

**THE ROLE OF CONSTITUTIONAL
COURTS IN THE GLOBALISED
WORLD OF THE 21ST CENTURY**

**KONSTITUCIONĀLO TIESU LOMA
GLOBALIZĒTAJĀ
21. GADSIMTA PASAULĒ**

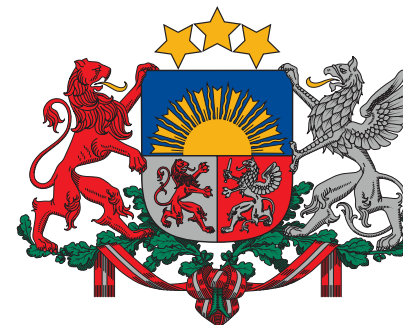
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The Role of Constitutional Courts in the Globalised World of the 21st Century.

Proceedings of the 2018 Conference of the Constitutional Court of the Republic of Latvia – Rīga: Constitutional Court of the Republic of Latvia, 2019., 272 pages.

Konstitucionālo tiesu loma globalizētajā 21. gadsimta pasaulē. Satversmes tiesas 2018. gada konferences materiālu krājums. – Rīga: Latvijas Republikas Satversmes tiesa, 2019., 272 lpp.



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ISBN 978-9934-8756-4-9

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Introduction

Globalisation with its various forms and consequences has become a major factor affecting modern discourse.¹ Yet this phenomenon has not been sufficiently discussed with regard to the functioning of constitutional justice. It seems that globalisation is a split-subject – it provides great opportunities for some and at same time causes great hardship for others. The bright side of it is a self-sufficient justification for those who benefit, while those struggling remind us that we cannot simply escape from the grips of reality.

On the one hand, there are strong tendencies to defend the globalisation, including free trade, European integration, and greater solidarity with the rest of the world. On the other hand, there are also those who feel that national constitutional principles are challenged as a result. This leads to a key question for the constitutional courts, i.e., where to strike a balance?

The constitutional justice is there to assess whether with regard to the most dividing issues in a given society the appropriate balance has been found that ensures peace, justice and prosperity. However, this is a world where different courts co-exist and co-decide. Is there a predictable and yet unsatisfactory hierarchy between them, or perhaps they have outgrown that stage and operate in a web of plurality?

The authors of the contributions included in this volume had the stimulating challenge to trace for credible ways how to bypass the traps of rigid hierarchical relations between different courts and jurisdictions. Their priceless experience and imaginative solutions suggest us the globalised justice as a place where each court – be it national, constitutional or supranational – has a valuable contribution to make. It is the persuasiveness of arguments and not the rank in the pyramid that will determine the outcome of cases in the 21st century.

Few people, if any, are more qualified than the Advocate General of the Court of Justice of the European Union **Eleanor Sharpston** to reflect on the paradox, sometimes a potential problem, where a case is decided by more than one supreme level court, each enjoying judicial independence and all of them being ‘at the top of the pyramid’, in the sense that they all are supreme.

Serving herself at a top level court, she suggests that ultimately it is unhelpful to think of hierarchy between courts or to speak of deference. According to her the terms of comity and cross-fertilisation are more appropriate.

¹ I am grateful to Mr Uldis Krastiņš, advisor to the Constitutional Court, for the research assistance rendered.

When different courts have an opportunity to work together, the rights of individuals are generally better protected than they would be if we were merely to look at the case-law of a single court. She names this process as one in which the work of each court keeps the other courts on their toes. In any event a legal solution should not be discarded anymore merely because it is ‘foreign’.

Judge at the European Court of Human Rights (ECHR), Dr. iur. **Mārtiņš Mīts** gives us the Strasbourg perspective, which sees the constitutional courts as domestic human rights courts. The interaction between them is inevitable and it presupposes reciprocal impact. He has the merit to suggest a less researched side of the relations between national courts and the Strasbourg court – the situations where the potential impact on the work of the ECHR originates from the rulings of the Constitutional Courts.

He is not alone recognising that supranational courts are open to solutions coming from the national courts. The president of the Belgian Constitutional Court, Dr. **André Alen** gives us numerous examples from the rich Belgian experience from which, in some cases, a palpable influence on the supranational courts may be inferred. Taking the Constitutional Court of Belgium as an example he shows how the principles of a genuine dialogue, in the understanding of Habermas, should be applied in the relationships between the national constitutional courts and the two supranational courts, the Court of Justice of the European Union (CJEU) and the ECHR. Alas, these conditions are not always met.

If the Luxembourg court has a well-established and highly formalised procedure of dialogue, it seems nonetheless less open to engage in a genuine dialogue with the national courts, whereas the ECHR, while having only recently initiated its own prejudicial ruling mechanism, is much more open to dialogue and mutual impact, in the judgment of this author. The very recent initiative of both supranational courts to create networks for exchange of documents with the highest national courts shows the good will to engage in a genuine dialogue with their national counterparts.

Where André Alen explores the ways and methods to influence the supranational courts, Prof. Dr. **Encarnación Roca**, Vice President of the Constitutional Court of Spain, gives us some valuable tools how constitutional courts can benefit from the free movement of ideas in the globalised world. She understands globalisation as a redefinition of the traditional equation in which law is linked to a territory. Leaving aside the old notion of sovereignty, globalisation introduces a new ‘inter-sovereignty’, relinquishing the traditional sovereignty of states in fields of common interest, where the decisions are shared with other members of the international community. Where a given national jurisdiction applies not only its own domestic law but a constellation of other applicable norms, it implies a redefinition of the concept of national sovereignty.

More specifically in the Spanish experience it suggests that the principles relating to fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties ratified by Spain. In other words it is called the international openness of the Spanish Constitution in relation to fundamental rights.

Globalisation itself excludes the vertical subordination of domestic legal orders to supranational courts but, instead, creates a horizontal network of courts. This dialogue implies a strong antidote against the so-called 'constitutional laziness', since it prevents an automatic assumption of human rights standards. On the contrary, constitutional courts in the 21st century can help preserve humanistic and cosmopolitan values, and orderly receive the benefits of globalisation, by protecting the rule of law, democracy and respect for human rights.

Recognising the approach by which the constitutional courts stay open to international law, Prof. Dr. **Doris König**, judge of the German Federal Constitutional Court, advocates for an openness of variable geometry. It is the constitutional court that is the best suited to find the right proportion how wide the national legal system should be opened to international rules; in other words, a flexible openness with foreseeable criteria is the right answer.

Indeed the European constitutional courts operate with three different legal rules: domestic law, European Union law, which takes precedence over domestic law based on its supranational nature and which already covers many areas of the domestic legal orders, and international law, whose rank in and impact on domestic legal orders depends on the respective constitutional provisions.

It is up to constitutional courts to develop mechanisms that can give effect to supranational and international law in the domestic constitutional order. It means also setting limits regarding the claim to validity of supranational and international law, since the constitutional court is the guardian of its own constitution and protects the essential parts of that constitution. Constitutional courts must explore these limits and handle them responsibly.

Poland is an example of an EU Member State willing to find its own way through the European integration, as described by dr. hab. **Justyn Piskorski**, a judge of the Constitutional Tribunal of the Republic of Poland. Indeed, this member state by way of a Protocol annexed to the EU treaties has expressed a wish not to be bound by part of the EU Charter of Fundamental Rights, and other members have agreed to that.

