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National identity and constitutional adjudication in the
European Union*

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Who speaks on our behalf? National identity and constitutional adjudication in the European Union

Quem fala por nós? Identidade nacional e jurisprudência constitucional na União Europeia

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RESUMO: Com a crescente influência do Tribunal de Justiça da União Europeia ("TJUE") em aspetos tradicionalmente considerados parte essencial da soberania dos Estados-Membros, os tribunais constitucionais nacionais têm invocado cada vez mais a identidade nacional para escapar ao primado do Direito da UE. Esta tensão é particularmente notória relativamente às competências fundamentais do Estado, que são intrínsecas à identidade nacional e à legitimidade constitucional dos Estados-Membros.

Este artigo explora como a identidade nacional é utilizada pelos tribunais constitucionais nacionais para resistir ao primado do Direito da UE. Tomamos a experiência portuguesa como ponto de partida, examinando o voto de vencido da juíza Joana Fernandes Costa no último acórdão do Tribunal Constitucional português sobre a retenção de dados, no qual ela levanta preocupações sobre até que ponto a jurisprudência do TJUE sobre a matéria permite que o direito da UE se sobreponha a questões fundamentais de segurança nacional, tais como garantir a segurança e a paz.

O principal argumento levantado é que, embora as reivindicações de identidade nacional possam servir de base para os tribunais nacionais resistirem ao primado do Direito da UE, estas também devem levar em consideração o acordo que os povos da Europa alcançaram ao aderir à UE.

PALAVRAS-CHAVE: Identidade Nacional; Retenção de Dados; Segurança Nacional; Tribunal Constitucional Português; Tribunal de Justiça da União Europeia.

ABSTRACT: With the growing influence of the Court of Justice of the European Union ("CJEU") in sectors traditionally seen as part of the core of Member States' sovereignty, national constitutional courts have increasingly invoked national identity to justify deviations from the primacy of EU law. This tension is particularly pronounced in matters tied to the fundamental competencies of the state which are intrinsic to national identity and the constitutional legitimacy of member states.

This paper explores how national identity is deployed by national constitutional courts to resist the primacy of EU law. We take the Portuguese experience as our starting point, examining the dissenting opinion of Justice Joana Fernandes Costa in the latest ruling of the Portuguese Constitutional Court on data retention, in which she raises concerns over the extent to which the CJEU case-law on the matter that allows EU law to override national security core

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concerns, such as ensuring security and peace.

The main argument raised is that, while national identity claims could serve as a basis for national courts to resist the primacy of EU law, they must also take into consideration the agreement the peoples of Europe reached when joining the EU.

KEYWORDS: National Identity; Data Retention; National Security; Portuguese Constitutional Court; Court of Justice of the European Union.

Chapter 1 Introduction

The case-law of the Court of Justice of the European Union (“CJEU”) on data retention is seemingly developing as an existential threat to Member States. Justice Joana Fernandes Costa did not mince words in her dissenting opinion on the latest decision of the Portuguese Constitutional Court regarding data retention.³ She went so far as to call for resistance against the Luxembourg Court, accusing it of prioritizing privacy, data protection, and freedom of expression to such an extent that it undermines the bonds of solidarity holding national communities together and hampers states' ability to protect citizens from serious crime.⁴

Justice Costa contends that the CJEU erred in its *Tele2 Sverige* ruling when it declared that the general and indiscriminate preventive retention of data failed the proportionality test, as it was not strictly necessary given the availability of less intrusive measures, such as selective data retention.⁵ While the latter could theoretically achieve the same objectives of fighting terrorism and organised crime, it was deemed technically unfeasible, ineffective, and, more importantly, constitutionally unattainable, as it would inevitably lead to discriminatory practices against minorities.⁶

These criticisms stem from a fundamental flaw in the CJEU's case law on data retention. The Court made a mistake in *Digital Rights Ireland* and *Tele2 Sverige* when it subjected blanket retention of traffic and location data for nearly the entire European population to a proportionality analysis. Instead, it should have outright declared such

³ TRIBUNAL CONSTITUCIONAL DE PORTUGAL. *Acórdão n.º 800/2023* [online]. Lisbon: [s. n.], 2023. Available from: <<https://www.tribunalconstitucional.pt/tc/acordaos/20230800.html>>.

⁴ TRIBUNAL CONSTITUCIONAL DE PORTUGAL. *Declaração de voto de Joana Fernandes Costa ao Acórdão n.º 800/2023* [online]. Lisbon: [s. n.], 2023, paragr. 10. Available from: <<https://www.tribunalconstitucional.pt/tc/acordaos/20230800.html>>.

⁵ COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of the Court, Cases C-203/15 and C-698/15 (Tele2 Sverige)* [online]. Luxembourg: [s. n.], 2016, paragr. 107-111. Available from: <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CJ0203>>.

⁶ TRIBUNAL CONSTITUCIONAL DE PORTUGAL. *Declaração de voto de Joana Fernandes Costa ao Acórdão n.º 800/2023* [online]. Lisbon: [s. n.], 2023, paragr. 5. Available from: <<https://www.tribunalconstitucional.pt/tc/acordaos/20230800.html>>.

measures a violation of the essence of the fundamental right to privacy, as enshrined in Article 7 of the Charter of Fundamental Rights of the European Union (“Charter”).⁷ By conceding the abstract possibility of bulk data retention being lawful under certain conditions, the CJEU inadvertently paved the way for national constitutional courts to push back against the alternative idea of selective data retention.

However, Justice Costa's attack on the CJEU is misguided. General and indiscriminate data retention is simply unacceptable in the EU. It's also absurd to suggest that the very existence of Member States — their national security and cohesion — is threatened by the absence of such measures. One might wonder if Justice Costa believes Portugal wasn't truly a State before it adopted preventive data retention for the first time when transposing a European Directive in July 2008.

