Filip Horák, Karel Řepa (eds)

European Constitutionalism and the Virus of Distrust

Edited Volume from the International Conference Held in Prague, Czech Republic on April 27–28, 2022

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ABOUT THE CONTRIBUTORS AND EDITORS

Pavel Svoboda

Pavel Svoboda is an associate professor at the University of Finance and Administration and the Faculty of Law of Charles University in Prague, former chairman of the Committee on Legal Affairs of the European Parliament and chairman of the board of the Institute for Christian Democratic Policy (IKDP). Contact: pavel@svoboda.com.

Francesco Rizzi Brignoli

Francesco Rizzi Brignoli holds a PhD in Political and Social Sciences at the University of Bologna, with a thesis in the field of political philosophy. He has been a tutor of philosophy of law in the Department of Law of the University of Bologna. He is a junior editor for the journal 'Athena - Critical Inquiries in Law, Philosophy and Globalization'. His main areas of research include European constitutionalism, normative theory of democracy and sovereignty, with a particular focus on deliberative constitutionalism and constitutional pluralism. In his work, he carries out an analysis which combines philosophical political and juridical aspects of normative theories of constitutional democracy. Contact: francesco.rizzi11@unibo.it.

Max Steuer

Max Steuer is an Assistant Professor at the Department of Political Science, Comenius University in Bratislava, Slovakia, and the Jindal Global Law School, O.P. Jindal Global University, India. His research interests focus on questions of democracy protection, constitutional adjudication in Central Europe, constitutionalism in the European Union, militant democracy and freedom of expression. He was a visiting researcher at the WZB Berlin Social Science Center (2018), at the Centre for Socio-Legal Studies at the University of Oxford (2018) and at Washington State University, as a Fulbright scholarship recipient (2019), among others. He holds graduate degrees from the Central European University (MA) and the University of Cambridge (LLM) and received his PhD from Comenius University. Max Steuer's work appeared in peer-reviewed journals in law, political science, sociology, and European studies (e.g. *International Journal of Human Rights, Review of Central*

and East European Law) and in international peer-reviewed edited collections and encyclopedias (*e.g. Max Planck Encyclopedia of Comparative Constitutional Law*). He has been an Advisory Board member of the Central and Eastern European Chapter of the International Society of Public Law and several international research projects, including 'EU Differentiation, Dominance, Democracy (EU3D)', funded by Horizon 2020. In 2021–22, he participated at the European Citizens' Panel 2 on 'European democracy/Values and rights, rule of law, security' as a randomly selected EU citizen. Contact: ms2632@cantab.ac.uk.

Ewa Michałkiewicz-Kądziela

Assistant professor at the Faculty of Law and Administration of the University of Szczecin; she obtained a doctorate in law in 2019 after defending her doctoral dissertation titled "The right to human identity in Polish and international law". Her main area of research includes human rights and their protection in the system of national, EU and international law. A special place among her research interests is taken by the issues of human identity and the associated rights, as well as contemporary threats to human rights resulting from social, economic and technological changes. She teaches in the following programmes: Law, Administration, Medical Law and Law of Uniformed Services, where she delivers, inter alia, courses such as constitutional law, European Union law, protection of human rights, state of emergency, sources of law, public interest commissioners in health protection, etc. Contact: ewa.michalkiewicz-kadziela@usz.edu.pl.

Ewa Milczarek

Ewa Milczarek is an Assistant Professor at the Faculty of Law and Administration, University of Szczecin, Szczecin, Poland. She accomplished her Ph.D. studies in 2019 after defending her doctoral dissertation thesis titled "EU standards of protection of the right to privacy on the Internet". Her main research areas are currently constitutional law, privacy, European Union law, new technology law, internet law and human rights. ORCID: https://orcid.org/0000-0003-0726-0959, contact: ewa.milczarek@usz.edu.pl.

Filip Horák (ed)

Filip Horák is an Assistant Professor at the Department of Constitutional Law, Faculty of Law, Charles University, Prague, Czech Republic. In his re-

search, he focuses on the fundamental constitutional values in legal argumentation, protection and limits of human rights, and interdisciplinary topics connecting the research approaches of psychology, political science and legal theory, such as the research of legal consciousness. He has published several articles in leading impacted journals. ORCID: https://orcid.org/0000-0002-7846-6308, researcherID: E-9069-2019, Contact: horakfil@prf.cuni.cz.

Karel Řepa (ed)

Karel Řepa is an Assistant Professor at the Department of Constitutional Law and a member of the Center for Constitutionalism and Human Rights, Faculty of Law, Charles University, Prague, Czech Republic. Between the years 2018–2022, he also worked as a legislative drafter of the Senate of the Parliament of the Czech Republic in the area of constitutional law. His areas of interest include constitutional theory and human rights law. He is (co-)author of several articles and monographies, such as Human Rights behind Bars (Auditorium 2021), as well as a dissertation dealing with the topic of religious freedom. During his studies, he spent year-long study visits at the Tel Aviv University, Israel and Freie Universität, Germany. Contact: repak@prf.cuni.cz.

FOREWORD

Karel Řepa & Filip Horák

This book represents a collection of selected papers that were presented by their authors at the "European Constitutionalism and the Virus of Distrust" conference that took place on the 27–28 April 2022 at the Law Faculty of Charles University in Prague, Czech Republic. The conference was organized by the Department of Constitutional Law as a reflection of growing tensions between the functioning of national and international institutions on one side and the perception of their modes of governance by the European society on the other side.

As the European continent faces a wide range of consecutive crises, such as the financial crisis of 2007–2008, the European sovereign debt crisis of 2011–2012, the European migrant crisis of 2015, as well as the COVID-19 pandemic since 2019 and the security and energy crisis associated with the ongoing war between Russia and Ukraine, trust between the public authorities and the society has been considerably disturbed. Thus, we live in an environment where certain social groups are living in a condition characterized by low confidence towards public authorities that considerably translates into their political action. As the academia tries to identify the solutions to the crisis of distrust taking place on the background of the aforementioned crises, the void created by the distrust has been swiftly utilized by a wide range of authoritarian and populistic political movements all across the European continent.

The endeavour of the conference was not only to establish why trust plays a key role in the structure of the public order of the European Union and its member states but also to cast light on the causes, symptoms and effects of the distrust that has been embedded in recent years. The general topic of the conference was thematized by a wide range of prominent domestic and international legal scholars as well as young scholars in a variety of panels, most notably focusing on the role of trust and distrust in European constitutionalism and pluralism in constitutional law, on the effects of states of emergency under COVID-19 pandemic, on the normalization of illiberal democracy in political and legal discourse. These topics with a direct relationship to the problem of trust and distrust in European Constitutionalism were supplemented by additional panels focusing on the effects of the migration dynamic and new human rights dynamic on the perception of trust and dis-

trust towards the established liberal democratic constitutional model of the European Union.

The aim of this publication is to capture some of the remarkable contributions to the conference. As the organizers of the conference were confronted with certain difficulties to gather enough written papers to build a wider monography on the topic, we have decided to publish the papers in a limited collection. The space is predominantly, even though not exclusively, given to doctoral students and post-doctoral assistants to share their views on topics associated with the question of trust in European Constitutionalism. The book follows the structure of the conference when it comes to the thematic line. Firstly, it presents papers focused on the general topic of trust in the European Union that is followed by specific human rights law topics.

In the first paper, Pavel Svoboda opens the collection with a unique elaboration on the multidimensional presence of trust in the structure of the European Union. He identifies the key two axis of trust, i.e., trust between Member States and trust of citizens towards the EU, which he further analyses on the background of the EU law and the ECJ case-law. He leads the reader through a plethora of areas where we can find either explicit or implicit imprints of trust. These areas include the principle of loyal cooperation, the principle of mutual recognition, the obligation of Member States and their institutions to implement binding secondary Union acts, the status of national courts as the basic courts of EU law, the citizenship of the Union, the mutual recognition of judicial decisions as well as the area of EU values. The paper shows a deeply multifaceted role of trust in the constitutional order of the EU and identifies recent points of weakness that in many cases have primarily political dimension that can be blurred if we employ too formalistic and normative understanding of the existence of the EU.

Francesco Rizzi Brignoli follows up on Pavel Svoboda as he focuses more closely on the question of trust from the perspective of the political process leading to the future constitutional design of the EU. In his paper "A new European constituent process? A deliberative constitutionalist suggestion" Brignoli acknowledges that some of the core paradoxes entrenched in the structure of modern constitutionalism persist in the EU, most notably the complex problem of legitimation between the sovereign and founding constituent power and the legitimated constituted authority. This issue raises many questions not only in the traditional domain of Member States but it is also directly connected with the question of trust between the EU and its citizens. The author discusses potential solutions to the question of the con-

stituent power of the EU that aim to strengthen trust towards the EU and strengthen the legitimacy of the EU. He builds on the idea of deliberative constitutionalism that is based on a circular constituent process with wide public engagement that could eventually reconstruct the value grounding of the European demos and provide a deeper political understanding between the liberal notions of constitutionalism and the political discourse.

The idea to strengthen the deliberative elements of the political process of the EU has most recently crystallized in the organization of the Conference on the Future of Europe (CoFoE) in 2021–2022. Max Steuer analysis the role and functionality of the two innovative components that were part of the CoFoE, i.e. the CoFoE Plenary and the European Citizens' Panels, as these two components represent core structures through which the deliberative integration of discussion on the future of Europe has taken place. The author provides not only an overview of the functioning of the CoFoE Plenary and the European Citizens' Panels but creates an analytical framework that allows the author the evaluate the criticism that the CoFoE Plenary and the European Citizens' Panels faced and draw recommendations that could be implemented into the future constitutional-making political processes in order to enforce trust of the EU citizens towards the process.

After reading the previous paper, the reader moves from the general questions of trust in the constitutional order of the EU towards the questions that are more closely connected with human rights law. Ewa Michałkiewicz-Kądziela focuses on the influence of international law on the development of state protection of the right to identity of children of same-sex couples. The paper addresses a very pressing issue that has gained attraction in recent years. While the right to identity has been established as a derivation of the right to privacy, the domain of this right in the context of the identity of children of same-sex couples can be mostly characterized by a legal vacuum. The author shows how the lack of explicit legal regulations at the international level leads to fragmented legal protection in Member States that in effect leads to discriminatory treatment across Member States. The paper is a valuable contribution to the book as it shows that European Constitutionalism can win trust of the citizens of the EU only if it places adequate focus on the protection of vulnerable individuals and groups.

The final chapter by Ewa Milczarek further elaborates on the right to privacy as she shifts the focus to the "EU standards of protection of the right to privacy on the Internet". The author analyses the current status of the human rights discourse concerning the right to the internet. The paper identifies

and assesses a variety of strategies that states have employed when it comes to the guarantees of the right to the internet, most notably the Greek model, the Estonian model, the French model, and the Italian model. The author goes beyond the comparative approach as it develops its own understanding of the right to the internet on grounds of traditional human rights guarantees, most notably the freedom of speech and the right to information, which consequently allows for critical evaluation of the aforementioned models. As well as in the previous paper, in this piece the reader encounters another domain associated with the question of trust towards public authorities as the internet represents a key medium supporting not only the flow of information from the public authorities towards individuals but a medium that provides means of direct interaction. Fulfilling the right to the internet thus becomes a key project on how to ensure and strengthen trust between society and public authorities.

As the volume of this book suggests, reinforcing the principle of trust between society and public authorities is key to upholding the legitimacy of the governing structures of the EU and Member states. While we might tend to view this question prima facie as focused predominantly on the realm of political deliberation and its dynamic, under thorough examination the topics extend as far as into the domain of human rights guarantees. Hopefully, the conference and the published papers will provide a valuable reference point for discussion to anyone who will wish to raise the fundamental questions of trust and distrust in the context of European Constitutionalism in the future.

TRUST AS THE BASIS FOR THE FUNCTIONING OF THE EUROPEAN UNION

Pavel Svoboda

Abstract

The article focuses on the fact that trust between EU Member States, in particular in the respect of EU values as set out in Article 2 of the Treaty on European Union, is the basis for the successful functioning of the EU. From time to time, this trust is undermined not only by some Member States but sometimes by the Union's institutions themselves. This is particularly evident today with regard to respect for the value of the rule of law.

Keywords: European Union, trust, values, rule of law

Introduction

The article focuses on the fact that trust between EU Member States, in particular in the respect of EU values as set out in Article 2 of the Treaty on European Union, is the basis for the successful functioning of the EU. From time to time, this trust is undermined not only by some Member States but sometimes by the Union's institutions themselves. This is particularly evident today with regard to respect for the value of the rule of law.

1. The notion of trust

Trust is a relationship based on the belief that the counterparty (person, institution, thing) will not lie or do harm, but on the contrary will act in good faith or even act in a beneficial way; for entities, this implies willingness to be threatened by a counterparty over whose behaviour the entity does not have full control or whose actions are not fully transparent to the entity. Typical qualities that trust puts at risk are honesty, reliability or self-reliance. Trust always relates to the future and must therefore be based on things that cannot be known with certainty; it is therefore always associated with uncertainty and risk.[1]

Most important relationships are built on trust, from the family to – especially since the end of the Bretton Woods system – international finance and most recently common defense as well.

Although trust is a predominantly psychological concept, law, including EU law, works with it, both implicitly and explicitly.

Trust from a general legal and sociological point of view is important for the observance of social norms, especially that part of morality which is not regulated by law, and within the law those parts of it which are unenforceable (e.g. because of their declaratory nature) or only less enforceable. Unlike law, whose norms (rules) are enforceable by power, moral norms, or their observance, are controlled individually by conscience, and at the level of society by public opinion. Moral norms lack sanctions in the legal sense: however, they are accompanied by social sanctions (e.g. social condemnation, pressure, rejection) in varying degrees of intensity, but without coercion by power (e.g. by the police, the courts, etc.). If for every legal norm (not to mention mor-

[1] Cf. https://dictionary.apa.org; http://psychology.iresearchnet.com; http://files.clps.brown.edu.

al norms) there were to be an apparatus to ensure their 100% enforceability, we would probably all be employed as law enforcers. The rate of compliance with anti-COVID-19 measures is a magnificent example of this.

It is therefore not surprising that trust is also essential for the functioning of the European Union.

2. Trust and the functioning of the EU

The main architect of the Community method of cooperation between Member States[2] Jean Monnet wrote in his Memoirs: "*The life of institutions is longer than the life of men; institutions, if well built, can thus gather and gradually transmit wisdom to succeeding generations*."[3] So far, despite all the crises, part of this wisdom seems to have been a reliance on trust in the possibility of post-war European cooperation, initially based on the abandonment of reparations and restrictions in favour of forgiveness, reconciliation and cooperation between states and their people.

As former Spanish foreign minister Ana Palacio puts it: "Institutions thrive when there is trust."[4] Trust is therefore essential to the functioning of the EU at two levels: as trust between Member States and as the trust of citizens in the EU.

2.1 Trust between EU Member States

Trust is the foundation of good relationships. Anyone who has seen the workings of the EU knows that, despite clear procedural rules, the quality of many interinstitutional relationships in practice depends to some extent on the interpersonal relationships between specific people. This is why, for example, ministers in the Council of the EU programmatically address each other by their first names.

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[2] Cf. e.g. F. Duchène, Jean Monnet's Methods, in Brinkley D., Hackett C. (eds), *Jean Monnet* (New York: Palgrave Macmillan, 1991), p. 184. W. Wessels, *Jean Monnet-Mensch und Methode: Überschätzt und überholt?* (Vienna: Political Science Series, 2001/74). P. Svoboda, *Nadnárodní prvky v EU a jejím právu* (Supranational elements in the EU and its law) (Prague: Leges, 2022), pp. 20, 40.

[3] Cf. J. Monnet, *Memoirs* (New York, 1978), p. 174.

[4] Cf. A. Palacio, *How International Institutions Die*, https://www.project-syndicate.org/commentary/erosion-of-trust-in-international-institutions-continues-by-ana-palacio-2021-11.

The role of states in building a transnational Europe, also embedded in the EU institutional system, is so far irreplaceable in standard-setting and its enforcement. The importance of trust for cooperation between EU Member States is both implicit and explicit in EU law.

2.1.1 Implicit anchoring of trust

Implicitly, trust as the basis for the functioning of the Union is reflected in at least six phenomena: the principles of loyal cooperation and mutual recognition, the obligation of Member States and their institutions to implement binding secondary Union acts, and in particular the position of national courts as the fundamental courts of EU law, embodied in particular in the preliminary ruling procedures, in the issues related to EU citizenship and finally even in the area of mutual defence of Member States in the event of military aggression by a third country. However, we could also explore the phenomenon of trust in other areas where it is relevant, such as currently so important area of EU foreigners' policy.

The principle of loyal cooperation

The EU Treaties do not contain a definition of the principle of sincere cooperation, in majority of linguistic versions called "loyalty". Even the Court of Justice of the EU (CJEU), which has been refining the concept of loyal cooperation since the early stages,[5] has never defined it precisely. Advocate General Mazak has defined it – in a non-legally binding way – as the "*enhanced obligation of good faith*" that Member States have towards each other and towards the EU institutions by virtue of their membership of the Union.[6]

The principle of loyalty implies a commitment to support the efforts of all actors involved and to eliminate conflict (which is a major point of the community method of cooperation[7]) or inaction.

[5] CJEU, Case 78/70, *Deutsche Grammophon*, para 5; 2/73 *Geddo*, para 4; Case 230/81, *Luxembourg* v *Parliament*, paras 37 and 38.

[6] CJEU, Opinion of GA Mazak in Case C-203/07 P, *Greece* v *Commission*, para 83.

[7] Cf. e.g., R. Dehousse, "The Community method" at sixty, in R. Dehousse (Ed.) "*The Community method*": *obstinate or obsolete?* (Basingstoke: Palgrave Macmillan, 2011), pp. 3–15. P. Svoboda, *Nadnárodní prvky v EU a jejím právu* (Supranational elements in the EU and its law) (Prague: Leges, 2022), p. 43.

The principle of loyalty is first and foremost – from the perspective of the sources of EU law – a general principle of law, namely a principle of a constitutional nature.[8]

The obligation of loyal/sincere cooperation (Art. 4(3), 24(2) TEU[9]) is primarily an obligation of Member States towards the EU (vertical ascending loyalty): Member States (and all their authorities, including national courts[10]) are primarily obliged to do everything possible to make EU law useful (l'effêt utile), in particular *a)* to take all measures to ensure the enforcement of their EU obligations (positive obligation), i.e. to adopt national legislation to ensure the usefulness of EU law[11] and to provide the Commission with information enabling it to fulfil its role as a guardian of legality under Art. 17/1 TEU,[12] within a reasonable time.[13] Such loyalty can be said to go beyond the classic international law principle of *pacta sunt servanda*; and *b)* to refrain from any measure capable of undermining the achievement of EU objectives (negative obligation), in particular not to adopt or maintain in force a national regulation capable of undermining the usefulness of EU law.[14]

The obligation of loyal cooperation relates in particular to the application of EU law and the implementation of obligations arising from EU law, which is their primary duty (Art. 291 TFEU; see below, Part B).[15]

The general nature of this commitment also implies that its fulfilment is difficult to measure. Trust in Member States to act in good faith with each other thus appears to be the minimum standard for its fulfilment. However, many of the provisions of the EU's founding Treaties can be seen as concrete manifestations of the principle of loyal cooperation.[16]

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[8] CJEU, Case C-404/97, *Commission* v *Portugal*, para 40; Case C-75/97, *Belgium* v *Commission*, para 88; Case C-499/99, *Commission* v *Spain*, para 24; Case C-52/84, *Commission* v *Belgium*, para 16; Case C-46/93 and C-48/93, *Brasserie du Pêcheur*, para 39.

[9] CJEU Case C-69/90, *Commission* v *Italy*, para 11; Case C-30/72, *Commission* v *Italy*, para 11; Case C-105/03, *Maria Pupino*, para 42.

[10] CJEU, Case 14/83, *Von Colson and Kamann*, para 26.

[11] CJEU, Case 30/70, *Scheer*, para 9; Case C-275/00, *First*, para 49; Case C-132/06, *Commission* v *Italy*.

[12] CJEU, Case 98/81, *Commission* v *Netherlands*, para 8.

[13] CJEU, Case C-137/91, *Commission* v *Greece*, para 6.

[14] CJEU, Case 13/77, *INNO/ATAB*, para 31.

[15] CJEU, Case C-137/91, *Commission* v *Greece*, para 6; Case C-459/03, *Commission* v *Ireland*, para 169 et seq.; Case C-82/03, *Commission* v *Italy*, para 15 et seq.

[16] Cf. Arts. 49, 92, 114(4) and (5), 168, 197, 210, 260, 267, 288, 325, 344, 351 TFEU; Art. 24(3) TEU.

Obligation on Member States and their institutions to implement binding secondary Union acts

Law is the basis for the existence of the European Union. As Walter Hallstein, the first President of the European Commission of the European Coal and Steel Community (ECSC) wrote, "*the Community is a creature of law. This is the decisive novelty that distinguishes it from previous attempts to unite Europe. Not violence, not slavery are used as a tool, but a spiritual, cultural force – law. The majesty of law is to create what blood and iron have failed to do for centuries*."[17] The founding Treaties have been declared by the Court of Justice to be the constitutional charter of the Union,[18] but they also have one unpleasant feature of constitutional texts, namely they do not contain definitions of basic concepts because of their necessary abstractness. The CJEU has been given compulsory jurisdiction by Member States to settle disputes arising from EU law, as part of the Community method of European cooperation aimed at de-escalating disputes.[19] The CJEU thus carries the confidence of Member States that it will rule competently and impartially. Those who know the economic consequences of some CJEU decisions can appreciate the extent of this trust. Therefore, even attacks on the impartiality of the CJEU or its politicisation, as suggested e.g. by Viktor Orbán, in connection with the recent CJEU decision on the possibility of financially sanctioning non-compliance with the rule of law,[20] constitute an attack on the very existence of the EU, or rather on the supranational elements of its functioning,[21] one of which is precisely the compulsory jurisdiction of the CJEU. Yet the multitude of supranational elements is precisely what makes the European Union the European Union, a place so attractive to live in.

