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Editorial

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The editors are pleased to present issue 2022/I of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

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In the Articles section, Hatim Hussain and Sanskriti Sanghi analyse the difficult issue of satire and human rights protection by the ECtHR, focusing on the question of intent in this context, while Alexandru-George Moș undertakes a multilevel analysis of constitutional identity and illiberalism.

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As always, a word of sincere gratitude is due to the anonymous peer reviewers of the current issue.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues. The next formal deadline for submission of articles is 15 October 2022, though submissions are welcomed at any time.

The editors

Recalling Fridtjof Nansen's legacy – people fleeing war now and hundred years ago

At the start of this year, most of us hoped that once the pandemic had passed, we would be back if not to our lives as usual, then at least to calmer everyday lives. However, experts had already foreseen since 2014 what for all of us became a terrifying reality here in Europe at the end of February 2022: decades of economic, social and international efforts to maintain peace had failed. Russia has launched a war against Ukraine.

Here I do not want to recall the international reactions of the past months – I do not want to talk about the exclusion of the Russian Federation from the Council of Europe, decided in March, nor about the legal implications of the European Union's numerous packages of financial and economic sanctions; this has already been done by others.

Rather, I seek the attention of the reader who is committed to international law, the European community of law, human rights and minority rights. The fate and the legal situation of people fleeing war in Ukraine reminded me of an exceptional personality from a hundred years ago, about whom we rarely speak, although the recollection of his life and activities is timely in many respects. I would like to give a snapshot picture of the personality and activities of Fridtjof Nansen, who was awarded the Nobel Peace Prize just one hundred years ago, in 1922 – and sadly note that for some states and their leaders in the international community, human life and human lives are still less important than the interests of power.

I invite the reader to come with me on a journey through time: the activities of the League of Nations a century ago are not without lessons for the current phenomena of the early 21st century on the international scene, where the clash of ideas and political realities is once again causing a shocking, terrible tragedy that is difficult to comprehend in common sense. In April 1946, at the General Assembly announcing the dissolution of the League of Nations, Lord Robert Cecil, one of the League's former organisers, announced with confidence the birth of the United Nations as the principal international organisation of peace and security ("The League is dead. Long live the United Nations.")[1] . There was no doubt that a hundred years ago, the League of Nations, for all its shortcomings, was an experiment that looked ahead to the second half of the 20th century, breaking new ground and seeking to model the basic principles and rules of the new international world order. And although for seven decades the new international world order seemed workable, the Russian-Ukrainian war taking place in 2022 before our own eyes opened up – as the final straw – a series of questions that bona fide altruistic individuals and organisations sought to answer after 1918-1919 and even after 1945.

A hundred years ago, Fridtjof Nansen was one of the truly remarkable figures of his time: a pioneer in many ways – a scientific zoologist, an oceanographer, a fearless polar explorer, a respected diplomat. As the first High Commissioner of the League of Nations for Refugees, he was instrumental in the creation and development of international efforts to clarify the situation and status of internally displaced refugees, perhaps the most vulnerable group of people in the world.

Refugees lose everything – their homes, their communities, their livelihoods, sometimes even their loved ones. Outside the protection of their state, they depend on the generosity of other states, host states, where they can count on refuge, where they can hope to start their lives anew without fear. As refugees, they are entitled to special legal status, to international protection in their host state.

[1] More information on the speeches and resolutions of the General Assembly is available at: https://www.nationalww-2museum.org/war/articles/league-of-nations (10 June 2022).

The development and organisation of the elements of this specific system can be traced back to Nansen, who facilitated the first legally relevant international agreements and also succeeded in getting some of them finally adopted, thus initiating the legal development that led to the 1951 Refugee Convention and the creation of the UNHCR.

Ironically, and regrettably, hundred years after Nansen accepted his first mandates in 1920-1921 to address the situation of Siberian prisoners of war, and the status of Russian refugees in Europe fleeing the famine in Russia and the Soviet rule, scores of people continue to be uprooted and lose their homes on a daily basis. Even in the 21st century, the number of people displaced due to violence and conflict worldwide still runs into the tens of millions, most of them registered as refugees, but also tens of millions of internally displaced persons. In addition to his pioneering work on behalf of refugees, Nansen introduced and applied the basic principles of humanitarian action a century ago. His main virtue was his neutrality and political independence, his ability to raise confidence, persuade and inspire others to join the cause, regardless of their nationality or political affiliation. These skills were also very much needed for his extensive diplomatic activity and to collect the necessary institutional and financial resources for the undertaken refugee missions of innovative nature. At a time in history when political and other interests made governments extremely insensitive to the suffering of civilians, Nansen's successes – and failures – have confirmed the still valid principle that genuine humanitarian action can only be undertaken with a firm respect for the principles of neutrality, impartiality and independence. Humanitarian organisations work in conflict and crisis situations around the world – their credibility for effective action is guaranteed by their political independence vis-à-vis all actors involved in the conflict. But political independence and neutrality should not mean inability of action and paralysis: Nansen's ingenuity and perseverance have enabled him to overcome many difficult situations in the field of helping refugees[2] – but also in cases when he has had to find a way out in extreme natural conditions as an oceanographer and polar explorer.

Fridtjof Nansen was one of the most interesting and outstanding personalities of his time, an all-round humanist.[3] Hundreds of thousands of troubled people have collectively benefited from his struggles, diplomatic successes and innovations that laid down the foundations for the international refugee system. This system, in its evolved form, exists, but it is under constant pressure, especially when respect for human rights is being eclipsed and racism and xenophobia are gaining ground.

Addressing the causes and consequences of international movements of millions of people, in a time of new social and international consensus building, it is worth recalling the work of figures like Fridtjof Nansen – and worth striving for rational collective thinking and, through this, for the restoration of social and international peace.

Elisabeth Sándor-Szalay

[2] One of these was the so-called Nansen passport for refugees without identity documents. See: https://theconversation.com/the-nansen-passport-the-innovative-response-to-the-refugee-crisis-that-followed-the-russian-revolution-85487 (10 June 2022).

[3] Marit Fosse & John Fox, *Nansen & Explorer and Humanitarian*. Hamilton Books, 2016, p. 134.

Irreverence Intended? Destabilizing 'Intent' as Determinative in Discourse around Satire at the ECtHR

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Humour is undeniably a controversial topic. While principally entertaining, its obscurity and elusiveness have long been at the forefront of juridical challenges at the European Court of Human Rights (ECtHR). Loosely termed as a form of artistic expression with a 'moral edge' to humour, satire ensues a critical complexity for courts to deconstruct due to the perceivable absence of a consistent criteria to adjudicate such cases. More importantly, analyzing satirical intent and its markers has enormously challenged the Court due to the inherent subjectivity prevalent in its interpretation. This article argues the need for the ECtHR to destabilize 'intent' in juridical encounters with satire, while cautioning us against alternatives which replicate the very same shortcomings. By interpreting legal discourse around satire at the ECtHR and interrogating the suitability of prevalent tests and defences pertaining to satirical expressions, we advocate for the emergence of a shared framework within humour regimes to facilitate a relatively better communal understanding of satire and its permissible limits. We also explore the possibility of a transition to the criterion of 'harm' as a relatively operational approach to examining such satirical devices. In cases such as satire where lack of consensus unavoidably leads the Court to open-ended, unsystematic and subjective interpretations, confronting the need for the destabilization of 'intent' will offer crucial lessons in the legal discourse on humour studies, as well as facilitate a relatively more consistent approach to regulating humorous expressions at the ECtHR in the future.

Keywords: Satire; ECtHR; Freedom of Expression; Humour.

1. Introduction

In 2006, when the cultural editor of the Danish newspaper *Jyllands-Posten* commissioned a series of satirical cartoons on Prophet Muhammad,[1] a heated public debate ensued,[2] in both courts and

[1] Giselinde Kuipers, *The Politics of Humour in the Public Sphere: Cartoons, Power and Modernity in the First Transnational Humour Scandal*, European Journal of Cultural Studies, Vol. 14, No. 1, 2011, p. 63.

[2] Asma T. Uddin, *Provocative Speech in French Law: A Closer Look at Charlie Hebdo*, FIU Law Review, Vol. 11,

outside, on the contours of humour as a form of artistic expression as well as the distinctions between its lawful and unlawful usage in regulating freedom of expression. At the European Court of Human Rights ("ECtHR"), corrective humour such as satire has been quite topical in recent times on account of the continuing difficulties of adopting a consistent approach to the interpretation of satirical texts.[3] A prominent metric in the ECtHR's adjudication has been the use of 'intent' as a determinative criterion to assess liability on the basis of Article 10 para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")—in such cases, the Court has found it cumbersome to analyze varied subjective elements ordinarily coloring satirical expressions.

This article aims to analyze the prevalence of 'intent' as a criterion in juridical challenges around satire, particularly at the ECtHR which has failed to approach regulation of artistic freedom that embraces satire or political humour consistently. By arguing for an emphasis on fostering an understanding of humour within a shared community as opposed to in the context of the dialectic of expressor's or recipients' intent, this article discusses ways forward for legal scholarship in this field.

The article has been structured in the following manner. It begins initially with a primer on definitional concepts and legal elements of 'satire', and thereafter investigates the existing legal literature on satirical expressions. Subsequently, the article explores the use of intent as a seminal yardstick in the ECtHR's assessment of satirical cases, identifying the fallacies and inadequacies in the dicta of the ECtHR and the false dichotomy in its use of intention as a criterion. Finally, the article concludes with an exploration of the shifts which need to be marked by the ECtHR from contemporary judicial practice in order to bridge the chasms between the expressor(s), recipients, and the Court.

2. Interpreting Discourse around 'Satire' at the ECtHR

While satire has been in use as a common means of expression since times immemorial, defining it has invariably been a complex challenge. Despite numerous differing notions, theorists widely agree on the conception of humour as a product of incongruity (i.e., something out of context, exaggerated, illogical, or unreasonable).[4] Unlike irony, wherein a more complex meaning lurks underneath the surface of the expression,[5] or parody, in which existing works are manipulated for comic effect,[6] which are both forms of humour involving ridicule as a central feature, satire has a 'sharper' edge. The central characteristic of satire, instead, is critique – and the endeavor in employing it as a form of expression is often to denounce a shortcoming in society or an individual by combining

2015, p. 189. See also Roger J. Kreuz, *Charlie Hebdo Shootings Served as an Extreme Example of the History of Attacks on Satirists*, The Conversation, 15 September 2020. https://theconversation.com/charlie-hebdo-shootings-served-as-an-extreme-example-of-the-history-of-attacks-on-satirists-145527 (22 May 2022); *Charlie Hebdo: Magazine Republishes Controversial Mohammed Cartoons*, BBC News, 1 September 2020. https://www.bbc.com/news/world-europe-53985407 (22 May 2022); Niaz A. Shah, *Charlie Hebdo: Testing the Limits of Freedom of Expression*, Muslim World Journal of Human Rights, Vol. 14, 2017, p. 83.

[3] Alberto Godioli, *Cartoon Controversies at the European Court of Human Rights: Towards Forensic Humor Studies*, Open Library of Humanities, Vol. 6, No. 1, 2020, p. 22.

[4] Henry W. Cetola, *Toward a Cognitive-Appraisal Model of Humor Appreciation*, De Gruyter Mouton, Vol. 1, 1988, p. 245.

[5] Daniel Chandler & Rod Munday, *Irony, A Dictionary of Media and Communication,* Oxford University Press, 2011. https://www.oxfordreference.com/view/10.1093/acref/9780199568758.001.0001/acref-9780199568758-e-1446 (22 May 2022).

[6] Conal Condren, Jessica Milner Davis, Sally McCausland, & Robert Phiddian, *Defining Parody and Satire: Australian Copyright Law and its New Exception*, Media and Arts Law Review, Vol. 13, No. 3, 2008. pp. 273-292.

ironic humour with criticism.[7] As a result, not all satirical expressions may incite laughter as humour is merely used as a conduit to expose a prevailing immorality or lacuna in a social or political context,[8] and such expressions may often be viewed as irreverent. Legally, ECtHR jurisprudence has defined satire as a "form of artistic expression and social commentary (which), by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate".[9]

Notably, extensive jurisprudence on the lawfulness of satirical expressions exists at the ECtHR. Under the ECHR, satirical expressions are regulated under Article 10 of the Convention,[10] which grants a broad spectrum of protection to information or ideas that are not only received favourably but also those which tend to "shock, offend, or disturb any section of the population".[11] Article 10, however, enlists a threefold criteria to enforce restraints on the fundamental right to expression, whereby a restriction is (a) required to be lawful, (b) must pursue a legitimate aim[12] and (c) be necessary in a democratic society. As indicated in *Bladet Tromso and Stensaas v. Norvège*, to assess the necessity of the restriction, the interference is required to be proportionate to the legitimate aim pursued,[13] respond to a 'pressing social need', and be 'relevant and sufficient' to justify the restriction.[14] The ECtHR usually allows a certain margin of appreciation to national authorities in identifying actions to be adopted to limit freedom of expression, especially in cases involving artistic representations which have a higher propensity for contextual determinations.[15]

In analysing satirical expressions, the ECtHR primarily employs 'intent' as a governing criterion to

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[7] Margaret A. Rose, *Pictorial Irony, Parody, and Pastiche. Comic Interpictoriality in the Arts of the 19th and 20th Centuries*, 1st edn., Bielefeld Aisthesis Verlag, 2020, pp. 27-55.

[8] *Satire: Oxford English Dictionary* https://www.oed.com/viewdictionaryentry/Entry/171207 (22 May 2022).

[9] *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33.

[10] Art. 10 ECHR "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*"

[11] See, for instance, *Handyside v. The United Kingdom* (App. No. 5493/72) ECtHR (1976); UN Human Rights Committee, 'General Comment No. 34, Article 19: Freedom of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34.

[12] These elements, listed under Art. 10 para. 2 include: national security and territorial integrity, public safety and the prevention of disorder or crime, the protection of health, the protection of morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. See, for instance, Toby Mendel, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, Centre for Law and Democracy. https://rm.coe.int/16806f5bb3 (22 May 2022).

[13] This requires a determination as to whether the aim of interference was proportionate to the means used. See, for instance, *Thoma v. Luxembourg* (App. No. 38432/97) ECtHR (2001) para. 48.

[14] Notably, the reasons for interference must be convincing. See, for instance, *Cumpana and Mazare v. Romania* (App. No. 33348/962004) ECtHR (2004) para. 90. See, for instance, *Bladet Tromso A/S and Stensaas v. Norway* (App. No. 21980/93) ECtHR (1999) para. 29; *Sunday Times v. United Kingdom* (App. No. 6538/74) ECtHR (1979) para. 62; *Feret v. Belgium* (App. No. 15615/07) ECtHR (2009). See also Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: Handbook for Legal Practitioners*, CoE, 2017. https://edoc.coe.int/en/fundamental-freedoms/7425-protecting-the-right-to-freedom-of-expression-under-the-european-convention-on-human-rights-a-handbook-for-legal-practitioners.html (22 May 2022).

[15] 'Margin of appreciation' allows a degree of discretion to the State, specifically in areas where the ECHR secures national guarantees of human rights. See, for instance, *Müller and Others v. Switzerland* (App. No. 10737/84) ECtHR (1988) (where the Court declared that where a conflict arises between two fundamental rights under ECHR, a wide margin of appreciation is available to the states to enjoy as regards the protection of morals).

determine whether a restriction is necessary in a democratic society. While the final decision of the Court is subject to a range of factors which are common to all cases before the ECtHR, including those governed by 'humour regimes', the distinctive nature of humorous expressions complicates how these factors are handled by the judges. While we shall delve into this in greater detail in the forthcoming segments of the article, it is imperative for us to provide an overview of the journey a satirical expression traverses through the ECtHR.

First, all forms of speech, regardless of the medium or content, are permissible under the ECHR, as detailed in *Handyside v. UK.*[16] This includes cultural, political, and social ideas, opinions, value judgments, critiques and other statements which are not necessarily based on truth. Given satire's inherent features of exaggeration or distortion of reality,[17] a greater latitude is afforded in cases pertaining to satire to accord a higher level of protection to these expressions.[18] However, this has also led the Courts to evolve a highly subjective criteria within the jurisprudence of Article 10. Remarkably, the ECtHR has also not specified the manner or the instances in which satirical expressions might fulfil these criteria, invoking complexities for the Court in respect of conceptualizing and enforcing uncertain and unforeseeable standards to deal with such instances.[19] On other fronts, the court then examines if the interference pursues a legitimate aim designed to protect other fundamental rights or serious public offences. Finally, a major emphasis is placed on the 'necessity test' outlined above—to identify if the interference with the rights protected is no greater than is necessary to address a pressing social need.

Typically, an application of the principle of *stare decisis* would require the ECtHR to adopt a consistent approach to the determination of cases pertaining to satire.[20] However, a failure on the part of the Court to identify the particularities of humorous expressions, to develop a common understanding of the application of certain criteria, and to recognize its inconsistencies has led to such expressions witnessing a rather mercurial attitude by the Court—often oscillating on polarizing fronts with respect to their interpretation under Article 10. This is clearly evidenced by the ECtHR's practice. For instance, while the Court in *Vereinigung Bildender Künstler v. Austria* reaffirmed the value of pluralism and the exchange of opinions and ideas[21] in democratic societies and contributed

[16] *Handyside v. The United Kingdom* (App. No. 5493/72) ECtHR (1976).

[17] With respect to this, we can find variations of satirical expressions in the case law of ECtHR, for instance a painting in *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33; a sign with a political message in *Eon v. France* (App. No. 26118/10) ECtHR (2013) para. 53; an advertisement in *Bohlen v. Germany* (App. No. 53495/09) ECtHR (2015) para. 50; a fictitious interview in *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007) para. 18; a caricature in *Leroy v. France* (App. No. 36109/03) ECtHR (2009); and a press article in a local newspaper in *Ziembiński v. Poland (no. 2)* (App. No. 1799/07) ECtHR (2016) para. 45.

[18] For example, in the case of *Nikowitz,* the Court had declared that despite the article written in a satirical style and conveyed as a humorous commentary, it nevertheless sought to make a crucial contribution to an issue of general interest (in this case being a society's attitude towards a sports star). In another case of Klein, the article criticized the Archbishop of the Roman Catholic and the fact that it was framed as an intellectual joke weighted favourably in a decision acquitting the journalist. See, for instance, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007).

[19] Alix de Bergeyck de Bergeyck, *Freedom of Artistic Expression, but at What Cost?: Where does the ECtHR draw the line between satire and offensive speech?* (idEU, 14 October 2020); Aoife O'Reilly, *In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights*, Trinity College Law Review, Vol. 19, 2016, p. 234.

[20] Patricio A. Fernández & Giacomo A. M. Ponzetto, *Stare Decisis: Rhetoric and Substance*, The Journal of Law, Economics, and Organization, Vol. 28, 2012, p. 313; Paula Feldmane, *Restrictions on Satire, Parody and Caricature in the Case Law of the European Court of Human Rights*, Riga Graduate School of Law Thesis, 2019. https://dspace.lu.lv/dspace/bitstream/handle/7/50064/Feldmane_Paula.pdf?sequence=1&isAllowed=y (22 May 2022).

[21] See, for instance, *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) ECtHR (1994); *Handyside v. The United Kingdom* (App. No. 5493/72) ECtHR (1976).

to the development of jurisprudence on the defences available to expressors in legal challenges to works of satire, it has been more inconsistent in certain subsequent cases and hesitant to repeat its findings where a particularly challenging contest arises in interpreting satire.

