of history, culture and power (ibid.: 225).[1]

A number of figures have been developed in social and cultural studies to theorize this continual construction of identity. A key figure is that of *différance*, which originates from Jacques Derrida's approach to language. He argued that language is necessarily constructed around elemental oppositions if it intends to have any meaning (Berns, 1979: 165; Derrida, 1981: 8–10, 29; Derrida, 1991: 60–67; Grossberg, 1996: 90). For example, the word 'car' only makes sense because it is in a relation of difference to words such as 'bus' and 'truck' and the word 'human' has meaning because it differs from words like 'robot' and '(non-human) animal'. As such, every meaning is reciprocally constructed by the other term rather than by an essential definition.

Derrida's conception of meaning in language has important implications for the notion of identity (Redman, 2000: 12). Firstly, the figure of *différance* suggests that identities are not fixed. Just like words are not made up of an essential definition, identities do not cohere around an essential 'truth', for example in biology or a shared history. Secondly, *différance* suggests that identities take their meaning from relations of difference internal to language and other cultural codes. Identities take their definition from that which they are not. For instance, the identity of the supposedly 'civilized European' is constructed in relation to a range of 'different' others: the 'barbaric' African, the 'exotic' Oriental and so on (ibid.). Thirdly, the figure of *différance* suggests that these differential identities are inherently unstable. For the meaning of words, the other represents an inherent ambiguity or instability central to any formation of meaning (Grossberg, 1996: 90): For instance, while the word 'human' gains meaning in contrast with the term 'robot', it is also continuously threatened to be indistinguishable from this other term. Similarly, the identity of the 'civilized' European is constantly haunted by the liminal presence of the 'Black' and 'Oriental' others into which it continually threatens to collapse (Redman, 2000: 12).

Therefore, identities can function as points of identification only because of their capacity to render some other 'outside'. This means that all identities operate through exclusion; every identity places at its 'margin' an excess, something more (Du Gay, 1996: 5). Because the excess gives meaning to identity that excludes it, it is labelled the 'constitutive outside' (ibid.: 4). A paradox surfaces here which unsettles a simple inside–outside distinction: The excess is conceptualized outside the subject of identity while it simultaneously constitutes and is necessary for that identity. Therefore, the excess of identity is paradoxically 'a constitutive outside to the subject, an abjected outside, which is, after all, "inside" the subject as its own founding repudiation' (Butler, 1993: 3).

Importantly, this rendering or placing outside of the excess does not happen passively but is the result of an active play of power. Laclau argues that 'the constitution of a social identity is an act of power' (Laclau, 1990: 31). Thus, the internal unity and external

excess which appears foundational to identities is not natural or objective, but the result of an active process of constructing 'closure'. Laclau notes:

> Derrida has shown how an identity's constitution is always based on excluding something (. . .) What is peculiar to the second term [i.e. the 'other'] is thus reduced to the function of an accident as opposed to the essentiality of the first. (ibid.: 32–33)

Here Laclau brings to light a fourth implication of *différance* for identity: The formation of closure creates a hierarchy between an identity and its excess. In other words, the prevailing identity assumes a dominance over the perceived excess. This is a thoroughly political process situated within the play of power of the state. Therefore, to study the conditions of the existence of a given identity is to study the power mechanisms making it possible (ibid.: 32).

The Legal Prioritization of National Identity

One such power mechanism is human rights law. The law plays a significant role in shaping human identity by specifying what constitutes the common good in a given society and which identity features are deemed (un)acceptable. Postcolonial scholars have focussed on this constitutive role of law by pointing out the precedence given to national identity in human rights discourse. They argue that human rights law assigns normative priority to national identity over other forms of identification, because 'others' are fundamentally imagined to be situated within a national frame and, as a result, there is an inability to conceive of the other outside the national frame.

