

EVA ROM

Constitutional Conflict as Judicial Civil Disobedience and Conscientious Objection

Verfassungsentwicklung in Europa

33

Mohr Siebeck

Verfassungsentwicklung in Europa

herausgegeben von

Hartmut Bauer, Peter M. Huber
und Karl-Peter Sommermann

33



Eva Rom

Constitutional Conflict as Judicial Civil Disobedience and Conscientious Objection

Reconceptualising National Constitutional Court
Rulings in the European Union Legal Space

Mohr Siebeck

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Introduction

This thesis belongs to the vast body of scholarship which revolves around the primacy of Union law, its properties, its justification, and – most delicately and most decisively of all – its limits. Intense scholarly attention has been bestowed on primacy because the European Union constitutional space knows two competing perspectives where this principle of Union law is concerned. The contrast of these two visions is particularly stark at the judicial level: Whereas the Court of Justice of the European Union has one concept of primacy, some national constitutional courts¹ have another and hence understand primacy differently.

I. Irreconcilability as the starting point

These two visions are incommensurable.² They do not differ regarding details, but with regard to the central assumptions on which primacy builds.³ The Court of Justice highlights the autonomy of the legal order it is tasked to interpret,⁴ it bases primacy solely on the Treaties⁵ and sees its immense importance in the fact that only primacy can guarantee the effective and uniform application of Union law. Other-

¹ For the sake of readability, I will portray this controversy as consisting of essentially two sides, the Court of Justice on the one hand and some national constitutional courts on the other. However, to gather together all national constitutional courts in one uniform block is not entirely accurate; some national constitutional courts might follow the Court of Justice more closely than others, so the case is more complex; see more precisely Dana Burchardt, ‘The Relationship between the Law of the European Union and the Law of its Member States – a Norm-Based Conceptual Framework’ (2019) 15 *European Constitutional Law Review* 73; see also Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (OUP 2022) 15 et seq. for what constitutional review means exactly in this context. For a handy overview of the different constitutional systems in the EU, see *ibid.* at 17.

² Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review* 317, 338; see also Ana Bobić, ‘Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU’ (2020) 22 *Cambridge Yearbook of European Legal Studies* 60, 65, detailing this incommensurability; see further Bobić, *Jurisprudence* (n 1) 25, 35, 37.

³ See Mattias Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11 *European Law Journal* 262, 278.

⁴ CJEU, C-6/64 *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, p. 593.

⁵ See Neil MacCormick, ‘The Maastricht-Urteil: Sovereignty Now’ (1995) 1 *European Law Journal* 259, 264; see also Bobić, ‘Constructive Versus Destructive Conflict’ (n 2) 64 speaking of the “autonomous, independent, and self-referential nature of the system of Treaties.”

wise, the “legal basis of the Community itself” would be questioned.⁶ Some Member State constitutional courts see primacy as much more relative a concept⁷ and outline what they understand as the red lines stemming from national constitutions primacy must steer clear of.⁸ Various national constitutional courts have issued rulings in this vein.⁹ Among them, the German Bundesverfassungsgericht’s (BVerfG’s) review mechanisms and the rulings in which these are applied are both the most well-known and the most controversial. These two competing visions of the Court of Justice on the one hand and of national constitutional courts on the other, which concern the same geographical space,¹⁰ will be outlined more comprehensively in the next chapter, while here my point is merely to give the broader background this investigation is set against. I would like to offer a metaphor: When we look at the European constitutional space, it is as if we are looking at one of those baroque picture puzzles, a “Vexierbild”.¹¹ Two individuals, looking at the same picture, may see something entirely different. Such optical illusions challenge us; they induce uncertainty.¹² They conjure up a sense of astonishment: “Is this real?”, followed by “What is real?”¹³

Legal scholars do not ponder paintings, but they *do* wonder whether the Court of Justice or a national constitutional court provides the better legal arguments. They might wonder how to reconcile the two and move away from the question of who has the final say on what it is we see when we look at the constitutional space of the European Union.¹⁴ This last aspect is particularly linked to scholars who can be assigned to the school of constitutional pluralism. In short, the starting point in the field of constitutional conflict in the European Union is a categorical disagreement of how the Union legal order relates to the national ones. By constitutional conflict in the European Union, I understand the interactions between the European Union level and the Member State levels which may result (or actually do) in confrontational

⁶ *Costa* (n 4) p. 594.