Enforcement of standards is particularly important and essential for the functioning of the EU, because the EU has mainly legal standards (and a little money), but no police, army or customs to enforce the EU commitments. In this respect, the EU system is based on trust that Member States will com-

[17] W. Hallstein, *Der unvollendete Bundesstaat* (Düsseldorf, Wien: Econ, 1969), p. 33.

[18] Cf. CJEU, Case C-294/83, *Les Verts*, para 23: the EU constitutes "*a community of law in the sense that neither its Member States nor its institutions are exempt from scrutiny of the conformity of their acts with the fundamental constitutional charter that is the Treaty*." Cf. also CJEU, Case C-621/18, *Wightman*, para 63; Case C-64/16, *Associaçio Sindical*, para 30.

[19] Cf. bibliography in footnote 6.

[20] CJEU, Case C-156/21, *Hungary* v *Parliament and Council*; Case C-157/21, *Poland* v *Parliament and Council*.

[21] Cf. https://www.politico.eu/article/ecj-authority-challenged-by-poland-and-hungary/.

ply with their obligation to implement their EU law obligations in practice without fail, as required not only by the principle of loyal cooperation in general (see above, Part A), but also as specifically committed to in Art. 291(1) TFEU: "*Member States shall adopt all measures of national law necessary to implement legally binding Union acts*."

The Union institutions are thus primarily responsible for secondary standard-setting (regulations, directives, decisions), while the implementation of this legislation falls largely on the shoulders of Member States and their apparatus.[22]

In the current context of Russia's aggression against Ukraine and media coverage,[23] the question arises, for example, how closely Member States monitor compliance with international sanctions by companies under their jurisdiction.

Principle of mutual recognition

Mutual recognition of national arrangements essentially means the reciprocal application of the country-of-origin principle;[24] it results from the removal of both discriminatory and non-discriminatory obstacles, unless their existence is justified by the public interest.

The basis for mutual recognition was laid by the Cassis de Dijon judgment[25] in the area of free movement of goods. This principle is linked to the principle of sincere cooperation between Member States (see section 2.1.1.A above) and also aims at mutual recognition of controls on goods originating in another Member State. Therefore, for example, the importation of goods

[22] Exception to this rule is to some extent, for example, competition policy implemented by the European Commission.

[23] Cf. report on arms shipments despite sanctions. https://www.breitbart.com/europe/2022/03/19/germany-france-other-eu-members-sold-huge-stocks-of-arms-to-russia--before-invasion-despite-embargo/.

[24] The country of origin regime means that the producer of goods/services is essentially governed by the conditions in "his" country of establishment when trading in another country: foreign products or services that meet the standards of the country of origin are also allowed to enter the country of import/destination. This principle differs from the so-called Most Favoured Nation clause (e.g. GATT), which guarantees "only" the best treatment that the receiving country gives to goods from a third country, not non-discrimination against domestic goods.

[25] CJEU, Case 120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.

properly produced in one Member State cannot in principle be prevented by reference to a different standard of the Member State of importation.

Within the EU's Area of Justice, Security and Justice, some manifestations of mutual recognition – recognition of judicial authorities – have been explicitly enshrined (see section 2.1.2.A below).

The status of national courts as the basic courts of EU law

The confidence in the loyal cooperation of Member States in achieving the objectives of the founding Treaties (see above, Part A) is also reflected in another respect: the position of national courts in the application of EU law.

The EU's judicial system is mainly made up of national courts, because the EU has not set up a complete special court system in Member States to deal with cases involving EU law. Only those cases that by their nature cannot be dealt with by national courts (e.g. disputes between Member States) are dealt with by the CJEU. This system therefore relies on trust that national courts will apply EU law as well as national law.

However, in order for EU law to function as a compact legal order, i.e. to be interpreted consistently and to ensure its effectiveness, national courts needed to be equipped with certain principles and instruments.

The **principles** that unify the decision-making practice of national courts in the application of EU law include the following:

- effective judicial protection (Art. 47 EU Charter of Fundamental Rights), binding on both EU,[26] and national courts.[27] The obligation of national courts to apply EU law is part of the general obligation of Member States to apply EU law; specifically for judicial protection, this obligation is enshrined in Art. 19 TEU and includes, inter alia, the principle of iura novit curia – the obligation to know EU law;
- the institutional and procedural autonomy of national courts, moderated by the principles of equivalence and effectiveness;
- the natural law approach to the law, arising inter alia from the fact that the CJEU 'shall ensure compliance with the law in the interpretation and implementation of the Treaties' (Art. 19 TEU), without being constrained in this respect by any list of sources of law,[28] and from the fact

[26] CJEU, Case 294/83, *Les Verts*.

[27] CJEU, Case 222/84, *Johnston*.

[28] Cf. in contrast to Art. 38 of the Statute of the International Court of Justice, listing as sources international conventions, international custom, general principles of law recognized by civilized nations, judicial decisions and the teachings of the most qualified experts.

that the source of law is also the unwritten legal principles that the CJEU discovers and enshrines.

The preliminary ruling procedure is a special tool for cooperation between national courts and the CJEU.

As mentioned above, the judicial application of EU law is mainly carried out by national courts, but only the CJEU has a monopoly on binding interpretations of EU law. The preliminary ruling procedure is the main instrument to eliminate this institutional discrepancy. This is a non-contentious procedure through which national courts can – and sometimes must – refer to the CJEU questions on the validity or interpretation of EU law that are necessary for the resolution of a specific dispute before such a court. However, parties to a dispute before national court are not entitled to request that their court initiate such proceedings.

This mechanism is intended to eliminate differences between the interpretation of EU law by national courts as a preventive measure, but the application of EU law in the relevant disputes remains reserved to them. The aim of this procedure is therefore to ensure the uniformity and effectiveness of European law. This judicial review accounts for over 50% of all proceedings before the CJEU.[29]

The CJEU is "*in principle obliged to rule on a question referred for a preliminary ruling if the procedural conditions are met*":[30] there is no denial of justice here,[31] because it is for the national courts to determine whether a question referred for a preliminary ruling is necessary,[32] unless the question is inadmissible. This correct assessment is also part of the confidence in the functioning of this part of EU cooperation.

The CJEU protects this instrument of cooperation, inter alia, at the level of relations between national courts. Therefore, according to its case law, national law must not prevent or prohibit national courts from asking a preliminary question; this is also a consequence of the primacy of European law over national law.[33] Similarly, a higher court (including the Constitutional Court) cannot, inter alia,

[29] Cf. CJEU statistics, most recently for 2021: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-03/cp220040cs.pdf.

[30] CJEU, Case C-295/05, *Asociación Nacional de Empresas Forestales*, para 30.

[31] CJEU, Case C-286/02, *Bellio*, para 27; Case C-217/05, *Confederación Española de Empresarios*, paras 16 and 17.

[32] CJEU, Case C-119/05, *Lucchini*, para 43.

[33] CJEU, Case C-416/10, *Križan*, paras 67–70: even the obligation to follow the legal opinion of a higher court does not deprive a lower court of the power to ask a preliminary question

- set aside a decision of a lower court because, in its view, it was not necessary to ask a preliminary question,[34]
- declare a decision on a preliminary question unlawful, since such a review would be akin to a review of the admissibility of an application, which is the exclusive competence of the CJEU,[35]
- initiate disciplinary proceedings on the ground that preliminary questions have been asked.[36]

However, there are limits to the trust of Member States or their constitutional courts, particularly as regards the primacy of binding EU law over national law. Although some rulings of constitutional courts are driven by a jealous defence of their national position rather than by the real issues in the protection of constitutionality,[37] with the exception of the recent products of the Polish Constitutional Court,[38] considered to be politicised, they do not pose a significant threat to the truce that prevails between the CJEU and some constitutional courts on the question of the primacy of EU law.

Trust and citizenship of the Union

The need to put the EU citizen at the heart of the EU project has long been carried out in the spirit of Monnet's slogan "*We are not forming coalitions of states, we are uniting men*". The aim is to bring the European integration process closer to the ordinary EU citizen and to move the EU from a purely economic integration (E[H]S) to a more political entity (EU), for which the Maastricht Treaty, among other things, introduced the institution of EU citizenship (Art. 9 TEU; Art. 20 – 25 TFEU; Art. 39 et seq. EU Charter of Fun-

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if it has doubts as to the compatibility of the higher court's opinion with EU law, even if the relationship between the constitutional court and the supreme court is at issue; CJEU, Case 166/73, *Rheimühlen*, paras 3–4: here, the national procedural rules did not provide for the possibility of staying the proceedings in order to ask a preliminary question.

[34] CJEU, Case C-210/06, *Cartesio*.

[35] CJEU, Case C-564/19, *IS*.

[36] CJEU, Joint Cases C-357, 379, 547, 811, 840/19, *Euro Box Promotion*; Case C-430/21, *RS*: here, it was the Romanian rule that – contrary to the principle of priority – the General Court is not entitled to assess whether national legislation which the Constitutional Court has ruled to be compatible with EU law is compatible with the Constitution, and therefore not to raise a corresponding preliminary question.

[37] Cf. e.g. Czech Constitutional Court, Case Pl. 5/12, following CJEU, Case C-399/09, *Landtová*.

[38] Cf. Polish Constitutional Court, Case K 3/21, online e.g. https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

damental Rights). An EU citizen is a person with the nationality of an EU Member State;[39] this nationality EU citizenship complements but does not replace it. EU citizenship can therefore only be acquired through citizenship of an EU Member State, which depends on national rules. By contrast, the content of EU citizenship is based on EU law and therefore cannot be restricted by national law without legitimate reasons and can be invoked by an EU citizen against his or her own Member State.[40]

The content of EU citizenship consists in the fact that a citizen of a Member State, in addition to the rights deriving from his/her nationality, acquires other EU-citizenship rights, especially the right of mobility, i.e. the right to move and reside freely within the territory of Member States, various political rights (e.g. active and passive voting rights for the EP) or the right to consular protection.[41]

What the issue of trust has in common with EU citizenship is that not all Member States act in good faith in this area. Indeed, Cyprus, Malta and Bulgaria "sell" their citizenship (and thus EU citizenship) for substantial investments in their country: if a citizenship applicant invests millions of euros in their country, he or she also gets citizenship. It is obvious that the "investor" is not interested in the citizenship of the countries concerned, but above all in the mobility rights associated with EU citizenship. This is a phenomenon that is more than questionable from the point of view of loyal cooperation, because the motivation for acquiring EU citizenship obviously smacks either of directly illegal activities (e.g. money laundering) or of a desire to make money illegally in a third country (especially Russia), but to have it secured beyond the reach of the local regime and, moreover, to be able to live in the pleasant and secure environment of the European Union.

[39] CJEU, Case C-184/99, *Grzelczyk*, paras 30 and 31; Case C-209/03, *Bidar*, para 31.

[40] CJEU, Case C-34/09, *Zambrano*; Case C-135/08, *Rottmann*; Case C-434/09, *McCarthy*; Case C-256/11, *Dereci*; Case C-673/16, *Coman*; Case C-490/20, *Stolichna obshtina*; Case C-118/20, *Wiener Landesregierung*.

[41] Cf. also Art. 46 EU Charter of Fundamental Rights and Directive 2015/637. Outside the EU, an EU citizen has the right to approach the diplomatic representation of another Member State if the representation of his/her own State is not available and will be treated as a national of that other Member State. This includes assistance in the event of death, serious accident or illness, detention and imprisonment, criminal damage abroad, repatriation and the issue of a replacement EU return document. EU diplomacy – the European External Action Service – can also help.

Trust in mutual defence

At the beginning of this text, we stated that everything essential in human life and interpersonal relations depends on trust, and that in the field of law this is particularly true for legal norms that are not easily enforceable and for moral norms – not regulated by law – as a whole. Today, the question of trust is easily tested in the field of security. In past decades it was considered an overstatement to say that while domestic politics is about HOW we live, foreign policy is about WHETHER we shall live. But the Russian invasion of Ukraine has shown us that this is not an exaggeration. Only now are we realizing that this very statement is the basis for extraordinary constitutional and criminal law regimes in the event of war. More urgently, it also raises the question of trust in defence: can we rely on the famous Article 5 of the Washington Treaty[42] or its stronger[43] EU version in Article 42(7) TEU[44] to be applied in the event of an attack? Can we rely on the fact that, for example, Germany, which until recently – because of Russia – refused to supply arms even to its allies in the Baltics, which refuses to supply heavy weapons to an attacked Ukraine and which refuses to cut itself off from Russian gas quickly, will change its behaviour if, for example, small Estonia is attacked, even though it is a member of NATO and the EU? Given the strong links to Russia, can we hope for the same from Hungary, Austria, Italy or Greece? The

[42] The North Atlantic Treaty (1949), Art. 5: "*The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.*
Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

[43] We consider the EU alliance commitment to be stronger because – unlike the Washington Treaty – it does not leave it to the discretion of the signatories whether to use military means in the event of an attack.

[44] Art. 42(7) TEU: "*If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.*
Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation."

limited Czech experience with the Munich Agreement of 1938 does not allow us to answer in the affirmative. However, we have nothing but NATO and the EU, and therefore we are left with the trust that in the Euro-Atlantic area – as opposed to the Russian-Asian one – the Roman maxim *pacta sunt servanda* applies not only on paper but also in practice.

2.1.2 Explicit anchoring of trust

In addition to the implicit entrenchment of trust in EU law, there are a number of explicit entrenchments. Examples include issues related to mutual recognition of judicial decisions and EU values.

Trust and mutual recognition of judicial decisions

While trade barriers (tariffs, quotas, border controls, etc.) have been removed in building the EU's internal market, mainly through mutual recognition or harmonisation of national standards, jurisdictional boundaries have remained. However, the possibility of obtaining enforcement of a judgment in another Member State, particularly in civil matters, is a necessary concomitant of the real functioning of the internal market, in particular the free movement of persons, and of EU citizenship. However, this mutual recognition is based on the confidence that the level of enforceability of justice does not differ substantially between Member States; this is expressed, inter alia, by the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: "*Mutual confidence in the administration of justice within the Community makes it possible for judgments given in any Member State to be recognised without any further proceedings being necessary, except in cases of dispute*."[45]

The importance of trust in this area has also been confirmed by the CJEU: "*It must be stressed that cooperation and mutual trust between the courts of Member States must lead to mutual recognition of judicial decisions, which is the basis for the creation of a genuine judicial area*."[46] The judicial area, a parallel concept to the internal market, thus enables the so-called fifth freedom of the EU – the free movement of judgments – through trust.

[45] Cf. recital 16 of the preamble to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, p. 1. 03/31, p. 390; now replaced by Regulation 215/2012.

[46] CJEU, Case C-499/15, *W and V*, para 50.

This was confirmed negatively by the European Commission when it rejected the UK's application to join the Lugano Convention,[47] partly on the basis of mutual trust: "*Convention is based on a high level of mutual trust among the Contracting Parties and represents an essential feature of a common area of justice commensurate to the high degree of economic interconnection based on the applicability of the four freedoms.*" (p.3).[48] In other words, according to the Commission the UK is not to be trusted in the recognition and enforcement of judgments in civil matters.

In the criminal-law area, in the context of the so-called euro-warrant, there is even talk of a high level of trust: "The mechanism of the European arrest warrant is based on a high level of confidence between Member States." [49] The fact that Member States have already agreed on a list of 32 offences for which the traditional condition of reciprocal criminality is waived for the purposes of the euro-warrant can be seen as an expression of this trust.[50]

Trust and EU values

The CJEU search engine (curia.eu) offers hundreds of CJEU judgments referring to trust. This paper does not aspire to analyse all the contexts in which the CJEU refers to the need for trust for the functioning of the EU. We will focus only on the top one – the relationship between trust and EU values under Art. 2 TEU and the sanctioning of their threat or violation under Art. 7 TEU. We will focus on this top aspect of trust because trust in the respect of EU values was explicitly named by the CJEU in its Opinion 2/13 (see below) as the existential basis of EU law and thus of the EU as a whole, since the EU does not have much else besides law (see section 2.1.1.B above).

The CJEU first expressed this fundamental importance of trust in its Opinion 2/13 in the context of the protection of human rights, which are among the EU's values under Art. 2 TEU, specifically in the context of the EU's possible accession to the European Convention on Human Rights (1950). Fol-

[47] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 2007/12/21, pp. 3–41.

[48] https://eapil.org/2021/05/05/european-commission-explains-rejection-of-uks-application-to-lugano-convention/.

[49] Cf. recital 10 of the preamble to the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 2002/07/18, pp. 1–20.

[50] Cf. Article 2(2) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190, 2002/07/18, pp. 1–20.

lowing the reflection on the autonomy of EU law, which gave rise to "*a structured system of interdependent principles, norms and legal relationships by which the Union itself and its Member States, as well as the Member States among themselves, are bound together*", the CJEU stated the following: "*Such a legal construction rests on the fundamental premise that each Member State shares with all other Member States a set of common values on which the Union is founded, as set out in Art. 2 TEU, and recognises that other Member States share these values with it. This presumption implies – and justifies – the existence of mutual trust between Member States in the recognition of these values and thus in the respect of Union law applying these values.*"[51]

The CJEU repeated this statement in relation to other values.

In Wightman, the CJEU addressed the UK's ability to unilaterally revoke a notice of withdrawal from the EU under Art. 50 TEU, inter alia, with regard to the values of freedom and democracy. In this context, the CJEU emphasised that "*the Union brings together States which have freely and voluntarily subscribed to the common values set out in Art. 2 TEU*", and then paraphrased the statement on mutual trust and confidence in their observance in the 2/13 Opinion.[52]

This has recently been reaffirmed by the CJEU in relation to the value of the rule of law[53] and Regulation 2020/2092: "*As stated in recital 5 of the contested regulation, once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State*

[51] CJEU, Opinion 2/13 (Accession of the European Union to the ECHR), paras 167–168.

[52] CJEU, Case C-619/18, *Commission* v *Poland*, paras 42–43: "*... the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values … Union law rests on the fundamental premise that each Member State shares those values with all other Member States and recognises that other Member States share those values with it ... That premise implies and justifies the existence of mutual trust between Member States, and in particular between their courts, in the recognition of those values on which the Union is founded, including the rule of law, and thus in the observance of Union law enshrining those values.*"

[53] Cf. the definition of the rule of law in Art. 2 of Regulation 2020/2092 on a general cross-compliance regime for the protection of the Union budget, OJ L 433I, 2020/12/22, pp. 1–10: "*It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.* "

shares with all the other Member States, and recognises that they share with it, the common values contained in Art. 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of Member States and to international law. That premiss implies and justifies the existence of mutual trust between Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected (see, to that effect, Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paras 166 to 168, and judgments of 27 February 2018, Associaçio Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, para 30, and of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, para 62). That recital also states that the laws and practices of Member States should continue to comply with the common values on which the European Union is founded."[54] The judgments referred to in this CJEU judgment also concern the value of the rule of law, in particular some of the principles that constitute this value: the independence of the courts or effective judicial protection.

In this judgment, the CJEU also mentioned the value of solidarity: "*In that regard, it should be noted, first, that the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Art. 2 TEU, which is itself one of the fundamental principles of EU law (see, by analogy, judgment of 15 July 2021, Germany v Poland, C-848/19 P, EU:C:2021:598, para 38), and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based, as stated in para 125 above, on the commitment of each Member State to comply with its obligations under EU law and to continue to comply, as is moreover stated in recital 5 of the contested regulation, with the values contained in Art. 2 TEU, which include the value of the rule of law*."[55] The judgment to which this CJEU statement refers concerns a specific case of solidarity – energy solidarity.

2.1.3 Problematic area: family law and EU institutions

The sources of EU law include so-called general principles of law. One of several types of these principles encompasses the so-called structural principles

[54] CJEU, Case C-156/21, *Hungary* v *Parliament and Council*, para 125; Case C-157/21 *Poland* v *Parliament and Council*, para 143.

[55] Ibidem, para 147.

of the EU, which include the principle of conferral of powers and the principle of respect for Member States. The latter principle is further composed of a number of specific legal principles,[56] including respect for national identity "which is rooted in their fundamental political and constitutional systems, including local and regional self-government" [Art. 4(2) TEU], respect for the primacy of Member States' citizenship vis-à-vis EU citizenship[57] or respect for linguistic, cultural and religious diversity.[58]

As part of EU law, compliance with these principles is therefore also linked to the value of the rule of law (see section 2.1.2.B above), as this value binds not only Member States but also the EU institutions.

An analysis of Arts. 2–6 TFEU shows that Member States have not conferred competence on the EU in the area of family law, with the exception of the regulation of the international elements of family law [Art. 81(3) TFEU]; the sensitivity of this area is reflected, among other things, by the fact that even in this marginal aspect of family law unanimity is required in the Council, i.e. each Member State has a veto.

However, the EU institutions – apparently for ideological reasons – try to circumvent this lack of power mostly through anti-discrimination legislation, or by not respecting the limit of the powers conferred on the EU. However, it is suggested that in doing so they violate the rule of law.

For example, the Council implicitly states in an internal document that non-discrimination on grounds of sexual orientation takes precedence over non-discrimination on grounds of religion, even though both fundamental rights have the same legal force and there is no hierarchical relationship between them.[59]

The Commission's LGBTIQ Equality Strategy 2020–2025[60] aims to, inter alia, "*provide funding opportunities for initiatives to combat hate crime,*

[56] Cf. e.g. P. Svoboda, *Úvod do evropského práva* (Introduction to European Law), 6th edition (Prague: C. H. Beck), p. 114.

