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Protection of Constitutional Identity as a Legitimate Aim for Differential Treatment

ECtHR 9 June 2022, No. 49270/11, *Savickis and Others v Latvia*

INTRODUCTION

On 9 June 2022, the Grand Chamber of the European Court of Human Rights (ECtHR) pronounced its judgment in the case of *Savickis and Others v Latvia*. The case concerns a differential treatment in the calculation of pension between Latvian citizens and the so-called "permanently resident non-citizens" (*nepilsoņi*), which is the applicants' official status. The applicants were denied recognition of their period of employment outside of Latvia when the country was illegally occupied by the Soviet Union (the USSR), while Latvian citizens could enjoy such a benefit. They argued that this constituted a breach of the accessory right to non-discrimination under Article 14 of the European Convention on Human Rights (ECHR) in conjunction with the right to property under Article 1 of Protocol No. 1 of the ECHR.[1]

The Grand Chamber eventually found no violation of these provisions. The importance of the case cannot be overstated, as the Court recognised Latvia's argument that the differential treatment was aimed to protect Latvia's constitutional identity. In other words, protection of constitutional identity was accepted as a legitimate aim for differential treatment. Moreover, the case also raises the issue of the rights of non-citizens in the context of a society dealing with its traumatic history, namely the illegal annexation, decades of occupation and population transfers by the USSR.

FACTUAL BACKGROUND

The case concerns five applicants who were born in a period between 1938 and 1948 in various parts of the USSR. They moved to Latvia at some point after it was annexed by the USSR in 1940 in accordance with the infamous Molotov-Ribbentrop Pact, which was a secret agreement dividing spheres of influence with Nazi Germany.[2] After Latvia regained its full independence on 21 August 1991, Latvian citizenship was "restored" only to those who possessed it before

[1] In this regard, the Court has observed that Article 14 of the ECHR "complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of them." See ECtHR 19 April 2007, No. 63235/00, *Vilho Eskelinen and Others* v *Finland,* para. 95.

[2] 'World War II: The Molotov-Ribbentrop Pact (August 23, 1939)', *Jewish Virtual Library* <www.jewishvirtuallibrary.org/the-molotov-ribbentrop-pact-august-1939>, visited 25 August 2022.

the unlawful annexation and their descendants. The five applicants, who did not belong to this category, became a "permanently resident non-citizens" (*nepilsoņi*),[3] which accounted for 11.4% of the Latvian population in January 2017.[4]

In theory, holders of *nepilsoņi* status could attempt to naturalise as a Latvian citizen. For this purpose, they would have to fulfil various requirements, including fluency in the Latvian language and knowledge of the basic principles of the Constitution, the text of the national anthem and the basics of Latvian history and culture.[5] In 2009, 38.9% of naturalisation applicants failed their Latvian language test and 17.7% their Latvian history test, indicating that the language and historical knowledge requirements constituted a major hurdle to citizenship.[6] Nevertheless, in a report adopted in 4 December 2018, the European Commission against Racism and Intolerance (ECRI) found that the language requirement was no longer a major reason. Instead, the ECRI found that many opted to remain a non-citizen to take advantage of visa-free travel to Russia and the eligibility for a then-more-advantageous Russian pension, although many also refused to naturalise based their principled belief that citizenship should automatically be granted to them.[7] In the meantime, the Latvian authorities have undertaken various efforts to reduce the number of non-citizens, such as providing a free Latvian language course.[8] Furthermore, as of 1 January 2020, all children of "non-citizens" would automatically be granted Latvian citizenship, except if the parents choose another citizenship for the child or if the child is a citizen of another state.[9]

The case at hand concerns the calculation of pension for non-citizens. Jurijs Savickis, the first applicant, was born in the Kalinin Oblast (now Tver Oblast, Russia) in 1939. When calculating his pension, the Latvian authorities did not include the 21 years, 3 months and 13 days when he worked in Russia. A similar fate befell the second applicant, who was born in Baku (now the capital of Azerbaijan) in 1938; the third applicant, who was born in Vladivostok (Russia) in 1948 and came to Latvia at the age of three; the fourth applicant, who was born in Termez (now in Uzbekistan) in 1946; and the fifth applicant, who was born in Syzran (Russia) in 1942. Their period of employment and/or military service accrued outside of Latvia was not

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[3] ECtHR 9 June 2022, No. 49270/11, *Savickis and Others* v *Latvia*, para. 18.
[4] ECRI Report on Latvia (Fifth Monitoring Cycle), CRI(2019)1, 5 March 2019, <www.rm.coe.int/fifth-report-on-latvia/1680934a9f>, visited 17 October 2022, para. 55.
[5] Section 12 of the Citizenship Law <www.likumi.lv/ta/en/en/id/57512-citizenship-law>, visited 17 October 2022.
[6] ECRI Report on Latvia (Fourth Monitoring Cycle), CRI(2012)3, 21 February 2012, <www.rm.coe.int/fourth-report-on-latvia/16808b58b6>, visited 17 October 2022, p. 32 fn. 60.
[7] ECRI, *supra* n. 4, para. 56.
[8] Ibid., para. 59.
[9] ECRI Conclusions on the Implementation of the Recommendations in Respect of Latvia Subject to Interim Follow-Up, CRI(2021)26, 5 October 2021, <www.ecoi.net/en/file/local/2061484/LAT-IFU-V-2021-26-ENG.pdf>, visited 17 October 2022, p. 4.

counted towards the calculation of their pension,[10] while Latvian citizens could enjoy such a benefit to obtain a higher monthly pension.[11]

Under Latvian law, such differences of treatment were provided under Paragraph 1 of the transitional provisions of the State Pensions Act (Paragraph 1 of the TPSPA).[12] While there is an option for the applicants to naturalise, the employment periods outside of Latvia are only recalculated *ex nunc*. In other words, the recalculation will only take effect from the day one acquires Latvian citizenship,[13] and thus the difference in treatment before naturalisation will remain unrectified. In the meantime, Latvia has also concluded bilateral agreements with other states with respect to mutual recognition of periods of employment in calculating pensions.[14] These include an agreement with Lithuania (in force since 1995), Estonia (since 1997), Ukraine (since 1999), Belarus (since 2010) and Russia (since 2011).[15] However, these agreements do not provide for retrospective payments of pensions,[16] which means that the difference in treatment in the years prior to the agreement will not be retroactively redressed. Moreover, at the time of the case, there was still no such bilateral agreements with other Post-Soviet states, such as Azerbaijan, Uzbekistan, Turkmenistan and Tajikistan.