⁷ See Armin von Bogdandy & Stephan Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1417, 1418.

⁸ Rudolf Streinz, *Europarecht* (11th edn, CF Müller 2019) para. 215.

⁹ In BVerfG, 2 BvR 2216/20 and 2 BvR 2217/20, 23 June 2021, *Einheitliches Patentgericht (Eilanträge)*, para. 74, the BVerfG refers to Member States which have made use of such “constitutional reservations”.

¹⁰ Bobić, *Jurisprudence* (n 1) 32.

¹¹ See, e.g., Duden, ‘Vexierbild’ <https://www.duden.de/rechtschreibung/Vexierbild>. All websites cited in this thesis last accessed 22 November 2025. Where page numbers are given with blog entries, these denote the pages in the PDF version.

¹² Verena von Nell, ‘Korruption – Vexierbild des Denkens’ in eadem, Gottfried Schwitzgebel & Matthias Vollet (eds), *Korruption. Interdisziplinäre Zugänge zu einem komplexen Phänomen* (Deutscher Universitäts-Verlag 2003) 31.

¹³ Lois Parkinson Zamora, ‘Trompe l’oeil tricks: Borges’ Baroque Illusionism’ <https://www.uh.edu/~englmi/BorgesBaroqueIllusionism/>.

¹⁴ This is the position of constitutional pluralists, who do not focus on the question of who has the final say, see, e.g., Matthias Goldmann, ‘Constitutional Pluralism as Mutually Assured Discretion. The Court of Justice, the German Federal Constitutional Court, and the ECB’ (2016) 23 *Maas-tricht Journal of European and Comparative Law* 119, 120.

situations, content-wise revolving around the question of Union law primacy and its limits. Its principal actors are both Union courts and national constitutional (or supreme) courts since these conflicts are carried out in and by these courts. As Bobić writes: “[...], studying constitutional conflict in the EU is inherently linked to studying courts.”¹⁵

The two concepts of civil disobedience and conscientious objection, which Smith & Brownlee understand as belonging to a more extensive category of “conscientious disobedience”,¹⁶ have also found their way into the extensive literature on constitutional conflict. Similarly to them, I use this last expression to denote both concepts at once. Civil disobedience and conscientious objection have been drawn upon to describe this conflict. This has been done in particular by Baquero Cruz and Kumm. Their publications build on the assumption that the two concepts are of use when thinking about constitutional conflict in the European Union. This is as innovative as it is audacious¹⁷, given the fact that civil disobedience and conscientious objection are concerned with the individual’s relationship towards the law, and any transfer to the *institutional* level calls for a precise justification.¹⁸

II. Conscientious disobedience: Is there space for resistance in a democratic regime?

What is invoked here when Union law scholars draw on civil disobedience and conscientious objection? Chapter B will introduce these two concepts in much more detail; here it may suffice to briefly sketch the field we venture into with these two concepts. The classic Rawlsian definition of civil disobedience sees it as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or politics of the government”.¹⁹ It is, in short, an act of opposition, but a very particular one, qualified in numerous ways. Conscientious objection refers to a similar concept.²⁰ It can be understood as “a principled act of nonconformity with a directive or legal order that people engage in for reasons of

¹⁵ Bobić, *Jurisprudence* (n 1) 21. See also at 21 et seq. on what causes this centrality of the courts and why she excludes other actors and the ECtHR in her analysis.