[57] Cf. Art. 9 TEU; Arts. 20–25 TFEU; Art. 39 EU Charter of Fundamental Rights et seq.

[58] Art. 22 EU Charter of Fundamental Rights, Art. 3(3) subsection 3 TEU, 13, 165(1), 167(4), 207(4)(a) TFEU.

[59] Council document 11492/13 – COHOM 134 - COPS 251 - PESC 775 – Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, point I.A.1 : "The EU ... affirms that ... religious values cannot be invoked as a justification for any form of discrimination, including discrimination against LGBTI persons."

[60] Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020–2025 (COM/2020/698 final).

hate speech, violence and harmful practices against LGBTIQ people (Citizens, Equality, Rights and Values Programme)", even though such funding is unlawful because "*combating hate crime, hate speech, violence and harmful practices against LGBTIQ people*" is not an offence under the exhaustive list of offences in Art 83 TFEU. It does not fall within the scope of EU competence and therefore the Commission has no right to fund related projects and programmes.[61]

An interesting question arises with regard to the European Parliament: is it bound by the principle of conferred powers only for legislative resolutions, whereas otherwise it can, as a relatively independent body,[62] debate and deliberate (i.e. consume its time and EU budgetary resources) on any topic, e.g. also on bioethical or family law issues, or is it bound by the division of powers between the EU and Member States even outside the legislative process? A clear answer to this question is not yet available.

The CJEU, for its part, systematically ignores the Treaty principle that EU citizenship has an accessory relationship with the citizenship of a Member State – it complements but does not replace it [Art. 9 TEU, Art. 20(1) TFEU] and that Member States have retained the area of family law within their competence, for whatever purpose. It is therefore puzzling that, although the Romanian Civil Code, for example, explicitly limits the institution of marriage to the relationship between one man and one woman, the CJEU inferred from the vague definition of marriage in secondary EU law (Directive 2004/38, adopted by qualified majority in the Council !)[63] the conclusion that, for the purposes of free movement, the prohibition of discrimi-

[61] Cf. P. Svoboda, Nový vývoj v prosazování vlády práva v EU (New Developments in the Enforcement of the Rule of Law in the EU), (*Právní rozhledy* 4/2021), pp. 134–136.

[62] The EU institutions are relatively autonomous within the horizontal conferral of powers, as "*[e]ach institution shall act within the limits of the powers conferred on it by the Treaties*" (Art. 13/2 TFEU). This autonomy, jealously guarded by the EU institutions, is expressed, i.e. in the autonomous adoption of rules of procedure and, in particular, in the absence of a common administrative procedural code, which the Commission, despite repeated proposals by the European Parliament, has strenuously resisted. Cf. P. Svoboda, Trnitá cesta ke kodexu unijního správního práva procesního (The Thorny Road to the EU Code of Administrative Procedure), in *Liber amicorum Monika Pauknerová* (Wolters Kluwer Prague, 2021), pp. 463–470.

[63] Marriage is not precisely defined here in terms of the difference in the sex of the spouses, nor is there any reason for such a precise definition in EU law: marriage is a family law concept and family law does not fall within the competence of the EU. It is therefore up to the individual Member States (and not the CJEU) to define this concept, as is the case with the concepts of public security, public order, etc.

nation on grounds of sexual orientation takes precedence over this unambiguous premise of the citizenship of a Member State,[64] however much Member States have not entrusted family law to the Union, and, moreover, unanimity in the Council is required on questions of non-discrimination on grounds of sexual orientation (cf. Art. 19 TFEU); this too is circumvented and ignored by the CJEU.

It is therefore not surprising when a Member State starts to point out these violations of the EU institutions against the rule of law (respect for its own EU law); Poland has already started talking about the politicization of the CJEU, Hungary is talking about the need to depoliticize the European Commission. In a situation where the EU institutions are trying hard to enforce the rule of law but are themselves having problems with it, this may ultimately weaken the EU as a whole and the confidence of Member States and their citizens in it.

2.2 Citizens' trust in the EU

Alongside trust between Member States, the trust of citizens in the European cooperation project is equally important.

The reason for the importance of this trust is obvious: the absence of this trust would be reflected in the results of democratic elections, through which the European project is influenced directly and indirectly. This trust is thus essential to the legitimacy of the European project.

Jean Monnet, the chief architect of the Community method of cooperation, had as the motto of his European endeavour "*We are not forming coalitions of states, we are uniting men*".[65] Free movement of people, reinforced by European citizenship (on which see section 2.1.1.D above), appears to be essential for connecting people – among all EU policies. Visa-free travel with no border controls within the Schengen area is the basis for this free movement, which is also supported by highly successful projects such as Erasmus for students and teachers or the cooperation of social security systems in terms of free movement of economically active people. People should therefore feel the benefits of the European project in their lives and have confidence in it through these benefits. In today's media age, when peace and the achievements of EU cooperation are taken for granted, it is still important not to neglect communicating these specific results to the public.

[64] CJEU, Case C-673/16, *Coman*; cf. also CJEU, Case C-490/20, *Stolichna obshtina*.

[65] Cf. J. Monnet, *Memoirs* (London: Third Millennium, 2015).

This usefulness of European cooperation and the trust it engenders are measurable: the most systematic surveys of this kind are those carried out by Eurobarometer.[66] These surveys show that, on average, the EU is trusted by European citizens across Europe, although the differences between Member States are significant.

The same can be said of another measure of trust, namely the European Parliament elections, where trust is measured by two criteria: the political orientation of MEPs (pro-European vs. anti-European) and voter turnout. The distinctly pro-European composition of the European Parliament clearly reflects EU citizens' trust in the Union. The generally lower turnout in the European elections compared to national elections cannot be seen as an expression of less trust in the European Parliament compared to national parliaments (as evidenced by both Eurobarometer surveys and various pan-European and national surveys[67]), but as a consequence of the fact that issues considered most important by ordinary citizens are not within the EU's remit: taxation, social and health security, public order and safety, and education.[68] This is compounded by the proven fact that the less knowledge one has about a given phenomenon, the less trust one has in it;[69] the knowledge of the average citizen about the EU is less than about his own state and its policies.

Conclusion

A good observer who has had the opportunity to get to know the workings of the European Union will, after a while, come to a surprising realisation: that this outwardly powerful and awe-inspiring organisation is actually very fragile and depends to a large extent on relationships, ultimately on inter-

[66] See https://europa.eu/eurobarometer/screen/home.

[67] Cf. e.g. Eurostat data. https://ec.europa.eu/eurostat/databrowser/view/sdg_16_60/default/table?lang=en; or Eurobarometer data https://euroskop.cz/2021/05/07/vysledky-eurobarometru-2021/.

[68] Cf., J. Venclík, Střety legitimit v Evropské unii (Clashes of Legitimacy in the European Union), (Prague: Leges, 2019), pp. 31–32, 35, 64. Andrew Moravcsik, quoted here, points out that disinterest should not be confused with distrust or dissatisfaction.

[69] Cf. P. Lyons, *Czech Citizens' Attitudes towards Membership, Benefits and Dissolution of the European Union,* Department of Political Sociology Institute of Sociology Czech Academy of Sciences Prague, Czech Republic. Working Paper GACR Project: 13-29032S. cf. also P. Lyons, R. Kindlerová (eds.). *47 odstínů české společnosti* (47 shades of the Czech society), (Prague: Institute of Sociology of the CAS, v.v.i., 2015), pp. 165–172.

personal relationships. And the quality of those relationships depends on respect and trust.

We live in a time when our societies, communities and families seem to be torn apart by individualism and misinformation. The abandonment of the tradition of the Ten Commandments with its simple instructions such as "thou shalt not bear false witness" seems irreplaceable. This is because its adherence is not based on legal enforceability, but on the moral integrity and self-correction of the person himself. This applies above all to legislation, which, in the absence of this phenomenon, has to resort to regulating even greater details of interpersonal relations, so that today it is completely illusory to insist, for example, on the maxim that ignorance of the law does not excuse it. But this is especially true from the point of view of trust: today, one cannot rely on another person to tell the truth simply because his conscience cannot bear a lie. This carries over into politics – see, for example, election campaigns – and subsequently into the law. Even supranational institutions such as the European Union are not spared this tendency: let us disregard misinformation and take just one example of how differently the top political representatives of Member States speak in the EU institutions and to domestic audiences: this is what I call the nationalisation of EU successes and the Brusselisation of domestic failures. This tendency has, of course, profound consequences for confidence in the EU and its functioning. However, the task of building mutual trust is a task not only for top politicians but for all citizens of the Union. As Richard Coudenhove-Kalergi puts it, "a part of the destiny of his world therefore rests in the hands of every European".[70]

[70] R. Coudenhove-Kalergi, *Pan-Europe*, preface to the first 1923 edition, translated from Czech translation (Praha: Pan-Evropa, 1993), p. 11.

A NEW EUROPEAN CONSTITUENT PROCESS? A DELIBERATIVE CONSTITUTIONALIST SUGGESTION

Francesco Rizzi Brignoli

Abstract

The present paper aims to address the debate on the legitimacy of European constitutionalism through different foundational assumptions. It is a well-known matter that constitutional states suffer of paradoxical origins, among which a vicious cycle of legitimation between the sovereign and founding constituent power and the legitimated constituted authority stands out the modern narrative. This has led, on one side, to a crisis of trust between present and future claims and the founders' intentions and commitments; on the other, to various sceptical authors to dismiss the concept of constituent power, especially where the transnational dimension configures as pluralist and post-sovereign. On the contrary, the paper proposes the recovery and review of the idea of constituent power in deliberative constitutionalist terms: it envisions a circular constituent process among generations, an ongoing conversation that could continually unveil the moral substance of the demos and reconstruct retroactively its own origin. Deliberative constitutionalism provides an efficient remedy to the problem of authorization among generations, as well as to the liberal friction between constitutionalism and democracy. In this sense it frames constitutions both as a mirror and catalyst of the community. The paper claims eventually that this constituent process could be a distinctive feature of the European polity itself, identifying the normativity of transnational constitutionalism as the opportunity to fix modern paradoxes and trusting flaws.

Keywords: deliberative constitutionalism; constituent power; bootstrapping process; constitutional paradox; European constitutionalism

Introduction: the complex paradox of constitutionalism

The breadth and variety with which the topic of constituent power has been developed and critiqued is unquestionable. Given the purposes of this paper, it is not possible to treat the history of this idea, for the age of modernity and the creation of the modern state, up to its developments in the twentieth century. Instead, this research aims to focus on the status of constituent power today: in particular to how democratic constitutionalism still presents itself marked by a complex paradox, on which several authors have recently renewed interest and proposed a conceptual systematization.[1] It is, as a widely accepted assumption, a strong tension between the (primordial) democratic spirit of constituent power and the liberal spirit of constitutionalism: on the one hand, power that authorizes law *prima facie*; on the other hand, law that limits the ruler's power.

Of course, this basic statement can be articulated more by explaining what implications this paradox has in a constitutional-democratic and national context. Thus, the present paper imagines the threefold system of national constitutionalism structured this way: the first two paradoxes refer to the conditions of the very existence of the constitutional entity and define both temporally and spatially the founding past; the third concerns, in the present time, the conflict between two interpretations of the performance of constitutions. So, in the first place we find the problem of authorization/legitimation between constituent power and constituted power. At the height of factual modernity, the expression of a constitution is configured as the act of a sovereign constituent power, which democratically belongs to the people. As Andrew Arato well observes:

> [...] Sovereign constitution making involves the making of the constitution by a constitutionally unbound, sovereign constituent power, institutionalized in an organ of government, that at the time of this making unites in itself all of the formal powers

[1] See M. Loughlin, N. Walker, *The Paradox of constitutionalism: Constituent power and constitutional for*m (Oxford University Press, 2007); C. F. Zurn, 'The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy', 16, 3, Legal Theory, 2010; D. Dyzenhaus, 'Constitutionalism in an old key: Legality and constituent power', 1, 2, Global Constitutionalism, 2012; M. Loughlin, 'On Constituent Power', in M. W. Dowdle, M. A. Wilkinson (eds.), *Constitutionalism beyond Liberalism*, (Cambridge University Press, 2017).

of the state, a process that is legitimated by reference to supposedly unified, pre- existing popular sovereignty.[2]

The paradox is therefore revealed in the causal circularity between a legitimized constituted power and a popular constituent power which undertakes a process of self-actualization: who legitimates the sovereign constituent power of the people/nation? Another former constituted authority? But who established that same authority? This brings clearly to an infinite regress in terms of legitimation, which has been later defined as 'bootstrapping' paradox.[3] The other purely 'foundational' paradox concerns the space designed by the constitutional identity of the demos that exercises constituent power: the latter is in fact severely limited or even prevented from democratically deciding its own identity, as the polity acts univocally as constituent.[4] In the case of nation-states, the polity coincides with the people-nation, rooted in an ancient ethnos that in turn substantially defines the attribution of sovereignty to that people. Herein lies the nationalistic paradox: the populational or territorial boundaries of a demos are excluded from political negotiation. This aspect, which was already highlighted by the father of constituent power, the Abbé Emmanuel Sieyès, in his *What is the Third Estate* (1789), remains of great relevance in today's world if only regarding the theme of multiculturalism and migration.

Finally, the third and last paradox concerns more generally a friction between two performing modalities of constitutionalism:[5] on the one hand, legal constitutionalism curbs power and majority will to protect minorities or individual rights and interests – thus preserving individual autonomy in a liberal perception; on the other hand, the so-called political constitutionalism that guarantees freedom of everyone to decide upon the decisions that affect them directly, by forming democratic majorities – thus preserving collective autonomy in a republican perception. This theoretical re-presentation defines the national space-time parameters, on which to set in the next sections the comparison with constituent power in the European transnational

[2] A. Arato, *The Adventure of Constituent Power: Beyond Revolutions?*, (Cambridge University Press, 2017), p. 31.

[3] C. F. Zurn, *supra* note 1. A paradox that seems to be endemic more than all to contractarian theories, which creates a counterfactual and imaginative mental experiment not driven by history or facts (see M. Loughlin and N. Walker *supra* note 1, p. 2).

[4] Cf. M. P. Maduro, 'Three Claims of Constitutional Pluralism', in M. Avbelj, J. Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012).

[5] Constitutionalism understood in its *thickest* conception [see C. Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996), p. 3].

dimension. Section 2 will address how constituent power presents itself in the contemporary debate, and how the latter diversifies by confronting the aforementioned issues, with a final emphasis on the fate of constituent power at the transnational level. Section 3 will introduce the discourse of deliberative constitutionalism and how it re-imagines constituent power, discussing the liberal-republican extremes of modern constitutionalism. Section 4 looks at how DC looks *beyond borders*, at the European case, with respect to sceptical positions towards the concept of constituent power, proposing it instead as a characteristic feature of the transnational evolution of constitutionalism.

2. Constituent power today: constitutionalist and democratic approach

The still current relevance of this paradox of constitutionalism has certainly been brought to the fore by its confrontation with the questions of the contemporary post-sovereign and pluralist world, as we shall see below. In this sense, new challenges have been posed to the legitimacy of national constitutionalism, and the contemporary debate on constituent power has evolved in a highly articulated way. First, within the constitutional temporality to which the founding act gave rise, a gap of distrust has been created between today's expectations, needs, and problems and the intentions and guarantees that the founders inscribed in the constitution. Here is where recalling and reusing the idea of constituent power today still means addressing the paradox of authority. This problem presents itself, rather than remaining purely an originalist fallacy,[6] by repurposing a perennial dualism between constituted power (constitutionalism in being) and a constituent democratic force that pushes the *entrenched* toward change.

Thus, the paradox still forces a position, but not only that: it is linked, in the present, to the problem of performance, that is, the conflict between the liberal fear of the few, whose rights are protected by the authority of the constitution, and the democratic will of the many,[7] which under exceptional conditions can be identified as constituent power. In this framework, the tension between liberalism and constituent power still arises, generating two

[6] N. Walker, 'Post-Constituent Constitutionalism? The Case of the European Union', in M. Loughlin, N. Walker (eds.), *The Paradox of constitutionalism: Constituent power and constitutional form* (Oxford University Press, 2007).

[7] M. P. Maduro, *supra* note 4.

macro-approaches that continue the confrontation[8]: on the one hand, radical democrats who defend the revolutionary and extra-legal act of constituent power; on the other hand, constitutionalists who imagine this power limited within constitutional constraints, or no real power at all from the legal point of view. These tendencies are articulated in different approaches with different characters, but some exemplifying authors can be recalled.

As Loughlin analyses,[9] radical democrats largely take inspiration from Carl Schmitt's decisionism or alternatively Hannah Arendt's republicanism. In the wake of the latter, it is worth mentioning Joel I. Cólon-Ríos,[10] who, similarly to Andreas Kalyvas,[11] advocates for a constituent power which allows citizens to recreate the fundamental laws with democratic acts of reconstitution and, when these acts are prevented, tackle the deficit of democratic legitimacy. Such a constituent power is part of a more complex framework called *Weak Constitutionalism* (2012), which refuses the supremacy of an unmodifiable constitution over the people's constituent power, or the supremacy of the totalitarian power of a political majority. Such a weak constitutionalism leaves the future open to new constituent episodes "in which new or radically transformed constitutions are produced through the most participatory mechanisms possible".[12] There are certain moments in the constitutional life when changes are necessary, when "democracy should trump constitutionalism"[13] through extraordinary participatory processes. It shall be borne in mind that plebiscites and referenda do not satisfy these principles of popular participation and open democracy, instead of processes which concretely involve citizens in "proposing, deliberating and deciding on a set of fundamental constitutional changes".[14]

Among constitutionalists, on the other hand, the most consistent 'faction' is represented by normative legal theory of both legal positivist and natu-

[8] O. Bashkina, 'Constituent Power(s) in a Dualistic Democracy', 41 Revus, 2020.

[9] M. Loughlin, *supra* note 1.

[10] J. I. Cólon-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge, 2012); J. I. Cólon-Ríos, *Constituent power and the law* (Oxford University Press, 2020).

[11] A. Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', 12, 2, Constellations, 2005;
A. Kalyvas, 'Constituent Power', in J. M. Bernstein et al. (eds.), Political Concepts: a Critical Lexicon (Fordham University Press, 2018).

[12] J. I. Cólon-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge, 2012), p. 11.

[13] Ibid., p. 168.

[14] Ibid., p. 91.

ralistic roots.[15] Within it we find a more 'extreme' or sceptical form towards constituent power. In this sense, David Dyzenhaus argues that the commonality that binds normativists is surely that of

> showing how legal order and law itself are best understood from the inside, from a participant perspective that argues that legal order has intrinsic qualities that help to sustain an attractive and viable conception of political community. It is, I will argue, those intrinsic qualities that give law its authority and without which there is neither law nor authority.[16]

Therefore, in order not to fall into the dualistic trap between constituent and constituted power, normative theories of law should focus only on the Hobbesian *principle of legality* that legitimizes, alone, the whole legal and political system. Consistently, Dyzenhaus has more recently derived from Kelsen a multilevel monism,[17] from the national to the transnational and international: each of them is grounded in an independent presupposed *Grundnorm*, by virtue of its own principle of legality. In this way, for normative legal theory, the problem of constituent power does not even arise and becomes a redundant concept. However, there is also a more 'moderate' constitutionalist faction, which preserves a dualism between constituent power and constituted power. On the one hand we find Bruce Ackerman,[18] who identifies in his theory two fundamental moments in constitutional time: on the one hand, the 'ordinary' constitutional politics, in which the Constitution can be reformed only through the normal procedures indicated by the Constitution itself (such as judicial review); on the other hand, the higher law-making where the people cause 'unconventional changes' outside the classical rules of amendments. The moments of higher constituent law making are so rare that, for the rest of the time, the sovereign people remain 'dormant', allowing ordinary politics operate on their behalf. In this way, this ver-

[15] M. Loughlin, *supra* note 1. He distinguishes respectively between structural liberalism and legal-moral liberalism.

[16] D. Dyzenhaus, *supra* note 1, p. 233. If legal positivism excludes any value judgement along Kelsenian lines, legal-moral liberalism gathers various Dworkinian inspirations to the legal as much as moral qualities of the legal order, including Dyzenhaus: "Moreover, while these are specifically legal qualities and a specifically legal kind of authority, the qualities and authority are moral as well as legal, and thus explain why law's claim to authority is justified." (ibid.)

[17] D. Dyzenhaus, 'Deliberative Constitutionalism through the Lens of the Administrative State' in R. Levy, H. L. Kong et al. (eds.). *The Cambridge handbook of deliberative constitutionalism* (Cambridge University Press, 2018).

[18] B. A. Ackerman, *We the People: Foundations* (Harvard University Press, 1993).

sion of the constitutionalist approach is already proposed as an intermediate way between the extremes of legal and political constitutionalism applied to constituent power, i.e. between the constituted protection of fundamental rights and popular sovereignty.

Another author who replies 'half-way' to the paradoxes of authority and performance is Andrew Arato, who has recently retraced the *Adventures of constituent power*.[19] He moves however a step beyond the univocal premise of the polity that underlies the constituent power. Arato criticizes the bond of sovereignty that amalgamates the demos:[20] constituent power must avert the danger of dictatorial abuses and thus the Schmittian idea of "any single agency, institution or individual that claims to embody the sovereign power and authority of the constituent people".[21] However, the "adventures of constituent power" should not be put to an end: they continue in a post-sovereign and post-revolutionary phase that replace Schmitt's political subject with a "pluralistic liberal as well as democratic pouvoir constituent".[22] Post-revolutionary therefore means that constituent power no longer manifests itself modernly as a single entity and only in exceptional cases such as revolutions. Conversely, it is enacted in multiple moments by a plurality of actors negotiating with the people on their participation to ratify the new constitution. From this derives what Arato calls multi-stage constitutionalism, which seeks a middle-ground between the two normative insurances of radical democracy and liberal constitutionalism:

> What is crucial for me, however, and more important than mere empirical relationships, is the presence of two normative logics in the post-sovereign paradigm, the normative logic of insurance that follows from the plurality of necessarily uncertain actors in the comprehensively negotiated cases, along with the normative logic of institutionalizing the democratic post- revolutionary founding experience. Insurance […] opens up a link to the founding experience through the institution of a suitably structured and enforceable rule of revision. While most of the post-sovereign negotiated cases produced such a

[19] A. Arato, *supra* note 2.