Numerous precedents at the ECtHR evidence this inconsistency. For instance, in *Leroy v. France*, the Court declared a cartoonist's depiction of a drawing on the 9/11 twin-tower attacks with the caption "we have all dreamt of it… Hamas did it" as justifying the 'use of terrorism'.[22] In *Ehrmann and SCI VHI v. France*, an artistic expression of placing a mural in the proximity of a historical monument was held by the Court as violative of heritage protection rules and the restriction was justified to preserve the 'distinctive characteristic' of the historical area.[23] Finally, in *Karttunen v. Finland*, a prohibition on an artist's display at a public art gallery of photographs of young women in sexual poses was upheld as a legitimate restriction on artistic freedom under Article 10 by the ECtHR.[24]

While the irregularity in the aforementioned cases has been detrimental to the development of explicit protections against satirical expressions, the ECtHR has inevitably also moved to the usage of *contextual* defences that allow a higher scope for subjectivity—thus, making the determination even more arbitrary. A wide count of dissenting opinions in most cases on satire also reflects the lack of nuance in an understanding of satirical works as well as the preconceived notion deployed by the Court that all satire is naturally offensive and ridiculous,[25] without elaborately detailing in depth on the markers of satire or the applicable defence in such cases.

3. Deconstructing 'Satirical Intention' under Article 10 of the ECHR

In cases which investigate satirical expressions, intention seems to have a significant influence on the reasoning of the ECtHR and may perhaps be regarded as the only consistent criteria in distinguishing a statement of fact from a value judgment.[26] An expression which is marked by clear indicators of satirical intent is thus afforded a higher degree of protection as against expressions wherein such intention is absent. Furthermore, the presence of intent is also a crucial indicator of other parameters—such as the aim of the expression, as to whether the statement is in public interest or a gratuitous offence, and its intended effects, as to whether it is a threat to public peace or damages the reputation of the individual.

While the presence of clear intention to produce a satirical work influences decision-making at the ECtHR, determination of the satirical character as well as its intended meaning is highly subjective and often contradictory.[27] From a juridical standpoint, it is highly problematic for the Court to re-

[22] *Leroy v. France* (App. No. 36109/03) ECtHR (2009) para. 42.

[23] *Ehrmann and SCI VHI v. France* (App. No. 2777/10) ECtHR (2011).

[24] *Karttunen v Finland* (App. No. 1685/10) ECtHR (2011).

[25] Feldmane 2019, p. 21.

[26] Godioli 2020, pp. 10-12. See, for instance, *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010) para. 38; *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33; *Palomo Sánchez and Others v. Spain* App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011) Joint Dissenting Opinion of Judges Tulkens, Björgvinsson, Jočienė, Popović, and Vučinić para. 11; *Leroy v. France*, (App. No. 36109/03) ECtHR (2009) para. 43.

[27] See, for instance, Godioli 2020, pp. 10-12. As Godioli indicates, direct interpretation of the 'intention' in a satirical text usually leads to disagreements between the majority opinion and minority dissent, especially where presence of a clear humorous intent could not be perceived or reconstruction of the purpose or specific message of the text is unclear. With respect to first, for instance, the majority opinion in *Vereinigung Bildender Künstler* and the dissenting opinion

construct an interpretation in cases where the expressor intended for a satirical work to have a *specific* connotation, and especially in circumstances where a high degree of implicitness is involved. A corollary concern which arises is that of the ascription of a particular intent to the expressor by the Court, more often so in relation to satirical expressions which have effects such as the incitement of violence or the promotion of hate speech, which may not have been intended at all. The Court has accompanied the test pertaining to the expressor's intent with the test of the 'reasonable/ average' recipient(s), [28] a test which entails the determination of who the audience is as well as a reconstruction of their perception of the satire.

Due to the subjectivity in the reception and appreciation of humour, there is an inevitable margin of it which trickles into the ECtHR's determination of such cases. Adjudication on the basis of a reconstruction of the expressor's intent or that of the perception of the recipients presents certain pitfalls in the ideation of the tests as well as in their implementation. It also allows for the creation of a false dichotomy between the expressor's and the recipients' intent, which detracts from the assessment of the permissibility of the satirical expression. This segment, thus, highlights the tensions involved in the use of 'intent' as an interpretative criterion and the ways in which it renders the task of deconstructing satire more cumbersome, at least on three levels: (i) the message the author intended to convey through the expression, (ii) the successful signaling of such intention by the text, and, (iii) the use of differing lenses of interpretations by the audience in the determination of liability.

4. Interrogating 'Intent' as a Criterion to Adjudicate upon Satirical Expressions

4.1. Interrogating the Pitfalls Inherent in the Formulation and Use of a Criterion such as 'Intent'

As might increasingly be evident from our discussion, the adjudication of satirical expressions at the ECtHR has recurringly been a site of intellectual contestations. One of the reasons for this is the departure marked by humorous expressions from the "rules of 'serious' discourse",[29] as a result of which the relationship between the expression and truth is significantly altered[30] in juridical encounters with humour in juxtaposition to in 'serious' discourse. This specificity of 'humour regimes' complicates[31] how the criteria used by the ECtHR as adjudicatory practice are handled in discourse around satire. These criteria, among others, include an emphasis on the expressor's intent as conveyed by the presence of certain clear markers within the text.[32] The ascertainment of

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of Judge Loucaides disagreed on the satirical intent of the object in question (i.e., a painting). See also *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) Dissenting Opinion of Judge Loucaides para. 33.

[28] *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007).

[29] Kuipers 2011, p. 69. "*Humour regimes can be seen as specific discursive regimes governing a non-serious and irreverent communicative mode that does not always obey the rules of 'serious' discourse. The relation of humorous utterances to truth differs from normal discourse: they do not have to describe 'real' beliefs or intentions. As a result, things said or done in jest can be more insulting and degrading than normal communication*."

[30] Michael Joseph Mulkay, *On Humour: Its Nature and Place in Modern Society*, Polity Press, 1988.

[31] Godioli 2020, p. 18.

[32] Ibid. See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 33; *Leroy v. France* (App. No. 36109/03) ECtHR (2009) para. 43; *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010) para. 38; *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015) paras. 54, 49; *Ziembiński v. Poland (no. 2)* (App. No. 1799/07) ECtHR (2016) para. 44; *Dickinson v. Turkey* (App. No. 25200/11) ECtHR (2021)

the 'intent' or 'goal' of the expressor is consequently influential for the decision of the Court on the aims and nature of the expression.

The use of the expressor's intent as a criterion is, however, erroneous given that satire is characterized by an incongruity which produces "a conflict between what we perceive and our expectations".[33] Moreover, the message contained within satire is often latent or covert, as opposed to explicit and clear,[34] which renders the expression open to a multiplicity of interpretations of the 'intent' of the expressor.[35] Some scholars have extended this argument to emphasize that no one, including the expressor, can conclusively decide what the 'real' intention of a satirical construction is as the non-serious nature of its engagement with its audience provides the possibility of deniability of certain interpretations as well as the affirmation of others[36]—considerations which may or may not have actually played a part in the process of formulation/creation.

The use of 'intent' as a criterion to adjudicate upon satirical expressions despite these lacunae has paved the path for a more worrying phenomenon. While the ECtHR guarantees that the freedom of expression extends to ideas which 'shock, offend, and disturb',[37] the influential charge exerted by the 'intent' of the expressor on the determination of the aims and nature of the expression[38] has resulted in the form-fitting of permissible 'shocking' ideas. This is because higher protection is conferred by the Court on expressions which are marked by clear indicators of satirical intention,[39] jurisprudence which is problematic due to such indicators being a rarity in satire due to its characteristics of latency and incongruency. Moreover, the failure to showcase such 'intent' has urged the Court to classify the expression as gratuitously offensive and to justify its curtailment due to its incapability to contribute to democratic debate.[40]

Such *dicta* showcases how the use of 'intent' as a criterion in the adjudication of satire can have a resounding impact on the ideas which are ascribed value as contributory towards democratic de-

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para. 52.

[33] John Morreall, *Funny Ha-Ha, Funny Strange, and Other Reactions to Incongruity* in John Morreall (Ed.), *The Philosophy of Laughter and Humor*, SUNY Series in Philosophy, 1986; Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise,* Southern California Interdisciplinary Law Journal, Vol. 21, 2011, p. 103.

[34] Godioli 2020, pp. 22-23; Little 2011, p. 105.

[35] Godioli 2020.

[36] Kuipers 2011, p. 71.

[37] *Handyside v. The United Kingdom* (App. No. 493/72) ECtHR (1976) para. 49; *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) para. 26; *Palomo Sánchez and Others v. Spain* (App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011) Joint Dissenting Opinion of Judges Tulkens, Björgvinsson, Jočienė, Popović, and Vučinić paras. 10-11. "*At no point does the Court examine in concreto whether the cartoon and articles overstepped the bounds of remarks that "shock, offend and disturb" and that are protected by Article 10 of the Convention as an expression of pluralism, tolerance and broadmindedness, without which there is no democratic society. It is precisely when ideas shock and offend that freedom of expression is most precious. 11. As regards the cartoon on the newsletter's cover, it is a caricature, which, while being vulgar and tasteless in nature, should be taken for what it is – a satirical representation*."; Aistė Marija Macaitė, *Finding Humour in Human Rights*, KU Leuven European Master's Degree in Human Rights and Democratisation, 2017. https://repository.gchumanrights.org/bitstream/handle/20.500.11825/529/Macaite.pdf?sequence=1&isAllowed=y (22 May 2022).

[38] Godioli 2020, pp. 11-12.

[39] Ibid.

[40] O'Reilly 2016, p. 241; Godioli 2020, pp. 11-12.

bate as well as self-development and the search for truth,[41] and their instrumentalist orientation.[42] By extension, it acts as the doorway which permits entry to certain notions of 'progress',[43] notions which cannot be divorced from the predilections of judges who are a product of their class and culture,[44] while relegating others to the "imaginary waiting room of history".[45] Furthermore, the imbrication between the criterion of 'intent' and that of the classification of the aims and nature of the expression lends itself to an implicit right 'not to be offended',[46] which is to be balanced against the exercise of free speech and expression, through the lens of 'subjective emotional impact' as opposed to 'objective damage' caused by the expression.[47]

In conjunction to the criterion of the 'expressor's intent', the ECtHR has also relied upon the doctrine of the 'reasonable/average' recipient of the expression[48] in cases pertaining to satire. The use of this test by the Court has oscillated between two ends of a spectrum. Either the recipient is postulated[49] as an 'all-understanding ideal' whose perception of the 'intent' underlying the expression mirrors that of the expressor's as determined by the Court, or she's characterized as an irrational, ill-equipped, or unfocused recipient[50] for whom the 'satirical intention' of the expressor can be confused for the truth. Both these constructions of the recipient, in their intersection with the 'explicitness' of the 'intent' of the expressor,[51] results in her distinctiveness being subsumed into a seemingly objective legal standard. This transpires, additionally, without an explanation from the Court of the manner in which it ascertained the 'audience' for the expression. Moreover, in the latter of the two constructions, a dialectic is also produced by the Court between the expressor's intent and the decipherability of such intent by the recipient.

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[41] O'Reilly 2016, p, 241; Tom Lewis, *At the Deep End of the Pool: Religious Offence, Debate Speech and the Margin of Appreciation before the European Court of Human Rights* in Jeroen Temperman and András Koltay (Eds.), *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, Cambridge University Press, 2017; Alberto Godioli, *Irony in Court: Marina v. Romania*. Strasbourg Observers, 17 August 2020. https://strasbourgobservers.com/2020/08/17/irony-in-court-marina-v-romania/ (22 May 2022).

[42] Lewis 2017.

[43] *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) ECtHR (1994) Joint Dissenting Opinion of Judges Palm, Pekkanen, and Makarczyk para. 3.

[44] Lennard J. Davis, *Bending over Backwards: Disability, Narcissism, and the Law*, Berkeley Journal of Employment & Labor Law, Vol. 21, 2000, p. 194.

[45] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, Princeton University Press, 2000.

[46] Helen Fenwick & Gavin Phillipson, *Media Freedom under the Human Rights Act*, Oxford University Press, 2006, p. 552; O'Reilly 2016, p. 245.

[47] Lewis 2017; Godioli 2020, p. 20; Bergeyck 2020; *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) ECtHR (1994) Joint Dissenting Opinion of Judges Palm, Pekkanen, and Makarczyk para. 6.

[48] Godioli 2020, pp. 20-21. See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) Dissenting Opinion of Judge Loucaides; *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Féret v. Belgium* (App. No. 15615/07) ECtHR (2009); *Sousa Goucha v. Portugal* (App. No. 70434/12) ECtHR (2016).

[49] Wolf Schmid, *Implied Reader,* The Living Handbook of Narratology, 27 January 2013. https://www.lhn.uni-hamburg.de/node/59.html (22 May 2022). See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007) Dissenting Opinion of Judge Loucaides; *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010); *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015); *Dickinson v. Turkey* (App. No. 25200/11) ECtHR (2021).

[50] See, for instance, *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Féret v. Belgium* (App. No. 15615/07) ECtHR (2009); *Marina v. Romania* (App. No. 50469/14) ECtHR (2020). See also Godioli, *Irony in Court: Marina v. Romania*, Strasbourg Observers, 17 August 2020. https://strasbourgobservers.com/2020/08/17/irony-in-court-marina-v-romania/ (22 May 2022).

[51] Feldmane 2019.

Pivotally, the employment of the test negates both, the concerns with a conclusive ascertainment of the intent of the expressor as well as the subjectivities[52] inherent in the perception and appreciation of satire. While the former has been delved into in the foregoing paragraphs, the latter is due to the interpretative difficulties[53] faced by a recipient encountering the incongruous features of satire which require her to find and replace the superficial message with an underlying message from among a host of possibilities. The reliance on this standard also acts as an impediment to the realization that humour is context-dependent,[54] and that reasonability is a concept which is culturally-determined[55]—which increase the latitude for multiple and differing interpretations among readers, and the possibility of the misalignment of these interpretations with the 'expressor's intent' as determined by the Court. In a digitally globalized space, this is even more critical as the absence of boundaries may blur the distinction between satire and offensive speech in the absence of commonly understood norms or a general consensus on its markers.

It also highlights the risks[56] that such a standard carries in the exercise of balancing the freedom of expression of the expressor with the rights claimed to be infringed by the recipients, when it is difficult to fathom how the Court can possibly foresee and account for which expressions can be (mis) interpreted as offensive regardless of the intention of the expressor. This is all the more pertinent to consider given that the threshold of sensitivity of certain individuals may differ as a result of factors pertaining to religion, sexuality, politics, economics, social norms, convictions and beliefs, etc. Thus, given the multiple ways in which the reconstruction of the expressor's intent and/or that of the perception of certain recipients of the expression negate the complexities of definitive ascertainments in humorous expressions, it can be argued that decision-making grounded in the use of these tests needs to be reassessed.

4.2. Interrogating the Unsystematic and Inconsistent Application of the Criterion of 'Intent'

It is interesting to note that despite the plethora of concerns about 'clear markers' of 'satirical intent' being used as a criterion to adjudicate disputes and balance competing interests, it is one of the most frequently used criterion at the ECtHR.[57] As we note earlier, it is also considered to exert significant influence on the reasoning of the ECtHR as well as the domestic courts over which the ECtHR sits as a supra-national court in supervision.[58] However, the unsystematic and inconsistent ways[59] in which the criterion has been applied consistently points towards a troubling paradox, and

[52] Little 2011, p. 129; Bergeyck 2020.

[53] Little 2011, p. 104.

[54] Tony Veale, *Figure-Ground Duality in Humour: A Multi-Modal Perspective*, Lodz Papers in Pragmatics, Vol. 4, No. 1, 2008, p. 73; Little 2011, pp. 127, 107; Will Self, *A Point of View: What's the point of satire?*, BBC News, 13 February 2015. https://www.bbc.com/news/magazine-31442441 (22 May 2022); Bergeyck 2020.

[55] Kuipers 2011, p. 68; Godioli 2020, p. 21.

[56] Where two fundamental rights under ECHR are required to be balanced, for instance the right of the applicant to present his (controversial) views and the freedom of thought, religion or conscience of the other, and where neither has an authority over the other, there is usually a wider margin of appreciation afforded to national authorities. This may result in more scope for subjectivity in national contexts in the EU. See, for instance, *Müller and Others v. Switzerland* (App. No. 10737/84) ECtHR (1988).

[57] Godioli 2020, pp. 10-12; Bergeyck 2020.

[58] Bergeyck 2020.

[59] Godioli 2020, p. 4; Anna Zaltsman, *Five Categories Defined, No Consistency Found: ECHR Convention and Case Law on Freedom of Artistic Expression,* CEU eTD Collection. http://www.etd.ceu.edu/2019/zaltsman_anna.pdf (22 May 2022); Bergeyck 2020.

has resulted in the imposition of 'uncertain and unforeseeable standards'[60] on the parties to a dispute before it through the vehicle of objective legal doctrines. Importantly, the uncertainty is not limited to the parties to the dispute, and pervades the reasoning of the Court as well.[61] This manifests in certain ways which consistently recur across the corpus of cases pertaining to satire at the ECtHR.

The first of these ways is the disagreement between judges at the ECtHR, as reflected by the divide between the majority and the minority, particularly on the detectability of clear markers of 'intent' as well as the aim/message of the impugned expression.[62] It has been found that such disagreements are significantly more frequent in cases pertaining to humour at the ECtHR[63] than in other cases. This trend has been exemplified by numerous decisions[64] in which the dissent has distinguished itself from the 'satirical intent' identified by the majority. For instance, in *Ernst August von Hannover v. Germany,*[65] while the majority held that the 'Lucky Strike' advertisement was intended to be satirical and was also capable of contributing to public interest,[66] the dissent found the advertisement to be commercial in its purpose and intended to mock Hannover and assert that he was violent.[67]

The second of these ways is the controversy around and contestations between national courts and the ECtHR about the presence of 'satirical intent' in the expression. This has been exemplified by numerous cases[68] as well, with the recurring theme in each of them being the differing interpretations of the 'intent' underlying the expression from court to court, and as a consequence of the influence of this interpretation upon the aims and nature of the expression, on its classification. For instance, in *Vereinigung Bildender Künstler v. Austria,*[69] while the Vienna Court of Appeal held that the painting was "not intended to be a parable or even an exaggerated criticism conveying a basic message",[70] the ECtHR held that the "portrayal amounted to a caricature of the persons concerned using satirical elements".[71] Similarly, in *Eon v. France,*[72] in stark opposition to the determination by the domestic courts of the use of the phrase *'casse toi pov'con'* as intended to cause offense, the ECtHR held that the applicant's intention was to "level public criticism of a political nature at the

[60] O'Reilly 2016, p. 240.

[61] Feldmane 2019.

[62] Godioli 2020, pp. 18-19.

[63] Ibid. "*The particularly problematic nature of humor-related cases is confirmed by the simple observation that, out of the 10 rulings under examination, seven feature separate opinions by one or more judges* (*six dissenting and one concurring*)*; and although the corpus is not statistically representative in the broader context of Article 10 rulings, this quantitative finding is remarkable in itself, as it suggests a significantly higher frequency of separate opinions in humor-related cases compared to the ECtHR average of 53%* (*Franck, 2019; an advanced search via the HUDOC database in January 2020 yielded a similar result, with 2317 separate opinions out of 4129 cases*)."

[64] See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007); *Leroy v. France* (App. No. 36109/03) ECtHR (2009); *Palomo Sánchez and Others v. Spain* (App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011); *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015).