¹⁶ William Smith & Kimberley Brownlee, ‘Civil Disobedience and Conscientious Objection’ *Oxford Research Encyclopedias* (24 May 2017) <https://oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-114>, 2.

¹⁷ See Julio Baquero Cruz, ‘Legal Pluralism and Institutional Disobedience in the European Union’ in Matej Avbelj & Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 249, 262.

¹⁸ It must be added, however, that Baquero Cruz sees this problem and provides his reasons for institutional disobedience, Baquero Cruz (n 17) 262–265. See more extensively for the problem of institutional civil disobedience under B.II.4.

¹⁹ John Rawls, *A Theory of Justice* (first published 1971, HUP 2005) 364.

²⁰ See Smith & Brownlee (n 16) 1.

personal morality.”²¹ Rawls speaks of “conscientious refusal” in his *Theory of Justice*.²² I would like to introduce these two concepts in turn.

1. Civil disobedience as an exceptional correctional mechanism

It is the very essence of democratic rule that its laws are agreed on by a majority. While the fabric of a democratic state based on the rule of law also exhibits its counter-majoritarian elements,²³ majority rule is at the heart of any democracy. Regarding the individual citizen, this raises the following question: Does the individual have to abide by the rules democratically agreed on or is it both imaginable and justifiable to resist in very specific circumstances?²⁴ Differently phrased, should a constitutional democracy accommodate practices such as civil disobedience or conscientious objection? This question has received elaborate attention inside the walls of academic institutions. It is, however, not confined to the theoretical, *au contraire*: History has raised this question time and again. The term civil disobedience will readily conjure up images of past struggles such as the American civil rights movement.²⁵ At present, we are once again confronted with the above question, hence relegating the concept of civil disobedience to the past could not be more wrong.²⁶ The possibilities and limits of non-violent resistance shape current public debate. The concept is discussed not only from the perspective of constitutional²⁷ and criminal law²⁸, but also from the perspective of democratic theory.²⁹

It is interesting to note that while the cause of the protestors has changed, the arguments with which they are attacked or defended have not as compared to a few decades ago.³⁰ Particularly the fight against climate change has catapulted the con-

²¹ Smith & Brownlee (n 16) 2; similarly Mark R. Wicclair, *Conscientious Objection in Health Care. An Ethical Analysis* (CUP 2011) 1; for a more extensive definition, see B.III.2.

²² See, e.g., Rawls (n 19) 340.

²³ See only Bickel's account with regard to the judicial branch, Alexander M. Bickel, *The Least Dangerous Branch* (first published 1962, YUP 1986).

²⁴ See William Smith, *Civil Disobedience and Deliberative Democracy* (Routledge 2013) 6 et seq. for an introduction to this question.

²⁵ See Daniel Markovits, ‘Democratic Disobedience’ (2005) 114 *The Yale Law Journal* 1897, 1899; extensively on civil disobedience and the civil rights movement, see Erin Pineda, *Seeing Like an Activist. Civil Disobedience and the Civil Rights Movement* (OUP 2021).

²⁶ Cf. Lewis Perry, *Civil Disobedience. An American Tradition* (YUP 2013) 284.

²⁷ Here the freedom of assembly plays a crucial role.

²⁸ See, e.g., Amtsgericht Flensburg, 440 Cs 107 Js 7252/22, 7 November 2022, https://www.anwalthoffmann.de/wp-content/uploads/2022/12/AG_Flensburg_440-Cs-107-Js-7252_22_ge_schwaerzt.pdf.

²⁹ See Rouven Dieckjobst, ‘Klimanotstand über Gewaltenteilung? Zur Annahme eines rechtfertigenden Notstandes aufgrund der Klimakrise durch das Amtsgericht Flensburg’ (*Verfassungsblog*, 11 December 2022) <https://verfassungsblog.de/klimanotstand-uber-gewaltenteilung/>.