Justice Costa's stance is particularly intriguing on another level. Although she does not explicitly frame her dissent in terms of national identity, there's an underlying assumption that Member States might find leeway to deviate from the CJEU's case law when it undermines state functions and the ability to protect citizens.⁸ In other words, had the underlying factual framework been different, Justice Costa's arguments concerning the protection of national identity could have potentially triggered Article 8(4) of the Portuguese Constitution, which prohibits the application of EU law that affects fundamental principles of democratic rule of law.⁹

This dissenting vote brings to light the contentious issue of national identity, which the

⁷ In *La Quadrature du Net*, the Court declared that the confidentiality of traffic and location data is essential for the right to respect for private life. See COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of the Court, Cases C-511/18, C-512/18 and C-520/18 (La Quadrature du Net)* [online]. Luxembourg: [s. n.], 2020, paragr. 142. Available from: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0511>>. In *Tele2 Sverige*, the Court classified the interference with fundamental rights stemming from national legislation implementing the Data Retention Directive as “very far-reaching” and “particularly serious”, but it dismissed any breach of the essence of the right to privacy, arguing that the content of the communications was not stored. However, the CJEU contradictorily recognised that the retained data was a means of establishing a profile of the individuals concerned, which was information “no less sensitive, having regard to the right to privacy, than the actual content of communications”. See COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of the Court, Cases C-203/15 and C-698/15 (Tele2 Sverige)* [online]. Luxembourg: [s. n.], 2016, paragr. 99-101. Available from: <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CJ0203>>. The idea that the bulk storage of metadata is necessarily less intrusive than the acquisition of content was also rejected by the European Court of Human Rights in *Big Brother Watch*. See EUROPEAN COURT OF HUMAN RIGHTS. *Big Brother Watch and Others v. United Kingdom (Proc. 58170/13, 62322/14 and 24960/15)* [online]. Strasbourg: [s. n.], 2021, paragr. 363. Available from: <<https://hudoc.echr.coe.int/fre?i=001-210077>>.

⁸ Not too far away from what Article 4(2) of the Treaty of the European Union and the respect over national identity included therein seem to suggest.

⁹ TRIBUNAL CONSTITUCIONAL DE PORTUGAL. *Declaração de voto de Joana Fernandes Costa ao Acórdão n.º 800/2023* [online]. Lisbon: [s. n.], 2023, paragr. 10. Available from: <<https://www.tribunalconstitucional.pt/tc/acordaos/20230800.html>>.

EU is obliged to respect (Article 4 (2) of the Treaty of the European Union), and its application in the relationship between Member States and the EU. From the German Constitutional Court's ruling on the Lisbon Treaty¹⁰ to the recent Polish constitutional saga,¹¹ national identity has the potential to be (detrimentally) used as a constitutional escape clause to avoid compliance with EU law, thus undermining its enforcement law and the integration process at large. To what extent, then, can we view Justice Costa's reasoning from an identitarian perspective, and could the Portuguese Constitutional Court — along with other national constitutional jurisdictions — use national identity arguments to disregard the case law of the Court of Justice?

In order to bring clarity to this question, we will first explore how the attainment of peace and security are core elements for the legitimacy and authority of the state in the eyes of its nation. However, and in a second step, we will argue that these core purposes need to be balanced with others, such as national identity and the belief the national community has in its existence as a political body and its core values. As we shall argue, the pursuance of peace cannot interfere with the nation's evolving self-understanding, under penalty of being seen as illegitimate. Lastly, we shall explore how identitarian conflicts should be solved and the role (constitutional) courts ought to play in stabilizing and synthesizing the decisions taken by the sovereign.

Chapter 2 Peace and security as identity matters

The constitutional state derives its legitimacy and authority from the consent and belief of its reasonableness held by the nation it serves. This forms the bedrock upon which the constitutional state is built, materialised through the enactment of modern constitutions, rooted in the will of the constituent power.

However, this will of the nation to create a polity is not without purpose. It is aimed at fulfilling specific essential purposes, among which the attainment of peace and security is one of the first. These competencies are not mere facets of governance but are intrinsic to the identity of the nation as a political unity: where the constitutional state

¹⁰ BUNDESVERFASSUNGSGERICHT. *Urteil des Zweiten Senats (2 BvE 2/08)* [online]. Karlsruhe: [s. n.], 2009. Available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html>.

¹¹ TRYBUNAŁ KONSTYTUCYJNY. *Wyrok w imieniu Rzeczypospolitej Polskiej (K 3/21)* [online]. Warsaw: [s. n.], 2021. Available at: <<https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-tractatu-o-unii-europejskiej>>; COURT OF JUSTICE OF THE EUROPEAN UNION. *Judgment of the Court, Case C-204/21 (Commission v. Poland)* [online]. Luxembourg: [s. n.], 2023. Available at: <<https://curia.europa.eu/juris/document/document.jsf?text=&docid=274364&pageIndex=0&doclang=P T&mode=lst&dir=&occ=first&part=1&cid=10341691>>.

proves incapable of ensuring peace and security, it cannot claim legitimacy or the right to command obedience from its people, reverting back to a state of nature.

It then seems clear that the assurance of peace and security is not only an essential core competency of the constitutional state, but a fundamental prerequisite for the political existence of the nation and, thus, for its identity as a political entity. Erosions of the state's competencies in these domains threaten its very existence and legitimacy, as well as the political unity of the nation.

Section 2.1 The nation as the foundation of the Constitutional State

The concept of nationhood was historically peripheral until the late eighteenth century, since the feudal system prioritized personal relationships of fealty over geographical cohabitation, where territories and populations were subject to frequent shifts based on royal marriages, with legitimacy derived from divine authority rather than citizen consent.¹²

However, the emergence of the modern nation-state marked a significant departure from this *status quo*. In contrast to feudal monarchies, the modern nation-state relies on the voluntary acceptance of its citizens to legitimize its exercise of power. This meant the need for (i) clearly defined territorial boundaries within which sovereign powers could be asserted and (ii) the acceptance by a clearly defined citizenry of state authority in order to legitimise it.¹³ This is all the more evident with the enactment of modern constitutional texts, whose legitimacy, fundamental authority, and agency are not inherent, but based on the will of the political entity - the constituent power (*pouvoir constituant*) - that both establishes and stabilizes the normative validity of the Constitution.¹⁴

Historically, the notion of constituent power gained prominence in 17th and 18th century discussions on political legitimacy and collective prosperity, where "the people" and civil society appeared as autonomous political entities.¹⁵ Locke and Montesquieu

¹² ANDERSON, Benedict. *Imagined Communities: The Origins and Spread of Nationalism*. Revised Ed. London: Verso, 2006, p. 19-20. ISBN 9781844670864.

¹³ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

¹⁴ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 169-172. ISBN 9780198714965.