In his essay *On Writing Rights*, Homi Bhabha refers to Article 27 of the UDHR, which protects 'the right of minorities, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. According to Bhabha, the insistence of this provision that minorities are to 'preserve' their cultural identity emphasizes the fact that they are regarded as having an excess of identity. National identity is considered a stable and neutral base, rendering all else an excess of identity. This excess can then be assimilated and regulated into the state's conception of the common good (Bhabha, 2000: 4). Bhabha refers to a well-known commentary on Article 27 which states that 'ethnic, religious, or linguistic groups must have been established in a State over a longer period of time – i.e. evidence a certain historical stability – in order to qualify as minorities under Art. 27' (Manfred Nowak cited in Pejic, 1997: 672). There is an assumption that 'long periods of time', 'historical stability' and the integrity of the whole society of the State all add up to the fact that a key element in the definition of a minority is stability and loyalty (Bhabha, 2003: 167). This neglects that, as we saw with Derrida, the 'other' per definition constitutes an instability that is necessary for the formation of identity. The common good of the nation, however, is invoked to constrain such instability. This moves Bhabha to state that Article 27 of the UDHR provides an insufficient safeguard for minorities:

> Our concept of common and collective 'goods' requires some rethinking when we realize that the human condition of being a 'minority' is often to participate in 'a partial culture' of

> migratory and transitional forces that cannot be as stable and settled as the state-centred discourse of 'naturalization' envisaged in Article 27. (ibid.: 168)

Bhabha asserts that the reason for this prioritization is the fact that international agreements are precisely that: agreements between nations (Huddart, 2006: 131). As a result, people who belong in different ways to the national culture may find little refuge in generally formulated human rights. Besides international law, European Union Law is more explicit in its exclusive protection of national identity. Article 4 of the EU Treaty guarantees the protection of national identity as a guiding principle: '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.'

Such normative prioritization of national identity can also be found in literature which otherwise claims to advocate a cosmopolitan worldview. In Julia Kristeva's *Nations Without Nationalism*, the nation is reconceptualized as a 'transitional object' with which one can have affective relations, but which ultimately assists people in transcending their differences and connecting to the cosmopolitan object (mankind). The affective relations are felt toward a series of transitional objects: the self, family, homeland, Europe and mankind. Each object, according to Kristeva, acts as a transition for the next, ultimately guiding people to an allegiance to global humanity. However, Kristeva fails to point out how different transitional objects relate to each other and ends up giving precedence to the homeland over affective relations to other possible objects. This hierarchic logic is palpable in her portrayal of the Muslim veil – also a prominent item in the case law of the Court that will be discussed below – where she suggests that the veil cannot function as a transitional object (Kristeva, 1993: 41). In fact, the veil might obstruct the transitional properties of the homeland (ibid.: 47). Kristeva has a hard time seeing the process of identification and forming affective relations as dynamic and achievable outside the frame of the nation. As Bonnie Honig notes: 'The problem with Kristeva is (. . .) her failure to explore the transitional properties of veiling while managing nonetheless to see the transitional possibilities of the nation' (Honig, 2001: 66). As such, while pursuing a cosmopolitan worldview, Kristeva perpetuates a normative prioritization of national identity over other forms of identification.

What is relevant from these brief theoretical reflections on identity, and particularly from Derrida and Bhabha's thought, for our further analysis is that the law is situated in a paradox that is inherent to identity; identity is personal while simultaneously constituted and shaped by overarching power mechanisms. There is a continuous tension between the political and apolitical, that which is constructed as collective and public against the individual and private. The next sections will suggest that this tension also comes to the fore in the formulation of identity in the Court's case law. We will do this by first providing an overview of the Court's use of identity and subsequently zoom in on three cases in order to illustrate that the tension between the political and the apolitical is visible as a common thread in the Court's case law concerning identity.

Identity in the European Court of Human Rights Case Law

This section provides an overview of the Court's use of identity in its case law. The Court has established safeguards for identity under different Articles of the European Convention of Human Rights (hereafter: ECHR): the right to private life under Article 8 ECHR, religious freedom under Article 9 ECHR and freedom of association under Article 11 ECHR. Accordingly, the Court's case law regarding identity consists of three categories: private identity in conjunction with Article 8 ECHR, religious identity in conjunction with Article 9 ECHR and collective identity in conjunction with Article 11 ECHR.[2] This section expands on these categories and the judgments central to each category. The selection of cases was based on where the Court specifically used the term 'identity' in its reasoning. This discursive approach assigns particular significance to the Court's choice of words and allows to sketch a tentative conceptual outline of the Court's understanding of the notion of identity (Cf. Dembour, 2006: 10).