³⁰ See Bernd Ulrich, ‘In der Schwebe. Was ziviler Ungehorsam nicht tun sollte und was demokratische Mehrheiten nicht tun dürfen.’ *Zeit Online* (Berlin, 4 November 2022) <https://www.zeit.de/2022/45/klimabewegung-radikalisierung-protest-demokratie>.

cept of civil disobedience into the centre of attention and the lines of argumentation put forward by politicians, journalists, protestors and legal scholars follow well-known paths: Some emphasise that the law must not be broken, which applies without exception, an argumentation which has been described as “authoritarian legalism” by Habermas.³¹ The law is the law, the majority is the majority, and a breach of law is a breach of law³², so to speak. This position also takes the form of a decidedly exclusively legal argumentation, turning around what exact criminal offences the protestors’ actions constitute and whether this amounts to violence.³³ On the other end of the spectrum, there are the protestors justifying their actions by referring to the gravity of the situation and the inexistence of other options to further change.³⁴ Other opinions fall somewhere in between, asking for clemency regarding the punishment of the protestors.³⁵ This last group appears to be guided in their argumentation by the theoreticians of the last century: At times, it seems as if the journalists in question have had Rawls’ *Theory of Justice* lying next to them when writing the piece, carefully outlining how the protestors’ actions show their respect for and belief in their constitutional democracy while selectively breaking the law.³⁶

When we contemplate resistance under an autocratic regime, we will more readily award rights to resistance. From a purely academic perspective, this constellation is “uninteresting”, as Markovits aptly put it, “because it is built into the characterization of the regimes as illegitimate.”³⁷ In a constitutional democracy, on the other hand, everything changes: To argue for the possibility of justified civil disobedience is considerably more difficult when the laws the disobedient is protesting are the product of a democratic process. As Smith points out by resorting to the Rawlsian

³¹ E.g., Jürgen Habermas, ‘Ungehorsam mit Augenmaß. Der Rechtsstaat braucht des Bürgers Mißtrauen’ *Die Zeit* (Hamburg, 23 September 1983) <https://www.zeit.de/1983/39/ungehorsam-mit-auge-nmass>, 3 et seq.; see for such an argumentation the interview with Swiss criminal law professor Niggli in Thomas Isler, ‘Darf man für den Klimaschutz das Gesetz brechen?’ *NZZ Magazin* (Zurich, 5 November 2022) <https://magazin.nzz.ch/nzz-am-sonntag/hintergrund/darf-man-fuer-den-klima-schutz-das-gesetz-brechen-ld.1710862?reduced=true>; in some instances, the condemnation of the climate activists’ acts goes very far; they have been described as “climate terrorists” in public discourse, see, e.g., “‘Unwort des Jahres’ 2022 ist ‘Klimaterroristen’” *Deutschlandfunk Kultur* (Cologne, 10 January 2023) <https://www.deutschlandfunkkultur.de/unwort-des-jahres-2022-ist-klima-terroristen-104.html>; see also, Ulrich ‘In der Schwebe’ (30) 3 referring to the *FAZ*; more subtly, naming such protestors in the same sentence with left and right wing terrorism, see the interview with Niggli. Referring to the Habermasian term of “authoritarian legalism”, Ulrich ‘In der Schwebe’ (n 30) 4.

³² Ulrich ‘In der Schwebe’ (n 30) 5.

³³ See Isler (n 31).

³⁴ See, e.g., Elena Erdmann & Johannes Schneider, “‘Die Klimakrise ist zu groß, um auf den eigenen Ruf zu achten’” *Zeit Online* (Berlin, 6 November 2022) <https://www.zeit.de/wissen/umwelt/2022-10/klimaforschung-cop-nana-gruening-wolfgang-cramer-klimakrise>.

³⁵ See, e.g., Ulrich ‘In der Schwebe’ (n 30).