¹⁵ AGUIRRESAROBÉ, Asier H. Is national identity in crisis? An assessment of national imaginations in the early 2020s. *Studies in Ethnicity and Nationalism*. 2022, Vol. 22, n° 1, p. 17-20; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 103-115. ISBN 0203960890.

argued for legitimacy and rights deriving from the people rather than from divine authority or inherited office, laying the groundwork for nations to be perceived as individual entities capable of historical action and existence alongside other equally independent nations.¹⁶ Rousseau was another main figure who elevated the people as the constituent power to a central role in discussions of political legitimacy and national sovereignty, based on a vision of civic nationhood predicated on voluntary association and equality before political authority.¹⁷ These political people, distinct from ethnic or cultural affiliations, constituted the backbone of constitutional legitimacy, as exemplified by the French Revolution.¹⁸

Then, state citizens - and thus the ones from whom all political legitimacy derived from - were to be exclusively nationals, leading to a realignment in the criteria for citizenship, based on the national versus non-national dichotomy.¹⁹ Not only the concept of citizenship had to be realigned, but nationalism also required the reframing of political representation in order to legitimise any individual or entity accepted as a representative of the nation, contributing to the perceived authority of those it empowered to act on its behalf.²⁰ Nations were then seen as the masters of their own fate, asserting their self-determination through independent political power.²¹

It becomes clear, then, that constituent power serves as the ultimate source of authority within the state.²² It enables the populace to establish and redefine the institutional structures through which they are governed on their own sovereign terms, resisting

¹⁶ MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 1-16. ISBN 0198280475 ; NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

¹⁷ BENNER, Erica. Nationalism: Intellectual Origins. In: BREUILLY, John, *The Oxford Handbook of the History of Nationalism*. Oxford: Oxford University Press, 2013, p. 36-55.

¹⁸ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 172-175. ISBN 9780198714965.

¹⁹ CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 1-16. ISBN 0203960890 ; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 1-16. ISBN 0198280475.

²⁰ AGUIRRESAROBÉ, Asier H. Is national identity in crisis? An assessment of national imaginations in the early 2020s. *Studies in Ethnicity and Nationalism*. 2022, Vol. 22, n° 1, p. 17-20; NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

²¹ O'CONNELL, Judith. Politics and Processes of Nation-Building During and After Empire: A Review of the Irish Case through an Examination of School Textbooks. *Studies in Ethnicity and Nationalism*. 2018, Vol. 18, n° 2, p. 18-19; SMITH, Anthony D. *National Identity*. London: Penguin Books, 1991, p. 37-42. ISBN 0140125655; TÖNNIES, Ferdinand. *Community and Civil Society*. Cambridge: Cambridge University Press, 2001, p. 234. ISBN 0521561191 ; DURKHEIM, Émile. *The Elementary Forms of Religious Life*. Oxford: Oxford University Press, 2001, p. 317-318. ISBN 9780199540129.

²² LOUGHLIN, Martin. The Concept of Constituent Power. *European Journal of Political Theory*. 2014, Vol. 13, n° 2, p. 219.

forms of representation entrenched e.g. in the constitutional document.²³ A Constitution's legitimacy and validity thus stem from this unified and sovereign will of the people.²⁴

Section 2.2 Security as the core state function

But if the nation is the ultimate source of legitimacy and authority within the state, the question that remains is why would it need a state in the first place and what core purposes would it serve.

Jean Bodin, Thomas Hobbes, and Georg Wilhelm Friedrich Hegel have provided answers to that, with Hobbes being particularly important in this regard, as he reconstructed the political and legal system to prioritize the attainment of peace and security.²⁵

At the heart of Hobbes's conception lies the state of nature, devoid of political order where individuals grapple with existential needs, and pervasive insecurity and devoid of the protective structures of familial or tribal communities, where individuals are threatened by the competing desires and potential aggression of others. This state of insecurity engenders a perpetual state of conflict where the 'right to everything' (*ius ad omnia*), self-preservation and self-defence become the ultimate guiding principles for survival.²⁶

For Hobbes, rationality dictates that individuals seek to transcend this state by pursuing peace and security through reasoned means, meaning, by relinquishing their total *ius ad omnia* in favour of collective security, personal defence and self-preservation, through a social contract. This leads them to transfer this right to a single authority - the state - capable of enforcing universally binding measures to attain peace and security, as well as to forfeit their right to resist this authority.²⁷

The state, then, emerges from this foundational contract as the sovereign authority.

²³ LOUGHLIN, Martin. The Concept of Constituent Power. *European Journal of Political Theory*. 2014, Vol. 13, n° 2, p. 234.

²⁴ NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

²⁵ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 59-63. ISBN 9780198714965 ; NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 137-140.

²⁶ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 59-63. ISBN 9780198714965.

²⁷ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 59-63. ISBN 9780198714965.

Unlike medieval sovereign contracts that merely transfer governance power, the Hobbesian social contract creates the political order itself through a contract of union - forming the community - and a contract of submission and government where sovereign powers are transferred, rulers selected and forms of governance chosen to safeguard the community's well-being.²⁸

Yet, this does not mean absolute submission to state power: it means submission for as long as the state fosters peace and safety, and is thus able to protect the community.²⁹ The guiding principle of Hobbes's statehood pivots around the maxim *salus populi suprema lex*— the good of the people is the supreme law — which includes worldly prosperity, defence against external threats, internal peace, wealth acquisition within the bounds of public security, and the general enjoyment of liberty. This requires the state to be vested with *summa potestas*, ensuring unified and effective governance through punitive measures, decision-making authority in matters of war and peace, and the legislative prerogative to define societal norms and obligations.³⁰

When the state fails to provide protection, it forfeits its claim to obedience. This principle is rooted in the very purpose of the state's existence: to safeguard its citizens. The right to self-defence, as a natural right, remains inalienable and supersedes the duty to obey state commands. Consequently, the state's protective power is a conditional one, contingent on its ability to fulfil its primary function of ensuring security, rather than demanding blind obedience.³¹

If undermined, individuals revert to a state of nature, where the absence of enforceable state laws means that the power of the stronger prevails, and the *ius ad omnia* becomes effective again.³²

It then becomes clear that the assurance of peace and security is the foundational purpose of the state, legitimised by the accord of the nation it serves. Without proper authority in these matters, the role of the state as the sovereign power to whom

²⁸ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 59-63. ISBN 9780198714965.

²⁹ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

³⁰ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 59-63. ISBN 9780198714965.

³¹ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 63-68. ISBN 9780198714965.

³² BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 63-68. ISBN 9780198714965.

individuals owe obeisance would be undermined. This supports the argument raised by Justice Costa that if the case law of the CJEU weakens member-states' power in national security and law enforcement policies, then that case law ought to be ignored, as it puts in question the very purpose of the state, its legitimacy and national identity. That being the case, security and peace are not the only core values pursued by the state. Indeed, and as we have hinted at above, for it to remain legitimate in the eyes of the nation that legitimises it, state action and its constitutional documents must remain reasonable. This means that a balancing of values needs to be made between the securitarian policies pursued and their reasonableness *vis-a-vis* the nation and the beliefs it holds.