LEGAL BACKGROUND

The human rights conformity of Paragraph 1 of the TPSPA was challenged before the ECtHR in the case of *Andrejeva v Latvia* (2009). The case concerns a Kazakh woman who worked in an enterprise that was placed under the authority of the central government of the USSR. In the calculation of her pension, her period of employment with this company in Latvia was not considered an "employment within the territory of Latvia".[17] The Court ruled in favour of the applicant and found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 of the ECHR.[18]

Following the ECtHR's judgment in *Andrejeva*, on 14 August 2009, the first, second, fourth and fifth applicants requested the Latvian State Social Insurance Agency to recalculate their pension. These requests were rejected, and their appeal to the District Administrative

[10] *Savickis and Others* v *Latvia*, *supra* n. 3, paras. 19-38.
[11] See ibid., para. 18.
[12] Ibid., para. 39.
[13] Ibid., para. 67.
[14] Ibid., para. 56.
[15] Ibid.
[16] Ibid., paras. 81 & 162.
[17] ECtHR 18 February 2009, No. 55707/00, *Andrejeva* v *Latvia*, paras. 10-15.
[18] Ibid., para. 92.

Court was also in vain.[19] They subsequently lodged an application to the Constitutional Court on 5 March 2010 to review the compatibility of Paragraph 1 of the TPSPA with the Constitution,[20] and the third applicant also filed his case on 22 March 2010.[21]

On 17 February 2011, the Constitutional Court ruled against the applicants. Its judgment relied on the 'state continuity doctrine'. According to this doctrine, the Republic of Latvia gained its independence on 18 November 1918 following a proclamation by the People's Council of Latvia. In 1940, the USSR occupied the Baltic States in violation of international law, and thus Latvian independence was liquidated *de facto*.[22] On 4 May 1990, during the final years of the USSR, the Supreme Council of the Latvian Soviet Socialist Republic adopted the Declaration "On the Restoration of Independence of the Republic of Latvia". The Preamble of this Declaration emphasised that the annexation of Latvia by the USSR was null and void from the purview of international law, and that the Republic of Latvia never ceased to exist *de jure* as a subject of international law.[23]

Based on this doctrine, the Court concluded that Latvia is not a successor to the rights and obligations of the USSR, and thus it is not obliged to undertake the obligations of the occupying state.[24] According to the Court, to claim otherwise would be contrary to the principle of *ex injuria ius non oritur* ("unjust acts cannot create law") and the obligation of non-recognition of unlawful acts under international law.[25] Furthermore, the Court emphasised that "[a] State that has been occupied as the result of an aggression by another State does not have the obligation to guarantee social security to persons who had travelled to its territory as the result of the immigration policy of the occupying State."[26] Having lost their case, the applicants filed a petition to the ECtHR. The case was then relinquished to the Grand Chamber on 1 December 2020.[27]

SUMMARY OF THE JUDGMENT

[19] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 44-45.
[20] Ibid., para. 46
[21] Ibid., para. 48.
[22] Satversmes tiesa 17 February 2011, Case No 2010-20-0106, *The Old Age Pension (Non-citizens)*, paras. 11.1-11.3, cited in *Savickis and Others* v *Latvia*, *supra* n. 3, para. 53.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 5.

On 9 June 2022, the Grand Chamber of the ECtHR ruled against the applicants in a 10 to 7 vote. The Court found the accessory right to non-discrimination in conjunction with the (autonomous) right to property to be applicable in the case. In their words:

> According to the Court's well-established case-law, the prohibition of discrimination enshrined in Article 14 generally applies where a Contracting State has in force legislation providing for the payment as of right of a pension or another welfare benefit; that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. If, but for the condition of entitlement under domestic law about which the applicant complains, he or she would have had a right enforceable under domestic law to receive the benefit in question, his or her complaint falls within the scope of Article 1 of Protocol No. 1 and that is sufficient to render Article 14 of the Convention applicable *ratione materiae*.[28]

In this regard, the Court observed that differences in treatment are not considered discriminatory if they have "objective and reasonable justification"; in other words, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means and the end.[29] While states enjoy a certain margin of appreciation in this regard, the breadth of the margin would vary in accordance with the specific circumstances of the case.[30] As the Court found that nationality is the sole criterion for distinction in *Savickis*, Latvia must adduce "very weighty reasons" to justify the differences of treatment in the calculation of pension.[31]

Legitimate Aim

With regard to the justification, Latvia raised two aims. The first, which was also invoked in *Andrejeva*,[32] is "protecting the economic system of the country".[33] The ECtHR accepted this aim and reiterated its observation in *Andrejeva* that after the restoration of Latvian independence, "[i]t is undisputed" that the authorities were faced with the problems of establishing a social security system while having a reduced national budget. Although Paragraph 1 of the TPSPA was only introduced in 1995 (four years after the restoration of independence), the Court found that this fact is not decisive. In their words, "[i]t is not surprising that a newly established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to ensure the country's economic well-being."[34] While the *Savickis* case was decided almost three decades since the

[28] Ibid., para. 122.
[29] Ibid., para. 181.
[30] Ibid., para. 183.
[31] Ibid., para. 193.
[32] *Andrejeva* v *Latvia*, *supra* n. 17, para. 86.
[33] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 196.
[34] Ibid., para. 197; *Andrejeva* v *Latvia*, *supra* n. 17, para. 86.

measure was introduced, the Court summarily accepted protection of Latvia's economic system as a legitimate aim.[35]

