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A Reconstructive Account

A Structural Comparison of Identity Claims with Civil Disobedience and Conscientious Objection

Human history began with an act of disobedience, and it is not unlikely that it will be terminated by an act of disobedience. […] The act of disobedience set Adam and Eve free and opened their eyes. […] 'Original sin', far from corrupting man, set him free; it was the beginning of history; man had to leave the Garden of Eden in order to learn to rely on his own powers and to become fully human.

(Erich Fromm, *A Matter of Life*)

1 Introduction

Previous chapters have challenged and deconstructed the concept of national constitutional identity in a rather critical way. The present chapter, however, aims to set the tone constructively, searching how best to understand and evaluate identity claims in the EU. Despite their challenges, claims of national constitutional identity are the existing constitutional reality. Our critique will not make them disappear; on the contrary. And as empirical observation shows, their frequency is increasing as a result of an ever closer European legal harmonization.

Accordingly, this chapter aims to identify the essential benchmarks which can guide us to a better understanding and evaluation of the meaning and scope of identity claims as a legitimate space for judicial challenge, contestation and resistance against the absolute primacy of EU law. In doing so, the research first identifies the structural similarities and differences of identity claims in the EU when structurally compared with conscientious objection and civil disobedience in political and legal theory and practice. Second, it explores these structural similarities to find essential elements that may be beneficially applied to European constitutional law. Finally, due to the identified similarities, the chapter draws several preliminary conclusions, subject to necessary further research, which one should consider when interpreting and evaluating the validity, acceptance and legitimacy of identity claims in relation to the EU legal order.

The chapter unfolds in the following steps. First, it explains the initially recognized structural similarities which have prompted this research, the applied methods in this chapter, and the caveats thereof (Section 2). Next, it outlines the various accounts of conscientious objection as understood in legal theory and practice (Section 3). Moreover, it identifies several 'transplants' that one may apply when elaborating on identity claims (Section 5). The chapter then proceeds with the concept of civil disobedience as understood in practice and in legal and political theory (Section 6). It adopts a modest approach, identifying what kind of 'transplants' we could apply in European constitutional law (Section 7). Furthermore, it analyzes the existing identity case law in the light of 'constitutional conscientious objection' and 'institutional civil disobedience' (Section 8). Finally, it outlines the major lessons of drawing on the structural comparison between the

national constitutional identity claims on the one side, and conscientious objection and civil disobedience on the other (Section 9). It closes with brief concluding remarks (Section 10).

2 Points of Departure – Structural Similarities, Previous Research, Methods and Caveats

This section explains the birth of the idea of respective structural comparison (2.1). Then it outlines the existing scholarly research, which has already made some preliminary connections between civil disobedience alongside conscientious objection and acts of state alongside its institutions (2.2). Moreover, it explicates two scholarly accounts which understand the state's institutions: namely parliament and the courts, as institutional civil disobedience (2.3). Furthermore, the section explains the structural similarities between civil disobedience alongside conscientious objection and claims of national constitutional identity in the EU (2.4). Additionally, it clarifies the application of interdisciplinary methods for the respective structural comparison (2.5), and concludes with potential caveats of the said research (2.6).

2.1 On Structural Similarities: The Birth of the Idea

The roots of the initial idea to explore the structural similarities between claims of national constitutional identity as acts of judicial resistance against EU law on the one hand, and on the other hand acts of civil disobedience and conscientious objection go back to the following two scholarly contributions: *Four Visions of Constitutional Pluralism*[1] edited by Matej Avbelj and Jan Komárek, and the chapter on 'The Moral Point of Constitutional Pluralism'[2] by Mattias Kumm.

At the symposium at EUI in 2008 on constitutional pluralism, Julio Baquero Cruz, Mattias Kumm, Miguel Poiares Maduro and Neil Walker put forward four different perspectives. According to the transcript of the

1 Matej Avbelj and Jan Komárek, 'Four Visions of Constitutional Pluralism', *EUI Working Paper LAW No. 2008/21* (European University Institute 2008) <https://cadmus.eui.eu/handle/1814/9372> accessed 24 February 2023.

2 Mattias Kumm, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

symposium and to the best of my knowledge, Cruz and Kumm for the first time came up with the idea of treating the judicial resistance by the national apex courts against the unconditional primacy of EU law as a matter of 'political disobedience' and 'civil disobedience'.[3] Cruz stated that one could accept a moderate version of pluralism, where the courts would have to first refer to the CJEU, but thereafter, 'as a very exceptional escape', and having 'extremely powerful reasons not to follow the law', they could exercise 'a sort of political disobedience'.[4]

As a follow-up, Kumm critically questioned the basic assumption about the Rule of Law that 'justifies giving it absolute priority over other principles, perhaps because without it, other principles would become unintelligible. That position has a long pedigree in Western legal thought. The idea has been central to the discussion of civil disobedience.'[5] Moreover, Kumm then explored the situation where a citizen disobeys the law because they think the government should not act the way it does. They want to change and improve that law. Thus, the question, 'under which circumstances might you legitimately be engaged in such a [disobedient] practice'?[6] Kumm argued that an answer 'never, because the Rule of Law is undermined' cannot be entirely convincing.

The scholarly discussions at that symposium, however, did not go any further than what is recalled and described above. The idea was being mentioned more in passing, and only at a highly abstract and undetermined level.

The second scholarly contribution referring to judicial disobedience as a comparison with civil disobedience, and for the first time with conscientious objection,[7] was Kumm's chapter in *Philosophical Foundations of European Union Law*[8] in 2012. Titled indicatively 'Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection', he argued that

3 Avbelj and Komárek (n 1) 19.
4 Ibid.
5 Ibid. 29.
6 Ibid.
7 Victor Ferreres Comella brought the respective analogy to Kumm's attention. See Kumm (n 2) 238.
8 Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).

> 'the kind of resistance by courts to the claims to authority by the more comprehensive legal orders is best understood as a form of either institutionalized civil disobedience or identity-based conscientious objection demanding asymmetric accommodation.'[9]

Kumm further wrote:

> 'To the extent that such [national constitutional] commitments are understood as part of national constitutional identity, the claim made by a court in the name of constitutional identity is structurally equivalent to a person demanding to be exempt from a generally applicable rule as a conscientious objector: it is a demand to accommodate a specific addressee of a legal obligation because of deeply held commitments that it would, on balance, be unreasonable for the legal order to require the addressee to give up. Unlike civil disobedience, conscientious objection is not directed towards legal reform. The claim is mere to be left alone regarding an obligation whose appropriateness for others is not put into question. When a national court invokes the constitutional identity of the national community as an argument not to comply with a legal obligation, it is thus not implausible to understand this claim as the democratically 'constitutionalized' version of what on an individual basis would be recognized as conscientious objection.'[10]

The result of striking the appropriate balance between competing principles of constitutionalism in a concrete context 'is a doctrinal framework that defines the conditions under which either institutionalised civil disobedience or constitution-based conscientious objection are justified'.[11]

Finally, he argued that

> '[w]hen the courts develop doctrines managing the interference between different legal orders, […] we might say that they are seeking to lay down the jurisdictional, procedural, and substantive conditions for the exercise of institutionalized civil disobedience or conscientious objection [which] provides a good way of capturing the moral point of constitutional pluralism.'[12]

9 Kumm (n 2) 233.
10 Ibid. 238.
11 Ibid.
12 Ibid. 244.

The present research takes up the above-explained idea of a structural comparison between judicial resistance in the EU framework and the jurisprudential notions of civil disobedience and conscientious objection. It connects national judicial resistance with the claims of national constitutional identity, and it asks the following research question: Can the findings of civil disobedience and conscientious objection, as understood in legal theory and applied in judicial practice, help us better understand and evaluate claims of national constitutional identity?

2.2 Existing Scholarly Connections of Civil Disobedience and Conscientious Objection with the Acts of State and its Institutions – State Civil Disobedience

Apart from the contributions by Cruz and Kumm described above, other scholars previously established a similar connection between civil disobedience and disobedient acts of a state. The analogous link between the civil resistance of citizens – civil disobedience and conscientious objection – and the acts of state institutions was explored in political theory and public international law, although not focused concretely on the European Union and the acts of the national judiciary.

In the field of international law, for example, Robert E. Goodin proposed in 2004 how to differentiate plain law-breaking from would-be law-making in international public law concerning customary international law.[13] To determine which moral standards one should apply in international conduct, he argued for the use of analogous standards 'to the ordinary standards for distinguishing civil disobedience from ordinary law-breakers'.[14] Goodin suggested applying knowledge and principles of civil disobedience when the 'would-be law-makers [are] breaking customary international law genuinely with a view to remaking it'.[15] Concretely, he claimed that when a state wants to change international customary law, it should violate the norms publicly, convinced that it offers morally correct interpretation of the customary law, accept the consequences of its breach, and embrace the generalizability of these acts – allowing others to act reciprocally in

13 Robert E Goodin, 'Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers' (2005) 9 The Journal of Ethics 225.
14 Ibid. 225.
15 Ibid. 246.

the same way.[16] In this manner, he argued, Britain's unilateral suppression of piracy led to international agreements on piracy on the high seas, and Truman's unilateral declaration to extend territorial waters from three miles to the Continental Shelf in 1945 created a change of rules accordingly, as reflected nowadays in the Convention on the Law of the Sea. Similarly, one may hope that Belgium's decision to prosecute violations of universal human rights happening anywhere in the world might encourage others to follow their lead.[17]

Moreover, in an attempt to construe a theoretical model of fairness in international relations, Nancy Kokaz published an article in 2005 that established a link between law and morality concerning international institutional practice with an argument of civil disobedience. Concretely, she argued that the operation of international institutions in relation to fairness must be connected with a conceptual space for civil disobedience. 'This is because all practices, even generally just ones, can at times become the perpetrators of injustice.'[18] For example, she stated that 'the Brazilian decision to produce and export generic HIV medications in defiance of intellectual property rights proved to be an instance of civil disobedience'.[19]

In addition, the connection of civil disobedience with a state's institutions also appears in political science. Jonathan White directly advocated drawing on criteria inspired by theories of civil disobedience adapted to the transnational context, specifically to disobedience on a multilevel order.[20] Ronnie Hjorth argued similarly, elaborating on state civil disobedience as an instrument for the moral improvement of institutions by challenging established laws and conventions on shared moral conceptions.[21] Against this view, William Scheuerman argued in a recent article that political institutions could not commit civil disobedience. Instead, he proposed to focus

16 There are some parallels with the rule of the persistent objector in international law which cannot be explored here due to the limited scope. See also James A Green, *The Persistent Objector Rule in International Law* (Oxford University Press 2016) 59ff.

17 Goodin (n 13) 245.

18 Nancy Kokaz, 'Theorizing International Fairness' (2005) 36 Metaphilosophy 68, 79.

19 Ibid. 80.

20 Jonathan White, 'Principled Disobedience in the EU' (2017) 24 Constellations 637, 641.

21 Ronnie Hjorth, 'State Civil Disobedience and International Society' (2017) 43 Review of International Studies 330, 344.

on civil servants and people in respected institutions who are exercising civil disobedience as individuals.[22]

Moreover, drawing on the works of Goodin,[23] Buchanan[24] and Hoag,[25] Antonio Franceschet expanded the theory of state civil disobedience in international politics, introducing an additional type of disobedience by less powerful states. With the help of Giorgio Agamben's concept of *destituent* power, he developed an additional conceptual framework of state civil disobedience for weak states that involves withdrawing from the obligations of a particular set of international institutions as a legitimate form of self-protection.[26] As an example, he explicated Uruguay's recent decision as the first country to legalize the production, sale and consumption of cannabis for non-medical purposes against the International Convention on Drug Control, followed by legalizon by Colorado and Washington. It has to be stressed that Uruguay challenged the said Convention beyond the rules of public international law, such as for example the concept of the persistent objector or the clause *rebus sic stantibus*.

Most illuminatingly, Franceschet differentiated in his contribution between the disobedient state act which aims to change a particular international norm for all states, and the act of state which only demands an individual exemption from international norms; a distinction which most closely resembles the focus of this research – institutions resisting in order to change the law – i.e. civil disobedience; or demand only to be excluded themselves from the respective norm – i.e. conscientious objection.

Instead of conscientious objection, Franceschet applied the terminology of *destituent* power. He wrote: 'Some might reject such disobedience be-

22 William E Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (2020) 82 The Review of Politics 269.

23 Goodin (n 13).

24 Allen Buchanan, 'From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform' (2001) 111 Ethics 673; Allen Buchanan, 'Reforming the International Law of Humanitarian Intervention' in JL Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press 2003); Allen Buchanan, 'The Morality of International Legal Reform' in Allen Buchanan (ed), *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2003).

25 Robert W Hoag, 'Violent Civil Disobedience: Defending Human Rights, Rethinking Just War' in Michael W Brough, John W Lango and Harry Van Der Linden (eds), *Rethinking the Just War Tradition* (State University of New York Press 2007).

26 Antonio Franceschet, 'Theorizing State Civil Disobedience in International Politics' (2015) 11 Journal of International Political Theory 239, 251.

cause it does not aim to improve political and legal systems; instead, it seeks to withdraw states from such systems or to suspend the negative effects these systems have on weaker states.'[27] 'Perhaps like Gandhi and the Indian independence movement, Uruguay is asking to be 'left alone' and to be allowed to try something on its own.'[28]

Finally, Gerald Neubauer presented the most elaborated theoretical framework of state civil disobedience in international law, stating that morally justified violations of international law should be considered civil disobedience.[29] He argued that 'the concept of individual civil disobedience which is widely accepted in political philosophy has to be applied to violations of international law by state actors'.[30] He advocated for the introduction of civil disobedience terminology in particular to create an 'early warning system for moral deficits and as a factory for reform alternatives'.[31] While recognizing that the progress of international law tends to create more international justice, some international rules fail to be just.[32] 'In order to prevent international institutions from developing towards a global Leviathan, we need a basic right for states to disobey unjust international rules.'[33]

Neubauer presented two examples of state civil disobedience in international law. In his view, the Argentinians' largest-ever sovereign debt cut against the rules of international law should be seen as state civil disobedience. A large part of the debt had a criminal character, and it mostly served the enrichment of corrupt elites, which essentially led to a dramatic economic crisis, mass protests, rising unemployment and the collapse of the peso.[34]

Similarly, Bolivia's refusal to respect international investment law under the BIT should also count as state civil disobedience. Bolivia was pressured to privatize public water enterprises in exchange for a World Bank loan.

27 Ibid.
28 Ibid. 250.
29 Gerald Neubauer, 'State Civil Disobedience: Morally Justified Violations of International Law Considered as Civil Disobedience' (TranState Working Papers 2009) Working Paper 86.
30 Ibid. 24.
31 Ibid. 25.
32 Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 158–90.
33 Neubauer (n 29) 24.
34 Ibid. 12.

The private investor in Cochabamba raised the water rates drastically up to 300%, which led to massive protests and eventually terminated the private company's licence. In the lawsuit at ICSID, the private company required enormous compensation from Bolivia, due to their violation of the bilateral investment treaty with the Netherlands.[35] Neubauer also acknowledged some essential conjectures on the causes and effects of the 'state civil disobedience'. He addressed the challenges of connecting individuals with states, the criteria for illegalities, the problem of conscientiousness of states, publicity, motivation, and non-violence.[36]

To sum up, the above-cited scholars in the fields of political science and public international law already recognized the structural similarities between civil disobedience (and indirectly, conscientious objection) and acts of states resisting against unfair or unjust international law. Moreover, they directly addressed numerous challenges of the theoretical framework of 'state civil disobedience', for example, the question of prohibition of violence and the challenges of ascribing to a state a subjective motivation for its actions.

However, the existence of the above-cited academic literature leaves many relevant issues overlooked and underexplored, prompting further research, specifically concerning the European multilevel constitutional framework, with an emphasis on the actions of state institutions, most notably the apex courts.

2.3 Institutions as Agents of Civil Disobedience – Parliaments and Courts

Decisively, two additional essential legal scholarly contributions most evidently support and justify this research inquiry: Andreas Føllesdal's theory of parliamentary civil disobedience against international human rights courts,[37] and N. Türküler Isiksel's article which analyzes CJEU's *Kadi*[38] decision against the UN Security Council's misapplication of fundamental

35 Ibid. 19.
36 Ibid. 7–10.
37 Andreas Føllesdal, 'Law Making by Law Breaking? A Theory of Parliamentary Civil Disobedience against International Human Rights Courts' in Andreas Føllesdal, Geir Ulfstein and Matthew Saul (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (Cambridge University Press 2017).
38 Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (*Kadi*) [2005] ECLI:EU:T:2005:332.

principles of the international order as 'best understood as an act of civil disobedience'.[39]

In 2015, Føllesdal presented a theory stating that parliamentary disobedience against, or non-compliance with, decisions of the international courts may be justified in some cases. Moreover, he argued that 'we can bring some light on the issues by understanding these acts as a form of civil disobedience'.[40] Føllesdal directly applied Rawls' framework of civil disobedience and laid out six characteristics and four conditions for a disobedient parliamentary act to be justified. As to the former, the act should be contrary to law;[41] it should be political and conscientious; it should aim to bring about change; take place publicly; in a non-violent manner; and the agent should accept the consequences. Moreover, the act would be justified when the respective injustice violates the appropriate normative principles; when other normal appeals have already failed; the amount of civil disobedience in general remains within limits; and finally, the injury of the innocent is avoided.[42]

Although not directly mentioning 'conscientious objection', Føllesdal also distinguished between two types of disobedience against international courts. In the light of conscientious objection, he wrote: 'Some non-compliance appears largely as claims to be *exempt* from a generally accepted rule– without any claim that the rule itself should change.'[43] The second variety of non-compliance is a deliberate disobedience 'in an ultimate effort to correct its interpretation',[44] where Føllesdal referred to the *Solange* jurisprudence as an example.

Finally, Føllesdal applied his account of parliamentary civil disobedience against international human rights courts to two concrete examples in the United Kingdom against the ECtHR's judgements. The *Hirst*[45] case relates to the blanket ban on prisoners voting, and the *Animal Defenders*[46] case

39 N Türküler Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' (2010) 16 European Law Journal 551.

40 Føllesdal (n 37) 335.

41 'Contrary to law' refers to a violation of a specific positive legal norm, which is challenged by the objector. If the claim to civil disobedience is legitimate, the legal system may eventually still accommodate this illegal act as justifiable under some higher principles of justice, hence, it may essentially become 'legal'.

42 Føllesdal (n 37) 339.

43 Ibid. 332.

44 Ibid. 331.

45 *Hirst v UK* App no 74025/01 (ECtHR, 6 October 2005).

46 *Animal Defenders International v UK* App no 48876/08 (ECtHR, 22 March 2013).

concerns freedom of expression in relation to the political advertisement on TV and radio denied by an NGO. He concluded that due to his account, one can assess the legitimacy of such illegal acts under international law as sincere attempts at more legitimate international law-making, although with some inherent dangers.[47]

Føllesdal's methods of employing a Rawlsian theoretical account thus come closest to the methodological approach of this research – applying the theoretical understandings of conscientious objection and civil disobedience from legal theory to the area of judicial resistance within the European multilevel constitutional landscape, as structurally comparable controversies.

The second contribution by Isiksel, dating from 2010, comes the closest to the *subject* of the respective research, the behaviour of courts. While focusing specifically on the behaviour of the CJEU, rather than the national apex courts of the Member States, Isiksel observed in a similar manner that the *Kadi* decision of the CJEU should 'best [be] understood as an act of civil disobedience'.[48] Once again, she understood civil disobedience by the CJEU as closing the gap between what is legal and what is legitimate as perceived by those bound by law.

To qualify the CJEU's defiant act as justifiable, Isiksel suggested five criteria. First, the court's motivation must not be self-serving, but rather dedicated to upholding the basic principles and higher norms of justice which underpin the errant legal system.[49] Second, the act must be public and dialogical. Isiksel wrote: 'The actors must be able to plead with their peers and publicly justify their reasons for breaking the law in terms that all could, in principle, agree to.'[50] Third, the disobedient party's 'ostensible aim cannot [...] be a private or business advantage: it must have *some* reference to a conception of justice or the common good'.[51] Lastly, the court's stance ought to be beneficial for the legal order rather than corrosive of its long-term cohesiveness and effectiveness. 'The aberrant act of breaking the law in the name of more fundamental standards of justice should stop short of jeopardising the basic conditions that make legality possible.' Civil

47 Føllesdal (n 37) 351.
48 Isiksel (n 39) 551.
49 Ibid. 568.
50 Ibid. 563.
51 Christian Bay, 'Civil Disobedience: Prerequisite for Democracy in Mass Society' in Jeffrie G Murphy (ed), *Civil disobedience and violence* (Wadsworth Pub Co 1971) 76; Isiksel (n 39) 567.

disobedience 'may challenge a particular law but must not threaten the very fabric of the law'.[52]

Isiksel did not overlook the connection between the *Kadi* argumentation with the special type of judicial defiance in the *Solange* case. On the contrary, she raised the concern that the 'Solange formula' and *Kadi* decision might encourage the apex courts to further contest the constitutionality of the European measures. According to Isiksel, the *Kadi* decision by the CJEU was an 'example that it is acceptable for a court to remedy extreme denials of justice in another legal system by taking the law into its own hands'.[53] The German Federal Constitutional Court (FCC), accordingly, quickly picked up this line of argumentation. In the *Lisbon* decision it referred specifically to *Kadi* to justify a potential disapplication of EU law. It stated that in the same way as the CJEU, which in a borderline case placed the assertion of its own identity as a legal community above the commitment that it otherwise respects, the FCC can equally declare EU law inapplicable in Germany.[54]

To sum up, the above-cited contributions together established a satisfactory methodological framework, which even on its own already sufficiently justifies the basic contours of the present research. While Føllesdal's research persuasively articulated and justified the reasons to apply the theoretical account of civil disobedience from legal theory, specifically the Rawlsian justificatory conditions for civil disobedience in relation to state institutions, Isiksel's research directly scrutinized the CJEU in that light. Seen together, these two scholarly contributions serve as a methodological starting point and basic justification as to why one scrutinizes and evaluates identity claims as structurally comparable to civil disobedience and conscientious objection. However, both contributions only outlined the basic contours of the said structural comparison, leaving the majority of queries underexplored, especially concerning the EU. The objective of the following contribution aims to supplement that aspect.