Chapter 3 National Identity

Constitutions, obviously not approved unanimously, apply to both consenting and dissenting voices alike, as well as to individuals who were not even born at the founding moment³³. Because of this, their legitimacy also needs to be supported by rational acceptance, aligning with Kantian or Rawlsian social contractarian principles.³⁴

This is especially relevant from a transgenerational perspective, whose values and beliefs may be quite different from those that laid the basis for the (original) Constitution. This means that, as a political unity, the nation, its homogeneity and consent stand as political fictions necessary for the mass rational acceptance of the Constitution and the state action derived thereof.³⁵

What this means in practice is that, even if the core function of the state is to ensure peace and security, it must do so in a way that does not conflict with the core values and beliefs of the nation, otherwise the rational acceptance of the constitution and state authority is undermined. This, then, leads us to a second question: even if ensuring security is a core task of the state, without which it cannot demand obeisance from society, who can claim the authority to balance the pursuit of peace and security with the evolving priorities, values and beliefs of the nation that may push in a different direction?

³³ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

³⁴ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 169-172. ISBN 9780198714965.

³⁵ Which leads us to conclude that the Constitution does not birth the idea of the nation; rather, it presupposes its political imagination as the constituent power to then be formalised in the Constitution as its source of legitimacy.

The answer, although not easy to give, has to be the entities that persuasively convince the nation that they act on its behalf, regardless of whether they respect constitutional constraints.

Section 3.1 National identity as a belief

The cohesion and homogeneity of a state's populace, through shared values, beliefs and history, is imperative for fostering the unity of the political community. It is also fundamental for ensuring the effectiveness of state power, minimizing internal conflicts arising from divergent interests and ideologies, thereby enhancing societal stability and the state's ability to maintain peace.³⁶ Furthermore, a homogenous society fosters a sense of collective responsibility and solidarity among citizens: where individuals perceive themselves as part of a cohesive community, they are more likely to adhere to societal norms and contribute to the common good.

The homogeneity of the populace thus serves as a cornerstone for the acceptance by the populace of the authority of the Constitution, strengthening the legitimacy of state power, as it is seen as representing the unified will of the people.³⁷

From these core elements, the literature argues that the identity of a nation revolves around the bond of solidarity and belief of being part of the same community, strengthened by the unity of its co-nationals based on common descent, ethnicity, culture, or language.³⁸ Even if this unity is now recognised as mostly a myth, its function persists as the justification for the bond of solidarity inherent to the belief of sharing a national community.³⁹ If it was not for this (myth of) unity and homogeneity, individuals would have no compelling reason to sacrifice their well-being (e.g. by paying taxes, or going to war) in name of their nation and fellow co-nationals.

Furthermore, as communities that aim to exist across generations, linking the past with the present and the future through a (again, myth of) common history, nations are

³⁶ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 75-76. ISBN 9780198714965.

³⁷ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 75-76. ISBN 9780198714965.

³⁸ TÖNNIES, Ferdinand. *Community and Civil Society*. Cambridge: Cambridge University Press, 2001, p. 234. ISBN 0521561191; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 45-47. ISBN 0203960890.

³⁹ O'CONNELL, Judith. Politics and Processes of Nation-Building During and After Empire: A Review of the Irish Case through an Examination of School Textbooks. *Studies in Ethnicity and Nationalism*. 2018, Vol. 18, n° 2, p. 18-19; SMITH, Anthony D. *National Identity*. London: Penguin Books, 1991, p. 37-42. ISBN 0140125655; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 35-47. ISBN 0198280475.

meant to subsist, to be everlasting and unchanging across time.⁴⁰ This means that the national community and its homogeneity ought to be kept at adequate levels of purity, creating a need to protect the shared character of the nation from external influences, that can lead to exclusionary measures against those not deemed as nationals.⁴¹ While these measures can be relatively acceptable (e.g. requirements on naturalisation processes), they can also lead to racism and violence, as epitomized by the events of the Second World War.

What allows the emergence of this identification process of individuals with their respective nation? The common understanding is that national identities, similar to other social identities, evolve over time through narratives, shaping our perception of the social world we inhabit. Generally built through a common language, these narratives form 'imagined communities,' connecting the past to the present and ensuring continuity amid change.⁴²

For a nation's narrative to materialize, a common (or perceived common) historical journey is essential – a shared myth or perception of a natural process uniting the community's members. A shared belief in this creates a social reality mirroring the nation's idea. 'Representations' or 'images' of the nation actively influence social relations and contribute to the ongoing struggle to shape and impose certain portrayals of social reality.⁴³ Furthermore, the spontaneous acceptance of nationalist principles, ingrained through a gradual process of socialization, mass education and media, becomes a key element in maintaining social order.

The essence of a nation then lies in its psychological or metaphysical will to exist – a desire for independent existence and cohesion among members over time. This inner

⁴⁰ RASH, Felicity. Images of the Self and the Other in the Nationalist Writing of Houston Stewart Chamberlain. *Studies in Ethnicity and Nationalism*. 2012, Vol. 12, n° 2, p. 346-348; DURKHEIM, Émile. *The Elementary Forms of Religious Life*. Oxford: Oxford University Press, 2001, p. 317-138. ISBN 9780199540129; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 45-47. ISBN 0203960890.

⁴¹ AGUIRRESAROBÉ, Asier H. Is national identity in crisis? An assessment of national imaginations in the early 2020s. *Studies in Ethnicity and Nationalism*. 2022, Vol. 22, n° 1, p. 17-20; NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 1-16, 124-130. ISBN 0198280475.

⁴² JAYET, Cyril. Is Nation 'One of the Most Puzzling and Tendentious Items in the Political Lexicon'? *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 15-16; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 45-47. ISBN 0203960890.

⁴³ ANDERSON, Benedict. *Imagined Communities: The Origins and Spread of Nationalism*. Revised Ed. London: Verso, 2006, p. 6. ISBN 9781844670864; SMITH, Anthony D. *National Identity*. London: Penguin Books, 1991, p. 37-42. ISBN 0140125655.

core, expressed through mores and laws, holds absolute and eternal validity for its members, shaping their interactions within the community and society at large.⁴⁴

Section 3.2 The mutability of national identity

However, our previous overview also leads us to conclude that nations and national identities are complex compositions, created from various myths, symbols, and memories.⁴⁵ As shown by Hutchinson, nations are predominantly modern phenomena shaped by important antecedents from the past and built on prior foundations rooted in ethnic symbols and myths. These traditions are not static, evolving to meet contemporary demands.⁴⁶ Nations result from historical experiences directing modern society's trajectories making them subject to various forces and shocks that prompt the reevaluation of their beliefs and community identities through time.⁴⁷ In this process clashes inevitably occur, where political actors seeking to align the world with their ideals face opposition from state governments unwilling to relinquish power to nationalist movements seeking e.g. territorial autonomy based on cultural or historical differences.

