Pitch Black in Strasbourg or a Bright, Sunshiny Day? Constitutional Identity and Anti-Discrimination in Context

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Lede: *2023 marks the thirtieth anniversary of the accession of my home country (Hungary) to the ECHR. A perfect time for stocktaking in the jurisprudence of the ECtHR regarding issues that might define the next 30 years. This is where constitutional identity surfaces, rooted in one majority decision in July 2022.*

Keywords: ECtHR, Constitutional Identity, European Union,

2023 marks the thirtieth anniversary of the accession of my home country (Hungary) to the ECHR. A perfect time for stocktaking in the jurisprudence of the ECtHR regarding issues that might define the next 30 years. This is where constitutional identity surfaces, rooted in one majority decision in July 2022. A bright and in-depth analysis of the was already published in ECLR, and a very dark and condemning account of the case published on *Verfassungsblog "*in the heat of passion" right after the judgment, from the point of view of 'victim blaming'. In this post, I would like rather to approach from the angle of the constitutional identity argument for two reasons.

- It has thus far really only influenced judicial dialogue within the European Union, starting out of lively debates surrounding Article 4(2) TEU, that mentions the respect by the EU of national identity inherent in the constitutional and political structures of the Member States.
- Savickis, the judgment in question. is interesting because it is possibly not without reason that the issue of constitutional identity has taken root in a majority argumentation when it was adopted. The facts of the case extend – later elaborated in detail – to the legal status of certain Russian citizens as well. The unfortunate shadow of Russia leaving the Council of Europe and the lingering horror of the Russo-Ukrainian war both might have served as a catalyst for such arguments to have taken root in a case originating in a post-Soviet state.

In the following, I will trace the development of argumentation about constitutional identity in the case-law of the Court and present conclusions on what this might mean regarding the future of European human rights protection.

In tracing the appearance of arguments tied to constitutional identity in ECtHR case law, we can see that it has surfaced much later than similar debates have started on the EU level. The two initial cases (filed in 2006 and 2014, respectively) have only contained footnoted references

to constitutional identity in Ilnseher v. Germany and in G.I.E.M. S.R.L. and Others v. Italy (both in 2018), mostly in the context of referencing the German[1] and Italian[2] constitutional jurisprudence on the issue.

Then, in Mugemangango v. Belgium, filed in 2015 and finally decided in 2020, where a concurring opinion by Polish judge Wojtyczek contained relevant reasoning. Not to delve into the detailed presentation of the case, it has been a post-election dispute, involving a demand to recount ballots due to alleged irregularities in the election process. Arguments were made by applicants pointing to a lack of adequate safeguards against arbitrariness and any remedies before and independent and impartial authority. In sum, the application relied on alleged violations of Art. 3 of AP1 to the Convention as well as Article 13 of the Convention. After careful consideration of the Parties' arguments (paras. 48-123), the Court has concluded on the first issue of Art. 3, AP 1 (free and fair elections) that applicant's complaint was examined by a not in fact impartial body and domestic law failed to adequately circumscribe its exact powers and competences. Therefore, the circumstances of these procedures did not shake the suspicion of arbitrariness and therefore warranted a determination of a violation of Art. 3, AP 1.

As to the second issue, regarding Art. 13, it was not too big a leap from the Court to declare that a conjunctive violation of said Article can also be determined through inference from the previous conclusion (paras. 132-136). As for the complaint procedure applicable to this case, however, the Court concluded that the applicant could only turn to the Walloon Parliament regarding his grievances, to the exclusion of all further remedies on the national level, which creates an exclusive parliamentary jurisdiction regarding decisions on the validity of elections. If this would not be enough to raise some eyebrows, then the Court held that the Walloon Parliament did not in fact provide effective safeguards regarding the examination applicant's complaint, so such remedy can "likewise not be deemed 'effective'" within the meaning of Art. 13 (para. 135).

J. Wojtyczek, concurring, starts out from a universal point of view, relying on references to the 'common understanding of human rights' and the 'common heritage of political traditions, ideals, freedom and the rule of law', and argues that these "*constitute the legal basis for inferring the directive that the Convention should be interpreted in a way which protects national constitutional identities*." (see: para. 3.)