2.4 Structural Similarities Explained

This section highlights the major contours of the said structural comparison. First, it draws a connection between *Solange I* and civil disobedience

52 Isiksel (n 39) 567.
53 Ibid. 570.
54 BVerfG, 2 BvE 2/08 *Lisbon* 30 June 2009, para 340.

as resistance to change (2.4.1). Second, it connects the *Sayn-Wittgenstein* decision with conscientious objection as a plea for exemption (2.4.2).

2.4.1 Civil Disobedience and Solange I – Resistance to Change

Before trying to answer the main research question above, we should start by explaining the main features of the structural comparison. What is civil disobedience, and how do some claims of national constitutional identity seem to reflect its main structural features?

Think of the famous words of Martin Luther King: 'One has not only a legal, but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws.'[55] Civil disobedience is usually directed towards arguably unjust or severely inadequate laws by openly and publicly violating these or some other rules to trigger political change. As Joseph Raz put it, civil disobedience is a 'moral right to break the law for moral or political reasons'.[56]

For example, in March 1955, Claudette Colvin defied American segregation laws and refused to give up her seat to a white passenger on a bus in Montgomery, Alabama. Colvin, a pregnant 15-year-old teenager, was manhandled off the bus, handcuffed and put in an adult jail.[57] Nine months later, Rosa Parks committed the same defiance, being arrested and fined. These disobedient acts against the segregation laws led the Women's Political Council, a group of black women working for civil rights, to call for a boycott of the bus system. As a result, shortly after, 40,000 African Americans boycotted the bus system; they organized taxi drivers for the same price as the bus fare; they protested and demanded changes to the existing system. Their 13-month mass protest ended with the US Supreme Court ruling in *Browder v Gayle* that segregation on public buses was unconstitutional under the Equal Protection Clause of the 14th Amendment to the US Constitution and it must end.[58]

A public act of defiance against the existing valid laws, in the name of justice and the principles of equality and fairness, prompted a massive

55 Martin Luther King Jr., *Letter from Birmingham Jail: Martin Luther King* (1st edn, Penguin Classics 2018) 10.

56 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Reprint edition, Oxford University Press 1983) 262.

57 Phillip Hoose, *Claudette Colvin: Twice Toward Justice* (Reprint edn, Square Fish 2010).

58 *Browder v Gayle* 352 US 903 (1956).

public reaction in support of that defiant action. Consequently, the legal rules on segregation were changed accordingly.

It is important to highlight the elements of the respective civil disobedience, which are fundamentally different from a mere disregard for laws. First, civil disobedience does not hide but is carried out publicly, for everyone to see. Moreover, it adheres to a higher principle of justice. Furthermore, it aims to achieve a political or legal change. What is more, an action of one individual often reverberates among the many, and it creates a collective (political or civil) force which has a higher legitimacy and is more difficult to ignore or dismiss. Finally, it creates a kind of double position: while civil disobedience acts *against* the law, outside formally binding rules, it also embodies a fidelity to law, namely, it adheres to higher 'first order' principles.

As a structural comparison, let us study the well-known German *Solange I* case law. As more thoroughly explained in Chapter 2, the FCC refused to accept the absolute primacy of EU law until the Community received a codified catalogue of fundamental rights, a democratically legitimate European Parliament, directly elected by the general suffrage and equipped with legislative powers, and Community organs which were politically accountable.[59]

Although the case of *Solange I* by the FCC is nowadays often praised as a generator of the advancement of European constitutionalism and supranational democracy,[60] it was also a clear case of judicial resistance and disobedience.[61] *Solange I* was not just a violation of the well-established primacy of EU law at that time, and for roughly ten years according to *Costa ENEL*[62] in general, and against the concrete case law *Internationale Handelsgesellschaft*[63] issued by the CJEU specifically, but was also considered as illegal domestically by three dissenting judges.[64]

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59 BVerfGE 37, 271 *Solange I* 29 May 1974, p 281.

60 Peter Hilpold, 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European "Popular Spirit"' in Markus Gehring (ed), *Cambridge Yearbook of European Legal Studies*, vol 23 (Cambridge University Press 2021) 164.

61 Andreas Haratsch, *Europarecht* (12th edn, Mohr Siebeck 2020) 323.

62 Case 6-64 *Flaminio Costa v E.N.E.L.* (*Costa ENEL*) [1964] ECLI:EU:C:1964:66.

63 Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Internationale Handelsgesellschaft*) [1970] ECLI:EU:C:1970:114.

64 Franz Mayer, 'The European Constitution and the Courts - Adjudicating European Constitutional Law in a Multilevel System' in Joseph HH Weiler and Armin von

One does not dispute the correlation between the respective judicial resistance and the advancement of the European constitutional design. The disobedient and resistant act of the strong national apex court contributed, together with other causes,[65] to European constitutional change. To accommodate the reasons for dissent, both the European constitutional design and European judicial awareness regarding the protection of fundamental rights have been improved. In other words, the respective change, which was co-prompted by the judicial resistance, has brought a considerable advancement of the legal system as such. The judicial resistance stirred the waters tremendously at that time, and seriously questioned the primacy of Community law, which eventually only improved the EU.

The essential elements of the *Solange I* saga are as follows. The underlying justificatory reason of the FCC was legitimate and equitable, namely, to reassure the adequate fundamental rights protection of individuals as governed by EU law. Regardless of any other unknown or speculative motivations that the FCC might have had, one can hardly distrust its stated reasons; especially in retrospect, as the cited judicial resistance proved to be constructive. Moreover, with its reasoning, *Solange I* appealed to and connected to other courts, scholars and institutions. It publicly expressed the concerns of many, which had already been raised before.[66] In that sense, one cannot see the FCC as an isolated and self-absorbed actor, longing for power and conflict, but rather as one among many on the common and shared path to making the EU more democratic, politically accountable, and committed to fundamental rights. It came as no surprise that the given reasons resonated among many other national apex courts.[67]

The structural similarities with the above-cited example of civil disobedience are astounding. Both actions at the beginning operated against the (legal) system itself, but only until they gained enough momentum not to be overlooked or ignored. Their arguments have been eventually addressed by changing the system towards which they were initially directed. Due to the

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Bogdandy (eds), *European Integration: The New German Scholarship* (9/03 edn, The Max Planck Institute for Comparative Public Law and International Law and Jean Monnet Center at NYU School of Law) 20.

65 William Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A Response to Delledonne & Fabbrini' [2020] TRiSS Working Paper Series.

66 Italian Corte Costituzionale, Case 183/1973 *Frontini* 27 December 1973.

67 Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

persistent, transparent and decisive resistance, the legal system recognized and amended its own deficiencies. Moreover, both resisting actions were justified by the universally shared principles of human dignity, equality, prohibition of discrimination, freedom, and a fair cooperation system,[68] on the ground of principles which claim to be universal across the globe, regardless of our cultural and historical differences. To rephrase Dworkin slightly,[69] Rosa Parks was no less right in her refusal to comply with the segregation laws before the *Browder v. Gayle*[70] decision of the Supreme Court than she was afterwards.

Henceforth, national judicial resistance against EU law notably resembles the inherent tensions one is able to observe in civil disobedience. The structural comparison may lead us to a better understanding of how to respond properly to such claims of judicial resistance.

2.4.2 Conscientious Objection and Sayn-Wittgenstein – Asking for Exemption

The aim of disobedience is twofold: either to change the respective law, or to be (individually) exempt from it.[71] Contrary to the above-described civil disobedience, which challenges the norms of a legal system in the name of justice and adheres to commonly shared political principles, the second type of disobedience, conscientious objection, concerns only a disobedient person themselves. Conscientious objection is based on the essential human condition: a conscience. It does not claim universality nor adhere to commonly shared principles of justice. The conscientious objector only claims that their genuine commitment to their individual conscience in exceptional circumstances justifies an exception from the respective legal obligation.

Conscience, a sense of individual morality of what is morally right and wrong, is the compass which navigates, controls and informs one's life decisions. If one were forced to disregard it entirely, it would create an inner conflict which would degrade one's dignity and personal autonomy. Moreover, the force of individual conscience may be so strong that it drives an

68 John Rawls, *A Theory of Justice: Revised Edition* (2nd edn, Harvard University Press 1999) 321.
69 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 211.
70 *Browder v Gayle* 352 US 903 (1956).
71 Rawls (n 68) 320.

individual into an unbearable position, where they must inevitably choose between their own convictions and the legal rules.

Liberal constitutional systems are primarily based on individual autonomy, respect for human dignity and individual freedom. All limitations and obligations must be necessary and proportionate, and the rule of law, despite the generality of legal norms, is not entirely blind to specific individual circumstances. So, under what conditions might an individual refuse to comply with respective legal norms which conflict with their own beliefs and conscience? And under what conditions might a legal authority tolerate such an objection and thus extend an exception to generally applicable legal norms?

The following example on abortion helps illuminate the complexity of the matter at hand. From the 1960s onward, many European countries liberalized abortion laws, allowing and ensuring that women had access to legal abortion services in the first trimester, according to various legal structures and requirements.[72] However, not all countries: Malta still fully prohibits abortion under any circumstance, even if the life of the pregnant woman is in danger; and Poland only recently introduced an almost-full prohibition of abortion rights, even for malformed fetuses.[73]

Together with abortion rights, many countries also introduced the legal possibility of raising a conscientious objection to performing the respective procedures. But not all legal systems have *legislated* the right to conscientious objection to carrying out an abortion. Sweden, Finland and Iceland generally do not permit healthcare professionals to refuse their service as part of their professional duties in the name of conscientious objection.[74] In Norway, for example, health professionals may refrain from assisting in abortion, whereas general practitioners do not have this right.[75] However, some of the general practitioners 'silently refused to refer for abortions'.[76]

72 Wendy Chavkin, Laurel Swerdlow and Jocelyn Fifield, 'Regulation of Conscientious Objection to Abortion' (2017) 19 Health and Human Rights 55, 56.

73 Polish Trybunał Konstytucyjny, Case K 1/20, 22 October 2020.

74 Christian Fiala et al., 'Yes We Can! Successful Examples of Disallowing "Conscientious Objection" in Reproductive Health Care' (2016) 21 The European Journal of Contraception & Reproductive Health Care 201.

75 Eva M Kibsgaard Nordberg, Helge Skirbekk and Morten Magelssen, 'Conscientious Objection to Referrals for Abortion: Pragmatic Solution or Threat to Women's Rights?' (2014) 15 BMC Medical Ethics 15.

76 Ibid. 7. Note that in Norway only general practitioners, not gynaecologists, refer abortions.

From a legislative perspective, different solutions have been provided. However, the practice shows that a lack of legal possibility to raise a conscientious objection does not solve the issue at hand, and the right to conscientious objection cannot be absolute when the immediate termination of pregnancy is essential for the life of the pregnant woman. That is clear from the recent case law by the ECtHR, which rejected a case from Sweden concerning the prohibition of conscientious objection relating to abortion as inadmissible,[77] yet nevertheless stated in passing that conscientious objection must give way to the right to health of women seeking to have an abortion.[78]

The matter thus boils down to the concrete circumstances of any individual case. Liberal constitutions generally respect the right to thought, conscience and religion, which under certain conditions translates into the right to conscientious objection. Raising a conscientious objection is thus not a priori illegal. However, concrete circumstances can reduce or even prohibit that right, subject to proportionality and appropriate adjudication, taking into account all relevant interests and colliding fundamental rights. Accordingly, conscientious objection is essentially an open-ended situation where no general output can be determined as an absolute rule.

Turning to judicial resistance in the EU, constitutional conflicts among the Member States and the Union have a surprisingly similar structure. The EU primary law specifically states that the Union respect the national identities of the Member States, but the CJEU never understood this provision as an absolute carte blanche for the Member States to declare EU law as inapplicable unilaterally,[79] but as a vehicle for the Member States to explain why a particular EU norm might conflict with national constitutional essentials and peculiarities.[80] If the respective constitutional essentials qualify as being of utmost importance, then the CJEU would assess whether the Member State would be allowed exceptionally to disapply EU law, subject to proportionality with the other respective rights and principles in question. Since any *ex tunc* exception concurrently limits the principle of equality

77 *Grimmark v Sweden* App no 43726/17 (ECtHR, 11 February 2020).

78 Wojciech Brzozowski, 'The Midwife's Tale: Conscientious Objection to Abortion after Grimmark and Steen' (2021) 10 Oxford Journal of Law and Religion 298, 300.

79 Thomas Wischmeyer, 'Nationale Identität Und Verfassungsidentität. Schutzgehalte, Instrumente, Perspektiven' (2015) 140 Archiv des öffentlichen Rechts 415, 441.

80 Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement' (2011) 13 Cambridge Yearbook of European Legal Studies 195.

of the Member States, their effectiveness and the unity of EU law, these exceptions are rare and subject to strict scrutiny.

The well-known *Sayn-Wittgenstein*[81] decision was highlighted in Chapter 3, Section 3.5.2. Here a brief recap of the subject matter must suffice, to explain the following example of constitutional conscientious objection. Ilonka Fürstin von Sayn-Wittgenstein, an Austrian citizen, born in Vienna and residing in Germany, had changed her name after moving to Germany. Later on, the Austrian authorities informed her that she must change her name due to the Austrian law on the abolition of the nobility. Sayn-Wittgenstein argued that her name had to be fully recognized in Austria as it was legally determined in another Member State, Germany, due to the freedom of movement under Article 21 TFEU. But the Austrian government contended that the respective law was intended to enable formal equality of treatment of citizens which, in the light of Austrian history, was a fundamental value of the Republic of Austria. Moreover, the respective law aimed to protect the constitutional identity of the Republic of Austria. The CJEU granted Austria an exception from fundamental freedom of free movement, accepting the Austrian claim that the abolition of the nobility constituted a matter of national identity which justified the violation of free movement.[82]

In a structurally comparable manner to conscientious objection, the CJEU as the respective judicial authority recognized the unique constitutional commitment of Austria, arguably deeply embedded into the Austrian society, which was concurrently justified by the constitutional principle of equality. Accordingly, the CJEU extended to Austria an exception to disapply otherwise applicable EU norms.[83]

In the case at hand, only the Austrian institutions could determine what elements of their constitutional structures and norms qualified as their national constitutional identity – just like a conscientious objector who alone can determine what their conscience demands. In the end, however, it is the CJEU which finally determines the matter; just as in the classical case of conscientious objection, where the objector's refusal cannot be one-sidedly determined, but must be examined by a court, taking into consideration all relevant circumstances and interests involved.

81 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (*Sayn-Wittgenstein*) [2010] ECLI:EU:C:2010:806.

82 Ibid. para 80.

83 Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 44, 161.

As in the case of conscientious objection, where an objector does not want to challenge the rules in general, but is only concerned about their own situation, Austria did not want to challenge the general rules.[84] It merely asked for an individual treatment, which would allow the subject to keep her highly sensitive and important, constitutionally self-viewed idiosyncrasies.

2.5 Methods of Research – Interdisciplinary Aspect

This chapter also applies interdisciplinary methods which correspond to the specific research inquiry.[85] Since the research question explores the structural similarities with civil disobedience and conscientious objection – both extensively researched and addressed in legal and political theory – the research here correspondingly relies on the main theoretical accounts of the respective conceptions. Methodologically speaking, the research aligns jurisprudence and legal theory with constitutional practice concerning the limits of European integration and legal disputes among the multilevel constitutional orders in the 'European multilevel Constitutional Verbund'.[86]

The second distinctive element of the research methods concerns comparison. In constitutional research, one often compares constitutional practices, constitutions and institutional characteristics from different political systems. One compares constitutional case law on similar legal issues, or different historical and sociological backgrounds which have influenced different constitutional outcomes. Comparative constitutional law is a vibrant field, including analytical, empirical, dogmatic, theoretical and other methods that aim to illuminate the respective research questions. The research here also includes a comparative element in a more indirect way. It does not theoretically compare the same concepts from different

84 Ibid. 45.

85 See also Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 224; Mathias Siems, *Comparative Law* (Cambridge University Press 2018) 369; Uwe Kischel, 'The Comparative Method' in Uwe Kischel and Andrew Hammel (eds), *Comparative Law* (Oxford University Press 2019) 102ff.

86 'European Constitutional Verbund' refers to all constitutional systems together, the EU and the 27 Member States. See also Birgit Schlütter, 'Principles of European Constitutional Law' (2011) 22 European Journal of International Law 605. Ingolf Pernice, *Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund* (De Gruyter 2011).

constitutional orders, but structural similarities among different subjects. The methods of the research are thus a conceptual legal approach with comparative elements from legal theory and constitutional practice.[87]

2.6 Caveats

The present inquiry is necessarily limited in scope and depth, and cannot explore all the divergent theories of civil disobedience and conscientious objection (2.6.1). Moreover, one could question comparing considerably different subjects; individuals with constitutions and civil society with judicial institutions; or anthropomorphically perceiving the states as having collective consciousness (2.6.2). Finally, the unconventionality of the research methods bears the question of the potential productivity of the undertaken journey (2.6.3).

2.6.1 The Scope of the Survey – Explored and Overlooked Theories

The methodological approach of the research requires a closer examination of the theoretical account(s) of civil disobedience and conscientious objection. However, after a preliminary examination of legal theory, it became obvious that legal scholars and philosophers have developed considerably divergent accounts. They range from the distinctively practical and case law-orientated argumentative approach developed by Dworkin, to the rather theoretically narrow and highly abstract approach by Rawls. Accordingly, one is faced with a dilemma: Which theoretical account should serve as a basis for the said structural comparison? Should one choose the most convincing account, the most elaborated one, or the one which seems to be the most promising regarding the envisaged comparison? As we have seen above, Føllesdal directly applied the Rawlsian account without any explanation as to why he chose this particular theoretical view. There is nothing wrong per se with the Rawlsian account, but it stands in contrast with many other theoretical accounts, which Føllesdal disregarded without explaining why.

Concerning civil disobedience, contemporary literature broadly distinguishes between three main threads: religious-spiritual civil disobedience,

87 P Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2019).

liberal civil disobedience, and radical democratic civil disobedience.[88] Religious disobedience can be traced back to the distant past, seen as the divine and sacred duty by the God(s). However, Mohandas K. Gandhi and Martin Luther King, Jr. also viewed their movements as religiously and spiritually inspired.[89] The liberal account of civil disobedience is a 'corrective to overbearing political majorities', and the radical-democratic view 'helps overcome far-reaching democratic deficits and leads to extensive reforms'.[90] Naturally, all threads share several elements and objectives.

The research here extends beyond one author to observe several different accounts simultaneously, while acknowledging their differences and similarities. Drawing on the work of William E. Scheuerman, the presuppositions, justifications and political aspirations 'are grasped best when situated in the context of rival political (and philosophical) traditions'.[91]

Accordingly, the research holistically views several competing theoretical accounts and focuses on their common denominators. To achieve that aim, one does not need to go through every existing theoretical account. It suffices to consider the major voices of civil disobedience and conscientious objection: namely, the jurisprudential theories of John Rawls, Joseph Raz and Ronald Dworkin, complemented by the writings of William E. Scheuerman and Kimberley Brownlee.

This choice and limitation of legal scholarship deserves a short explanation. The limited scope of the research simply does not allow for addressing the various conceptions of resistance in legal theory beyond the above-cited survey scope. Moreover, the respective scope of the survey should not limit or distort the potential outcomes. The survey represents two contemporary legal views from two distinctive legal understandings. Whereas Raz understands the law as best understood through social facts rather than moral principles, in the light of exclusive legal positivism,[92] Dworkin has an 'interpretive' approach to law and morality, an approach which comes

88 Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (n 22) 274.
89 William E Scheuerman, *Civil Disobedience* (1st edn, Polity 2018) 11.
90 Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (n 22) 275.
91 Ibid. 274.
92 Brian H Bix, 'Joseph Raz's Approach to Legal Positivism' in Patricia Mindus and Torben Spaak (eds), *The Cambridge Companion to Legal Positivism* (Cambridge University Press 2021).

close to what one could call a contemporary (post)-natural understanding of law;[93] a law which is normative and based on moral principles.[94]

Moreover, it is not wrong per se to decide subjectively on one or several comprehensive theoretical accounts, which are plausible, well-argued and widely recognized. Although this research cannot cover all angles, especially due to the supreme complexity of the said subject matter, this fact alone does not dismiss the respective findings hereinafter. Rather, it sets the initial foundations of the structural comparison, which will need further research. It is only the first step and an invitation to others to pick up the thread and complement the findings with further, more detailed studies.