The second aim, which was asserted by Latvia to be "more important" than the aim of protecting its economic system, is "safeguarding the constitutional identity of the State by implementing the doctrine of State continuity."[36] The ECtHR's observation in this regard is worth quoting in full:

> (…) the essential point in this regard is not the doctrine of State continuity *per se* but rather the constitutional foundation of the Republic of Latvia following the restoration of its independence. The underlying arguments for Latvia's doctrine of State continuity stem from the overall historical and demographic background which, as argued by the Government, accordingly also informed the setting up of the impugned system of retirement pensions following the restoration of Latvia's independence. More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country.[37]

The Court therefore concluded that "[i]n this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate."[38]

Proportionality

Having accepted the two aims invoked by Latvia, the ECtHR proceeded with its proportionality test whose strictness depends on the breadth of margin of appreciation accorded to Latvia. In its previous cases, the Court has already acknowledged that there may be valid reasons to accord special treatment to "those whose link with a country stems from birth within it or who otherwise have a special link with a country (…)."[39] The Court then noted that the special status of *nepilsoņi* was established in response to a situation arising from unlawful Soviet occupation and annexation,[40] thus implying that this is a valid reason to grant special treatment to Latvian citizens only.

The ECtHR also pointed to the "specific temporal scope and context of the impugned measure" as another factor to be considered.[41] In this regard, the measure addressed only periods of employment outside the territory of Latvia before the restoration of Latvian

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[35] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 198.
[36] Ibid., para. 196.
[37] Ibid., para. 198.
[38] Ibid.
[39] Ibid., para. 207.
[40] Ibid., para. 208.
[41] Ibid., para. 209.

independence.[42] This is to be contrasted to a case where one is entirely excluded from a social security scheme on the basis of nationality.[43] The Court previously already accepted differential treatment based on nationality for reasons relating to when the applicants started developing ties with the state concerned.[44]

Moreover, the Court reiterated the observation of both the Latvian Constitutional Court and government that the differential treatment was "directly linked to the particular historical and demographic circumstances of Latvia's situation at the relevant time, together with the constraints imposed by the severe economic difficulties prevailing at the time."[45] Thus, *Savickis* "is characterised by the specific background to the impugned transitory measure concerning this pension system."[46] The Court already held before that states enjoy a wide margin of appreciation in the context of the transition from a totalitarian regime to democracy, which necessitates large-scale economic and social legislation.[47]

Furthermore, the scope of the margin of appreciation in cases concerning social benefit depends on whether the measure led to a loss of individual contributions paid by the applicants. The margin is also influenced by whether the applicants had no social cover as a result of the lack of entitlement.[48] In this respect, the Court observed that the differential treatment did not concern the applicants' entitlement to basic pension benefits, nor did it lead to the deprivation or loss of benefits that are based on individual contributions.[49] The Court further noted that the Latvian system "was based on social insurance contributions and functioned according to the principle of solidarity, in the sense that the total amount of contributions collected was used to fund the current disbursement of pensions, payable to all the beneficiaries at a given time."[50] For the Court, "these types of trade-offs in social welfare systems generally call for a wide margin of appreciation."[51] Given the particular difficulties faced by the Latvian authorities in this regard, the Court granted "a substantial degree of deference" to them.[52]

The Court also observed that *nepilsoņi* was intended as a temporary status to enable those who fall under this category to obtain either Latvian nationality or the citizenship of

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[42] Ibid.
[43] Ibid., para. 210. *See also* ECtHR 27 November 2007, No. 77782/01, *Luczak* v *Poland*.
[44] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 210. See also ECtHR 15 September 2016, No. 44818/11*, British Gurkha Welfare Society and Others* v *the United Kingdom*, paras. 84-85.
[45] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 211.
[46] Ibid.
[47] Ibid.
[48] Ibid. para. 212.
[49] Ibid. para. 217.
[50] Ibid. para. 218.
[51] Ibid.
[52] Ibid.

another State (such as Russian, which the fifth applicant had acquired). In this regard, the Court held that "there may be certain situations where the element of personal choice linked with the legal status in question may be of significance with a view to determining the margin of appreciation left to the domestic authorities, especially in so far as privileges, entitlements and financial benefits are at stake (…)."[53] The ECtHR then pointed out that the applicants never tried to acquire Latvian citizenship, despite having settled there for long. While admitting that naturalisation requires efforts from the applicants, the Court held that nationality "is largely a matter of personal aspiration rather than an immutable situation, especially in the light of the considerable time-frame available to the applicants to exercise that option (…)".[54] In this way, the Grand Chamber has departed from its previous ruling in *Andrejeva*, where it expressly held that "(…) dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance."[55]

Based on these considerations, the Court granted a wide margin of appreciation to Latvia in the case. In the words of the Court, "the assessment of whether the impugned difference in treatment is justified by "very weighty reasons" must be carried out against the background of the wide margin of appreciation to be applied in the circumstances of the present case."[56] The Court eventually concluded that "the impugned difference in treatment was consistent with the legitimate aims pursued and that the grounds relied upon by the Latvian authorities to justify it can be deemed to amount to very weighty reasons."[57] Hence, the majority found that there was no violation of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1 of the ECHR.[58]

SEPARATE OPINIONS

Several separate opinions were attached to the judgment. The first is a concurring opinion by Judge Wojtyczek. He agreed with the dissenting opinion of Judge Ziemele in *Andrejeva*,[59] who argued that there is no international law obligation to take into account the years of employment under the USSR unless this was provided through an inter-state agreement. Moreover, he approvingly cited Judge Ziemele's observation that in the context of illegal annexation,

[53] Ibid. para. 215.
[54] Ibid.
[55] *Andrejeva* v *Latvia*, *supra* n. 17, para. 91.
[56] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 213.
[57] Ibid. para. 219.
[58] Ibid. para. 221.
[59] *Savickis and Others* v *Latvia*, *supra* n. 3, Concurring Opinion of Wojtyczek.