³⁶ See, e.g., Bernd Ulrich, ‘Das Gegenteil von RAF’ *Zeit Online* (Berlin, 8 December 2022) <https://www.zeit.de/politik/deutschland/2022-12/letzte-generation-raf-demokratischer-rechtsstaat-klimaaktivisten-klimakrise>, 2 et seq.

³⁷ Daniel Markovits, ‘Democratic Disobedience’ (2005) 114 *The Yale Law Journal* 1897, 1936.

term of the “bonds of ‘civic friendship’”, such methods try these bonds – they strain them.³⁸ The disobedient knows about the respective law’s character – and decides to break it regardless. The passing of time may strengthen the disobedients’ arguments and support for their position may grow, but it may also do the opposite and their actions may turn out as misguided. These insights, however, are not available at the moment of the rebellious act itself, but very much a privilege of the future. Habermas has phrased this difficulty in the following manner: “The fools of today are not always the heroes of tomorrow; many will, tomorrow too, remain the fools of yesterday.”³⁹

Resistance to laws democratically agreed upon in a constitutional democracy, which, as mentioned, can turn out to have been a disproportionate means in retrospect, is a controversial element to argue for. There is certainly a sense of unease for many contemplating such a thought and more so, endorsing it. With the rule of law as one of the pillars every constitutional democracy rests on, arguing for an – although highly selective and exceptional – possibility to justified civil disobedience equals stepping onto thin ice. It is not a side question, but goes to the heart of the democratic system. The “absolute legalist” will see the rule of law jeopardised.⁴⁰ The overarching fear of opponents of civil disobedience is that the concept is “staatszersetzend”. While he was secretary-general of the German CDU in the 1980s, the politician Heiner Geißler spoke of civil disobedience as “applying the axe to democracy.”⁴¹ The “absolute individualistic moralist” meanwhile will accept such practice as legitimate.⁴²

What we find in scholarly literature is elaborate arguments to resolve this tension by proposing a narrowly defined concept of civil disobedience as an *ultima ratio*, most prominently provided by Rawls.⁴³ The difficulty lies in balancing the two sides, “for we recognize the potential despotism of the former extreme and the potential anarchy of the latter.”⁴⁴ While civil disobedience is understood as a “characteristic of a mature political culture”⁴⁵, it is subject to strict conditions.⁴⁶

³⁸ Smith (n 24) 7 referring to John Rawls, *A Theory of Justice: Revised Edition* (Oxford University Press 1999) 5.

³⁹ Habermas (n 31) 3.

⁴⁰ Alan Gewirth, ‘Civil Disobedience, Law, and Morality: An Examination of Justice Fortas’ Doctrine’ (1970) 54 *The Monist* 536.

⁴¹ Habermas (n 31) 2; Tobias Schieder, *Ethisch motivierter Rechtsungehorsam. Rechtsdebatten zu Widerstandsrecht, Gewissensfreiheit und zivilem Ungehorsam in der Bundesrepublik Deutschland 1949–1989* (Mohr Siebeck 2018) 226. It should be added, however, that Geißler’s general political views altered significantly later in his life, see Jan Philipp Wölbern, ‘Heiner Geißler’ (*Konrad Adenauer Stiftung*) <https://www.kas.de/de/web/geschichte-der-cdu/personen/biogramm-detail/-/content/heiner-geissler>.

⁴² Gewirth (n 40) 536.

⁴³ Rawls (n 19) 333–391.

⁴⁴ Gewirth (n 40) 536.

⁴⁵ Habermas (n 31) 1 et seq.

⁴⁶ They are indeed so strict that they come close to legality, see Samira Akbarian, *Ziviler Ungehorsam als Verfassungsinterpretation* (Mohr Siebeck 2023) 143.