Rather than being frozen in time, nations are then dynamic entities influenced by various factors, including religion, interstate competition and warfare, trade, and migration.⁴⁸ The multi-layered formation that emerges is characterized by a continuous evolution of myths, adapting to new purposes and persisting in the background until

⁴⁴ TÖNNIES, Ferdinand. *Community and Civil Society*. Cambridge: Cambridge University Press, 2001, p. 234. ISBN 0521561191; DURKHEIM, Émile. *The Elementary Forms of Religious Life*. Oxford: Oxford University Press, 2001, p. 317-318. ISBN 9780199540129.

⁴⁵ DURKHEIM, Émile. *The Elementary Forms of Religious Life*. Oxford: Oxford University Press, 2001, p. 317-318. ISBN 9780199540129; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 124-130. ISBN 0198280475.

⁴⁶ KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 170-175; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 45-47. ISBN 0203960890.

⁴⁷ HUTCHINSON, John. *Nations as Zones of Conflict*. London: Sage Publications, 2005, p. 3-4. ISBN 0761957278; KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 172-175; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 17-25. ISBN 0203960890; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 124-130. ISBN 0198280475.

⁴⁸ HUTCHINSON, John. *Nations as Zones of Conflict*. London: Sage Publications, 2005, p. 4-5, 13-16. ISBN 0761957278; PAREKH, Bhikhu. The concept of national identity. *Journal of Ethnic and Migration Studies*. 1995, Vol. 21, n° 2, p. 267-268; MILLER, David. *Citizenship and National Identity*. Cambridge: Polity Press, 2000, p. 31-33. ISBN 0745623948.

relevant again.⁴⁹

In times of social crisis, individuals termed by Hutchinson as 'moral innovators' emerge, guiding nations towards new directions. This process of 'mythic overlaying', involves the creation of new myths by these innovators, often embodied in extraordinary collective sacrifices against a common enemy.⁵⁰ These new myths rejuvenate national identity when old ones fail while also ensuring their preservation for their potential revival later on if needed.⁵¹ Culture wars ensue as rival traditions, representing coexisting alternative strategies for managing change, clash over differing symbols and myths, competing for control over the nation's trajectory.⁵² Even if the selection process of certain symbols over others remains clouded, three key elements can be mentioned: variation, selection and inheritance.⁵³ Variation pertains to the emergence of diverse symbol and myth variants due to mutations of previous elements, that are then subject to selection processes by the community based on their usefulness to solve the problems it faces. Lastly, inheritance involves the transmission of these variations across generations, with selection again entailing the dominance of certain variants in particular contexts and times.

In other words, this adaptation of symbols and myths to an environment signifies, firstly, the provision of solutions to specific challenges within a given context. At the same time, through selection, certain variations are deemed 'successful', thus facilitating their transmission over others. Moreover, culture is represented both mentally (privately, by individuals, encompassing beliefs, intentions, and preferences) and publicly (as shared representations among the group).⁵⁴ Public representations undergo a transformation as they are disseminated, becoming cultural representations

⁴⁹ HUTCHINSON, John. *Nations as Zones of Conflict*. London: Sage Publications, 2005, p. 25-26. ISBN 0761957278; KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 172-175.

⁵⁰ HUTCHINSON, John. Myth Against Myth: The Nation as Ethnic Overlay. *Nations and Nationalism*. 2004, Vol. 10, n° 1-2, p. 117, 120.

⁵¹ HUTCHINSON, John. *Nations as Zones of Conflict*. London: Sage Publications, 2005, p. 71. ISBN 0761957278.

⁵² HUTCHINSON, John. *Nations as Zones of Conflict*. London: Sage Publications, 2005, p. 77-78. ISBN 0761957278; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 17-25. ISBN 0203960890; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 124-130. ISBN 0198280475.

⁵³ KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 175-178.

⁵⁴ KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 175-178.

once widely distributed within the group, thereby fostering a shared mental representation among its members. This information is then preserved and passed down through successive generations via institutions, routines, habits, and rules, contributing to the shaping of society and culture.⁵⁵

Nevertheless, the process does not end here. Upon acquiring and embracing a cultural representation, individuals engage in reinterpretation and transformation as they internalize it in a never-ending cycle of selection, variation and inheritance.⁵⁶

Returning to our initial discussion, this mutability of the nation's identity poses a major constitutional challenge: it can undermine the legitimacy of the initial constitutional agreement due to a clash between the ideals embedded in the founding agreement and the priorities of subsequent generations that need to be reflected on the constitutional framework for it to remain legitimate through time. This tension becomes palpable when examining the historical American contradictions between the proclaimed equality of all men and the acceptance of slavery, embedded within the 1776 U.S. Declaration of Independence versus the 1787 Constitution.⁵⁷

In navigating the tension between historical roots and current national beliefs and priorities, narratives play a pivotal role in projecting avenues of reconciliation. These narratives aim not to erase historical realities but to align constitutional norms with evolving societal values and the demands of reason. What this means is that culture emerges as the mechanism through which national identities are preserved and transmitted across generations through social learning, involving the acquisition of behaviours and information through observation or instruction.⁵⁸ This dynamic renders societal development multilinear and multi-layered. Moral innovators navigate within this spectrum of options, shaping their institutional trajectory and moulding the cultural, social, and institutional landscape, which in turn influences their choices. For instance, while the 1787 U.S. Constitution initially condoned slavery, subsequent amendments and legal developments sought to bridge the gap between historical imperatives and

⁵⁵ KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 175-178.

⁵⁶ KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 175-178.

⁵⁷ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

⁵⁸ KERR, William. Nations as Zones of Conflict, Nations as Zones of Selection: A Darwinian Social Evolutionary Engagement with John Hutchinson's 'Culture Wars'. *Studies in Ethnicity and Nationalism*. 2019, Vol. 19, n° 2, p. 175-178.

contemporary norms (albeit imperfectly, as time would show), in order to reconcile historical foundations with contemporary norms and to ensure the enduring legitimacy of the Constitution.⁵⁹

Then, as it is with constitution-making, the nation - through its representatives - also plays a role in this nexus of constitutional interpretation and re-design, through a constant blend of historical fact, myth, and normative ideals.⁶⁰ As argued by Sieyès, an important corollary from the placement of the nation as the constituent power is that it not only legitimizes governmental authority, by giving it a constitutional framework to justify its actions, but is also capable of reconstituting its own identity at any time, based on its current needs and priorities.⁶¹ Nation-building and constitution-making is then an ongoing process involving reinterpretations and reconstructions of past heritage.⁶² To exist, nations must find a living past to endure, allowing successive generations to reconnect with their heritage. Each generation constructs its own social identity within the confines of the myth-symbol complexes, landscapes, and historical personages inherited from past generations, creating an ongoing, cyclical process maintained through the rediscovery and reinterpretation of historical narratives.⁶³

What this means is that the peoples of Europe, from the moment they decided to join a supranational organisation such as the EU, inevitably recognised a change to their national identity, where they no longer see themselves as isolated peoples, but as part of a larger political and economic community. Because of that, they also consent and recognise that their Constitutional Courts no longer have the last say on the interpretation of their founding documents, but share it with other bodies, such as the CJEU.