"citizens of the injured State had a strong expectation that they would not have to suffer any more than they already had and that this might as well translate into their right to pension advantages."[60]

The second is a dissenting opinion by Judges O'Leary, Grozev and Lemmens. They criticised the majority's statement that the 'very weighty reasons' requirement must be read in light of a wide margin of appreciation, as they could not understand what the majority was trying to convey. In their words, "[a]t best, they blow hot and cold at the same time. At worst, they undermine the strict criterion of "very weighty reasons" by giving the notion of a wide margin of appreciation a prominent, perhaps even determinative, place in it."[61]

They also questioned the majority's suggestion that the applicants could have changed their nationality.[62] In this regard, the three dissenting judges found it "very troublesome that the *Andrejeva* logic is abandoned in [*Savickis*]. The majority's reasoning risks undermining the very essence of the prohibition of discrimination."[63] The dissenting judges then expressed their concern that the line of reasoning in *Savickis* could become "a dangerous and slippery slope", as they wondered to what extent the Court would be ready to accept that victims of discrimination could simply change their non-immutable status to avoid such a treatment.[64] In any case, changing nationality would only eliminate the differential treatment in the future, as the law did not provide for retrospective payment.[65] Furthermore, they pointed out that Soviet citizens were often moved not by their own account, and the unlawful acts of the government should not automatically be attributed to all of its citizens.[66]

Furthermore, Judges O'Leary, Grozev and Lemmens criticised the recognition of protection of constitutional identity as a legitimate aim. They feared that this would become "another potentially dangerous and slippery slope."[67] They themselves were not entirely dismissive of the notion; in their words, "[w]e do not contest the importance of a State's constitutional identity nor the need for reliance on such considerations in certain circumstances."[68] However, in their view, "a State's constitutional identity is usually associated with *its fundamental structures, political and constitutional*",[69] a phrase that seems to be taken

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[60] *Andrejeva* v *Latvia*, *supra* n. 17, Partly Dissenting Opinion of Judge Ziemele.
[61] *Savickis and Others* v *Latvia*, *supra* n. 3, Joint Dissenting Opinion of Judges O'Leary, Grozev and Lemmens, para. 8.
[62] Ibid. para. 18.
[63] Ibid.
[64] Ibid.
[65] Ibid., para. 19.
[66] Ibid., para. 17.
[67] Ibid., para. 24.
[68] Ibid.
[69] Ibid, emphasis added.

verbatim from Article 4(2) of the Treaty on European Union (TEU).[70] In this respect, the dissenting judges found it "difficult to accept" that "Latvia can continue to justify differential treatment in relation to the calculation of a pension supplement affecting a now very reduced category of permanent residents with reference to its constitutional identity."[71] Furthermore, they warned that "Europe knows only too well by now how some States may misuse or instrumentalise arguments relating to their constitutional identity for a variety of purposes."[72] Finally, the dissenting judges were also incredulous with respect to whether Latvia can continue to invoke the aim of protecting its economic system so long after the restoration of Latvian independence.[73]

The third separate opinion was written by Judge Seibert-Fohr and was joined by Judges Turković, Lubarda and Chanturia. She also lamented the Court's departure from *Andrejeva*; in her words, "there are no good reasons to depart from the findings in *Andrejeva v. Latvia*, which has served as a precedent for the Court's interpretation of Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1, for more than a decade."[74] Moreover, she held that the case does not concern *ex injuria ius non oritur*, but rather protection of individuals from discrimination, and in this regard, Latvia had failed to demonstrate why the injustice suffered by Latvians at the time of Soviet occupation justified the impugned differential treatment.[75] Judge Seibert-Fohr especially highlighted that "[d]uring these periods, Latvians working outside Latvia did not contribute any more or less to the Latvian economy than non-nationals."[76] Finally, the government's suggestion for the applicants to naturalise "casts serious doubts" on the measure's "objective necessity" in implementing the state continuity doctrine, as it implies that "the difference in treatment is exclusively grounded in nationality, and not in the beneficiaries' contribution to the economy and development of Latvia (…)."[77]

COMMENTARY

The importance of *Savickis* cannot be overstated, as the ECtHR accepted 'protection of constitutional identity' as a legitimate aim for differential treatment. This case note will focus

[70] The article reads "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."
[71] *Savickis and Others* v *Latvia*, *supra* n. 3, Joint Dissenting Opinion of Judges O'Leary, Grozev and Lemmens, para. 24.
[72] Ibid.
[73] Ibid., para. 25.
[74] Ibid., Dissenting Opinion of Judge Seibert-Fohr, Joined by Judges Turković, Lubarda and Chanturia, paras. 1-3
[75] Ibid., para 12.
[76] Ibid., para 13.
[77] Ibid., para 14.

on the potential implications of the newly-recognised legitimate aim, and it will also criticise the Court's proportionality analysis in relation to this particular aim. Moreover, the case raises the issue of the rights of non-citizens in Latvia. The judgment itself has been criticised by Sarah Ganty and Dimitry Kochenov for "victim blaming and overturning a settled precedent [in *Andrejeva*] against the spirit and the letter of the Convention".[78] The case note will also discuss this matter in the context of a society striving to move on from a traumatic unlawful occupation in the past.

Protection of Constitutional Identity as a Legitimate Aim

In the European constitutional discourse, 'constitutional identity' has been increasingly invoked by domestic authorities to justify a deviation from their international legal obligations, particularly in the context of the European Union (EU) and the ECtHR.[79] As an illustration, in Judgment No. 12-P/2016 of 19 April 2016, the Russian Constitutional Court received a petition concerning the compatibility of the ECtHR's judgment in *Anchugov and Gladkov v Russia* with the Russian Constitution.[80] The ECtHR had previously found in *Anchugov and Gladkov* that automatic disenfranchisement of convicted prisoners is against the right to vote under Article 3 of Protocol No. 1 of the ECHR.[81] This led to a direct conflict with to Article 32(3) of the Russian Constitution,[82] which enshrines that "citizens who are kept in places of imprisonment under a court sentence, do not have the right to elect and be elected."[83] The Court eventually declared *Anchugov and Gladkov* non-executable,[84] and it emphasised that "the effectiveness of norms of the Convention for the Protection of Human Rights and Fundamental Freedoms in the Russian legal order in many respects *depends on the respect of the European Court of Human Rights for the national constitutional identity* (…)."[85]