Private Identity (Article 8 ECHR)

In the majority of cases where identity is mentioned, the Court regards identity as part of an individual's private life. As such, a right to identity has been developed under Article 8 ECHR, which guarantees the right to private life. The Court's standard consideration on identity and the right to private life was first formulated in the case of *Mikulić v. Croatia*:

> Private life, in the Court's view, includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity. (*Mikulić v. Croatia*: para. 53)

The applicant was a child looking to establish the fatherhood of a man who kept evading the scheduled DNA tests. The national courts ruled that evading the DNA tests was not sufficient to establish the man's fatherhood. The applicant complained, under Article 8, that the Croatian courts had failed to reach a decision in her case, which had left her uncertain about her personal identity. The Court agreed and found a violation of the applicant's rights under Article 8. The Court notes that the applicant had a vital interest to 'uncover the truth about an important aspect of [her] personal identity' (ibid.: para. 64). Thus, the right to identity gave the applicant a forceful claim to demand increased efforts by the authorities to establish paternity.

The Court reiterated the aforementioned consideration in several cases, ruling that private life also encompasses gender and ethnic identity. In *Van Kück v. Germany*, gender identity was deemed 'one of the most intimate areas of a person's private life'. (*Van Kück v. Germany*: para. 56; see also *Y.Y. v. Turkey*: para. 66). In another transgender case, the Court held that Article 8 ECHR includes people's 'right to establish details of their identity as individual human beings'. (*Christine Goodwin v. the United Kingdom*: para. 90). In several cases concerning Roma rights, among which *Aksu v. Turkey*, the Court held that an affront to ethnic identity can also fall

within the scope of private life (*Aksu v Turkey*: para. 58; cf. *Perinçek v. Switzerland*: para. 200, 227; *Chapman v. the United Kingdom*). Moreover, in *Putistin v. Ukraine*, the Court accepted that the reputation of an ancestor could in some circumstances affect a person's private life and identity, and thus might engage Article 8 ECHR (*Putistin v. Ukraine*: para. 33, 36–41).

In terms of legal consequences, the Court has ruled that the State's margin of appreciation is restricted when a person's identity is implicated. In a similar case to *Mikulić*, the Court held in *Odièvre v. France* that Article 8 guarantees the right to obtain information necessary to discover the 'truth' concerning important aspects of one's personal identity (*Odièvre v. France*: para. 29). French law prevented the applicant from discovering information about her family as her mother had requested that details regarding the birth be kept secret. The applicant stated that establishing her basic identity was an integral part not only of her private life, but also of her family life with her natural family, with whom she hoped to establish emotional ties (ibid.: para. 25). The Court nonetheless found no violation, stating that the French lawmaker had struck a fair balance between protecting a person's identity and safeguarding third-party interests. In a dissenting opinion joined by seven judges, the judges phrased the right to access to the 'essence of a person's identity' as 'the inner core of the right to respect for one's private life' and, therefore, higher scrutiny was called for when weighing up the competing interests (joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre v. France*). In later cases, the Court embraced this dissenting opinion as its common view. In *Evans v. the United Kingdom*, the Court ruled that the State's margin of appreciation is limited in cases where an individual's identity is implicated:

> A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. (*Evans v. the United Kingdom*: para. 77)

The *Evans* case concerned a female applicant's right under UK law to take decisions on her in vitro fertilization without consent from her former husband. The Court found no violation by the State for requiring continued consent between the man and woman in each stage of the reproductive process. Thus, the limited margin did not affect the outcome in this case. However, in the case of *X. and Others v. Austria*, the Court found a violation of Article 14 in conjunction with Article 8 ECHR for barring same-sex couples from obtaining second-parent adoptive parenthood (the applicants consisted of a female same-sex couple and the biological child of one of the partners), referring to the State's limited margin of appreciation in situations where a person's identity is implicated (*X. and Others v. Austria*).

Therefore, violation of a person's right to identity may constitute a reason for the Court to find a breach of the Convention. In such cases, this can lead to a demand of increased efforts by the authorities (*Mikulić v. Croatia*) or to a limited margin of appreciation for the State (*X. and Others v. Austria*).