⁵⁹ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

⁶⁰ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

⁶¹ LOUGHLIN, Martin and WALKER, Neil. Introduction. In: LOUGHLIN, Martin and WALKER, Neil, *The Paradox of Constitutionalism: Constitutional Power and Constitutional Form*. Oxford: Oxford University Press, 2007, p. 3; NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

⁶² SMITH, Anthony D. *The Ethnic Origins of Nations*. Oxford: Blackwell Publishing, 1986, p. 206-208. ISBN 9780631161691; SMITH, Anthony D. *National Identity*. London: Penguin Books, 1991, p. 37-42. ISBN 0140125655.

⁶³ GRAMSCI, Antonio. *The Modern Prince & Other Writings*. Paris: Foreign Languages Press, 2021, p. 66. ISBN 9782491182-502; PAREKH, Bhikhu. The concept of national identity. *Journal of Ethnic and Migration Studies*. 1995, Vol. 21, n° 2, p. 267-268; MILLER, David. *Citizenship and National Identity*. Cambridge: Polity Press, 2000, p. 31-33. ISBN 0745623948; CALHOUN, Craig. *Nations Matter: Culture, History, and the Cosmopolitan Dream*. New York: Routledge, 2017, p. 17-25. ISBN 0203960890; MILLER, David. *On Nationality*. Oxford: Oxford University Press, 1995, p. 124-130. ISBN 0198280475.

Thus, from that moment on, and regardless of whether this constitutional and identitarian change respected the pre-defined constitutional processes, previous constitutional arrangements needed to be re-designed in order to match the new priorities and beliefs of the nations they derive their legitimacy from. Security and peace, while still core functions of the state, need to be balanced with the new ideals of the EU nations, which give importance to the creation of a European-wide community based on the respect of the fundamental rights enshrined in the Charter, as interpreted by the CJEU.

Section 3.3 Limits to sovereignty

However, it is also important to bear in mind that the nation, although theoretically the ultimate source of legitimacy of political and state action, does not have the ultimate sovereign power Sieyès and subsequent authors argued.

Indeed, the creation of the constitutional state marked a pivotal shift in governance within the modern era, characterized by the primacy of written constitutions. Emerging from the Enlightenment *ethos* of liberty and equality, constitutions represent a departure from the feudal order and absolutism, by limiting state action through pre-defined foundational norms.⁶⁴ For instance, for Locke, state powers were delegated and fiduciary, limited to preserving property and securing freedom. Similarly, German constitutionalism sought to temper monarchical sovereignty by subsuming it within an organic state persona, subject to constitutional constraints.⁶⁵

However, the efficacy of the constitutional state also hinges on mechanisms ensuring adherence to these established norms, without which constitutional authority risks devolving into mere semantics and potentially a state of constant revolution as after the French Revolution. Moreover, these mechanisms must also ensure that every state body operates within the confines of the Constitution, thus devoid of inherent absolute sovereignty.⁶⁶ This means that bodies subject to the Constitution must have limited powers in regards to, i.e. unilaterally amend these foundational constitutional norms. Thus, the constitutional state emerges as a defense against arbitrary power, ensuring

⁶⁴ ROSENFELD, Michel. *The identity of the constitutional subject: Selfhood, citizenship, culture, and community*. London: Routledge, 2009, p. 17-36. ISBN 0203868986.

⁶⁵ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 141-145. ISBN 9780198714965.

⁶⁶ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 141-145. ISBN 9780198714965.

that sovereignty resides not in individuals or bodies but in the constitution itself.⁶⁷ Because of this, the need to re-align the state's constitutional framework to the nation's sociological and political priorities faces two main limitations.

First, while the sovereign constituent power is theoretically vested in the nation, this does not mean that, from the moment the polity is given form through a Constitution, political authority resides solely in it nor that it has sole power to reconstitute its own identity. Indeed, these powers are in reality not vested directly in the people but are instead manifested through the interplay between constitutional imagination and governmental action.⁶⁸

As we saw, (the fiction of) constituent power transforms the multitude into a political community, leading to a symbolic act - enactment of a Constitution - where individuals recognize themselves as part of a unified whole and vest powers in a set of constitutionally ordained representatives.⁶⁹ From the moment sovereign power is delegated to the constituted powers, the original constituent power is transformed into a mere virtual equality among citizens with the consequent division between rulers (the constituted bodies, representatives of the people) and ruled (the people-as-the-governed).⁷⁰

Secondly, it is essential to recognize that representation in politics goes beyond the mere reflection of existing identities or structures of the people that provide legitimacy to its authority. It plays a pivotal role in shaping those very same political identities and fostering shared understandings within society. As stated by Hanna Pitkin, representation involves making something present, even if not literally.⁷¹ This process entails defining the object represented and understanding how this representation operates, even if requiring a shared ground or framework that lends legitimacy to the relationship between representatives and the represented.⁷²

⁶⁷ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 141-145. ISBN 9780198714965.

⁶⁸ LOUGHLIN, Martin. The Concept of Constituent Power. *European Journal of Political Theory*. 2014, Vol. 13, n° 2, p. 231.

⁶⁹ LOUGHLIN, Martin and WALKER, Neil. Introduction. In: LOUGHLIN, Martin and WALKER, Neil, *The Paradox of Constitutionalism: Constitutional Power and Constitutional Form*. Oxford: Oxford University Press, 2007, p. 3.

⁷⁰ NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

⁷¹ PITKIN, Hanna. *The Concept of Representation*. Berkeley: University of California Press, 1972, p. 8. ISBN 9780520021563.

⁷² DORMAL, Michel. Political Representation and Imagined Community: The Case of Luxembourg. *Studies in Ethnicity and Nationalism*. 2012, Vol. 12, n° 3, p. 499-501.