He points to his dissenting opinion in the 2016 Baka v. Hungary, where he wrote that "*under the approach adopted […], the most important expression of popular sovereignty, namely the national Constitution, would now be subject to scrutiny under the Convention by an international court. Moreover, this scrutiny extends to the actual motives for constitutional reforms. The present judgment is an important step towards substantially limiting the constitutional autonomy of the High Contracting Parties.*" Here, constitutional autonomy appears as a facet of the HCPs being substantially limited by the decision, and then Wojtyczek writes concurring with Mugemangango (para. 3.) that "*guarantees against undue international interference extend beyond the scope of national constitutional identities and encompass other elements of national constitutional law*".

In sum, 'constitutional autonomy', 'constitutional identities' of the HCPs and 'other elements of their domestic constitutional law' appear as separate classifications. Domestic law therefore seem to be subjected to different levels of international judicial scrutiny if they pertain to any of the above categories, but any possible harm to the HCPs constitutional autonomy and identity is undesirable. This framework (in para. 3.) is then complemented by references to domestic

rules "of constitutional rank" and "detailed rules of national legal systems" that may come into collision with common fundamental principles, as well as "*blind spots in the rule-of-law system of guarantees […] deeply rooted in national constitutional tradition*".

Wojtyczek is of the opinion here that constitutionally allowing the parliament certain autonomy (as part of common constitutional heritage) is certainly prone to political abuse if judicial remedies are excluded, and historical experience dictates that systems that have used these solutions have gradually shifted towards judicial review. Therefore, the Belgian rules brought into question regarding the effectiveness of the remedies offered by the Walloon Parliament definitely do not fall within the core of common constitutional heritage, but also "[do] *not appear to be an important element of the national constitutional regime, let alone a constitutive element of the Belgian constitutional identity*." (para. 4.) This actually leads to his conclusion that while Belgium had constitutional autonomy to create such rules, they will not enjoy protection of constitutional identity based on the appearance of not being important elements of national constitutional law.

In addition, J. Pinto de Albuquerque argues in G.I.E.M, mentioned above that the constitutionality test imposed on the Convention is not limited "*to a special set of core constitutional norms and interests*" as a matter of constitutional law. Albuquerque mentioned (EU) constitutional identity as a counterpoint therein, referring to the infamous Italian *controlimiti* (counter-limits) doctrine, which he defined – through referencing Italian constitutional case-law – as the "*intangible core of constitutional identity and State sovereignty includes "the fundamental principles of our constitutional order*" […]." In his view expressed here, Albuquerque holds that "*every constitutional norm or interest may serve as a legitimate bar to the penetration of the Convention*" and therefore, I assume, international judicial review by the ECtHR.

How to Reaffirm Identity? Arguing for Distinction from Others

Through an intricate web of history, geopolitics, national and international legislation and constitutional court decisions, the Savickis case deals with differential treatment between two groups (see: para. 1.): Latvian citizens and Latvian permanent residents (hereinafter: LPRs, non-citizens) regarding the calculation of their pensions. The laws challenged in the case exclude, for LPRs, "*employment and equivalent periods accrued outside Latvia prior to 1991, in other parts of the former Union of Soviet Socialist Republics*". Art 1. AP 1 and Art. 14 ECHR are taken conjunctively as legal bases for the application.

To an (Hungarian) ear familiar with tone of the National Avowal of the Fundamental Law, the historical narrative in Savickis (para 12-16.) is not unknown. In 1990, the freely elected legislative assembly declared the 1940 incorporation of Latvia into the USSR unlawful under international law and officially reinstated the provisions of the original Constitution (*Satversme*), adopted in 1922. One year later the country's full independence was decreed, before the USSR was finally dissolved by the Minsk Agreement and the Commonwealth of Independent States set up. (And one hundred years from 1922, the case was decided.)

As to the actual fact pattern (paras. 17-18), the 1996-originated Latvian social security system is important, "*under which periods of employment and equivalent periods accrued prior to 1991 in the territory of Latvia were to be taken into account in the calculation of retirement pensions. Such periods were also to be taken into account for citizens of Latvia if they had been*

accrued in the other territories of the former USSR. However, in relation to "permanently resident non-citizens" the employment and equivalent periods accrued in the other territories of the former USSR were to be taken into account only in a limited number of situations" (paras. 66-68).

