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Kiadja a Stádium Intézet
Budapest, Akadémia utca 11. mfsz. 3/A
stadiumintezet@gmail.com
arsboni@arsboni.hu
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TARTALOMJEGYZÉK

Sulyok Márton:[1]

New Horizons in ECtHR Jurisprudence?
The Relevance of Protecting Constitutional Identity

The discourse and debate on constitutional identity, until recently, was primarily focused on the internal power relations of the European Union, defining dialogue on the relationship of the EU and Member States and that of the CJEU and national constitutional jurisdictions (e.g. sovereignty- and identity-control, ultra vires review). In the past years, we find more and more significant mentions of or references to the conceptual framework of constitutional identity. As it will be presented, most of the time it appears in concurring or dissenting opinions, with some of its elements being interpreted to the context of the case, but in Savickis and Others v. Latvia, in June 2022, the constitutional identity argument was first used in a majority opinion, particularly in the context of assessing the legitimacy of the stated aim of a national legislative measure on the calculation of pensions. The paper traces the development of identity-arguments in ECtHR case law and assesses the character of its use.

I. Introduction – New Horizons in European Human Right Protection?

The year 2023 marks the thirtieth anniversary of Hungary's accession to the framework of the ECHR. It is as good a time as any to take stock about recent development in the jurisprudence of the European Court of Human Rights regarding issues that might define the next 30 years in European human rights protection. This is where the issue of constitutional identity surfaces on the horizon, rooted in one majority decision in July 2022. The decision and the identity argumentation is noteworthy for two reasons.

(i) Firstly, constitutional identity, 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. Certain strands of public discourse and legal literature have branded this debate to be about 'constitutional identity', which since then has taken root in many CJEU judgments and national constitutional courts' decisions.

(ii) Secondly, the case at hand (Savickis[2]) is interesting because it is possibly not without reason that the issue of constitutional identity has taken root in a majority argumentation right now. The facts of the case extend – later elaborated in detail – to the examination of certain rules of the pension system

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[1] JD, PhD LLM, Senior Lecturer in Constitutional Law and Human Rights, Faculty of Law and Political Sciences, University of Szeged (Hungary), Member of the Management Board (EU Fundamental Rights Agency, 2015-2020), Member of the European Group of Public Law (of the European Public Law Organization). Head of the Public Law Center at Mathias Corvinus Collegium in Budapest (Hungary).

[2] Savickis and Others v. Latvia (no. 49270/11), ECtHR judgment of 9 June 2022.

in Latvia, extending to 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 serve as a catalyst for such arguments to take root. 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 general and very broadly understood, as translated into the ECHR-context, 'constitutional identity' might be construed as 'margin of appreciation', encapsulating the legislative and constitutional room for maneuver for those political and constitutional structures (in the wording of the TEU) that are responsible to create rules in the fulfillment of an essential state function to regulate social relations on the sovereign territory of a Member State.

However, contrary to the EU-debate in this sense about the extent of conferred and reserved powers and competences, in the framework of the Council of Europe, the issue is never about a dispute in terms of who has how much power to regulate what. Consequently, looking at 'constitutional identity' as 'margin of appreciation' might not best serve the interest of translating the use of the previous concept into the practice of the ECtHR.

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 first case that referred to the concept was decided in 2018, and since then only in three others, with Savickis being the last one, contained similar arguments, culminating in using the concept and its protection as a justification for a legitimate aim in a majority opinion regarding an Article 14 claim (as presented in more detail below). In the vast case-law of the Court, these are actual trace elements, but serve as fertile ground for further research expanding the horizons of both EU-level debates on the topic and those of European human rights protection.

Now, in chronological order, let us review the development of this line of argumentation through the four samples discovered.

II. Early Markers of A Blossoming Identity in Mugemangango

The first part of the review will be the shortest as the decisions in the two initial cases (filed in 2006 and 2014, respectively) have only contained footnoted references to constitutional identity, mostly in the context of referencing the German[3] and Italian[4] constitutional jurisprudence on the issue.