Representation, therefore, is not a mere mirror of the nation. Instead, it is subject to institutional processes and historical traditions.⁷³ Over time, political rationalities and representations of public life evolve alongside changes in institutions and social dynamics. This means that, in reality, while the concept of constituent power originates from the nation, it establishes a hierarchical relationship between rulers and ruled, representatives and the represented, ensuring a balance between sovereignty and the enforcement of decisions taken by government. This tension between sovereignty (general will) and the exercise of sovereign powers (the authority to enforce decisions) defines the nation - the original holder of constituent power - as the subject of the constituted powers.⁷⁴

From the moment the polity is given form, constituent power, while originating from the nation, doesn't exclusively locate political authority in it. In the founding moment, the nation must be conceptualized both as a virtual entity (the sovereign, holder of the constituent power) and as a non-institutionalised body subject to the constituted bodies who represent it (the 'people-as-the-governed').⁷⁵

What this means is that, during times of peace and stability, the nation is not completely free to alter the constitutional structure of its state through its representatives since from the moment it gives itself a Constitution, it accepts to limit its own sovereign power, in order to ensure stability and peace, by transferring it to bodies with limited power and subject to the constraints embodied in the Constitution. In other words, the constitutional state aims to remove discussions of sovereignty in a post-constitution phase, attributing supreme authority to the constitutional framework itself, where the balancing between state priorities - pursuance of securitarian goals and the respect for the nation's identity - is initially set,⁷⁶ which seem to support Justice Costa's assertion of the need for member-states to deviate from the CJEU's rulings when those constitutional balances are put in question.

⁷³ For instance, different historical events such as the American and French Revolutions have led to distinct concepts of republicanism, each with its symbolic logic of representation. See DORMAL, Michel. Political Representation and Imagined Community: The Case of Luxembourg. *Studies in Ethnicity and Nationalism*. 2012, Vol. 12, n° 3, p. 499-501.

⁷⁴ NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

⁷⁵ NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

⁷⁶ BÖCKENFÖRDE, Ernst-Wolfgang. Constitutional and Political Theory: Selected Writings. Oxford: Oxford University Press, 2017, p. 145-147. ISBN 9780198714965.

Chapter 4 Who decides?

However, even if this conception works in a time of constitutional stability, it ignores the reality of constitutional conflicts, which invariably demand a decisive (sovereign) arbiter. Hence, the crux of this discussion revolves around identifying the sovereign and delineating their role in shaping national identity amidst constitutional and identitarian changes.

Carl Schmitt's "Sovereign is he who decides on the exception",⁷⁷ highlights sovereignty's role in transcending legal constraints, particularly when the state's unity is imperilled, wielding decisive authority over the state's trajectory, whether enshrined in constitutional provisions or asserted through sheer political dominance.⁷⁸

In debates of early modernity, the question revolved around the sovereignty of the monarch versus the sovereignty of the people.⁷⁹ However, the rise of democracies seemingly resolved this in favour of the people and their elected representatives: since the entire nation cannot convene, the authority to act on its behalf is to be delegated to extraordinary representatives, who, as surrogates for the nation, possess the legitimacy to address specific constitutional matters for a limited duration, independent of any pre-defined procedural constraints e.g. in the Constitution.⁸⁰ Whether these powers are delegated to the ordinary representatives, or to others especially appointed for this task, their collective will holds equivalent weight to that of the nation itself, provided their mandate is understood as deriving from the people.⁸¹

Yet, the advent of constitutional jurisdiction muddles this clarity. Constitutional jurisdiction grants courts - such as the Portuguese Constitutional Court - the power to interpret and enforce the Constitution, including the authority to adjudicate on the constitutionality of laws and the limits of constitutional amendments. In their role of safeguarding and scrutinizing legislation, they ensure alignment with established national and constitutional identities, thereby articulating the essence and identity of

⁷⁷ SCHMITT, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: University of Chicago Press, 2005, p. 5. ISBN 9780226738895.

⁷⁸ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 145-147. ISBN 9780198714965.

⁷⁹ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 145-147. ISBN 9780198714965.

⁸⁰ SIEYÈS, Emmanuel Joseph. *Political Writings Including the Debate between Sieyès and Tom Paine in 1791*. Cambridge: Hackett Publishing Company, 2003, p. 133-144. ISBN 9780872204317.

⁸¹ SIEYÈS, Emmanuel Joseph. *Political Writings Including the Debate between Sieyès and Tom Paine in 1791*. Cambridge: Hackett Publishing Company, 2003, p. 133-144. ISBN 9780872204317.

the nation, preventing governmental actions from contravening them.⁸² However, this also grants them a substantial role in determining the content of the Constitution.

This poses a fundamental question: what constraints (if any) exist on judicial supremacy regarding constitutional and identitarian matters? When constitutional changes occur outside traditional procedural or substantive constitutional limits, how should courts recognize and interpret them?

Ackerman provides insight by analyzing historical developments surrounding the American Constitution, highlighting phases where political movements gained legitimacy to redefine the American constitutional framework without adherence to constitutionally-defined processes.⁸³ He makes a distinction within constitutional politics between 'higher lawmaking' and 'normal politics,' meaning between periods of intense public involvement and routine governance.⁸⁴ During higher lawmaking phases, movements or bodies propose significant constitutional reforms, often contested by other constituted entities, leading to standstills. In asserting the voice of the people, proponents claim additional legitimacy, prompting heightened public engagement.⁸⁵ Ackerman emphasizes the role of Constitutional Courts in synthesizing these changes, ensuring their legitimacy and binding effect on public and representative branches.⁸⁶

Contrary to originalists, Ackerman recognizes the impact of informal changes on constitutional identity, allowing earlier identities to dissipate. His model diverges from living constitutionalism by avoiding a portrayal of constitutional development as an ongoing process strictly bound by legality.⁸⁷ Ackerman's framework acknowledges the influence of both formal and informal changes, challenging the notion of a continuous thread connecting past and present constitutional identity.⁸⁸ Despite the concealment

⁸² DORMAL, Michel. Political Representation and Imagined Community: The Case of Luxembourg. *Studies in Ethnicity and Nationalism*. 2012, Vol. 12, n° 3, p. 292-295.

⁸³ BASSOK, Or. Interpretative theories as roadmaps to constitutional identity: The case of the United States. *Global Constitutionalism*. 2015, Vol. 4, n° 3, p. 306-313.

⁸⁴ ACKERMAN, Bruce. *We the People: Foundations*. Cambridge: The Belknap Press of Harvard University Press, 1991, p. 44. ISBN 0674948400; ACKERMAN, Bruce. *We the People: Transformations*. Cambridge: Belknap Press of Harvard University Press, 1998, p. 10-11. ISBN 0674948475.