[20] Closely to Arendt's criticism to the sovereign roots of constituent power, due to the inegalitarian and arbitrary unique general will that destroys the plurality of voices in the public sphere: cf. H. Arendt, *On Revolution* (Penguin Books, 1963).

[21] A. Arato, *supra* note 2, p. ix.

[22] Ibid., p. 418.

> rule, only some of them produced the multi-track rule open, though procedurally limited on the highest replacement level. While all these cases generated constitutional courts, only some explicitly established amendment review. Yet on the level of the normative logics of insurance and foundation it is that combination that best expresses the meaning of post-sovereign constitution making.[23]

The negotiation of a multi-track, open amendment review is based on a dualism that, as Bashkina notes,[24] is aimed to be complementary with Ackerman's. Arato focuses only on Ackerman's constitutional changing moment, breaking it down into the further dualism of the two agencies doing the negotiation: central representation and councils. These separated actors participate simultaneously at the constituent process, whenever it is "awaken" (following the terminology of Ackerman[25]). The central point for Arato is that even when there is a constituent monopolizing assembly that speaks in the name of the sovereign people, the plurality of voices and representative institutions is preserved, in order to democratize the processes of constitution-making and make them no longer exceptional. In this way he also distinguishes himself from the Kelsenian multi-monism of Dyzenhaus and from the "sleeping" and dualistic constituent power of Ackerman.

Now, for the purposes of this paper, an interesting aspect emerges which is common to authors who rework the idea of constituent power: as already mentioned, the latter seems to "become present" and manifest several times during the life of the polity, in a post-revolutionary and no longer univocal form. Deliberative constitutionalism (DC) also proceeds along this line, which will be investigated in the next section. However, it will also be argued that the continuity of such constituent power cannot be effectively explained by a radical or constitutionalist approach. DC also takes the form of an intermediate answer, but better specifies the role of a continuous constituent process in a normative theory of constitutional democracy, which in this case is expanded beyond the boundaries of nation states and applied to the case of the 'founding' of European constitutionalism.

[23] Ibid.
[24] O. Bashkina, *supra* note 8, p. 4.
[25] B.A. Ackerman, *supra* note 18.

3. Constituent process in deliberative constitutionalism

The first element to consider regarding a deliberative constitutionalist intermediate answer is the theoretical perspective it identifies in the relationship between deliberative democracy and constitutionalism. DC starts from a normative theory of democracy – deliberative democracy – which eases the tension between private and public autonomy, contrasting a purely aggregative or majoritarian vision of democracy and targeting instead the wider political debate in the public sphere. DC normativity implies then a peculiar epistemic value, that is legitimacy of constitutional deliberations. This legitimacy is the *common issue* concerning deliberation and constitutionalism: if on one hand constitutions continuously ground and reinforce polity's commitments public debate, on the other deliberative democracy raises the question about the inclusiveness and the correctness of constitutional deliberative procedure. However, as mentioned by Levy and Kong,[26] there have been limited perspectives in past literature: on one side, deliberative democrats unveiled deliberative processes, informed and rational discussions within constitutional institutions such as high courts and parliaments. In this manner, however, they have been focusing on how governmental elites deliberate in a democracy, neglecting the constitutional plural sources and effects on the public sphere. On the other side, most constitutionalists have overlooked deliberative processes (with some important exceptions),[27] sticking instead to a more classical liberal view of democracy. Put aside the quality of the public debate in the civic society, constitutional theories focused on "notions of liberty, equality and integrity (or anti-corruption) conceived narrowly as ways of curbing political power".[28] The relevant point here is that only recently some authors have been focusing on how constitutions can epistemically contribute to shape the deliberative public debate and, at the same time, be object of discussion themselves.

Constitutional deliberations may be accounted from different normative points of view that can relate with the afore-mentioned approaches to constitutionalism. DC, firstly, distinguishes how deliberation occurs 'under constitutions', namely under the constitutional authority, identifying how law fil-

[26] R. Levy, H. L. Kong et al., *The Cambridge handbook of deliberative constitutionalism*, (Cambridge University Press, 2018).

[27] Ibid., *Introduction: Fusion and Creation*, note 2.

[28] Ibid., p. 2.

ters and telescopes democratic deliberation.[29] In this sense a constitutionalist perspective is in fact adopted when speaking of 'constituent' deliberation. Secondly, DC also accounts for deliberation 'about' constitutions, addressing the boundaries of the legislature's authority themselves. In this case, we speak of deliberation in a radical-democratic sense, because the popular will legitimizes by deliberating the constitutional elites, through episodic referenda and in moments of (more or less revolutionary) change.

However, the most interesting perspective for the configuration of the intermediate answer is called 'comprehensive view', which accounts for deliberation 'under and about' constitutions. This perspective allows to grasp in the best way possible the dialectical relationship between deliberative democracy and constitutions, namely the fact that "a full account of a deliberative democratic constitutional order should examine the reciprocal influence of, on the one hand, deliberation that generates legitimate constitutional law and, on the other hand, constitutional practice and norms that enhance democratic deliberation".[30] Furthermore, comprehensiveness highlights more than all how DC works when dealing with the beforementioned constitutional performance and bootstrapping paradoxes. Comprehensive DC bridges democracy and constitutionalism through the common issue of legitimacy, easing the tension between democratic majority will resulting from the aggregation of preferences and the individual constitutional protection. The domain of constitutional legitimation is thus *stretched* within the dialectic between deliberation and constitutionalism and consequently the conversation about the community commitments and institutions opens up to the wider public sphere. In this sense, DC reflects on "how to use laws to establish and enforce a polity's foundational commitments – as these are reflected in its institutions, values and collective mission – without wholly ceding power over those commitments to the closed band of elites – judges, lawyers, administrators and legislators – who tend to be a constitution's day-to-day stewards".[31] DC embraces a multi-actor perspective, beyond the borders of those institutions that are traditionally called to apply constitutional norms.[32] This in the wake of a systemic view of deliberative democra-

[29] See J. Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (Polity Press, 1996).

[30] R. Levy, H. L. Kong, *supra* note 23, p. 6.

[31] Ibid., p. 7.

[32] Cf. S. Chambers, 'Kickstarting the Bootstrapping: Jürgen Habermas, Deliberative Constitutionalism and the Limits of Proceduralism', in R. Levy, H. L. Kong et al. (eds.). *The Cambridge handbook of deliberative constitutionalism* (Cambridge University Press, 2018);

cy, that catches how deliberation interrelates among different bodies and actors and overcomes the exclusive High Courts standpoint on constitutional matters – and other band of elites.[33] The most important and varied political body is precisely civil society, constituted by the participation of citizens and their will formation through deliberative channels. If within the public sphere the latter are confronted with the gap of distrust towards the setting and the constitutional commitments decided by the founders, a new present form of constituent power looms, rethinking those same purposes. In this way DC responds to the bootstrapping paradox by identifying a continuous 'bootstrapping process' of constituent legitimacy.

To better understand this point, one must recall Habermas' theory that presents the ultimate inclusive view of DC.[34] He bases his vision of constitutional democracy[35] on the relationship of co-originality, i.e., an interdependency between private and public autonomy at the beginning of the discursive process: the legal (constitutional) guarantee of basic rights for the individual freedom (private autonomy) is inextricably tied up to the necessity that each citizen participates to the democratic decision-making process (public autonomy). This relaxation of the liberal friction goes with a different vision of the democratic will formation, in the light of a dialectic relationship between deliberation and constitutionalism. In this manner, a comprehensive vision 'broadens' the conversation on the legitimacy of foundational moments both from the spatial (at least among different actors on the same territory) and the temporal point of view: in order to respond to the paradoxical regress of authority, Habermas re-imagines it as a self-correcting learning process, stretched towards the past and as much as towards the future. Consequently, the bootstrapping paradox turns into a bootstrapping process over time, demanding to every new generation a revision of the system of rights. Specifically, "all the later generations have the task of actualiz-

J. Parkinson, 'Ideas of Constitutions and Deliberative Democracy and How They Interact' in R. Levy, H. L. Kong et al. (eds.), *The Cambridge handbook of deliberative constitutionalism* (Cambridge University Press, 2018)

[33] In other words: when looking at the deliberative constitutional system as a whole, we can actually reflect on the structural implications that this perspective has, not much from the single institutions' practical point of view, but rather for the definition of institutions and political concepts that refer to that particular polity.

[34] J. Habermas, *supra* note 26.

[35] Starting from the principle of democracy: "Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted." Ibid., p. 110.

ing the still-untapped normative substance of the system of rights laid down in the original document of the constitution".[36] Keywords of this process are the 'inclusion' on egalitarian terms of all- affected voices and perspectives to the public conversation and the interdependence between democratization and constitutionalisation. Habermas dispels the paradox by not assuming an essence of the demos that teleologically reveals to itself – in a Hegelian way – but rather conceding that constitutional political communities do not come out ex nihilo. Instead, constitutions reflect a previous set of moral values and commitments and constituted communities from which the learning process proceeds.[37]

One of the key words of this bootstrapping process is still *circularity*, which however has a diametrically opposite meaning compared to the bootstrapping paradox:[38] far from having a founding moment that has value of eternity, generating the causal stalemate, the self-learning process can retroactively reconstruct its own 'kickstart',[39] even though at the initial moment the community was not aware of it and its constitutional conversation even underwent a regression phase.[40] Through the reconstructive method, Habermasian-derived DC reworks the foundational conditions of legitimacy of constitutionalism: circularity becomes the very engine of the process and the mutual influence between the deliberative process and constitutionalism make the constitution both trace and catalyst of society.[41] However, one still has to wonder what kind of theoretical challenge Europe represents in this reasoning: the present work certainly follows Habermas in considering the EU an opportunity to reveal aspects of DC that otherwise would not come to light; at the same time DC offers a normative framework well suited for the pluralist condition of the European Union.

[36] J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', 29, 6 Political Theory, 2001, p. 774.

[37] The values to which Habermas refers for Western democracies are the ones pertaining to the phenomenon of modernization (cf. J. Habermas, The philosophical discourse of modernity, MIT Press, 1985).

[38] J. Habermas, *The inclusion of the other: Studies in political theory* (MIT Press, 1998), p. 774.

[39] S. Chambers, *supra* note 32.

[40] This is how Habermas justifies after the failure of the Laeken process (2005): although the constitutional debate did not continue following the referendums, he remains faithful to the principle that the first conversation is fundamental for one to be able to speak of constitutionalisation.

[41] N. Walker, 'Constitutionalism and Pluralism in Global Context', in M. Avbelj, J. Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012).

4. Deliberative constitutionalism and the EU: how to get over scepticism

It is not possible to reduce DC to a theory created ad hoc to account for the complex and unresolved phenomenon of European constitutionalism. As an umbrella concept[42] it covers a range of approaches of broader scope and origin. DC thus does not arise per se like Neil McCormick's constitutional pluralism with a normative and descriptive focus on the European Union,[43] but it still finds in the latter the potential to reconstruct and practically achieve those processes that it envisions. This is the operation that Habermas has carried out over the past two decades[44] recognizing the following objectives in the process of European integration: the loosening of the tension between private and public autonomy; the recovery of the successes and the cure of the pathologies of national democracies; a continuous process of rethinking polity commitment and the space to create a new civic solidarity; a greater democratic authoritative weight in the face of globalization. Similarly, this paper exploits the framework of DC to address the debate of European constitutionalism through different foundational assumptions. Especially where Europe represents the opportunity to overcome the last nationalistic paradox: not so much because now the borders of the polity are more easily part of the political negotiation,[45] or because constitutional identities are cancelled in favour of an ethnic-free Union. Still maintaining the national identification, the European Union provides at least a fundamental layer of post-sovereignty and pluralism to which constitutionalism must confront. It is in this sense that DC makes its normative claim about European constitutionalism: it reworks the concept of constitutional legitimacy, 'stretching' it beyond the border of elite institutions and re-opening the constitutional conversation to the wider public sphere. As we have seen, this would lead to a peculiar bootstrapping process changing the foundational assumptions and making constitutions both trace and catalyst of society. Now, along this line DC

[42] R. Levy, H. L. Kong, *supra* note 23.

[43] Although, during the last decade, even CP has developed in various strands with an extra-European and more cosmopolitan focus [cf. M. Avbelj, J. Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012), introduction].

[44] S. Chambers, *supra* note 32.

[45] And in fact, they're not, except policies at the intergovernmental level, within the European council regarding the extension or shrinking of the union. There are very few instances of popular vote or democratic negotiation, Brexit being one of them. Borders of member states remain decidedly unchanged.

makes also its *thick* normative claim, that is: the *distinctive* feature of European constitutionalism corresponds to this new concept of constituent power, as a mark of a particular evolution of modern constitutionalism.

However, there are contrary voices in the debate on European transnational constituent power, structuring a varied *scepticism* that is useful to compare with a DC approach. To this end, the classification proposed by Neil Walker[46] specifically for the European case can be helpful: (1) *non-constituent constitutionalism*, i.e. the hypothesis that constituent power is simply not necessary to describe European constitutionalism and that therefore its very idea is redundant when invoked at the supranational level; (2) *constitutional scepticism*, although it holds that the idea of constituent power is necessary and desirable for any constitutional experience, it cannot logically apply to a non-constitutional experience such as the European one; (3) the hypothesis called *constitutional vindication*, which argues in controversy with the previous ones, the maturity of the European constitutional and constituent experience; (4) finally, the one supported by Walker himself, the constructivist hypothesis of *post-constituent constitutionalism*, which argues: "(contrary to the redundancy argument) that constituent power remains a necessary feature of European constitutionalism, that (contrary to the maturity thesis) it has not yet been realized, but that (contrary to the sceptics) this constituent power is capable of being developed in the future".[47]

Within the first case of scepticism (1) we can easily frame Dyzenhaus' normativism, which defends the possibility of a transnational legal order, endowed with a specific principle of legality. Its validity depends solely on its intrinsic legal quality. From a constitutional point of view, as mentioned, constituent power becomes a redundant political act. When we refer instead to constitutional scepticism (2) the best example, starting with his debate in the 1990s with Habermas, is surely Dieter Grimm.[48] Together with Dyzenhaus, Grimm shares the critique of a surge of theoretical anxiety in illustrating any phenomenon of legal integration as constitutionalism, including the European case. For Grimm, in fact, the risk of this hype for a supranational rule of law is to lead to a democratic and legitimacy cost, at the expense of

[46] N. Walker, 'Post-Constituent Constitutionalism? The Case of the European Union', in M. Loughlin, N. Walker (eds.), *The Paradox of constitutionalism: Constituent power and constitutional form* (Oxford University Press, 2007).

[47] Ibid., p. 252.

[48] D. Grimm, 'Does Europe Need a Constitution?', 1, 3 European Law Journal, 1995; D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', 21, 4 European law journal, 2015.

national citizens who do not have the power to intervene as sovereign will at the European level.[49] The Union would result de-politicized: the responsibility and developments of European integration are entrusted almost solely to the courts and their jurisprudence, not to the democratic will of the citizens. Grimm, therefore, defends the inescapable modern, territorial and national roots of constitutionalism and relegates the possibility of expressing a genuine democratic will to each national democratic sphere, including the act of constituent power.

At the European level, one cannot speak of constitutionalism without falling into the counterfactual, even if applying a sort of reconstructive method a la Habermas. It seems clear that sceptics generally embrace a monistic approach to the issue of constituent power between national and transnational dimensions.[50] On the contrary, the post-constituent constitutionalism of Walker (4) is different, and certainly cannot be defined as monist, but pluralist. He is in fact sceptical of the myth of the univocality of constituent power, supporting its expression in the already constituted phase through a plurality of voices and "reflexive interprets".[51] It must be said that in this way Walker argues against both scepticism (2) and the constitutional vindication (3), for example, of Joseph Weiler (2003). Walker believes that the choice of either faction is only apparent, as both an optimistic and pessimistic approach betray an originalist fallacy: "The democratic credentials of the constitution depend either upon original sin (sceptic) or original grace (vindicationalist)".[52] As mentioned at the end of the second paragraph, Walker's is a part of an intermediate conception which, far from pure scepticism, sees constituent power reappearing several times in the political life of a community, in a non-univocal and post-revolutionary form. A process of legitimation that manifests itself within an already constituted power and that leads us, along

[49] Recalling the no-demos thesis.

[50] Monism which, as Walker notes, could manifest in two main strands: firstly, it includes what Walker defines as "situated or embedded particularism", denying the descriptive and normative peculiarity of European constitutional perspectives. EU constitutionalism is as centralized and hierarchical as national constitutionalism, only at a higher level. Thus, either a state-centered or an EU-centered vision is possible and normatively supported. Secondly, monism could also translate into detached particularism: all the constitutional unities would live in a compartmentalized system where only a plurality de facto applies. Cf. N. Walker, 'Constitutional Pluralism Revisited', 22,3 European Law Journal 2016, pp. 337–338.

[51] Similarly to Arato's multi-stage constitutionalism.

[52] N. Walker, *supra* note 46, p. 262.

the lines of Arato, to wonder: how do the adventures of constituent power continue in today's transnational world?

In the above proposed terms of DC, the continued emergence of constituent power is understood through a fifth additional category, namely that of bootstrapping process. The latter, in the opinion of the author of this paper, succeeds best in providing a normative response to overcome the complex paradox of modern constitutionalism and the trust gap between present and future generations and the intentions of the founding fathers. It is not a sceptical answer, but neither is it a vindicationalist one (3), since identifying constituent power as an evolving process certainly cannot postulate its maturity or completeness at the European level. Therefore, it is eventually necessary to remind two 'normative bridges' that DC builds to account for this process. The first is that which connects the national and transnational dimensions, referring to how DC responds to sceptical monism. In this sense we are again helped by Habermas,[53] who takes up the issue of counterfactual reconstruction of the normative expectations that citizens would have as participants in a constitution-making process.

The reconstruction leads Habermas to see in European citizens a splitting of their exercise of constituent power: one customary exercised at the "domestic" level of the nation state, while the other levelled-up to the supranational dimension. The mental experiment in facts claims that:

> Let us imagine a democratically developed EU as if its constitution had been brought into existence by a double sovereign. The constituting authority is to be composed of the entire citizenry of Europe, on the one hand, and of the different peoples of the participating nation states, on the other. Already during the constitution-framing process, the one side should be able to address the other side with the aim of achieving a balance between the interests mentioned. In that case, the heterarchical relationship between European citizens and European peoples would structure the founding process itself.[54]

[53] J. Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible', 21, 4 European Law Journal, 2015; J. Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte: Citizen and State Equality', 55, 2, Journal of Common Market Studies, 2017.

[54] J. Habermas, (2015), *supra* note 53.

The splitting of constituent power binds the two communities, national and transnational, in an inseparable relationship that is that of citizens as belonging to the sovereign national people and at the same time to European citizenship.[55] Therefore, Habermas accompanies the change of the classical conception of sovereignty, which is transformed into a transnational sovereignty, into an ambiguous division between and at the same time sharing of national sovereignties: on the one hand we would have the plural division between the existing single entities, on the other hand a sharing space that is not merely the sum of its components but transcends it. Not reducing the components in a monistic European constitution, or in a new homogenizing European subject, Habermas proposes a dynamic dualism, not fixed on a single identity. The already constituted and legitimized national subjects are levellingup to the higher level of the bootstrapping process: instead, it configures as self-learning process which can reconstruct its own path and can easily undergo a regression phase, as much as an 'auto-correction' phase. It is here that Habermas emphasizes, on the one hand, the importance and distinctiveness of the transnationality of this cooperation, of the search for a new constitutional compact and, on the other hand, of the new challenge that opens up for democratic theory.[56]

Another part of the distinctive claim that DC makes about this constituent power as process, as previously mentioned, is the temporal 'bridge' that opens that same process to a future orientation (see Fichera 2021). Such feature would maximally stretch the domain of potential legitimation towards the generations to come[57] and draw the continuity or circularity beyond any founding moment that hold eternal legitimacy.[58] The opening up to a constitutional future would, however, also coincide with the evolving history of the adventures of constituent power themselves: the national ones would therefore belong to a founding past of European constitutionalism, while the pro-

[55] M. Bozzon, 'Costituzione e Crisi. Ripensare l'Europa con Jurgen Habermas', 10, 1, Philosophical Readings, 2018.

[56] J. Habermas (2017), *supra* note 53.

[57] Generating all the issues that have been analyzed in the recent literature and that, for reasons of space, cannot be considered here: cf. A. P. Gosseries, 'Constitutions and Future Generations', 17, 2, The Good Society, 2008; L. Beckman, 'Power and future people's freedom: intergenerational domination, climate change, and constitutionalism', 9, 2, Journal of Political Power, 2016; R. Araújo, L. Koessler, 'The Rise of Constitutional Protection for Future Generations', 7, Legal Priorities Project Working paper series, 2021.

[58] The paradoxes of authority and performance would therefore flatten one on the other towards a resolution that is a continuous reflexive process of renegotiation tending to the future.

cess identified at a transnational level would make it possible to unfold the potential evolution of modern constitutionalism. In this sense the constituent process qualifies as the distinctive mark of evolution of European constitutionalism.