He suggests that the Protocol may serve as a tool for eliminating conflicts between the CJEU's established 'principle of primacy' and the Polish constitutional catalogue of the sources of law. The Protocol itself belongs

to primary law and therefore it also determines the catalogue of general principles of EU law. This does not mean that the Polish Constitutional Tribunal rejects the European standard of fundamental rights protection in its jurisprudence; however, the said protection is derived from sources other than the EU Charter.

The conversation between the national courts and the CJEU does not always have to follow the patterns, as reminded by Prof. **Silvana Sciarra**, judge of the Italian Constitutional Court. Indeed in the *conversation* initiated by the Italian Constitutional Court in '*Taricco*' case, the Italian court, when taking the final decision, carried out a constitutional review and, at the same time, verified what was required by the CJEU. There is no difficulty in accepting that it is the exclusive competence of the Court of Justice to provide a uniform interpretation of EU, and yet the Italian Court reminds us that an interpretive outcome that does not comply with the principle of legal certainty in criminal matters has no place in our legal system.

This was the closing argument of that conversation, declaring that the questions initially raised were unfounded, because, irrespective of the additional grounds for unconstitutionality that have been deduced, the violation of the principle of legal certainty in criminal matters serves as an absolute bar.

If the 'style' of the Italian Constitutional Court was firm, aiming to confirm the supreme values of the Italian legal order, at the same time, the Court meant to be deferential to the Court of Justice of the European Union. The CJEU, on its side, showed a truly open attitude and an interest in feeding a virtuous communication.

Natallia Karpovich, Deputy Chairwoman of the Constitutional Court of the Republic of Belarus gives us some valuable insight on the application of the principle of openness to international law in Belarus and the implementation of the Eurasian Economic union law by its Constitutional Court.

Judge of the Constitutional Court of Ukraine **Natalia K. Shaptala** gives us a frank and straightforward appreciation on the recent constitutional reforms in Ukraine. The Ukrainian Constitutional Court is now open to individual complaints regarding violations of fundamental rights, thus engaging the Ukrainian Court in a dialogue with other European constitutional courts as well as the European Court of Human rights.

Prof. univ. dr. **Mircea Stefan Minea**, judge of the Romanian Constitutional Court, has the merit of introducing us with the recent constitutional jurisprudence in the tax matters. The Romanian Constitutional Court has had the opportunity to develop its methodology in reviewing the constitutionality of legal provisions relating to the fulfilment of tax obligations by a taxpayer with a special status and the legal conditions in which interest must be paid to a taxpayer who has made payments to the budget contrary to the legal requirements.

Finally, in my own presentation I see the role of constitutional courts as institutions maintaining the balance together with the international courts, since both of them are two basic components of the global legal order. The part of the constitutional courts in this balance should be respected by the international and supranational courts. There is a reason to say that the international community is governed by the global law, which is horizontal, pronouncedly plural, and decentralised by its nature. The notion of sovereignty has been changing since the middle of the 20th century in view of globalization but it still remains both in political and legal discourse a rather closed notion unable to respond to the challenges of the 21st century. Therefore, in my view, the way forward is to re-conceptualize the discourse and to move away from competing authority claims among the legal orders towards accepting that all legal orders form a universal legal order. That also requires the acceptance of the proper role that each court has, be it constitutional or European, as well as work towards an increased dialogue among the courts, both formally through methods and procedures and informally through meetings and exchanges.

This volume exemplifies that there is a certain common vision among constitutional courts as to their relationship and the role in a global world where legal systems have more convergences than ever before.

Prof., Ph.D. (Cantab.) Ineta Ziemele
President of the Constitutional Court
of the Republic of Latvia



Raimonds Vējonis
President of Latvia

Highly esteemed judges,
Excellences,
Ladies and Gentlemen,

This year we celebrate the first centenary of Latvia. Festivities are not only an excellent opportunity to assess what has been done and to be proud of the achievements. Festivities also remind us of overdue tasks and yet unattained goals.

Hundred years ago the dream of the founders of the Latvian state was voiced. They were convinced that Latvia would be a democratic state of justice, where everyone's rights would be ensured and where there would be no place for injustice.

Today we can ask ourselves whether, indeed, we are able to ensure justice in all instances? Can, indeed, everyone in this state feel secure, protected by the law and the court?

We have done a lot in the field of justice, and much has been attained. In this respect, the work of the Constitutional Court has been of special importance, as well as the contribution of its judges and staff since the first working day of the Court. The Constitutional Court by its work has facilitated the people's trust in the rule of law and in Latvia.

However, still much remains to be done.

I am concerned about the quality of the adopted laws and by how simply and quickly an idea which has not been fully considered, can turn into a binding law. Regretfully, the *Saeima* has been unable to reach an agreement on amendments to the *Saeima* Rules of Procedure that would be aimed at improving the legislative process. It is still possible to produce defective legislative goods in the third reading; the legislator still does not have the obligation to explain the submitted proposals and the adopted laws.

I am also worried about those cases where the law is applied formally and superficially, when the justice and the person who attempts to defend his rights are lost in the daily routine. We must reinforce and support the civil service and the judicial power. Unless we have good and professional judges and civil servants who are able to find a just solution in all cases, even the best-written laws will remain on paper. People's trust in the rule of law and in Latvia begins from minor things when they encounter for the first time the public administration, local governments, and courts.

The involvement of the Constitutional Court will be required in order to improve the quality and the application of laws. I sincerely hope that the new convocation of the *Saeima* will not increase the workload of the Constitutional Court.

I am convinced that the doors of the Constitutional Court are open to everyone who faces injustice. However, the person's path to the Constitutional Court is long. We all must work together to ensure justice as soon as possible. This should be our task. This should be the aim for the coming years.

I wish you fruitful work at the conference.

Let new ideas arise that we can implement in Latvia to increase the people's trust in the judicial power and in Latvia as a whole!



Raimonds Vējonis
Valsts prezidents

Augsti godātie tiesneši!
Ekselences!
Dāmas un kungi!

Šogad mēs svinam Latvijas valsts pirmo simtgadi. Svētki ir ne tikai lieliska iespēja novērtēt padarīto un lepoties ar sasniegto. Svētki mums atgādina arī par iekavētiem darbiem un vēl nesasniegtiem mērķiem.

Pirms simts gadiem izskanēja mūsu valsts dibinātāju sapnis par Latvijas valsti. Viņi bija pārliecināti, ka Latvija būs demokrātiska taisnības valsts, kurā ikviena tiesības tiks nodrošinātas un nebūs vietas netaisnībai.

Šodien mēs varam sev uzdot jautājumu, vai patiešām mēs spējam nodrošināt taisnīgumu ikvienā lietā? Vai patiešām ikviens mūsu valstī var justies drošs likuma un tiesas aizsardzībā?

Tiesiskuma jomā mēs esam darījuši daudz, un daudz ir paveikts. Sevišķi būtisks šajā ziņā ir bijis arī Satversmes tiesas, tās tiesnešu un darbinieku ieguldījums kopš tiesas pirmās darba dienas. Ar savu darbu Satversmes tiesa ir sekmējusi iedzīvotāju uzticēšanos tiesiskumam un Latvijai.

Tomēr mums vēl ir arī daudz darāmā.