There are different avenues to argue for civil disobedience as a legitimate means in a democratic society. Some stem from a liberal tradition⁴⁷, while others embody what is referred to as “(radically) democratic civil disobedience”.⁴⁸ The former argue that such a form of protest can actually strengthen and stabilise a democracy,⁴⁹ the latter considering it a means to rectify democratic deficits.⁵⁰ Particularly concerning the former, the basic underlying premise here is that the sovereign errs from time to time, and it is this fallibility which necessitates such a concept as civil disobedience.⁵¹ This does not mean that all proponents of civil disobedience agree on its exact definition or conditions which have to be fulfilled in order for it to be justified. On the contrary, there is a myriad of different understandings of the concept and consequently, certain acts may be regarded by some as justified civil disobedience, but not by others. This multitude of understandings of the concept makes it necessary to clearly define what is understood by the term for the purposes of this investigation.

2. Conscientious objection as civil disobedience's individualistic cousin

Conscientious objection is also a form of noncompliance to laws democratically agreed on,⁵² and as such it is closely related to civil disobedience.⁵³ Again, it can be defined as “a principled act of nonconformity with a directive or legal order that people engage in for reasons of personal morality.”⁵⁴ As the definition makes clear, the act of conscientious objection is inspired by the objector's individual conscience, however, and is not based on the values of the polity as a whole.⁵⁵ It is more “individualistic”, so to speak, and shows a strong link to a person's identity.⁵⁶ The concept of conscientious objection becomes relevant in situations which might present a deep dilemma to an individual, such as abortion or the duty to take up arms.⁵⁷

What sets conscientious objection apart from civil disobedience, among other aspects, is that the concept appears in the form of positive law.⁵⁸ Some constellations have been regulated via a constitutional provision. Article 4 para. 3 Grundgesetz

⁴⁷ The main proponents are Rawls, Dworkin and Habermas, see extensively Akbarian (n 46) 99–126.

⁴⁸ Here Arendt and Celikates may serve as examples, see extensively Akbarian (n 46) 167–196.

⁴⁹ E.g., Rawls (n 19) 333, 383; see also Gary Wihl, ‘Civil Disobedience in Democratic Regimes’ (2018) 51 *Israel Law Review* 301, 309; cf. also Richard Nobles & David Schiff, ‘Civil Disobedience and Constituent Power’ (2015) 11 *International Journal of Law in Context* 462, 478 et seq.

⁵⁰ See, e.g., Robin Celikates, ‘Democratizing Civil Disobedience’ (2016) 42 (10) *Philosophy and Social Criticism* 982, 986, 991.

⁵¹ See Rawls (n 19) 353 et seq.

⁵² Rawls (n 19) 368.

⁵³ E.g., Rawls (n 19) 368, 371; Smith & Brownlee (n 16) 1.

⁵⁴ Smith & Brownlee (n 16) 2; similarly, see Wicclair (n 21) 1.

⁵⁵ Rawls (n 19) 369.

⁵⁶ Wicclair (n 21) 5.

⁵⁷ Smith & Brownlee (n 16) 1 et seq.

⁵⁸ See Juan Carlos Velasco Arroyo, ‘Politische Dissidenz und partizipative Demokratie: zur Rolle des zivilen Ungehorsams heute’ (1998) 84 *Archiv für Rechts- und Sozialphilosophie* 87, 93 et

(GG) provides such an example insofar as an individual cannot be forced to do his military service by taking up arms.

III. Conscientious disobedience and constitutional conflict in the European Union: Of underexplored parallels between two highly normative debates

It has been established that the academic examination of conscientious disobedience is highly relevant at present, and, quite frankly – with its philosophical questions relating to the deep structure of constitutional democracy – intellectually intriguing. Why should we draw on it in the context of constitutional conflict in the European Union, however?