Strictly speaking, from the perspective of international law, constitutional identity is no excuse for violating a state's human rights obligation in the field of non-discrimination. Article

[78] S. Ganty and D.V. Kochenov, 'Citizenship Imposition is the New Non-Discrimination Standard: ECtHR Blames the Victims in Savickis', *Verfassungsblog*, 22 July 2022, <www.verfassungsblog.de/savickis/>, visited 25 August 2022.
[79] See F. Fabbrini and A. Sajó, 'The Dangers of Constitutional Identity', 25 *European Law Journal* (2019) p. 457 at pp. 459-61; J. Scholtes, 'Abusing Constitutional Identity', 22 *German Law Journal* (2021) p. 534 at p. 535.
[80] Russian Constitutional Court 19 April 2016, Judgment No. 12-P/2016.
[81] ECtHR 4 July 2013, Nos. 11157/04 and 15162/05, *Anchugov and Gladkov* v *Russia*, para. 108.
[82] A. Padskocimaite, 'Assessing Russia's Responses to Judgments of the European Court of Human Rights: From Compliance to Defiance', in R. Grote, M.M. Antoniazzi and D. Paris (eds.), *Research Handbook on Compliance in International Human Rights Law* (Edward Elgar 2021) p. 136 at p. 175.
[83] Art. 32(3) Russian Constitution.
[84] Judgment No. 12-P/2016, *supra* n. 80, para. 4.4.
[85] Ibid., para. 1.2.

27 of the Vienna Convention on the Law of Treaties (VCLT) explicitly enshrines that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[86] In the words of Kirsten Schmalenbach, "deviating internal law is not internationally recognized as a valid justification for non-performance. (…) [I]nternational law turns a blind eye to internal law."[87] Moreover, Article 1 of the ECHR requires states to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[88] The ECtHR has previously clarified in *Anchugov and Gladkov* that "Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a member State's "jurisdiction" – which is often exercised in the first place through the Constitution – from scrutiny under Convention."[89]

In this context, *Savickis* is ground-breaking because the Court has effectively provided a legal avenue for states to invoke their constitutional law to justify differential treatments, as long as they could demonstrate that this law is part of their constitutional identity. While Julian Scholtes argued that constitutional identity should be understood "as a form of argument that occupies the interstitial space between national and European constitutional orders, and thus helps negotiate the allocation of authority between them",[90] the acceptance of protection of constitutional identity as a legitimate aim implies that the concept now has its own place within ECHR law.

The Grand Chamber, however, did not elaborate on the definition of 'constitutional identity'. Constitutional identity itself is, in the words of Michel Rosenfeld, "an essentially contested concept as there is no agreement over what it means or refers to."[91] Gary Jacobsohn, for instance, argued that constitutional identity "emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past."[92] Meanwhile, the understanding found under Article 4(2) of the TEU (and in the dissenting opinion of Judges O'Leary, Grozev and Lemmens) limits constitutional identity to those

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[86] Art. 27 VCLT.
[87] K. Schmalenbach, 'Article 27: Internal Law and Observance of Treaties', in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd edn, (Springer 2018) p. 493 at p. 499.
[88] Art. 1 ECHR.
[89] *Anchugov and Gladkov* v *Russia*, *supra* n. 81, para. 108.
[90] Scholtes, *supra* n. 79, p. 540.
[91] M. Rosenfeld, 'Constitutional Identity', in M. Rosenfeld and A. Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (OUP 2012) p. 756. See also T. Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach', 21 *German Law Journal* (2020) p. 105 at p. 116.
[92] G. Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) p. 7.

relating to the state's "fundamental structures, political and constitutional".[93] In relation to this, constitutional identity can also refer to a constitutional core that may never be subject to amendment,[94] such as the republican form of government in the Italian Constitution.[95] At the same time, there is a trend in East and Central Europe to construe constitutional identity in an ethnocultural sense,[96] while François-Xavier Millet believes that identifying constitutional identity requires an examination of not only the constitutional text, but also extrajudicial sources drawn from national identity such as culture and history.[97] In this way, the distinction between national and constitutional identity is blurred.[98]

As there are various ways of understanding constitutional identity, the Grand Chamber's lack of elaboration made it unclear whether the Court would treat 'constitutional identity' as an autonomous concept, i.e. that the concept has its own independent meaning under ECHR law, distinct from the understanding found in domestic law,[99] or whether it would defer to the meaning found at the domestic level. The Court's acceptance of Latvian constitutional identity argument itself could be interpreted in different ways. It could be read as an effective deference towards domestic authorities' understanding of 'constitutional identity', in line with the Grand Chamber's previous observation in *Ždanoka v. Latvia* (concerning the disqualification of a former leading member of the Communist Party of Latvia as a parliamentary candidate) when it had to deal with a dispute between the parties over the course of Latvian history:

> [I]n exercising its supervisory jurisdiction, the Court's task is not to take the place of the competent national authorities but rather to review the decisions they delivered pursuant to their power of appreciation. In so doing, *it has to satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts, and did not reach arbitrary conclusions* (…). Furthermore, the Court will abstain, as far as possible, from pronouncing on matters of purely historical fact, which do not come within its jurisdiction; however, it may accept certain well-known historical truths and base its reasoning on them.[100]

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[93] Art. 4(2) TEU; *Savickis and Others* v *Latvia*, *supra* n. 3, Joint Dissenting Opinion of Judges O'Leary, Grozev and Lemmens, para. 24.
[94] See Y. Roznai, *Unconstitutional Constitutional Amendment* (OUP 2017) pp. 148-49; P. Faraguna, 'Identity', *Max Planck Encyclopaedia of Comparative Constitutional Law*, March 2020, <www.oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e792>, visited 29 October 2020, paras. 12 & 17.
[95] Art. 139 Costituzione della Repubblica Italiana.
[96] K. Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts', 18 German Law Journal (2017) p. 1703.
[97] F. Millet, L'Union européenne et l'identité constitutionnelle des Etats membres [The European Union and the Constitutional Identity of Member States] (European University Institute 2012), <www.cadmus.eui.eu/bitstream/handle/1814/25134/Millet_2012.pdf>, visited 21 October 2022, pp. 135-36.
[98] See Faraguna, *supra* n. 94, para. 10.
[99] See E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015) pp. 202-22.
[100] ECtHR 16 March 2006, No. 58278/00, *Ždanoka* v *Latvia*, para. 96, emphasis added.