Mani uztrauc pieņemto likumu kvalitāte un tas, cik vienkārši un ātri līdz galam nepārdomāta ideja var kļūt par saistošu likumu. Diemžēl Saeima nav spējusi vienoties par grozījumiem kārtības rullī, kas būtu vērsti uz likumdošanas procesa pilnveidošanu. Joprojām ir iespējams trešajā lasījumā ražot likumdošanas brāķi, joprojām likumdevējam nav pienākums pašam skaidrot iesniegtos priekšlikumus un pieņemtus likumus.

Mani arī uztrauc tie gadījumi, kad likums tiek piemērots formāli un pavirši, ikdienas rutīnā pazaudēts taisnīgums un cilvēks, kurš mēģina aizstāvēt savas

tiesības. Mums nepieciešams stiprināt un atbalstīt ierēdniecību un tiesu varu. Ja mums nebūs labu un profesionālu tiesnešu un ierēdņu, kas spēj ikvienā lietā atrast taisnīgu risinājumu, pat vislabāk uzrakstītie likumi tā arī paliks uz papīra. Iedzīvotāju uzticēšanās tiesiskumam un Latvijai sākas mazās lietās, kad viņi pirmo reizi saskaras ar valsts pārvaldi, pašvaldībām, tiesu.

Satversmes tiesas iesaiste būs nepieciešama, lai uzlabotu likumu kvalitāti un to piemērošanu. Es ļoti ceru, ka jaunais Saeimas sasaukums nesagādās vairāk darba Satversmes tiesai.

Esmu drošs, ka Satversmes tiesas durvis ir atvērtas ikvienam, kurš saskaras ar netaisnību. Taču līdz Satversmes tiesai cilvēkam ir ejams garš ceļš. Mums visiem kopā ir jāstrādā, lai taisnīgums tiktu nodrošināts pēc iespējas ātrāk. Tam ir jābūt mūsu uzdevumam. Tam jābūt mērķim turpmākajiem gadiem.

Novēlu raženu darbu konferencē.

Lai rodas jaunas idejas, kuras varam ieviest Latvijā, lai augtu iedzīvotāju uzticēšanās tiesu varai un Latvijai kopumā!



Ināra Mūrniece
Speaker of the Parliament
of the Republic of Latvia

Highly esteemed President of the State,
Honourable President of the Constitutional Court,
Prime Minister,
President of the Supreme Court,
President of the Venice Commission,
participants and guests of the Conference,

I am genuinely pleased to greet you at this conference – “The Role of the Constitutional Courts in the Globalised World of the 21st Century”.

The preamble to the *Satversme* of the Republic of Latvia underscores that Latvia is an independent, democratic, national state governed by the rule of law. Latvia is an equal member in the international community of states and it defends its national interests and promotes sustainable development of united Europe and the world and democracy.

Following the restoration of independence, the people of Latvia made their choice at a referendum in favour of the space and values of the states of the European Union. Latvia is a Member State of the European Union and has become a member of other very important European and international organisations. These developments have promoted international cooperation, facilitated sharing of information, establishment of business contacts, getting to know other countries and movement of persons between the states.

“Globalisation is not a policy choice, it is a fact,” was once said by Bill Clinton, the President of the United States of America. Globalisation, by expanding international cooperation, has made the world smaller, closer, and more accessible. Therefore, the events and decisions adopted in other countries may have greater impact also upon the events in Latvia.

The *Saeima* by adopting laws is solving the most important issues for the society – social, economic, and legal ones. Many decisions by the *Saeima* are adopted after examining events in the neighbouring states or even a broader region.

Only the Constitutional Court has been granted the jurisdiction to review the compliance of the laws adopted by the *Saeima* with the *Satversme* and, in case of incompatibility, to revoke the laws. Therefore the Constitutional Court also has to assess the circumstances in which laws have been adopted. And these circumstances are not only legal, these are also political. These circumstances are linked also to the globalisation processes. In the fast and changing contemporary world, the adopted legal norms must be filled with new contents. To do that, an understanding of the reason for a particular law is required.

The Constitutional Court does not develop politics; it respects the exclusive competence of the *Saeima* to take political decisions. However, the Constitutional Court as an institution that balances the state powers has the tasks of the guardian of the *Satversme*; it adopts all its decisions to reinforce the values expressed in the *Satversme*.

The words that have been inscribed in the preamble to our *Satversme* are extremely powerful and create a stable balance between the interests of Latvia as a nation state and the obligations of Latvia as part of the international community. The *Satversme* is the criterion for the validity of the rules and laws that have been adopted. The existence of the Constitutional Court ensures the priority of the norms of the *Satversme*.

I would like to emphasize that the Constitutional Court is the supreme tool for safeguarding the values of Latvia as an independent, democratic and national state governed by the rule of law in the contemporary globalised world.

Let the creative spirit lead to intensive discussions during today's conference!



Ināra Mūrniece
Saeimas priekšsēdētāja

Augsti godātais Valsts prezidenta kungs,
Ļoti cienītā Satversmes tiesas priekšsēdētājas kundze,
Ministru prezidenta kungs,
Augstākās tiesas priekšsēdētāja kungs,
Venēcijas komisijas prezidenta kungs,
Konferences dalībnieki un viesi,

Man ir patiess prieks sveikt jūs šīsdienas konferencē “Konstitucionālās tiesas loma globalizētajā pasaulē 21. gadsimtā”.

Latvijas Republikas Satversmes preambulā uzsvērts, ka Latvija ir neatkarīga, demokrātiska, tiesiska un nacionāla valsts. Latvija ir līdzvērtīga valstu starptautiskajā kopienā un aizstāv savas valsts intereses, veicinot vienotas Eiropas un pasaules ilgtspējīgu attīstību un demokrātiju.

Pēc neatkarības atjaunošanas Latvijas tauta referendumā savu izvēli ir izdarījusi par labu Eiropas Savienības valstu telpai un vērtībām. Latvija ir Eiropas Savienības dalībvalsts un kļuvusi par citu ļoti nozīmīgu Eiropas un starptautisko organizāciju dalībnieci. Šie notikumi ir sekmējuši starpvalstu sadarbību, veicinot informācijas apriti, biznesa kontaktu dibināšanu, valstu iepazīšanu un cilvēku pārvietošanos starp valstīm.

“Globalizācija ir fakts, nevis politika,” savulaik teicis Amerikas Savienoto Valstu prezidents Bils Klintonš. Globalizācija, paplašinot starpvalstu sadarbību, padarījusi pasauli mazāku, tuvāku, pieejamāku. Tāpēc notikumi citās valstīs un pieņemtie lēmumi tajās aizvien vairāk var skart notikumus Latvijā.

Saeima, pieņemot likumus, risina sabiedrības dzīves svarīgākos jautājumus – sociālos, ekonomiskos, tiesiskos. Daudzi Saeimas lēmumi tiek pieņemti, vērtējot notikumus kaimiņvalstīs, vai pat plašākā reģionā.

Satversmes tiesai vienīgajai ir piešķirta kompetence vērtēt Saeimas pieņemto likumu atbilstību Satversmei un neatbilstības gadījumā - tos atcelt. Tāpēc arī Satversmes tiesa saskaras ar likumu pieņemšanas apstākļu vērtēšanu. Un šie apstākļi nav tikai juridiski, tie ir arī politiski. Šie apstākļi ir arī ar globalizācijas procesiem saistīti. Mūsdienu ātrajā un mainīgajā pasaulē pieņemto likumu normas nākas piepildīt ar jaunu saturu. Lai to spētu izdarīt, ir jāizprot konkrēta likuma rašanās iemesls.