2.6.2 Apples, Oranges, and Anthropomorphism – Comparing Individuals and Constitutions, Civil Society and Judicial Institutions

A serious critique of the research in the last chapter might be the selected subject of structural comparison. One could argue that the research compares apples and oranges, individual conscience with a constitution, and civil society with judicial institutions. Are these concepts suited to be compared with one another? Moreover, one may conclude that we are ending up 'ascribing a dubious moral capacity to institutions themselves'.[95] Considering these potential critiques of arguably unrelated matters, can the anticipated research agenda remain relevant?

Furthermore, and even more severe, can we talk about the states as they would be *a persona*? Can we understand institutions as moral agents, not just viewed as reducible to the actions of their representatives?[96] Or would that be an entirely anthropological approach that, while trying to relate, would likely ascribe the meaning to a collective entity in a deeply erroneous way? For example, some scholars warn us to perceive a state in a personified manner, which reflects a fascist state.[97] Moreover, one cannot

93 James Donato, 'Dworkin and Subjectivity in Legal Interpretation' (1988) 40 Stanford Law Review 1517.
94 Ronald Dworkin, ''Natural' Law Revisited' (1982) 34 Florida Law Review 165.
95 White (n 20) 642.
96 Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States' (2001) 15 Ethics & International Affairs 67, 75.
97 Alexander Wendt, 'The State as Person in International Theory' (2004) 30 Review of International Studies 289, 292.

understand a state as an organism, a form of life that possesses *collective consciousness* and subjective experiences.[98]

Attributing an inner moral conscience to the states, or the capacity to have one, may be perceived as a far-fetched endeavour. Scheuerman critically argued that what makes civil society-based disobedience fundamentally different from a state's disobedience is that the latter privileges access to power and coercion.[99] Any organized and monopolized violence in a state creates a normative paradox – because it is prescribed by law, it is impossible to attribute a moral consciousness to it.[100] Finally, a state's institutions legally represent the citizens, whether one agrees or disagrees with their actions. Accordingly, when an institution acts 'illegally', this inevitably binds the citizens even if they disagree with the respective acts. One could argue that 'it seems strange and perhaps even perverse to interpret those acts as somehow doing justice to some notion of free and equal citizens'.[101]

The critical considerations above are of a serious nature and must be thoroughly addressed before going *in media res*.

As to the subject of comparison, the research does not claim that civil disobedience and conscientious objection *equal* resisting national judicial claims against the authority of the EU. What it does instead is recognize and explore the *structural* similarities between them. One can clearly identify similarities as to what the identity claims want to achieve, as well as their justificatory reasons. Thus, as a starting point of the research's hypothesis, one could assume that the established and well-analyzed scholarly accounts and observations in one field can illuminate how one should understand a structurally comparable situation elsewhere. The research is therefore not an immediate comparison in a narrow sense, aware of the distinctiveness of the observed subjects, but rather an inquiry into the structure of legal arguments and judicial responses of civil disobedience and conscientious objection, with the aim to assess *whether* (if at all), and to what extent, one could transplant and apply these arguments in the legal framework of the EU: namely, to correspondingly observe and evaluate claims of national constitutional identity as resistance against the authority of the Union.

The second consideration relating to the projected anthropological personification of a state is more difficult to address in its full complexity.

98 Scheuerman, 'Can Political Institutions Commit Civil Disobedience?' (n 22) 277.
99 Ibid.
100 Ibid. 282.
101 Ibid. 278.

A preliminary study of the intellectual history of a state quickly indicates that the perception of a state closely correlates with specific sociological and historical circumstances of a particular time period. For example, Hobbes significantly shaped Western political thinking, and in his words, a man's life is 'solitary, poore, nasty, brutish, and short.'.[102] Hence, in order to preserve ourselves, especially in the light of 17th century England's Civil War, we need an absolute power of a sovereign protector. The cover picture of *Leviathan* by a French artist Abraham Bosse illustrates this point: the cover picture was an important device for a reader in the 17th century, which mediates how to engage and understand the text according to the *paratexts*.[103] We see a crowned giant, clutching a crosier and a sword, emerging from a landscape made up of the bodies of thousands of people who all look up to him in allegiance. Or, in the words of Hobbes:

> 'A Multitude of men, are made One Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the Unity of the Representer, not the Unity of the Represented, that maketh the Person One.'[104]
> In other words, a personalized State under the full control of a sovereign.

Interestingly, correlating with the birth of psychology, the perception of a state becomes quite different, yet still *personified*. One perceives a state as an unpredictable and capricious agent, much like the new wave of intellectual thinking;[105] a collectiveness that one can analyze and understand. By contrast, in the period of increasing technical innovations, the perception of a state becomes increasingly scientific. A state is highly technical, objec-

102 Thomas Hobbes, *Leviathan* (Christopher Brooke ed, 1st edn, Penguin Classics 2017) pt 1, ch 13.

103 Gerard Genette, *Paratexts: Thresholds of Interpretation* (Jane E Lewin tr, Cambridge University Press 1997).

104 Hobbes (n 102) pt 1, ch 16.

105 See also Elizabeth Ann Danto, 'Three Roads from Vienna: Psychoanalysis, Modernism and Social Welfare' in Joy Damousi and Mariano Ben Plotkin (eds), *The Transnational Unconscious: Essays in the History of Psychoanalysis and Transnationalism* (Palgrave Macmillan UK 2009) 19ff; Alexander Wendt, 'The State as Person in International Theory' (2004) 30 Review of International Studies 289; Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 18.

tive, and made from institutions; a state as a machine in the Weberian sense.[106]

Moreover, as Wendt wrote, we are attributing to the state properties which we associate with human beings: rationality, identities, interests and beliefs; as found in the works of realists, liberals, institutionalists, Marxists, constructivists, behaviouralists, feminists, postmodernists, international lawyers and all those in between.[107] Hence, all these discussions assume 'that the idea of state personhood is meaningful and at some fundamental level makes sense'.[108]

A deeper and more serious intellectual history of the personification of the state exceeds the scope of this research. Yet, these generalized examples indicate that the perception of a state changes through time and is an attractive placeholder for projections of our current understandings of time and society. Does a modern state have a character? Can we analyze a state as an agent with its own intentions, character or idiosyncratic features? Can we project our anthropological views on a collective entity which consists of thousands of opinions, communities and diverse institutions?[109]

The questions above are perhaps too ambitious for the purposes of the present research. We will only assume that the constitution of a state articulates the main societal values and principles, and main institutions, and sets the basic framework of how the plurality of political opinions translates through political processes into applicable legal norms. The highest (constitutional) courts have the power to interpret the constitution and develop its contemporary meaning, whereby the apex courts – whose members in no way represent the plurality of the respective society – essentially determine what a state is, what it thinks, and what it protects. With the other branches of power, most notably the legislative power, the apex courts speak for a constitution that ties together its people; as Thucydides in 431 BC referred to the polis as a singularity representing the citizens, 'inscribing a corporate personality into the substance of the state is a tradition as old

106 Andreas Anter, 'The State as Machine' in Andreas Anter (ed.), *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (Palgrave Macmillan UK 2014).

107 Wendt (n 97) 289.

108 Ibid.

109 Peter Lomas, 'Anthropomorphism, Personification and Ethics: A Reply to Alexander Wendt' (2005) 31 Review of International Studies 349.

as international relations'.[110] Pavlina Starski similarly highlighted a state's personhood concerning the unwilling and unable state in public international law as a 'metaphorical analogy' which contains fictional elements – from 'organic' to 'anorganic' perceptions of a state's personality.[111] In short, public international law builds on the fiction of anthropomorphization of the state, regardless of how misguided that construction may be.[112]

When we refer to claims of national constitutional identity by the apex courts as acts of resistance against the Union, we are aware that a particular judicial decision only formally and legally represents a state. Different benches of judges are likely to reach a different conclusion as to what is a national constitutional identity of a respective state. And all along, the legal fiction of determining the contents of what is supposed to be shared by all can never incorporate the hearts and minds of all the people, as *Leviathan*'s book cover suggests. Yet, one can still observe states and their institutions as agents expressing arguments, intentions and social positioning. It is not the biological or human, but the social nature of the state which creates social and political reality, subject to the research at hand.[113]

To sum up, this research consciously rejects the vision of a state as a personalized agent with its own 'conscience'. It merely explores the legal reasoning of the national apex courts, founded on their respective constitutions, as a legal practice which resembles structural settings and justificatory reasons for civil disobedience and conscientious objection.

2.6.3 (Un)Productive Journey – What Can We Learn?

As a final caveat, it is impossible to predict with certainty whether the said inquiry will bring results that one can directly apply in the judicial praxis, going beyond the general and abstract observations as made by Føllesdal and Isiksel. Will the final conclusions find their way into judicial reasoning

110 Robert Oprisko and Kristopher Kaliher, 'The State as a Person?: Anthropomorphic Personification vs. Concrete Durational Being' (2014) 6 Journal of International and Global Studies 30, 31.

111 Paulina Starski, *The Unwilling or Unable State as a Challenge to International Law* (2023) 121 (forthcoming).

112 Cf Anna Sophia Tiedeke, 'Are We Taking the State (Too) Seriously? Anna Sophia Tiedeke' (Colloquium of the Center for Global Constitutionalism 2021) (forthcoming).

113 Oprisko and Kaliher (n 110).

by the CJEU when adjudicating the meaning and legitimacy of national identity claims?

From a dogmatic legal perspective, the anticipated research rather unconventionally applies the theories from legal theory and jurisprudence into concrete judicial practice. The challenge of the said interdisciplinary research is to determine whether, and to what extent, the present findings may truly help judicial practice. Only future developments will be the judge of that.

3 Conscience and Conscientious Objection

Conscience is the internal moral compass of each person, which guides and signals what is right and what is wrong, or what to do or not to do. Some people understand it as the personal source of morality, whereas some religious believers consider it a medium for God's voice. Conscience can reflect one's identity, values or beliefs. Sophocles' Antigone refused Creon's command and buried her brother's body in defiance of the King's edict.[114] Socrates rejected both avoiding the death penalty and ceasing to 'corrupt' the youth of Athens.[115] Henry David Thoreau refused to pay his taxes because he claimed that would make him an agent of injustice, thereby financing the ongoing Mexican–American war and slavery.[116] They all followed their conscience before any other terrestrial authority. Conscience universally (co)defines human beings and is intrinsically connected to every person.

Conscience is legally acknowledged and legally relevant. Article 1 of the Universal Declaration of Human Rights states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and *conscience* and should act towards one another in a spirit of brotherhood.'[117] Article 18 of the International Covenant on Civil and Political Rights says: 'Everyone shall have the right to freedom of thought, conscience and religion.'[118] The Human Rights Committee adopted General Comment No. 22, relating to Article 18, where it stated: Although '[t]he Covenant does not explicitly refer to a right to conscientious objection, [but] the Committee believes that such a right can be derived from article 18'. And also: '[T]he obligation to use lethal force may seriously conflict with the freedom of

114 Sophocles and Edith Hall, *The World's Classics: Antigone; Oedipus the King; Electra* (HDF Kitto tr, Oxford University Press 1994).

115 Plato, *Plato: Euthyphro, Apology, Crito, Phaedo, Phaedrus* (Harold N Fowler tr, Loeb Classical Library 1914).

116 Lewis Hyde and Henry David Thoreau, *The Essays of Henry D. Thoreau: Selected and Edited by Lewis Hyde* (North Point Press 2002).

117 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1 (emphasis added).

118 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 18(1).

conscience.'[119] It also asserted that 'there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs'.[120]

In addition, conscience is not only defined as a right, but also as a positive obligation. Principle IV (Superior Orders) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgement of the Tribunal states: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was, in fact, possible to him.'[121]

On the regional European level, Article 9 of the European Convention on Human Rights almost identically reiterates: 'Everyone has the right to freedom of thought, conscience and religion.'[122] The Council of Europe's Parliamentary Assembly (PACE) adopted Resolution 337 (1967) on the Right of conscientious objection. The Resolution determines the right to refuse to perform armed service. This right 'shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States'.[123]

Furthermore, conscience or profound belief can arise from 'religious, ethical, moral, humanitarian, philosophical or similar motives'.[124] Resolution 1763 (2010) on the right to conscientious objection in medical care invites its members, to 'guarantee the right to conscientious objection in relation to participation in the medical procedure' and to 'ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider', and to 'receive appropriate treatment, in particular in cases of emergency'.[125] Resolution 1928 (2013) on Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence, calls to 'ensure the right to well-de-

119 UNCHR 'General Comment 22' (1993) UN Doc C/21/Rev.1/Add.4, para 11.
120 Ibid.
121 ILC, 'Report of the International Law Commission covering its 2nd Session' (5 June–29 July 1950) UN Doc A/1316, principle IV, para 97.
122 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 9.
123 PACE (22nd Sitting) Res 337(1967) *Right of conscientious objection* 26 January 1967, para a(2).
124 Ibid.
125 PACE (35th Sitting) Res 1763(2010) *The right to conscientious objection in lawful medical care* 7 October 2010, paras 4.1–4.3.

fined conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education, [...], provided that the rights of others to be free from discrimination are respected and that the access to lawful services is guaranteed'.[126]

Finally, Resolution 2036 (2015) on Tackling intolerance and discrimination in Europe with a special particular focus on Christians, calls to 'uphold freedom of conscience in the workplace while ensuring that access to services [...] is maintained and the right of others to be free from discrimination is protected'.[127] Additionally, many states regulate specific aspects of conscience, for example in relation to military service,[128] medical procedures,[129] religious freedoms,[130] and even concerning the freedom of the parliamentary electors.[131] However, this research does not address the

126 PACE (14th Sitting) Res 1928(2013) *Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence* 24 April 2013, para 9.10.

127 PACE (8th Sitting) Res 2036(2015) *Tackling intolerance and discrimination in Europe with a special focus on Christians* 29 January 2015, para 6.2.2.

128 See i.e. Derek Brett et al. (eds), European Bureau for Conscientious Objection, *Annual Report: Conscientious Objection to Military Service in Europe 2021* (Brussels, 21 March 2022).

129 Mark Campbell, 'Conscientious Objection and the Council of Europe: The Right to Conscientious Objection in Lawful Medical Care Resolution 1763 (2010) Resolution Adopted by the Council of Europe's Parliamentary Assembly' (2011) 19 Medical Law Review 467; Anna Heino and others, 'Conscientious Objection and Induced Abortion in Europe' (2013) 18 The European Journal of Contraception & Reproductive Health Care: The Official Journal of the European Society of Contraception 231; Emmanuelle Bribosia and Isabelle Rorive, 'Seeking to Square the Circle: A Sustainable Conscientious Objection in Reproductive Health Care' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 396ff; Valerie Fleming, Beate Ramsayer and Teja Škodič Zakšek, 'Freedom of Conscience in Europe? An Analysis of Three Cases of Midwives with Conscientious Objection to Abortion' (2018) 44 Journal of Medical Ethics 104. See also Ludovica Anedda et al. (eds), European Parliament, *Sexual and reproductive health rights and the implications of conscientious objection* (2018), pp 97ff.

130 Heiner Bielefeldt, Nazila Ghanea and Michae Wiener, 'Conscientious Objection', *Freedom of religion or belief: An International Law Commentary* (Oxford University Press 2016) s 1.3.11; Kavot Zillén, 'Religious Refusals in Health Care as a Matter of Freedom of Religion' in Hedvig Bernitz and Victoria Enkvist (eds), *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (Hart Publishing 2020) 181ff.

131 Bernd Grzeszick, 'GG Art. 20' in Theodor Maunz et al. (eds), *Grundgesetz-Kommentar* (C.H. Beck 2022).

scope of conscientious objection under positive law, but its scope in the lack of it.

In a socio-political sense, the emergence and constitution of the conscience in recent times can be seen through four significant historical moments, characterizing its different roles, as identified by Julie Saada and Mark Antaki.

First, Christianity constituted conscience as an essential part of religion. However, only the Church had the authority to shape and transmit the dogmatic truth of conscience. The Church was therefore the authority to guide an individual conscience,[132] which played a central role in salvation through the practice of confession,[133] and it was embodied by the normative teaching of the institution.

Second, conscience was eventually de-institutionalized by Protestantism. Conscience had to be freed from any institutional impact[134] and become autonomous. Only in that way would it be able to connect with the transcendental and be a recipient and medium of the divine.

Third, while it is argued that it was freedom of conscience that 'paved the way for the concept of equality, representation and self-determination',[135] the concept was dissolved with the creation of the social contract. Pre-political rights of individuals and their conscientious consent in the state of nature were prerequisites to establishing the social contract. However, when constituted, the individual objections become reduced, and conscientious objection became absorbed by the collective will and legitimacy of the newly established political and legal order.[136]

Finally, Saada and Antaki observe the last historical moment in the fusion of conscientious objection and civil disobedience. If conscientious objection cannot realize the underlying principle it invokes, it would essentially remain on the margins of political dimensions and thus remain insignificant.[137] However, if it (even unintentionally) mobilizes others and spreads and evolves as a political contestation, it can realize its goals.

132 Julie Saada and Mark Antaki, 'Conscience and Its Claims: A Philosophical History of Conscientious Objection' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 31.
133 Ibid.
134 Ibid. 41.
135 Ibid.
136 Ibid. 48.
137 Ibid. 49.

Hence, the difference between civil disobedience and conscientious objection may become tenuous.[138]

Even today, conscientious objection as an intricate subject still deeply divides legal and philosophical views as to its nature, and the degree of tolerance it should enjoy in legal order. Some authors claim that it does not contribute to the legal order.[139] Conscientious objectors withdraw from democratic societies, want to be left alone, and enjoy an exception from the obligations that everyone else must comply with.[140] Furthermore, modern organized society cannot endure laws not being applied to all alike.[141] The principle of equality which is the essence of the rule of law arguably demands that.

But there are many arguments supporting an individual's conscience. Locke and Mill both saw 'freedom of conscience and belief as the surest path to discovery of the truth in human affairs'.[142] In recognizing a conscience, one recognizes humanism and personal autonomy, which enables self-respect and a sense of identity. Moreover, conscience might even contribute to the development of the currently established interpretation of fundamental rights. Or simply from a pragmatic point of view, it often proves to be contra-productive when forcing people to act against their strong commitments. Furthermore, from a rule of law perspective, the conscience of an individual remains a marginal deviation, and one can hardly claim that it would endanger a robust democratic system. For laws are constantly being violated without seriously putting the system in question. In addition, many states have incorporated specific conscientious objections in their domestic laws, legally allowing objectors to refuse to carry out specific tasks: for instance, to refuse to exercise an abortion, or to serve in the military. States can tacitly recognize some conscientious objections through the discretion of
(non-)prosecution; and the courts can use it as attenuating circumstances while defining the scope of potential culpability and sanction.

138 Ibid. 55.

139 Marci A Hamilton, 'The Missing Children in Elite Legal Scholarship' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018).

140 Bernhard Schlink, 'Conscientious Objections' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 102.

141 Dworkin (n 69) 206.

142 John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Ian Shapiro ed, 1st edn, Yale University Press 2003) xv.

Conscientious objection (still) lacks a legally and theoretically comprehensive and commonly accepted definition. It is usually understood as a claim to refuse a legal obligation being at variance with one's conscience. Yet, it is not clear whether and to what extent a legal system should recognize such claims. On the one hand, democratic legal systems are not fully blind to the objections of the conscience. On the other hand, the scope and nature of the claim are heavily disputed in theory and practice. The consequences of conscientious objection are unclear, and the constituencies of the conscience can vary considerably. While conscientious objection is universally recognized and essential to all humans, it remains strikingly impalpable in the context of concrete legal acceptance in practice and theory.

4 Conscientious Objection in Legal Theory

The following section introduces three distinctive theories of conscientious objection in legal theory: first, a theory of conscientious refusal according to the political principles of justice by John Rawls (4.1); second, a theory of conscientious objection based on an individual's autonomy put forward by Joseph Raz (4.2); finally, a theory of civil disobedience by Ronald Dworkin (4.3).