Religious Identity (Article 9 ECHR)

Another Court consideration that invokes the notion of identity is related to the right to religious freedom. The Court holds that the religious dimension is one of the most vital elements of the identity of believers:

> The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. (*Leyla Şahin v. Turkey*: para. 104)

The Court's references to religious identity stand out for their lack of explicit impact on the Court's reasoning. In the case of *Leyla Şahin v. Turkey*, from which the above-mentioned consideration is taken, identity plays no role in the further considerations of the Court. The Court rules that Turkey did not violate the applicant's religious freedom by banning her from university for wearing a headscarf, without further regard to the possible effects of the State's measures on the applicant's identity. One possible reason for the Court to discard religious identity as a component of its decision is the disputed nature of the headscarf. The Court notes that there is disagreement over the function that the headscarf symbolizes:

> Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism, who draw a distinction between the *başörtüsü* (traditional Anatolian headscarf, worn loosely) and the *türban* (tight, knotted headscarf hiding the hair and the throat), see the Islamic headscarf as a symbol of a political Islam. (*Leyla Şahin v. Turkey*: para. 35)

Identity does not occur explicitly in the judgment after this remark. Since only those in favour see the headscarf as a form of expression linked to religious identity, the Court might have wanted to avoid using religious identity as an important element of its decision.

A similar observation can be made about the case *İzzettin Doğan and Others v. Turkey*, where the Court reiterated that religion is one of the most vital elements of the identity of believers (*İzzettin Doğan and Others v. Turkey*: para. 103). The case concerned a complaint about the lack of recognition of the Alevi faith as a religious denomination distinct from that of the majority of citizens, who adhere to Sunni Islam. Although the Court ruled that the religious freedom of the Alevis was violated in this case, it did not ponder the impact of the misrecognition on their religious identity. Instead, the Court based the violation mainly on the State's failure to comply with its duty of neutrality and impartiality towards the Alevi faith.[3]

An interesting contrast to these Turkish cases is posed by the Italian cases of *Lautsi*, where the focus is on a state promoting a national religious identity rather than obstructing a minority religion. While these are arguably two sides of the same coin, the shift in focus leads to interesting results. The *Lautsi* cases concerned the requirement in Italian

law that crucifixes should be displayed in classrooms of state schools. The government maintained that crucifixes were an 'identity-linked symbol' for the Italian people. On 3 November 2009, the Court held that there had been a violation of Article 2 of Protocol No. 1 (right to education) taken together with Article 9 ECHR. The Court found that the symbol of the crucifix has 'a number of meanings among which the religious meaning is predominant' (*Lautsi v. Italy*: para. 51) and saw therein a violation of the state's duty to uphold confessional neutrality in public education in order to inculcate in pupils the 'habit of critical thought' (ibid.: para. 56). The case was referred to the Grand Chamber, which overturned the Chamber's ruling and found no violation. The Court reiterated the crucifix's primary religious symbolic meaning: 'The question whether the crucifix is charged with any other meaning beyond its religious symbolism is not decisive at this stage of the Court's reasoning' (*Lautsi and Others v. Italy*: para. 66). The Court's main argument lies in that a crucifix is an 'essentially passive symbol' and there is 'no evidence' that it will have an influence on the young children (ibid.: respectively para. 72 and para. 66).

The Grand Chamber contrasts its reasoning in *Lautsi* to the 'entirely different' (ibid.: para. 73) case of *Dahlab v. Switzerland*, in which the Court labelled the headscarf a 'powerful external symbol' and, therefore, found a complaint about the Swiss prohibition on teachers wearing headscarves in the classroom inadmissible (*Dahlab v. Switzerland*). Fascinating is the Court's depiction of children and their susceptibility to influence in these two cases. In *Lautsi*, the Grand Chamber paints a picture of children who are rather resistant to the effects of the crucifix symbol: 'It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities' (*Lautsi and Others v. Italy*: para. 72). The children in *Dahlab* appear to be a lot more vulnerable: 'The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils' (*Dahlab v. Switzerland*). This difference could be interpreted as a result of how the Court tries to coherently validate its conclusions throughout the entire judgment, but nonetheless points to a bold inconsistency in how it depicts those concerned depending on which identity feature is at stake.