Satversmes tiesa neveido politiku, tā respektē Saeimas ekskluzīvo kompetenci politisku lēmumu pieņemšanā. Bet Satversmes tiesai kā valsts varas līdzsvarojošai institūcijai ir Satversmes sargātāja uzdevums: jebkuru lēmumu tā pieņem, lai stiprinātu Satversmē paustās vērtības!

Mūsu Satversmes preambulā ierakstītie vārdi ir ārkārtīgi spēcīgi un rada stabilu līdzsvaru starp Latvijas kā nacionālas valsts interesēm un Latvijas kā starptautiskas kopienas daļas pienākumiem. Satversme ir pieņemto noteikumu un likumu spēkā esamības kritērijs. Satversmes tiesas pastāvēšana nodrošina Satversmes normu prioritātes esamību.

Vēlos uzsvērt, ka Satversmes tiesa ir augstākais instruments, lai nosargātu Latvijas kā neatkarīgas, demokrātiskas, tiesiskas un nacionālas valsts vērtības mūsdienu globalizētajā pasaulē!

Lai radošs gars raisa spraigas diskusijas šīs dienas konferencē!



Māris Kučinskis
Prime Minister of Latvia

The Constitutional Court of the Republic of Latvia has been working for more than twenty years. The idea of establishing the Court was proposed already in pre-war Latvia but, for various reasons, at the time it did not gain the politician's support. The idea of the necessity of the Constitutional Court was reborn together with the restoration of the independence of Latvia. Following many public and behind-the-scenes discussions, the political parties represented in the *Saeima* reached an agreement and voted in favour of establishment of the Constitutional Court. This, definitely, was an essential decision for improving the legal system of Latvia, it was also important because there were different opinions among the politicians on whether we needed such "a luxury" as the Constitutional Court.

Many years later, when working in the *Saeima* and the government, I again happened to hear the rhetorical question – Why do we need the Constitutional Court? This question serves as the most precise illustration of the relationship between the legislative power, also the executive power, and the Constitutional Court. Decisions of no other court are as closely linked with the politicians' decisions as those of the Constitutional Court. And the rulings by the Constitutional Court cannot be dismissed.

It gives great satisfaction to conclude that, notwithstanding various misunderstandings, the Constitutional Court has been able to maintain a high reputation in society and also among the politicians. During the recent years the impact and the reputation of the Constitutional Court has even increased. This is proven also by the latest ruling of the Court on the salaries for overtime work of the employees in the health care system. It will have to be enforced. I know that many people ask about what is the work that the Constitutional Court is engaged in? Yesterday, when viewing the statistics on the Court's work

published on the homepage of the Constitutional Court, I felt a slight surprise. In the period from 1997 to 2016, the panels of the Constitutional Court have received for examination 3469 applications, and the Court has initiated 608 cases. Percentage-wise, the majority of applicants are natural persons. The conclusion is simple – the Constitutional Court works and is trusted. Perhaps, society should be told about it more often.

The title and the content of today's conference are very important for all branches of power of the Latvian state – for the legislator, the government, courts and also the Constitutional Court.

Latvia's involvement in various international organisations makes us assume various commitments and sign important documents. These organisations are developing. And, almost inevitably, any new agreement or strategy, for example, in the framework of the European Union, must be aligned with the *Satversme* of the Republic of Latvia. It is not an easy task but it is the obligation of the Constitutional Court.

I set my hopes on your professionalism, the integrity of judges and loyalty to the *Satversme*! The best of success in your work!



Māris Kučinskis
Ministru prezidents

Latvijas Republikas Satversmes tiesa pilnvērtīgi strādā jau vairāk kā divdesmit gadus. Idejas par tās izveidi izskanēja jau pirmskara Latvijā, tomēr dažādu iemeslu dēļ tās neguva politiku atsaucību. Domas par Satversmes tiesas nepieciešamību atdzima līdz ar Latvijas neatkarības atjaunošanu un pēc daudzām publiskām un kuluāru diskusijām, Saeimā pārstāvētās partijas vienojās un nobalsoja par Satversmes tiesas izveidi. Tas noteikti bija būtisks lēmums Latvijas tiesiskās sistēmas pilnveidošanā, tas bija svarīgs arī tāpēc, ka politiku vidū valdīja ļoti dažādi uzskati par to, vai mums ir nepieciešama tāda “greznība”, kā Satversmes tiesa.

Arī daudzus gadus vēlāk, strādājot Saeimā un valdībā, man ir gadījies dzirdēt retoriskas dabas jautājumus – Vai tāpēc mums ir vajadzīga Satversmes tiesa? Šis jautājums visprecīzāk ilustrē attiecības starp likumdevēja varu, arī izpildvaru un Satversmes tiesu. Nevienas citas tiesas lēmums nav tik cieši saistīts ar politiku lēmumiem, kā tas ir Satversmes tiesai. Un Satversmes tiesas lēmumus nevar noraidīt.

Ar gandarījumu var secināt, ka par spīti dažādiem pārpratumiem, Satversmes tiesai ir izdevies saglabāt augstu reputāciju sabiedrībā un arī politiku vidē. Pēdējo gadu laikā Satversmes tiesas ietekme un reputācija pat ir palielinājusies. Par to liecina arī pēdējais tiesas lēmums par veselības aprūpes sistēmas darbinieku algām par virsstundu darbu. Tas būs jāpilda. Zinu, ka daudziem cilvēkiem ir jautājums, ar ko tad Satversmes tiesa nodarbojas? Vakar pārlūkojot Satversmes tiesas mājas lapā publicēto statistiku par tiesas darbu biju nedaudz pārsteigts. Savas darbības laikā no 1997. gada līdz 2016. gadam izskatīšanai Satversmes tiesas kolēģijās ir nodoti 3469 pieteikumi un tiesa ir ierosinājusi 608 lietas. Procentuāli lielākais pieteikumu iesniedzēju skaits ir

fiziskas personas. Secinājums ir vienkāršs – Satversmes tiesa strādā un tai uzticas. Varbūt mazliet biežāk to ir jāpastāsta sabiedrībai.

Šodienas konferences nosaukums un saturs ir ļoti nozīmīgs visiem Latvijas valsts varas zariem – likumdevējiem, valdībai, tiesām un arī Satversmes tiesai.

Latvijas iesaiste dažādās starptautiskajās organizācijās, liek uzņemties dažādas saistības un parakstīt svarīgus dokumentus. Šīs organizācijās attīstās un gandrīz vai neizbēgami, jebkura jauna vienošanās vai stratēģija, piemēram Eiropas Savienības ietvaros, ir jāsaskaņo ar Latvijas Republikas Satversmi. Tas nav viegls uzdevums, bet tas ir Satversmes tiesas pienākums.

Ceru uz Jūsu profesionalitāti, tiesnešu godaprātu un uzticību Satversmei! Veiksmi darbā!