Conclusion

To collect a few concluding remarks, one could recall Arato's question in which direction, whether they keep on going, do the constituent power adventures continue: this paper focuses on how, in deliberative constitutionalist terms, these adventures enable an evolution of national towards transnational constitutionalism. DC seems to overcome the complex paradox underneath national constitutionalism, giving better normative solutions for the continuation of a constituent *process*. Among these solutions, a prominent role is given to a new spatiotemporal framework to define and mark the evolutionary development of transnational constitutionalism. This entails to even make the 'evolution' a distinctive feature of constitutionalism itself, embracing a perspective not just enlarged beyond the territorial borders of the nation state, but *temporally* widened to confront past commitments, present needs and future consequences.

There are however some caveats to make: firstly, the institution of a constitutional future perspective has renewed as a research interest in constitutional theory[59] but remains a compelling and unresolved issue. Secondly, the focus on legitimacy between constitutionalism and deliberation is not enough on its own: the relationship between legitimacy and constitutional pluralism underlying a transnational polity must be investigated in order to understand to what extent the conversation about constitutional legitimacy may be *stretched*.[60] Finally, more clarification should be made regarding normative orders of constituent power or even more simply of citizenship, as in the dualism drawn by Habermas. Some authors have recently tried to further develop the argument, by emphasizing strengths and criticalities,[61] but it still

[59] Cf. note 57.

[60] This entails to what extent arrives the inclusion or exclusion of different actors, but also whether the borders of this conversation are only procedurally or also substantially defined.

[61] Cf. M. Patberg, 'Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment: Constituent Power: Openness and Containment', 24, 1, Constellations, 2017; P. Niesen, 'The 'Mixed' Constituent Legitimacy of the European Federation', 55, 2, JCMS, 2017.

leaves open the question of in what capacity legitimizing subjects should participate in the conversation along these lines of constitutional evolutionism.

TO END SLEEPWALKING: THE CONSTITUTIONAL POTENTIAL OF THE CONFERENCE ON THE FUTURE OF EUROPE[1]

Max Steuer

Abstract

The purpose of this contribution is to critically scrutinize prominent reactions to two key innovative components introduced by the European Union (EU) institutions at the Conference on the Future of Europe (CoFoE) in 2021–2022: the CoFoE Plenary and the European Citizens' Panels. These components were at the heart of what has been considered a unique deliberative (quasi)constitutional experiment aimed at 'ending sleepwalking' characterized by low trust and engagement between EU citizens and institutions and deficits in democratic decision-making in the EU. How do the two components fare from the perspective of contributing to this outcome? To conduct a systematic evaluation, the chapter identifies two main approaches to evaluating deliberative processes with a constitutive element; the popular mobilizational and the ideational institutional accounts. Both oppose sceptical views of deliberation as competing with the principle of representation. After elucidating the key features of both accounts and highlighting the complementarities and contrasts between them, the chapter proceeds to address selected criticisms of the CoFoE Plenary and the ECPs. It finds that while some of these criticisms are largely supported by the popular mobilizational account, their purchase decreases with the ideational institutional account. Instead, the ideational institutional account sheds light on some shortcomings of these formats, that tend to be neglected by alternative perspectives. The findings contribute to understanding some lessons from the CoFoE for

[1] This contribution was funded by the Slovak Research and Development Agency (project APVV-21-0237-SKEUDIFGOVRE). Text updated with developments until 1 September 2022 and links to online sources accessible to this date. The input received from the participants of the *European Constitutionalism and the Virus of Distrust* conference as well as the Special COST Action Meeting on *Future of Europe in Debate: Insights from a Deliberative Democracy Perspective* are gratefully acknowledged. The usual disclaimer applies.

a potential EU Convention triggering Treaty changes as well as more permanent deliberative mechanisms.

Keywords: conference on the Future of Europe, deliberative democracy, ideational institutionalism, popular mobilization, European Citizens' Panels, EU institutions, inclusion

Introduction

After two years of preparation and a year of frenetic implementation amidst a raging pandemic and subsequently the Russian invasion of Ukraine, the 'closing event' of the Conference on the Future of Europe took place on 9 May 2022.[2] The EU's leaders – the President of the Commission, the Parliament and the head of the state holding the rotating EU Presidency[3] – held individual speeches, in which they reinforced, inter alia, their joint commitment to respond to the proposals generated by the CoFoE. The usual audience in the Strasbourg Hemicycle, European parliamentarians (MEPs), were only present in small numbers. In the room there were mostly randomly selected citizens who authored many of the proposals presented in the CoFoE final report.[4] Present among them were the 'ambassadors': the randomly selected representatives of the 'citizen participants'[5] from each of the four European Citizens' Panels (ECPs), as the main 'laboratories', in which the foundational ideas on the future of the EU were developed. These ambassadors underwent a unique, but also exhaustive, seven-round meeting journey as members of the CoFoE plenary, where their role was to advocate for the recommendations developed by them and their fellow ECP members.

[2] See the programme of the closing event at https://futureu.europa.eu/pages/about.

[3] Emmanuel Macron. The French President was an important ideational proponent of the CoFoE himself, and his presence certainly helped attract attention to the event. The permanent European Council President (Charles Michel) was conspicuously absent, further boosting the image of the Councils as the vehicles for member state influence, rather than one of the EU institutions key for the unity and advancement of the common project.

[4] Report on the final outcome, May 2022, https://cor.europa.eu/en/Documents/CoFE_Report_with_annexes_EN.pdf.

[5] The language utilized during the CoFoE is just one of the many subjects in need of further interdisciplinary study. The randomly selected participants were became uniquely associated with the notion of the 'citizens', which arguably resulted in the presentation of the other stakeholders as divided from 'citizens' (despite them being citizens themselves). In addition, an image of the 'citizens' presenting the 'ordinary people' of the EU as opposed to the elites was permeated by this language. Alternative terms to identify the randomly selected citizen participants (such as 'panel members') were rarely used, thus perpetuating the language of othering which fuelled the juxtaposition of the panel members vis-à-vis elected officials.

At this moment the CoFoE already faced criticisms on several fronts. Both right-wing Eurosceptics[6] and progressive forces[7] claimed that it was not inclusive enough, though they differed sharply over which voices were underrepresented. Experts on deliberative practices were sceptical about some of the design choices associated with the process of reaching conclusions[8] while proponents of strengthening representative democracy in the EU including the role of political parties spoke about an undesirable trend of challenging the achievements of the representative principle in bourgeoning EU democracy.[9] Despite the criticisms, some of these actors as well as several prominent academics continued to defend the main idea of the CoFoE as an effort to reinvigorate EU democracy and push back against the loss of trust and citizens' 'sleepwalking' through EU politics. These defences, pointing to the releasing of the EU's 'democratic genie'[10] or a 'crucial democratic experiment',[11] exemplify the idea of academics and policymakers acting as 'critical friends' of the efforts at the EU's democratization.[12]

[6] Jacek Saryusz-Wolski, 'Hijacked Europe: Downward Spiral or Return to the Roots', EURACTIV, 2 May 2022, https://www.euractiv.com/section/future-eu/opinion/hijacked-europe-downward-spiral-or-return-to-the-roots/.

[7] Daniela Vancic and Maarten de Groot, 'This Conference Can Still Go Either Way', EURACTIV, 22 February 2022, https://www.euractiv.com/section/future-eu/opinion/this-conference-can-still-go-either-way/.

[8] High-Level Advisory Group, 'Conference on the Future of Europe: What Worked, What Now, What Next?' (Brussels: Conference Observatory, 22 February 2022), pp. 5–7, https://conference-observatory.eu/wp-content/uploads/2022/03/High_Level_Advisory_Group_Report.pdf.

[9] Evangelos Venizelos, 'The Conference on the Future of Europe as an Institutional Illusion', *Verfassungsblog* (blog), 16 December 2021, https://verfassungsblog.de/the-conference-on-the-future-of-europe-as-an-institutional-illusion/; Carlo Invernizzi Accetti and Federico Ottavio Reho, 'The Conference on the Future of Europe as a Technopopulist Experiment', *Review of Democracy*, 22 March 2022, https://revdem.ceu.edu/2022/03/22/the-conference-on-the-future-of-europe-as-a-technopopulist-experiment/.

[10] Alberto Alemanno, 'Releasing Europe's Democratic Genie', *Social Europe* (blog), 1 July 2021, https://socialeurope.eu/releasing-europes-democratic-genie.

[11] Eleonora Vasques, 'CoFoE Should Become Permanent Exercise into EU Legislative Process: Interview with Kalypso Nicolaïdis', EURACTIV, 8 February 2022, https://www.euractiv.com/section/future-eu/interview/eleonora-cofoe-should-become-permanent-exercise-into-eu-legislative-process/.

[12] European University Institute, 'EUI-STG Democracy Forum', 2022, https://www.eui.eu/en/academic-units/school-of-transnational-governance/stg-projects/transnational-democracy-at-the-school-of-transnational-governance/the-forum-on-democratic-participation-and-the-future-of-europe. See also report at https://cadmus.eui.eu/handle/1814/72598, p. 2.

This chapter offers an alternative account for scrutinizing the CoFoE as an instrument to reinvigorate democracy in the EU, focusing specifically on the ECPs and the CoFoE Plenary. While the Plenary was responsible for the generation of the final recommendations and manifested the unique interplay between the representatives of EU institutions, national parliaments, civil society and randomly selected ambassadors of the ECPs, the ECPs are the most innovative component of the CoFoE as they enabled transnational, multilingual deliberation between EU citizens.[13] Rather than praising the 'power of the people' vis-à-vis the institutional context, the chapter argues that the achievements of these two key CoFoE structures come to the fore *precisely* in that context, which is best captured by an *ideational institutional perspective*, as opposed to the more commonly used *popular mobilizational perspective*. In the former perspective, those components of the CoFoE that bring the partisan representatives and the randomly selected citizens into an equal interaction with each other, as well as the empowering actions for participants' capacity to express and defend their priorities carried out by the organizers (in particular the Common Secretariat of the CoFoE) count among the CoFoE's strengths. The ideational institutional perspective furthermore provides a refreshing way to identify the avenues for improvement for transnational deliberative exercises and may yield lessons for a future EU Convention. Thus, it can help unpack the ways in which the CoFoE can indeed be seen as a 'quasi constitutional'[14] experiment.[15]

[13] This chapter does not discuss other innovations, such as the multilingual digital platform for collecting ideas and events on the future of the EU, or the national citizens' panels. For an early, but comprehensive analysis of the platform, see Alberto Alemanno, 'Unboxing the Conference on the Future of Europe and Its Democratic Raison d'être', *European Law Journal* 26, no. 5–6 (2020): pp. 494–99, https://doi.org/10.1111/eulj.12413.

[14] Federico Fabbrini, 'The Conference on the Future of Europe: Process and Prospects', *European Law Journal* 26, no. 5–6 (2020): 408, https://doi.org/10.1111/eulj.12401; Paul Blokker, 'The Constitutional Deficit, Constituent Activism, and the (Conference on the) Future of Europe', in *Imagining Europe: Transnational Contestation and Civic Populism*, ed. Paul Blokker, Palgrave Studies in European Political Sociology (Cham: Springer International Publishing, 2021), pp. 329–34, https://doi.org/10.1007/978-3-030-81369-7_11; Max Steuer, 'The Conference on the Future of Europe as a Constitutional Experiment', IACL-IADC Blog, 19 May 2022, https://blog-iacl-aidc.org/new-blog-3/2022/5/19/the-conference-on--the-future-of-europe-as-a-constitutional-experiment.

[15] At the time of writing, EU institutions as well as experts disagree whether, for the ultimate success of the Conference, a launch of a new EU Convention is needed. However, if a Convention ensues, it seems essential to minimize the risks of repeating the story of failure in the early 2000s. On that story, see, for example, Kalypso Nicolaïdis, 'The EU's Constitutional Moment: A View from the Ground Up', in *The Rise and Fall of the European*

After a brief background concerning the contemporary debates on the CoFoE, the chapter details the ideational institutional account in light of existing scholarship on deliberative constitutionalism and popular mobilization in EU politics. Then, it zooms in on the ECPs and the CoFoE Plenary to explore whether and how the ideational institutional account affects the assessment of their strengths and weaknesses and how it might contribute to the debate on utilizing the experiences with the CoFoE for EU-level constitution-making processes.

1. The CoFoE: A few starting considerations

At the time of envisioning the CoFoE, no one could have predicted that it will unfold amidst the COVID-19 pandemic and the Russian invasion of Ukraine, both of which have had profound implications for EU integration.[16] Even without these ruptures, scepticism surrounded the initiative, given the poor record of the EU institutions to 'put citizens into the driving seat', as exemplified by the limited achievements of the European Citizens' Initiative and other forms of public involvement in EU politics.[17] A cursory look at the 'architecture of the Conference'[18] gives credit to the claim of deliberation at

Constitution, ed. Nicholas W. Barber, Maria Cahill, and Richard Ekins (Oxford; Portland: Hart Publishing, 2019), pp. 41–49, https://doi.org/10.5040/9781509910977.

[16] Scott L. Greer, Anniek de Ruijter, and Eleanor Brooks, 'The COVID-19 Pandemic: Failing Forward in Public Health', in *The Palgrave Handbook of EU Crises*, ed. Marianne Riddervold, Jarle Trondal, and Akasemi Newsome, Palgrave Studies in European Union Politics (Cham: Springer International Publishing, 2021), pp. 747–64, https://doi.org/10.1007/978-3-030-51791-5_44; Floris de Witte, 'Russia's Invasion of Ukraine Signals New Beginnings and New Conflicts for the European Union', *EUROPP* (blog), 14 March 2022, https://blogs.lse.ac.uk/europpblog/2022/03/14/russias-invasion-of-ukraine-signals--new-beginnings-and-new-conflicts-for-the-european-union/.

[17] Dominik Hierlemann and Janis Emmanouilidis, 'The Missing Piece: A Participation Infrastructure for EU Democracy' (Gütersloh: Bertelsmann Stiftung, January 2022), https://www.bertelsmann-stiftung.de/en/publications/publication/did/policy-brief-012022-the--missing-piece-a-participation-infrastructure-for-eu-democracy; James Organ, 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals', *European Constitutional Law Review* 10, no. 3 (December 2014): pp. 422–43, https://doi.org/10.1017/S157401961400131X; Stefan Thierse, 'The Conference on the Future of Europe – Finally, an Opportunity for More Top-down Bureaucracy?', *Verfassungsblog* (blog), 16 March 2021, https://verfassungsblog.de/cofoe-bureaucracy/.

[18] See CoFoE final report, https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf, pp. 6–9. The best critical analysis of the architecture to date is provided by Alemanno, 'Unboxing the Conference on the Future

the EU level being 'a costly and complex activity given the EU's size and diversity and its multi-level governance framework'.[19] The foundations of the CoFoE, as articulated in the Joint Declaration of the Commission, Parliament and Council,[20] and the Rules of Procedure[21] remained open-ended in several key regards, notably the functioning and decision making procedure of the CoFoE Plenary and the form in which the outcomes would be considered and feedback provided to the participants. They prompted concerns about the actual aim of the Conference,[22] which, even when it was in full swing in late 2021, was described as a 'political enigma'.[23]

To steer the practical functioning of the Conference, a Common Secretariat was set up 'composed of an equal number of staff respectively from the European Parliament, the General Secretariat of the Council and the European Commission'.[24] This in itself was an innovative organizational unit, which added to several substantive innovations, such as one third of the ECP members being young people below 25 years,[25] and the random selection of twenty members ('ambassadors') of each of the four ECPs to join the CoFoE Plenary.[26] The number of new formations and the complex language sur-

of Europe and Its Democratic Raison d'être'. It is worth noting that the final report writes about the multilingual digital platform, four ECPs, 'six National Citizens' Panels, thousands of national and local events as well as seven Conference Plenaries' as the summary of activities (p. 5). The fact that only six member states organized panels that met the deliberative criteria has become a source of discontent, as it meant that insights from other member states' national events could only be considered via the digital platform. However, the responsibility for this oversight is not necessarily with the CoFoE organizers, but with the member states, which did not organize the national panels following the deliberative criteria.

19 Firat Cengiz, 'Bringing the Citizen Back into EU Democracy: Against the Input-Output Model and Why Deliberative Democracy Might Be the Answer', *European Politics and Society* 19, no. 5 (20 October 2018): 590, https://doi.org/10.1080/23745118.2018.1469236.

20 https://futureu.europa.eu/uploads/decidim/attachment/file/6/EN_-_JOINT_DECLARATION_ON_THE_CONFERENCE_ON_THE_FUTURE_OF_EUROPE.pdf

21 https://futureu.europa.eu/uploads/decidim/attachment/file/9340/sn02700.en21.pdf.

22 Sergio Fabbrini et al., 'The Conference on the Future of Europe: Vehicle for Reform versus Forum for Reflection?', *Future of Europe Blog* (blog), 15 June 2021, https://futureofeurope.ideasoneurope.eu/2021/06/15/the-conference-on-the-future-of-europe-vehicle-for-reform-versus-forum-for-reflection/.

23 Lucas Guttenberg, 'A Political Enigma: Four Open Questions about the Conference on the Future of Europe', Hertie School, 21 December 2021, https://www.delorscentre.eu/en/publications/detail/publication/a-political-enigma.

24 Art. 8, Rules of Procedure.

25 Art. 5, RoP.

26 The composition of the Plenary is detailed in Art. 16 of the Rules of Procedure. With 108 representatives each from the EP and the national parliaments, as opposed to 54 from the

rounding them have arguably amplified the difficulties with communicating the CoFoE in an understandable manner.

The four ECPs, each after three sessions,[27] endorsed a total of 178 recommendations, with another 25 proposed recommendations not receiving the required 70 % threshold in a final vote of each of the four ECP plenaries. The endorsed recommendations formed the basis of the deliberations in the CoFoE Plenary and its nine working groups, which combined elected representatives with ambassadors from the ECPs and other plenary members.[28]

After the event of 9 May 2022 which featured the official presentation of the final CoFoE report, hopes have been expressed towards both the institutionalization of new, permanent mechanisms of deliberative democracy in the EU,[29] and Treaty change as a follow-up to the CoFoE. Both have their basis in the recommendations of the ECPs. The former stems from the second ECP's last recommendation, which, however, comes with a twist: the ECP members ask for a 'legally binding and compulsory law or regulation' enshrining the Citizens' Assemblies, and 'the EU' to 'ensure the commitment of politicians to citizens' decisions taken in Citizens' Assemblies'.[30] The latter stems from another recommendation of ECP 2 'that the EU reopens the discussion about the constitution of Europe with a view to creating a constitution informed by the citizens of the EU. Citizens should be able to vote in the creation of such a constitution [...].'[31] In addition, a portion of the recom-

Council and only three from the Commission, the parliamentary component was clearly the most numerous, followed by the 80 ECP ambassadors, 27 representatives of national events (one per member state, selected at the discretion of the member state) and the President of the European Youth Forum, totalling 108 plenary members. The remaining 68 members represented the interests of economic and social partners, regional and local authorities, with only eight members representing civil society actors.

27 One in-person, one virtual, and one hybrid. See Final Report, op. cit., pp. 15–22.

28 https://futureu.europa.eu/pages/working-groups.

29 High-Level Advisory Group, 'Conference on the Future of Europe: What Worked, What Now, What Next?', pp. 11–17.

30 https://futureu.europa.eu/assemblies/citizens-panels/f/299/, recommendation no. 39. In the plenary proposals, this is watered down by demanding only a 'justification' by the 'institutions' in case of the citizens' proposals not being 'taken on board', and by underscoring that 'the EU is founded on representative democracy' where the prime expression of citizens about EU policies takes place during European elections (Proposal 36, sec. 7). For a study recommending the institutionalization of a particular form of permanent European citizens' assembly, see Alberto Alemanno, 'Towards a Permanent Citizens' Participatory Mechanism in the EU' (Strasbourg: European Parliament, 2022).

31 Ibid., recommendation no. 35.

mendations clearly requires Treaty change,[32] so to the extent the recommendations articulate the panel members' will, these further support reopening the Treaties.

Treaty change has been endorsed by the European Parliament in its resolution from 4 May 2022[33] and formally triggered one month after the closing event of the CoFoE. In the 9 June resolution, the EP calls for strengthening qualified majority voting at the expense of unanimity, extend the EU's competences in several areas, 'co-decision rights on the EU budget' and the right to legislative initiative, and strengthening value protection in the EU.[34] The resolution also suggested involving several observers in the Convention,[35] though randomly selected citizens were conspicuously absent from the list.[36]

This background alone highlights some of the controversies associated with the CoFoE and its follow-up: the emphasis on competences versus policies, the role of randomly selected individuals in EU decision making and the split between legally binding and advisory measures. To evaluate these controversies, this chapter enlists the help of ideational institutional perspectives, which, contrary to what a superficial reading might suggest, can support broad popular involvement in EU politics.

[32] Eleonora Vasques, 'Over 10% of Citizen Proposals on EU's Future Require Treaty Changes, Expert Says', EURACTIV, 15 April 2022, https://www.euractiv.com/section/future-eu/news/over-10-of-citizen-proposals-on-eus-future-require-treaty-changes-expert-says/.

[33] https://www.europarl.europa.eu/doceo/document/B-9-2022-0228_EN.html.

[34] P9_TA(2022)0244, sec. 5. Not all these requests are based on the CoFoE's outcomes, however. In fact, the final statement of the 'citizens' component' of the CoFoE plenary in the report highlights a 'diverging position on measure 38.4, third bullet since it originated neither from the European nor the National Panels and was not sufficiently discussed in the Plenary Working Group' (report, p. 40). That measure precisely requests budgetary powers for the EP. The right to legislative initiative for the EP was not part of the ECP recommendations, but stemmed from the recommendations of several national citizens' panels and the multilingual digital platform.