[65] *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015).

[66] Ibid. paras. 54, 49.

[67] *Ernst August von Hannover v. Germany* (App. No. 53649/09) ECtHR (2015) Dissenting Opinion of Judge Zupančič.

[68] See, for instance, *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007); *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007); *Eon v. France* (App. No. 26118/10) ECtHR (2013); *Mladina D.D. Ljubljana v. Slovenia* (App. No. 20981/10) ECtHR (2014); *Ziembiński v. Poland (no. 2)* (App. No. 1799/07) ECtHR (2016).

[69] *Vereinigung Bildender Künstler v. Austria* (App. No. 68354/01) ECtHR (2007).

[70] Ibid. para. 16.

[71] Ibid. para. 33.

[72] *Eon v. France* (App. No. 26118/10) ECtHR (2013).

head of State".[73] In *Leroy v. France,*[74] while the domestic courts failed to take the expressor's intent into account, the ECtHR interpreted his intent to be that of support for the violent destruction of the US as opposed to as asserted by him—that of communicating the decline of anti-Americanism through satire.

The third way is the Court's supplementation of 'intent' as a criterion with other highly subjective values to determine whether the restriction on the freedom of expression can be justified under Article 10(2).[75] Given that it has been recognized that satire is inherently offensive,[76] the employment of tests such as that of 'gratuitous offense' or 'incitement to hatred and violence', without a clear definition of their threshold and in the absence of consistent and systematic practice, reinforces the juridical standpoint as being that of 'subjective emotional impact' as opposed to 'objective damage' or 'harm'.[77] This is a worry which is only amplified by the realization that judges continue to perform the task of decision-making in cases pertaining to satire under a garb of authority which belies the absence of a communal understanding of the factors which constitute these subjective expressions.

The fourth way in which the Court has been inconsistent and unsystematic when it comes to the application of 'intent' as a criterion is in its hesitancy to repeat its more expansive understanding of free speech and expression in cases which it finds novel or challenging.[78] While the ECtHR seems to be more comfortable in recognizing expressions as bearing a satirical intention when they are aimed at public figures[79] or accepted 'public values' of importance[80] or can be considered to be 'artistic',[81] it finds expressions aimed at controversial issues or events,[82] at social and moral norms in society,[83] or in labour relations[84] more complex and is cautious in approaching and categorizing these expressions. The subjectivities replete in the process facilitate each of these varied rationalizations, as does the absence of the recognition of specific defences such as that of 'satire'.[85]

5. Destabilizing 'Intent' as a Determinative Criterion in Juridical Encounters with Satire

So far, our interrogation of the use of 'intent' as a determinative criterion in the adjudication of satire has revealed the need for its destabilization, as well as for certain shifts to be marked from

[73] Ibid. para. 58.

[74] *Leroy v. France* (App. No. 36109/03) ECtHR (2009).

[75] Bergeyck 2020.

[76] Feldmane 2019.

[77] Bergeyck 2020; Godioli 2020, p. 20.

[78] Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights,* Human Rights Law Review, Vol. 16, No. 3, 2016, p. 511.

[79] Polymenopoulou 2016, p. 531.

[80] See, for instance, *Kuliś and Różycki v. Poland* (App. No. 27209/03) ECtHR (2010).

[81] See, for instance, *Alves da Silva v. Portugal* (App. No. 41665/07) ECtHR (2010); *Tatár and Fáber v. Hungary* (App. Nos. 26005/08 and 26160/08) ECtHR (2012).

[82] See, for instance, *Leroy v. France* (App. No. 36109/03) ECtHR (2009); *Féret v. Belgium* (App. No. 15615/07) ECtHR (2009).

[83] See, for instance, *Marina v. Romania* (App. No. 50469/14) ECtHR (2020).

[84] See, for instance, *Palomo Sánchez and Others v. Spain* (App. Nos. 28955/06, 28957/06, 28959/06, and 28964/06) ECtHR (2011).

[85] Polymenopoulou 2016.

contemporary judicial practice. The first of these shifts requires concerted efforts on the part of the judges at the ECtHR to develop a shared understanding of humorous expressions and the particularities of the various modes and forms these expressions can take. Such a shift should, ideally, entail interdisciplinarity between law, linguistics, and humour studies, and encourage insights from humour studies and linguistics as potentially informative for the law. Moreover, such a dialogue between disciplines should have as one of its endeavours the goal of equipping and educating judges with a framework which offers them 'an adequate terminology that is grounded in theory'.[86]

The emergence of a shared framework, rooted in theory which can be drawn upon by the judges and parties alike to some extent, shall ensure that theory shall influence the character of the legal standards pertaining to satire due to its capacity to participate in the life of the object.[87] Furthermore, the sites of tension which have been teased out, deliberated upon, and explicated by scholars can provide a starting-point for some of the issues within 'humour regimes', and satire in particular, which can benefit from the application of this shared framework. Most importantly, perhaps, given that the law in any community is considered to be guiding for its members,[88] the shift from the inconsistent and unsystematic practice of the ECtHR to a shared framework shall facilitate a relatively better communal understanding of satire and its permissible limits.

A second shift which is necessitated is that of a movement from the use of a subjective criterion such as 'satirical intent' and, as a corollary, 'offense', to a relatively more objective criterion such as 'harm'. This is imperative for satire, in particular, which due to its characteristics of critique and morality,[89] produces divergent reactions—such that, "no single kind of satire, no matter how prêt-a-porter, can fit all".[90] The reliance on the notion of 'harm' shall facilitate a journey towards curtailment of satirical expressions which seriously undermine "the target's assurance as to a status of equal worth in the community, having regard to the target's knowledge, the speaker's power, and the forum of the expression, at the time it is made".[91]

In traversing to this notion, it is hoped that the ECtHR shall emphasize on whether expressions undermine the dignity of an individual as opposed to the "subjective aspects of feeling, including hurt, shock, and anger",[92] as well as the impact the satirical expression shall have on the reputation of an individual.[93] While the notion of 'harm' is unlikely to be entirely objective, it is fraught with relatively fewer subjectivities. Some of the concerns posed by the 'harm' test include the difficulties

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[86] Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, The Review of Litigation, Vol. 35, 2016, p. 69; Godioli 2020, p. 3.

[87] Margaret Davies, *Ethics and Methodology in Legal Theory a (Personal) Research Anti-Manifesto*, Law Text Culture, Vol. 6, No. 7, 2002, p. 23.

[88] Timothy Endicott, *Law and Language,* Stanford Encyclopedia of Philosophy, 15 April 2016. https://plato.stanford.edu/entries/law-language/ (22 May 2022).

[89] Bergeyck 2020.

[90] Self 2015.

[91] Philippe Yves Kuhn, *Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights*, Human Rights Law Review, Vol. 19, No. 1, 2019, p. 119.

[92] Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press, 2012; Kuhn 2019, p. 129.

[93] Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, American University International Law Review, Vol. 26, No. 1, 2010, p. 212; *Nikowitz and Verlagsgruppe News GmbH v. Austria* (App. No. 5266/03) ECtHR (2007) para. 26. "*The Court notes that the impugned statement speculates on Mr. Eberharter's true feelings about his competitor's accident and suggests, firstly, that he was pleased because he expected to benefit from this incident and, secondly, that he hoped his competitor would be further weakened. The Court acknowledges that such feelings, if actually expressed, would seriously affect and damage any sportsman's good image. However, the Court does not find that the same can be said about this humorous passage, which clearly mentions that Mr. Eberharter made no such statement*."

involved in defining 'harm' as well as the varied interpretations such a term can give rise to. Even more worrying is the possibility for the test to result in the conflation of 'harm' with 'offense',[94] and the failure of the Court to recognize the possibility of hostile messages being conveyed via a subtext[95] which entails a certain degree of subjective interpretation.

While each of these concerns seemingly echoes worries associated with the criterion of 'intent' as well, it is hoped that the communal understanding produced by reference to and reliance upon a shared framework shall be critical in bridging the chasms. Moreover, it is hoped that a transition to the test of 'harm' shall allow for the determination of the aims and nature of the expression (e.g., whether the expression is capable of contributing to democratic debate, whether the expression is governed by the 'humour regime' etc.) to be divorced from and dependent on the 'intent' of the expressor. This shall allow the Court's 'unconditional phrasing'[96] about the imbrication between the two to come unravelled, paving the path for a reconsideration of the worth and place of certain ideas in society.

A third shift which needs to be marked by the ECtHR is that of a movement from contextual defences to the recognition of specific defences for humorous expressions, such as the defence of 'satire'. While Article 10 of the ECHR does not explicitly recognize any defences, the Court has developed jurisprudence on and applied certain defences across its corpus of cases. At present, due to the erratic manner of its use,[97] satire cannot be considered to have crystallized into an acceptable defence.[98] That being said, the plethora of judgments cited in this article as well as the dissenting opinions submitted across several decisions reflect, particularly in the period post 2005, that there is the potential for the Court to recognize specific defences and to operationally benefit from such recognition. Such recognition could be crucial for the Court while undertaking the balancing exercise between competing rights as well as for the kind of margin enjoyed by the States.

Vitally, it also bears attention that there is not a lot to be gained from scholarship, whether developed in the past or emerging at present, which attempts to tailor satirical expressions to a particular format or which by consequence allows for only certain kinds of satirical expressions on certain themes to be permitted into society. Given that "[W]ithout a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy"[99] has been considered to be an undeniable proposition, any scholarship or jurisprudential development which encroaches on or constrains the space for the guarantee must be critically questioned and potentially reconsidered. It is hoped that the proposals for destabilizing and journeying from 'intent' as a criterion put forth in this article will urge a realization of this nature.

6. Concluding Remarks on (the) Irreverence 'Intended'

Our endeavour, in this article, has been to interrogate the suitability of the 'expressor's intent' as a criterion in adjudication pertaining to satirical expressions. An analysis of the conceptualization of the criterion as well as its application to satire, which is a constitutive element of the distinctive 'humour regime', has revealed its several shortcomings. In many ways, the numerous nodes of

[94] Macaitė 2017.

[95] Kuhn 2019, p. 128.

[96] Godioli 2020; Lewis 2017. See, for instance, *Marina v. Romania* (App. No. 50469/14) ECtHR (2020).

[97] *Leroy v. France* (App. No. 36109/03) ECtHR (2009); *Feret v. Belgium* (App No. 15615/07) ECtHR (2009).

[98] Polymenopoulou 2016, p. 531.

[99] Bychawska-Siniarska 2017, p. 11.

subjectivity inherent in or relational to 'intent' have brought forth the realization that perhaps one may only definitively assert that a satirist intends irreverence by "[endeavouring] to hold open the site of judgment, the transitivity of deciding, and [by suggesting] that certainty is not necessarily the most valuable of values".[100]

In paving the path for this realization, satire fulfils its purpose of initiating conversation and inviting deliberation even as it provokes and agitates in the space of the courtroom, which is styled as an authoritative decision-maker due to its reflection of the society as a microcosm of it. It also urges us to confront the need for the destabilization of 'intent' as a determinative criterion in juridical encounters with satire, while cautioning us against alternatives which replicate the very same shortcomings. It is, thus, essential for the ECtHR to make a transition to the relatively objective standard of 'harm', while journeying towards a communal understanding of the specificities of humour.

[100] Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, Michigan Law Review, Vol. 103, No. 3, 2004, p. 512.

Illiberalism and Constitutional Identity. A Critique from a Multilevel Perspective

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As democratic backsliding envelops Hungary and Poland, the legal authority of supranational actors becomes increasingly questioned. Among the legal arguments justifying their insubordination, the two member-states of the European Union (EU) invoke the respect owed to national constitutional identity. The present work aims to prove that the use of constitutional identity as an excuse to overcome the primacy of EU law in the context of the rule of law crisis is unfounded. By approaching EU law from a multilevel perspective, the paper explores the roles, functions, and aims of constitutional identity and advances a theoretical test meant to identify uses of the concept which are compatible with EU law. By applying this test to the constitutional reality of Hungary and Poland, following their democratic backsliding, the paper argues that the language of constitutional identity is misused by the two EU member-states.

Keywords: Illiberalism, European Union, European Constitutional Law, Constitutional Identity, Multilevel Constitutionalism

1. Introduction

With the advent of the post-national constellation,[1] the relations of power between traditional polities often evolve in surprising and divergent manners. As power is transfused from one political entity to another, a multilayered system is starting to take shape, where different powers collide under the question: *Who has the ultimate authority?* Within the process of European integration, this question is tied to the existential doctrine of the primacy of European Union (EU) law which, as developed by the European Court of Justice (ECJ), states that EU law has unconditional precedence and should always be given priority over all conflicting provisions of national law.[2] However, from the perspective of the national polity, absolute primacy is yet to be entirely accepted, as it brings into the spotlight a fragile instrument – sovereignty.

Since the question of the primacy of European law is intimately connected to debates on sovereignty,[3] mapping the concept of ultimate authority implies an exercise of decoding the latter's various

[1] See Jürgen Habermas & Max Pensky, *The Postnational Constellation: Political Essays*, Mass: MIT Press, Cambridge 2001.

[2] Monica Claes, *The Primacy of EU Law in European and National Law*, in Damian Chalmers & Anthony Arnull (Eds.), The Oxford Handbook of European Union Law, Oxford University Press, 2015, p. 178.

[3] M. Elvira. Mendez-Pinedo, *Constitutional Pluralism and Legal Perspectivism in European Union law*, Juridical Tribune, Vol. 10, No. 1, 2020, p. 23.

nuances. However, this exercise may turn rather problematic as European integration runs counter to proven notions of state sovereignty.[4] Via a supranational lens, sovereignty can no longer be regarded as absolute and indivisible,[5] being instead transferred from the nation-state to the Union.[6] Herein lies the crux of the matter. In its constant case law, the ECJ gradually developed the principle of unconditional primacy of EU law within its sphere of conferred powers.[7] Following this approach, traditional literature underlined that primacy precludes conflict since, upon transferring sovereign powers to the Union, the national polity loses its claim to legislate in the respective areas.[8] However, this principle of primacy has never been codified in the founding Treaties of the EU. In the Lisbon rounds, primacy was deleted from the body of the Treaty and transferred to Declaration 17,[9] annexed to its main text. Even though its non-codification should not be seen as a rejection of the principle,[10] the exclusion of a specific provision upholding primacy from the Treaties makes it unlikely for national constitutional courts to accept that EU law prevails over national constitutions.[11] Thus, Member States generally recognize the primacy of EU law, but by virtue of their fundamental laws[12] because, according to national constitutional law, the dominant position is that sovereignty has not been transferred, but is rather being exercised in common within the framework of the EU.[13] Thus, within classical variations of constitutionalism, the final umpire would be either the EU or its Member States.[14]

With the issue of primacy unsettled,[15] the riddle of ultimate authority gradually started to be decoded by a growing scholarship under the umbrella of 'constitutional pluralism', which ultimately views the post-national realm as characterized by an interaction of different suborders within a

[4] Ludger Kühnhardt, *Globalization and the Changing Rationale for European Integration*, in Ludger Kühnhardt (Ed.), European Union - The Second Founding: The Changing Rationale of European Integration, Nomos Verlagsgesellschaft MbH, Baden-Baden 2011, p. 296.

[5] Giacinto della Cananea, *Is European Constitutionalism Really 'Multilevel'?*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 70, No. 2, p. 296.

[6] Damian Chalmers, Anthony Arnull & Takis Tridimas, *The ECJ and the National Courts*, in Damian Chalmers & Anthony Arnull (Eds.), The Oxford Handbook of European Union Law, Oxford University Press, 2015, p. 418.

[7] The already-settled case law of the ECJ over unconditional primacy dates back to the landmark *Internationale Handelsgesellschaft* Ruling (C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle* für *Getreide und Futtermittel*, [EU:C:1970:114]). See also Cases C 6/64, *Flaminio Costa v E.N.E.L.*, [EU:C:1964:66] and C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [EU:C:1978:49].

[8] Mendez-Pinedo 2020, pp. 12-3.

[9] See the 2007 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 2702 UNTS.

[10] Claes 2015, p. 201.

[11] Paul Craig & Gráinne de Búrca, *EU Law, Text, Cases and Materials, Oxford University Press*, 2015, p. 308.

[12] Per Cramér, *Does the Codification of the Principle of Supremacy Matter?*, The Cambridge Yearbook of European Legal Studies 2004-2005, Hart Publishing, 2006, pp. 60-61.

[13] Bruno de Witte, *The European Union as an International Legal Experiment*, in Gráinne de Búrca & Joseph H. H. Weiler (Eds.), The Worlds of European Constitutionalism (Contemporary European Politics), Cambridge University Press, 2011, p. 42.

[14] Thus, the 'Decisive Question' of final authority boils down to the methodological clothing of the actors seeking to address it. In this regard, the ECJ and national apex courts anchor their reasoning in interpretations of either EU law, or national law. Following the German Constitutional Court's (GCC) reasoning in its *Maastricht* ruling (BVerfG, Order of the Second Senate of 31 March 1998 - 2 BvR 1877/97), its authority flows from the national constitution. Conversely, the ECJ rules from the perspective of an increasingly constitutionalized legal space, floating alongside the national legal orders. In this regard, see Theodor Schilling, Joseph H.H. Weiler & Ulrich R. Haltern, *Who in the Law is the Ultimate Judicial Umpire of European Community Competences?* The Schilling - Weiler/Haltern Debate, No. 10, Jean Monnet Working Papers, Jean Monnet Chair, 1996.

[15] Claes 2015, p. 202.

more open, political form.[16] In general, the pluralist discourse sees both state actors and the EU as autonomously rooted sources of constitutional authority, being heterarchically rather than hierarchically related.[17] Therein, as Maduro hints, the question *supra* would remain open as competing claims would be solved dialogically, through judicial cooperation.[18] Thus, following a pluralist approach, one cannot identify strict hierarchical relations between EU and national legal orders, which appear as parallel and complementary.[19]

The two theoretical approaches converge by accepting that the principle of primacy has to be, in most cases, safeguarded. From this rule, transnational constitutional practice gradually developed an 'identity review' of EU acts, meant to leave provisions of EU law inapplicable in areas located closer to the material core of the constitution. In this approach, the argument of a constitutional kernel, essential to the sovereign existence of the national polity, became increasingly popular to resist the absolute primacy envisaged by the ECJ. Under the clothes of this novel brake to competence transfer, constitutional identity began to earn the potential of tool meant to tame the absolute primacy of EU law. However, as 'identity' itself is an elusive and malleable concept, constitutional identity may be prone to abusive uses. Indeed, as Walter[20] shows, constitutional conceptions of identity can be quickly captured by socio-political considerations and recent political practice mirrors this caveat accordingly. Correspondingly, as certain EU Member States, ruled by increasingly illiberal regimes, attempt to resist the primacy of European norms, national constitutional identity becomes a primordial excuse to bend the application of the principle.

In this paper, I attempt to prove that constitutional identity, as a regulator of primacy,[21] is misused by national actors in illiberal EU Member States. Firstly, the paper maps the European legal order by using the theoretical framework of Multilevel Constitutionalism in order present the underlying rationale of the principle of EU law primacy as a tool of European integration. After this conceptualization, I offer a comprehensive analysis of the role and functions of national constitutional identity from a comparative standpoint, leading to its operationalization as a legal argument meant to counterbalance the principle of primacy. Given the diffuse interaction between constitutional identities and the ECJ-based absolute primacy, I will complement the judicial approach with a consistent scholarship review in order to advance a theoretical model of national constitutional identity meant to successfully derogate from the abovementioned principle. Using this test, I will argue that Poland and Hungary misuse the language of constitutional identity, by manipulating the essential features of the concept.