At the same time, the acceptance of Latvian argument could also be an indication that 'constitutional identity' relates to the state's fundamental constitutional structures. As observed by the Court, "the essential point in this regard is not the doctrine of State continuity *per se* but rather the constitutional foundation of the Republic of Latvia following the restoration of its independence."[101] In this line, one may infer that constitutional identity refers to the constitutional foundation of a state, and that the Court accepted Latvia's argument because the state continuity doctrine relates to the constitutional foundation of the Republic of Latvia.

In this context, a more thorough elaboration from the Court is required, as references to constitutional identity immediately raise the spectre of potential abuse. Federico Fabbrini and András Sajó have previously criticised constitutional identity as a "dangerous" concept,[102] since "[n]ot only the identification of the components [of constitutional identity] is haphazard, and additions (iterations and curtailments) are always possible, but the scope of the identified components evolves without a clear algorithm and remains open to political arbitrariness."[103] Judges O'Leary, Grozev and Lemmens also warned that the recognition would become a "dangerous and slippery slope".[104]

It is true that identity itself is not static; Gary Jacobsohn observed that constitutional identity is subject to "an ongoing process entailing adaptation and adjustment as circumstances dictate".[105] His account of constitutional identity is also fluid, albeit it is not "fluidity without boundaries", as "textual commitments such as are embodied in preambles often set the topography upon which the mapping of constitutional identity occurs."[106] Nevertheless, in *Savickis*, the majority did not set the contours of constitutional identity in its reasoning. They did not clarify how a constitutional identity should be identified, and to what extent can constitutional identity be inferred from extraconstitutional sources (such as by reference to culture). As a result, there is a risk that states could engage in a 'particularly inventive interpretation' to shield multifarious discriminatory measures under the cloak of 'protecting constitutional identity'.[107]

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[101] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 198.
[102] Fabbrini and Sajó, *supra* n. 79, pp. 467-69.
[103] Ibid., p. 468.
[104] *Savickis and Others* v *Latvia*, *supra* n. 3, Joint Dissenting Opinion of Judges O'Leary, Grozev and Lemmens, para. 24.
[105] Jacobsohn, *supra* n. 92, p. 13.
[106] Ibid.
[107] As an illustration of a 'particularly inventive interpretation', see the Russian Constitutional Court's judgment which declared the ECtHR judgment in the *Yukos* case to be non-executable, despite the impugned law not attaining the rank of a constitutional law: Russian Constitutional Court 19 January 2017, Judgment No. 1-P/2017; K. Dzehtsiarou and F. Fontanelli, 'Unprincipled Disobedience to International Decisions: A Primer from the

There are interpretative techniques which the Court could resort to in order to minimise the risk of abuse. For instance, in its decision on 16 February 2022, the Court of Justice of the European Union (CJEU) had to decide on a legal challenge by Hungary against the Rule of Law Conditionality Regulation that would allow the European Commission to adopt various measures, including suspension of payments from the EU budget, against Member States for breaches of the rule of law.[108] The CJEU held that the values contained under Article 2 of the TEU, which include human dignity, freedom, democracy, equality, the rule of law and respect for human rights (including the right of minorities), "have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties."[109] While the CJEU acknowledged that the EU respects the national identity of Member States as provided under Article 4(2) of the TEU, "it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another."[110] The CJEU then ruled that Member States must respect the rule of law as "a value common to their own constitutional traditions".[111]

Pietro Faraguna and Tímea Drinóczi interpreted this judgment as demonstrating that the CJEU refused to abandon the concept of constitutional identity. Instead, the CJEU "clearly defined "constitutional identity" in EU terms", i.e. that efforts to shield violations of Article 2 of the TEU through an appeal to Article 4(2) would be considered "an abusive application of the identity clause".[112] This could perhaps provide an inspiration for the ECtHR in future cases: that constitutional identity would need to be defined in ECHR terms. For instance, the Court could hold that constitutional identity must not undermine the very essence of the right to non-discrimination, and that it must not allow states to "engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention" (in line with Article 17 of the ECHR).[113] The Court could also point out, as it had done before, that "the Convention was designed to maintain and promote the ideals and values of a democratic society governed by

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Russian Constitutional Court' in W. Benedek, P. Czech, L. Heschl, K. Lukas and M. Nowak (eds), *European Yearbook on Human Rights 2018* (Intersentia 2018) p. 319 at pp. 327-28.

[108] ECJ 16 February 2022, Case C-156/21, *Hungary* v *European Parliament and Council of the European Union*.

[109] Ibid., para. 127.

[110] Ibid., para. 233.

[111] Ibid., para. 234.

[112] P. Faraguna and T. Drinóczi, 'Constitutional Identity in and on EU Terms', *Verfassungsblog*, 21 February 2022, <www.verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/> visited 21 October 2022.

[113] Art. 17 ECHR. See also ECtHR 2 February 2016, No. 79917/13, *Bîrsan* v *Romania*, para. 71.

the rule of law",[114] and thus protection of constitutional identity must not be invoked to justify breaches of these underlying values. Attempts to do otherwise could be condemned as an abusive invocation of constitutional identity.