4.1 Conscientious Refusal and Political Principles in the Theory of Justice

Conscientious refusal is often closely connected with civil disobedience (as discussed further below)[143] and drawing delineation lines between them may actually appear more blurred than one often assumes. John Rawls, however, clearly distinguishes between the two in his *Theory of Justice*.[144] For Rawls, conscientious refusal is, by its very nature, an individual matter which does not need collective support; it is not necessarily carried out in a public forum – although a conscientious refusal is likely known to authorities, or at least it does not try to hide; it does not appeal to (justice) convictions of the broader community; and finally, it is essentially not a political act.[145]

Conscientious refusal, or conscientious evasion, according to Rawls is non-compliance to a direct legal injunction or administrative order which is being addressed to an individual, and which the latter refuses to fulfil due to political, religious or other principles being at variance with the constitutional order.[146] Rawls names some typical examples, such as the refusal by a Jehovah's Witness to salute the flag; early Christians performing certain acts of piety proscribed by a pagan state; the unwillingness of a pacifist to serve in the armed forces; a soldier disobeying a military order manifestly

143 Dworkin (n 69).
144 Rawls (n 68) 319, 323.
145 Ibid. 323.
146 Ibid. 324.

contrary to moral law; or a refusal to pay tax on grounds which would possibly establish an individual as an agent of grave injustice to another.[147]

As to the possible justification of conscientious refusal, Rawls makes a relevant distinction relating to the reasons for refusal or evasion. It is self-evident to him that the law cannot and will not always respect the dictates of conscience.[148] For example, if conscience dictates that human sacrifice is a matter of religious belief, this clearly cannot be tolerated at all. Consequently, conscientious refusal may only be potentially valid if it is based on political principles underlying the constitution: for instance, when a pacifist soldier refuses to go to war because killing people constitutes a violation of life and human dignity. Nevertheless, if the war was just (if that is at all possible, and for the sake of argument) because it is fought for example in self-defence, participation in a just war would be compliant with constitutional principles: that is, the protection of life, dignity and freedom. These are the same principles as the agent claims to protect while raising their conscientious refusal.[149] Henceforth, in a situation where the political principles underlying the constitution justify both legal duty and conscientious objection, Rawls seems to deny the validity of conscientious objection. In a just war and due to a fair conscription system, all persons capable of fighting would be legally and morally obliged to carry out their military duties.

An agent would only legitimately exercise their claim of conscientious refusal if their claim were grounded in one of the principles of justice, and stand against an unjust or likely unjust conduct, contradicting those principles: for example, a war fought for economic or power reasons (as it usually is), or a soldier's refusal to engage in certain illicit acts of war.[150] In other words, one can legitimately oppose a direct legal injunction if the underlying principles of such an injunction are essentially in conflict with the principles of justice.

One may have some critical observations concerning Rawls' theory of conscientious refusal. First, the conscience as such does not seem to have a significant role when considering it as an essential element of conscientious objection. Whether a refusal is tolerated or not depends on the constitution's underlying political principles, which justify the refused legal injunc-

147 Ibid.
148 Ibid. 325.
149 Ibid. 334.
150 Ibid. 333.

tion, regardless of how strong one actually feels about it. In that, Rawls completely moves the sphere of conscience into the sphere of normative objection against the validity and coherence of a legal system, if a legal injunction is no longer in accordance with the fundamental principles of political justice. One can hardly see how Rawls' conscientious refusal is different or beyond the classical constitutional challenge of a legal norm, which is claimed to be potentially at variance with the constitution.

Second, even if one's own (conscientious) reasons completely resort to the principles of political justice (for example, the principle of human dignity or the protection of human life), and the challenged norm also complies with the same principles, it is not obvious why the default solution suggested by Rawls should lead to a priori rejection of the conscientious refusal. When two competing interests are based on the same principles of justice, the principled absolute rejection of the conscientious refusal does not appear to be entirely persuasive. Thus, in the case of reasonable disagreement, an absolute dismissal of conscientious refusal without further (judicial) investigation might overlook its essence.

Rawls barely addresses a conscientious refusal based on religious and other moral reasons being at variance with the constitutional order. He only offers guidelines that 'the degree of tolerance accorded opposing moral conceptions depends upon the extent to which they can be allowed an equal place within a just system of liberty'.[151] However, this misses the point of conscientious objection, which is to seek an individual exemption from a legal duty or legal injunction due to one's conscience. An individual conscience disables a person from acting in accordance with the law. A person does not seek to propose a different general (legislative) solution which would more appropriately balance the conflicting issues. On the contrary, the person seeks an individual exemption for themself, while in principle possibly already acquiescing to the general rules which currently accommodate the conflicting interests. The burning question is therefore not how to adjust the law, but how to perceive an individual refusal and due to what kind of standards.

Furthermore, Rawls' theoretical approach does not offer any guidelines for conscientious objection based on religious or other principles being at variance with the constitutional order. How would Rawls respond to the actual example of the conscientious religious objection presented by

151 Ibid. 325.

Joseph Raz, where one parent strongly objected that his daughter had to wear a skirt in school and was determined to emigrate rather than comply?[152] Could one possibly accept this refusal, since the degree of tolerance conceivably corresponds to the extent to which others can be allowed an equal place within a just system of liberty? It seems that this jurisprudential account is relatively insufficient to be applied beyond the claims based on political principles of justice.

However, one can still understand Rawls' thin account of conscientious refusal as a legitimate way of refusing a legal obligation, when such an obligation is possibly in violation of basic principles of political justice, which are the foundational element of the constitutional system.

Lastly, how can we observe the claims of national constitutional identity to disapply EU law in a structural comparison with the Rawlsian position on conscientious refusal? What reasons and what kind of considerations could be possibly identified? Prima facie it can be stated that Rawls' position comes close to one specific type of claim of national constitutional identity – claims within shared liberal constitutional commitments. For example, if the CJEU was to severely disregard fundamental rights protection, despite the guarantees of the EU Charter, a Member State could potentially and in a legitimate way refuse to comply with this judgement. However, Rawls' theory unfortunately cannot offer a more persuasive answer to the situation where the constitutional conflict between the Member States and the EU arises out of two different *interpretations* of the same fundamental values or constitutional principles; or when one faces a conflict between two opposing constitutional principles, both embedded in the liberal constitution and based on the principles of political justice, for example in cases such as *Melloni*[153] or *Sayn-Wittgenstein*.[154] Consequently, one ought to examine an alternative, more comprehensive jurisprudential account of conscientious objection.

152 Raz (n 56) 278.

153 Case C-399/11 *Stefano Melloni v Ministerio Fiscal (Melloni)* [2013] ECLI:EU:C:2013:107.

154 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806.

4.2 Conscientious Objection in the Theoretical Approach of Joseph Raz

The theory of Joseph Raz on conscientious objection is more encompassing as compared with conscientious refusal above. His theory builds on the principle of humanism and respect for the individual,[155] which is the point of departure for the entire justification of conscientious objection. Respect for persons presupposes the value of personal freedom, which essentially constitutes the value of pluralism. Respect for persons or humanism pursuant to Raz 'calls for respecting the autonomy of persons, that is, their right and ability to develop their talents and tastes and to be able to lead the kind of life they are committed to'.[156]

Raz believes that most people have a certain vision of themselves which is inevitably connected and built around some aspects and goals of their lives or personalities. Therefore, preserving those goals is crucial to their self-respect and sense of identity.[157] Hence, according to Raz, it would be wrong to force people to disregard their moral convictions or sacrifice their personal goals.[158] Apart from practical and utilitarian reasons which additionally support conscientious objection (for example, pacifists in the army would possibly make bad soldiers and would bring discord to the army),[159] Raz makes a moral argument for raising a conscientious objection even under the assumption of a good state, where the law is morally valid and one should in principle comply with it.[160]

Conscientious objection according to Raz is a private act designed to protect the agent from interference by public authority,[161] where the agent believes, although perhaps wrongly, that such an imposition is morally prohibited for that individual.[162] However, in his view, conscientious objection is not absolute and must be balanced with other interests and values. In other words, the law should, in principle, not coerce a person to do what they think to be morally wrong (however misguided that may be), but

155 Raz (n 56) 277.
156 Ibid. 280.
157 Ibid. 281.
158 Ibid.
159 Ibid. 278.
160 Ibid. 277.
161 Ibid. 276.
162 Ibid. 277.

acknowledges that this principle can be overridden to protect other values and ideals.[163]

Raz further works out several distinctive types of legal norms that are distinguished by considering the law's nature and purpose: namely, the type of law which imposes duties on a person in the interest of that person subjected to that legal burden; or the type of law which serves the public's interests; or finally, the kind of law which directly protects the interests of other identifiable individuals.[164]

According to Raz, the claim to conscientious objection is considerably more potent in the following three scenarios. First, conscientious objection is more legitimate when an agent refuses to carry out the duties of a paternalistic law. Second, when the identifiable individuals consent to the violation of the law, which protects their interests. Finally, when an individual exemption from the public-interest law does not disproportionally impact the protected goods.

For example, when a Sikh with a turban refuses to wear a helmet when riding a motorcycle,[165] he is refusing to follow a paternalistic duty (if we leave the aspect of the social distribution of public healthcare costs aside). Paternalistic laws aim to protect the individuals in their interests, but it may overlook some exceptional individual cases where protected interests collide with other strong commitments. Hence, it seems paternalistically unconvincing to argue that a Sikh must wear a helmet instead of a turban, because that is supposedly in his interest, although he would prioritize his religious belief over his decreased safety. Hence, in the case at hand, the arguments for the justification of individual exemption appear to be stronger.

Another example refers to the assistance to carry out euthanasia[166] for a close family member or friend who asks for it. Although assistance to death is illegal, an individual might feel firmly obliged to violate that prohibition due to their conscience. The consent of the individual, which the law is trying to protect, invalidates the assumption of the law and strengthens the claim for conscientious objection.[167]

163 Ibid. 281.
164 Ibid. 283.
165 Ibid.
166 Ibid. 285.
167 The research here cannot address all the modalities of euthanasia concerning other interests at stake, such are public interests and the value of life. See also the recent decision by the German FCC concerning self-determined death in the light of

In addition, an isolated and individual violation of the public-interest law scarcely makes a substantial change in relation to the protected common good. The following cases will make little discernible difference to the protected good: if one person refuses to pay taxes because they would be spent for morally wrong reasons; or one is exempt from conscription, claiming to be a pacifist; or one violates the cap on CO_2 emissions for whatever personal and (however misguided) moral reasons.[168] The money will still be collected and spent for the same planned reason; the army will conscript another person; and the pollution will continue to decrease or increase. Hence, the claim to conscientious objection in the circumstances of the public-interest law is strong.

By contrast, the legitimacy of tolerating an exemption is reduced where the law protects the direct interests of other identifiable individuals. In that scenario the exemption of one directly hurts the other.

Raz finds it unbalanced and unfair if one would simply allow for an exemption from the law. Thus, he argues for embracing legal sanction or compensation by the agent: not to force them to carry out their legal duty, but to bring something to the table instead. For example, he states that the liability to pay damages rightfully compensates an exemption from legal duty, although it is being carried out in the name of moral conviction.[169] Some other civil service should compensate the exempt from conscription by the objector (which is in fact often the case).

At last, Raz's theory of conscientious objection rejects a legal form of having a special and unified legal doctrine granting a *right* to conscientious objection.[170] He argues that it would be contra-productive to have a right to request an exception, objecting when being sued for a breach of law, or letting the judicial authority decide on it. He is convinced that the right to conscientious objection would expose the notion to grave abuse, since it is only the word of an agent which can count as evidence of the true conviction. Moreover, the right to conscientious objection would expect the agent to inspect their own personal motives, which are often mixed or even conflicting. That would encourage self-doubt, self-deception and other undesirable forms of introspection. Finally, the right to conscientious

personal autonomy and self-determination. BVerfG, 2 BvR 2347/15 *Self-determined Death* 26 February 2020.

168 Raz (n 56) 285.

169 Ibid. 284.

170 Ibid. 286.

objection would constitute a public intrusion into private affairs, since it would have to investigate, pry and demand from an individual to justify and prove their account for their moral life.[171] Accordingly, one would have to compromise several aspects of autonomy, such as one's privacy, self-respect and dignity, to guarantee freedom of conscience.[172]

To summarize, even if the moral belief of an agent is misguided and outside the normative constitutional principles, that would not necessarily remove the legitimacy of the conscientious objection. Moreover, the legitimacy of the claim of conscientious objection derives from the principle of humanism and respect for persons, which essentially leads to valuing personal freedom or autonomy as one of the leading values and principles. Furthermore, the essential element to evaluate the admissibility and legitimacy of conscientious objection is the law's nature and purpose, which is being contested. Paternalistic law, law protecting public interests, and law protecting the interests of the identified subjects, which are concretely consenting with the respective violation, should be treated differently from the law directly protecting other identifiable individuals.

In addition, an acceptable exercise of the conscientious objection does not exclude a person from their duty to compensate society or the other individual(s) for their breach of duty or disapplication of the law. Compensation can be a liability to pay damages, or alternatively to carry out some other deeds or services as appropriate. Finally, the preferred solution is the lack of a clear legal doctrine or the right to conscientious objection. The contrary would likely lead to countless cases of abuse and misuse of conscientious objection and its application in practice, as well as necessarily encroaching on the principles of privacy, self-respect and personal dignity.

4.3 When the Law is Doubtful – Dworkin's Judicial Theory of Civil Disobedience

A quite divergent view of individual resistance is offered by Ronald Dworkin. His approach does not differentiate terminologically between conscientious objection and civil disobedience, but only uses the terminology of civil disobedience. According to Rawls, Dworkin does not define civil disobedience as collective action, which – in his view – is the essence

171 Ibid. 288.
172 Ibid.

of civil disobedience.[173] For Dworkin, civil disobedience means acting in accordance with the law, but based on personal judgement of what the law requires or what is legally right.

He starts with the simple question, 'What should a citizen do when the law is unclear, and when he thinks it allows what others think it does not?'[174] In Dworkin's view, one must occasionally dismiss one's conscience when knowing clearly that the law commands it. But this is quite different from saying that one must dismiss one's conscience when reasonably believing that the law does not require it.[175] A disobedient agent is not simply refusing to comply with the law due to their conscience, but also ought to have plausible and convincing legal arguments that the current understanding of the law is incomplete.

Dworkin considers three distinctive possibilities for acting when one believes the law is doubtful. Option 1: when the law is doubtful, one should assume the most restrictive possible interpretation and act according to it. Option 2: when the law is doubtful, one should act according to one's own understanding; however, only as long as there is no judicial decision (of the final instance) to the contrary. Option 3: even if there is a final judicial decision of the last instance (by a constitutional or supreme court) contrary to what one believes the law requires, one should still act according to one's own judgement.[176]

It is obvious that the first option cannot be the right one. It would be fundamentally wrong if society would self-limit its scope of action by assuming the worst. Freedom in society would be unnecessarily reduced. But far more importantly, society would voluntarily give away its vehicle to test the law through judicial practice. The courts would no longer be faced with opposing conflicting views, which would have to be adequately accommodated. Losing that, the development of the laws and policies would essentially decline. Only through actual reasonable disagreements and confrontations of the opposing arguments can one discover proportionate and fair policies.[177]

Yet, Dworkin rejects the second option as well. Even if there is a final contrary decision of the last instance, an agent can still act due to their

173 Rawls (n 68) 323.
174 Dworkin (n 69) 210.
175 Ibid. 214.
176 Ibid. 211.
177 Ibid. 214.

own judgement. If there were no resistance against final judicial decisions, the highest courts would never change their rulings.[178] But even the highest courts are changing their decisions by reversing their judgements every so often. For instance, in 1943, the Supreme Court in the USA changed its decision from 1941, allowing objections to saluting the flag on grounds of conscience. Moreover, it decided, that '[saluting] was no crime after the first decision either'.[179] In other words, individuals who refused to comply with the cited prohibition by the first decision of the highest judicial authority, pursuant to their conscience, were not in fact, in the retrospective view of the highest court, acting unlawfully.

Henceforth, when the law is doubtful, the third option applies. When the law is doubtful, an individual shall follow their own judgement; regardless of the contrary judicial decision, even of the last instance, and even if it is unlikely that the last instance would reverse its decision any time soon.[180] For Dworkin, following one's own judgement simply cannot be unfair as long as one is taking into serious consideration the arguments of the judicial authority and still believing that their own judgement might be fundamentally and politically right. In Dworkin's words, one cannot simply assume that the constitution is what the Supreme Court says it is.[181] Law at its core is an adversary process which needs constant contestation. There would never be any overruling should everybody simply comply with the existing interpretation. Without the pressure of dissent, the chance of the governance offending the principles we serve would be increased. Therefore, only through dissent can the existing law stay alive, develop itself further, and maintain its relevance. Consequently, disobedience should be treated with the necessary amount of tolerance.[182]

178 Ibid. 215.
179 Ibid. 213.
180 Ibid. 214.
181 Ibid. 211.
182 Ibid. 214.

5 Transplants of Conscientious Objection

After revisiting these very different theoretical perspectives on conscientious objection, we will now return to the following question: What can we apply to the pluralistic European legal world from the various accounts of conscientious objection, as quite diversely understood in legal theory? The following section aims to identify some of the elements from the theories of conscientious objection and transfer them to European constitutional law. I call these features 'the transplants'.

The transplants of conscientious objection may serve as supporting guidance when deciding on the legitimacy of national constitutional identity claims. The transplants, which are identified below, are structured based on specific aspects of the law: first, according to the nature and purpose of the law (5.1); second, pursuant to the spheres of law (5.2.); addressing the dilemma of (un)necessary compensation for conscientious objection (5.3); and finally, the reasons and consequences for the lack of a comprehensive legal doctrine of conscientious objection (5.4).

5.1 Nature and Purpose of the Law

The most vivid element in the outlook of conscientious objection by Raz is the focus on the nature and purpose of law.[183] Every legal norm pursues an implicit or explicit aim and has an effect in different spheres of society. If the legal norm fails to realize its purpose, its legitimacy (or even its legality) is decreased accordingly. The claims to disapply these norms in the name of conscientious objection, which hold their own normative value, in these cases are more powerful. The research therefore establishes different elements in relation to the nature and purpose of law.

5.1.1 Legal Paternalism and Self-Regarding Actions

Sometimes a norm regulates the conduct of individuals with the goal of fully or partially benefitting these individuals. However, concrete circum-

183 Raz (n 56) 283.

stances may prove this presumption wrong. The subjects may in fact pursue a different goal, which is not the same as the supposedly beneficial relevant norm. In simple terms, the norm is paternalistic, knowing better than the individual whom it claims to protect. How much alcohol should an adult person consume? How often should we exercise? What kind of choices should we carry out regarding our body? What kind of clothes should we wear? If there are no other strong interests from others, these types of norms are paternalistic. In these circumstances, for example, a Sikh who refuses to wear a helmet because his religious belief requires him to wear a turban, an objector has a stronger claim.

The situations described above are similar to the concept of so-called self-regarding actions,[184] the actions which only harm yourself, which can be traced back to John Stuart Mill.[185] He argued that 'society may only interfere with those actions of an individual which concern others and not with actions which merely concern himself'.[186] In these circumstances the authority of the respective norms has only a weak justification, especially when confronted with a genuine and strong conscientious commitment.

The same may apply in European constitutional law. A Member State has a stronger claim to refuse to apply EU law due to its constitutional commitments if the nature of EU law is paternalistic, as described above.

The following example illustrates this argument. Under the Economic and Monetary Union (EMU), the Member States designed a set of rules to ensure sound and public finances and to coordinate their fiscal policies. The rules are known as the Stability and Growth Pact (SGP). The SGP, pursuant to Articles 121 and 126 TFEU, regulates the fiscal discipline of the Member States and sets the maximum limit for government deficit (3% of GDP) and debt (60% of GDP). Under the cited provisions, the EU institutions may eventually sanction and fine the Member States, should they not comply with the required recommendations.[187]

184 John Stuart Mill, *The Collected Works of John Stuart Mill: Essays on Ethics, Religion and Society*, vol 10 (Liberty Fund 2006) 153.

185 Michel Rosenfeld, 'The Conscience Wars in Historical and Philosophical Perspective: The Clash between Religious Absolutes and Democratic Pluralism' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 63.

186 CL Ten, 'Mill on Self-Regarding Actions' (1968) 43 Philosophy 29, 29.

187 Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Italy and delivering a Council opinion on the 2018 Stability Programme of Italy [2018] OJ C320/48.

At the end of 2018, Italy came close to the excessive deficit procedure pursuant to Article 126(3) TFEU, after the European Commission rejected Italy's submitted Draft Budget Plan for 2019 (DBP)[188] due to its extensive overreaching of the mandated thresholds as incorporated in the Two Pack Regulation No. 473/2013.[189] Italy's public debt, at 131.2% of GDP in 2017, is the second largest in the Union,[190] and exceeds the maximum of 60%. However, Italy was supposedly following the logic of supporting social inclusion and public investment. In particular, it provided for citizenship income, aiming to guarantee a monthly income of 780 EUR; and therefore, corresponding to the relative poverty threshold,[191] it reformed its active labour market policies, increased the labour market participation of women by rationalizing family-support policies, and introduced a 15% flat tax on personal income etc.[192] Moreover, when Italy joined the Euro system, it was already violating the Stability and Growth Pact and exceeding the GDP threshold for more than 40%.[193] In addition, many argued that the EMU and its rules are skewed towards the northern countries and that Italy never really fitted into the existing growth model.[194]

In the light of this structural comparison, what are the rules' nature and purpose on the Stability and Growth Pact? A simplified answer could be deduced from its name: stability and growth. However, there are clearly other political visions as to the means of achieving these objectives. The EU institutions are bona fide trying to help Italy to achieve the common goal of stability and growth, and help Italy to save Italy from itself. However, there is an additional factor: the fear of failing and consequently its spilling

188 Report from the Commission, Italy, Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union [2018] COM(2018) 809 final, 21.11.2018.