[35] 'Representatives of the EU's social partners, the European Economic and Social Committee, the European Committee of the Regions, EU civil society and candidate countries.'

[36] The Citizens Take Over Europe coalition has highlighted how a Convention without broader popular involvement runs contrary to the ECP recommendation: https://citizens-takeover.eu/blog/open-letter-to-eu-presidents-we-need-a-people-powered-convention/. See also Paul Blokker, 'Experimenting with European Democracy', *Verfassungsblog*, 21 June 2022, https://verfassungsblog.de/experimenting-with-european-democracy/.

2. Making sense of the CoFoE: The ideational institutional and the popular mobilizational account

It is well-known that elections to the European Parliament alone do not suffice to generate interest in EU affairs and can be captured by national issues.[37] One solution to this deficit has been to increase avenues for public participation in EU politics. However, the existing avenues largely did not meet the expectations, prompting questions about alternative designs.[38] As an ad hoc mechanism, the CoFoE on its own could not aspire to meet the demands for a 'systemic approach to EU democracy'.[39] Virtually all stakeholders, however, plausibly asserted that the CoFoE, nor participatory mechanisms in general, do not aim to replace representative democracy in the EU, with its dual arm encompassed by the Councils and the Parliament.[40] This alone represented an advancement of the debate on participation in EU politics, which initially presented participation and representation as mutually exclusive.[41]

The distinct added value of the CoFoE, however, lies in deliberation. Rather than offering only an avenue to share one's perspective on the future of the EU, the components of the CoFoE encourage *interaction* between individuals, the sharing of their views and the possibility to *change or adjust* these to the arguments brought up during the deliberation. For long, deliberation has

[37] Ariadna Ripoll Servent and Olivier Costa, 'The European Parliament: Powerful but Fragmented', in *The Institutions of the European Union*, ed. Dermot Hodson et al., Fifth Edition (Oxford: OUP, 2021), pp. 139–42; Sandra Seubert, Oliver Eberl, and Daniel Gaus, 'Political Inequality and Democratic Empowerment in the European Union: The Role of the European Parliament', in *Democratic Empowerment in the European Union*, ed. David Levi-Faur and Frans van Waarden (Cheltenham: Edward Elgar Publishing, 2018), pp. 40–62.

[38] E.g. Justin Greenwood, 'The European Citizens' Initiative: Bringing the EU Closer to Its Citizens?', *Comparative European Politics* 17, no. 6 (1 December 2019): pp. 940–56, https://doi.org/10.1057/s41295-018-0138-x; Alberto Alemanno, 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections', *German Law Journal* 21, no. 1 (January 2020): pp. 35–40, https://doi.org/10.1017/glj.2019.92.

[39] Alberto Alemanno and James Organ, 'The Case for Citizen Participation in the European Union: A Theoretical Perspective on EU Participatory Democracy', in *Citizen Participation in Democratic Europe: What Next for the EU?*, ed. James Organ and Alberto Alemanno (London; New York: ECPR Press, 2021), pp. 1–12.

[40] Alemanno, 'Unboxing the Conference on the Future of Europe and Its Democratic Raison d'être', 485–91; Michele Fiorillo et al., 'A Citizens' Europe?', *Social Europe* (blog), 27 April 2022, https://socialeurope.eu/a-citizens-europe.

[41] Stijn Smismans, 'Democratic Participation and the Search for a European Union Institutional Architecture That Accommodates Interests and Expertise', in *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis*, ed. Simona Piattoni (Oxford: OUP, 2015), pp. 88–111.

been reserved to elites (e.g. in the parliament or between judges at courts), with the *populus* at best tasked to express their support or opposition to proposals tabled by the elites.[42] Deliberation can be understood as 'thoughtful consideration of an issue through a facilitated group process',[43] which takes participation to the 'next level' by enabling an exchange and modification of views before decision making takes place. The outcomes of deliberation do not need to be (and rarely are) legally binding,[44] but the ideal of a deliberative *democracy* envisions them as key for the decision-making process.[45] In short, it is the *combination of participation and deliberation* which brings a distinct added value to democracy, as it combines inclusion and reflection.[46]

With the CoFoE as an *ad hoc* deliberative project, the conventional institutional perspective, emphasizing the significance of competence changes for reforming the EU,[47] has been rather sceptical of its potential. For example, a dialogue section on the CoFoE in an EU law journal is concerned almost exclusively with avenues to prevent the unanimity rule to block meaningful reform.[48] The ambiguity of the CoFoE's purpose surrounding its launch in

[42] James S. Fishkin, 'Deliberative Democracy and Constitutions', *Social Philosophy and Policy* 28, no. 1 (January 2011): pp. 242–60, https://doi.org/10.1017/S0265052510000129.

[43] https://rm.coe.int/cddg-2022-3e-mappingdeliberativedemocracy-2-2-2765-5446-0166-v--1/1680a62671, p. 2.

[44] See, for example, Claudia Chwalisz, 'Good Practice Principles for Deliberative Processes for Public Decision Making' (Paris: OECD, 2020), https://www.oecd.org/gov/open-government/good-practice-principles-for-deliberative-processes-for-public-decision-making.pdf, which mentions accountability as a key practice in terms of 'influence on public decisions' and a commitment, from the public authority, to 'responding to or acting on participants' recommendations in a timely manner' (but not be legally bound to do so).

[45] Jon Elster, 'Introduction', in *Deliberative Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 1998), pp. 1–18.

[46] Stephen Elstub, 'Deliberative and Participatory Democracy', in *The Oxford Handbook of Deliberative Democracy*, ed. Andre Bächtiger et al. (Oxford: OUP, 2018), pp. 186–202, https://doi.org/10.1093/oxfordhb/9780198747369.013.5; Dennis F. Thompson, 'Deliberative Democratic Theory and Empirical Political Science', *Annual Review of Political Science* 11, no. 1 (2008): pp. 511–12, https://doi.org/10.1146/annurev.polisci.11.081306.070555. It can also combat loneliness as a dangerous trend in politics noted prominently by Hannah Arendt, whereby lonely individuals who do not engage over matters of public concern with fellow members of their communities are more prone to support authoritarian regimes. https://www.wpr.org/how-loneliness-can-lead-totalitarianism.

[47] Sergio Fabbrini, 'Institutions and Decision-Making in the EU', in *Governance and Politics in the Post-Crisis European Union*, ed. Ramona Coman, Amandine Crespy, and Vivien A. Schmidt (Cambridge: Cambridge University Press, 2020), pp. 54–73.

[48] Federico Fabbrini, 'Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options', *European Papers – A Journal on Law and Integration* 2020, no. 2 (15

May 2021 prompted the question whether it would become merely a 'forum for reflection' and argued that there is a significant risk in it fuelling populists' claims of 'a self-fulfilling prophecy in terms of EU impotence'.[49] As these examples illustrate, the traditional institutional perspective does not have high hopes in the transformative potential of the CoFoE.[50]

Deliberation is much more central in an alternative view with a rich tradition encompassing the work of Jürgen Habermas.[51] This approach, here called popular mobilizational, encompasses a wide range of views which are, however, supportive of the constitutive potential of deliberation. Paul Blokker distinguishes between legal, political, popular and democratic constitutionalism, whereby only the latter places more substantive citizen participation centre-stage, while sharing 'with political constitutionalism an emphasis on the open-endedness of the democratic process, and the ultimately open-ended nature of rights.'[52] Scholars of 'deliberative constitutionalism' have engaged with the ways in which the polity can be made more inclusive by its laws providing ample space for deliberation, and in turn their quality and legitimacy being enhanced via that deliberation.[53] They, similarly to Blokker, tend to reject the emphasis of popular constitutionalism on majority will

December 2020): pp. 963–82, https://doi.org/10.15166/2499-8249/407; Frank Schimmelfennig, 'The Conference on the Future of Europe and EU Reform: Limits of Differentiated Integration', *European Papers – A Journal on Law and Integration* ´5, no. 2 (15 December 2020): pp. 989–98, https://doi.org/10.15166/2499-8249/409; Bruno De Witte, 'Overcoming the Single Country Veto in EU Reform?', *European Papers – A Journal on Law and Integration* 2020, no. 2 (15 December 2020): pp. 983–88, https://doi.org/10.15166/2499-8249/408.

[49] https://www.eu3d.uio.no/publications/eu3d-policy-briefs/eu3d-policy-brief-1-may-2021.pdf, p. 6. The joint coordination of the CoFoE was also critiqued as contributing to a lack of stability and effective management.

[50] Of course, some of the institutionalist views published in 2021 did not have the benefit of the hindsight to the extent that this chapter does. Hence, they serve also as a snapshot of the perceptions of the CoFoE before the ECPs and the Plenary formats were specified and started their work.

[51] For more sources of this claim, see Max Steuer, 'A Dual Legitimacy for a Democratic European Community? Jürgen Habermas and Constituent Power in the European Union' (International Centre for Democratic Transition, 2015), http://archivesicdt.demkk.hu/publications/2015/max-steuer-a-dual-legitimacy-for-a-democratic-european-communtiy--jurgen-habermas-and-constituent-power-in-the-european-union.

[52] Paul Blokker, 'Constitutional Reform in Europe and Recourse to the People', in *Participatory Constitutional Change: The People as Amenders of the Constitution*, ed. Xenophon Contiades and Alkmene Fotiadou (London: Routledge, 2016), [8 of a pre-print version].

[53] Hoi L. Kong and Ron Levy, 'Deliberative Constitutionalism', in *The Oxford Handbook of Deliberative Democracy*, ed. Andre Bächtiger et al. (Oxford: Oxford University Press, 2018), pp. 624–39, https://doi.org/10.1093/oxfordhb/9780198747369.013.40.

only, which translates into only a limited participatory toolbox such as referenda or imperative mandates.[54]

Yet, the popular mobilizational account does not look favourably at (or does not even engage with) the embedding of deliberation in robust *existing* institutional designs and the *involvement of institutions* in the deliberative process. Rather, the strength of deliberation is in extra-institutional forms of mobilization and activism. In the CoFoE context, Aliénor Ballangé, while expressing several concerns about the CoFoE,[55] identifies a ground of optimism in 'an unforeseen form of insurgency from arising from the citizens themselves on the occasion of an issue sufficiently mobilizing for a pluri-ideological and pluri-national micro-society to be self-constituted during, or even after, the CoFoE.'[56] This requires the transformation of 'the self-understanding of participants in a cooperative venture',[57] whereby they decide to take collective action beyond the formal roles they were expected to fulfil by the convenors of the deliberation. Such activism does not require established institutions, which instead form a potential obstacle to its realization.

The popular mobilizational account has merits over the conventional institutional perspective in underscoring the responsibility of individuals for the future of democracy and calling for more robust forms of inclusion than established democratic processes typically enable.[58] It effectively opposes the calls for creating a dichotomy between strengthening representative in-

[54] Cf. Mark Tushnet, 'Institutions for Realizing Popular Constitutionalism', *Revus. Journal for Constitutional Theory and Philosophy of Law / Revija Za Ustavno Teorijo in Filozofijo Prava*, no. 47 (26 January 2022), https://doi.org/10.4000/revus.7744. Popular and deliberative constitutionalism need not be opposed to each other, if the qualities of popular constitutionalism are seen in the dialogue not only between institutions of the separation of powers, but also between institutions and citizens. Gideon Sapir, 'Popular Constitutionalism and Constitutional Deliberation', in *The Cambridge Handbook of Deliberative Constitutionalism*, ed. Ron Levy et al. (Cambridge: Cambridge University Press, 2018), pp. 311–23, https://doi.org/10.1017/9781108289474.024.

[55] The top-down organization, the restriction of the ECP members to European citizens and the risk of an overly polarized composition of the ECPs caused by the fact that those uninterested in EU affairs would be unlikely to participate.

[56] Aliénor Ballangé, 'Why Europe Does Not Need a Constitution: On the Limits of Constituent Power as a Tool for Democratization', *Res Publica*, 15 November 2021, p. 16, https://doi.org/10.1007/s11158-021-09535-y.

[57] Simone Chambers, 'Kickstarting the Bootstrapping: Jürgen Habermas, Deliberative Constitutionalisation and the Limits of Proceduralism', in *The Cambridge Handbook of Deliberative Constitutionalism*, ed. Ron Levy et al. (Cambridge: Cambridge University Press, 2018), p. 264, https://doi.org/10.1017/9781108289474.024.

[58] https://citizenstakeover.eu/blog/open-letter-to-executive-board-civil-society-organisations-call-for-conference-to-include-marginalised-communities/

stitutions, such as political parties, and the direct voices of individuals and communities,[59] and succeeds in highlighting the need to discuss the meaning of key values and constitutive features of the (EU) polity.

However, its scepticism towards existing institutions, including those that may, on occasion, constrain majority will may ultimately run against the worthy goal of furthering inclusion, due to the deliberative process *not* encouraging the support of minority voices without adequate institutional design and involvement. This has been illustrated in the ECPs with the fact that some of the most minority-regarding recommendations generated by the ECPs working groups were not approved by the final ECP plenary votes, in which 70 % of the ECP members had to endorse the proposed recommendation in an online vote in order for it to become part of the ECP's official output and be forwarded to the CoFoE Plenary.[60]

What if we 'bring institutions back in' though, not as adversaries but potential partners of the deliberative processes, not just by offering internal spaces for interaction but also by supporting popular deliberations,[61] such as the ECPs or the Plenary at the CoFoE? Strands of institutionalist thought have highlighted the potential of institutions to bring to the fore and solidify key political ideas and encourage new, transformative ones.[62] Instead of generating a rift between 'regular citizen' participants and elected representatives,[63] this account encourages mutual learning and the capacity

[59] Accetti and Reho, 'The Conference on the Future of Europe as a Technopopulist Experiment'.

[60] At the same time, the existence of this 70% threshold offsets criticisms of the pro-EU bias of the ECPs, which have been voiced particularly by Eurosceptic actors, cf. Saryusz-Wolski, 'Hijacked Europe'. Motion for an EP resolution B9-0235/2022, point 6. A minority of ECP members could have voted down proposed (more 'pro-EU') recommendations at the closing ECP plenary. Steuer, 'The Conference on the Future of Europe as a Constitutional Experiment'.

[61] E.g. Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford: Oxford University Press, 2014), Chapter 3.

[62] Vivien A. Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse', *Annual Review of Political Science* 11, no. 1 (2008): pp. 303–26, https://doi.org/10.1146/annurev.polisci.11.060606.135342; Colin Hay, 'Constructivist Institutionalism', in *The Oxford Handbook of Political Institutions*, ed. Sarah A. Binder, R. A. W. Rhodes, and Bert A. Rockman (Oxford: Oxford University Press, 2008), pp. 56–74.

[63] The CoFoE has arguably encouraged this by utilizing the language of 'randomly selected citizens' and 'citizen component' (in the context of the Plenary) in presenting the CoFoE structure. Illustratively, the badges given out at the ECP in-person sessions differentiated between 'citizens' (i.e. ECP members) and other stakeholders (media, observers, staff, experts), as if the latter were not citizens themselves.

of generating ideas in participant-elite interactions. Elites cannot be completely isolated from the design and implementation of deliberation, particularly if it concerns broad visions of the future of a polity.[64] While, according to one survey, 'public servants hold unfavourable – and sometimes factually unsupported – assumptions about deliberation and decision-making by members of the general public', this 'elite problem'[65] does not fade away by focusing on extra-institutional fora. It may be more productive to see how established institutions could become partners for the deliberating agents, hence maximizing the potential that not just the process, but also the outcomes of deliberation enhance mutual trust and the quality of democracy. The table below summarizes how this ideational institutional account, while not incompatible with emphasis on popular mobilization, emphasizes slightly different features of successful deliberation. The next section uses the distinction between these two accounts to scrutinize some frequent critiques levelled vis-à-vis the ECPs and the CoFoE Plenary.

[64] Ron Levy, 'The "Elite Problem" in Deliberative Constitutionalism', in *The Cambridge Handbook of Deliberative Constitutionalism*, ed. Ron Levy et al. (Cambridge: Cambridge University Press, 2018), p. 352, https://doi.org/10.1017/9781108289474.009.

[65] Levy, pp. 366–67.

Table: Comparison of the ideational institutional and popular mobilizational accounts to deliberative mechanisms in EU politics.
Source: author.

Approach to CoFoE/ deliberative mechanisms	Institutions' position towards participation	Structure of deliberation	Actors involved in deliberation	Content of deliberation	Position towards majority will
Ideational institutional	Traditional institutions may enhance participation	Understanding and learning between institutions and individuals	Involvement of a broad range of institutional actors	Openness to discuss key values and broad ideas	Going beyond majority will
Popular mobilizational	Traditional institutions generally limit participation	'Civic populism' challenging status quo	Involvement of marginalized communities		Realizing the neglected majority will

3. The CoFoE in an ideational institutional perspective: Revisiting the critiques

The ideational institutional perspective puts several aspects of the ECPs and the Plenary into a different light. In this introductory survey, I focus on how it helps offset criticisms pertaining to the breadth of topics, the role of professionals (EU officials, facilitators and experts) and the results of the recommendations. At the same time, it indicates the insufficient involvement of officials and institutions from across the EU's institutional structure and beyond it.

To begin with, with the ideational institutional account, the criticism of the ECP topics having been too broad to reach concrete, meaningful recommendations[66] loses its purchase, as it is precisely the open-endedness and bottom-up character of the deliberation that supported the presentation of

[66] https://conference-observatory.eu/wp-content/uploads/2021/09/1st_CoFoE_Citizens_Panel.pdf, pp. 4–5

ideas, including on the general direction and nature of the EU and the meaning of the key values.[67]

The intensive involvement of other stakeholders (the CoFoE Secretariat and facilitators in the design and the organization of the ECPs and the Plenary and experts in sharing their insights with the ECP members) is also put into different light with the ideational institutional account. Rather than bureaucrats who, at worst, represent obstacles for the citizens' will or, at best, provide the administrative backbone for a complex organizational endeavor, the Secretariat members from the three EU institutions are participants in the process, providing their expertise to enable the randomly selected ECP members (and, in case of the Plenary, randomly selected ambassadors) to more effectively articulate their views and preferences. The fact that they hail from different institutions that maintain disagreements between each other, while potentially complicating decisions on the procedure, may help more consideration and mutual feedback placed into the avenues chosen, and prevent decision making at the whims of a single, supreme leader.[68] This does not mean that certain interventions by the organizers into the ECP process were not overly intrusive, or that more bottom-up designs could not be imagined.[69] However, this account avoids framing the officials *a priori* as adversaries or barriers to the 'genuine' articulation of the ECP members' will.[70] A similar point can be made in relation to the facilitators of the ECP sessions, who played essential role in coordinating the ECP working groups, but also in designing the methodology of the ECPs and later supporting the ECP ambassadors in the process of the CoFoE plenaries. Facilitators engage in cru-

[67] At least this was the case at the very beginning of the ECPs that asked a broad question on the participants' vision of the EU in 2050. Later stages, particularly the generation of the 'streams' for subsequent discussion, were not inclusive enough. See Max Steuer, 'Roots of the EU Tree', *Verfassungsblog* (blog), 9 October 2021, https://verfassungsblog.de/roots-of-the-eu-tree/.

[68] See, for a similar argument against strong leaders with respect to the EU as a whole, Armin von Bogdandy, 'Our European Society and Its Conference on the Future of Europe', *Verfassungsblog* (blog), 14 May 2021, https://verfassungsblog.de/our-european-society-and-its-conference-on-the-future-of-europe/.

[69] Steuer, 'Roots of the EU Tree'.

[70] See also Alberto Alemanno and Kalypso Nicolaïdis, 'Citizen Power Europe', *Revue Européenne Du Droit*, no. 3 (4 January 2022): p. 15. These scholars present a somewhat more moderate argument highlighting that the CoFoE – as a unique endeavour – would not have been made possible without the intensive institutional involvement. However, they rightly note that the prevailing tendency of the CoFoE observers has been to 'bemoan' this 'overengineering' of the process.

cial 'frontstage and backstage' work surrounding deliberative sessions,[71] and thus can have enabling effect on generating an inclusive atmosphere in which ideas are presented, exchanged and shaped in the collective of the participants. Finally, the experts are themselves actors with own worldviews, however, they bring to the table the benefit of in-depth overview over a particular area and hence may enhance the quality of the deliberation.[72]

The ideational institutional perspective can similarly respond to the major claims levelled by Eurosceptic actors in the two motions for a resolution they had submitted in the European Parliament.[73] These actors see in the outcomes of the work of the ECPs and the Plenary a manifestation of disproportionate influence of 'federalist' views (though the concept of 'federalism' does not appear in the approved proposals) and the neglect towards the actual concerns of citizens across the EU by focusing on competence transfers. Theoretical sophistication is not required to note that most of the 49 proposals are not focused on competences, but policies, such as climate, health, migration, employment or education.[74] A basic infusion with deliberative theory demonstrates that the value of interaction and compromise stemming from deliberation cannot be squared with simple public opinion polls, which do not require 'considerable resources – time, money and some form of political

[71] Oliver Escobar, 'Facilitators: The Micropolitics of Public Participation and Deliberation', in *Handbook of Democratic Innovation and Governance*, ed. Stephen Elstub and Oliver Escobar (Cheltenham: Edward Elgar Publishing, 2019), pp. 178–95.

[72] This is not an evaluative claim of the extent to which the CoFoE ECPs succeeded in realizing this role for the experts. Rather, it specifies the *potential* of the experts that gets more easily obscured in the participatory-mobilizational account, that emphasizes the will of the collective subject in presenting an alternative to current affairs.

[73] Motions for resolutions B-9-0229-2022 and B-9-0235-2022, submitted for the plenary sitting on 2 May 2022.