Moreover, the recognition of 'protection of constitutional identity' as a legitimate aim does not imply a blanket acceptance of all measures that are claimed to pursue this particular aim. The Court still has the final say on whether the differential treatment is proportionate to the aim sought. In this way, the Court could still respect a state's genuine and profound attachment to its constitutional identity without abdicating its supervisory role. This respect is particularly relevant for *Savickis*, given the fundamental importance of the state continuity doctrine to Latvia and the historical sensitivity of the case at hand.[115]

In *Savickis*, however, the finding of a wide margin of appreciation led to the lack of strict scrutiny in the proportionality analysis. As a result, the Court has summarily accepted the proportionality of the impugned measure to the aims of protecting Latvia's economic system and constitutional identity. In this regard, the Court's line of reasoning in determining the breadth of the margin is not convincing, but rather confusing. It has failed to elaborate why the factors it cited to justify a wide margin outweighs the fact that the differential treatment is based solely on nationality, which requires 'very weighty reasons' and thus should have been a 'very weighty' factor in narrowing the margin. In this way, 'very weighty reasons' would no longer be 'very weighty', particularly as a mere "valid reason" was one of the factors cited by the Court to widen the margin.[116] Sarah Ganty, Dimitry Kochenov and Judges O'Leary, Grozev and Lemmens are consequently right in observing that the majority has undermined the 'very weighty reasons' test.[117] Janneke Gerards has also commented that the combination of the 'very weighty reasons' test with the margin of appreciation doctrine is a novelty, and that this novelty significantly obscures the determination of the intensity of the review for no apparent reason.[118]

Because of the lack of strict scrutiny, the Court has failed to question the suitability of the impugned measure to the aim of protecting constitutional identity. It is not disputed that the state continuity doctrine constitutes part and parcel of the Latvian constitutional identity, as

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[114] See ECtHR 28 November 2017, No. 72508/13, *Merabishvili* v *Georgia*, para. 307.
[115] *Savickis and Others* v *Latvia*, *supra* n. 3, paras. 98 & 102.
[116] Ibid., para. 207.
[117] Ganty and Kochenov, *supra* n. 78; S. Ganty and D.V. Kochenov, ''It's their own fault': the new non-discrimination standard in Savickis v. Latvia is about blaming minorities for their state-mandated statelessness', *Strasbourg Observers*, 5 August 2022, <www.strasbourgobservers.com/2022/08/05/its-their-own-fault-the-new-non-discrimination-standard-in-savickis-v-latvia-is-about-blaming-minorities-for-their-state-mandated-statelessness/>, visited 20 October 2022; *Savickis and Others* v *Latvia*, *supra* n. 3, Joint Dissenting Opinion of Judges O'Leary, Grozev and Lemmens, para. 8.
[118] J.H. Gerards, 'Savickis e.a. t. Letland', *EHRC: European Human Rights Cases Updates*, 26 September 2022, <www.ehrc-updates.nl/commentaar/212200?skip_boomportal_auth=1>, visited 25 October 2022, para. 16.

enunciated by the Declaration "On the Restoration of Independence of the Republic of Latvia" and also the judgment of the Latvian Constitutional Court. What is questionable here is the extension of this doctrine to justify differential treatment in the calculation of pensions. There is a gap between the *descriptive* observation that the Soviet Union unlawfully annexed Latvia and thus Latvia *is* not a successor state of the USSR, and the *normative* claim that this implies people who were settled by the USSR in Latvian territory *should* not enjoy the same pension benefits as Latvian citizens. The doctrine simply implies that Latvia does not automatically assume all the previous obligations of the USSR, and it may still extend benefits by its own motion, as it had done for its own citizens. Latvia has thus failed to demonstrate how the impugned measure would jeopardise the state continuity doctrine.

The Court did specifically mention that the essential point is not the doctrine *per se*, but rather "to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country".[119] However, this is also a weak ground. First, recognising past periods of employment in another country is not equal to assuming oneself as the successor of that country, just as acknowledging past periods of employment in, for instance, East Germany is not equal to assuming to be the successor of that particular state. Recognising past periods of employment in the USSR is also not equivalent to approving Soviet occupation and immigration policy; there is a leap in reasoning here that needs to be bridged. Second, Latvia already decided by its own motion to recognise the period for Latvian citizens, and it does not imply that they retrospectively approved the consequence of Soviet policy to Latvians. As a consequence of the wide margin of appreciation, however, these gaps in reasoning were not identified.

The Rights of Non-Citizens in Latvia

As already highlighted by the two dissenting opinions attached to the case, the Grand Chamber in *Savickis* has overturned *Andrejeva* by suggesting that the applicants could have naturalised, whereas previously it held that the victim could not be expected to do so. This is despite the Court's observation in *Savickis* that "while it is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases."[120]

Although the majority did not explicitly enumerate the reason for this change of heart, they pointed to "the considerable time-frame available to the applicants to exercise" the option

[119] *Savickis and Others* v *Latvia*, *supra* n. 3, para. 198.
[120] Ibid., para. 202.

to naturalise.[121] In this context, it is perhaps not a coincidence that the 2018 ECRI report was quoted in the judgment. The report found that many permanently resident non-citizens chose to retain their status to benefit from visa-free travel to Russia and the more-than-advantageous Russian pension.[122] The report also commended Latvia for providing free language courses in preparation for naturalisation exam, although they asked Latvia to ensure sufficient places as the classes filled up very quickly.[123]

The discussion over the element of personal choice, however, detracts from the crux of the case, which is whether it is justifiable for the state to treat someone differently solely based on nationality in the calculation of pensions. Irrespective of whether nationality is 'mutable', as the majority claimed, there are other grounds of non-discrimination enshrined in the ECHR, such as religion and political opinion, which can be changed. This does not imply that one can, for instance, expect religious minorities to change their religion to avoid discrimination. In this vein, Judges O'Leary, Grozev and Lemmens are right in pointing out that expecting the applicants to change their status would undermine the very essence of the right to non-discrimination.

The degree of the mutability of nationality itself can be called into question. Despite the attempts of the Latvian government to reduce the number of non-citizens, the fact remains that fulfilling naturalisation requirements is no trip to the park, but rather takes significant efforts. In this respect, Ganty and Kochenov observed that the conditions for naturalization in Latvia are "hard to comply with, especially for the elderly, like the applicants".[124] Justice Gérard La Forest of the Supreme Court of Canada even considered citizenship to be immutable due to the really high costs in changing it:

> The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs. Moreover, non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions.[125]

What is worse in *Savickis* is that naturalisation would not lead to a retrospective payment, and thus the differential treatment before the naturalisation would remain unredressed.