Ivars Bičkovičs,
President of the Supreme Court of Latvia

Highly esteemed President of the state,
Highly esteemed Prime Minister,
Honourable President of the Constitutional Court,
Highly esteemed Minister of Justice,
Excellences, honourable colleagues,

I use the word “colleagues” to address the judges of the European courts, constitutional courts and of various levels of Latvian courts as colleagues in essence. This word characterises our mutual relationships, although we work in different courts. We are all colleagues. Colleagues have common work. The colleagues – judges – together promote the rule of law in the shared legal space. Us, the judges of the Supreme Court, of course, together with the judges of the first and appellate instance, together with the judges of the Latvian Constitutional Court – in the legal space of Latvia – whereas together with the judges of the Court of Justice of the European Union and the European Court of Human Rights – in the broader space of European law.

The legislator has conferred a generally binding nature to the interpretation of legal norms provided by the Constitutional Court. This simultaneously gives a substantial authority and imposes responsibility. With regard to this obligation, I would like to note that the Constitutional Court examines and outlines the essential principles of law in the matters of Latvian law.

The value of the rulings of the Constitutional Court, including the principles of law defined and verified therein, is proven by their further use in applying legal norms. This year, the Supreme Court has added to its archive of jurisprudential rulings an index of cited rulings, which clearly demonstrates the findings of the Constitutional Court that are used in the rulings of the Supreme Court.

The Constitutional Court in its rulings also often refers to the case-law in the application of legal norms. Mutually respectful interaction definitely reinforces the rule of law in this country.

The Constitutional Court has clearly outlined the awareness of the value of Latvia as a state and its foundations in rulings that are important for the constitutional identity of the state, for example, in the Lisbon Treaty Case and the Border Treaty Case. However, the findings and principles established by the Constitutional Court are no less valuable and important also in dealing with daily matters. For example, compensation for moral damages within the framework of regulation on the compulsory civil liability insurance.

The judicial activity of submitting applications to the Constitutional Court is not a mechanism of law review of exceptional nature, it is a regular process. In 2017 the Supreme Court submitted six applications to the Constitutional Court. These applications pertain to the tax law and procedural laws, as well as to the church law. The dialogue on the rights of imprisoned persons has been reoccurring.

Today's conference is dedicated to the role of constitutional review bodies in the contemporary globalised world.

The judicial dialogue is both active, for example, by submitting an application to the Constitutional Court or by requesting a preliminary ruling from the Court of Justice of the European Union, and passive – by keeping track of the rulings by the courts of other countries, by absorbing, to a certain extent, in one's interpretation the arguments of other courts. Such actions by a lawyer of the highest repute prove both the professionalism and the ability to find one's way in the contemporary global dimension of law. Of course, this reasoning must be based on prior critical assessment and must attest to professional common sense.

The mutual assessment of findings by courts and keeping track of the protection of democratic values is the supreme safeguard for the rule of law. The common stability will be ensured only if we strive to ensure justice in each case.

In view of the outstanding scholars of law announced for this conference, who will share their reflections and experience, I wish to everyone to find courage for professional challenges and inspiration in their daily work in the future.



Ivars Bičkovičs
Augstākās tiesas priekšsēdētājs

Augsti godājamais Valsts prezidenta kungs!
Augsti godājamais Ministru prezidenta kungs!
Ļoti cienījamā Satversmes tiesas priekšsēdētājas kundze!
Augsti godājamais tieslietu ministra kungs!
Ekselences, godātie kolēģi!

Vārdu “kolēģi” izmantoju, uzrunājot Eiropas tiesu, konstitucionālo tiesu un Latvijas dažādu līmeņu tiesu tiesnešus kā kolēģus pēc būtības. Šis vārds raksturo mūsu savstarpējās attiecības, lai arī strādājam dažādās tiesās. Mēs visi esam kolēģi. Kolēģi strādā kopīgu darbu. Kolēģi tiesneši kopīgi atbildīgi sekmē tiesiskumu kopīgajā tiesību telpā – mēs, Augstākās tiesas tiesneši, protams, kopā ar pirmās un apelācijas instances tiesnešiem, kopā ar Satversmes tiesas tiesnešiem – Latvijas tiesību telpā, savukārt kopā ar Eiropas Savienības Tiesas un Eiropas Cilvēktiesību tiesas tiesnešiem – jau plašākā Eiropas tiesību telpā.

Likumdevējs Satversmes tiesas dotajai tiesību normu interpretācijai ir piešķīris vispārobligātu raksturu. Tas vienlaikus dod būtiskas pilnvaras un uzliek arī atbildīgu pienākumu. Saistībā ar šo pienākumu gribu atzīmēt, ka Satversmes tiesa vērtē un iezīmē būtiskus tiesību principus Latvijas tiesību jautājumos.

Satversmes tiesas nolēmumu vērtību ar tajā definētajiem un pārbaudītajiem tiesību principiem pierāda to izmantošana tiesību normu turpmākā piemērošanā. Augstākā tiesa savu Judikatūras nolēmumu arhīvu šajā gadā ir papildinājusi ar citēto nolēmumu rādītāju, kas uzskatāmi parāda Augstākās tiesas nolēmumus izmantotās Satversmes tiesas atziņas.

Arī Satversmes tiesa savos nolēmumos nereti norāda uz tiesu praksi tiesību normu piemērošanā. Ja savstarpējā mijiedarbība notiek savstarpējā respektā, tas katrā ziņā stiprina tiesiskumu mūsu valstī.

Nenoliedzami Satversmes tiesa Latvijas kā valsts vērtību un darbības pamatu apzināšanos ir iezīmējusi valsts konstitucionālajai identitātei būtiskos nolēmumos – tādos kā, piemēram, Lisabonas līguma lietā un Robežlīguma lietā. Taču ne mazāk vērtīgas un nozīmīgas Satversmes tiesas atziņas un iedibinātie principu skaidrojumi ir arī ikdienas jautājumu risināšanā. Piemēram, morālā kaitējuma atlīdzinājuma lietā obligātās civiltiesiskās apdrošināšanas regulējuma ietvarā.

Tiesu aktivitāte, vērstoties ar pieteikumiem Satversmes tiesā, nav izņēmuma rakstura tiesību pārbaudes mehānisms – tas ir ikdienas process. 2017.gadā Augstākā tiesa Satversmes tiesā vērsās ar sešiem pieteikumiem. Pieteikumi attiecināmi gan uz nodokļu tiesībām, gan procesuālajiem likumiem, gan baznīcu tiesībām. Vairākkārtējs dialogs norisinās jautājumā par brīvības atņemšanas iestādēs esošo personu tiesībām.

Šīsdienas konference veltīta jautājumam par konstitucionālās kontroles institūciju lomu šodienas globalizētajā pasaulē.

Tiesu dialogs notiek gan aktīvi, piemēram, iesniedzot pieteikumu Satversmes tiesā vai prejudiciālo jautājumu veidā ar Eiropas Savienības Tiesu, gan pasīvi – sekojot līdzi citu valstu tiesu nolēmumiem, savā veiktajā interpretācijā zināmā mērā absorbējot citu tiesu argumentus. Šāda augstākās raudzes domājoša jurista rīcība apliecina gan profesionalitāti, gan prasmi orientēties mūsdienu globālajā tiesību dimensijā. Protams, šai argumentācijai jābalstās arī iekšējā kritiskā vērtējumā un jāapliecina profesionāls veselais saprāts.

Tiesu veikta savstarpēja atziņu izvērtēšana un sekošana demokrātisko vērtību aizsardzībai ir tiesiskuma visaugstākais garants. Kopējā stabilitāte tiks nodrošināta, ja ikkatrā lietā tieksimies nodrošināt taisnīgumu.