Collective Identity (Article 11 ECHR)

Far from developing a standard formula, the Court has occasionally referred to collective identities as providing a basis for protection under the right to freedom of association (Article 11 ECHR). In a case where Polish authorities refused to register an association formed by people from Silesia, a minority in Poland, the court found a breach of Article 11 (*Gorzelik and others v. Poland*). The Court, referring to the Framework Convention for the Protection of National Minorities, considered that the freedom of association is crucial for minorities to enable them to express and promote their identity:

> The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, 'a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious

> identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity'. Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights. (ibid.: para. 93)

The Framework Convention for the Protection of National Minorities, to which the Court refers, mentions the requirement to respect the ethnic, cultural, linguistic and religious identity of national minorities. As the Court notes, what a 'national minority' means is not defined in the Framework Convention. However, the Court found that the Silesian people are a national minority in Poland and their freedom of association should be guaranteed in order to express and promote their identity.

In another case concerning the Kurdish minority in Turkey, the Court was more cautious to mention the right to identity of the minority. The Court found that Article 11 ECHR was violated as a result of the liquidation of a Communist political party (*The United Communist Party of Turkey and Others v. Turkey*). The contentious element in this case is that it concerns a minority with its 'own' national identity within a nation. The Court explicitly referred to the party's political programme which states that the party advocates the participation of groups in politics with their own national identity:

> The TBKP [. . .] said in its programme: 'A solution to the Kurdish problem will only be found if the parties concerned are able to express their opinions freely, if they agree not to resort to violence in any form in order to resolve the problem and if they are able to take part in politics with their own national identity'. (ibid.: para. 56)

Thus, without explicitly stating the right to a separate national identity, the Court does find a breach of Article 11 ECHR for not providing the minority with an adequate safeguard to their freedom of association. Therefore, collective identity plays a role in case law on the right to freedom of association. These cases seem to revolve around national minorities. Such cases are not common.

Analyzing the Excess of Identity

This section analyses the Court's approach to identity in the case law by zooming in on three cases discussed in the previous section. It is suggested that these three cases illustrate how the tension between the political and the apolitical inherent in identity, discussed in the first section, is reflected in the Court's approach to identity. One case is selected from each of the three legal categories discussed in the previous section, in order to illustrate that the tension is visible as a common thread in the Court's case law on identity. Accordingly, the section is built up in three steps. First, the paternity case of *Odièvre v. France* is used to show that the Court constructs its own, at times biologistic, notion of identity. Secondly, the Court depicts identity as a pre-political entity, which is most evident in the *Leyla Şahin* case. Out of these assumptions arises a perceived natural form of identity to which alien features are a surplus. The case of the Turkish political party, finally, most clearly pits the state's national identity against a minority's national identity.

Fatherhood and the Essence of Identity

In the case of *Odièvre v. France*, the Court speaks of the necessity to 'discover the truth' about one's identity in relation to the right to obtain information about family history (*Odièvre v. France*: para. 29). The seven dissenting judges adopted the same discourse in the dissenting opinion, referring to establishing fatherhood as the 'essence of a person's identity' (joint dissenting opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää in *Odièvre v. France*). In their opinion, the right to identity is an essential condition of the right to autonomy and development and, therefore, is within the inner core of the right to respect of one's private life.

The question arises why lineage, and in particular fatherhood, is deemed so important for identity. This is not explained nor justified by the Court. More than that, why is it considered part of the 'essence' of identity by the dissenters? The Court uses the term identity in a fully biologistic way. Jill Marshall argues that the Court stays remarkably ambiguous on what identity means in this situation. She notes that while the Court speaks of the truth and essence of identity, only four per cent of children born anonymously ask for access to origins information that is legally available under the French law, 96 per cent do not (Marshall, 2014: 132). If the Court does not justify what constitutes the essence of identity and what belongs to its peripheries, the right to identity remains undetermined with a potentially over-inclusive or exclusive scope. It also raises the question whether belonging to the essence of a person's identity will give features a different weight in the Court's assessment than features belonging to the 'peripheries' of identity. Given that the Court adopted a margin-reducing effect of the right to identity in its later judgments, an elucidation of what is meant by the 'essence' of identity is called for.