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[16] Nico Krisch, *The Case for Pluralism in Postnational Law*, in Gráinne de Búrca & Joseph H. H. Weiler (Eds.), The Worlds of European Constitutionalism (Contemporary European Politics), Cambridge University Press, 2011, p. 203-204.

[17] Klemen Jaklič, *Constitutional Pluralism in the EU*, Oxford University Press, 2004, p. 21.

[18] Miguel Poilares Maduro, *Three Claims of Constitutional Pluralism*, in Matej Avbelj & Jan Komárek (Eds.), Constitutional Pluralism in the European Union and Beyond, Hart Publishing, 2012, p. 9.

[19] See Merita Huomo-Kettunen, *Heterarchical Constitutional Structures in the European Legal Space*, European Journal of Legal Studies, Vol. 6, No. 1, 2013, p. 51.

[20] Maja Walter, *Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 72, No. 2, 2012, p. 190.

[21] As the following chapters will hint, EU law primacy is not a traditional rule of validity, being instead, as Claes suggests an implicit conflict rule, which authorizes national judges to set aside a national norm which cannot be interpreted as compatible with EU law. See Claes 2015, p. 182. In this light, constitutional identity acts as an interpretative device meant to limit the incidence of EU law over a specific unfolding of facts.

2. Research Design

In developing this paper, I predominantly use a doctrinal method, commonly employed in legal studies to identify specific principles and their underlying rationale. In the case of this article, understanding the European legal order and its foundational philosophy is paramount in defining the role of constitutional identity. Therefore, an interpretative approach is suitable for describing the mechanism of certain principles (such as the primacy of EU law) by reference to existing literature. In this analysis, I use Multilevel Constitutionalism[22] as a reference theory due to its capacity to explain the legal order of the EU in a unique attempt of reconciling national and supranational claims of legal authority. Then, a conceptual discussion around the place of constitutional identity in the supranational legal order presents the concept in light of comparative scholarship and case law. These various approaches in defining the role of the concept build up the proposal for a tree-step test meant to identify a treaty-compliant model of national constitutional identity. Recently, as authors have already pinned similar models meant to identify abusive uses of constitutional identity,[23] I will anchor my test in a multilevel interpretation of the EU constitutional architecture, in order to further nuance the implications of the concept's misuse.

The aim of the paper is to conduct an evaluation of the abusive use of constitutional identity by illiberal actors, having as reference the proposed theoretical test. Therefore, the selected models of the case study are EU Member States which are commonly referred to as illiberal and subject to democratic backsliding. While constitutional identity is an increasingly popular argument among national constitutional courts meant to leave EU provisions inapplicable, Hungary and Poland are the only Member States that have invoked the concept in an exercise of political insubordination. As the EU gradually started to react against some of the measures enacted by the incumbent regimes,[24] constitutional identity became a popular argument in resisting the undertaken legal actions. As such, the context of the argument's usage significantly differs from the already existing comparative case law in other Member States, which address it in more nuanced terms and usually as part of a broader judicial dialogue with the ECJ. Moreover, the contested policies supposedly protected by the identity argument are the result of a 'democratic backsliding' which weakens the institutional balance of the courts as guarantors of the identity's interpretation.[25] On this background, the use of constitutional identity in the two Member States raised serious concerns in legal literature, which prompted some authors[26] to question the very foundations of the concept. Although not meant to advance a counter-critique starting from their arguments, the paper pleads for the legitimacy of

[22] The concept, initially coined as 'Verfassungsverbund' by Ingolf Pernice in 1999, gained a wide attention in international literature under the name of 'Multilevel Constitutionalism'. Throughout the paper, I use the terms 'multilevel constitutionalism', 'Verfassungsverbund' (or simply 'Verbund') and 'composite European constitution' interchangeably. Although the terms are not formally identical and scholarship criticizes the translation of 'Verfassungsverbund' into 'multilevel constitutionalism' (See della Cananea 2010, p. 301), for the purpose of writing this paper, I will consider the notions synonymous.

[23] See, for instance, Scholte's defense of constitutional identity and his proposed three-tiered analysis of the concept's abuse: Julian Scholtes, *Abusing Constitutional Identity*, German Law Journal, Vol. 22, No.4, 2021.

[24] Specifically, the measures targeted the migration crisis in Hungary and the independence of the judiciary in Poland. A more detailed account is provided in Ch. 6, *infra*.

[25] The constitutional courts of Hungary and Poland have been repeatedly described as "packed" with political allies of the governing parties, raising caveats around the coherence of their rulings. See Tímea Drinóczi & Agnieszka Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, German Law Journal, Vol. 20, No. 8, 2019.

[26] See, for instance, Federico Fabbrini, Federico & András Sajó, *The Dangers of Constitutional Identity*, European Law Journal, Vol. 25, No.4, 2019 and R. Daniel Kelemen & Laurent Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, Cambridge Yearbook of European Legal Studies, Vol. 21, December 2019.

constitutional identity as an academic and legal argument for taming the absolute primacy of EU law, by arguing that illiberal uses of national constitutional identity are incompatible with the concept's roles and underlying philosophy.

3. Illiberalism. A Terminological Clarification

Prior to developing the paper, certain coordinates regarding the term 'illiberal', which characterises the subjects of my analysis, have to be established. In this regard, a wide stream of transdisciplinary literature has constantly sought to define the conceptual framework of illiberalism as a political device. However, since the aim of my work is mostly grounded in a legal discussion, I will limit myself to setting a general layout of the concept and its relation to modern constitutionalism. In an early view, *illiberal democracy* was considered to glue formal democratic practices with a disregard for constitutional limits to power and a deficient protection of individual rights.[27] Naturally, as liberalism would imply an effective protection of individual liberty, underpinned by a constitutionalist foundation, illiberalism would appear as an antithetic manifestation of power regulation within the polity, which distorts fundamental checks and balances. Starting from this assumption, the very term *illiberal democracy* seems to be an oxymoron. In fact, Zakaria's original concept of *illiberal democracy* was largely criticized, precisely given that a genuine democracy implies more than just mechanical elections and cannot be decoupled from liberalism, as it recognises the legitimacy of pluralism[28]. More recent definitions would locate illiberalism in the coordinates of populism, (organizational) antipluralism and monism,[29] while giving due attention to the geographical and political space it manifests in.[30] In a broader *ex-negativo* definition, illiberalism is a backlash against today's liberalism's scripts, hinging on a majoritarian, nation-centric and culturally homogenous foundation.[31] As such, pre-modern emotional elements, supposedly suppressed by liberal constitutionalism and the rule of law, are revived within an illiberal regime, which reverses constitutional trends in regulating public authority.[32] Similarly, if the main characteristic of constitutionalism is the legally limited power of the government, neither authoritarian nor illiberal polities can fulfil the requirements of constitutionalism.[33] As such, I will generally refer to illiberalism as a broader notion manipulating pre-modern imaginative elements of social relations, fostered by a loosely regulated power structure, and place the concept in opposition to modern liberal constitutionalism.

[27] Fareed Zakaria, *The Rise of Illiberal Democracy*, Foreign Affairs, Vol. 76, No. 6, 1997, pp. 22-43.

[28] See, for example, Jan-Werner Müller, *The Problem With 'Illiberal Democracy'*, Social Europe, https://www.socialeurope.eu/the-problem-with-illiberal-democracy (29 April 2022) and Gábor Halmai, *Populism, Authoritarianism and Constitutionalism*, German Law Journal, Vol. 20, No. 3, 2019.

[29] Jan Kubik, *Illiberal challenge to liberal democracy. The case of Poland*, Taiwan Journal of Democracy, Vol. 8, No. 2, 2012, pp. 1-11.

[30] See Weronika Grzebalska & Andrea Pető, *The gendered modus operandi of the illiberal transformation in Hungary and Poland'*, Women's Studies International Forum, Vol. 68, 2019, pp. 164-172.

[31] Marlene Laruelle, *Illiberalism: a Conceptual Introduction*, East European Politics, 2022, p. 7.

[32] See András Sajó & Juha Tuovinen, *The Rule of Law and Legitimacy in Emerging Illiberal Democracies*, OER Osteuropa Recht, Vol. 64, No.4, 2018, p. 528.

[33] Halmai 2019, p. 312.

4. Conceptualizing Verbund and Identity

4.1. Beyond Constitutionalism and Pluralism. Verfassungsverbund in the German Constitutional Thought

In the introduction, we have seen how theories such as classical Constitutionalism and Pluralism, drawing on the *Janus*-faced hierarchy and heterarchy of the EU and national legal orders, attempt to tackle the question of ultimate authority. The constitutionalist discourse, revolving around absolute primacy (of EU and national constitutional law, respectively), envisages the European (or national) legal order as a Kelsenian pyramid, with the founding treaties (or national constitutions) as *Grundnormen*, while the pluralist discourse, in its many shades, theorizes the European legal sphere as a heterarchical arrangement, which interlocks the supranational and national legal orders in procedurally equivalent elements that give substance to each other. However, while the former fails to find a consensual balance, the latter lets the conflicting claims of ultimate authority unresolved. Beyond what the two discourses have argued so far, the national and supranational elements can be arranged in yet a different constellation.

In this context, Ingolf Pernice introduces his concept of 'Verfassungsverbund'. Following a post-national understanding of constitutionalism, Pernice[34] argues that the constitution itself may be redesigned as an instrument that can be used to create new institutions on the foundation of existing legal structures. Thus, Pernice fosters the idea that a European Constitution already exists as a composition of the Member States' national constitutions at the foundation, and the EU primary law as a complementary layer.[35] The national constitutions and the European treaties are, therefore, closely interwoven and interconnected in both their institutions and their substantive law.[36] Taking the theory further, Martinico explains the interactions between the supranational and national levels as part of a constitutional *synallagma*, a process of *inter curiae* exchange of rules and practices, fostering integration as constitutional coordination.[37] In this interpretation, the European Constitution is seen as a process rather than as a document.[38] Since the relationship between the two levels is pluralistic and cooperative,[39] this composite European constitution shares the same premise with constitutional pluralism. The difference between the concepts lies in the answer of how to achieve legal unity in this pluralistic legal space[40] or, in other words, how to reconcile the national and supranational levels by answering the question of ultimate authority. Herein lies the ingenious apparatus of the *Verfassungsverbund*. According to the traditional approach to legal hierarchies, as developed by Kelsen,[41] primacy grants validity and application in a vertical order. The superior law validates the subsequent law, thus allowing its application. In the *Verfassungsverbund* however, heterarchy between legal orders on the level of their validity does not necessarily result in

[34] Ingolf Pernice, *Multilevel constitutionalism in the European Union*, European Law Review, Vol. 27, No. 1, 2002, p. 515.

[35] Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, Columbia Journal of European Law, Vol. 15, No. 3, 2009, p. 353.

[36] Pernice 2009, p. 379.

[37] Giuseppe Martinico, *Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma*, German Law Journal, Vol. 8, No. 3, 2007, p. 212.

[38] Martinico 2007, p. 213.

[39] Pernice 2009, pp. 383-4.

[40] Christina Calliess & Anita Schnettger, *The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism*, in Christina Calliess & Gerhard van der Schyff (Eds.), Constitutional Identity in a Europe of Multilevel Constitutionalism, 1st ed, Cambridge University Press, 2019, p. 357.

[41] Hans Kelsen, *Pure theory of law*, University of California Press, Berkeley 1967.

a heterarchy of application, as neither hierarchy of application may imply a hierarchy of validity.[42] According to Pernice, unlike the traditional polity, governed by kelsenian hierarchies of validity, the EU is grounded in a supranational understanding of democracy going beyond the traditional subordination of legal levels.[43] The kernel of the multilevel approach starts from considering legal levels equivalent and ordered not by a static rule of validity, but by a dynamic instrument meant to facilitate the needs of the citizens, which the national polity is increasingly unable to fulfil.[44] Thus, the whole interpretative edifice of the multilevel constitutional system starts from the understanding of the EU from the citizens' perspective. As more recently suggested by Pernice, when viewed as such, the constitutional architecture of the EU ceases to represent a union of abstract states.[45] Instead, because the citizens of the Union are, in the same fashion, citizens of the nation-state, the source of constitutional legitimacy is no longer the monopoly of the latter.[46] Thus, the European citizens are the ultimate masters of the Treaties, and their choice to establish the primacy of EU Law as a tool of supranational governance enables the principle's application ('functional primacy' – limited to the scope of the Treaties).[47] Thus, hierarchy is restricted to the level of application (and not validity), under the form of the primacy of EU law,[48] which, according to this view, does not fit the classical state-revolving theories of legal hierarchy. Instead, EU law is given primacy by a treaty-enshrined right-of-way,[49] connected to the national constitutions of the Member States, which authorize the priority in the application of international instruments.

Accordingly, the Member States and their constitutional courts have acknowledged the primacy of European law even over their national constitutions, but this is not an unconditional primacy.[50] As della Cananea hints, he [Pernice] makes it quite clear that, though a unified Europe now exists, it must not cancel the constitutional identity of the Member States.[51] Therefore, national constitutional structures are integrated into the European composite constitution and, thus, the refusal to apply a provision of European law that is incompatible with their national constitutional identity would not be a violation of the treaty, but an expression of the loyalty between the elements of the *Verbund*.[52] But to prevent conflict in this order, national constitutional claims have to be recognized by both levels in the constitutional composition and must be determined consensually.[53] Thus, the question of where the ultimate jurisdictional claims are located arises again. Following Pernice's multilevel approach,[54] the answer points to Art. 267 TFEU[55] on procedural grounds and through a

[42] Dana Burchardt, *Die Rangfrage im Europäischen Normenverbund. Theoretische Grundlagen und Dogmatische Grundzüge des Verhältnisses von Unionsrecht und Nationalem Recht*, Mohr Siebeck, 2006, p. 381.

[43] Pernice 2015, pp. 547-9.

[44] Pernice 2002, pp. 2-3.

[45] Pernice 2015, p. 543.

[46] Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, Common Market Law Review, Vol. 36, 1999, p. 720.

[47] Pernice 1999, p. 719.

[48] Burchardt 2015, p. 264.

[49] Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, in Armin von Bogdandy & J.ürgen Bast (Eds.), Principles of European Constitutional Law, Hart Publishing, 2010, p. 430.

[50] Pernice 2009, p. 383.

[51] della Cananea 2010, p. 299.

[52] Pernice 2009, p. 64.

[53] Mayer 2010, p. 431.

[54] Ibid.

[55] Art. 267 TFEU provides the legal basis for preliminary ruling requests from the ECJ. From a pluralist perspective, the article provides a legal basis for judicial cooperation in the EU. According to Jóźwicki, this 'sequential model' of adjudication would enable national constitutional courts to issue a referral for a preliminary judgment to the CJEU by interpreting the content of national constitutional identity and describing why it is incompatible with the EU norm

substantive lens, to Art. 4 (2) TEU. In this reading, the ultimate authority would be exercised jointly by the Union, through the ECJ and the Member States, a view which now glides over a consistent practice of constitutional courts addressing preliminary ruling requests to the ECJ.[56]

4.2. A Much Debated and Contested Concept: Constitutional Identity and its Discontents

We cannot get away from identity or identity politics.[57] And, in a similar vein, from identity on matters constitutional. *In nuce* encasing the core principles of a polity's constitution, there is no clear consensus concerning an accurate, all-encompassing definition of the subtitles' subject matter. Throughout American scholarship, constitutional identity is an essentially contested concept as there is no agreement over what it means or refers to.[58] And no trenchant lines can be drawn in Europe either. As some of its critics show, the sources of constitutional identity are difficult to trace, since the concept itself is clouded in uncertainty and arbitrariness,[59] and tied to constitutional subjectivity.[60] With a growing myriad of clashing interpretations, the following paragraphs aim to shed light on the multi-faceted figure of constitutional identity.

In North American literature, constitutional identity is intrinsically tied to historical constitutional evolution, therefore emerging dialogically, as it dissolves commitments that are expressive to a nation's past and determination towards transcending it.[61] In this light, constitutional identity appears as a continuous renegotiation of the interpretation of a polity's constitutional core. Starting from the sociological assumption that identity depends on the dialogical relation with others,[62] Jacobsohn[63] links constitutional identity to the aspirations of the polity, the constant process of their formation, and concessions between these universal commitments and the peculiar nuances of the local socio-political reality. Clothed in a meta-constitutional language, the identity of the Constitution is, thus, subject to social, political, cultural, and religious influence, elements intertwined as part of a 'living tradition'.[64] Since Jacobsohn understands constitutions as embodiments of unique histories and circumstances,[65] his view anchors constitutional identity in the specific legal culture, inside which a given constitution operates.[66] Thus, the concept may be found dwelling in the various legal

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it seeks to leave inapplicable. See Władysław Jóźwicki, *Ultra Vires and Constitutional Identity Control: Apples and Oranges or Two Drops of Water?*, Verfassungsblog, https://verfassungsblog.de/ultra-vires-and-constitutional-identity-control-apples-and-oranges-or-two-drops-of-water/ (1 May 2022), p. 2.

[56] The German Constitutional Court's practice spearheads the developments in the area of judicial dialogue. For a contextual account, see Tímea Drinóczi & Ágoston Mohay, *The Preliminary Ruling Procedure and the identity Review*, in Dunja Duić & Tunjica Petrašević (Eds.) Procedural Aspects of EU Law, Jean Monnet International Scientific Conference, 2017, p. 199.

[57] Franics Fukuyama, *Identity: the demand for dignity and the politics of resentment*, Pearson, London 2018, p. 163.

[58] Michel Rosenfeld, *Constitutional Identity*, in Michel Rosenfeld & András Sajó (Eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 2012, p. 756.

[59] Fabbrini & Sajó 2019, p. 469.

[60] Francesca Strumia & Asha Kaushal, *Opening the Ranks of Constitutional Subjects: Immigration, Identity, and Innovation in Italy and Canada*, German Law Journal, Vol. 18, No. 7, 2017, p. 3.

[61] Gary Jeffrey Jacobsohn, *Constitutional Identity*, Harvard University Press, 2010, p. 7.

[62] Charles Taylor, *The Ethics of Authenticity*, MA: Harvard University Press, 1991, p. 48.

[63] Jacobsohn 2010, pp. 103-117.

[64] One may already notice the transdisciplinary migration of ideas outside European legal literature. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, Third Ed., University of Notre Dame Press 2007, p. 206.

[65] Gary Jeffrey Jacobsohn, *Constitutional Identity*, The Review of Politics, Vol. 68, No. 3, 2006, p. 372.

[66] Elena-Simina Tănăsescu, *Despre identitatea constituțională* și *rolul integrator al Constituției*, Curierul Judiciar, Vol. 5, 2017, p. 244.

cultures of the world,[67] ingrained with the dialogical interaction between other global and local constitutional identities.[68]

Likewise, for Rosenfeld, the making of every constitution is a unique historical event.[69] *A fortiori*, the construction of the constitutional identity implies an organic process of negation and integration of extra-constitutional traditions or, as Tushnet[70] remarks, an application of psychoanalytic theory, whose goal is to explain how a person's past both structures and provides opportunities for present and future experiences. From this perspective, French constitutional identity stems from appropriating an existing language and imposing it throughout the territory of the nation-state to make political deliberation accessible, while, in contrast, German constitutional identity is, *ab origine*, linked to an ethnic understanding of nationhood.[71] Consequently, this view of constitutional identity, originating from the interpretation of an old constitution, historically difficult to amend, naturally focuses on the interpretation of constitutional change, by employing a transdisciplinary methodology. In a world of younger constitutions, gradually integrated into a multilevel constitutional system, the case for constitutional identity lies on different premises.