189 Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

190 Report from the Commission, Italy, Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union [2018] COM(2018) 809 final, 21.11.2018.

191 Ibid. p 11.

192 Ibid. p 19.

193 Frederik Traut, 'Playing the chicken game: The conflict over Italy's draft budget reveals a construction flaw in the EMU' (*Verfassungsblog*, 2 November 2018) <https://verfassungsblog.de/playing-the-chicken-game-the-conflict-over-italys-draft-budget-reveals-a-construction-flaw-in-the-emu> accessed 24 February 2023.

194 Ibid.

effect.[195] But the possibility of failure is not eliminated simply by abiding by the rules of the SGP. Furthermore, Italy did not only intend to increase its GDP deficit to achieve the common goal of stability and growth, but also to materialize and fulfil its basic public policy choices and social values: namely, distribution of income, levying and collection of personal taxes, the distribution of social welfare benefits and ensuring the availability and functioning of public healthcare and education systems; in other words, its core constitutional commitments.

In the case above, the excessive deficit procedure was ultimately not (yet) launched due to an eleventh-hour agreement[196] reached between the Italian government and the EU Commission. However, the situation could and still can easily turn out differently. How could one assess the potential claim of Italy to disapply the specific deficit rules under the SGP in the light of the anticipated social policy reforms as indicated above? Can Italy question and reject the prevailing post-crisis northern narrative of fiscal responsibilities, supposedly in its own interest, in the light of the transplant of paternalism and due to its democratic social commitments?

While drawing on the theory of Raz concerning paternalistic law, national constitutional disobedience would have a high legitimacy in the case above, where EU law may jeopardise the minimum welfare standards.

5.1.2 Consent

Another criterion to consider when determining the law's nature and purpose is the consent of the person whom the law protects. Consent is an important element, which can be transferred into European constitutional jurisprudence. The law sometimes regulates the conduct of people in order to protect the interests of identifiable subjects. Yet, the identifiable subjects can unequivocally reject the extended protection and consent to the antici-

195 Paul Dermine, 'The Italian Budget Drama – Brussels and Rome on Collision Course' (*Verfassungsblog*, 27 October 2018) <https://verfassungsblog.de/the-italian-budget-drama-brussels-and-rome-on-collision-course/> accessed 24 February 2023.

196 The Italian government revised the 2019 GDP growth forecasts from 1.5% to 1%; deficit/GDP ratio was changed from 2.40% to 2.04% (optical illusion); also, there is no structural deficit/GDP ratio any more. Paolo Pizzoli, 'Italy: No Request (yet) for Excessive Deficit Procedure from the EU Commission' *ING Think* (19 December 2018) <https://think.ing.com/articles/italy-no-request-yet-for-excessive-deficit-procedure-from-the-eu-commission/> accessed 24 February 2023.

pated violation of the norm which protects them. If one refuses to comply with the respective norm due to the requirements of one's conscience, and the agent whom the law protects approves the action of the objector, the claim of the said conscientious objection would be strong.

The transplant of consent in European constitution law can be demonstrated with the EU asylum system and the secondary movements of asylum seekers. The EU institutions invested great efforts to unify the European asylum application system. One of the prerequisites for the proposed Common European Asylum System (CEAS) was a unified and comprehensive common European dactyloscopy database (Eurodac), where the initial registration and fingerprinting are stored and accessible to all Member States. The Member States were therefore obliged to register the fingerprints of all asylum seekers immediately on entry to the particular EU territory. In that way the Member States could determine the country of first entry and potentially return the 'secondary movements asylum seekers' back to the country of first arrival.

Italy and Greece were accused of apparently 'slipping in' more than two-thirds of asylum seekers without prior registration.[197] According to Dublin Regulation III,[198] any Member State (and any other contracting party) which undertakes the first registration must carry out the asylum application. Considering the absence of a compromise among the Member States to share the burdens of those most exposed to migration movements, and the severe problems of these states to sufficiently guarantee better conditions for the asylum seekers, the 'northern countries' have the option to voluntarily process the asylum applications themselves. By doing so, they would agree with the violation of Dublin Regulation III, which predomi-

197 Manuela Samek Lodovici et al., 'Integration of Refugees in Greece, Hungary and Italy Comparative Analysis' (European Parliament, Committee on Employment and Social Affairs 2017) <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614194/IPOL_STU(2017)614194_EN.pdf> accessed 24 February 2023; Bruno Waterfield, 'Italy and Greece "Let Migrants Slip In"' *The Times* (Brussels, 3 May 2018) <https://thetimes.co.uk/article/italy-and-greece-let-migrants-slip-in-7870nmfl5> accessed 24 February 2023.

198 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

nantly secures their own interests and does not really work in practice.[199] In light of the long-standing and continuous attempts to make the situation (more) sustainable, initiating infringement proceedings against the said Member States by the Commission would be a delicate matter. Should the 'northern' Member States tacitly agree with this open and defiant violation of Dublin Regulation III, the claims to disapply the respective provisions would be considerably stronger.

5.2 The Spheres of Law

A law can regulate different spheres of conduct or different types of relationships. The effect of an objection against law changes when it is directed only towards the state, or when it affects also other private individuals (5.2.1). When conscientious objection directly impacts on other private individuals, one should differentiate between two distinctive scenarios: first, when the objector acts on behalf of the state (5.2.2), and second, when the objection takes place solely between private citizens (5.2.3).

5.2.1 Objections Against the State and Beyond

Classic conscientious objections are directed against public authority: the refusal of a Jehovah's Witness to salute the flag,[200] refusal to carry out an unjust order in the army, to participate in an unjust war, or to pay taxes which would be spent on an unjust cause. When objecting to the state's authority, no (private) person is directly affected or upset. If an individual objected to conscription, the army would still exist, and one individual objection against the state would not severely undermine the army and its goals.

While the distinction between the private and the public sphere is deeply ingrained in legal thinking, one observes an evolution of the said distinction. Globalization and privatization made the nexus between private and public law increasingly intertwined, and a delineation between them more

199 Rachel Garrett and Nicole Barrett, 'Dublin III in Practice: Synthesizing a Framework for European Non-Refoulement Cases at the Human Rights Committee' (2021) 13 Journal of Human Rights Practice 250.

200 *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

blurred than ever before.[201] The accumulation of information, size and power in the private sphere has grown considerably, thus one must extend the guarantee of fundamental rights beyond the traditional sphere of public authority.[202] Moreover, traditional public services, such as for example health, education and infrastructure, have been outsourced or moved to the private sphere. The field of fundamental rights protection, traditionally covering solely the relationship between the state and the individual, no longer exempts the private sphere from some fundamental rights obligations.[203]

Similar effects can be observed with conscientious objection, which is no longer intrinsically linked to the public sphere. For example, objections against unrestrained and ethically questionable private data collection on an unprecedented scale, whistleblowing about privacy violations,[204] and many more. When one objects to private or semi-private relations, the addressee is not always a big corporation or private institution, which can be substituted for the state in some respects. It can be another private individual, a historically repressed minority, or a religious community. If a conscientious objection is raised directly against public law, it would claim nothing more than an exception for itself. By moving into the private sphere, a conscientious objection potentially directly affects and upsets the dignity of other individuals too.

Rosenfeld similarly identified that the shift from public to private relations affects society at large, because it has substantial consequences for a democratic constitutional design.[205] Tensions can be multiplied when freedom of religion faces the protection of minorities (protection against discrimination) in the private sphere. A typical example is the case concerning a bed and breakfast reservation made by a same-sex couple, which

201 Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 International Journal of Constitutional Law 125.

202 David Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57 Theoria: A Journal of Social and Political Theory 1.

203 Martin Borowski, 'Drittwirkung', *Max Planck Encyclopedia of Comparative Constitutional Law* (2018).

204 William E Scheuerman, 'Whistleblowing as Civil Disobedience' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).

205 Susanna Mancini and Michel Rosenfeld, 'Introduction: The New Generation of Conscience Objections in Legal, Political, and Cultural Context' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 4.

was cancelled when the religious (private) owners learned about the sexual orientation of their anticipated guests.[206]

Hence, the spheres of the law in which conscientious objection is raised bring new unknowns into the equation. An objection has a different dimension when it affects private individuals and their fundamental rights.

5.2.2 Objection on Behalf of the State

A distinctive context for conscientious objection concerns a situation where an objector acts on behalf of the state. For example, the objector works for a public authority, but refuses to carry out some of the entrusted assignments. In that way the objection directly affects or upsets other individuals, vulnerable groups, or other minorities.

The most widely known and accepted conscientious objection in this setting is conscientious objection in medical care. For instance, while most of the Member States allow doctors to exercise the right to be exempt from performing an abortion, they at the same time guarantee effective access to legal abortion. Clarifying the interpretation of Article 9(1) ECHR, the ECtHR stated:

> '[T]he word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief 'States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.'[207]

The proper accommodation of all three distinctive factors, namely the conscience of the individual, effective access to abortion services, and a state's duty to provide those services, is not an easy task. Thus, conscientious objection inevitably loses its sharpness when faced with other legitimate interests.

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206 Helen Keller and Corina Heri, 'The Role of the European Court of Human Rights in Adjudicating Religious Exception Claims' in Michel Rosenfeld and Susanna Mancini (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 323.

207 *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012) para 106.

Medical care is not the only example where the interests of others may be directly affected. The case of *Ladele*,[208] a black religious registrar worker who refused to officiate at a same-sex civil partnership due to her Christian belief, can serve as another example. Ladele was a member of a small Evangelical church and was working in Islington Council. When she started her job as a registrar worker, officiating at a same-sex partnership was not yet an option. When Ladele refused to officiate a same-sex civil partnership, she simultaneously discriminated against homosexuals on behalf of the state. Although some have argued that Islington Council was one of the most LGBT-friendly authorities, and it was Adele who was in the minority with her strong religious belief,[209] the Court of Appeal, concerned with the matter refused her objection and stated that her task was purely secular, part of her job, and did not affect the core of her religious beliefs.[210]

Eventually, and notably with two dissenting opinions, the ECtHR dismissed Ladele's complaint in the joint cases of *Eweida and Others*.[211] In its judgement the ECtHR cited the Constitutional Court of South Africa:

> 'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful

208 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357.

209 Susanna Mancini and Michel Rosenfeld (eds), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge University Press 2018) 96.

210 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, para 52: 'Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.'

211 *Eweida and Others v UK* App no 48420/10, 36516/10, 51671/10 et al. (ECtHR, 15 January 2013).

and intensely burdensome choices of either being true to their faith or else respectful of the law.'[212]

Conscientious objection in this specific context cannot and should not be blind to the fundamental rights and interests of others involved, especially when it is raised by a person acting on behalf of the state. This is not to say that in such circumstances the conscientious objection cannot be legitimately raised any more. Notwithstanding, the scope of objection in these circumstances appears to be considerably confined.

5.2.3 Conscientious Objection Among Private Individuals

A conscientious objection can be raised solely within the scope of private relations. One recent case brought before the UK Supreme Court illustrates well the complexity and confusion of the said scenario. In the case of *Lee v Ashers Baking Company*[213] the Supreme Court had to decide whether two private owners of a bakery shop could refuse Mr Lee, a gay man, his wish to order a cake. The cake was intended for an event by campaigners for same-sex marriage in Northern Ireland, and was ordered with a depiction of cartoon characters Bert and Ernie and the words 'Support Gay Marriage'. The Court had to decide between the unlawful discrimination of homosexuals and the conscientious objection by the owners. Ashers were sincerely convinced that gay marriage is inconsistent with Biblical teachings and therefore unacceptable to God. Moreover, they claimed they could not produce that slogan in good conscience. The Supreme Court reversed two earlier court decisions, which found Ashers discriminating against Lee on grounds of sexual orientation. The Supreme Court argued that the legal question was essentially about freedom of expression, which includes the right not to be forced to express an opinion that one does not hold. The Supreme Court stated that Ashers could not refuse to make the cake because Mr Lee was gay, but they should not be obliged to supply a message with which they profoundly disagreed due to their freedom of expression. In the words of the Supreme Court, there is a 'distinction between refusing to produce a cake conveying a particular message, for any customer who

212 *Eweida and Others v UK* App no 48420/10, 36516/10, 51671/10 et al. (ECtHR, 15 January 2013) para 60.

213 The Supreme Court of the UK, *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 2017/0020.

wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics'.[214]

The cited case law indicates a more lenient approach of the Supreme Court among private individuals. It suggests that a conscientious objection has a higher legitimacy when it is applied directly among private individuals, when they do not act on behalf of the state.[215] Although the case could be compared with *Ladele*, which argued that having to officiate at a same-sex marriage could equally impact her (negative) freedom of expression,[216] yet her role as registrar worker acting on behalf of the state creates a difference, which explains the respective judicial differentiation.[217]

5.3 Compensation or Substitute Services

It remains disputed whether a conscientious objector should compensate others for being exempt. One may be inclined to say that the willingness to accept the consequences of conscientious objection indicates the depth of the conviction and thus validates its authenticity. Moreover, it restores equal treatment because the objector, through the compensation, 'pays' for its privilege. In that sense, Raz believed that the principle of equality requires balancing the exemption with an alternative obligation.[218] Hannah Arendt ridiculed this popular (mis)understanding,[219] and Dworkin rejected it too.[220] If one had to accept the sanction, the situation would be no different from an ordinary violation of law without any conscientious motive.

Moreover, conscience is the moral guide of an individual, which unwillingly puts them in conflict with the existing rules of society. Understood in that way, it is more of an impediment, which causes its holders to step out of line, expose themselves and pursue their own convictions. To have

214 Ibid. para 62.
215 Mancini and Rosenfeld (n 205) 5.
216 Schlink (n 140) 107.
217 Another set of cases concern the prohibition from wearing any visible signs of political, philosophical or religious belief in the private workplaces. See also Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (*Samira Achbita*) [2017] ECLI:EU:C:2017:203; Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* (*Asma Bougnaoui*) [2017] ECLI:EU:C:2017:204.
218 Raz (n 56) 285.
219 Hannah Arendt, *Crises of the Republic: Lying in Politics. Civil Disobedience. On Violence. Thoughts on Politics and Revolution* (1st edn, Mariner Books 1972) 52.
220 Dworkin (n 69) 206.

a conscientious belief is not a conviction by choice. If taken seriously, it is a constitutive element of an individual, upon which one cannot exercise full control, if being honest with yourself. Hence, when a conscientious objection is recognized and legally granted, there would arguably be no need to burden the objector any more than they are already confined by its own moral compass.

Even if the willingness to compensate for exception cannot be normatively desirable, it can nevertheless demonstrate the genuine conviction of the objector. Accordingly, transferred to European constitutional law, one could argue that the resisting Member States should accept an alternative obligation to compensate for any granted exception of EU application. The idea is controversial and potentially even dangerous.

For example, when Hungary refused to comply with European legislation concerning the relocation of refugees in the name of its current illiberal constitutional commitment, could it simply pay off the other Member States instead?

The new Hungarian constitution specifically acknowledged their Christian religion and the preservation of Hungarian culture and tradition as the essential elements of Hungarian identity. Moreover, the Hungarian government held a referendum on the relocation of refugees, through which the majority rejected the proposed European legislation,[221] although the referendum itself did not achieve a minimum turnout of 50%.[222] The Council outvoted the opposition of Hungary, Slovakia, Czech Republic and Romania (with Finland abstaining) and adopted the relocation scheme for refugees from Greece and Italy. Hungary and Slovakia challenged the decision in court, but the CJEU dismissed the case.[223] Nevertheless, Hungary continued to ignore and disapply the cited decision and has not relocated any of the foreseen refugees.

How plausible is the idea that Hungary could maintain its constitutional objection if it was willing to freely compensate the other Member States? Although the said exemption would not directly impact the rights of refugees – they would be accommodated by the other Member States

221 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration [2015] COM(2015) 240 final.

222 The result of the referendum was 90% against the scheme. The turnout was 43.7%.

223 Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* [2017] ECLI:EU:C:2017:631.

instead – the suggested pragmatic argument cannot be right. It would go directly against common European principles and values, such as the principle of non-discrimination and solidarity. Accordingly, I argue that even if a Member State would be willing to compensate for the requested exemption in the name of national constitutional identity, one could not accept it if concurrently it ran against common and shared principles.[224]

5.4 Away with a Comprehensive Legal Doctrine of Conscientious Objection

This section has identified some main features of conscientious objection, which could potentially be transplanted into European constitutional law. For example, when a conscientious objector refuses to comply with the norm, which is of a paternalistic, self-regarding nature; when the respected individual, protected by the challenged norm, consents to its violation; when the norm only protects the interests of the state; or when the norm regulates completely private interactions. In all these cases, the claim of the conscientious objector has a stronger stand.

Nevertheless, the section also showed and acknowledged that legal theory does not provide the grounds for one commonly accepted and sufficiently coherent doctrine of conscientious objection, which would be broadly endorsed and practised across jurisdictions.[225] Some states have enacted rules allowing conscientious objection only in some rare, extraordinary situations, whereas others do not even recognize it as a legal institution.[226] Members of the Council of Europe recognize freedom of conscience as one of the human rights under Article 9 ECHR. Yet, there is arguably more to conscientious objection than the moderate ambit of the ECtHR's case law suggests.[227]

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224 Luke D Spieker, 'Defending Union Values in Judicial Proceedings. On How to Turn Article 2 TEU into a Judicially Applicable Provision' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021).

225 Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford University Press 2012).

226 Hitomi Takemura (ed.), 'Right to Conscientious Objection in European Human Rights Law', *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Springer 2009).

227 Mark Campbell, 'Conscientious Objection, Health Care and Article 9 of the European Convention on Human Rights' (2011) 11 Medical Law International 284.

Despite the lack of a coherent doctrine of conscientious objection and the difficulties we are faced with when trying to determine its exact scope and character, the said structural comparison is neither redundant nor implausible. Just because one cannot clearly define conscientious objection according to positive law, the concept does not lose its meaning and value.

The rule of law is more complex and intelligent than we anticipate, as Dworkin once stated.[228] If we take the legal landscape seriously, nothing that might impact it can be outside of it. Thus, just because a constitution or legal doctrine does not mention unambiguously what kind of role conscientious objection plays in the legal game, it does not mean that it is irrelevant, impotent, or even non-existent.

Additionally, a lack of comprehensive doctrine may follow purposely from the unique nature of the conscientious objection. It might appear at first sight as destructive, contra-legal and against the unified system that the law (or perhaps the lawyers) tries to construct and maintain. It may challenge the principles of predictability, foreseeability and equality. Yet, in that way, it diminishes the potential for misuse and abuse.[229] It hides in the shadow and awaits a genuine agent. Finally, it offers to the judicial branch a kind of justice corrector. If used wisely, a restrictive application of conscientious objection can offer a balancing justice when appropriate and when all the other legal norms blindly require its acceptance.

In that sense, one should understand the presence of identified transplants being an indicator for a stronger claim of the objector. Due to the lack of comprehensive theory, these transplants can only serve as guiding references when the CJEU faces Member States' claims to disapply EU law, purportedly against the essential national constitutional commitments. The transplants are neither exhaustive nor decisive arguments, which could automatically predict the outcome. They offer a more structured and coherent way to think about national constitutional resistance in the EU.

228 Dworkin (n 69) 222.
229 Raz (n 56) 288.

6 Civil Disobedience

This section outlines two major accounts of civil disobedience. First, it presents the main defining characteristics of civil disobedience according to Rawls: it is the last resort, non-violent, and open to consequences (6.1). Second, it presents a slightly different view from Raz, focusing on moral justificatory reasons for civil disobedience (6.2). Despite the guidelines given by the cited legal theory, the last sub-section explicates how the real and contemporary examples of civil disobedience remain morally ambiguous, failing to provide clear-cut answers to what is morally right and wrong (6.3).