In total, there were five applicants to the case (of national origin from within the USSR), who have resided in Latvian USSR territory for longer periods before 1991 and gained LPR status when Latvia became independent again, also being entitled to retirement pensions after their employment in Latvia. However, no periods through which they have worked outside of Latvian territory under the USSR regime, were accounted towards their retirement pensions, contrary to rules applicable to Latvian citizens.

Two decisions have been brought in the case by the Latvian Constitutional Court (first in 2001), upon a request of ex post constitutional review initiated by parliamentarians. The Constitutional Court did not find the claims of unconstitutionality substantiated, did not find a link to the right to property and did not find any discrimination as specified under the national constitution. This decisions was later challenged in front of the ECtHR, in Andrejeva (2009), followed by a second Constitutional Court decision in 2011.

Devising and regulating social security systems, as these issues fall under social policy, falls squarely within the realm of constitutional identity (according to Chalmers, 2010, p.5) taken in the EU context, with EU rules violating *"central parts of a national constitutional identity, [e.g] the Sozialstaat*." Consequently, it only seems fair that the same approach is taken by the ECtHR, focusing on a constitutional identity argumentation when facing important issues of social policy.

As we can read in Savickis (paras. 53 et ss.), the 2011 Latvian Constitutional Court decision has made some important remarks regarding the restoration of independence in the context of international law and mentioned the 'legal identity' of a State, determining its rights and obligations, specifying that the illegal annexation of a State to another has no effect in legal terms, especially in light of the doctrine of 'state continuity', affecting also the internal affairs of Latvia in the case at hand. A thus reborn state, therefore, in the opinion of the Constitutional Court, has to have a particular responsibility for its citizens, which substantiates "a difference in treatment in the sphere of social rights", and in this the state enjoys a margin of appreciation, and "*the difference in treatment when calculating pensions for citizens and* [LPRs] *of Latvia has objective and reasonable grounds*." (see: paras. 54-55)

Under the approach taken to the legal identity of the Latvian State, the Respondent Government argued with the doctrine of the above-mentioned state continuity, and put forward that under this theory and public international law, the State had two legitimate aims, one of which has been instilling "respect for the principle of State continuity and constitutional identity" (para. 176), elsewhere appearing as "safeguarding the constitutional identity of the State by implementing the doctrine of State continuity, the latter aim being more important than the former" [i.e. protecting the economic system of the country, see paras. 196 and 198]. Here, the Court concludes that: *"the essential point in this regard is not the doctrine of State continuity per se but rather the constitutional foundation of the Republic of Latvia following the restoration of its independence. […] More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature*

when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate." In the following I will provide a short review of concurring and dissenting arguments, in light of the above.

Judicial Dialogues on Identity in Savickis – Alternate Narratives

Firstly, J. Wojtyczek reinforces the majority arguments rooted in public international law and does not talk about constitutional identity. However, he signals full agreement with the outcome and main arguments of the judgment, therefore we assume that he agrees with considering the design and regulation of social policy and the social security system such foundational elements of national constitutional law, which should be shielded by protections afforded to constitutional identity.

The main issue for dissent was an apparent "reverse deference" to the argumentation given by the 2011 Latvian Constitutional Court, found convincing by the ECtHR, thereby departing from earlier established jurisprudence set by the above-cited Andrejeva judgment (decided 16 to 1) on the same issues.

Regarding the issue of the legitimacy of the aim, the conclusion of the dissent was that the legitimate aim argument is substantiated by the fact that the constitutional foundation of Latvia needs to be protected – and while it might be legitimate, the challenged regime of pension calculations is not "a natural instrument" to achieve such legitimate aim. At this point, the dissenting judges (O'Leary, Grozev, Lemmens, para. 14.) engage in a proportionality review. Next up, the dissent assessed the constitutional identity argument in light of state continuity, legitimate aim and differential treatment, agreeing with the majority determination that the aim can substantially be achieved through differential treatment. The main dissenting argument (paras. 15-16) was that the regulation in question chose an excessive not an appropriate means to achieve the aim ("not a natural instrument").