Nemot vērā šīsdienas konferencē pieteiktos izcilos tiesībzinātniekus, kas dalīsies savās pārdomās un pieredzē, novēlu ikkatram smelties drosmi profesionālajiem izaicinājumiem un iedvesmu turpmākā ikdienas darbā.



Gianni Buquicchio
President of the European Commission
for Democracy through Law
(the Venice Commission)

Madam President of the Constitutional Court, Judges,
Ladies and Gentlemen,

It is a pleasure for me to be in Riga today to open this international conference dedicated to the 100th anniversary of the State of Latvia!

Even if the Council of Europe and, more specifically, the Venice Commission's relationship with Latvia has not reached the ripe old age of a century – but only that of a quarter of a century – since Latvia joined the Council of Europe in February 1995 and then the Venice Commission seven months later, in September 1995 – I still believe this counts as an important achievement!

Co-operation between the Venice Commission and Latvia, however, already began before then, in 1992, when the Commission provided assistance on the draft electoral law of your country.

Our co-operation with the Constitutional Court of Latvia began in 1997, shortly after its creation in December 1996. This co-operation took the form of a workshop “*on the functioning of the Constitutional Court of Latvia*” where we discussed the merits of the individual complaint procedure and case management.

That was many years ago... and we have had the pleasure to meet and work together on many occasions since then.

Madam President, Ladies and Gentlemen,

As the President of the Venice Commission, I like to say – and to repeat – that the creation of a Constitutional Court is one of the most important historical events of a country. The reason I say this is because, at the Venice Commission, we have noted over the years that constitutional courts provide constitutional stability, which in turn contributes to developing and upholding democracy.

Although constitutions guarantee the separation of powers, the rule of law and the protection of fundamental rights, it is the constitutional court that ensures the respect for the rule of law and fundamental rights.

Over time, constitutional courts have acquired a distinctive role in strengthening the development of democracy and the rule of law as well as providing for their continuity, using the constitution as a pillar.

These basic principles and constitutional values must be respected in practice, because they provide the foundation for the peace and stability of a country. This respect forms the essence of constitutionalism.

Madam President, Ladies and Gentlemen,

It has, however, come to our attention that in an increasing number of member States of the Venice Commission, constitutional courts have been the target of disrespectful criticism.

I cannot stress enough that constitutional courts have a central role to play as the independent guarantors of the constitution – especially in our day and age. We should never forget that and ensure that these courts' independence is upheld and respected.

Over the past five years, the Venice Commission has seen constitutional courts come under undue pressure and threatened to an extent that is unprecedented.

I have had to intervene with statements over a dozen times for the constitutional courts in Armenia, Bosnia and Herzegovina, Georgia, Kyrgyzstan, the Republic of Moldova, Poland, Turkey and Ukraine.

We have closely followed what has happened in Poland, where there were attempts to influence the work of the Constitutional Tribunal by legislative amendments to ensure that the Tribunal act in accordance with the will of the political majority – preventing it from playing its crucial role of ensuring respect for human rights, the rule of law and democratic principles protected by the Constitution of Poland.

The latest sad example in this context is the European Court of Human Rights' judgments of

20 March 2018 against Turkey concerning journalists, who were arrested and detained following the attempted military coup in Turkey in July 2016 (*Şahin Alpay v. Turkey / Mehmet Hasan Altan v. Turkey*). They remained in pre-trial detention because a lower court decided to disregard the Constitutional Court's judgment that found a violation of the Constitution and rejected their applications for release.

The European Court of Human Rights found that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty (Article 5 of the ECHR).

This is a clear indication that we must remain vigilant.

I would therefore like to emphasise the importance for us to never take any achievements made in the field of constitutional justice for granted. We must remember that it is a constant battle to ensure that fundamental rights do not get set aside and autocratic governments brought back in through the back door.

Here, I would like to refer to a Resolution that was adopted not long ago by the XVIIth Congress of the Conference of European Constitutional Courts in Batumi, Georgia.

This Resolution is entitled "*Respect for Independence of Constitutional Courts*" and refers to the need for constitutional justice to be independent in order to have legitimacy and to be effective.

It states that only a constitutional court, which is and appears to be independent from other state organs and political parties, is capable of gaining the confidence such a court must inspire in the public in a democratic society.

The Resolution ends with an important message concerning the role of the constitutional court, namely that it is only bound by the constitution and the rule of law and therefore must take it upon itself to maintain, defend as well as strengthen its independence by, among others, resisting political influence and unlawful aims of political authorities.

Madam President, Ladies and Gentlemen,

Constitutional courts have always played a special role for the Venice Commission and we have supported the establishment of these courts since our inception.

We are therefore very pleased to follow the Constitutional Court of Latvia's work in promoting fundamental democratic values and principles and its role in upholding the values contained in Latvia's Constitution.

Your Constitutional Court is independent, respected by other state bodies and by the population at large. This is very good and you must battle to maintain your status.

Your Court is also active in our cooperation with constitutional courts, which consists of promoting an exchange of information and experience between them, by organising seminars and conferences and by publishing the Bulletin on Constitutional Case-law and the database CODICES that now contains more than 10 000 judgments from over 80 courts.

CODICES is not only a showcase of these judgments that can be seen by other courts and the public at large, but more importantly, it offers an unmatched spectrum of constitutional arguments, which provides a valuable comparative-law basis that could assist those that consult it in complicated cases before their respective courts.

In addition, the Venice Commission provides a confidential on-line forum for these courts, on which they can quickly request as well as exchange information relating to pending cases.

This type of co-operation encourages intercultural dialogue based on democracy, the protection of human rights and the rule of law as a means of promoting mutual understanding and peace – what we like to refer to as “cross-fertilisation”.

In pursuing this type of co-operation, the Venice Commission decided in 2009 to organise the first Congress of the World Conference on Constitutional Justice, in Cape Town, South Africa, hosted by the Constitutional Court of South Africa.

This event gathered 9 regional or linguistic groups and around 90 courts. It was agreed that the World Conference should promote constitutional justice understood as constitutional review that includes human rights case-law as a key element for democracy, the protection of human rights and the rule of law.

The success of this event led to the drafting of a Statute for the World Conference on Constitutional Justice, which was adopted at the 2nd Congress was held in Rio de Janeiro, Brazil in 2011.

The fourth Congress of the World Conference was hosted by the Constitutional Court of Lithuania in September 2017, both of which were very successful events.

The Fifth Congress will be hosted by the Constitutional Council of Algiers in 2020.

To date, the World Conference counts 112 member courts and I would like to underline that the Constitutional Court of Latvia is also a member of the World Conference – this makes me very proud!

Madam President, Ladies and Gentlemen,

Please allow me to conclude my presentation by wishing the State of Latvia a very Happy 100th Birthday and to wish it the very best for the future as well as to its exemplary Constitutional Court!

Thank you very much for your attention.



Prof., Ph.D. (Cantab.) **Ineta Ziemele**
President of the Constitutional Court
of the Republic of Latvia

Honourable President of Latvia!

Honourable Prime Minister!

Honourable President of the Supreme Court!

Honourable judges of constitutional courts, representatives of European courts and the Venice Commission, excellencies, ladies, and gentlemen!