European legal literature links constitutional identity to the gradual transplant of national sovereign elements in the supranational structure of the EU. Thus, the regional discourse on the identity of the constitution is largely framed in positivist and procedural terms, distancing itself from the emotional constitutionalism of North American literature. Instead of discussing constitutional identity as an emulator of constitutional culture, European legal literature frames it as an *ultima ratio* safeguard of constitutional supremacy. The substantive core of constitutional identity in this discourse is not anchored in meta-legal processes, but in whimsical constitutional provisions, eternity clauses,[72] the preamble of the constitution, or even sub-constitutional texts, whereas the identity-holder does not have a written constitution.[73] Additionally, Drinóczi deduces constitutional identity from the identity of the constitutional subject, as materialized in the name of the constitution, the state, and its inherent symbolism, as well as from the peculiarities of the amendment system and its safeguards.[74] In a similar vein, Varga refers to the *national identity clause* (distinct from Art. 4 (2) TEU) as an implicit all-encompassing constitutional provision meant to emulate peculiar institutions, constitutional traditions, values, and principles.[75] It is perhaps this legal realist approach that would

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[67] Ibid.

[68] Bui Ngoc Son, *Globalization of Constitutional Identity*, Washington Law Review, Vol. 26, No. 3, 2017, p. 467.

[69] Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Routledge, 2009, p. 149.

[70] Mark Tushnet, *How Do Constitutions Constitute Constitutional Identity?*, International Journal of Constitutional Law, Vol. 8, No. 3, 2010, p. 673.

[71] Michel Rosenfeld, *The Problem of 'Identity' in Constitution-Making and Constitutional Reform*, Cardozo Legal Studies Research Paper No. 143, 2005, pp. 7-8.

[72] In European constitutional practice, eternity clauses are the most common markers of constitutional identity. For example, in its *Lisbon* ruling, the German Constitutional Court referred to the eternity clauses of the German Constitution to determine the content of its identity. See BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08, paras. 216-8. Eternity clauses grant absolute entrenchment status to certain constitutional values and rights to ensure that they remain eternal, and are not amended (See Rivka Weill, *Secession and the prevalence of both militant democracy and eternity clauses worldwide*, Cardozo Law Review, Vol. 40, No. 2, 2018). As these provisions seek to prevent eventual authoritarian revolutions, they protect the constitutional core of a polity from subsequent amendments. In this regard, constitutional identity could prove itself an implicit redline for the law-making process.

[73] Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, German Law Journal, Vol. 18, No. 7, 2017, pp. 1605-10.

[74] Tímea Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, German Law Journal, Vol. 21, No. 2, 2020, p. 119.

[75] Attial Varga, *Identitatea Constituțională Națională – Sursă de conflicte sau de soluții? Unele aspecte doctrinare și*

define constitutional identity as a special, constructed identity related to the constitution itself and deduced from constitutional processes.[76]

While the legal-realist approach is dominant in defining the concept, European legal literature doesn't neglect the underlying culture constitutional identity is rooted in. For instance, Belov suggests that constitutional engineering can be complemented by a common socio-cultural experience, thus viewing constitutional identity as based on a mixture of rational and emotional constitutionalism.[77] And certainly, the constitutionalization of national peculiarities implies a deeper understanding of the socio-political realities that gave birth to them. In an incremental democratic process, principles of national identity are constitutionalized through political deliberation, which mirrors their legitimacy. In this respect, constitutional identity would signal "the zenith of national political choice in constitutional design".[78]

Employed by the EU's Member States to justify the retention of certain sovereign attributes, constitutional identity becomes a tool of interpretative arguments,[79] sketching a conceptual instrument of defence.[80] To act as a shield in the face of the supranational law-maker when acting *intra-vires*, constitutional identity has to carefully convey core legal institutions, whose essence is invaluable for the national polity's constitutional architecture. In this sense, constitutional identity conveys a strong message to the EU lawmaker, which has to take into account the core constitutional features of the Member States when designing new legislation.[81] Likewise, the national legal orders may use the argument to counterbalance the incidence of already enacted EU law in areas 'protected' by the constitution's identity. This latter approach generated a significant stream of constitutional case law, which seeks to set limits to the ECJ's absolute primacy doctrine. Based on this practice, Konstadinides observes that states use identity either as a 'shield' (as a legitimate derogation from EU law) or as a 'sword' (as a break to competence transfer using judicial review of EU acts).[82] As further interpreted by Faraguna, states like Germany in its *Solange I* ruling raised soft shields meant to provide an additional layer of protection to human rights provided by the national constitution, while hard shields were used as domestic limits to integration set by constitutional identities.[83] In this denomination, constitutional identities as hard shields and swords are usually unilaterally proclaimed by national actors as limits of integration, while soft shields are used as tools of inter-institutional dialogue. Substantively, national constitutional practice of the EU Member States

jurisprudențiale, in Elena-Simina Tănăsescu & Ștefan Deaconu (Eds.), In Honorem Ioan Muraru - Despre Constituție în Mileniul III, Hamangiu, 2019, p. 457.

[76] Polzin 2017, p. 1603.

[77] Martin Belov, Martin, *The Functions of Constitutional Identity Performed in the Context of Constitutionalization of the EU Order and Europeanization of the Legal Orders of EU Member States*, Perspectives on Federalism, Vol. 9, No. 2, 2017, p. 91.

[78] Ibid. p. 89.

[79] Petr Kucherenko & Elena Klochko, *The Concept of Constitutional Identity as a Legal Argument in Constitutional Judicial Practice*, Russian Law Journal, Vol. 7, No. 4, 2019.

[80] Arnold Rainer, *Constitutional Identity in European Constitutionalism*, 2019, http:// www.constcourt.md/public/files/file/conferinta_20ani/programul_conferintei/Rainer_Arnold.pdf (28 April 2022).

[81] According to Halberstam, constitutional practice outlines certain areas where lawmaking belongs to the final authority of the state and, as such, cannot be infringed by subsequent EU legislation. See Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland!"*, *German Law Journal,* Vol. 10, No. 8, 2009, p. 1251.

[82] Theodore Konstadinides, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, Cambridge Yearbook of European Legal Studies, Vol. 13, No. 1, 2011, p. 195.

[83] Pietro Faraguna, *Constitutional Identity in the EU–A Shield or a Sword?*, German Law Journal, Vol. 18, No. 7, 2017, p. 1629.

used constitutional identity to outline a constitutional kernel immune to the transfer of powers to the EU. For instance, the Czech Constitutional Court argued that the EU could not violate the basic principles of the Czech Constitution.[84] However, few courts expressly defined, or at least indicated the content of constitutional identity. Following judicial and extra-judicial practice on sovereign matters, scholarship referred to constitutional identities as vessels of national sensitive areas, which are left uncovered by the EU law.[85] For instance, Millet[86] sketches French constitutional identity starting from the overarching principle of the egalitarian republic (including, *inter alia*, the distinctive laïcité). Additionally, the double jurisdictional order (judicial and administrative) of the French Republic as a distinctive element of statehood with a strong legal tradition can be considered as an element of constitutional identity.[87] This interpretation leads to the 'distinctiveness' criteria of national constitutional identity. Accordingly, as Van der Schyff infers, constitutional identity ultimately conveys fundamental elements or values of a particular Member State's constitutional order as an expression of its individuality.[88] The next subsection bridges the concept of constitutional identity with the EU legal framework, seen through the lens of multilevel constitutionalism.

4.3. Bridging the Concepts. Constitutional Identity from a Multilevel Perspective

Connecting constitutional identity with EU law is most commonly operationalized through Art. 4 (2) TEU. Drawing its basis from the vague Art. 6 (3) of the Maastricht Treaty, the new Lisbon provision states that "Apart from respecting the Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, the Union shall also respect their essential State functions". A teleological interpretation of the identity clause, starting from its *travaux préparatoires* as designed for the Constitutional Treaty[89] reveals that its drafters wished to broaden the scope of the derogation by wording it in general terms, instead of creating a charter of restrictive competencies held by the Member States.[90] Thus, the Member States have been granted a strong tool at the EU level to protect aspects central to their identity.[91] But Art. 4 TEU only mentions national identity. Even though the discourse of constitutional identity was already highly popular by the time of the drafting, the concept is missing from the Treaty. Drawing on existing legal literature, Advocate General Bot argued in his Conclusionsin *Tarrico II*[92] that the national identity of the Member States certainly includes constitutional iden-

[84] Jiří Přibáň, *Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism*, Journal of Law and Society, Vol. 45, 2018, p. 198.

[85] Thomas Wischmeyer, *Nationale Identität und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven*, Archiv des öffentlichen Rechts, Vol. 140, No. 3, 2015, p. 429.

[86] François-Xavier Millet, *Constitutional Identity in France. Vices and - Above All – Virtues*, in Christian Calliess & Gerhard van der Schyff (Eds.), Constitutional Identity in a Europe of Multilevel Constitutionalism, 1st ed, Cambridge University Press, 2019, p. 147

[87] Millet 2019, p. 149.

[88] Gerhard van der Schyff, *Exploring Member State and European Union constitutional identity*, European Public Law, Vol. 22, No. 2, 2016, p. 226.

[89] Although the Constitutional Treaty was not adopted, the national identity clause as defined by its drafting committee was transferred to the subsequent Lisbon Treaty, cited *supra*.

[90] See the reports of the Fifth Working Group, specifically CONV 400/02, 13 November 2002, http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00400.en02.pdf (22 April 2022) and CONV 251/02, 9 September 2002, http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00251.en02.pdf. (22 April 2022).

[91] Mary Dobbs, Sovereignty, *Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?*, Yearbook of European Law, Vol. 33, No. 1, 2014, p. 334.

[92] Case C-42/17, *Criminal Proceedings against M.A.S., M.B (Tarrico II)*, Opinion of Advocate General M.P. Maduro, [EU:C:2017:564], para. 172.

tity. Similarly, as Faraguna shows,[93] the connection between national and constitutional identity has gradually been taken as a self-evident truth. However, this 'intentionalist' approach has been criticized[94] as Art. 4 (2) TEU precludes the use of constitutional identity since national constitutional courts found their claims on immutable state sovereignty, a theory the ECJ does not endorse, adding that it should be protected instead on different normative grounds.

As seen *supra*, when constructed in an EU legal discourse, the notion of constitutional identity cannot depart from the existential doctrine of the primacy of EU law.[95] In Konstadinides' reading,[96] Article 4 (2) TEU implies that national identity counterbalances the principle of EU law primacy. Therefore, the ECJ pays due respect to the legal traditions and identities common to the Member States as long as constitutional identity retention does not (…) undermine the underlying goals of the EU legal order.[97] In a similar vein, Advocate General Maduro noted in *Michaniki*[98] that "as [Union] law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the [Union] legal order". Consequently, constitutional identity as defined by the Member States deserves protection under EU law only after it is mediated by the EU framework.[99] This reading qualifies Art. 4 (2) as a *Verbundnorm*, a provision meant to allow national orders to permeate EU law in a point of shared normativity.[100] Elevating national constitutional values as general principles of EU Law suggests a reconciliatory Union, which builds its own identity upon these national institutions.[101] Consequently, constitutional diversity is a fundamental value of the Union,[102] for the integrity of which, no constitutional identity can be proclaimed in radical, nationalistic terms.[103]

On the judicial stage, soon after the Lisbon Treaty came into force, the ECJ accepted Austria's arguments that the republican order, fundamental for its constitutional identity, allows the prohibition of nobility titles as a justified measure in restricting the freedoms conferred by Art. 21 TFEU.[104]

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[93] Pietro Faraguna, *Taking Constitutional Identities Away from the Courts*, Brooklyn Journal of International Law, Vol. 41, No. 2, 2016, p. 496.

[94] See Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, Netherlands Journal of Legal Philosophy, Vol. 45, No. 2, 2017, pp. 95-6.

[95] Barbara Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, Yearbook of European Law, Vol. 31, No. 1, 2012, p. 263.

[96] Konstadinides 2011, p. 198.

[97] Ibid. p. 211.

[98] Case C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, Opinion of Advocate General M.P. Maduro, [EU:C:2008:544], para. 33.

[99] Anita Schnettger, *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System*, in Christina Calliess & Gerhard van der Schyff (Eds.), Constitutional Identity in a Europe of Multilevel Constitutionalism, 1st ed, Cambridge University Press, 2012, p. 26. This mediation is not necessarily restricted to Art. 4 (2) TEU. As Faraguna observes, constitutional identities can be brought to a rich extra-judicial dialogue, for example through treaty reservations. Moreover, the discourse may also be found in proceedings based on Art. 7 TEU, under which EU Member States' may have their political power limited if found to be breaching their obligations pursuant to the Founding Treaties. See Faraguna 2016, p. 534.

[100] Schnettger 2019, p. 13.

[101] Sacha Garben, *Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers*, JCMS: Journal of Common Market Studies, Vol. 58, No. 1, 2020, p. 45.

[102] Pernice 2011, p. 221.

[103] Massimo Fichera & Oreste Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, German Law Journal, Vol. 20, No. 8, 2019, p. 1101.

[104] See C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, [EU:C:2010:806].

Although not expressly referring to constitutional identity as stated by the Austrian Government,[105] the Court held that the status of the State as a republic formed part of its national identity, thus intensifying the nexus between national identity and fundamental constitutional principles.[106] However, it is still debatable whether the Luxembourg Court simply followed a previous trend of allowing Member States to derogate from the Treaties by invoking elements of public interest.[107] Afterall, *Sayn-Wittgenstein* was a Market case concerning the fundamental freedoms, where the broader public policy justification played the card of derogation. Nevertheless, an expansive reading of the identity clause suggests constitutional identity would serve as a broader rationale of these justifications.[108] Viewed from an overarching constitutional perspective, the post-Lisbon judgment mirrors the innovation brought by the new identity clause which, as noted by, renders a constitutionalization of national identity,[109] by weakening its historical and cultural references. In the light of the *Verfassungsverbund*, Art. 4(2) TEU provides a legal basis that links national constitutional law to EU law and forms a building block of the composite constitutional structure of the Union.[110] Thus, Wischmeyer shows that, through constitutionalization, principles that have been recognized by the citizens as part of their order are worthy of protection in the *Verbund*.[111] Upon being accepted by the supranational polity, constitutional identity becomes a platform meant to negotiate normative principles, and not a *norme de résistance* meant to abusively leave EU norms inapplicable.[112] Therefore, as both the EU and its Member States should partner in applying constitutional identity as a limitation to primacy, the next section sketches a test meant to identify patterns of identity compatible with the scope of Art. 4 (2) TEU as a valve of power regulation in the composite European constitution.

5. Drawing the Baselines of a Treaty-compliant Model of National Constitutional Identity

Any discussion over constitutional identity in a Union of multilevel constitutionalism ultimately leads to the challenge of successfully employing it as an exception to the principle of the primacy of EU law. As detailed in the last section, the TEU would allow, in theory, derogations based on constitutional identity supposedly certain formal and substantive requirements are met. Following the multilevel constitutional approach, I consider these requirements to be distinctive constitution-

[105] Throughout its case law, the ECJ refrains from directly addressing the matter of constitutional identity. Given the connotation of the concept in several national courts' case law, it was suggested that answering constitutional identity questions could be seen as a gateway to undermining the primacy of EU law. See Robbert Bruggeman & Joris Larik, *The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity*, Utrecht Journal of International and European Law, Vol. 35, No. 1, 2020.

[106] Armin Von Bogdandy & Stephan W. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, 2011, pp. 1424-1425.

[107] See Cases C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, [EU:C:1989:599] and C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmnH v. Oberbürgermeisterin der Bundesstadt Bonn*, [U:C:2004:614].

[108] Ágoston Mohay & Norbert Tóth, *What's in a Name? Equal Treatment, Union Citizens and National Rules on Names and Titles, Vienna Journal on International Constitutional Law*, Vol. 11, No. 4, 2017, p. 600.

[109] Faraguna 2017, p. 1620.

[110] Certainly, as Von Bogdandy and Schill argue, not every provision of domestic constitutional law forms part of a Member State's constitutional identity as art. 4(2) TEU only covers basic domestic constitutional features, provisions which otherwise coincide with the constitutional limits to the primacy of EU law domestic constitutional courts developed. See Von Bogdandy & Schill 2011, p. 1431.

[111] Wischmeyer 2015, pp. 431-432.

[112] Ibid. p. 460.

alization, democratic legitimation and supranational validation.

Firstly, for national constitutional identity to be integrated as a joint element in the composite European constitutional order, the former has to *a priori* imply a constitutionalization[113] of essential national institutions which mirror the selfhood of a legal culture.[114] In my reading, this criterion requires a Member State's constitutional identity to be located in normative procedural and substantive coordinates. For detailing the former, one may refer to the *triad of constitutionalization* advanced by Moser and Rittberger,[115] namely the markers of democratic scrutiny by parliaments, judicial review by courts, and classical governance standards, such as transparent decision-making[116] in designing legal institutions. Conversely, de-constitutionalization implies a weakening of the elements of the triad,[117] thus signalling an inconsistent normative sedimentation of the values encompassed by a given constitutional identity. From a substantive point of view, constitutional identity has to protect an element of national constitutionalism.[118] But since not every legal institution is encompassed by constitutional identity, I complement this requirement by the 'distinctiveness' criteria, which identifies certain elements as indispensable to the polity's constitutional culture.[119] In this reading, constitutional identity is a normative tool meant to protect selective legal institutions which are the result of a gradual constitutionalization of national socio-cultural elements. Because the *Verbundnorm* ensures a degree of constitutional diversity, only institutional aspects which are unique and distinctive for the Member States may complement the constitutional structure of the Union.

Secondly, as the citizens' opinion-making lies at the conceptual foundation of the *Verbund*, these national institutions have to reflect a collective agreement. Thus, from the view of a citizens'-perspective constitutionalism, incremental legitimation of legal traditions is paramount in justifying their protection when colliding with supranational constitutional engineering. In my reading, this condition mirrors a supranational transfer of legitimacy, as paramount elements of the polity's constitutional imaginary are the result of a timely validated tradition. In a Habermasian sense, the citizens of the Union are justified in having an interest in their respective nation-states continuing to perform their proven role as guarantors of law and freedom also in their role as EU Member States.[120] *A fortiori*, it becomes evident that constitutional identity itself has to be legitimated by the members of the national polity. As Drinóczi shows,[121] constitutionalizing collective identity is the result of exercising popular power by the national citizens, who recognize a freedom-guaranteeing constitutional instrument as their own.[122] Similarly, as Belov remarks,[123] constitutional identity is a

[113] See, for instance, Wischmeyer 2015, pp. 431-432, Faraguna 2017, p. 1620, and Drinóczi 2020, p. 117.

[114] van der Schyff, 2016, p. 226.

[115] See Carolyn Moser & Berthold Rittberger, *The CJEU and EU (De)Constitutionalization - Unpacking Jurisprudential Strategies*, SSRN Electronic Journal, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805923 (13 June 2022) p. 4.

[116] In the authors' reading, this process overlaps with existing definitions of the rule of law. See Moser & Rittberger, 2021, pp. 4-5.

[117] Ibid. p. 5.

[118] Scholtes also suggests that constitutional identity has to be located in a broader normative picture. As such, the concept cannot be detached from a shared European constitutional understanding. See Scholtes 2021, pp. 551-552.

[119] The emphasis on the *material core* of the constitution is highlighted in national case law as well. See the *Decision of the Czech Constitutional Court of Nov. 26, 2008*, Pl. ÚS 19/08: Treaty of Lisbon I, para. 85.