[3] Ilnseher v. Germany (nos. 10211/12 and 27505/14), ECtHR judgment of 4 December 2018. Only a footnoted mention (fn. 189) regarding the German Basic Law.

The ice has finally broken in Mugemangango v. Belgium,[5] 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[6] 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. (The importance of the case is also demonstrated by the fact that Venice Commission, the Government of Denmark have acted as third parties, submitting comments.)

After careful consideration of the Parties' arguments,[7] 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[8] through inference from the previous conclusion. 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'"[9] within the meaning of Art. 13.

This is where I turn to assessment of the concurring reasoning of J. Wojtyczek. Starting 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', Wojtyczek 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*."[10]

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[4] G.I.E.M. S.R.L. and Others v. Italy (nos. 1828/06 and 2 others – see appended list), in the partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque, para. 10, fn. 65. (merely a footnoted mention)
[5] Mugemangango v. Belgium (no. 310/15), ECtHR judgment of 10 July 2020.
[6] For the facts and circumstances of the case, see: Mugemangango, paras. 8-22.
[7] See: Mugemangango, paras. 48-123.
[8] See Mugemangango, paras. 132-136.
[9] See Mugemangango, para. 135.
[10] See Mugemangango, Concurring opinion by J. Wojtyczek, para. 3.

At this point, he refers to a dissenting opinion of his to a Hungarian case decided in 2016 (Baka v. Hungary), dealing with the issue of judicial independence and the justice system – currently one of the hotbeds of EU debates regarding constitutional identity in Hungary and in Poland as well. In this dissent, appended to the Baka judgment, Wojtyczek wrote that finding a violation of Article 6 just because the applicant did not have the chance to have certain constitutional provisions reviewed by a court goes beyond the mission of the Court, or more exactly: "[U]*nder the approach adopted in the instant case, 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.*"

As we could see, constitutional autonomy appears as a facet of the HCPs being substantially limited by the decision, and then Wojtyczek writes in his concurring opinion to Mugemangango that "*guarantees against undue international interference extend beyond the scope of national constitutional identities and encompass other elements of national constitutional law*".[11] In a makeshift theoretical framework woven around these arguments we see that '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.

Wojtyczek then engaged in argumentation regarding the role of tradition and monarchical constitutional history in Belgian terms, arriving at the conclusion that some domestic rules "of constitutional rank" (and "detailed rules of national legal systems") may come into collision with common fundamental principles and states that "*blind spots in the rule-of-law system of guarantees […] deeply rooted in national constitutional tradition*"[12] are not part of such constitutional heritage that builds on these common principles.

Regarding the instant case, he argues 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*."[13] This actually leads to the 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.

[11] Ibid.
[12] See all citations: Mugemangango, Concurring opinion by J. Wojtyczek, para. 3.
[13] Ibid, para. 4.

On adjacent note, I want to mention here the above-referred G.I.E.M. case[14], wherein a partly dissenting and concurring opinion by J. Pinto de Albuquerque argues 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 constitutional identity (construed in the EU sense) 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.

III. Legitimizing Identity – Arguing for Distinction from Others

In general, when we identify ourselves, we differentiate and distinguish between 'us' and 'them'. Identity-building is a dialectic, discursive process, we become different from others or join their groups to them through communication and dialogue. After having presented the early markers of a blossoming identity discourse hidden in the margins of ECtHR cases, I turn to the first and so far one and only majority opinion, in which constitutional identity has appeared as a decisive argument pertinent to the merits of the case, and thus legitimized its use.

The application in question, Savickis, has been filed in 2011, but only decided in July 2022. Through an intricate web of history, geopolitics, national and international legislation and constitutional court decisions, the case basically deals with differential treatment between two groups: 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*".[15] Art 1. AP 1 and Art. 14 ECHR are taken conjunctively as legal bases for the application.

To a Hungarian ear familiar with tone of the National Avowal of the Fundamental Law,[16] the following historical narrative[17] included in the facts of the case is not unknown. In

[14] See G.I.E.M., fn 4., also for the source of citations in this paragraph.
[15] See, Savickis, fn. 2. supra, para. 1.
[16] *"We do not recognise the suspension of our historic constitution due to foreign occupations.*
We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship.
We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we therefore proclaim it to be invalid.
We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution.
We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed.