[74] This is also underscored by the documentation prepared by the Council and the Commission ahead of the European Council meeting on June 23, which show how many modifications can be implemented without competence changes: https://data.consilium.europa.eu/doc/document/ST-10033-2022-INIT/en/pdf, https://data.consilium.europa.eu/doc/document/ST-10033-2022-ADD-1/en/pdf, https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/results/?WordsInSubject=&WordsInText=&DocumentNumber=10033%2F22&InterinstitutionalFiles=&DocumentDateFrom=&DocumentDateTo=&MeetingDateFrom=&MeetingDateTo=&DocumentLanguage=EN&OrderBy=DOCUMENT_DATE+-DESC&ctl00%24ctl00%24cpMain%24cpMain%24btnSubmit= (Proposals and related specific measures contained in the report on the final outcome of the Conference on the Future of Europe: Preliminary technical assessment and Annex); https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3750 (Commission sets out first analysis of the proposals stemming from the Conference on the Future of Europe).

expertise, constant updating and learning.'[75] The value of learning (between ECP members as well as ECP members and the institutions) is key also to understand that the resulting recommendations are 'more the by-product of the genuine transnational experience gained by the Conference's participants than the inevitable result of a supposedly pro-EU biased initiative.'[76]

However, as compared to popular mobilizational approaches, ideational institutionalism has fewer difficulties to justify the involvement of professional facilitators and organizers, as well as to defend the legitimacy of the CoFoE Plenary, which, while including a non-negligible component of the randomly selected ECP members, primarily comprised elected representatives from the EP and national parliaments. Nor does it have a difficulty of claiming that the perspectives obtained via deliberation might differ from the majoritarian preferences obtained via public opinion, and yet, implementing them cannot be deemed illegitimate merely on the grounds of this contrast.[77] Both accounts meet in supporting explicit and vivid engagement with questions of values, and the popular mobilizational account is arguably more vocal in highlighting the need to include marginal voices that are not captured by the existing institutional structures,[78] but are nevertheless essential for drawing an inclusive vision of the future of the EU.

Just as some of the critiques lose their persuasiveness with the ideational institutional account, however, previously neglected avenues on improving the structure and operation of the CoFoE Plenary and the ECPs reveal themselves. These can only be sketched here and require further elaboration beyond the CoFoE context. Firstly, if institutions matter for mutual learning, an inclusive approach should be adopted also towards the range of institutions represented in the deliberations. In the ECPs, this would have been particu-

[75] David Levi-Faur and Frans van Waarden, eds., *Democratic Empowerment in the European Union* (Cheltenham: Edward Elgar Publishing, 2018), p. 5.

[76] Alemanno and Nicolaïdis, 'Citizen Power Europe', p. 8.

[77] As noted by Palermo (although he does not distinguish between participation and deliberation in this respect), the 'key criterion' advancing these forms of democracy is 'the abandonment of the majority principle'. Francesco Palermo, 'Towards Participatory Constitutionalism? Comparative European Lessons', in *Constitutional Acceleration within the European Union and Beyond*, ed. Paul Blokker (London: Routledge, 2017), p. 28.

[78] These entail the random selection of the ECP members or the composition of the main EU institutions. The latter has been criticized for insufficient inclusion of officials with minority background. E.g. Dermot Hodson, Uwe Puetter, and Sabine Saurugger, 'Why EU Institutions Matter: Five Dimensions of EU Institutional Politics', in *The Institutions of the European Union*, ed. Dermot Hodson et al., Fifth Edition (Oxford: OUP, 2021), p. 4 and sources therein.

larly doable via inviting representatives of such institutions with an expert status.[79] Secondly, important institutions for democracy protection in Europe should have had a say in the CoFoE, either via representation in the CoFoE Plenary or at least expert status in the ECPs. Notably, the Council of Europe, which brings together more Europeans than the EU via its institution of EU citizenship, including the European Court of Human Rights and the Venice Commission, could be a particularly important institution for the deliberations.[80] Thirdly, institutions beyond Europe should be actively sought to be invited to observe the process, and share their views. While the openness of the multilingual platform regardless of the geographical provenience of the authors of ideas and the inclusion of representatives from the Western Balkans and Ukraine to selected CoFoE plenaries are welcome steps in this direction, there is more space to include, for example, actors struggling for the consolidation and protection of democracy and enhancement of citizen participation in other continents, particularly in non-Western settings. If the CoFoE is indeed a 'decisive moment for citizen participation in Europe',[81] effort is needed to truly include Europeans and avoid pre-defined, inward-looking notions of 'Europe'[82] when doing so.

[79] Some of them were invited, but the selection was controversial. Notably, the invitation of the (now former) Executive Director of the European Border and Coast Guard Agency (Frontex), who was subject to criticism of human rights monitoring organizations: https://citizenstakeover.eu/blog/ctoe-expresses-strong-concerns/. Instead of 'disinviting' the Frontex representative, an ideational institutional perspective would have supported inviting experts from other institutions with alternative views (including the European Ombudsman and the Fundamental Rights Agency, as well as the CJEU). On the latter, see Max Steuer, 'Neglected Actors at the Conference on the Future of Europe', *Verfassungsblog* (blog), 30 June 2021, https://verfassungsblog.de/neglected-actors-at-the-conference-on--the-future-of-europe/.

[80] The lack of attention towards the Council of Europe might also have been linked to the fact that the EU's accession to the European Convention on Human Rights progresses slowly, and with virtually no public attention. See https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights for (very detailed, but not particularly accessible) documentation of the current negotiations, and an 'idea' on the multilingual digital platform shared by the author of this chapter: https://futureu.europa.eu/processes/ValuesRights/f/12/proposals/263242.

[81] Gabriele Abels et al., 'Next Level Citizen Participation in the EU: Institutionalising European Citizens' Assemblies' (Gütersloh: Bertelsmann Stiftung, 24 June 2022), p. 5.

[82] See the idea of 'reversing the gaze' as presented by Kalypso Nicolaïdis, 'Bringing Europe Back In: Global IR, Area Studies and the Decentring Agenda', *St Antony's International Review* 16, no. 1 (1 August 2020): p. 198.

Conclusion

The two perspectives on initiatives fostering deliberative democracy in the EU, introduced in this chapter via the analyses and critiques of the Plenary and the European Citizens Panels of the Conference on the Future of Europe, should be seen as potentially complementary, rather than inherently contradictory. The popular mobilizational account is valuable in pushing back against a minimalist approach to democracy constrained to elections[83] while retaining its reading of the majority will as essential for democratic ordering. Furthermore, it demands more inclusion of diverse voices into participatory mechanisms *qua* deliberation that are capable to trigger policy and even polity changes. However, the popular mobilizational account alone is vulnerable to criticisms by voices sceptical of participation *qua* deliberation, particularly if it is to have more than informational value as a feedback and possibly advisory mechanism for political elites.

The ideational institutional account helps respond to these criticisms. While it shares the emphasis on values over material interests with the popular mobilizational account, it focuses more the interactions between individuals and institutions, with the latter capable to 'change the distribution of political interests, resources and rules by creating new actors and identities […].'[84] The majority-minority distinction becomes less central, as institutions are not juxtaposed to individual and collective preferences, but seen as essential for the articulation and shaping of those preferences. This account also identifies previously neglected areas which could be improved, should elements of the CoFoE (particularly the random selection of European people's representatives deliberating with societal elites) serve as a foundation for an EU Convention. Such inspirations would be more than welcome to minimize the risk of a Convention failing stop citizen sleepwalking in EU affairs or even pushing to wake them up on the wrong side of the bed.

[83] See, for example, Adam Przeworski, *Crises of Democracy* (Cambridge: CUP, 2019), p. 5.

[84] James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989), pp. 160, 164.

THE INFLUENCE OF INTERNATIONAL LAW ON THE DEVELOPMENT OF STATE PROTECTION OF THE RIGHT TO IDENTITY OF CHILDREN OF SAME-SEX COUPLES

Ewa Michałkiewicz-Kądziela

Abstract

The right to identity, derived from the fundamental right to privacy, should be guaranteed equally to every human being. However, protection of this right becomes difficult or sometimes even impossible in the case of children of same-sex couples. This is mainly due to the lack of explicit legal regulations at the international level that would guarantee a minimum standard of protection of the rights of these children on a large scale. As a result, most countries regulate these issues internally, separately and at their own discretion. This problem has recently gained momentum and become urgent. This situation is particularly visible in the countries of the European Union, where the principle of free movement of persons is in force. Differentiating between children who are in the same legal position leads to discriminatory situations.

Keywords: right to identity, children's rights, same-sex parents, human rights, international law, EU law

Introduction

The right to identity, derived from the fundamental right to privacy, should be guaranteed equally to every human being. However, protection of this right becomes difficult or sometimes even impossible in the case of children of same-sex couples. This is mainly due to the lack of explicit legal regulations at the international level that would guarantee a minimum standard of protection of the rights of these children on a large scale. As a result, most countries regulate these issues separately, internally, at their own discretion. This problem has recently gained momentum and become urgent. This situation is particularly visible in the countries of the European Union, where the principle of free movement of persons is in force. Differentiating between children who are in the same legal position leads to discriminatory situations.

Due to the fact that the subject is extremely broad, the discussion undertaken in this article will be limited only to selected issues in the context of international and EU law and to an examination of the most important judgments of the European Court of Human Rights and the Court of Justice of the European Union and of how they affect the legislative situation at the national level. The study primarily investigates the law in force as it is given, which not only allowed me to analyze the most important provisions of international law, but also made it possible to compare them with the relevant judgments of international courts.

1. Current legal situation of children of same-sex parents

Currently in Europe there are more and more families in which same-sex couples raise a child. And although there are no official statistical data on this subject, it is estimated that in Poland alone there are approx. 50,000 such families.[1] Most European countries do not recognize such families in their legal systems, so they only function on the basis of lasting emotional ties and a shared household. These are, for example: Hungary, Poland, and the Czech Republic. There are some European countries (a clear minority) which, despite the lack of appropriate domestic regulations, recognize such families and guarantee them appropriate rights, or legalize the functioning

[1] M. Abramowicz, *Rainbow Families in Poland. Report*, (Campaign against Homophobia 2020), p. 5.

of such families in their legal systems. For example, in the EU, only 13 out of 27 countries allow for the adoption of children by same-sex couples and at the same time recognize such families in their legal systems,[2] which provides them with legal protection. These are, for example: Germany, Belgium and Malta. In this case, such families may be formed as a result of:

– the adoption of an unrelated child by both people,
– adoption of a partner's child,
– using the services of a surrogate or anonymous sperm donation.[3]

When it comes to protection of the rights of children of same-sex couples, the situation is most dangerous where these families operate in an unsanctioned manner in a given country and where there are no legal ties binding them. This results in a violation of the right to the identity of the child and many other rights associated with it, including the right to citizenship, the right to a family, the right to education or the right to health protection. Violations most often occur when such a family moves from one country where the adoption of children is legal to another, where the adoption is not legal or where such families are not recognized as a family. In this case, the child often faces problems with obtaining identity documents (passport, ID card) or documents confirming his citizenship, he cannot benefit from free education or health care,[4] he faces a negation of his vision of the family and experiences difficulties when it comes to donations or regulations of the inheritance law.[5] Difficulties also arise when parents separate or one of them dies, as the issues of parental authority, custody of the child and the possibility of maintaining personal contacts with the child are not regulated.[6]

All these situations could indicate that the provisions of international and domestic law are still not sufficient to provide adequate protection to children of same-sex couples. However, this claim cannot be accepted. It should

[2] S. Kraljić, 'Same-Sex Partnerships in Eastern Europe: Marriage, Registration or No Regulation?' in K. Boele-Woelki and A. Fuchs (eds), *Same-Sex Relationships and Beyond: Gender Matters in the EU, Cambridge*, (Intersentia, 2017), p. 71.

[3] A, Tryfonidou, 'The Parenting Rights of Same-sex Couples under European Law', 25 *Marriage, Families & Spirituality* (2019), p. 177.

[4] M. Siegel, C. Assenmacher, N. Meuwly, M. Zemp, 'The Legal Vulnerability Model for Same-Sex Parent Families: a mixed methods systematic review and theoretical integration', 12 *Frontiers in Psychology* (2021), p. 3.

[5] C. E. Smith, 'Equal Protection of Children of Same-Sex Parents', 6 *Washington University Law Review* (2013), vol. 90, p. 1620.

[6] S. Ben-Wei Lee, 'The Equal Rights to Parent: Protecting the Rights of Gay and Lesbian, Poor and Unmarried Parents', 4 *N.Y.U Review of Law and Social Changes* (2016), vol. 41, pp. 640–641.

be pointed out that, both at the level of international and national law, there are appropriate clauses in this situation that impose on the countries the obligation to protect the rights of the child. The main problem, however, is that states are unable to use these laws or refuse to use them for moral reasons that are difficult to understand. This state of affairs is also caused by the lack of a minimum standard of protection of the identity of children of same-sex couples and the fact that the issue of adoption of children by same-sex couples falls under the margin of appreciation.

One of the clauses which can protect the rights of children of same-sex couples is the principle of the best interests of the child which appears in Art. 3(1) of the Convention on the Rights of the Child.[7] It is assumed that the "best interests" clause should take precedence over all other legal principles, due to the special position of the child in the legal system.[8] Therefore, some domestic courts even allow the possibility of violating the domestic legal order in order to protect the best interests of the child, e.g. allowing for a violation of regulations on the transcription of foreign birth certificates in order to protect the right to identity of a child of a same-sex couple.[9]

Moreover, it should be noted that the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms[10] may also be an effective tool for the protection of the rights of children brought up by same-sex couples, especially their right to identity. Art. 8 of the Convention guarantees the protection of private life and family life, and therefore it should be assumed that it also includes broad protection of children's rights, whereas following the judgments of the European Court of Human Rights, it may be indicated that it also includes the protection of the right to identity.[11] On the basis of this provision, the child should be provided with, inter alia, protection of his name, surname, gender and origin.[12] The latter element is guaranteed primarily by issuing a birth certificate and, further, identity documents confirming the child's origin. If the actual family situation of the child is not

[7] The Convention on the Rights of the Child, Treaty Series, vol. 1577, Nov. 1989.

[8] P. Gerber, A. Timoshanko, Is the UN Committee on the Rights of the Child Doing Enough to Protect the Rights of LGBT Children and Children with Same-Sex Parents?, 4 *Human Rights Law Review* (2021), vol. 21, p. 788.

[9] The Polish Supreme Administrative Court 10 October 2018, II OSK 2552/16.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series 005, Council of Europe, 1950.

[11] ECtHR 12 February 2003 No. 42326/98, *Odièvre v France.*

[12] EctHR 25 September 2012 No. 33783/09, *Godelli v. Italy.*

recorded, his family identity will be violated.[13] Obviously, the problematic issue is that in the case of families where the child is brought up by same-sex couples, there will be a problem of violating the child's genetic identity as genetically he or she will not necessarily come from at least one of the parents. However, this situation is not exceptional, as it also occurs in the case of children adopted by one person or heterosexual couples. Refusing to equate a child who is in the same situation as other children only because of their parents' sexual orientation, should be considered discriminatory.

The protection of the child's identity is also provided for in the Charter of Fundamental Rights of the European Union.[14] Article 3 of Charter shows that every human being has the right to respect for his or her physical and mental integrity. The protection of the child's identity is manifested in this case not only in the guarantee of the autonomy and completeness of his body, but also in the need to ensure his harmonious and undisturbed mental development. It is a mechanism that also protects the sphere of identity's subjective elements, and therefore it protects the child's family identity as much as possible.

Provisions of legal acts, especially international ones, are abstract and general in their nature. They are complemented by interpretations made by independent judicial authorities. The issue of the protection of children of same-sex couples was dealt with, inter alia, by the European Court of Human Rights. However, the cases it examined in this matter have so far been based on the challenge of discrimination on the basis of sexual orientation, and therefore the protection of rights actually concerned the parents, not the children themselves.

2. Children's right to identity in selected judicial decisions

A review of the Strasbourg case law shows that the European Court of Human Rights has taken a stance on the adoption of children by homosexual people in two different situations. The first one relates to the adoption of a child by a homosexual person, and therefore this adoption is individual (single-parent adoption). The second one occurs when people of the same sex are in a relationship and one of them wants to adopt a partner's child (sec-

[13] EctHR 26 June 2014 No. 65941/11, *Labasse v France*.

[14] Charter of Fundamental Rights of the European Union, *Official Journal of the European Union C83*, vol. 53, European Union.

ond-parent adoption).[15] This means that, so far, the European Court of Human Rights has not yet resolved a complaint relating to joint adoption by a same-sex couple.

In the case of individual adoptions by homosexual persons, two judgments should be taken into account: the first is the 2002 case of Fretté v. France[16] and the second is the case of E.B. v. France from 2008.[17] When it comes to second-parent adoptions, the case of Gas and Dubois v. France of 2012[18] and the case of X. and Others v. Austria of 2013 are extremely important.[19]

It is possible to derive some basic principles from these judgments that are valid today:

1. differentiating the right to adopt based on sexual orientation is a violation of the European Convention on Human Rights – where the sexual orientation of the potential family is the only objective reason for refusing to conduct the adoption procedure, it should be considered that there has been a violation of Art. 8 of the Convention;

2. restricting the right to adoption for heterosexual married couples does not violate the European Convention on Human Rights – where marriages are reserved only to heterosexual persons and national law provides that only married persons may apply for adoption, this does not constitute an infringement of Art. 8 of the Convention;

3. refusal to allow persons in same-sex partnerships to adopt children of their partners is a violation of the European Convention on Human Rights, when people forming heterosexual non-married couples have the right to adopt their partner's child; where in a given country of the Council of Europe legal provisions stipulate the possibility of adopting a child by a heterosexual partner of the child's partner who is not married to them but excludes such a possibility for a homosexual partner, it should be considered that these provisions violate Art. 8 of the Convention.

It is worth noting that the cited judgments of the European Court of Human Rights do not focus on the protection of the right to found a family, pro-

[15] E. H. Morawska, Poszukiwanie konsensusu europejskiego przed Europejskim Trybunałem Praw Człowieka w sprawie adopcji dzieci przez osoby I pary homoseksualne [Looking for the European consensus before European Court of Human Rights in the case of adoption of children by homosexual people and partners], Problemy Współczesnego Prawa Międzynarodowego, Europejskiego I Porównawczego, vol. XV, p. 31.

[16] EctHR 26 February 2002 No. 36515/97, *Fretté v. France*.

[17] EctHR 22 January 2008 No. 43546/02, *E.B. v. France*.

[18] EctHR 15 March 2012 No. 25951/07, *Gas and Dubois v. France.*

[19] EctHR 19 February 2013 No. 19010/07, *X. and Others v. Austria.*

tected by Art. 12 of the Convention, but refer to the protection of the right to privacy and family life, guaranteed by Art. 8 Convention.

While the approach presented in the judgments of the ECtHR was intended to contribute to the protection and recognition of rainbow families, it did not take into account the best interests of the child himself. Legal acts at the international level [e.g. Article 3(1) of the Convention on the Rights of the Child] and at the national level assume the protection of the best interests of the child as the main principle. And it is this principle that should be the starting point for a discussion on the protection of the right to a child's identity.

States that do not recognize foreign birth certificates in which parents of one sex are entered are thus negating the family structure that actually functions and with which the child identifies. This is the case not only when the foreign birth certificate is transcribed and the actual data of both parents is refused to be entered in the new birth certificate, but also when the family identity is violated, especially when in a given country is legally required to enter in the transcribed birth certificate fictional family. For example, in Polish legislation this is the case when the data of the biological father remains unknown. Polish law then requires that the mother's surname be also the father's surname, and that his first name is chosen either by the mother herself or by the head of the register office.[20] The consequence of such action is that the child's family identity is disturbed not only in documents, but also in real life. Whenever a child has to use a birth certificate created in this way or documents issued on its basis, they will also have to face the need to explain why the data in the document differs from the actual status. Additionally, the data from the document will destroy the established image of the family and functions on the basis of the emotional ties between its members.

Failure to recognize a birth certificate of a single-sex couple or the inability to transcribe such an act will also lead to problems related to obtaining documents confirming the child's identity. This, in turn, will entail a problem of access to education or free health care.

The lack of legal regulation of the child's situation may also cause problems in matters related to family and inheritance law. In the event of the death of one of the parents entered in the child's birth certificate, the other parent, who does not appear in such a certificate and has been raising the child for many years, will not have the legal title to take care of the child any

[20] Art. 61 of the Act of 28 November 2014 Law on certificates of civil status, consolidated text, Dz. U. (Journal of Laws) of 2021 items 709, 1978, of 2022 item 350.

longer. This is a violation of the right to family life of a child who, in such a situation, may in the end, despite having a living parent, be placed in a foster family. Such a situation undoubtedly constitutes a breach not only of the child's best interest, but also of the child's right to privacy and family life, especially since the judgments of the European Court of Human Rights show that the family is not only blood ties, but above all emotional ties that have developed between the child and his parents.[21]

Inheritance issues may also prove problematic. While yes, same-sex couples can make a will, but in the absence of a will, the child cannot benefit from the provisions of intestate succession, as would be the case with a child raised by heterosexual couples. This means that we are dealing with a differentiation of a situation of children who find themselves in the same circumstances but have parents with a different sexual orientation.

3. Future solutions to protect the children's identity

The protection of a child's identity in international law is not regulated comprehensively, which results in violations of children's rights. The catalogue of these infringements is only an example, but it should be noted that the lack of regulations in this respect constitutes a systemic legal loophole. The existence of this lacunae has so far been explained by the margin of appreciation granted to member states of the Council of Europe in this matter. The absence of a universally accepted standard of protection of rainbow families also extends to the European Union, which, following the example of the Council of Europe, decided not to regulate these issues and leave them to be regulated by Member States.