Besides the legal shortcomings, conceptual problems result from the Court's approach. While the Court constructs identity as an individual matter that warrants protection under Article 8's right to private life, it promotes a particular view of what is presented as an unquestionable part of identity. With its focus on biological parenthood, the Court sketches a picture of identity that is not as natural as the Court makes it out to be. Objectors to the notion of fixed parenthood oppose a status of father based on whether one has a blood connection, preferring a status based on whether one exercises the rights and fulfils the obligations of parenthood (Baker, 2004). Irrespective of one's opinion on this matter, positioning biological fatherhood at the core of identity shows that the Court has serious skin in the game of identity formation; what it places under the banner of identity is related to interests of upholding a particular conception of the common good.

Identity and the Political in Leyla Şahin

The pre-political conception of identity that the Court holds in *Odièvre v. France* becomes visibly untenable in cases where the nature of an identity feature is contended. The *Leyla Şahin* case reveals rather explicitly this fascinating phenomenon: Certain objects can, at will, be considered part of identity by one group in society, and not by others. The Court's presentation of the case does precisely that it describes the religious

proponents as seeing the headscarf as part of their identity, while supporters of secularism see it as a political symbol:

> Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism, who draw a distinction between the *başörtüsü* (traditional Anatolian headscarf, worn loosely) and the *türban* (tight, knotted headscarf hiding the hair and the throat), see the Islamic headscarf as a symbol of a political Islam. (*Leyla Şahin v. Turkey*: para. 35)

The contrast in itself is questionable: Why can an object that is part of our identity not be a political symbol at the same time? Or rather, when does any part of identity stop being political? The Court chooses to evade these questions and avoids using the notion of identity in the rest of the judgment.

But the constructed contrast between identity and political symbols reveals more than it hides about the Court's approach to identity. It demonstrates the arbitrariness and at once the significance of being classified under the banner of 'identity', because under this banner an identity attribute, object or feature is protected from involvement of the political. This pre-political approach to identity is visible throughout the mentioned case law. Take, for instance, how the Court's classification of fatherhood as part of a person's identity is presented as an established fact, obscuring the political significance of this choice. Critics argue that rights, in fact, constitute us as persons, rather than simply recognize a pre-existing personhood. That is, they 'call into being, and enable, particular forms and expressions of personhood, as well as disable others' (Sarat and Kearns, 1997).

Evidently, the Court does not go into this much depth about the politicality of the headscarf. Rather, the Court holds that 'the obvious purpose of the restriction was to preserve the secular character of educational institutions' (*Leyla Şahin v. Turkey*: para. 158). In this way, the Court appears to ascribe an identity to the nation-state of Turkey: a secular state following secularist principles in the public sphere. From this perspective, the headscarf is an excess to the state's politically accepted identity norm, and is deemed justifiably banned (see also Bleiberg, 2005: 160 and further).

In the *Lautsi* cases, the state's national identity takes a much more explicit and prominent role. Christian tradition is acknowledged as the national Italian religious identity. Moreover, the accommodation of several 'excesses' – from Italy's perspective – of identity is part of the Grand Chamber's argument for allowing the continuation of the state's explicit religious symbolism. Italy's openness toward headscarves, Ramadan festivities and non-Christian religious education are considered a sign that the national identity is not obstructing other manifestations of religion:

> (. . .) Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were 'often celebrated' in schools; and optional religious education could be organised in schools for 'all recognised religious creeds'. (*Lautsi and Others v. Italy*: para. 74)

Therefore, ultimately, no violation of the Convention was found in either the *Leyla Şahin* or *Lautsi* cases. In the former, the Court found that the neutrality of the Turkish state is a justified motive for prohibiting women with headscarves into universities. In the latter, the Court is convinced that crucifixes do not infringe upon the neutral identity of secularists (since the crucifix is an 'essentially passive symbol') and appeases itself with the idea that the Italian commitment to Christian tradition does not interfere with other religious groups' rights. *Lautsi* demonstrates the concept of *différance* at work. The Court contrasts the crucifix as an 'essentially passive symbol' to the headscarf as a 'powerful external symbol' to validate its reasoning. One identity characteristic – the one which is commonly accepted in Italy – gains its meaning by placing it in a differential relation to a different 'other', the uncommon.