[120] Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, European Journal of International Law, Vol. 23, No. 2, 2012, p. 345.

[121] Drinóczi 2017, p. 117.

[122] Wischmeyer 2015, p. 432.

[123] Belov 2017, p. 79.

bearer of democratic legitimacy, as it expresses a transgenerational consensus of the political community. The relevance of constitutional identity as an emulator of collective social identity may be further explained by reference to the French Constitutional Council's 2006 Decision.[124] The ruling suggests that a directive cannot run counter to French constitutional identity *unless authorized by the constituent power,*[125] thus signalling the ultimate importance of the polity's citizens in regulating the flow of constitutional authority. As such, constitutional identity as an expression of the citizens' will to institutionalize cardinal elements of municipal culture can be waived solely by the same holder of constitutional authority.

Finally, national constitutional identity should not depart from a shared meaning of constitutionalism which glues the multilevel structure together. In order to properly connect constitutional identity to the *Verbund*, its definition in national law has to be validated by the EU, through judicial (Art. 4(2) as *Verbundnorm*) and extra-judicial (treaty opt-outs and Art. 7 procedures) channels of dialogue. Following the multilevel approach, (judicial) dialogue is indispensable in defining and validating constitutional identities as safeguards of national constitutional primacy. As such, the proposed test is essentially filtering illiberal uses, as it requires an incremental process of legitimation of certain institutions which are central for the polity's constitutional imaginary. The next subtitle argues that the use of constitutional identity amidst the rule of law crisis in Hungary and Poland does not mirror any of the test's criteria.

6. Discussing the Limits of Constitutional Identity

Employing abusive constitutional practices,[126] populist parties from Central Europe managed to gain majoritarian positions in their countries' parliaments and soon started to enact policies standing at odds with classical virtues of constitutionalism.[127] Building on identity politics, the narratives promoted by Hungarian and Polish political majorities hinge on the *othering* of Western liberal Europe.[128] In turn, institutional *othering* results in an apparent *constitutionalization* of populist nationalism,[129] a rhetoric which can now formally legitimate legislative action. This value fragmentation also allows the two Member States to grant national constitutional identity an illiberal clothing. Following new, more daring claims of the concept, several voices[130] started to question and even

[124] French Constitutional Council, *Decision no. 2006-540 DC of 27 July 2006*.

[125] Ibid. para. 19.

[126] See David Landau, *Abusive Constitutionalism*, University of California, Davis, Vol. 47, 2013, p. 195.

[127] The subject of capturing state institutions by populist parties has been widely covered in legal literature. For a comprehensive analysis in the case of Hungary, see Gábor Halmai, *The Evolution and Gestalt of the Hungarian Constitution*, 2019, https://me.eui.eu/gabor-halmai/work-in-progress/ (24 April 2022) and Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper No. 18/01, SSRN Electronic Journal, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 (24 April 2022) for Poland.

[128] Chrisopher Bridge, *Chapter 1. Orbán's Hungary: The Othering of Liberal Western Europe*, in Jan Chovanec & Katarzyna Molek-Kozakowska (Eds.), Discourse Approaches to Politics, Society and Culture, John Benjamins Publishing Company, 2017, p. 39.

[129] See Drinóczi & Bień-Kacała 2019, p. 1156. However, as outlined *supra*, illiberalism and constitutionalism are divergent concepts, thus constitutionalizing pre-modern elements appears as an oxymoron. Nevertheless, given the incorporation of certain pre-political elements in the Constitution's preamble, one may ascertain a formal constitutionalization of illiberal discourse.

[130] See Gábor Halmai, *Abuse of constitutional identity: the Hungarian constitutional court on interpretation of article E) (2) of the fundamental law*, Review of Central and East European law, Vol. 43, No. 1, 2018, as well as Fabbrini & Sajó, 2019 and Kelemen & Pech cited *supra*.

call for abandoning the identity discourse. In the recent years, Hungary used constitutional identity amidst its concerns over migration, while Poland pioneered a shy identity review meant to protect the organization of the judiciary against the ECJ's 'negative integration' over the rule of law. My analysis, thus follows the metamorphosis of the concept in the two Member States' constitutional practice, following their democratic backsliding. After a brief legislative context, I test Decision 22/2016 of the Constitutional Court of Hungary[131] (CCH) and its subsequent case law, as well as two novel rulings of the Polish Constitutional Tribunal[132] (TK), together with the Polish Government's ambiguous references to the concept amidst the Art. 7 TEU procedures in 2018 against the benchmarks of the test.

6.1. Hungary

The constitutional landscape of Hungary witnessed a profound shift in 2011, with the occasion of a new Fundamental Law (FL), enacted in a suspiciously short period which prompted international observers, such as the Venice Commission, to question its drafting legitimacy.[133] The FL seemingly reorients the Hungarian constitutional imaginary towards a pre-political understanding of nationhood,[134] while abolishing some constitutional traditions such as the *action popularis* and creating an 'inferior' standard for the protection of fundamental rights.[135] However, the FL does not radically depart from the aspirations of modern constitutionalism, as it establishes principles such as the separation of powers, the rule of law and popular sovereignty, as well as imports the former 1989 Constitution's commitment to European integration,[136] fortified by a uniform constitutional practice, which does not reflect the metamorphosis of the FL.[137] By striking a balance between national and European commitments,[138] the FL appears as an admixture of "traditional nationalism and contemporary constitutionalism".[139]

For Hungary, 2015 saw the highest number of migrants ever reaching the country, with asylum requests multiplying manifold[140]. Even though many of these claims were abandoned, as most of the applicants left the country a few days later, the Hungarian state used 'mass migration' as a justifi-

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[131] See *Decision 22/2016 of the Constitutional Court of Hungary*, 5 December 2016.

[132] See *Decision K-3/21, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, 7 October 2021 and *Decision P-7/20*, 14 July 2021.

[133] Venice Commission, *Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session*, Venice 17–18 June 2011, http://www.venice.coe.int/webforms/documents/?pdf=CDL%282011%29058-e (30 April 2022) p. 23.

[134] Zsolt Körtvélyesi & Balázs Majtényi, *Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary*, German Law Journal, Vol. 18, No. 7, 2017, p. 1734.

[135] Nóra Chronowski, Márton Varju, Petra Bárd & Gábor Sulyok, *Hungary: Constitutional (R)Evolution or Regression?*, in Anneli Albi & Samo Bardutzky (Eds.), National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, T.M.C. Asser Press, 2019, p. 1441.

[136] Nóra Chronowski and Erzsébet Csatlós, *Judicial Dialogue or National Monologue? The International Law and Hungarian Courts*, ELTE Law Journal, Vol. 1, 2013, pp. 8-9.

[137] Chronowski et al 2019, p. 1440. See, also, Decision 2/2019 of the CCH, which accommodates the application of EU law as a sui generis legal order, distinct from international law, in the 'retained sovereignty' doctrine.

[138] Ferenc Hörcher, *The National Avowal*, Politeja, Vol. 17, 2011, p. 35.

[139] Timothy William Waters, *The Undignified Part of Constitutional Analysis - Gábor Attila Tóth (ed.): Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law (Budapest, CEU Press2012) ISBN 978-615-5225-18-5.*, European Constitutional Law Review, Vol. 10, No. 2, 2014, p. 373.

[140] Boldizsár Nagy, *Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation*, German Law Journal, Vol. 17, No. 6, 2016, p. 1035.

cation for introducing emergency measures to protect the sovereignty and cultural identity of Hungary.[141] Following a Ceasarean logic aimed to curb pluralism,[142] Orbán's *Fidesz* gradually started to institutionalize a new political *Weltanschaaung*, revolving around an ethno-centric understanding of nationhood. As part of this process, culminating in a failed attempt of the ruling party to amend the constitution which would embed pre-political values in Hungary's constitutional identity, the CCH reconsidered an "abandoned petition" of the Ombudsman that challenged implementation a Council Decision meant to relocate refugees to Hungary.[143] In theory, the Ombudsman argued Hungarian law provided superior protection to the rights of the asylum-seekers in comparison to EU law, but in fact, the validity of the Council Decision was questioned by reference to the constitutional identity of Hungary. In Decision 22, the CCH asserted that, while it cannot review EU law, exercising joint competences meets two limits: sovereignty and constitutional identity[144]. Thus, in a tone reminiscent of *Solange I*, the CCH positioned itself as the holder of ultimate authority, by arguing that the FL ensures superior protection of human dignity, a fact which *prima facie* might signal a legitimate use of constitutional identity. However, even though mentioning cooperation and dialogue in its decision, the CCH did not even consider requesting a preliminary ruling from the ECJ,[145] a silence which suggests the absence of an invitation to dialogue and, thus, the absence of a subsequent validation from the supranational polity. Instead, the Hungarian Court unilaterally invoked Art. 4 (2) TEU as a ground for derogation based on constitutional identity described as a dynamic list of achievements of Hungary's historic constitution.[146]

The 'historic constitution', a concept introduced by the FL is interpreted to sum various laws and customs that ensured freedoms and provided guarantees for the institutional functioning of the Kingdom of Hungary.[147] To explain the term, one should refer to a *huge corpus* of secondary literature in Hungarian legal history, over which there is no consensual opinion concerning what it exactly conveys.[148] These documents are intrinsically tied to the 'Holy Crown' doctrine, which has been described as encasing a mystic membership, opposed to constitutional patriotism.[149] However, albeit its pre-modern connotations, the concept could be permeated by liberal conceptions, which allowed reconfigurations of the political system.[150] Therefore, the preamble meant to decode the Hungarian constitutional identity conveys a chain of ambiguous references to history. However, as della Cananea points out, giving due respect to constitutional identities does not necessarily implthat pre-existing identities and ties of both a national and a local nature are immutable.[151] Instead, as seen *supra*, to deserve protection as elements of the composite European constitutional structure, identities have to convey legal principles, detached from their national (*i.e.* cultural) connotations, through a process of constitutionalization, compliant with democratic safeguards, specifically to

[141] Kriszta Kovács, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, German Law Journal, Vol. 18, No. 7, 2017, p. 1712.

[142] Rorbert Sata & Ireneusz Pawel Karolewski, *Caesarean Politics in Hungary and Poland, East European Politics*, Vol. 36, No. 2, 2020, p. 11.

[143] Halmai 2018, p. 30. The term "abandoned petition" is borrowed from Halmai.

[144] Decision 22/2016, para. 54.

[145] Ágoston Mohay & Norbert Tóth, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law*, American Journal of International Law, Vol. 111, No. 2, 2017, p. 473.

[146] Ibid. para. 56.

[147] Ivett Császár & Balázs Majtényi, *Hungary: The Historic Constitution as the Place of Memory*, in Markku Suksi, Kalliope Agapiou-Josephides, Jean-Paul Lehners & Manfred Nowak (Eds.), First Fundamental Rights Documents in Europe, 1st ed, Intersentia, 2015, p. 62.

[148] Hörcher 2011, p. 28.

[149] Kovács 2017, p. 1715.

[150] Császár & Majtényi 2015, p. 62.

[151] della Cananea 2015, p. 299.

the rule of law. The constitutional identity referenced by Decision 22/2016 fails to express such a process, being instead pictured in an illiberal view.

Yet, regardless of its cosmetic historicism, the application of the FL by reference to the case-law of the CCH shows the rather weak practical significance of the preamble. For example, in 2018, an applicant before the CCH specifically referred to Christianity and family values as mentioned by the National Avowal in determining the status of Sunday as a rest day. Even though the petition was dismissed on formal grounds, a dissenting opinion shows that, even though the Christian element allowed the recognition of Sunday as a day of rest, this factor plays no definitive role today as the state secularized its meaning.[152] Furthermore, even though the value of human dignity is given a communitarian interpretation by the National Avowal,[153] the CCH gave a positivist reading of the principle, arguing that establishing that legal gender recognition and related name change is a fundamental right of transgender persons is part of the principle of human dignity, as understood by the Hungarian state, giving no clue toward a Christian understanding which, according to some authors would signal an 'exclusive' constitutional identity.[154] Moreover, in Decision 477/2021, the Court subtly suggested a liberal interpretation of the National Avowal. The case concerned the aftermath of C-808/18[155] in the context of the national law not allowing third country nationals to wait inside Hungary while their asylum applications were processed. The CCH interpreted the right to human dignity as an overarching principle of the FL and encased in Hungary's constitutional identity. Then, the Court assessed the principle by reference to the achievements of the 'historic constitution', this time referencing a poignant piece of history, namely St. Stephen's admonition to his son Imre, read in a rather 'liberal' key.[156] Consequently, the CCH postulated the state's obligation to ensure the human dignity of all the persons staying on Hungary's territory, regardless of their legal title, or the lawfulness of their stay.[157]

It, therefore, seems that Decision 22/2016 is an isolated example of constitutional interpretation, with no effects concerning an eventual derogation from EU law, being rather a simulation of legal insubordination. The reasoning standard stands in stark contrast with the GCC's identity and ultra vires review. Firstly, the variable list of the 'historical constitution's' achievements is open to the CCH's interpretative liberty, while the GCC's identity review is limited to the German Constitution's eternity clauses, thus putting the coherence of the identity argument at the whim of the Court's discretion. Moreover, although mentioning a GCC-inspired *Europafreundlichkeit*, the CCH is more willing to maintain a lively dialogue with the governing parliamentary majority than with ECJ.[158] To sum up, in Bakó's words,[159] the CCH "just tries to follow the 'bold rebel' GCC, without

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[152] Miklós Könczöl & István Kevevári, *History and Interpretation in the Fundamental Law of Hungary*, European Papers – A Journal on Law and Integration, Vol. 5, No. 1, 2020, p. 172.

[153] Katalin Egresi, Katalin, *Role of the Holy Crown Doctrine and 'Historical Constitution' in the Hungarian Constitutionalism*, Studia Juridica et Politica Jaurinensia, Vol. 1, 2014, p. 17.

[154] Kovács 2017, p. 1719.

[155] See C-808/18, *Commission v Hungary*, [EU:C:2020:1029].

[156] See Decision X-477/2021, p. 17 and Scheppele's account of the reasoning. Kim Lane Scheppele*, Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament, VerfBlog,* 2021/12/21, https://verfassungsblog.de/escaping-orbans-constitutional-prison/ (2 May 2022). Although not directly cited by the Decision, the Admonition illustrates the Court's intentions tellingly: "*For a country of one single language and one set of customs is weak and vulnerable. Therefore, I enjoin on you, my son, to protect newcomers benevolently and to hold them in high esteem so that they should stay with your rather than dwell elsewhere."*

[157] X-477/2021, p. 19.

[158] Beáta Bakó, *The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires and Fundamental Rights Review in Hungary*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 78, 2018, p. 898.

[159] Bakó 2018, p. 901.

having the same weapons, and without realising the difference between the situations".

6.2. Poland

In Poland, the identity argument's career was born out of the governing party's entanglement with the independence of the national court system. The reforms of the judiciary established, along with the lustration of the Supreme Court justices, a political subordination of the National Judiciary Council[160] (NCJ; a technocratic organ that usually has its leading members elected from the ranks of the judiciary and has the role to oversee the proper functioning of the court system) and the establishment of a special disciplinary chamber within the Supreme Court[161] (meant to facilitate executive pressure over the judiciary). As the organization of the judiciary is an exclusive competence of the Member States, the EU cannot, at least following classical harmonization measures, interfere with its national variations. However, following the increasingly criticized reforms of the governing Law and Justice party (PiS), ordinary judges started to challenge the allegedly abusive measures vis-à-vis the general principles of EU law. With the ECJ opening the gates of what may be described as a 'negative integration' based on the rule of law in *ASJP*[162], the Polish ordinary courts began to pierce the smokescreen of the exclusive competence discourse, by supplying the ECJ with arguments to extend the newly created rule of law standard of art. 19 TEU to the constitutional crisis in Poland. Unsurprisingly, the ECJ answered the call in a stream of case law which uses a constellation of primary law provisions as standards of negative integration.[163]

However, prior to the Court's intervention, the Commission's own commitment to the rule of law resulted in an activation of the Art. 7 TEU procedure. On this background, the Polish Government started to sketch the first usage of constitutional identity. Essentially, the state's agents don't picture a detailed account of the identity argument in the context of the constitutional crisis. As the procedure unfolded before the ECJ's avant-garde *ASJP* ruling, the Government centred its defence around the "exclusive competence" discourse, with constitutional identity being a rather futile addition, backed by limited arguments. Similar to the CCH, the Polish Government referenced[164] existing *Lisbon*-like constitutional case law on the matter of identity, as well as pre- and post-*Lisbon* rulings on Art. 4 (2) by the ECJ. However, the specific application of the Polish constitutional identity is only mentioned in para. 207 of the white paper[165] presented with the occasion of the Art. 7 proceedings. In the memorandum's wording, the concept allows the reforms of the judiciary to "be assessed solely at the national level by competent authorities", thus suggesting an overarching con-

[160] Sadurski 2018, p. 38.

[161] For an overview of the Chamber's history, see Katarzyna Gajda-Roszczynialska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, Hague Journal on the Rule Law, Vol. 12, 2020, p. 463.

[162] The *ASJP* ruling (C-64/16, *Associação Sindical Dos Juízes Portugueses*, [EU:C:2018:117]) is reminiscent of the ECJ's *Cassis de Dijon* jurisprudence, which extended the application of an Internal Market rule beyond the standard of art. 34 TFEU. See Aistė Mickonytė, *Effects of the Rule-of-Law Crisis in the EU: Towards Centralization of the EU System of Judicial Protection*, Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Vol. 79, No. 4, 2019, p. 831.

[163] For a broader discussion over the ECJ's daring quest of consolidating the rule of law within the EU, see Laurent Pech & Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (May 20, 2021). SIEPS, Stockholm, 2021-3, SSRN Electronic Journal, 2021, https://ssrn.com/abstract=3850308 (25 March 2022).

[164] See Polish Government's *White Paper on the Reform of the Polish Judiciary*, 17 March 2018, https://www.statewatch.org/media/documents/news/2018/mar/pl-judiciary-reform-chanceller-white-paper-3-18.pdf (23 April 2022).

[165] Ibid. para. 207.

stitutional identity gliding over the entirety of the national court system. Furthermore, according to the Government, constitutional identity enables the arbitrary change of the NCJ's leadership's composition, as "tensions between the executive and the judiciary are natural for any democratic state".[166] But it was ultimately the Polish Constitutional Tribunal (TK) which undertook the role as a guardian of the Republic's constitutional identity.

Before the events of 2015 which led to the constitutional crisis, the TK highlighted the *axiological convergence* between European and Polish law, which embrace the same sources of inspiration in constructing their identities.[167] This interpretation creates the premise of a constitutional identity conveying values worthy of protection in the *Verbund* – such as the system of democratic governance and observance of human rights.[168] Yet, the analysis of the constitutional reality following the events in 2015 leads to the conclusion that the content of these values is hollowed out by the mechanism of ordinary legislation and political practice.[169] Indeed, from a procedural standpoint, the National Council of the Judiciary was subordinated by means of ordinary legislative action and, substantively, it was justified by a selective[170] and formalistic[171] reading of the Constitution. In the white paper, the Government made no reference to the values encompassed by the Polish constitutional identity. Instead, one such value referenced to in the earlier case law of the Constitutional Tribunal – the separation of powers – has been deliberately ignored in justifying the reforms of the judiciary.[172] Moreover, the arguments trying to use Art. 4 (2) TEU as a justification for the reforms were further rejected by the ECJ,[173] which argued that "although the organization of justice in the Member States falls within their competence, when exercising that competence, Member States are required to comply with their obligations deriving from EU law, particularly the independence of the judiciary". However, the ECJ's ruling is not the result of a judicial dialogue with the TK as an overseer of constitutional identity, but a result of a preliminary ruling request raised by the ordinary courts. Furthermore, as the new legislation regulating the Council ignores the voices of the Polish judges' positions as reflected by several bills presented to the Parliament,[174] the requirement of popular legitimacy seems to be absent as well if constitutional identity would be supposed to procedurally justify this measure.