I would like to take one step back and clarify why we should pair up conscientious disobedience and constitutional conflict to start with. I believe it is no coincidence these two fields have been brought together; instead, it is the discovery that the two debates share parallels on a deeper level: First, and most noticeably, conscientious disobedience refers to an act of resistance. The fundamental idea is a type of opposition to the law as it stands. Constitutional conflict in the European Union mirrors this element since national constitutional courts sometimes deliver rulings which more or less directly defy the Court of Justice's interpretation of the primacy of Union law.⁵⁹ Regarding both conscientious disobedience and constitutional conflict, the act of opposition is understood as an *ultima ratio* act, a possibility of last resort.⁶⁰ Both constitutional conflict and conscientious disobedience do not just concern any act of opposition, but a *qualified* one built on certain principles. The two debates share this core structural similarity. The oppositional nature of the act brings with it the burden of justification. The presumption is that the individual must oblige, and that Union law be given precedence (see under C.II.1.d), p. 192 for Kumm portraying the latter presumption). By not accepting a law, the individual puts him- or herself in opposition to what the majority has agreed on. Similarly, the national constitutional court opposing the Court of Justice and declaring Union law inapplicable assumes a role it does not have according to Union law. This opposition is, it cannot be emphasised enough, a qualified one and there is a normative structure underlying it.

Second, both fields of research do not exhaust themselves in legal discussions, but are heavily normative. This requires more elaboration, particularly where constitu-

seq.; Michele Saporiti, 'For a General Legal Theory of Conscientious Objection' (2015) 28 *Ratio Juris* 416.

⁵⁹ For disobedience by the *executive* as opposed to the judiciary, see Philipp Koepsell, *Exekutiver Ungehorsam und rechtsstaatliche Resilienz* (Mohr Siebeck 2023), at 22 briefly referring to the constellation pertinent to this enquiry.

⁶⁰ The *ultima ratio* requirement forms part of the criteria of justification in the Rawlsian account, e. g., Rawls (n 19) 373. National constitutional courts also see their respective judgments as *ultima ratio*, e. g., Stanisław Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland' (2020) 21 *German Law Journal* 1104, 1108 et seq.

tional conflict in the European Union is concerned. Regarding conscientious disobedience, these forms of protest are inspired by what the individual believes to be right.⁶¹ I believe it is hard to think of any concepts more steeped in moral considerations. In these concepts, legal and moral considerations invariably meet. Turning to constitutional conflict in the European Union: here, too, we encounter extra-legal considerations. As Canihac points out when writing on constitutional pluralism, we sometimes encounter an “*ethical*, rather than legal, language.”⁶² This is reminiscent of MacCormick’s seminal essay *The Maastricht-Urteil: Sovereignty Now*, in which he argues that a pluralist vision “entails acknowledging that not all legal problems can be solved legally.”⁶³ Studying Kumm’s pluralist approach, we can also see that morality plays a role.⁶⁴ When Bobić elaborates on her view of various prominent cases of constitutional conflict with the aim of distinguishing between legitimate and illegitimate ones, she also readily clarifies that her article submits “a normative argument.”⁶⁵ The language of morality is also used to criticise the courts themselves. One case in point here is Kelemen, calling the BVerfG’s line of case law regarding Union law primacy “illogical and – in one sense at least – immoral, [...]”⁶⁶ My point here is to highlight that arguments for and against national constitutional or supreme courts putting themselves in opposition to the Court of Justice are often normative ones, which makes drawing on conscientious disobedience seem less far-fetched.

Last, the two fields of research share a common challenge: Let us assume that there may be constellations in which, say, an act of civil disobedience is indeed justified. Which exact conditions have to be fulfilled in order for it to be subsumed under “civil disobedience” and furthermore for it to be a justified instance of such? This will be discussed in much more detail later. For now, let us assume a constitutional democracy allows for such a deviation from the rule of law. How are we to guarantee that such a concept is not misused? Many will want to claim the designation as a civil disobedient for themselves, but self-characterisation cannot be the deciding factor here.⁶⁷ Constitutional conflict knows a comparable problem: If we accept the possibility of the Member State level to defy the Union one if certain conditions are met, how can it be prevented that others invoke this possibility, while disregarding the strict conditions it must be attached to? A ruling by a national constitutional court in

⁶¹ See Smith & Brownlee (n 16) 1.