On behalf of the Constitutional Court of the Republic of Latvia I thank the highest representatives of the Republic of Latvia for having found a possibility to address us today at this international conference organized by the Constitutional Court of the Republic of Latvia – in the year of Latvia’s one-hundredth anniversary. In my address I will give my views on the issues that we have agreed to discuss at this conference. Namely, what kind of role do the constitutional courts have in the 21st century and what role should they have in the future. At a time when the execution of the functions of states, including the judiciary function, is influenced and changed by the modern framework of globalization and technological developments, there is no doubt that today national courts, especially in Europe, cannot limit themselves to the application of laws adopted by the national legislator. Europe is characterized by a relatively united legal space – because of both historical preconditions and historical lessons – and this space has certainly been further built by European organizations, including the European courts. However, the constitutional traditions of European countries have played a significant role.

The important question is – will national constitutional traditions continue to be just as crucial in further developing the common European legal space, possibly by contributing a global legal space? What will be their role? By what

methods do constitutional courts participate in the European integration project? We will talk about these issues today.

There is currently an active debate at the political level concerning the various development options and choices for the European integration project, in the light of the various new challenges and threats. Therefore the contributors to the common legal space must also foresee some of this debate. The available legal constructs should be revisited.

I hope that we will succeed in starting this type of conversation at least to some extent. Namely, we might touch upon the adequacy of the well-known legal institutes for meeting the challenges of a globalized world. We need to ask these questions because we each are a part of something bigger and today the global world is at our home, in our workplace.

The goal of this conference is to look forward while strengthening the values that have been achieved. In my opinion, in the centennial of Latvia which our guests can celebrate these days with us it is entirely appropriate to think about the future, to look forward. To the guests – welcome to Latvia, and I wish you a conference that will be thought provoking.

Thank you!



Prof., Ph.D. (*Cantab.*) **Ineta Ziemele**
Satversmes tiesas priekšsēdētāja

Augsti godātais Valsts prezidenta kungs!

Augsti godātais Ministru prezidenta kungs!

Augsti godātais Augstākās tiesas priekšsēdētāja kungs!

Godājamie Konstitucionālo tiesu tiesneši, Eiropas tiesu un Venēcijas komisijas pārstāvji, ekscelences, dāmas un kungi!

Satversmes tiesas vārdā es pateicos Latvijas valsts augstākajām amatpersonām par rasto iespēju mūs šodien uzrunāt Satversmes tiesas organizētajā starptautiskajā konferencē Latvijas valsts simtgadē. Sniegšu arī savu skatījumu jautājumā, par kuru esam vienojušies runāt šajā konferencē. Proti, kāda ir un kādai ir jābūt konstitucionālo tiesu lomai 21. gadsimtā. Laikā, kad valstu funkciju īstenošanu, tostarp tiesas spriešanu, ietekmē un maina globalizācijas un tehnoloģiju attīstības modernais ietvars, nav šaubu, ka šodien nacionālās tiesas, īpaši Eiropā, nevar aprobežoties tikai ar nacionālā likumdevēja pieņemtu normu piemērošanu. Eiropu raksturo salīdzinoši vienota tiesiskā telpa – tam pamatā ir gan vēsturiski priekšnoteikumi, gan vēstures mācības – un šo telpu noteikti ir papildījušas Eiropas organizācijas, tostarp Eiropas tiesas. Taču liela loma ir bijusi Eiropas valstu konstitucionālajām tradīcijām.

Jautājums – vai valstu konstitucionālās tradīcijas turpinās būt tikpat svarīgas, attīstot Eiropas vienoto tiesisko telpu, iespējams, veidojot globālo tiesisko telpu? Kādā veidā? Ar kādām metodēm konstitucionālās tiesas piedalās Eiropas integrācijas projektā? Par šiem jautājumiem šodien runāsim.

Saistībā ar Eiropas integrācijas projekta virzības iespējām un variantiem dažādo jauno izaicinājumu un apdraudējumu rezultātā politiskā līmenī pašreiz noris aktīvas diskusijas. Tādēļ arī tiesiskās telpas veidotājiem ir jāprognozē Eiropas projekta virzība. Ir jārevidē pieejamie juridiskie konstrukti.

Es ceru, ka vismaz nedaudz mums izdosies uzsākt šāda veida sarunu, proti, cik pietiekami adekvāti ir jau aprobētie tiesību institūti globalizētās pasaules izaicinājumiem. Mums šis jautājums ir jāuzdod, jo esam katrs daļa no kaut kā lielāka, un šodien šis kaut kas lielākais ir mūsu mājā, mūsu darbavietā.

Šīs konferences mērķis, nostiprinot sasniegtās vērtības, ir lūkoties uz priekšu. Manuprāt, Latvijas simtgadē, kuru mūsu viesi šajās dienās varēs atzīmēt kopā ar mums, ir absolūti vietā domāt par nākotni, skatīties uz priekšu. Viesiem – laipni lūdzu Latvijā un novēlu domu, lielu domu raisošu konferenci.

Paldies!



Eleanor V. E. Sharpston¹
Advocate General at the Court of Justice
of the European Union

Keeping each other on our toes – a circle of mutual encouragement towards setting high standards for fundamental rights protection

Introduction

This meeting is an impressive bringing together of top courts to mark a notable date: the hundredth anniversary of Latvia's independence. It is an honour for me to represent the Court of Justice of the European Union ("the CJEU") on this occasion and, as the first speaker in the first working session, to have been asked to start the ball rolling: a very appropriate task for an Advocate General.

Let me at once highlight the paradox (and the potential problem) behind the title that I have chosen for my presentation. On the one hand, each court – national or transnational – has *its* jurisdiction and *its* specific responsibilities. On the other hand, an individual case brought by an individual litigant may pose questions that trigger different legal provisions (of national constitutional law, EU law and the European Convention of Human Rights ("the ECHR")) and that may therefore engage different courts, often at different stages of the procedure.

Thus, it may be possible to raise a constitutional law point part-way through national proceedings by making a separate application to the constitutional

¹ The views expressed are personal and do not bind the court in which I serve. I am grateful to my assistant Isabella Wimmer for her efficiency in tracking down references during the process of converting my manuscript speaking notes into a text fit for publication, and to Jamie Hathaway for reading through the final draft. Any remaining errors are my own.

court. A reference to “Luxembourg” – that is, to the CJEU under Article 267 TFEU – may happen along the way or, in any event, once the matter reaches the Supreme Court (the former, as a matter of judicial discretion; the latter, on an obligatory basis unless the EU law point is *acte claire*). And once domestic remedies have duly been exhausted,² “Strasbourg” – that is, the European Court of Human Rights (“the ECtHR”) – may get involved. The same core problem may therefore, at different stages, find its way before different courts.

No great powers of invention are required to construct an example of a situation in which national constitutional law, EU law and with it the EU Charter of Fundamental Rights (“the Charter”), and the ECHR could all potentially be engaged.

Suppose that a displaced person (let us call him John) enters Member State X and applies for asylum. His application is processed and refused and John starts the process of appeals within the national legal system. That results in a partial success on a procedural point and the case is remitted to the competent authorities for reconsideration. Again they turn down his application. Again John appeals, now arguing that the substantive decision misapplies the rules contained in the EU “Qualifications Directive”.³ The wheels of the asylum process and the court system both turn relatively slowly; and in the meantime John has acquired a wife (an EU national from another Member State) and two small children, both born in Member State X, who benefit from *jus soli* and who are therefore both citizens of that Member State and citizens of the European Union. And so claims based on the right to family life and the rights of the child (under national constitutional law and / or the EU Charter of Fundamental Rights and / or the ECHR) are now added to the dossier before the national court.