National Identity contra *National Identity*

The case law thus far suggests that the Court creates a pre-political construct of identity that abides by a state's accepted norms and assesses the applicant's claim, the excess of identity, through that construct. When does an excess become a threat to the state's national identity? In some instances, the identity of a claimant might pose an explicit questioning of, or threat to, the identity of the state against which the claim is directed.

The case of the Turkish political party, *The United Communist Party of Turkey and Others v. Turkey*, most clearly pits the state's national identity against a minority's national identity. The claim to identity no longer concerns a slight feature. The national identity endorsed by the applicant forms an excess that expressly challenges the Turkish national identity. The political party proposes that both groups participate in the political process with their own national identity, but the state strikes down the proposal. This is where the Court steps in: The minority's rights to challenge the national identity should be protected. It seems that the more explicit challenging of national identity, particularly when proceeding through political channels, can count on protection by the Court.

As Bhabha argues, the precedence that is given to national identity demands that 'others' are fundamentally imagined to be situated within a national frame. In the above-mentioned case, the national framework plays a significant role in placing the Kurdish identity vis-à-vis the Turkish prevailing national identity. While the minority's rights are protected under the ECHR, the inability of the Court to conceive of the minority, the 'other', outside of the national frame is patently clear. This case shows that, similar to the cases concerning religious freedom, distinguishing between what is inside and outside of the subjectivity of identity is not only conceptually paradoxical, as was argued in the first section, but within a pluralistic nation-state also practically challenging.

Conclusion

In the long fight against racial segregation in the United States, the pioneering sociologist W.E.B. Du Bois posed what he called the 'unasked question': 'How does it feel to be a problem?' (cited in Gilroy, 1987: 11). Being an excess means that one's identity is approached primarily as a problem. This article has argued, drawing from Derrida's figure of *différance*, that identities have no fixed essence and depend on excesses,

'others', to gain their meaning. Different power mechanisms facilitate the process through which identity is constructed, among which human rights law.

This article's analysis of the notion of identity in the Court's case law suggests that the tension between the political and apolitical is visible as a common thread in the Court's use of identity. In case law concerning paternity, the Court appears to hold a specific view of what is presented as an unquestionable part of identity. This ostensibly pre-political notion of identity becomes untenable in cases where the nature of an identity feature, such as the headscarf, is contended or a minority has adopted a national identity that conflicts with the majoritarian national identity. The Court's approach to identity in such cases reflects a paradox that is inherent to identity; identity is personal while simultaneously constituted and shaped by overarching power mechanisms.

In a time when identity dominates in public debates, the way the Court approaches identity is of utmost importance. Human rights act as central moral and political reference points in these public debates. Indeed, human rights are often used by opposing political camps and social groups to justify and enhance their assertions. Under such conditions, it is imperative that the Court is especially well aware of how it uses the notion of identity in its case law. Further research on the ways the Court approaches identity under the different Articles of the Convention and how this relates to insights on identity gained from other fields of knowledge will push the Court's use of identity to a more justified and coherent standard.

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Notes

1. Hall's distinction can be mapped onto the two perspectives Paul Ricoeur used to study personal identity: ipse (selfhood) and idem (sameness). See Ricoeur, 1994: 116 and further. The dialectic between sameness and selfhood is equally discernible at the national level. Debated in recent literature under the banner of *constitutional identity*, a country's constitution can serve as an illustration of how processes of identity formation function in a nation state. Michael Rosenfeld suggests that while the text of a constitution often remains the same, interpretations of the text vary and diverge over time. See Rosenfeld, 2010: 27; see also Corrias, 2016: 22.
2. The relevant judgments of the Court referred to in this article can be found in the Court's online database <hudoc.echr.coe.int>.

3. Cf. *S.A.S. v. France*, a case in which the Court finds it 'understandable' that women who observe the burka 'may perceive the ban as a threat to their identity' but finds it of more significance that the ban is 'not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face'.

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