⁸⁵ ACKERMAN, Bruce. *We the People: Foundations*. Cambridge: The Belknap Press of Harvard University Press, 1991, p. 299. ISBN 0674948400.

⁸⁶ ACKERMAN, Bruce. *We the People: Foundations*. Cambridge: The Belknap Press of Harvard University Press, 1991, p. 192. ISBN 0674948400.

⁸⁷ BASSOK, Or. Interpretative theories as roadmaps to constitutional identity: The case of the United States. *Global Constitutionalism*. 2015, Vol. 4, n° 3, p. 306-313.

⁸⁸ ACKERMAN, Bruce. *We the People: Transformations*. Cambridge: Belknap Press of Harvard University Press, 1998, p. 81-95. ISBN 0674948475.

of ruptures in legality, as seen in the ratification of the US Constitution, the 14th Amendment, and the New Deal reforms, Ackerman's argument logically extends to situations where bodies convincingly claim to represent the people and manage to change constitutional norms and principles, regardless of the constitutionality of the process that was adopted.⁸⁹

In this process, Ackerman underscores the crucial role of Constitutional Courts in recognizing and synthesizing constitutional changes arising from mass public engagement, beyond formal procedures. This synthesis forms the roadmap to an authentic expression of the people's will, encompassing both formal and informal alterations to constitutional identity.

This then means that the authority of constitutional processes hinges on its ability to accurately reflect the collective political identity and will.⁹⁰ Consequently, the formal Constitution, despite its seeming permanence, remains inherently provisional, subject to the power of revision inherent to those who can convincingly argue to speak for the people.⁹¹ This ensures that Constitutions remain adaptable to societal evolution, thus ensuring the symbolic representation of the unity of the populace.⁹² The people, both as a unified entity (the nation) and as individuals subject to governance ('people-as-the-governed'), embody this dual conceptualization within the foundational framework of the Constitution.⁹³

In cases of conflict then, the determining factor lies in asserting stronger democratic legitimacy and authority to act as the representative of the popular sovereign. Notably, states like Switzerland, Great Britain, Denmark, and Sweden lack constitutional jurisdiction overseeing legislative adherence to the constitution. As long as belief in popular sovereignty and the representative nature of legislative bodies remains unbroken, this absence of oversight appears internally consistent.⁹⁴

⁸⁹ BASSOK, Or. Interpretative theories as roadmaps to constitutional identity: The case of the United States. *Global Constitutionalism*. 2015, Vol. 4, n° 3, p. 306-313.

⁹⁰ NOOTENS, Geneviève. Constituent power and people-as-the-governed: About the 'invisible' people of political and legal theory. *Global Constitutionalism*. 2015, Vol. 4, n° 2, p. 140-145.

⁹¹ LOUGHLIN, Martin and WALKER, Neil. Introduction. In: LOUGHLIN, Martin and WALKER, Neil, *The Paradox of Constitutionalism: Constitutional Power and Constitutional Form*. Oxford: Oxford University Press, 2007, p. 2.

⁹² LOUGHLIN, Martin. The Concept of Constituent Power. *European Journal of Political Theory*. 2014, Vol. 13, n° 2, p. 232.

⁹³ LOUGHLIN, Martin. The Concept of Constituent Power. *European Journal of Political Theory*. 2014, Vol. 13, n° 2, p. 233.

⁹⁴ BÖCKENFÖRDE, Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017, p. 145-147. ISBN 9780198714965.

This means that, when joining the EU, member states' representatives, claiming to represent the will of their nations, decided to join a broader supranational political community. These representatives derived their legitimacy to do so from convincingly stating that they were speaking in the name of their peoples, who now wanted to be part of a wider community of peoples, regardless of whether or not the constitutional processes were respected.

This decision fundamentally altered the national constitutional framework from that point onward. By legitimately speaking in the name of the sovereign nation, these representatives bypassed constitutional limitations and initiated a significant constitutional transformation. This shift not only signified a change in national identity but also incorporated an EU dimension that must be upheld and respected by the member-states. Consequently, it is the responsibility of constitutional courts to synthesize this new constitutional framework. They are not merely to uphold constitutional values such as security but must do so while also respecting the EU aspect of their identity, as interpreted by the CJEU. This balance is crucial because, even if security and peace are core state functions as defended by national judges like Justice Costa, they must be weighed against other fundamental identitarian values such as the fundamental rights of the Charter and in line with the already existing case law of the CJEU.

Indeed, the synthesis on the balance over the pursuance of security and peace versus the need to respect fundamental rights, at the EU level, has already been addressed by the CJEU, particularly through the Digital Rights Ireland and Tele2 Sverige cases. Initially, this case-law was informed by the input of national constitutional courts regarding the original Data Retention Directive and its national implementations. Constitutional Courts in i.e. Germany and Romania had already declared that the mass retention of metadata violated fundamental rights on a constitutional level, highlighting the tension between state security measures and individual privacy rights, prompting a revaluation at the EU level.⁹⁵

With this, the CJEU responded by synthesizing an EU-wide minimal standard for respecting fundamental rights, integrating these national standards into a broader EU context. The prohibition of mass data retention and the invalidation of the Data Retention Directive was a direct outcome of this synthesis, ensuring a uniform standard

⁹⁵ COUTINHO, Francisco Pereira. *Data Retention in Portugal: Big Brother is (No Longer) Watching* [online]. 2023, p. 12-15. Available from: <<https://ssrn.com/abstract=4216870>>.

across member states. Over time, the CJEU has adapted these standards, relaxing them in certain instances based on further input from national (constitutional) courts, thereby reinforcing the dynamic synthesis process between EU and national standards.

It is then incumbent upon national constitutional courts to respect and uphold this EU-wide synthesis and incorporate it into their own. This is especially relevant, given that the data retention rules originated from EU law in the first place, meaning that member states cannot logically assert that these securitarian measures are exclusively national concerns. Furthermore, they cannot claim that such retention measures are indispensable for security purposes, as demonstrated by other member states and their constitutional courts in the invalidation of the data retention directive implementation laws.

National courts must then adhere to this EU-wide synthesis, recognizing that the legitimacy of securitarian measures depends on their alignment with fundamental rights as defined by the interplay between the national and EU legal standards. Failure to maintain this balance risks undermining the entire constitutional structure (both national and EU). Focusing solely on unilateral national values could lead to a constitutional redesign that no longer aligns with the nation's decision during accession to be part of a broader economic and political community. Such a significant alteration would require a new intervention by representatives claiming to speak for the people, reaffirming the necessity of continually reflecting the collective political identity and will of the populace within the evolving constitutional framework.

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