

Identity Claims and the Law: Uses and Abuses

- Abstract -

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Identity claims are claims to perform practices or engage in behaviors that are deemed to be of special importance to a certain person because of the connection between that practice or behavior and the cultural, religious, and/or gender identity that that person shares with other people of the same group.

Identity claims are growing more and more intense as societies become more pluralist and minority groups become more assertive, in other words they are linked to the phenomenon of *social pluralism*. By social pluralism I mean a social setting whose main actors are not only *individuals* (who may happen to have different conceptions of the good life, ideological stands, etc.), but also *groups* that ask for social recognition. Moreover, social pluralism brings with it the idea that pluralism understood in this way is not only a fact (something we have to cope with), but a value (something we should cherish and foster). In a sense, pluralism as a fact has always existed (to say the least, it caused the various wars of religion across Europe in the Modern Age). Pluralism as a value, however, is an entirely different thing: it entails that diversity must – to some extent – be accommodated in the polity and that it is something worth preserving.

The idea that social pluralism is a value *per se*, that differences should be preserved and assimilation resisted, is also one of the basic tenets of so-called postmodern legal movements such as *Critical Race Theory* and *Feminist Legal Theory*. These movements have emphasized that belonging to a group (construed on racial, ethnic, or gender lines) is meaningful in the process of shaping one's individual identity, which has an ethical dimension for those who share the traits considered intrinsic to that group. Consequently, they have called for a comprehensive reform of the law in order to take into account specific identity claims.

While identity claims often have an ethical dimension (that is, an ethical meaning for the people advancing them), they can also be problematic if the relevant practice or behavior is against the law. In such a case, a dilemma arises: individual liberty, which includes the individual's right to perform the relevant practice (and which in its broadest terms is usually recognized and protected by the law in the guise of freedom of expression, religious freedom, or freedom of association, for instance) comes into conflict with different interests or values protected by the law. Dilemmas of this kind have arisen frequently in both European and American legal systems, and the law has mostly found itself unprepared to resolve these cases, let alone accommodate these claims.

We need a fresh perspective and new tools in order to meet the challenge that social pluralism - in its various forms – poses to contemporary law. However, while I am not buying completely the arguments put forward by postmodern legal movements, I will argue that they are right in acknowledging the limits of the ‘traditional’, ‘modern’ legal mind as far as the accommodation of identity claims is concerned. Thus, I will try to explain the reasons the law finds itself at odds with this phenomenon and to what extent it can (and, indeed, should) try to accommodate it. I will argue that not all conceivable identity claims have equal moral standing: some of them are harmless and reasonable, while certain others pose serious moral dilemmas. To anticipate somewhat the conclusions of my argument, I will defend the view that expressions of individual identity are in principle to be protected, whereas vindication of group identity and group rights should in principle be discarded.