6.1 Defining Civil Disobedience – The Last Resort, Non-violence, and Openness to Consequences

The meaning of civil disobedience, too, must rely on scholarly writings because the positive law cannot describe when the law can be broken – that would be an oxymoron. One can only determine the conditions in retrospect, due to the highest constitutional principles and moral justice. As conscientious objection, civil disobedience lacks one coherent theoretical account.[230] For the present contribution, it should suffice to limit ourselves to the main two currents in legal theory: the writings of John Rawls and Joseph Raz. In his account, Rawls canonically synthesized various academic views after the incendiary civil rights and anti-war movements in the US in the 1960s.[231] The late Raz explicated the second account of civil disobedience, specifically from his book *The Authority of Law*.[232]

For Rawls, civil disobedience is a 'public, non-violent, conscientious yet political act contrary to law usually done to bring about a change in the law

230 William E Scheuerman, 'Introduction: Why, Once Again, Civil Disobedience?' in William E Scheuerman (ed.), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).
231 Max Muir, *Civil Disobedience: A Reasonable Polemic* (University of Oxford 2019) ii.
232 Raz (n 56).

or policies of the government'.[233] Limiting us to liberal constitutionalism, or a 'nearly just society',[234] as Rawls would put it, civil disobedience illustrates the nature and limits of majority rule. On the one hand, one has a duty to comply with the laws enacted by the majority. On the other hand, one has the right to defend one's liberties and the duty to oppose injustice.[235] Hence, in a society where the conception of justice is commonly shared, the minority opposing the injustice 'addresses the sense of justice of the majority'.[236]

According to Rawls, not every reaction to injustice qualifies as civil disobedience. It must be an act against substantial and clear injustice, a 'serious infringement of the first principle of justice, the principle of equal liberty, and blatant violations of the second part of the second principle, the principle of fair equality of opportunity':[237] for example, when certain minorities are denied the right to vote or hold office, or when certain religious groups are repressed and denied various opportunities. However, one does not have a *right* to civil disobedience, the right to disobey. Rather one justifies civil disobedience by 'the political principles underlying the constitution'.[238]

Rawls' definition of civil disobedience is a collective action of a minority to persuade the majority. A minority forces the majority to reconsider the legitimacy of their claims on the grounds of a shared sense of justice. In his view, civil disobedience can be either direct or indirect. Direct civil disobedience disobeys the laws it challenges, whereas indirect disobedience violates other (minor) rules only to draw attention to a disputed subject matter. There are two additional distinctive elements to Rawls' account. The first one is a willingness to accept the legal consequences of one's conduct.[239] In that way, one shows fidelity to the law and sincerity at the respective conviction. Second, civil disobedience must remain non-violent, and it must be distinct from militant action and obstruction.

233 Hugo A Bedau, 'On Civil Disobedience' (1961) 58 The Journal of Philosophy 653; Rawls (n 68) 320.
234 Rawls (n 68) 319.
235 Alexander Kaufman, 'Liberalism: John Rawls and Ronald Dworkin' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).
236 Rawls (n 68) 319–20.
237 Ibid. 326.
238 Ibid. 339.
239 Ibid. 322.

In addition, Rawls understands that moral arguments are broad in meaning, open to interpretation, and it is hard to verify the true intentions of the dissenters. For example, he recognizes the critique that

> 'moral sentiments are not a significant political force. What moves men are various interests, the desires for power, prestige, wealth, and the like. Although they are clever at producing moral arguments to support their claims,' […] their views are calculated to advance their interests.'[240]

But Rawls rejects these arguments. Once society is interpreted as a scheme of cooperation among equals, those injured by grave injustice need not submit. Although civil disobedience is, strictly speaking, illegal, it is morally correct, and it helps to maintain and strengthen just institutions. Rawls sees civil disobedience (and conscientious objection as well) potentially as one of the stabilizing devices of a constitutional system, although by definition illegal.[241] It lies somewhere between the legal right of freedom of association and entirely unacceptable and illegitimate militant action and obstruction.

6.2 Moral Justificatory Reasons from Raz

Joseph Raz presented an alternative account of civil disobedience. While he generally agrees with Rawls that there is no *right* to civil disobedience – one is not 'entitled civilly to disobey'[242] – he refused Rawls' considerations that civil disobedience must conform to a proper form. Rawls argued that civil disobedience must be an act of last resort, non-violent and submissive to prosecution and punishment. Yet, for Raz, civil disobedience so understood means to justify the *form* rather than the underlying reasons. The difference between being able to show that the act is right, or to show if one has a right to perform that act, is significant.[243] Henceforth, why not have a *right* to civil disobedience? Raz claimed that having a right means that it can be exercised even in cases where one should not (morally) use it. For example, one has a right to lie, but lying is still usually not morally justifiable.

240 Ibid. 338.
241 Ibid. 336.
242 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 267.
243 Ibid. 273.

Moreover, why should one freely submit to punishment for exercising civil disobedience? As Arendt wrote, nobody puts themself before a court with a demand to be punished.[244] Raz similarly said that there is no reason why dissenters would have to make their identity known and voluntarily submit themselves to punishment.[245] Furthermore, it is not apparent why civil disobedience must remain the last resort and avoiding violence. Raz stated, for example, that sometimes a miners' march on the streets of London, where the protesters commit minor offences, would be a preferred option, although not the last resort, over a lawful but lengthy miners' strike.[246] Additionally, while causing harm directly to another individual cannot be acceptable, non-violent acts like a strike by ambulance drivers may also have severe consequences, sometimes even bigger than a minor act of violence.[247] In other words, violence is sometimes relative in relation to different non-violent (legal) acts of dissent which may have a bigger impact on others.

Civil disobedience must remain 'an exceptional action, beyond the general right of political action', and one must shy away from an attempt to routinize it, making it 'a regular form of political action'.[248] Hence, the legitimacy of and the moral claim for support, or non-interference in civil disobedience, depend solely on the rightness of one's cause, on the rightness of the political goal of the disobedient protester.[249]

To sum up, for Raz: 'designed to catch the public eye', 'civil disobedience is a politically motivated breach of law designed to contribute directly to a change of a law or a public policy or to express one's protest against, and dissociation from, a law or a public policy'.[250] However, the question remains: Under what circumstances does one have the moral right to break the law for moral or political reasons?[251] Raz does not answer this satisfactorily and only states that the rightness of the act depends on the underlying reasoning – the moral conclusion of disobedience.

244 Arendt (n 219) 69–102.
245 Dworkin (n 69); Brownlee (n 225); Candice Delmas, *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press 2018).
246 Raz (n 242) 269.
247 Ibid. 267.
248 Ibid. 275.
249 Ibid. 268.
250 Ibid. 263.
251 Ibid. 262.

6.3 Determining What is Morally Right and Wrong – Conflicting Examples

If we accept Raz's account, then every single instance of disobedience must be scrutinized and evaluated individually. Yet, how can one determine which actions are right and which actions are wrong? While one should not adhere to absolute moral relativity, evaluating concrete actions through the vague eyes of political morality is challenging. Is there a difference between disobedient actions relating to climate,[252] pandemic restrictions,[253] mandatory vaccination, abortion, animal protection or whistleblowing? Moreover, according to what kind of evaluative matrix? How difficult the distinction can be will be illustrated in the following by looking at some current examples.

In autumn 2022, a group of young climate protesters associated with the global climate strike movement Last Generation once again glued themselves to the streets of Berlin, saying that they wanted to cause peaceful friction. One activist noted: 'I really hoped something would change, that politicians would react and finally take us and the science of climate change seriously, but we are still heading for a world that's 3 to 4 degrees Celsius warmer.'[254] The dissenters achieved the 'friction' and created a traffic jam, eventually leading to a total blockage of the streets, preventing ambulances and fire brigade from passing through without delay. As it happened, an ambulance arrived at the scene where a seriously injured person needed help, but too late.[255]

Another example refers to active disobedience over the Covid-19 pandemic and its mandatory measures. During the pandemic of 2020, in one of many demonstrations, 38,000 people gathered on the streets of Berlin to demand the immediate cancellation of all restrictive mandatory measures against Covid-19. The included a motley mixture of families with children,

252 Saskia Stucki, 'In Defence of Green Civil Disobedience' (*Verfassungsblog*, 30 October 2020) <https://verfassungsblog.de/in-defence-of-green-civil-disobedience/> accessed 24 February 2023.

253 Yoann Della Croce and Ophelia Nicole-Berva, 'Civil Disobedience in Times of Pandemic: Clarifying Rights and Duties' [2021] Criminal Law and Philosophy 1.

254 Frank Jordans, 'Activists Blocking Berlin's Roads Say They Aren't Here to Be Liked' *euronews* (15 July 2022) <https://euronews.com/green/2022/07/15/climate-activists-sticking-themselves-to-berlins-roads-say-they-want-to-cause-peaceful-fri> accessed 24 February 2023.

255 Maximilian Steinbeis, 'Not All Right' (*Verfassungsblog*, 11 November 2022) <https://verfassungsblog.de/not-all-right/> accessed 24 February 2023.

esotericists, pensioners, anti-vaxxers, *NPD* neo-Nazis, radical right extremists, people from the radical left, followers of the *QAnon* conspiracy theory group, members of the *Querdenken* movement, and many other individuals who claimed not to be affiliated to any group. They ignored the rules of social distancing and the obligation to wear a mask, demanding social life to be restored, the freedom to work, to go to schools, theatres, gyms, bars, hotels and restaurants.[256]

Furthermore, in the US, like many other countries, people continuously demonstrate and exercise civil disobedience concerning abortion. People are fighting both for its prohibition and for the right to have access to it. In the US, the Supreme Court in June 2022, overturned its long-standing *Roe v Wade* case law that made access to abortion in the United States a federal right.[257] As a response, an activist group, including some members of the House of Representatives, protested and illegally blocked the intersection between the Capitol building and the Supreme Court. Many of them were arrested and fined. Moreover, shortly after the cited overruling, thousands of people across the whole country marched against the decision.[258] Whereas on the other side, for decades there have been anti-abortion and pro-life protests, demonstrations and violence, including arson and bombings of abortion clinics or even murders and attempted murders of physicians and doctors, for example, by the extremist organization *Army of God*.[259]

One can observe a similarly divided society in Poland, where the government and the Constitutional Tribunal, after decades of permissive liberalized legislation, almost entirely prohibited access to abortion in 2021.[260] Abortion in Poland is currently legal only in cases resulting from a criminal act or when the woman's life is in danger. For example, in September 2022, at the Human Rights Council Session in Geneva, the civic organization stated that even Ukrainian refugees in Poland, those who are survivors

256 'Proteste gegen Schutzmaßnahmen zur COVID-19-Pandemie in Deutschland' *Wikipedia* (22 November 2022, 2022) <https://de.wikipedia.org/w/index.php?title=Proteste_gegen_Schutzma%C3%9Fnahmen_zur_COVID-19-Pandemie_in_Deutschland&oldid=228193985> accessed 24 February 2023.

257 Sarah Katharina Stein, 'Dobbs kills Roe' (*Verfassungsblog*, 27 June 2022) <https://verfassungsblog.de/dobbs-kills-roe/> accessed 24 February 2023.

258 '2022 Abortion Protests' *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=2022_abortion_protests&oldid=1125964231#Protests_after_the_ruling> accessed 24 February 2023.

259 Patricia Donovan, 'The Holy War' (1985) 17 Family Planning Perspectives 5.

260 Marta Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon' (2022) 14 Hague Journal on the Rule of Law 73.

of sexual assault, face severe obstacles to access to abortion since the law requires a certificate from the Polish prosecuting authorities attesting to the crime. But it is almost impossible to obtain such a certificate due to the unclear procedures and high stigma accompanying pregnancy resulting from rape.[261] Tens of thousands of Polish women (and men) are continuously taking to the streets to protest against the new heavy restrictions; especially after the recent tragic incident, when a pregnant woman died due to a septic shock after a foetal demise because doctors waited too long, justifying their actions by the new abortion regulations.

Moreover, one pro-choice activist currently faces a three-year jail sentence for giving a woman a miscarriage-inducing pill. The woman was experiencing domestic violence and contacted the activist after her husband prevented her from travelling to Germany for the procedure.[262]

While observing this civil disobedience against the legal restriction to abortion, it is important to emphasize that the current legislation in Poland results partially from public pressure exercised by civil pro-life movements such as *Ordo Iuris* and the like, who have protested and lobbied for years to restrict the right of women to have complete control over their bodies.

In addition, many other civil disobedience movements appeal to liberal values and principles of justice. They advocate for animal rights,[263] against the use of nuclear power,[264] or for the support of acts of whistleblowing[265] to disclose the practices of private or public companies concerning data and privacy (mis-)management – most notably the acts of Julian Assange via Wikileaks and Edward Snowden, who was simultaneously nominated

261 Karolina Kocemba, 'Pregnancy Registry in Poland' (*Verfassungsblog*, 22 June 2022) <https://verfassungsblog.de/pregnancy-registry/> accessed 24 February 2023.

262 Weronika Strzyżyńska, 'Polish Woman Is First Activist to Face Trial for Violating Strict Abortion Law' *The Guardian* (28 March 2022) <https://theguardian.com/global-development/2022/mar/28/polish-woman-is-first-to-face-trial-for-violating-strict-abortion-law> accessed 24 February 2023.)

263 Peter Singer, *Animal Liberation: The Definitive Classic of the Animal Movement* (Upd, Harper Perennial Modern Classics 2009); Tony Milligan, 'Animal Rescue as Civil Disobedience' (2017) 23 Res Publica 281.

264 Richard Norman, 'Civil Disobedience and Nuclear Protest: A Reply to Dworkin' (1986) 44 Radical Philosophy 24.

265 Scheuerman, 'Whistleblowing as Civil Disobedience' (n 204).

for the Nobel Peace Prize and denounced as a traitor deserving the death penalty.[266]

Finally, some contemporary movements such as *MeToo* and *Black Lives Matter* indicate that rather than appealing to public principles of political morality, civil disobedience 'may, in fact, seek to transform the common sense of morality'.[267]

Considering the above examples, how should we determine which of them deserves to be recognized as justifiable civil disobedience, and which should be treated as an ordinary offence or crime? Do they all deserve to be tolerated and go unpunished? And if so, what level of disobedience and what degree of damage and upheaval would still be acceptable?

The examples above indicate the difficulty of creating *objective conditions* for legitimate civil disobedience. Accordingly, civil disobedience is an exception, not a rule. Moreover, it is embedded in society, which is itself subject to sociological and cultural change. In the latter sense, it will always depend on concrete circumstances whether a particular act of disobedience, all things considered, complies with the principles of justice.

266 David E Pozen, 'CODA: Edward Snowden, National Security Whistleblowing, and Civil Disobedience' in Kaeten Mistry and Hannah Gurman (eds), *Whistleblowing Nation* (Columbia University Press 2020).

267 Candice Delmas and Kimberley Brownlee, 'Civil Disobedience', *Stanford Encyclopedia of Philosophy* (Winter 2021 edition, 2021) para 3.2.

7 Transplants of Civil Disobedience – Modest Guidelines for Justification

Despite the initial optimism that legal theory concerning civil disobedience has all the answers, and that structural comparison would be straightforward, one remains modest in conclusively defining the justificatory reasons for civil disobedience. There is little that can be concluded apart from the following general observations.

Civil disobedience must be treated differently than a mere violation of law. Henceforth, when the apex courts engage in a serious confrontation with the CJEU, stating their reasons openly and perhaps even acting outside their competences to demonstrate their point, a structural comparison suggests that action deserves unique and differential attention.

Civil disobedience is a fairly frequent act in liberal societies. As Habermas argued, civil disobedience is a litmus test for the maturity and legitimacy of the political culture of democracy.[268] Accordingly, one should not be overly radical when faced with it. Rather one should expect that a relatively free society will always produce contestation and disobedience. Opposition beyond the regular means of political contestation by institutions and political parties should serve constructively to question established and conventional practices. What is more, even if one rejects a particular civil disobedience, the mere existence of firm objections cannot effectively undermine the existence of a democratic legal order, except in extremely rare and extreme circumstances. Mature legal orders function with the permanent presence of disagreements, and are based on the plurality of narratives and convictions.[269]

If civil disobedience essentially depends on its justification, then one should pay attention to whether it improves justice for all, or only demands benefits for some. Moreover, would fulfilling the demands of disobedience take away the rights of others, or only improve the positions of the oppressed? As the recent Covid-19 pandemic illuminated, less draconian restrictions led to quicker spread of the virus, a higher number of infections

268 Jürgen Habermas, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 Berkeley Journal of Sociology 95.

269 Brownlee (n 225).

and eventually a higher death rate. Whereas whistleblowing demands more fair and transparent public policies, which do not directly limit the fundamental rights of others. The same goes for claims for more dignified animal care or omission of nuclear weapons – these demands do not radically restrict the rights of others.

Moreover, civil disobedience appeals to the majority with the call for justice.[270] Many important and successful movements in the past understood well that achieving their goal requires wider social support. Although civil disobedience does not necessarily depend on numbers and usually remains a minority in political terms (if not, it can achieve change via regular legislative proceedings), the collectiveness of the cause and the scale of public support significantly add to the legitimacy of the movement. Public support plays a role when evaluating the justifiability of civil disobedience.

Furthermore, as Kent Greenawalt put it, what are the likely effects of civil disobedience?[271] Are the probable consequences of disobedience desirable or not? Will they, for example, reduce privacy for security or, vice versa, promote one value at the expense of another?[272] Civil disobedience opens a broader query regarding the appropriateness of current social values[273] and a 'conflict over what social ends are desirable'.[274] Accordingly, one should focus less on a disobedient act as such, whether to punish the person or not, but rather on discussing the broader social issues that civil disobedience conveys.

Civil disobedience should engage with meaningful and important social questions, and not with trivialities such as food quality in the cafeteria.[275] Not every social inconvenience or even injustice should qualify for justifiable civil disobedience.

Finally, when civil disobedience leads to the regression of fundamental rights, has anti-democratic features, stands at odds with basic liberal commitments, or increases discrimination and unequal treatment among citizens, one must remain cautious about embracing it. These are not the goals

270 Critical view on civil disobedience as anti-democratic concept: Daniel Weinstock, 'How Democratic Is Civil Disobedience?' (2016) 10 Criminal Law and Philosophy 707.

271 Kent Greenawalt, 'A Contextual Approach to Disobedience' (1970) 70 Columbia Law Review 48, 48.

272 Ibid.

273 Linda MG Zerilli, 'Against Civility: A Feminist Perspective' in Austin Sarat (ed), *Civility, Legality, and Justice in America* (Cambridge University Press 2014) 109.

274 Greenawalt (n 271) 51.

275 Ibid. 48.

of liberal democracies – not in compliance with the presumably shared values of the respective society.

In addition, civil disobedience's value is in bringing the subject matter to the public forum. It highlights the political question with higher stakes involved, thus presenting a different type of public consideration. It forces people to get involved with the disputed question; it causes public disturbance, and therefore a public reaction. As such, though peculiar and challenging, it proves to be a highly discursive practice,[276] a 'plea for reconsideration'.[277] As we know, democracies are built on discursive practices.

276 William Smith, 'Deliberative Democratic Disobedience' in William E Scheuerman (ed), *The Cambridge Companion to Civil Disobedience* (Cambridge University Press 2021).

277 Peter Singer, *Democracy and Disobedience* (Oxford University Press 1973) 84.

8 Identity Jurisprudence in the Light of Institutional Civil Disobedience and Constitutional Conscientious Objection

Resistance by the national apex courts to the EU legal order takes two distinctive forms: first, disobedience as an incentive to change via ultra vires review (7.1); second, resistance as constitutional conscientious objection in the language of identity claims, asking for an exemption (7.2).

8.1 Disobedience as Incentive to Change – Ultra Vires Review

As explicated above under sub-section 2.4.1, *Solange I* serves as the most persuasive example of how national judicial resistance in the name of the highest principles of justice – due to the effective and robust protection of fundamental rights – ameliorated the European architecture of fundamental rights. In the light of civil disobedience, the German FCC refused to comply with the European principle of primacy of EU law and demanded a change.

As we have learned, civil disobedience is a collective endeavour, not an individual act. It tries to persuade not only the respective authorities, but also society in general. Its disturbance highlights the matter, and the underlying reasons for justice aim to convince the majority of the rightness of the cause. Hence, the acceptance of the cause by society at large plays an important role. In that light one can contextualize *Solange I* as well – not as a capricious and lonely call, but as part of a collective effort, together with other agents, calling for change. As Ulrich Everling wrote in 1994:

> 'In Germany, the story is believed that it was only under the pressure of Solange I that the Court of Justice assumed the role of protector of human rights. This is historically not correct since the relevant jurisdiction began long before.'[278]

278 Ulrich Everling, 'The Maastricht Judgment of the German Federal Constitutional Court and Its Significance for the Development of the European Union' (1994) 14 Yearbook of European Law 1, 14.

Delledonne and Fabbrini argued similarly in a recent article titled 'The Founding Myth of European Human Rights Law'.[279] They wrote: '[B]y the time the Italian and West German constitutional courts voiced their concerns against the supremacy of EU law on human rights grounds, the ECJ had already recognised the importance of human rights in the European legal order.'[280]

The CJEU stated in 1969 in its *Stauder*[281] decision that 'fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court'[282] and reiterated this general idea in 1970 in *Internationale Handelsgesellschaft*, arguing that

> '[r]espect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the community.'[283]

William Phelan argued that one could see similar calls for improving fundamental rights architecture in the other Member States.[284] Moreover, the argumentation to construe fundamental rights protection by the CJEU through common constitutional traditions dates back to the first president of the Commission, Walter Hallstein, who argued in parliamentary discussions that the protection of fundamental rights must be part of the general principles of EU law.[285]

Solange I must be read accordingly: as a significant incident, but far from an isolated case. Allegedly the most powerful apex court in Europe,[286] the FCC was certainly an important actor. Still, the message was successful not because of the FCC's power, but because it conveyed and reverberated the idea, shared and raised by many. Moreover, it was not successful because many respective agents shared the attitude, so clearly and directly articulat-

279 Giacomo Delledonne and Federico Fabbrini, 'The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence' (2019) 44 European Law Review 178.
280 Ibid. 182.
281 Case 29-69 *Erich Stauder v City of Ulm* (*Stauder*) [1969] ECLI:EU:C:1969:57.
282 Case 29-69 *Erich Stauder v City of Ulm* (*Stauder*) [1969] ECR 1969, p 425.
283 Case 11-70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.
284 Phelan (n 65).
285 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 365.
286 Dieter Grimm, 'A Long Time Coming' (2020) 21 German Law Journal 944, 945.

ed by the FCC, but also due to the underlying justificatory reasons behind this disobedience. Arguing for more fundamental rights protection is one of the most legitimate goals one could have.