At the same time, it is impossible to ignore the political sensitivity surrounding the case. As observed by Judges O'Leary, Grozev and Lemmens:

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[121] Ibid., para. 215.
[122] Ibid., para. 88.
[123] Ibid.
[124] Ganty and Kochenov, *supra* n. 78.
[125] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 195.

> When the Grand Chamber deliberated for a second time on 2 March 2022, the geopolitical situation in the region and in Europe had changed dramatically. The current events obviously do not have an influence on the outcome of the case. They illustrate, however, how acutely sensitive the relations between different communities in a given State may be. We are fully aware both of the importance of this case and of its sensitivity, which transcend the national borders of Latvia.[126]

In this regard, Judge Ziemele in *Andrejeva* (as cited by Judge Wojtyczek in *Savickis*) has argued that the strong expectation of Latvian citizens, as the victims of Soviet illegal occupation and population transfers, to not suffer more can be translated to pension advantages. She proceeded that "there is nothing unreasonable in the fact that after long years spent under an unlawful totalitarian regime the independent legislature decided to reward the citizens."[127] Judge Ziemele further emphasised that "we are in the presence of a situation much closer to that known as *decolonisation* under United Nations law or sometimes referred to in the doctrine as a situation of *disannexation* (…)."[128]

However, this sort of argument is rather difficult to accept from the perspective of liberal constitutionalism, as it effectively punishes a group of people simply because they belong to that group. In this respect, Judge Seibert-Fohr in her dissenting opinion has made a particularly convincing argument:

> Given that the Convention is based on a system of individual rights, the fact that the Soviet Union unlawfully annexed Latvia and, as an occupying State, committed illegal acts and maintained the unlawful occupation for five decades, does not in itself justify reserving unfavourable treatment on the sole basis of their nationality for all former subjects of the Soviet Union who have settled in Latvia (…).[129]

Furthermore, even if the majority had wished to avoid a backlash in Latvia given the sensitivity of the issue, they could have been much more legally robust in their reasoning. Janneke Gerards, for instance, suggested that the majority could have simply focused on the 'very weighty reasons' test and determine whether the grounds invoked by Latvia can be considered as such.[130] As it stands, however, *Savickis* ended up not only undermining the very essence of the right to non-discrimination, but also the 'very weighty reasons' test itself.

CONCLUSION

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[126] *Savickis and Others* v *Latvia*, *supra* n. 3, Joint Dissenting Opinion of Judges O'Leary, Grozev and Lemmens, para. 6.
[127] *Andrejeva* v *Latvia*, *supra* n. 17, Partly Dissenting Opinion of Judge Ziemele.
[128] Ibid., para. 26.
[129] *Savickis and Others* v *Latvia*, *supra* n. 3, Dissenting Opinion of Judge Seibert-Fohr, Joined by Judges Turković, Lubarda and Chanturia, para. 12.
[130] Gerards, *supra* n. 118, para. 17.

The ECtHR's recognition of 'protection of constitutional identity' as a legitimate aim for differential treatment is not without problems. It could be abused by states to circumvent Article 27 of the VCLT. While it is possible to reduce this risk by defining 'constitutional identity' in ECHR terms and by exercising a strict proportionality test, this safeguard could be jeopardised if the Court decided to accord a wide margin of appreciation to the state concerned. *Savickis* demonstrates how the recognition of this aim might satisfy some states, but still poses the risk of excessive deference to states, thus justifying a discriminatory treatment based solely on nationality.

It should be noted that this case is only concerned with differential treatment. One may ponder whether one day the Court would also recognise protection of constitutional identity as a legitimate aim for human rights limitation in general. For instance, imagine a state invoking protection of the traditional family as an aspect of that state's constitutional identity to deviate from *Oliari and Others v Italy* (2015), where the Court established an obligation to afford a legal protection to same-sex couples under Article 8 of the ECHR on the right to private and family life.[131]

At the same time, there is a clear hurdle to protection of constitutional identity as a legitimate aim for human rights limitation in general, as the ECtHR has ruled that "[t]he lists of legitimate aims for the pursuit of which Articles 8 to 11 of the Convention permit interferences with the rights guaranteed by them are exhaustive."[132] Hence, limitation to these rights "must, in particular, pursue an aim that can be linked to one of those listed (…)."[133] As a consequence, in each particular case relating to Articles 8 to 11 of the ECHR, the burden is on the state to demonstrate that protection of constitutional identity can be linked to the enumerated legitimate aims, for instance the interests of national security, public safety or the economic well-being of the country; protection of morals; or protection of the rights and freedoms of others. Regardless of the ECtHR's future approach to such a scenario, what is clear is that arguments relating to constitutional identity will not be put into rest anytime soon.

Savickis also raises the issue of the rights of non-citizens in Latvia. In this regard, the Court had to tread lightly given the sensitivity of the matter and also the increased hostility against (ethnic) Russians in the wake of Russian military aggression against Ukraine. This does not mean that a group can be collectively castigated simply because of 'guilt by association',[134] particularly as the ECHR is founded on the values of legality and liberalism that guarantee individual enjoyment of rights.[135] The Court, however, found no violation in

[131] ECtHR 21 July 2015, Nos. 18766/11 and 36030/11, *Oliari and Others* v *Italy*, paras. 177-78.
[132] ECtHR 28 November 2017, No. 72508/13, *Merabishvili* v *Georgia*, para. 294.
[133] ECtHR 27 August 2015, No. 46470/11, *Parrillo* v *Italy*, para. 163.
[134] Ganty and Kochenov, *supra* n. 78.
[135] See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) p. 5.

Savickis and in the process undermined the very essence of the right to non-discrimination by suggesting for the applicants to change their status. This could become a slope that is even more slippery than ‘protection of constitutional identity’ its