The saga of the Disciplinary Chamber allowed a more detailed use of constitutional identity. As the ECJ stated its new form's incompatibility with the requirements of Art. 19 TEU,[175] the TK issued a mirror-ruling arguing against the primacy of EU law over matters pertaining to the judiciary. Specifically, the TK linked the organization of the Polish judiciary with the constitutional identity

[166] White Paper 2018, para. 207.

[167] See Case K-32/09, *Judgement of 24 November 2010*, para. 28.

[168] Ibid. para. 26.

[169] Miroslaw Wyrzykowski, *Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland*, Hague Journal on the Rule of Law, Vol. 11, No. 2-3, 2019, p. 418.

[170] Stowarzyszenie Sędziów Polskich 'Iustitia', *Response to the White Paper Compendium on the Reforms of the Polish Justice System, Presented by the Government of the Republic of Poland to the European Commission*, 2018, https://www.statewatch.org/media/documents/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf (30 April 2022) para. 9.

[171] Marcin Matczak, *The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defense*, Hague Journal on the Rule of Law, Vol. 12, No. 3, 2020, p. 433.

[172] Tomasz Tadeusz Koncewicz, *Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe*, Verfassungsblog, 2017/7/19, https://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/ (27 April 2022).

[173] See Case C-824/18, *A.B. and Others (Nomination des juges à la Cour suprême - Recours)*, [EU:C:2021:153].

[174] Iustitia 2018, para. 11.

[175] See ECJ, Case C-791/19 *Commission v Poland*, [EU:C:2021:596].

argument, referencing broader constitutional rules and principles.[176] Thus, it appears the Tribunal circumvents the ECJ's negative integration rationale, by inferring the latter is exercising competences Poland did not transfer.[177] In fact, the ECJ is drawing fundamental principles in a functionalist manner. The judicial independence standard of art. 19 stems from the necessity to ensure that only independent bodies qualify as courts in 267 TFEU – fashion, being thus entitled to engage in the preliminary ruling procedure. The EU does not assume a competence to regulate the national judiciaries, but conveys that an arbitrary exercise of the Member States' exclusive competences may ricochet in the effectiveness of EU law.[178] As such, the TK's approach reframes constitutional identity as a basic 'sovereign' carve-out exception, tied to a broad legal realm which would ensure its intangibility from the ECJ's reach.[179] P-7/20 echoes other recent constitutional courts' decisions which tie the identity argument to the organization of the judiciary. In Decision 390/2021, the Romanian Constitutional Court (RCC) reached a similar conclusion. Specifically, the identity referenced by the RCC isolates the organization of the judiciary as a sovereign discretionary power of the law-maker.[180] In its more recent K-3/21 ruling, the Tribunal went further in broadening the horizons of the Polish constitutional identity. Confirming the Prime Minister petition,[181] the TK established the right of the President to appoint judges as an element of the constitution's identity. Moreover, as speculated in P-7/20, the Tribunal extended the primacy of the Constitution over EU law in its entirety, making the 'identity' argument redundant, eventually returning the case law to the early days of integration, when sovereignty itself was postulated as an implicit limit of EU law.

As such, the TK's usage of constitutional identity implies the concept is gliding over a broader interpretation of the 'rule of law' as a constitutional principle. Aside from the questionable composition[182] of the TK affecting its legitimacy as a constitutional actor and its refusal to use Art. 267 TFEU as a gateway to dialogue, one can hardly trace a specific institution referenced by the Tribunal's reasoning. This expansive interpretation stands, however, at odds with the elective nature of the 'identity' argument. In other words, the Tribunal's definition of constitutional identity shifts the focus from any particular institution to a broader category of judicial organization. Likewise, the TK's reasoning, specifically in K-3/21, departs from the GCC's practice. Whereas the Karlsruhe Court accepts the primacy of EU law over the German Constitution, the TK postulates a 'blanket primacy' of the Polish Constitution, while isolating itself from judicial dialogue with the ECJ.[183] Even if framed in a technical constitutional discourse over the conferral of powers, the TK's identi-

[176] P-7/20, para. 204.

[177] Ibid. para. 145.

[178] See Matteo Bonelli & Monica Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses*, European Constitutional Law Review, Vol. 14, No. 3, 2018, p. 631.

[179] Throughout the early Market integration phases, Member States have historically relied on an implicit 'sovereignty exception' supposedly enshrined by the Community Treaty which would shield national measures related to direct taxation from EU law, albeit discriminatory. The Court challenged this conception in the landmark *Avoir Fiscal* case (C 270/83, *Commission of the European Communities v. French Republic*, [EU:C:1986:37]), leading to a wave of case law testing the compatibility of national direct tax regimes with the principles undergirding the Internal Market. See Servaas van Thiel, *The Direct Income Tax Case Law of the European Court of Justice: Past Trends and Future Developments*, Tax Law Review, Vol. 61, 2008, p. 146.

[180] See Decision 390/2021, published in the Romanian Official Gazette, No. 612 of 22 June 2021, para. 85.

[181] See Polish Prime-Minister's motion to the Constitutional Tribunal regarding EU Treaties conformity with the Polish Constitution (case K 3/21), comment available at: https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/ (1 May 2022).

[182] See European Court of Human Rights: *Xero Flor w Polsce sp. z o.o. v. Poland* (Application no. 4907/18), ECHtR (2021).

[183] Alexander Thiele, *Whoever equates Karlsruhe to Warsaw is wildly mistaken*, VerfBlog, 2021/10/10, https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/ (28 April 2022).

ty review fails to nuance the boundaries of the 'identity' argument and its interrelation with EU law. If one were to frame the interactions of the EU and Polish legal order in a multilevel perspective, the TK disables its built-in dialogic dimension by proclaiming a radical supremacy of the constitutional order, at the expense of the Union's guiding principles.

7. Conclusion

Constitutional identity is a multi-dimensional concept, around which a rich and fruitful academic debate began to flourish in the last decades. Recent turbulent events, such as those in Hungary and Poland ignited a hazardous search of political agents for legal justifications when confronted by international bodies in regards to rule of law issues. On this background, constitutional identity was detached from its natural evolution as a normative tool for dialogue between the national and supranational polities, and weaponized by populist state actors. My contribution further nuances the predicament that 'institutional capture' does not drastically change the constitutional identity of a Member State, which, moreover, as seen from the EU's perspective, incorporates parts of a shared European identity.[184] By applying the proposed test to the constitutional realities of Hungary and Poland, one may reach a similar conclusion. As both Hungary and Poland gradually departed from a shared premise of modern constitutionalism by veering toward an illiberal model, constitutional identity became an entrancing justification for counterbalancing the application of the Union's efforts to impose its authority amidst this upheaval.

The findings of my work hint that, when viewed from a pluralistic perspective (more specifically, following the basic premises of Multilevel Constitutionalism), the usage of constitutional identity as a jurisprudential limit of primacy, is for the most part mishandled by illiberal Member States' actors. Specifically, the CCH and TK's relevant rulings easily escape the multilevel reading of the 'ideal' interplay between the national and EU legal orders. Firstly, the identity referenced by the CCH in Decision 22/2016 sketches a radical interpretative model, tied to a seemingly historicist understanding of constitutionalism, which, in light of the FL's adoption procedure, could hardly be seen as stemming from a coherent will of the constituent power. However, as the subsequent case law of the CCH departed from this initial statement of force, one may argue that even the elusive 'historic constitution' as the conceptual anchor of Hungary's constitutional identity can be seen as allowing modern interpretations which depart from an illiberal view. From the Polish perspective, the Government and the TK, likewise building on contested legislative measures, created a broad definition of constitutional identity, which negates its fundamental nature as an elective argument meant to shield *specific* institutions from the ambit of EU law. However, the common issue with the approach followed by the two constitutional courts is the tacit refusal to engage in judicial dialogue. Thus, what may be considered the foundational mechanism of Multilevel Constitutionalism – the dialogical interaction of constitutional actors – is downplayed in favour of a sort of "judicial Manicheism",[185] where constitutional identity becomes a magic formula meant to preclude Member

[184] Nanette Neuwahl & Charles Kovacs, *Hungary and the EU's Rule of Law Protection*, Journal of European Integration, Vol. 43, No. 1, 2021, p. 24.

[185] One may even re-theorize constitutional identity as a tool of political contention. The over-arching definition given by the CCH in 2016 prompted governmental actors to claim a victory against an antagonized Union. For instance, PM Viktor Orban's words soon after Decision 22/2016 entered the public debate are illustrative in explaining the role of constitutional identity as a discursive tool of contention: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty". See HGV.hu, *Brüsszel meg akarja szüntetni a rezsicsökkentést*, 2 December 2016, http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel (30 April 2022).

States from complying with EU law. However, recent constitutional practice shows signs that even a 'packed' court has the potential of conserving the normative aspirations of modern constitutionalism.

As the ECJ gradually acknowledged the legitimacy of constitutional identity as a limitation of primacy,[186] the multilevel constitutional reading of Art. 4 (2) TEU invites constitutional courts to submit their own interpretations of the concept via the preliminary ruling procedure. While the CCH has already created a stirring conceptualization around the 'historic constitution', future usages of Hungarian constitutional identity should, perhaps, follow a more *Europafreundlich* dimension by using Art. 267 TFEU as a gateway towards a validation of its claims. While the present case law of the TK is more problematic vis-à-vis the elective nature of constitutional identity, the *Lisbon* decision might serve as a starting platform for a coherent identity review, which takes into account specific constitutional values or institutions. However, whether the CCH will project its poetic constitutionalism in new colours, or the TK will return to its case law and redesign its identity review in a GCC-styled fashion, it remains for the two courts to follow the path of dialogue and answer the question of *ultimate authority* harmoniously.

[186] See the findings of the ECJ in C-156/21 *Hungary v. European Parliament*, [EU:C:2022:97].

The CJEU Partially Excludes Bulgaria from Taking Part in Judicial Cooperation – an Absolute Order or a Balancing Act? The *Gavanozov II* Case

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The European Investigation Order is a judicial decision issued for gathering evidence located abroad. Directive 2014/41/EU establishing the European Investigation Order applies the usual toolbox for giving effect to the principle of mutual recognition. The EIO majorly contributed to the system of judicial cooperation in criminal matters between Member States since it managed to extend the application of the principle of mutual recognition to investigative measures as well. This clearly increases the efficiency of cooperation. While the EIO Directive has the potential to hamper the protection of fundamental rights – as any legal instrument based on the principle of mutual recognition in the field of judicial cooperation -, arguably, it will indirectly contribute to the strengthening of the status of the individual in the EU since it provided the Court of Justice of the European Union with jurisdiction to rule on preliminary questions regarding questions of protecting fundamental rights in the investigation phase of the criminal procedure. One such example – and the first at that – is the Gavanozov cases where the CJEU took a road which was seemingly less travelled in its previous case law and excluded Bulgaria from issuing certain kinds of EIOs for the protection of the individual.

Key words: principle of mutual recognition, principle of mutual trust, European criminal law, European Investigation Order, procedural safeguards, right to an effective legal remedy

1. Introduction

Scholars have already pointed out that the European Investigation Order (hereinafter referred to as EIO) may have far-reaching consequences for the protection of fundamental rights.[1] It is a procedural legal instrument based on the principle of mutual recognition, aiming to enhance judicial cooperation between Member States in criminal matters, specifically in the phase of investigation.[2] As such, it necessarily has a nature of constricting human rights to a certain extent.[3] This could be

[1] Inés Armada, *The European Investigation Order and the Lack of European Standards for Gathering Evidence*, New Journal of European Criminal Law, Vol. 6, No. 1, March 2015 p. 18; Andrea Jánosi, *Az európai nyomozási határozat előzményei és vívmányai.* Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica 2015. p. 216; Krisztina Karsai, *Emberi jogok védelme és az európai nyomozási határozat,* Rendészet és emberi jogok, Vol. 3, No. 3, 2012. p. 27.

[2] Council and European Parliament Directive 2014/41, OJ 2014 L 130/1, Recital 7.

[3] As demonstrated in the case law guide of the ECtHR, during the investigation, evidence may be gathered againts the

observed in the *Gavanozov I* and *II* cases brought before the Court of Justice of the European Union (CJEU) as well.[4] In this annotation, I argue that the CJEU continued its line of cases that started with the *Aranyosi* and *Caldararu* joined cases, and set out another standard of protection of fundamental rights – namely, one that is applicable in the investigation phase. Such a standard is a very welcome addition to the law of the EU's Area of Freedom, Security and Justice- In addition, the *Gavanozov II* case shows us that the CJEU once again drew on the case law of the European Court of Human Rights (hereinafter referred to as: ECtHR)which results in the further approximation of their practice.

2. Factual and Legal Background of Gavanozov I and II

Both cases brought before the CJEU were initiated based on a criminal procedure against I. D. Gavanozov, a Bulgarian individual who was accused of committing tax offenses in a criminal organisation. He was suspected of having imported, via shell companies, sugar into Bulgaria from other Member States, and of subsequently having sold that sugar on the Bulgarian market without assessing or paying value added tax. The accused forged documents according to which that sugar had been exported to Romania in an attempt to cover his conduct constituting the offenses.[5] In order to collect evidence located abroad, the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria) decided to issue an EIO requesting the Czech authorities to execute searches of home and business premises and seizure of certain items.[6] However, the Bulgarian court also decided to initiate a preliminary ruling procedure before doing so, since it found that the Bulgarian implementation of the EIO directive does not allow for challenging the substantive reasons of issuing an EIO if it concerned the above-mentioned investigative measures.[7]

In the *Gavanozov I* case, its question referred to preliminary ruling concerned if the Bulgarian implementation of the EIO directive precluding legal remedies challenging the substantive reasons of issuing an EIO in case of certain investigative measures (e.i. the search of home and business premises, the seizure of items and the hearing of witnesses) is in line with Art. 14 of the Directive concerning legal remedies. The Bulgarian judge also inquired whether Art. 14 of the Directive grants to the concerned party the right to challenge the court decision issuing an EIO, even if such a procedural step is not provided by national law.[8] The underlying issue is that the Bulgarian implementation regulates legal remedies regarding the EIO much like legal remedies provided in a similar domestic case, where the Criminal Procedure Act does not allow to challenge the issuing of any kinds of investigative measures but just a constricted number of them.

It is clear that the above-mentioned investigative measures necessarily violate – or rather constrict – the right to respect for the private and family life of persons involved in the criminal procedure. However, such limitation of that fundamental right must further a legitimate aim, must be proportionate to the aim of the criminal procedure and must be necessary in a democratic society.[9]

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person's will who is subject to the investigative measure. See: Jeremy McBride, *Human Rights and Criminal Procedure. The case law of the European Court of Human Rights,* Council of Europe, 2018. p. 9.

[4] Case C-324/17 Gavanozov I, [EU:C:2019:892]; Case C-852/19 Gavanozov II, [EU:C:2021:902].

[5] Case C-324/17 Gavanozov I, paras. 10-11.

[6] Case C-324/17 Gavanozov I, para. 12.

[7] Case C-324/17 Gavanozov I, para. 14.

[8] Case C-324/17 Gavanozov I, para. 16 (1)-(2).

[9] For a thorough analysis of the necessity and proportionality requirements, see: ECtHR *Guide on Article 8 of the European Convention on Human Rights.* 2021. https://www.echr.coe.int/documents/guide_art_8_eng.pdf (4 April 2022)

Fulfilling these requirements is safeguarded by the right to effective legal remedy in cases when the intrusion of state actions into the private life of concerned persons is of a considerable nature capable of having adverse effects as well.[10]

It is clear, that an effective legal remedy is lacking in the case in question. This is not a Bulgarian speciality. The Hungarian transposition of the directive also applies the same rule on legal remedies regarding the issuance of an EIO. It only allows to challenge the lawfulness of issuing an EIO if the investigative measure requested in it could be challenged in a similar domestic case.[11] Thus, it also provides a somewhat limited scope of legal remedies in comparison to the scope of the EIO (however wider than its Bulgarian counterpart).[12] This brings us to the rather problematic conclusion that the right to legal remedies against the issuing of an EIO is of a varying nature according to which Member State issued it.

3. Judgement of the Court – Gavanozov I

Thus, the assignment for the CJEU was clear. It needed to decide whether the Bulgarian transposition is contrary to the Directive. Moreover, indirectly, the Court's judgement would have also defined the scope of legal remedies provided in the EIO Directive. However, the Luxembourg court avoided doing so in the *Gavanozov I* case by reformulating the question referred to it. Instead of delivering a judgement on whether the Bulgarian transposing legislation was in line with the directive, it decided that the referring court's question concerns Section J of the form where the available legal remedies do not need to be indicated if recourse to them did not take place.[13] Nevertheless, it should be noted that Advocate General Bot considered such national legislation transposing the EIO directive to be in violation of Art. 47 of the Charter (a Fundamental Rights), the right to an effective legal remedy.[14]

4. Comments on Gavanozov I

After a closer look at the case-law of the CJEU, it does not come as a surprise that the CJEU avoided answering the question. Since the principle of mutual recognition has only been applicable during the phase of criminal investigations for a couple of years by the time it needed to deliver the preliminary ruling in the *Gavanozov I* case (that is from 23 May 2017 to 24 October 2019), it did

pp. 12-13.

[10] This is underpinned by the nature of the right to an effective legal remedy, it being a complementary tool which can only be violated if a state action constricting human rights cannot be challenged. See: ECtHR *Guide on Article 13 of the European Convention on Human Rights.* 2021. https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf (4 April 2022) p 8.

[11] Act CLXXX of 2012 on Criminal Cooperation between EU Member States §§ 50(1), 58(1).

[12] The Hungarian transposition of the EIO refers to the Criminal Procedure Act regulating legal remedies in connection to contesting investigative measures ordered in an EIO. The Act provides the possibility to challenge procedural measures only if they are issued in the form of an order. These procedural measures do include the search of home and business premises and the seizure of property; hence the scope of legal remedies is wider in the Hungarian criminal procedure than in the Bulgarian criminal procedure. See: Act XC of 2017 on the Criminal Procedure §§ 362(1), 369, 374.

[13] Case C-324/17 Gavanozov I, paras. 25, 38.

[14] Case C-324/17 Gavanozov I, Opinion of Advocate General Bot, delivered on 11 April 2019, [EU:C:2019:312] para. 82.

not yet establish case law on the underlying issue. Given the fragility of the system of criminal co-operation between Member States, based on the principle of mutual recognition, it is possible, that the Court saw an option for avoiding the need to – once again – provide a balancing act between the protection of fundamental rights and the efficiency of criminal cooperation and took it.

Of course, the CJEU could have looked for inspiration in the case law of the ECtHR which dealt with a rather similar issue in a series of cases.[15] Among these cases, a landmark decision was delivered in *Posevini v. Bulgaria*[16] with a quite similar underlying criminal procedure where the same investigative measures have been applied. The defendants turned to the Strasbourg court since searches of their homes and business premises as investigative measures could not be challenged according to the Bulgarian Criminal Procedure Act.[17] The ECtHR found that such legislation violates the right to an effective remedy.[18] This is an obvious indication that the right to an effective legal remedy would be violated in the *Gavanozov* case, at least compared to the standards set out by the ECtHR.