⁶² Hugo Canihac, ‘Is Constitutional Pluralism (II)liberal? On the Political Theory of European Legal Integration in Times of Crisis’ (2021) 22 German Law Journal 491, 503.

⁶³ MacCormick (n 5) 265.

⁶⁴ See Dimitri Van Den Meerssche, ‘European Perspectives on Constitutional Pluralism(s): an Ontological Roadmap’ (2018) 9 Transnational Legal Theory 1, 21 et seq., 27 fn. 162.

⁶⁵ Bobić, ‘Constructive Versus Destructive Conflict’ (n 2) 60.

⁶⁶ R Daniel Kelemen, ‘On the Unsustainability of Constitutional Pluralism. European Supremacy and the Survival of the Eurozone’ (2016) 23 Maastricht Journal of European and Comparative Law, 136, 139.

⁶⁷ Cf. William E Scheuerman, ‘Introduction: Why, Once Again, Civil Disobedience?’ in idem (ed), *The Cambridge Companion to Civil Disobedience* (CUP 2021) 1, 2.

which it has (selectively!) defied primacy will be construed as support for and by those governments which have been dismantling the rule of law in their Member States.⁶⁸ Some have argued the rule of law crisis mainly relating to Poland and Hungary makes it careless to defend any position which is not in line with the Court of Justice's view of primacy,⁶⁹ whereas others pursue a different avenue and explicitly differentiate between the single instances of opposition, providing arguments for why some are tolerable while others are not.⁷⁰

I have aimed to demonstrate that the two fields of research share significant parallels and face similar challenges. This makes it worth enquiring whether arguments developed in the field of conscientious disobedience may be used with regard to constitutional conflict in the European Union. The hypothesis is the following: The literature of conscientious disobedience contains important insights which can be drawn upon to build a framework with which to assess cases of constitutional conflict in the European Union. The potential conscientious disobedience holds for (European) constitutional law has not yet been surveyed in detail. The assumption is, however, that civil disobedience and conscientious objection as concepts describing a *qualified* form of resistance will prove highly valuable to study in order to arrive at an analytically sharper understanding of constitutional conflict.

In the following chapters, constitutional conflict will be presented in more detail, as will civil disobedience and conscientious objection. Key points from these chapters will inform the design of a framework for assessing cases of constitutional conflict. While a mere theorisation of constitutional conflict in the European Union is a useful endeavour in itself, here I would like to incorporate the aspect of legal studies which distinguishes it from philosophy and history: its orientation towards the concrete case.⁷¹ Häberle writes that abstract theory must be able to display its value on the concrete level.⁷² This is what is intended with Chapter D: The framework will be applied to four prominent cases of constitutional conflict.

⁶⁸ This fear has been voiced after the German *PSPP* judgment, as Biernat notes, extensively discussing this aspect, Biernat (n 60) 1104–1115.

⁶⁹ See, e.g., Federico Fabbrini & András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 *European Law Journal* 457–473; R Daniel Kelemen & Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59–74.

⁷⁰ See, e.g., Bobić, 'Constructive Versus Destructive Conflict' (n 2); Tom Flynn, 'Constitutional Pluralism and Loyal Opposition' (2021) 19 *International Journal of Constitutional Law* 241–268.

⁷¹ See Peter Häberle, '(Rechts-)Wissenschaften als Lebensform' in Markus Kotzur & Lothar Michael (eds), *Peter Häberle. Verfassungsvergleichung in europa- und weltbürgerlicher Absicht. Späte Schriften* (Duncker & Humblot 2009) 275, 281.

⁷² Häberle, '(Rechts-)Wissenschaften als Lebensform' (n 71) 281. The German original here reads: "Abstrakte Theoriehöhe muss sich konkret in Nähe bewähren können."

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