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.

As to the actual fact pattern[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" (detailed in the judgment under 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)[19], followed by a second Constitutional Court decision in 2011.

This Spring, Ignatius Yordan Nugraha has completed an in-depth analysis of the case itself in a case note published in the European Constitutional Law Review,[20] so I am not going to repeat what he has already stated there, rather I would like to focus solely on the contexts and outcomes of the argumentation centered around constitutional identity.

We shall consider this date to be the beginning of our country's new democracy and constitutional order." The English text of the Fundamental Law is available here: https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178

[17] See Savickis, paras. 12-16.

[18] See, esp.: Savickis, paras. 17-18.

[19] Andrejeva v. Latvia (no. 55707/00), ECtHR judgment of 18 February 2009.

[20] Ignatius Yordan Nugraha: *Protection of Constitutional Identity as a Legitimate Aim for Differential Treatment: ECtHR 9 June 2022, No. 49270/11, Savickis and Others v Latvia.* European Constitutional Law Review, 19(1)2023:141-162. Available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/protection-of-constitutional-identity-as-a-legitimate-aim-for-differential-treatment/4B6EE91B6180FA5B0ACF98E3A4F78B00

Devising and regulating social security systems, as these issues fall under social policy, falls squarely within the realm of constitutional identity based on what has been said so far about the EU context, in the wake of the 2010 German Lisbon judgment, which established the ultra vires and the identity review tests. The by now infamous analysis of LSE's Damian Chalmers posited, and many have agreed since – myself included, that (in the content of identity review) "*it* [meaning: the EU] *violates central parts of a national constitutional identity even when acting within its powers by curtailing the role of the Bundestag by legislating in core areas other which the latter should have a monopoly. These are the State's monopoly of violence, fundamental elements of fiscal policy and the Sozialstaat, and culturally important fields, notably family, education and religious law*."[21]

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. Anti-discrimination is also connected to the discourse on constitutional identity through those human rights are construed to fall within its purview.

As we can read in the judgment, the 2011 Constitutional Court decision has made some important remarks[22] 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",[23] 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*."[24]

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",[25] 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"[26] [i.e. protecting the economic system of the country].[27]

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[21] See: Damian Chalmers: *A Few Thoughts on the Lisbon Judgment.* In: Andreas Fischer-Lescano / Christian Joerges / Arndt Wonka (eds) The German Constitutional Court's Lisbon Ruling: Legal and Political-Science Perspectives. ZERP Diskussionspapier. 1/2010. Universitat Bremen. p. 6. https://pure.mpg.de/rest/items/item_1231921/component/file_1231919/content

[22] See: esp. Savickis, para. 53 et ss.

[23] Ibid, para. 54.

[24] Ibid, para. 55.

[25] Ibid, para. 176.

[26] Savickis, para. 196.

[27] The same issue is formulated in another way in para. 198: "*the need to protect the constitutional identity of the Republic of Latvia, which is based on the principle of State continuity as set out in the Declaration on the Restoration of Independence and subsequent constitutional provisions and doctrine*."

Finally, 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."*[28]

There are many specific contextual determinants and historical, cultural, geopolitical circumstances when judging an legislative issues in light of protections afforded for constitutional identity. These do not escape our daily debates in the EU either. After this majority representation of the protection of constitutional identity, the debates at the ECtHR continue to take place in the margins: the dissenting and concurring opinions appended to the judgment. In the following I will provide a short review of these, in light of the above.

IV. Judicial Dialogues on Identity in Savickis – Alternate Narratives

First off, J. Wojtyczek remains consistent to his earlier concurring views elaborated in Mugemangango (see: above), at least we can safely infer that he does. In concurring with the majority, in this case, he reinforces the 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 can rest assured 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 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) engage in a proportionality review (See: "*pursuit of this aim can go as far as to deny advantages to any and all individuals who took up residence in Latvia as a consequence of the immigration policy practiced by the Soviet Union*.")[29]

[28] Ibid.
[29] See: Savickis, Joint Concurring Opinion by J. O'Leary, Grozev and Lemmens, para. 14.