5. Gavanozov II – a Slightly Modified Question

Since the CJEU avoided answering the question referred to it in the *Gavanozov I* case, the Bulgarian court initiated another preliminary ruling procedure with a slightly different question in the beginning of 2020:

'Is national legislation which does not provide for any legal remedy against the issuing of a European Investigation Order for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41/EU and with Articles 47 and 7 of the Charter (of Fundamental Rights), read in conjunction with Articles 13 and 8 of the ECHR?

Can a European Investigation Order be issued under those circumstances?'

While the *Gavanozov II* case was pending, I speculated in a previous annotation,[19], that the CJEU could arrive at two different conclusions. First, taking inspiration from the case law of the ECtHR, it could have found that the Bulgarian legislation indeed violated the right to an effective remedy. I also speculated that such a decision would have provided the possibility to apply the fundamental-rights-rejection-clause provided in the directive (note that according to the latest case law analysis regarding the legal instrument provided by the Eurojust in 2020, this rejection clause has yet to be applied).[20] However, such a preliminary ruling would have indirectly accepted the fact that criminal justice systems of Member States are unequal since the underlying issue is – as I have already

[15] As we have seen recently, the CJEU does not shy away from even directly relying on ECtHR case law to fill gaps in EU law, as witnessed for instance by the judgment in Case 128/18 Dorobantu [EU:C:2019:857] For analysis of this aspect see Ágoston Mohay, The Dorobantu case and the applicability of the ECHR in the EU legal order, Pécs Journal of International and European Law, Vol. 5, No. 1. May 2020, pp. 86-87.

[16] *Posevini v Bulgaria* (App. no. 63638/14) ECtHR (2017).

[17] Ibid. para. 3.

[18] Ibid. As already explained, this specific fundamental right's violation may be found in the context of violating another fundamental right, *e.g.* the right to respect for private life. Cf. footnote 10.

[19] István Szijártó, *The implications of the European Investigation Order fort he protection of fundamental rights in Europe and the role of the CJEU.* Pécs Journal of International and European Law, Vol. 7, No. 1, June 2021, pp. 66-72.

[20] Eurojust: *Report on Eurojust's casework in the field of the European Investigation Order*, 2020. https://www.eurojust.europa.eu/publication/report-eurojusts-casework-field-european-investigation-order (22 March 2021) p. 36.

referred to it – the varying nature of legal remedies provided by each Member State. Although significantly less probable, I anticipated, that the CJEU could have also found that the Bulgarian implementation of the directive was insufficient since it does not always provide the possibility to challenge the substantive reasons for (the lawfulness of) issuing the EIO which is stipulated in Art. 14(2) of the EIO directive. The latter assumption is in the judgement of the CJEU in the *Gavanozov II* case stating that Article 14 of the Directive merely sets out an equivalence clause. Article 14(2) of the Directive, stipulating that the substantive reasons of issuing an EIO can only be challenged in the issuing state, read in conjunction with the equivalence clause, cannot oblige Member States to provide additional legal remedies to those that exist in a similar domestic case.[21]

6. The Judgement of the Court in Gavanozov II

Essentially, the Court delivered a judgement which is in line with the AG's opinion,[22] i.e. the lack of legal remedies against the ordering of investigative measures applied in the underlying case indeed violates the right to an effective legal remedy as laid down in the Convention and the Charter and elaborated in the case law of the ECtHR.[23] Hence, national legislation which does not provide for any legal remedy against the issuing of an EIO, the purpose of which is the carrying out of searches and seizures as well as the hearing of witness by videoconference is precluded.[24]

However, a much more important questions was how to reconcile a situation where the national law violates the right to an effective legal remedy (or any other fundamental right) with the system of criminal cooperation based on the principles of mutual recognition and mutual trust. I speculated that this could open the possibility to apply the fundamental-rights-rejection-ground of the EIO.[25] However, the AG as well as the Court went further in this regard. In his opinion, AG Bobek argued that the full responsibility of finding the unlawfulness of an EIO cannot rest on the executing Member State. On the contrary, the issuing Member State must make sure that its legislation is in line with the standards of protection of fundamental rights as derived from the Convention, the Charter and the case law of the ECtHR. Failing that should exclude the Member State in question from taking advantage of the system of judicial cooperation in criminal matters.[26] In its judgement, the Court also noted that issuing an EIO for the purpose of carrying out investigative measures which cannot be contested is *a fortiori* in violation of fundamental rights. Consequently, the application of the fundamental-rights-rejection-ground in the EIO directive would become automatic in such cases – a practice which would not be compatible with the principles of mutual trust and sincere cooperation, and the very nature of the rejection ground itself, which is devised to be applied on a case-by-case and exceptional basis.[27]

To resolve this contrast between the above-mentioned principles and the national legislation which does not uphold the standards of protection of fundamental rights, the CJEU concluded that an EIO ordering investigative measures which cannot be contested according to the national legislation of

[21] Case C-852/19 Gavanozov II, para. 26.; Advocate General Bobek also notes that a grammatical and taxonomic interpretation of Article 14 of the Directive leads to the conclusion that the equivalence clause binds both the issuing and the executing Member States. See: Case C-852/19 Gavanozov II, Opinion of Advocate General Bobek delivered on 29 April 2021, paras. 32-38. [EU:C:2021:346] .

[22] Ibid.

[23] Case C-852/19 Gavanozov II, para. 34.

[24] Ibid. para. 50.

[25] Szijártó 2021, p. 69.

[26] Case C-852/19 Gavanozov II, AG Opinion, paras. 89-91.

[27] Case C-852/19 Gavanozov II case, para. 59.

the issuing Member State cannot be issued at all.[28]

7. Comments on Gavanozov II

By excluding the possibility to issue an EIO which orders the carrying out of investigative measures, the lawfulness of which cannot be contested, the Court seemingly adopted a very different approach from the line of cases concerning the protection of fundamental rights starting with the *Aranyosi* and *Caldararu* joined cases. Instead of a balancing act, it could be perceived that the Court delivered an absolute order where there is no place for correction. However, after taking a closer look, it is arguable that this was its only option, since the wording of the Directive did not allow space for finding that the Bulgarian transposing legislation is in breach of EU law. Even if we assume that the Bulgarian transposing legislation could be modified so it would provide a legal remedy against the issuing of an EIO, without modifying the national legislation, it would result in a situation where persons subject to an investigative measure ordered in an EIO are better protected than persons subject to investigative measures carried out in purely national criminal procedures.

In addition, the fact that the EIO in question is *a fortiori* in breach of the right to an effective legal remedy makes the reconciliation procedure (one that would be similar to the *Aranyosi* test) obsolete in terms that the very nature of the violation of the fundamental right results in a situation which cannot be mitigated since its based on the Bulgarian criminal justice system. Last, but not least, the possibility to turn to a mitigating procedure like the *Aranyosi* test is still available in the fundamental-rights-rejection-ground which should be applied only on an exceptional basis as emphasised by the Court.

In conclusion, the effects of the judgement of the Court in the *Gavanozov II* case have the potential to be far-reaching. It sets a substantial standard of protection of fundamental rights in connection to criminal cooperation in the phase of investigation, i.e. that Member States are obliged to provide legal remedies to persons subject to investigative measures even if that measure is considered less restrictive of fundamental rights, such as the hearing of witnesses.[29] By excluding Member States from taking part in judicial cooperation in criminal matters – an exclusive club, so to say – if their legislation does not uphold this, or other standards of protection of fundamental rights, the Court created a forceful stimulus for those Member States to modify their criminal justice system – hopefully – resulting in the overall strengthening of the status of the individual in the criminal procedure.

Taking into consideration the legal issues which could be encountered in the process of judicial cooperation in criminal matters – including the one introduced in this annotation –, minimum harmonisation of the core concepts and instruments of criminal procedure seems more important than ever. The *Gavanozov* cases demonstrate that minimum harmonisation is needed regarding the right to legal remedies both in terms of the EIO and investigative measures on a national level. Such harmonisation could take place under Art. 82(2)b) TFEU providing a legal basis to adopt directives harmonising the rights of the individuals in the criminal procedure, beyond those already adopted on certain procedural aspects.

[28] Ibid. para. 62.

[29] Case C-852/19 Gavanozov II case AG Opinion, para. 97.

Book review

Petra Lea Láncos: The Many Facets of EU Soft Law

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The concept of soft law has intrigued legal researchers for many decades. It is a concept that is perhaps most often associated with international law, though even the origins of the term are not fully certain.[1] Soft law is however also a factor in the autonomous supranational legal order of the European Union, although the EU is much more known for its 'hard' legislative competences and occasionally even a tendency to 'overregulate.' However, soft law is also enshrined in the EU legal order at various levels – some of the EU's competences are 'soft-ish' to begin with, and secondary EU law may take the form of non-binding opinions and recommendations.

Yet the status and relevance of – and various actors' reliance on – EU soft law is far from being a simple issue. In her monograph entitled 'The Many Facets of EU Soft Law',[2] Petra Lea Láncos undertakes to provide a thorough and multifaceted analysis of EU soft law.

The monograph starts by taking stock of existing research on the subject – this literature review makes it clear that there is a definite need for a systematic examination of EU soft law. But why adopt soft law in the first place? What good is the law if it is not 'hard'? The author answers these obvious but difficult questions by analysing the underlying strategies of adopting non-binding norms in the EU. Láncos delves into the depths of the legal nature of both formalized (i.e., enshrined in Article 288 TFEU) and non-formalized soft law, giving insight into how the Member States, EU legislative bodies, and the Court of Justice of the EU utilize soft law – and providing quite illustrative examples, predominantly from the field of EU media law. CJEU case law is further analysed in light of the practical effects of soft law, where the bottom line of the Court's approach seems to be that measures that are not legally binding can nevertheless not be regarded as having no legal effect at all. This view partly overlaps with the 'spectrum approach' mentioned in the monograph as well.[3]

The author devotes considerable attention to the strange case of what she calls 'directive-like recommendations', which, regardless of their non-binding nature, often proclaim a desire of implementation. As a case study, the Hungarian legislative approach to these measures is also analysed, representing an added value, especially for non-Hungarian researchers. The Hungarian case study is further followed up in the chapter dealing with the use of EU soft law in the member states. That chapter also offers an insight into the 'reception' of soft law in specific policy fields such as

[1] Cf. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, European Journal of International Law, Vol. 19, No. 5, 2008. pp. 1075–1093, who debates whether the term can indeed be traced back to Lord McNair, as many believe.

[2] Petra Lea Láncos, *The Many Facets of EU Soft Law*, Pázmány Press, 2022.

[3] See, e.g., Lorne Sossin – Chantelle van Wiltenburg, *The Puzzle of Soft Law*, Osgoode Hall Law Journal, Vol. 58, No. 3, 2021. pp. 623-668. and Láncos 2022, pp. 14-15.

competition policy, focusing on fining policies for anti-competitive conduct in a number of selected Member States. The monograph concludes with the findings on this latter topic, emphasizing among other things that spontaneous approximation as a gap-filling method will no doubt continue in the context of the ECN+ Directive.[4] The monograph contains no additional concluding chapter, something the analysis could have benefitted from by brining together the various strands of analysis explored throughout the book.

Overall, the monograph is a welcome addition to the relatively scarce research on soft law in the EU legal order and can be recommended to anyone aiming to gain deeper knowledge on this subject. With a firm grip on both theory and practice, Petra Lea Láncos's work can be useful for not only academics but practitioners as well.

[4] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ 2019 L 11.

Alexis Heraclides and Gizem Alioğlu Çakmak (Eds.): Greece and Turkey in Conflict and Cooperation. From Europeanization to de-Europeanization

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The volume "Greece and Turkey in Conflict and Cooperation. From Europeanization to de-Europeanization" by edited by Alexis Heraclides and Gizem Alioğlu Çakmak is part of the series Routledge Advances in European Politics.[1] The editors are professors of international relations and social science.

The book aims to provide a comprehensive overview of Greek-Turkish relations, presenting the political scene, historical stereotypes as well as the controversial issues which burden the bilateral cooperation between Greece and Turkey (such as the Cyprus problem, the dispute over the Aegean or minority issues). At the same time, it considers the historical dimensions, which are crucial and essential to understanding the actual political dynamics. The authors emphasize why these issues remain contentious despite the efforts made in the past years.

Besides the introduction, the book is divided into three parts, and it is composed of fifteen chapters dealing with different aspects of Greek-Turkish relations. All contributions contain a short conclusion in the end.

In the introduction, the reader receives a broad overview of the conflicting areas in Greek-Turkish relations, including the Cyprus issue, nationalism or cultural differences. The author presents the various periods of the Greek-Turkish relations and concludes that despite the high hopes of normalisation in the first decade of the 21st century, pessimism has emerged on both sides since 2016. Furthermore, the introduction highlights the most relevant areas of cooperation, namely in the fields of energy policy, the economy, civil society, migration and relations with the European Union, which are less controversial areas in the relationship of Greece and Turkey. It is important to mention that even though energy policy can create some level of cooperation, keeping in mind its geopolitical angle, it can easily create competition or rivalry as well. The role of the European Union is also complex, as indeed it served as a constructive catalyst in Greek-Turkish relations – at least until Turkey's accession process was progressing.

The first part of the book, called "International theory and perceptions/misperceptions" provides an appropriate overview of the institutionalist international relations theories and Greek-Turkish relations. It highlights that recent conflicts in the bilateral relations challenge not only Europeanization perspectives but also institutional theories in international relations, referring to the dispute over the Aegean and the escalatory rhetoric perceivable in recent years. In principle, the European Union and other international institutions are supposed to generate mutual trust and peaceful solutions, but in the case of Greek-Turkish relations one can argue that analysts overestimate the impact of the European Union and disregard the domestic conditions. The accession process to the European Union would raise expectations of the transformative power on

[1] Alexis Heraclides & Gizem Alioğlu Çakmak, *Greece and Turkey in Conflict and Cooperation. From Europeanization to de-Europeanization,* Routledge, 2019.

both member and candidate states, creating among other things a security community. In this case the European Union failed to moderate the mutual mistrust and threat perception in an appropriate way. At the same time, it facilitated numerous civil society connections, inter-societal collaboration and transformed the relations by the early years of 2000. The book emphasizes the fact, that the relations did not immediately deteriorate following the growing tensions linked to the Cyprus issue. This also proves that Turkey was committed to improving its relationship with Greece in order to propel the accession process forward. However, the chapter called "Back to the future: institutionalist international relations theories and Greek-Turkish relations" highlights that Turkey's confidence as an emerging power and weakening membership prospects in the 2010s, undermined its commitment to the EU membership and resulted a slowdown in fulfilling all the criteria in the accession process. The book examines the national identities, narratives and perception. While for Greece Turkey is a danger (military, security), Turkey sees Greece rather as an irritant (especially in diplomatic influence level), than a real threat. The first part of the book concludes that the relations are in a need of a drastic paradigm shift.

The second part addresses "the traditional disputes" between the two countries and examines the problems and prospects. The dispute over the Aegean remains an unresolved issue, despite several attempts at a settlement and involving tangible interests. The situation has worsened considerably since 2016, as one can witness incidents on a weekly basis. The conflict is quite complex including disputes over the Aegean continental shelf, the breadth of the Greek territorial sea, the breadth of the Greek national airspace, the demilitarization status of the Eastern Greek islands, the sovereignty of Imia/Kardak islets and the rights and obligations linked to the Athens Flight Information Region. The book mentions that the non-resolution is also related to the Cyprus issue and the mutual fears regarding the "real aim" of the other side. Due to the fundamental demographic inequalities, establishing a political equality is extremely difficult. The chapter dedicated to the Cyprus issue examines in detail the Cyprus stalemate and demonstrates opportunities for peace and lessons from the Turkish-Bulgarian ethnic relations, which is unusual in the Turkish/Greek/Cypriot context.

This part also explores the impact of reciprocal minorities and the mutual minority protection. Negative measures taken against minorities were not only based on minority issues, but also on the broader Greek-Turkish conflict. Hence, minorities are vulnerable to the general Greek-Turkish relations. The chapter on Greek and Turkish reciprocal minorities concludes that reciprocity is a highly controversial point, which determined the minority provisions set in the Treaty of Lausanne. The chapter titled "The Ecumenical Patriarchate under Patriarch Batholomew and Greek-Turkish relations" provides many interesting pieces of information, for example, data on the shrinking Greek Orthodox minority in Turkey and state of Muslims in Greece. Undoubtedly, the European Union had a significant role in the modernization of Turkey and was seen as a powerful force until 2005. Churches have a special role in international relations and could be described as "soft power", therefore this part finishes with demonstrating the international role of the Ecumenical Patriarchate. The chapter argues that the deadlock of Turkey's accession process is contrary to the Patriarchate's desire.

The third and final part titled "New prospects" focuses on the areas of cooperation and friction. It looks at the economic and energy dimension of the relations as well, and provides a well-structured overview on the Greek-Turkish rapprochement, their relationships with the European Union and how things moved from Europeanization to de-Europeanization. This part of the book analyses the European Union's constructive impact on the relations in many areas. However, as Turkey's EU membership started to fade away, the reform process and democratization slowed down as well. Along the economic and financial crises and the EU-imposed austerity measures, a de-Europeanization process was also observed in Greece. The author examines the economic relations, including the trade volumes, foreign direct investment and tourism flows. Despite the

increasing volumes, the political disputes set a ceiling in the ability to de-securitize the relations. By a comparative study on conjunctural images, Greece's portrayal by the Turkish print media is also analysed. The main argument is that the media passively mirrors the government's views on Greece. Turkey has always been a popular topic in the Greek media, where Turkey is often presented as an aggressor or expansionist. This is explained by the theory that Greek (public and political elite) tend to navigate foreign policy through the "prism of Greek exceptionalism".

The Eastern Mediterranean has a special geopolitical significance in regional politics and international relations. The recent discovery of hydrocarbon deposits has put the region into the spotlight once again. Instead of catalysing peace, the discovery has created further tension. The European Union also plays a crucial role in regional energy projects, which can develop energy security. By examining not only the political but economic interests, this part indirectly refers to the role and interests of regional and global actors in the broader context of Aegean and Eastern Mediterranean. The book argues that Turkey returned to its traditional Cyprus policy by securitizing energy. No doubt, that the refugee crises also had a major impact on the relations. The third part concludes that the EU-Turkey Statement has become the main tool to manage the flows and provides a legal umbrella for the externalisation of refugee management, while turning Greece and Turkey into "buffer zones".

Overall, the book has many strong points, and presents the results of collaboration of academics from Greece, Turkey and Cyprus. A constructive understanding dominates throughout the book, while providing a realistic approach and overview. It gives an analysis of the recently emerged challenges, which dominate the relations nowadays, such as the dispute over the energy resources or the refugee crises. In addition, the book dedicates special attention to the Europeanization of Greek-Turkish relations and other factors, which have played a crucial role in shaping the relations, for example the role of the civil society. Moreover, it also examines the facts, which have led to de-Europeanization and a downward trend in the bilateral relations or relations with the European Union. The style of the book is professional and understandable – also for readers who are new to the subject. One of the major achievements of the book is that it analyses the multidimensional nature of the Greek-Turkish relations. It refers to historical facts and data, which makes the analyses empirically strong (however some information is repetitive). Overall, the book can be considered essential reading for those who are conducting research of Greek-Turkish relations, the Cyprus issue or the Europeanization of Turkey, be they university students, academics, researchers or policy-makers.

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