Solange I as a case of 'institutionalized civil disobedience' was based on a legitimate rationale – fundamental rights; it was discursive, because the FCC engaged with the CJEU; and it appealed with its reasoning to other contesters. Most importantly, it eventually facilitated gradual European constitutional change.[287]

Let us now move away from the historically significant *Solange I*, which was a decision taken under unique circumstances. As was shown in Chapter 4, one cannot compare the arguments of fundamental rights protection and fundamental rights standards. Arguing that a commitment to fundamental rights forms a national constitutional identity is a legitimate claim. However, arguing that a particular interpretation of fundamental rights infringes national constitutional identity is an entirely different thing, and a much less convincing one indeed. Although one could analyze a myriad of cases by the national apex courts in the light of institutionalized civil disobedience, we will limit our review to the following three recent ultra vires decisions: the Danish *Ajos*,[288] the German *PSPP*[289] and the Polish *K 3/21*[290] decisions.

The *Ajos* decision by the Danish Supreme Court in 2016 rejected the application of EU law, stating that the CJEU acted ultra vires, beyond its conferred competences. The *Ajos* decision concerned the unwritten European principle of non-discrimination on the grounds of age, creatively constructed by the CJEU. The cited principle overrode a Danish statute that deprived an employee of a severance allowance upon the termination of their contract if they were entitled to receive a pension due to their age under Danish legislation.[291] The Danish Supreme Court decided that

287 Phelan (n 65).

288 Danish Højesteret, Case 15/2014 *Dansk Industri (DI) acting for Ajos A/S v The estate left by A* (*Ajos*) 6 December 2016.

289 BVerfG, 2 BvR 859/15 *PSPP* 5 May 2020.

290 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

291 Lars Hjortnæs, 'A view from the Danish Supreme Court in light of the Ajos Judgment' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law* (Springer Professional 2019); Helle Krunke, 'Constitutional Identity in Denmark: Extracting Constitutional Identity in the Context of a Restrained Supreme Court and a Strong Legislature' in Christian Calliess and Gerhard van

the 'judge-made principle of EU law, such as the general principle of non-discrimination on the grounds of age, cannot be binding, because it did not have its origin in a specific Treaty provision'.[292] The Supreme Court further argued that the Danish Accession Act did not transfer to the EU competences to create such an unwritten principle. That would go directly against the principles of legal certainty and the protection of legitimate expectations.[293]

The Danish Supreme Court did not attack the principle of discrimination on the grounds of age as such, but rather the overly creative judicial reasoning by the CJEU. Moreover, when the Supreme Court decided the case, in 2016, the matter was settled at national and supranational levels. The Danish legislator amended the respective statute accordingly on the national level. On the supranational level, the said principle became formally binding with the EU Charter under Article 21(1). The judicial disobedience was therefore not grounded in any (unchangeable) constitutional identity, which must be forever protected against EU law, but rather a disobedient act with a simple message to the CJEU, which was a simple warning: Do not overstep your boundaries. The Danish Supreme Court 'rebelled', because it felt strongly that the CJEU was notably wrong; although the assessment itself cannot be immune to the critique of formalistic reasoning and activistic and imprecise reasoning.[294]

As some commentators put it, the decision created a consequence where 'every single national constitution of member state creates its own variation of EU law. This transforms EU law from an autonomous order into a residual one, contingent on national legal practice and specific constitu-

der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

292 Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in AJOS' (*Verfassungsblog*, 30 January 2017) <https://verfassungsblog.de/legal-disintegration-the-ruling-of-the-danish-supreme-court-in-ajos/> accessed 24 February 2023.

293 Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) 23 European Law Journal 140, 13.

294 Urška Šadl and Sabine Mair, 'Mutual Disempowerment: Case C-441/14 Dansk Industri, Acting on Behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case No. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v The Estate Left by A' (2017) 13 European Constitutional Law Review 347, 347.

tional provisions.'[295] On the contrary, the respective disobedience raised the issue of conflict between unwritten European principles which collide with formally binding and constitutionally sound national legislation. In the meantime, the conflict was addressed and resolved.

In the light of civil disobedience, in *Ajos* one can identify several important elements. A disobedient act aimed to improve the European legal system in general, directed towards the activistic reasoning of the CJEU *in concreto*. It was based on the principles of the rule of law and legal certainty, which are legitimate principles of liberal constitutionalism and moral justice. Finally, the decision aimed to highlight the prerequisite in the European delineation of competences of maintaining a fair balance between national and supranational institutions. It did so, as Helle Krunke argued, in a dialogical and constructive manner, containing elements of institutionalized civil disobedience.[296] The goal of the Danish Supreme Court was essentially achieved.[297]

Another recent disobedient decision was the German *PSPP*, which declared the CJEU's *Weiss*[298] judgement ultra vires, not comprehensible and arbitrary from an objective legal perspective. The FCC argued that the CJEU failed to apply the proportionality test appropriately as a means for delimitating the competences: specifically the impact of the respective *PSPP* programme from the monetary to the fiscal area. Moreover, it argued that the CJEU 'methodologically untenably' carried out self-restraint in its judicial review over the ECB, and eventually declared the *PSPP* programme outside the domestic Act of Approval, directing the German Central Bank to participate in the said programme only subject to further procedural conditions.

295 Madsen, Olsen and Šadl (n 292).

296 Krunke (n 291) 117.

297 Urška Šadl, 'When is a Court a Court?' (*Verfassungsblog*, 20 May 2020) <https://verfassungsblog.de/when-is-a-court-a-court/> accessed 24 February 2023.
The *Ajos* decision later curiously and quietly disappeared from the website. It is not clear why. One reason could be that the rebellious decision was a one-time judicial faux pas, and the court did not want the whole legal academia of Europe continuously referring to this decision as a sign of a deeper understanding of constitutional pluralism in the EU. Or did the court remove the decision after it communicated and achieved its aim, reluctant to be further posited as an example of disobedience in the wider legal academia?

298 Case C-493/17 *Proceedings brought by Heinrich Weiss and Others* (*Weiss*) [2018] ECLI:EU:C:2018:1000.

I do not want to speculate, as some scholars suggest,[299] that the FCC motivation was to simply get rid of *Weiss* because it did not like the outcome. Giving the FCC the benefit of the doubt, it is possible that the said resistance wanted to achieve a more robust commitment to the rule of law, better and more dogmatically sound interpretative methods by the CJEU, and more transparency when it comes to the economic consequences of fiscal decisions. As Dieter Grimm argued, the CJEU did not hold onto its part of the bargaining: it 'refrained from conducting effective oversight of the ECB and enabled the ECB to freely determine the extent and scope of its mandate'.[300] The FCC, arguably, wanted to remedy this inadequacy.[301]

Once again, in the light of civil disobedience, the decision effectively prompted a myriad of lively and contradictory academic discussions[302] about what a public disobedient act ought to do. However, contrary to what it hoped to achieve, it did not find wider public support, leaving aside the Polish reaction,[303] to what we will come shortly hereafter. Mattias Wendel discernibly argued that the *PSPP* decision claimed ultra vires where there is none.[304] 'It may be a poor performance, an unlawful performance at most, but certainly not an ultra vires act.'[305]

299 Šadl (n 297).

300 Grimm (n 286) 948.

301 Giovanni di Lorenzo and Heinrich Wefing, 'Andreas Voßkuhle: 'Erfolg ist eher kalt" *Die Zeit* (Hamburg, 13 May 2020) <https://www.zeit.de/2020/21/andreas-vosskuhle-ezb-anleihenkaeufe-corona-krise> accessed 24 February 2023.

302 Karsten Schneider, 'Gauging "Ultra-Vires": The Good Parts' (2020) 21 German Law Journal 968; Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979; Grimm (n 286); Mark Dawson and Ana Bobić, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court' (2020) 57 Common Market Law Review 1953; Franz C Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020' (2020) 21 German Law Journal 1116.

303 Stanisław Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' (2020) 21 German Law Journal 1104, 1105.

304 Franz C Mayer, 'Auf dem Weg zum Richterfaustrecht?' (*Verfassungsblog*, 7 May 2020) <https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/> accessed 24 February 2023; Ingolf Pernice, 'Machtspruch aus Karlsruhe: „Nicht verhältnismäßig? – Nicht verbindlich? – Nicht zu fassen…"' (2020) 12 Europäische Zeitschrift für Wirtschaftsrecht 508; Martin Nettesheim, 'Das PSPP-Urteil Des BVerfG – Ein Angriff auf die EU?' [2020] Neue Juristische Wochenschrift 1631; Heiko Sauer, 'Substantive EU Law Review Beyond the Veil of Democracy' (2020) 16 EU Law Live 2; Daniel Sarmiento, 'Requiem for Judicial Dialogue' (2020) 16 EU Law Live 9.

305 Wendel (n 302) 990.

The fierce legal discussions and reasonable disagreements among the German and European lawyers precisely indicate this: there is disagreement on the appropriate *interpretation*, but no consensus that the CJEU's *Weiss* decision went unambiguously too far. While the rationale to prevent the abuse of power by the CJEU can be normatively defended, the various reactions indicate that the *Weiss* decision is academically disputable at best.

Moreover, what was intended to be justified institutional civil disobedience against the CJEU turned into a discussion about the disobedient act itself: questioning the rationale and appropriateness of the respective *PSPP* decision.[306] The general reception of the *PSPP* decision was not positive, with an awareness of the underlying risk that the other apex courts, perhaps less self-constrained and not acting bona fide,[307] could quickly follow in the footsteps of the FCC. This general attitude culminated in the decision of the Commission to issue infringement proceedings against Germany, which was essentially resolved with the intervention of the German government pledging to respect the principle of primacy and stating that it would seek to do everything in its power to prevent its own national constitutional court from examining the legality of the acts of the EU institutions in the future.[308]

The described disobedience was not an advancement by any measure. While it potentially damaged the legitimacy of the FCC, it did not significantly change the architectural structure of the Eurosystem in general, or establish asset purchase programmes specifically. The German Central Bank continues to participate in the challenged programme, and the purchase of the PSPP has only increased.[309] Moreover, the unconventional practices of the ECB – non-standard monetary policy measures – have even accelerated with the introduction of the additional pandemic recovery new PEPP programme. In retrospect, the challenge of the *PSPP* by the FCC did not alter the European monetary and fiscal architecture.

306 Sven Simon and Hannes Rathke, '"Simply Not Comprehensible." Why?' (2020) 21 German Law Journal 950.

307 Biernat (n 303).

308 European Commission, Closing of the infringement case, INFR(2021)2114, 2 December 2021, Judgment of the German Constitutional Court concerning the joined constitutional complaints 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16.

309 Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (recast) (ECB/2020/9) [2020] OJ L39/12.

Finally, it remains unlikely that the CJEU would change its way of legal argumentation as a result of the *PSPP* decision. After all, the CJEU has to accommodate 27 legal cultures, which are considerably diverse, and the CJEU's European route through these legal traditions would always upset some national conventions.

To sum up, the described institutional civil disobedience was not entirely illegal, considering that it was still 'a disobedience', and not an act in accordance with national and supranational principles and rules. Yet, it did not resonate among the other institutions in the Union and the Member States in a way that would facilitate the desired change. The avalanche of critique has proved, domestically as well as internationally, that the matter is not yet ready to be remedied in the way the FCC suggested. Or in the words of the architect of the respective decision, 'the success is rather cold'.[310] Finally, the wide public critique could also partially explain the rather cautious and restrained recent decision of the FCC on the legality of the EU Recovery Package, the so-called Next Generation EU, which authorizes the European Commission to borrow up to EUR 750 billion on capital markets on behalf of the European Union. In what could be yet another ultra vires decision, the FCC finally rejected the attempt to challenge the ratified decision[311] via constitutional complaint, arguing that it violates the principle of democracy – the right to democratic self-determination – because it arguably manifestly exceeds the integration agenda and thereby the budgetary responsibilities of the German Parliament (the Bundestag).[312]

The last and the most radical disobedient decision we will examine comes from Poland and concerns the autonomy of the Polish judicial 'reform' and the lack of European competences. Since 2015, the Polish legislature has been gradually introducing several structural 'reforms' to the judicial system. In 2017, it most notably enacted a disciplinary chamber as an additional court chamber at the Supreme Court, which was supposed to improve and control the judiciary. In fact, the chamber served the govern-

310 di Lorenzo and Wefing (n 301).

311 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433I/23.

312 BVerfG, 2 BvR 547/2 *NGEU* 6 December 2022.

ment by holding in line and subduing the judges who refused to follow the expectations and instructions of the ruling party.[313]

The reform was heavily criticized nationally and internationally, despite the fierce political campaign by the Polish government to demonstrate its legality and legitimacy: namely, disconnecting the judicial system and its members from their communist past,[314] and arguing that judicial reform falls within the exclusive competences of the Polish state, where the Union does not have anything to say.[315] Yet, the existence of the disciplinary chamber was challenged before several national and international courts. First, the Polish Supreme Court (notably a different chamber) declared that the disciplinary chamber is neither a court in the EU sense nor is it national law.[316]

When concerned with the matter, the ECtHR came to the same result, stating that the disciplinary chamber is not a tribunal established by law within the meaning of the ECHR.[317] Finally, the CJEU declared that the disciplinary chamber violates the principle of an independent judiciary guaranteed under EU law.[318] The matter was, one would assume, thereby legally settled.

Notwithstanding, the government did not want to acquiesce to the outcome. Instead, it turned to the 'packed'[319] Constitutional Tribunal to try

313 Wojciech Sadurski, 'The Disciplinary Chamber May Go – but the Rotten System will Stay' (*Verfassungsblog*, 11 August 2021) <https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/> accessed 24 February 2023.

314 Anna Wójcik, 'Keeping the Past and the Present Apart' (*Verfassungsblog*, 26 April 2022) <https://verfassungsblog.de/keeping-the-past-and-the-present-apart/> accessed 24 February 2023. See also Mateusz Morawiecki, 'Prime Minister Mateusz Morawiecki: Why My Government Is Reforming Poland's Judiciary' *Washington Examiner* (13 December 2017) <https://washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary> accessed 24 February 2023: 'All year, we have struggled with the widespread misunderstanding of our plans to reform Poland's deeply flawed judicial structure.'

315 Biernat (n 303).

316 Polish Sąd Najwyższy, Case III PO 7/18, 5 December 2019, paras 78, 79.

317 *Reczkowicz v Poland* App no. 43447/19 (ECtHR, 22 November 2021).

318 Case C-791/19 *European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:596.

319 The Polish Constitutional Tribunal was 'packed' because the judges were nominated under the law which was declared unconstitutional and in violation of the principle of judicial independence and the rule of law. See also Tomasz Tadeusz Koncewicz, '"Court-packing" in Warsaw: The Plot Thickens' (*Verfassungsblog*, 18 December 2015) <https://verfassungsblog.de/court-packing-in-warsaw-the-plot-thickens/> accessed 24 February 2023.

to achieve its political aim via the judiciary. No one other than the Polish Prime Minister asked the Polish Constitutional Tribunal to assess the constitutionality of the CJEU's judgement. Although the Polish Constitutional Tribunal had ruled in 2010 that the Lisbon Treaty in general complies with the Polish Constitution,[320] it took a different road in the respective decision. It found that the CJEU's interpretation of Article 19(1) TEU as a guarantee of the independence of (national) judges is non-compliant with the Polish Constitution.[321] Moreover, the CJEU's request concerning the independence of the national judiciary fell outside the scope of the CJEU's conferred competences and thus effectively constituted an ultra vires decision.

The cited disobedient decision was clearly against the well-established rules and principles on the level of the Union, as well as in contrast to the previous Polish case law, as was explained by numerous Polish scholars and judges immediately after the Tribunal decision.[322] A national apex court does not have the competence to declare a particular interpretation of the Treaties by the CJEU as unconstitutional.[323] In that way, one can look at it as an example of institutionalized civil disobedience comparable to the other examples previously addressed. However, there are several differences. Whereas the German *PSPP* bet on the intellectual sophistication of more than 100 pages and its renown in the legal sphere, the Polish Constitutional Tribunal did not even bother to try to persuade with serious arguments. After issuing the tenor in 2021 – the operative part of the judgement, we are still waiting for substantial justification, which will probably never see the light of day. Moreover, few (if any) are intellectually defending the said decision. In contrast to the range of various interpretations concerning the German *PSPP* decision, the Polish act of disobedience remains an isolated instance; not to mention the dubious legitimacy of the 'packed' court.[324]

320 Polish Trybunał Konstytucyjny, Case K 32/09 *Lisbon* 24 November 2010.

321 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.

322 Stanisław Biernat et al., 'Statement of Retired Judges of the Polish Constitutional Tribunal' (*Verfassungsblog*, 11 October 2021) <https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/> accessed 24 February 2023.

323 R Daniel Kelemen et al., 'National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order' (*Verfassungsblog*, 26 May 2020) <https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/> accessed 24 February 2023.

324 Koncewicz (n 319).

In response, the EU Commission started an infringement procedure against Poland, and the CJEU issued a daily penalty of 1 million EUR until Poland was to suspend the activities of the disciplinary chamber, which directly violated the ruling of the CJEU.[325] In 2022, the Polish authorities dissolved the chamber to finally unlock the frozen EU funds and to end the penalties levied by the CJEU.[326]

While it is too soon to determine conclusively all the consequences of the said decision, it is fair to say that the Constitutional Tribunal's resistance did not change the CJEU's firmly settled case law[327] on the required independence of the national judiciary, also a matter of the EU law under Article 19(1) TEU in relation to Article 2 TEU. Additionally, it did not shield the Polish judicial 'reform' from European expectations and demands. Accordingly, the cited judicial disobedience did not achieve noteworthy results when evaluated solely from the perspective of its actual consequences.

However, the argument that the EU has no competences to interfere with the national judiciary of its Member States under articles 19(1) and 2 TEU, which (interestingly) the Polish Constitutional Tribunal never explicitly made, points to a possible avenue to be explored further.

While it might be normatively desirable, politically necessary, and while it was already quite firmly established in several recent decisions,[328] this argument requires a considerable amount of judicial creativity and activism. The resistance of the Polish Constitutional Tribunal could be, in that light, at least intelligible. However, the Polish Constitutional Tribunal did not engage in dialogue with the CJEU via preliminary reference proceedings, disregarding the discursive element of institutional civil disobedience. Nor did it try to persuade with moral and legal arguments that the case law of the CJEU went too far and has to be revised. Finally, the circumstances of the case were just too ambiguous. The decision was exploited by the Polish government to achieve their own political aims, and the argument

325 Case C-204/21 R *European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:878.

326 Pawel Marcisz, 'A Chamber of Certain Liability' (*Verfassungsblog*, 31 October 2022) <https://verfassungsblog.de/a-chamber-of-certain-liability/> accessed 24 February 2023.

327 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (*ASJP*) [2018] ECLI:EU:C:2018:117; Case C-896/19 *Repubblika v Il-Prim Ministru* (*Repubblika*) [2021] ECLI:EU:C:2021:311.

328 Case C-64/16 *ASJP* [2018] ECLI:EU:C:2018:117; Sébastien Platon and Laurent Pech, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) 55 Common Market Law Review 1827.

of ultra vires was overshadowed by actual 'legal realism', the fact that the Polish Constitutional Tribunal wanted to prevent the guarantee of judicial independence. Seen all together, the circumstances rendered this act of institutional civil disobedience fruitless.

8.2 Identity Claims as Constitutional Conscientious Objection – Asking for Exemption

The second cluster of identity claims resembles the structure of a conscientious objection. A Member State is not trying to change the Union and its legal norms and political institutions, but only wants to be exempt from a norm which potentially conflicts with the Member State's constitutional essentials or its national constitutional identity. As we shall see in the following, these objections are not always successful, depending on the values they are trying to protect and the potential consequences the respective exception may have for the Union and for the other Member States.

Considering the claims of national constitutional identity as 'constitutional conscientious objection', the research identifies which claims were successful, and it distinguishes the underlying rationales that prompted the CJEU to allow and tolerate an exception from the unified application of EU law. The most established objections concern the idiosyncrasies of national languages, and other successful objections refer to specific expressions of common constitutional principles. Lastly, the CJEU frequently rejects objections which would concurrently lead to discrimination. The following three cases from Ireland, Lithuania and Latvia aim to protect and promote their national languages against European fundamental freedoms, which demanded the liberalization of national rules.