In characterizing the differential treatment in the context of international and USSR law, the dissent rightly argues – on both accounts – that

- given the realities of the USSR state job market and the circumstances under which citizens might have had to relocate not of their own volition inside USSR territory, the applicants should not be blamed for acting in accordance with USSR state immigration policy; and
- attributing "*the unlawful acts of the Soviet Union to all former citizens of the Soviet Union who moved to Latvia during its* occupation [who then have received LPR status], *irrespective of the extent to which these individuals personally bore responsibility for the fact that they settled in Latvia*" is wrong – especially in light of the assumption that everyone has rights and responsibilities (para. 17).

Now disregarding further analysis of the arguments (i) regarding the LPR status change into citizenship and the "personal choice argument" voiced by the majority (para. 18-20); (ii) the

time periods regarding which the pension calculation took effect (paras. 21-23), I shall focus on the constitutional identity rationale.

Interestingly enough, the dissent here (para. 24) declares the reference to constitutional identity potentially dangerous because it is "*usually associated with its fundamental structures, political and constitutional*". I have copied the notion used by the dissent verbatim because it is the exact wording used in describing the obligation of the EU to respect national identity by Article 4(2) TEU (which remains uncited, through a reference of 'usual association' with the concept). In other words: the dissenting opinion explicitly equates the TEU concept of national identity as defined by Article 4(2) with that of constitutional identity. The argument then turns towards a historical perspective, where "*Latvia can continue to justify differential treatment in relation to the calculation of a pension supplement affecting a now very reduced category of permanent residents with reference to its constitutional identity*." This is, although the dissent remains silent on this, especially due to the changes (during those 19 years passed since the Andrejeva judgment) in those exact fundamental political and constitutional structures that make up a state's constitutional identity.

However, a political undertone is also apparent in the argumentation here (para. 24), where the dissent emphasizes the care with which "*questions relating to the fallout of its history and challenges following the restoration of independence*" were handled in the past, which evolves organically into the last sentence that condemns the constitutional identity argument in its entirety because "*Europe knows only too well by now how some States may misuse or instrumentalise arguments relating to their constitutional identity for a variety of purposes*." In the legal argumentation presented above, the dissent seemed to be intent on tracing said 'instrumentalization' of the identity argument in the majority opinion, and finally arrives at the finding that that conclusion was not convincing regarding the determination of no violation of Article 14 – a departure from their earlier case law.

Pitch Black or Sunshine? Conclusions on the (B)rightness of Constitutional Identity

It is apparent from the above that the use of this narrative is just dawning on the Court. In Mugemangango, certain aspects of national constitutional and political structures have been looked at by the concurring judge whether they are so deeply rooted in national constitutional law that they should enjoy the protection of constitutional identity or looked at as 'blind spots' in the rule of law system, based on political tradition. In Savickis, the first majority opinion to apply on this narrative had turned into a 'pitch black' of dissent, due to its

- Mis-characterization by the majority for the purposes of substantive arguments underpinning differential treatment in terms of its legitimate aim; and
- characterization of a political tool prone to misuse by certain governments.

In Savickis, the constitutional identity argument also seems to eclipse or shade over important considerations of fundamental rights protection. I am stating this despite being a vocal and firm believer in the increased reliance on constitutional identity to protect national constitutional structures from undue international interference, but those making use of it, whether on the national or international level, need to tread very lightly when the argumentation

- enters the arena of circumventing protections against non-discrimination based on – in the words of the dissenting minority – "original sins" of a long-fallen regime; and

- might possibly be motivated by an Anti-Russian sentiment due to present geopolitical considerations in the region, in which an increased reliance on this narrative might be seen as indispensable but becomes a political instrument.

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[1] Ilnseher contains a footnoted mention (fn. 189) regarding the German Basic Law.
[2] G.I.E.M. contains a footnoted mention (fn. 65) in the partly concurring and partly dissenting opinion of J. Pinto de Albuquerque, (see: para. 10.)

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