The current lack of regulations at the international level does not have a positive effect on the protection of children's rights in Member States of the Council of Europe or the European Union, but there are signs that this situation may change in the future. The margin of appreciation works in such cases where no common standard of protection of a given right has been developed.[22] However, in the case of protecting the identity of children of same-sex couples, this standard is slowly being developed. There are more and more countries that allow the adoption of children by same-sex couples or that recognize such families. This may be analogous to the situation of

[21] EctHR 24 January 2017 No. 25358/12, *Paradiso and Campanelli v. Italy*.

[22] S. Greer, *The Marigin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, (Council of Europe Publishing 2000), p. 35.

partnerships or same-sex marriages. Initially, only a small number of Council of Europe states legalized same-sex marriages or partnerships.

Therefore, when adjudicating on complaints about non-recognition of unions formed in this way in other countries of the Council of Europe, the European Court of Human Rights relied on the principle of the margin of appreciation, leaving it to the states to regulate this issue. As time have passed, and more and more countries have begun to legalize or recognize same-sex relationships in their legal systems, the ECtHR has adapted its rulings to the situation. And despite the lack of a uniform standard for recognizing such types of relationships in countries that have not legalized them, the ECtHR ordered their recognition in the countries of the Council of Europe in its judgment in Oliari and others v. Italy.[23] This state of affairs is possible due to the fact that the Convention is assumed to be a "living instrument", adapting to the times in which it is used.

It may therefore be assumed that a similar situation will take place in the case of rights of children from rainbow families. As the number of countries recognizing such families increases, the ECtHR's approach to this topic will also change, and the standard of protection for such families will be developed in the distant future. The Court of Justice of the European Union hopes so too and in its judgment of December 2021[24] it ordered EU Member States that do not provide for the possibility of adoption by same-sex couples in their legal systems to issue documents proving the identity of such children. This is undoubtedly the first step forward in protecting children's rights and their identity. The CJEU's judgment is binding on all European Union countries, whereby if so far the states have claimed it was impossible to issue identity documents or documents confirming citizenship on grounds of the public security clause, now they will have to issue such documents despite the lack of relevant provisions.

It should be noted that the Court's decision is extremely important from the point of view of protecting the right to identity of children brought up by same-sex couples. However, it cannot be ignored that this judgment only solves selected inconveniences that these children have to face but does not solve the problem of violation of the children's right to identity comprehensively. The issue of identity documents will not guarantee protection of their vision of a family life. Due to the lack of common regulations for all European countries, they will independently regulate how these documents are

[23] ECtHR 21 July 2015 No. 18766/11 and 36030/11, *Oliari and Others v. Italy*.

[24] ECJ 14 December 2021 Case C-490/20, V.M.A. v. *Stolichna obshtina, rayon Pancharevo*.

issued. This may mean that the child might receive, for example, a passport or an ID card where only one of their parents is named. The judgment also does not solve the problems related to child custody, inheritance, or tax issues, etc.

Conclusion

International law does not comprehensively protect the right to a child's identity, but nevertheless its impact on the protection of children brought up by same-sex couples at the national level is noticeable. Firstly, international law provides the basis for this protection in the general provisions of international legal acts protecting the child's privacy, family life or the best interests. However, the level of protection of the right to identity based on these legal bases varies from country to country, as some of them do not use existing protection tools – they do not know how to use them or do not want to use them.

Secondly, the decisions of international tribunals have been developing the content of general provisions of international law, showing in detail which elements of the identity of children of same-sex couples enjoy legal protection and to what extent. On this basis, also countries belonging to organizations such as the Council of Europe or the European Union must comply with these guidelines. So far, the only problem that remains is whether the protection of the rights of children of same-sex couples is covered by the margin of appreciation. Until a comprehensive, minimum standard of protection of the right to identity of such children is developed, violations of their rights will continue to occur.

Thirdly, it should be assumed that over the next few years it is the interpretation of international law by independent international courts that will contribute to the change of national regulations and the protection of identity of children of same-sex couples. With the increase in the number of countries allowing the adoption of children by same-sex couples or recognizing such families, there will undoubtedly be a clarification of a minimum standard of protection for children of same-sex couples, which will have to be implemented without exception by all European countries.

MODELS OF INCORPORATION OF THE RIGHT TO INTERNET ACCESS INTO NATIONAL LEGAL ORDERS

Ewa Milczarek

Abstract

The information revolution, and the associated rapid development of technology, has led to significant social changes. Currently every aspect of our life depends on access to the internet. The conceptualization of the right to internet access is a consequence of these changes and nowadays this right is perceived as a fundamental right. Many countries have started to implement it into their legal systems. The paper separates and assesses individual strategies of incorporating this law: *a)* the Greek model – introducing the right to internet access into the constitutional order, *b)* the Estonian model – constituting the right to internet access at the statutory level, *c)* the French model – instrumental norm inference recognizing the right to internet access as legitimate by means of instrumental norm inference, *d)* the Italian model – adoption of a non-binding declaration. The research aim of the article is to answer the question: does the right to internet access require direct introduction to the state's constitutional order? The discussion intends to define the desired place of the internet right in the national legal order.

Keywords: right to internet access, human rights, new tech law, constitutional law

Introduction

Internet access, with its range of political, economic, social and cultural uses, is essential for contemporary living. Today, the internet access allows the exercise of human rights such as the right to freedom of expression and the right to information.[1] Also, the internet is good for democracy, as it helps build the government's credibility and it facilitates public participation.[2]

The practical concept of human rights proposed by Beitz[3] grounds the normativity of the human rights concept on both the basic interests that are supposed to protect and the political role it is expected to play in current human right practice.[4] Therefore, some scholars and commentators believe that the rank of the right to internet access is becoming equal to a fundamental right[5] and advocate international recognition of internet access as a human right *per se*.[6] However, this right has not been directly expressed in any significant act of international law and the international community has not established the normative content of this new right. Yet, its rank was confirmed in a Resolution of the United Nations Commission on Human Rights, which called the blocking of internet access a human rights violation[7] and affirmed that the same rights people have offline must also be protected online.[8] International judiciary too recognizes the status of this right and makes it a basis of their decisions by emphasizing its role as a means that allows individuals

[1] S. Tully, 'A Human Right to Access the Internet? Problems and Prospects', 14(2) *Human Rights Law Review*, (2014), pp. 175–195; ECtHR 18 December 2012, No. 3111/10, *Ahmet Yıldırım v. Turkey*.

[2] B. Wellman, A. Quan Haase, J. Witte, K. Hampton, 'Does the Internet increase, decrease, or supplement social capital? Social networks, participation, and community commitment', 45(3) *American Behavioral Scientist*, (2001), pp. 436–455.

[3] C. R. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009).

[4] X. Wang, 'Time to Think about Human Right to the Internet Access: A Beitz's Approach', 6(3) *Journal of Politics and Law* (2013), pp. 67–77.

[5] D. Jancic, 'The European Political Order and Internet Piracy: Accidental or Paradigmatic Constitution-Shaping', 6 *European Constitutional Law Review* (2010) p. 456; S. B. Wicke, S. M. Santoso, 'Access to the internet is a human right', 56 (6) *Communication of the ACM* (2013), pp. 43–36.

[6] L. M. Cradduck, *Legislating for Internet "Access"-ability*, Second International Handbook of Internet Research (2020, Springer), p. 647.

[7] 32nd session of the Human Rights Council (13 June to 1 July and 8 July 2016) <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Pages/ResDecStat.aspx> visited 15 March 2022.

[8] Resolution adopted by the Human Rights Council 26/13 The promotion, protection and enjoyment of human rights on the Internet.

to exercise their right to freedom to receive and to disseminate information or ideas.[9] The right to internet access is two-pronged and includes the following: unrestricted access to the internet subject to enumerated legal restrictions and availability of technology to access the internet.[10]

So far not many countries have decided to incorporate the right to internet access directly into their legal orders. Since there are no standards within the international community as to this new right's desired content and place in the legal system, states have been regulating it by themselves, independent of one another. This analysis identifies four models of such incorporation:

- the Greek model – introduction of the right to internet access into the constitutional order;
- the Estonian model – constituting the right to internet access at the statutory level;
- the French model – recognizing the right to internet access as legitimate by means of instrumental norm inference;
- the Italian model – adoption of a non-binding declaration.

1. Models of incorporation of the right to internet access into legal orders

1.1 The Greek model

The idea to regulate this right in the prism of a contemporary constitution[11] seems natural, as seen in the example of Greece. Following a revision of 6 April 2001, Article 5A was added to the Constitution of Greece[12] in the section devoted to individual and social rights, which introduced the right to access to information and the right to participate in the information society. The same article lays down the state's obligation to make efforts to facilitate access to electronically transmitted information, as well as of the production,

[9] ECtHR 1 December 2015, No. 48226/10 and 14027/11, *Cengiz and Others v. Turkey*.

[10] Special Rapporteur On The Promotion And Protection Of The Right To Freedom Of Opinion And Expression, Human Rights Council, U.N. Doc. A/HRC/17/27, Para 3 (2011).

[11] V. Amenta, 'Network access: Social law implied in the constitution for the use of an active citizenship', 2 *Mondo Digitale* (2014), p. 1.

[12] Constitution of Greece as revised by the parliamentary resolution of May 27th 2008 of the VIIIth Revisionary Parliament.

exchange and diffusion thereof, in observance of the guarantees of the protection of the right to privacy.[13]

The 2012 White Paper published by the government of Malta stipulated postulates to introduce "Digital Rights" to Chapter II of the Constitution. The proposals focused on four fundamental rights: the right to internet access (including access to content and structure); the right to access information on the internet; the right to share and disseminate information; and the right to privacy on the internet.[14] These principles did not enter into force.

1.2 The Estonian model

Estonia is one of the most digitised countries in the world where most public services, including electoral processes, are delivered on-line.[15] Thus, the internet has become key for citizens in their day-to-day functioning and internet use is not a choice but a must. Such a system forces the legislator to introduce guarantees of access to the internet. Nevertheless, the right to internet access has not been directly expressed at the constitutional level. Referring to the right guaranteed in the Constitution of Estonia "to freely obtain information and to freely disseminate ideas, opinions, beliefs and other information",[16] the right to internet access was regulated at the statutory level. The Public Information Act[17] lays down that everyone shall be able to freely access public information in public libraries via the internet. The access is regulated in the Public Libraries Act[18] which guarantees that access to libraries shall be universal and free of charge. Moreover, library staff have the responsibility to help people access internet websites of central and local authorities.[19]

[13] More in J. Rzucidło, 'Prawo dostępu do Internetu jako podstawowe, prawo człowieka. część I [The right to Internet access as a fundamental human right. part I]', 2 *Kwartalnik Naukowy Prawo Mediów Elektronicznych* (2010), p. 39.

[14] A. Spiteri, *The introduction of digital rights in the Constitution of Malta*, MS thesis. University of Malta, 2013.

[15] M. M. Morten, 'eGovernance and Online Service Delivery in Estonia', *Proceedings of the 18th Annual International Conference on Digital Government Research*, June 2017, pp. 300–309

[16] § 45 Riigi Teataja no. 26 of 6 July 1992, item 349 [Constitution of the Republic of Estonia].

[17] Public Information Act of 15 November 2000 (RT I 2000, 92, 597).

[18] Public Libraries Act of 12 November 1998 (RT I 1998, 103, 1696).

[19] Article 15(1–3) Ibidem.

Like Estonia, Finland has also guaranteed internet access in its statutes. The Communications Market Act[20] sets forth that a telecommunications operator shall provide, at a reasonable price and regardless of the geographic location, a subscriber connection to the public communications network at the user's permanent place of residence or location. The subscriber connection shall allow appropriate internet connection for all users, taking into account prevailing rates available to the majority of subscribers, technological feasibility and costs. These terms and conditions are specified by the Ministry of Transport and Communications, which set the universal service broadband speed at 2Mb/s from the start of November 2015, whereas it is to be 10 Mb/s from 2021 onwards.[21]

In Spain, Article 25 of the Sustainable Economy Law[22] guarantees access to universal broadband services and a 1 Mbit/s broadband connection is to be provided by any technology. Terms for public broadband access are to be laid down by a royal decree.

1.3 The French model

The Member States of the Council of Europe are obliged to secure for everyone within their jurisdiction the human rights and fundamental freedoms contained in the ECHR. This obligation also applies to the use of the internet.[23] The ECtHR linked the binding force of a norm related to access to the internet with the achievement of other norms under the human rights protection system. The constitutional judiciaries of many countries have come to similar conclusions by invoking their constitutional laws.

The French Constitutional Council recognized freedom of access to the internet in its decision on constitutionality of the Act no. 2009/669,[24] referred to as HADOPI, which addressed popularization and protection of creative expression on the internet. The Constitutional Council held that in connection with the freedom of expression stipulated in Article 19 of the 1948 Uni-

[20] § 60c, Communications Market Act (363/2011).

[21] Press release: The Ministry of Transport and Communications <https://www.lvm.fi/-/more-speed-for-broadband-universal-service-796925> visited 24 May 2022

[22] Law 2/2011 of 4 March, Sustainable Economy, (BOE no. 55, 5 March 2011, pp. 25033, 25235).

[23] Recommendation CM/Rec (2014)6 of the Committee of Ministers to Member States on a Guide to human rights for Internet users (adopted on 16 April 2014).

[24] Law no. 2009-669 of 12 June 2009 promoting the dissemination and protection of creation on the Internet (JORF n°0135 13 June 2009).

versal Declaration of Human Rights and Article 11 of the 1789 Declaration of the Rights of the Man and of the Citizen,[25] the right to communication also covers freedom of access to on-line communication services as a tool of participation in democratic life and of expressing ideas and opinions.

In response to a complaint from a student, Faheemi Shirin, who questioned unjustified restrictions on using mobile phones in girls' hostels, an Indian High Court held in its 2019 decision[26] that internet access is a fundamental right which is part of the right to freedom of speech under Article 19 of the Constitution of India, the right to privacy under Article 21 and the right to education expressed in its Article 21a. The right to information is directly affected due to the advances in the field of information and communication technology, which have become the dominant mode of information dissemination.[27]

The Constitutional Tribunal of Costa Rica[28] concluded that a public service, here a telecommunications service involving access to the internet, affects two fundamental rights: the right to communication and the right to information. The Tribunal reserved that in the context of today's knowledge-based information society, the right of all people to access and participate in the creation of information and knowledge is becoming a fundamental requirement, whereby internet access must be guaranteed to the entire population. Therefore, the Costa Rican Electricity Institute is obliged to provide the required internet services despite technological limitations. Providing public telecommunications services involves a responsibility for creating the necessary infrastructure, planning its extension and, finally, making it available to enable citizens to exercise their basic rights to communication and information.[29]

[25] Which is part of France's constitutional order.

[26] In The High Court Of Kerala At Ernakulam Present The Honourable Smt. Justice P.V. Asha Thursday, The 19th Day Of September 2019 / 28th Bhadra, (1941 Wp(C).No.19716 Of 2019(L).

[27] K. Chawla, 'Right to Internet Access – A Constitutional Argument', 7 *Indian Journal of Constitutional Law* 57 (2017), p. 57–88.

[28] Constitutional Chamber of the Supreme Court of Justice, Exp: 10-003560-0007-CO, (Res. Nº 2010-010627).

[29] A review of Costa Rican case law relevant to internet access was discussed in G.B. Solano, 'El derecho de acceso a internet y la libertad de expresión' ['The right of access to the internet and freedom of expression'] *Libertad de Expresión, Derecho a la Información y Opinión Pública* (Cuadernos de jurisprudencia de la Sala Constitucional de Costa Rica 2018).

1.4 The Italian model

The issue was regulated differently in Italy, where the right to internet access was recognized in a non-binding declaration. The Declaration of Internet Rights[30] emphasizes that the internet is an increasingly important space for the self-organisation of individuals and groups, and also a vital tool for promoting individual and collective participation in democratic processes. The declaration itself, due to its non-binding nature, is intended to only create an ideological framework for future works on modernizing the jurisprudence.

2. Discussion

The right to internet access is associated with the contemporary concept of the status of an individual. Modern constitutionalism seeks to ensure human rights protection and it must adapt to the changes brought about by the modern age. As emphasized, the right to internet access is now the main tool to exercise rights such as the right of freedom of expression and information, universally guaranteed at the international and constitutional level alike. The right to internet access has the nature of a derivative right i.e. they are rights which are not mentioned explicitly in the constitutional text but are nevertheless important for the achievement of the Constitution's objectives. They are termed 'penumbral rights' or 'unenumerated rights' in American jurisdiction.[31]

Unfortunately, an open and free access to the internet has encountered large opposition based on political, economic and ethical reasons.[32] The internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress and ensuring universal access to the internet should be a priority for all States.[33] Also, discourse dedicated to the internet and related rights

[30] Declaration of Internet Rights <https://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf> visited 27 May 2022.

[31] Missouri v. Holland, 252 US 416.

[32] S. Wonga, E. Altmanb, J. Rojas-Morac, 'Internet access: Where law, economy, culture and technology meet', 55(2) *Computer Networks* (2011), p. 470.

[33] K. Mathiesen, 'The Human Right to Internet Access: A Philosophical Defense', 18 *The International Review of Information Ethics* (2012), p. 22.

generates debates about the pragmatic meanings of the intersection of citizenship, rights, and access to technology.[34]

The challenge for human rights jurisprudence and discourse is not only to bring both stability and a coherent framework to bear upon such complexities but also to adapt to them.[35] The strategy adopted by countries such as France or Costa Rica boils down to recognizing that the right to internet access is indispensable in exercising other rights, thus there is a causal link between them. The state has the responsibility to take measures that adequately lead to this goal while measures that prevent or make it difficult to achieve such a goal are prohibited. This allows a conclusion, like the conclusions in the judicial decisions quoted earlier, that the state is first and foremost obliged to create conditions that enable citizens to use the internet (such as providing appropriate infrastructure), and secondly, it cannot limit access to the internet discretionally. The courts have a significant role in translating traditional human rights conceptions of freedom of expression into digital and online contexts.

The right to internet access is *de facto* ensured in all countries whose legal systems proclaim the freedom of expression and of access to information. That allows us to specify only general rules relevant to the exercise of the right to internet access. Pursuant to the UN recommendation, a state's activity should not be limited solely to the obligation of non-interference, but it should also include a number of positive obligations, such as the need to expand the internet infrastructure, to ensure its affordability and to build digital skills in society especially in most disadvantaged and marginalised groups. Due to the fact that changes in the digital space are very intense, the legal system is not capable of following them at the same speed.[36] The main flaw of the French approach is its lack of a precisely defined scope of state's positive obligations and thus difficulties in implementing citizens' personal rights. Similar shortcomings may be observed in the Greek approach. Even though Greece introduced the right to internet access into the catalogue of constitutional rights and freedoms as early as 2010, the general share of Greek households with access to the internet is much lower than the average

[34] T. Oyedemi, 'Internet access as citizen's right? Citizenship in the digital age', 19(3-4) *Citizenship Studies* (2015), p. 450.

[35] D. Joyce, 'Internet Freedom and Human Rights', 26(2) *The European Journal of International Law* (2015) p. 514.

[36] M. Nastić, 'The impact of the informational and communucation technology on the realization and protection of Human Rights', 17 *Balkan Social Science Review* (2021), p. 91.

in the European Union.[37] The right to internet access in the constitutional order serves as a programme norm and is a symbolic emphasis that stresses the country's modern character.[38] The Italian approach is similarly symbolic, i.e. it outlines a desirable direction of development of legislation, not its real achievements. As demonstrated, the right to internet access and its validity is a natural consequence related to the validity of the freedom of expression or the right of access to information and does not require separate recognition. In constitution, the right to internet access is a primarily a rhetorical tool.

A digital revolution has generated the following changes in the constitutional ecosystem: individuals' increased ability to exercise their fundamental rights an increased risk of threats to fundamental rights, and it has emphasised the special role of private actors.[39] The Estonian approach points to the state's strictly positive obligations, including i.e. conditions of access to the web or its bandwidth, thus giving citizens the possibility to demand specific rights. This approach is clearer and more effective. It allows a precise specification of individual rights granted to citizens while at the same time flexibility is achieved thanks to the application of a statutory regulation that allows legal norms to be adapted to the dynamic social and technical realities.

Conclusion

The internet's strong rooting in modern life means that its status must be regulated to ensure that citizens have a real opportunity to use it. Due to the great differentiation of the level of technological and economic[40] development of individual countries and the dynamic character of technological advancement, it is difficult to specify common standards on technical aspects of the web's functioning at the constitutional (or international) level. Access to the internet an autonomous right is only a precondition for enjoying other rights. Its essence is limited to ensuring that the right to information and freedom of expression through a specific medium may be exercised. It is a

[37] Share of households with internet access in Greece from 2007 to 2020 <https://www.statista.com/statistics/377701/household-internet-access-in-greece/> visited 28 January 2022.

[38] See: E. Milczarek, Miejsce prawa do internetu w krajowych porządkach prawnych [The place of the right to internet access in national legal orders], 1 *Przegląd Prawa Konstytucyjnego* (2023).

[39] E. Celeste, 'Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology's Challenges', 2 HIIG Discussion Paper (2018), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219905> visited 28 May 2022.

[40] M. N. Shaw, *Prawo międzynarodowe [*International law*]* (Książka i Wiedza 2007), p. 19.

significant and key medium, though its role is to serve. The very propagation of the right to internet access in constitutions is unnecessary to recognize it as a right in force. Therefore, guarantees at the level of statutes are the most effective way to achieve the desirable degree of this access. Today every government can afford the provision of adequate public access to its legal information and the lack of political will to do so is the preeminent factor responsible for inadequate—and in some cases extremely poor—public access.[41]

[41] L. E. Mitee, 'The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right', 6 *German Law Journal* (2017), p. 1429.