In 1998, the CJEU accepted the Irish claim to impose an obligation on lecturers in public vocational education schools to have a certain knowledge of the Irish language. However, that might infringe the free movement of workers under EU law. The CJEU accepted the objection while acknowledging that the Irish government actively promoted the use of Irish 'as a means of expressing national identity and culture'.[329]

The CJEU similarly accepted the Lithuanian claim in 2011 that the national authorities can demand to enter a person's surname and forenames

329 Case C-379/87 *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* (*Groener*) [1989] ECLI:EU:C:1989:599, para 18.

on the certificates of civil status 'only in a form which complies with the rules governing the spelling of the official national language'.[330]

Moreover, in a recent decision in 2022, the CJEU similarly accepted the claim of Latvia to disregard the European freedom of establishment due to its national rules which oblige 'higher education institutions to provide teaching solely in the official language of that Member State, so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued'.[331]

Additional national objections, articulated as claims of national constitutional identity and accepted by the CJEU as legitimate exceptions from the unitary application of EU law, concern specific expressions of common constitutional principles. Cases such as *Omega*, *Sayn-Wittgenstein* and *Taricco II* are the three examples in point.

In *Omega* the CJEU accepted the German claim that the level of protection of human dignity, as it is understood in Germany with its high degree of sensitivity due to historical injustices, must outlaw the laser game in which the objective of the game is 'to fire on human targets' and thus 'play at killing people',[332] although this would limit the freedom to provide services and is accepted in other Member States.

Similarly, the CJEU accepted the Austrian claim in *Sayn-Wittgenstein*, where it tolerated the prohibition of nobility titles, despite the said objection restricting freedom of movement. The CJEU acknowledged the said prohibition of nobility in the context of Austrian constitutional history, accepting that it constitutes 'an element of national identity'.[333]

Finally, in the *Taricco II* decision, the CJEU eventually accepted the objection of the Italian Constitutional Court that it could not retroactively change the statute of limitations for criminal proceedings affecting the financial interests of the Union, as initially required by the CJEU, because that would violate the principle of legality in Italy: namely, that all offences and penalties must be defined by law beforehand. Contrary to other juris-

330 Case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others* (*Runevič-Vardyn*) [2011] ECLI:EU:C:2011:291, para 94.

331 Case C-391/20 *Proceedings brought by Boriss Cilevičs and Others* (*Cilevičs*) [2022] ECLI:EU:C:2022:638, para 87.

332 Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (*Omega*) [2004] ECLI:EU:C:2004:614, para 39.

333 Case C-208/09 *Sayn-Wittgenstein* [2010] ECLI:EU:C:2010:806, para 80.

dictions, Italian legal scholarship idiosyncratically understands the statute of limitations as a matter of material rather than procedural law, which qualifies it under the said principle of legality.[334]

In all three cited cases, the national objections aimed to protect a specific national expression of shared fundamental rights: human dignity, the principle of equality and the principle of legality. While the CJEU tolerated that EU law was not unified across all Member States and extended the respective exceptions, it did so only as long as these exceptions did not directly and substantially undermine the common European principles. In that way the respective judicial constitutional objections resemble a kind of constitutional conscientious objection.

At this point it is important to note that in contrast to what these cases might suggest, the Member States and their courts are not always successful with their objections. In the following instances the CJEU ignored or rejected claims of national constitutional identity, arguing for exception from EU law due to the requirements of their constitutions: the *Landtová*,[335] *Egenberger*[336] and *Coman*[337] decisions all explicate constitutional conscientious objections, which the CJEU considered but eventually rejected.

In the first case, as more thoroughly explained in Chapter 3, Section 3.8.2, the CJEU rejected a claim for special treatment of Czech citizens vis-à-vis other EU citizens, despite their unique historical situation.[338] According to the rules of dissolution of the previous common state of Czechoslovakia, some Czech citizens were receiving considerably lower pensions from the Slovak Republic because they were employed by companies that had their official seat in the Slovak Republic at the time of dissolution,

334 Case C-42/17 *Criminal proceedings against M.A.S. and M.B* (*Taricco II*) [2017] ECLI:EU:C:2017:936.

335 Case C-399/09 *Marie Landtová v Česká správa socialního zabezpečení* (*Landtová*) [2011] ECLI:EU:C:2011:415.

336 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (*Egenberger*) [2018] ECLI:EU:C:2018:257.

337 Case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* (*Coman*) [2018] ECLI:EU:C:2018:385, para 46.

338 Ladislav Vyhnánek, 'The Eternity Clause in the Czech Constitution as Limit to European Integration' (2015) 9 Vienna Journal on International Constitutional Law 240.

although the workers might never actually live there.[339] To remedy that, the Czech Republic provided pension supplements that did not comply with the EU principle of non-discrimination. However, the Czech Supreme Court rejected the CJEU's ruling and declared the *Landtová* decision ultra vires.[340]

The second decision is no less explosive, concerning the appropriate balance between the prohibition of discrimination as required (also) by EU law, and the considerable independence and self-determination of the churches as constitutionally guaranteed in Germany since 1919. The CJEU rejected the claim that the German courts can conduct only a limited review of employment matters by the churches as employees.[341] The saga is not yet fully completed, and we are still awaiting the final reaction by the FCC.[342]

In the *Coman* decision, the Romanian authorities refused to legally recognize the marriage of a gay couple who had married in Belgium and subsequently moved to Romania for work. Because Romanian constitutional law does not recognize marriage between two persons of the same sex, the legal recognition of such marriage concluded in any other Member State, as required under EU law due to the freedom of movement, would in the eyes of Romanian institutions contradict the said national constitutional commitments.[343] The CJEU once again refused this objection and stated that 'an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not

339 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10 European Constitutional Law Review 54.

340 Czech Ústavní Soud, Case Pl. ÚS 5/12 *Slovak Pensions* 31 January 2012.

341 Martijn van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' (2022) 1 European Law Open 89.

342 The German churches have recently, in November 2022, changed their labour law. See Gitta Kharraz, Britta Schultejans and Angelika Resenhoeft, 'Neues kirchliches Arbeitsrecht für mehr Diversität' *beck-aktuell heute im recht* (23 November 2022) <https://rsw.beck.de/aktuell/daily/meldung/detail/neues-kirchliches-arbeitsrecht---der-teufel-steckt-im-detail> accessed 24 February 2023.
See also Hans Michael Heinig, 'Why Egenberger Could Be Next' (*Verfassungsblog*, 19 May 2020) <https://verfassungsblog.de/why-egenberger-could-be-next/> accessed 24 February 2023.

343 Marjan Kos, 'The Relevance of National Identity in European Union Law and Its Potential for Instrumentalisation' (2019) LXXIX Zbornik znanstvenih razprav 53.

undermine the national identity or pose a threat to the public policy of the Member State concerned'.[344]

While all cited cases have their own specificities and context, one common thread connects them: namely, the unwillingness of the CJEU to compromise on the principle of non-discrimination, despite the importance, and obligation, to respect national constitutional identities under EU law. In all three cases, if one tolerated national constitutional objections, the respective exceptions would directly cause discrimination. The CJEU was not willing to compromise on that principle, even if the national apex courts refused to accept these outcomes in the light of constitutional conscientious objection.

344 Case C-673/16 *Coman* [2018] ECLI:EU:C:2018:385, para 46.

9 A Reconstructive Account of National Constitutional Identity

This last section highlights the basic contours of the undertaken structural comparison, aiming to provide reconstructive elements for the evaluation of identity claims in the EU. First, it recognizes the importance of identification of motivation for action to define the type of resistance – serving either the interest of one individual Member State or the collective (9.1). Moreover, it differentiates between the undermining and constructive types of resistance (9.2). Additionally, it distinguishes resistance which is discursive or articulated in absolute terms, unwilling to compromise (9.3). Finally, it emphasizes the importance of underlying rationales, or the justificatory reasons for resistance as the decisive element in evaluating the legitimacy of identity claims (9.4).

9.1 The Motivation for Action – Individual v Collective Interests

Knowing *the kind* of resistance can provide guidance in answering the question how to respond appropriately. When a Member State raises the claim of national constitutional identity against the application of EU law, that alone does not determine the matter. First, one should examine what kind of motivation stands behind the respective claim of identity. Does a Member State argue identity to obtain an exception for itself, or does it oppose a norm in general, stating its incompatibility with European and national shared constitutional principles more generally?

After determining the goal and motivation of the claim of national constitutional identity, one can focus appropriately on the relevant subject of review. If a Member State raises 'constitutional conscientious objections', the focus will lie on the respective national constitution. One will have to examine whether the respective constitution genuinely consists of the subject matter claimed to be about national constitutional identity. Is there a previous case law which can support such an interpretation by the national apex court?[345] Are there any circumstances which shed serious

345 Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457.

doubt as to the good faith of the claim, suggesting that the principle of sincere cooperation has not been observed?[346] How would the respective exemption impact on other Member States, the effectiveness and unity of EU law, and the fundamental rights of EU citizens? Would the exemption be proportionate?[347]

By contrast, the motivation for action may aim to change the EU as such, objecting to the respective norm, or the CJEU's interpretation of EU law, not just for itself, but for all Member States. An act ultra vires – the CJEU acting manifestly beyond the conferred competences – concerns all Member States, even if it is only one which raises the objection.[348] It does not point to national constitutional idiosyncrasies, but to the European principles of justice. It is an objection in the light of Dworkin's account of civil disobedience, believing and arguing that the law, properly interpreted, requires something else.[349] In these circumstances one must evaluate the justificatory reasons for objection, and investigate whether, and to what degree, the other Member States also share this view or elements of it.

9.2 Constructive and Undermining Consequences of Resistance – Time will Judge

Resistance will always create trouble, disturb the legal tranquillity and create tensions. As Isaiah Berlin put it well, when explaining that David Hume was right that

> 'stability in society is important, so that it may be better at times to suffer bad laws than to alter these laws so frequently as to undermine the authorities of laws and institutions as such, which may end by causing greater misery than the bad laws and institutions themselves. But peace and stability–still less laws, customs, rules–are not an ultimate value, as

346 Barbara Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018).

347 Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 German Law Journal 917, 937.

348 Bobić (n 83) 75.

349 Dworkin (n 69) 211.

> are truth, or love, or friendship, or freedom, or art, or justice, or equality, or life itself.'[350]

However, one ought not to forget that laws are being violated all the time. Yet, democracies are not destroyed by mere law-breaking. On the contrary, every legal system accepts and anticipates law-breaking as part of its ordinary existence. If ordinary violations of law do not destroy and not even endanger a democratic political system, the occasional toleration of conscientious objection and civil disobedience pose an even lesser threat. In fact, both commence their claims by acknowledging the existence and validity of the legal system before justifying their claim for deviation. Furthermore, the European legal system by now has become almost a synonym for individually tailored exceptions, reservations and opt-outs. Daniel Thym pointed out that European supranational integration should more aptly be described as supranational *differentiation*.[351] The cherry pickings and examples of enhanced cooperation are to be found everywhere, in the field of justice and home affairs, defence policy, monetary union, Schengen rules, foreign affairs, European public prosecution, etc. Integration is happening at great speed and the general mechanism for enhanced cooperation is a European reality by design, which should prevent us from thinking too rigidly about individual claims for exceptions and objections to EU law.[352]

Despite the reasonable tolerance towards institutional and constitutional objections, it is important to differentiate between constructive and undermining objections. Keeping in mind that the supranational law of the European Union also fulfils a stabilizing function, accordingly the number of acts of disobedience must be kept within limits to prevent the unravelling of its basic structure.[353] Furthermore, and as discussed at length in Chapter 3, claims of national constitutional identity, which aim to undermine the common European project and contradict common and shared constitutional principles and values, must be rejected. When the Member State's

350 Isaiah Berlin, 'A Matter of Life' in Clara Urquhart (ed.), *A Matter of Life* (Jonathan Cape 1963) 39.

351 Daniel Thym, 'Supranational Differentiation and Enhanced Cooperation' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018).

352 Marjan Kos, 'Constitutional Diversity and Differentiation in the EU: What Role for National Constitutional Demands under EU Law?' in Maja Sahadžić et al. (eds), *Legal Mechanisms of Divergence and Convergence: Accommodating Diversity in Multilevel Constitutional Orders* (Routledge 2023) (forthcoming).

353 Føllesdal (n 37) 346.

conduct endangers the principle of democracy,[354] the principle of judicial independence,[355] prohibition of discrimination,[356] or any other essential value enshrined in Article 2 TEU,[357] one should no longer tolerate the resistance, even in the name of national constitutional identity.

However, distinguishing is not an easy task in this context either. One cannot always tell whether tolerating a particular judicial resistance may stabilize the multilevel constitutional orders, or rather if it may open a Pandora's box of idiosyncrasies and eventually lead to the dissolution and disintegration of the Union. The *Solange I* decision was heavily disputed at the time of its delivery, equipped with three dissenting opinions and accompanied by heavy critiques from European and German scholars providing ample opportunity for (public) debate. Interestingly, the CJEU never openly accepted the rejection of the principle of primacy of EU law in *Solange I*. Yet, in retrospect, the Union progressed because of the decision not in spite of it, a development which was impossible to predict at the time of the respective resistance.

9.3 Discursive or Absolute Resistance

Resistance, especially in the light of institutionalized civil disobedience, must be discursive rather than articulated in absolute terms. Civil disobedience always appeals to the public: first, aiming to disturb the public discourse just enough to get the necessary attention; and second, to convince the public to support, or at least tolerate their cause. Civil disobedience seeks empathy and persuades with the arguments of what is morally and legally right.

In European constitutional law, due to the discursive nature of disobedience, the preliminary reference procedure according to article 267 TFEU plays an essential role in institutional civil disobedience. Via identity arguments, the preliminary reference procedure is the framework where the national apex courts highlight their national sensibilities, objections and

354 Case C-896/19 *Repubblika* [2021] ECLI:EU:C:2021:311.
355 Case C-791/19 *Commission v Republic of Poland* [2021] ECLI:EU:C:2021:596.
356 Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257.
357 Luke D Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford University Press 2023) (forthcoming).

concerns.[358] It provides publicity and a forum to advance legal arguments from a national perspective. In the German *Honeywell* decision, it was held that the national apex courts could not declare EU law ultra vires before first submitting the matter to the CJEU via a preliminary reference procedure, in which they would raise their arguments and concerns.[359]

As one former judge at the CJEU wrote, 'the judges are never impressed if national courts even of the highest level threaten to ignore their obligations under the Treaty. But of course, they are highly interested in their opinions, and they are always ready to be convinced by better arguments.'[360] Or in the words of White, disobedient institutions must show 'a readiness to submit actions to public approval'.[361]

In trying to persuade others of the importance of one's cause, a disobedient agent has several (potential) addressees. As mentioned, the most obvious interlocutor is the CJEU via a preliminary reference procedure. Refusing to engage in dialogue already at this stage openly demonstrates defiance without any readiness for a compromise. As cited above, the last Polish Constitutional Court's *K 3/21* decision exhibits this kind of absolute resistance.[362] By contrast, in *Tarico*, the Italian Constitutional Court adhered to the established rules of dialogue and even presented the issue to the CJEU twice, before it was able to persuade them and obtain an exception from the CJEU.[363] The second group of addressees concerns European and domestic legal scholarship; whereas the national apex courts have the power to speak for all citizens in a respective Member State – constitutional courts have an exclusive power to interpret constitutions. In this context the legal scholarship often compensates this limited scope of review by critically revealing the context of the respective disobedient decision, by evaluating the given arguments, and in that way representing a litmus test of how genuine and legitimate the respective objection is.[364] For example, the arguments which were put forward in *Ajos, PSPP* and *K 3/21* all failed to persuade domestic and international scholars of their cause.

358 Guastaferro (n 346).
359 BVerfG, 2 BvR 2661/06 *Honeywell* 6 July 2010.
360 Everling (n 278) 15.
361 White (n 20) 646.
362 Polish Trybunał Konstytucyjny, Case K 3/21 *Unconstitutionality of EU Law* 7 October 2021.
363 Case C-42/17 *Taricco II* [2017] ECLI:EU:C:2017:936.
364 Habermas (n 268).

9.4 Normative Justificatory Reasons for Action – The Rationale

Perhaps the most important element of institutional civil disobedience and constitutional conscientious objection is, not surprisingly, the underlying rationale. The described structural comparison teaches us the importance of a distinctive assessment of any individual case. Understanding conscientious objection and civil disobedience does not offer a simple template for appropriately resolving all the instances of judicial resistance in the EU. Rather it demonstrates that the said conceptions remain outside the positively defined legal norms with a reason – they are exceptions. As such they require individual case-by-case assessments.

When a disobedient action or conscientious objection directly causes the discrimination of other individuals, the chances of success are close to zero. When it goes directly against the common and foundational values of social liberal democracies, undermining society's and the polity's very fabric, the chances of success are small. White argued similarly, that the rule-breaking actions of agents of disobedience in a transnational polity must be irreducible to the pursuit of local interests.[365] Henceforth, when the argument of national constitutional identity is applied solely to serve your own interests in a self-absorbed manner – so-called abusive identity claims[366] – one must not tolerate them. In the words of Raz, conscientious objection is 'moral objection, not an objection in the name of one's interest in preserving one's basic lifestyle and one's fundamental plans for the future'.[367]

On the contrary, matters of national language,[368] national security[369] and specific expressions and interpretations of shared and common fundamental rights enjoy a higher level of legitimacy and thus potential toleration.[370] Moreover, when identity claims are embedded in the basic principles of

365 White (n 20) 642.

366 Julian Scholtes, 'Abusing Constitutional Identity' (2021) 22 German Law Journal 534.

367 Raz (n 56) 277.

368 Case C-379/87 *Groener* [1989] ECLI:EU:C:1989:599; Case C-391/09 *Runevič-Vardyn* [2011] ECLI:EU:C:2011:291; Case C-391/20 *Cilevičs* [2022] ECLI:EU:C:2022:638.

369 Joined Cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net and Others v Premier ministre and Others* (*La Quadrature*) [2020] ECLI:EU:C:2020:791, paras 89, 135.

370 Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614; BVerfG, 2 BvR 2735/14 EAW 15 December 2015.

justice, exhibiting manifest deficiencies of the European legal order, arguing for a general change, and procuring a wide acceptance from the other apex courts as well as from domestic and international scholarship, the legitimacy of such claims is high; especially since the European project does not merely want to generate wealth, but ought to be understood as a new supranational way of organizing political power, based on human dignity and individual rights.[371]

Understanding and evaluating identity claims as judicial disobedience in the light of conscientious objection and civil disobedience, the underlying rationales play a decisive role. Suppose the normative justificatory reasons comply with and reflect the common and shared principles of social liberal constitutionalism, and the limitation of other rights and interests in the respective case proves to be proportionate. In that case, one may occasionally tolerate these identity claims. Rawls stated similarly that while disobedience is admittedly contrary to the law, it nevertheless expresses fidelity to the law and appeals to the fundamental political principles of a democratic regime.[372] Or, as White put it, disobedience must express its 'underlying commitment to a genuine constitutional order'.[373]

371 Isiksel (n 39) 576.
372 Rawls (n 68) 338.
373 White (n 20) 646.

10 Conclusion

This research introduced a structural comparison between the claims of national constitutional identity in the EU on the one hand, and civil disobedience and conscientious objection on the other. It aimed to look for potential structural similarities and apply them to European constitutional law: specifically how to improve understanding and evaluation of claims of national constitutional identity.

Between identity claims and conscientious objection and civil disobedience, as this chapter has revealed, there exist several structural parallels which can offer guidance in evaluating identity claims. The respective unconventional, comparative undertaking has, as such, proven productive and insightful. However, the very nature of resistance, like understanding constitutional pluralism in the EU,[374] avoids and escapes hierarchical and strictly defined rules of application. Accordingly, one can and should not expect to find the magic formula which would straightforwardly provide the means to assess and evaluate every instance of national judicial resistance vis-à-vis the CJEU. In and of itself, that is not a surprise; the law rarely works these kinds of miracles.

Despite the difficulty of firmly determining the conditions of legitimate conscientious objection and civil disobedience, the structural comparison allows us to draw several preliminary conclusions. First, it was helpful in determining what kind of elements one should observe closely. Second, we were able to categorize them according to the type of resistance; according to different underlying rationales; by looking at whether the resistance engaged in a discourse; and with a view to what were the potential consequences of resistance for the other individuals and the EU legal order in general. Third, the 'transplants' which were identified through a detailed and serious engagement with different theoretical conceptions of civil disobedience and conscientious objection and constitutional practice have provided us with guidance to be able to ask the right kind of questions and to be conscious of different aspects of justification and effects of resistance.

374 Miguel Poiares Maduro, 'Three CLaims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

Accordingly, one can regard identity claims in the EU as 'institutional civil disobedience' and 'constitutional conscientious objection'.

Finally, and before concluding this chapter, one caveat is in order. The present research should be understood as the first step to a better and more nuanced understanding of identity claims. Necessary further research, carrying out a comprehensive analysis of *all* case law across the Member States and the Union, would be required to explore further, and more thoroughly, the comparative yardsticks outlined in this contribution.