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 was that the regulation in question chose an excessive not an appropriate means to achieve the aim ("not a natural instrument").[30]

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

(i) 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
(ii) 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*"[31] is wrong – especially in light of the assumption that everyone has rights and responsibilities.

Now disregarding further analysis of the arguments (i) regarding the LPR status change into citizenship and the "personal choice argument" voiced by the majority;[32] (ii) the time periods regarding which the pension calculation took effect,[33] I would much rather like to focus on the in-depth assessment of the core constitutional identity rationale.

Interestingly enough, the dissent at this point declares the reference to constitutional identity potentially dangerous because it is "*usually associated with its fundamental structures, political and constitutional*".[34] 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).[35]

Here, the argument turns towards a historical perspective, stating that "*nineteen years after the restoration of independence, and even more so in 2022, 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*."[36] 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

[30] Ibid, paras. 15-16.
[31] Ibid, para. 17.
[32] Ibid, paras. 18-20.
[33] Ibid, paras. 21-23.
[34] Ibid, para. 24.
[35] 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.
[36] See: Savickis, Joint Concurring Opinion by J. O'Leary, Grozev and Lemmens, para. 24.

exact fundamental political and constitutional structures that make up a state's constitutional identity.

After presenting the legal arguments of the dissenting opinion above, we also have to say a few words about a political undertone apparent in the argumentation.

In reference to earlier case law[37] 'touching on Latvian constitutional identity', 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*."[38] In some parts of 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 the majority conclusion was not convincing regarding the no violation of Article 14, also requiring a departure from earlier case law (cf. Andrejeva).

V. Dawn, Sunset or an Eclipse? Conclusions on the Role of Constitutional Identity in ECtHR Jurisprudence

When we look at the appearance of constitutional identity argumentation on the horizons of European human rights protection, as we could see from the cases presented, the use of this narrative is just dawning on the Court.

In the 2018 Mugemangango case, certain aspects of national constitutional and political structures (i.e. review procedures by the national parliament) 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 should rather be looked at as 'blind spots' in the rule of law system, based on political tradition.

In Savickis, the first majority opinion in 2022 had induced an 'instant sunset' on the dawning of this new line of argumentation according to the dissenting judges. This was primarily due to its

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

In addition to this, the constitutional identity argument also seems to be an eclipse over important considerations of fundamental rights protection. I am stating this despite being a vocal and firm believer in the increased reliance on protections afforded to constitutional identity to protect national constitutional structures, arrangements and

[37] E.g. Ždanoka v. Latvia, no. 58278/00 (2006), or Petropavlovskis v. Latvia, no. 44230/06 (2015).
[38] See: Savickis, Joint Concurring Opinion by J. O'Leary, Grozev and Lemmens, para. 24.

essential state functions 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

(i) 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 (a word also used by the dissenting minority); and
(ii) 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.

The appearance of the constitutional identity narrative in the case law of the ECtHR, however, definitely signals one thing: the closing gap or convergence between the EU and the CoE human rights regimes. The fact that in a majority decision, the Court applied a notion rooted and widely discussed in EU law, associating with it a definition tied to the Treaty on the European Union, that had so far only oriented mainly internal EU debates, definitely signals a *rapprochement* of the two systems.

As it happens, the initial reluctance of the CJEU from allowing the EU to accede to the ECHR has been overcome through necessary compromises and processes have been put in motion to converge the two systems by the so-called 46+1 Group.[39] Eventually, such a convergence might also mean that the ECtHR will have to grapple and deal with such notions and debates that have previously almost exclusively permeated EU affairs, just like that of constitutional identity. The further evolution of this new *modus operandi*, however, will be the next new horizon in European human rights protection and further discussing this would depart from the original intent of this paper.

[39] *Major progress on the path to EU accession to the ECHR: Negotiations concluded at technical level in Strasbourg* (on 31 March 2023) Published by the Delegation of the EU to the Council fo Europe https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-concluded-technical-level-strasbourg_en?s=51