On such facts, those representing John will, at different stages of the process, probably raise a constitutional law issue that might need to go to the constitutional court; suggest that the national court should make a reference to the CJEU under Article 267 TFEU and – if they are unsuccessful and exhaust national remedies – finally try to get redress from the ECtHR. The courts so seized have overlapping responsibilities to uphold core values and to rule according to the applicable law.

Of course, the way in which the different systems of protection operate is not identical. As the President of my Court, Koen Lenaerts, pointed out in his speech

² As required by Article 35 ECHR as a pre-condition of admissibility.

³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

at the solemn hearing for the Opening of the 2018 Judicial Year at the ECtHR,⁴ “Whilst the [ECHR] operates as an *external* check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an *internal* component of the rule of law within the EU”. Constitutional protection is likewise an integral part of any national legal system that benefits from the guarantees afforded by a written constitution.

The CJEU duly interprets instruments of secondary EU law (regulations, directives, decisions) in the light of the European Union’s fundamental rights document, namely the Charter. In most cases, it is possible to find a reading of the text that is consistent with fundamental rights. When such a consistent interpretation is *not* possible, however, the CJEU has been prepared to annul or declare invalid the EU act in question as constituting an unjustified limitation on the exercise of a fundamental right guaranteed by the Charter. Thus in *Digital Rights Ireland*,⁵ the CJEU declared invalid the data retention directive⁶ on the grounds that that directive violated Articles 7 and 8 of the Charter (the right to respect for private life and the right to protection of personal data, respectively) by ordering the indiscriminate retention of personal metadata. In so doing, the CJEU was exercising functions akin to those of a national constitutional court upholding fundamental rights.

The different possible approaches

It would in theory be possible for each court – a national constitutional court, the CJEU or the ECtHR – to proceed in magnificent disdain for what the “other” courts are doing. Individual judgments are, indeed, sometimes singled out by eager commentators as showing that court A seems to be particularly concerned to safeguard its prerogatives against encroachment from outside. Those commentators then tend to present the underlying situation as one of inevitable incipient conflict – a kind of “turf war” in which each jurisdiction jealously guards its rights and prerogatives and is intolerant towards any suggestion that another jurisdiction’s approach to a similar situation might have merit, let alone supply persuasive precedent or constitute binding authority.

⁴ Koen Lenaerts, “The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection”, Strasbourg, 26 January 2018, p. 2.

⁵ Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238.

⁶ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p.54).

I think that that betrays a misunderstanding of how supreme courts view their function. To take the non-controversial, historical example of *Solange I*⁷ and *Solange II*,⁸ it seems to me that the Bundesverfassungsgericht there acted entirely normally (and, if I may respectfully say so, entirely properly and legitimately) in patrolling what fell within its remit, namely the protection of fundamental rights under the Grundgesetz in the Federal Republic of Germany. At the time of *Solange I*, protection of such rights under what was then EEC law was little more than embryonic. Hence the decision in that case: “as long as” that is the situation, *we will review* compatibility of EU law with our fundamental rights standards. The EEC’s supreme court then took the hint and developed fundamental rights under EEC law; and the Bundesverfassungsgericht responded with *Solange II*: “as long as” *you* watch over the observance of fundamental rights appropriately, *we will refrain* from operating a systematic fundamental rights review of EEC law.⁹

More fundamentally, I do not believe that the “turf war approach” is a true reflection of how, in fact, supreme jurisdictions now view comparative legal scholarship. I add that from the perspective of the individual citizen, if they *were* to take such an approach, that would undoubtedly be unhelpful and detrimental to justice.

Let me illustrate by reference to the part of the equation I know best – that is, EU law and the court in which I serve: the CJEU.

Article 53 of the Charter seeks to coordinate the three different standards of protection that co-exist in EU Member States: protection from national constitutional law, protection from the Charter and protection from the ECHR. As President Lenaerts neatly put it, “That provision of the Charter aims to bring order to pluralism by striking a balance between European unity and national

diversity”. Where precisely that balance will be struck will, however, necessarily vary from case to case.

Here I need to take the bull by the horns and speak first of *Melloni*¹⁰ (where European unity won out over national diversity), before comparing the judgment in that case with *F*¹¹ (where the constitutional law of the Member State in question was determinative of the issue). Both were cases involving the European Arrest Warrant (“the EAW”).

Mr Melloni had been tried in absentia in Italy. When his extradition under an EAW was sought in Spain, he brought a “recurso de amparo” (petition for constitutional protection) before the Tribunal Constitucional, claiming that execution of the EAW would violate his right to a fair trial as guaranteed by Article 24(2) of the Spanish Constitution. The Tribunal Constitucional, loyal to its obligations under both the Spanish Constitution and EU law, made a reference to the CJEU asking for guidance. Were the Spanish courts precluded from making surrender of Mr Melloni conditional on the right to have the conviction in question reviewed?

The key to understanding the CJEU’s decision in *Melloni* is to look with care at the evolution of the EU rules governing the EAW. The original version of the EU instrument creating the EAW (Council Framework Decision 2002/584/JHA)¹² had indeed allowed enforcement of an EAW where a trial had been conducted in absentia to be made subject to the condition that the accused should be guaranteed a retrial.¹³ However, the amendment introduced by Council Framework Decision 2009/299/JHA¹⁴ *specifically repealed that provision* and formulated (in a new Article 4a) *agreed common conditions for conducting an in absentia trial* which, if respected, would render a subsequent EAW enforceable without further limitation. *On that particular point*, the rules regulating the EAW represented *complete harmonisation* (as the recitals to Framework Decision 2009/299/JHA, when read in full, make crystal clear).

In its judgment, the CJEU did no more than to recognise and give effect to what the sovereign Member States – to use the German phrase, “Die Herren der

⁷ Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114 / German Federal Constitutional Court’s decision in *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, BVerfGE 37, 271.

⁸ Judgment of 12 April 1984, *Wünsche*, 345/82, EU:C:1984:166 / German Federal Constitutional Court’s decision in *Wünsche Handelsgesellschaft* (BvR 2, 197/83; 1987 3 CMLR 225), decided on 22 October 1986.

⁹ In more recent cases, the Bundesverfassungsgericht has unflinchingly preserved its right to do its duty and ensure that the Grundgesetz is not violated. Where questions of EU law were concerned, this has required it to strike a delicate balance. See, e.g., BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - paras. (1-126) on the implementation of a European Arrest Warrant (ECLI:DE:BVerfG:2015:rs20151215.2bvr273514) ; and BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13 - paras. (1-220) on the OMT (Outright Monetary Transactions) programme of the European Central Bank (ECLI:DE:BVerfG:2016:rs20160621.2bvr272813).

¹⁰ Judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107.

¹¹ Judgment of 30 May 2013, *F*, C-168/13 PPU, EU:C:2013:358.

¹² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

¹³ See the original version of Article 5(1).

¹⁴ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

Verträge” – had decided should henceforth be the uniform EU-wide approach to applying the EAW when a trial had been held in absentia. The Member States had collectively agreed to the amendment to the original EAW framework decision. In so doing, they had agreed common rules. Those rules reflected a consensus reached by all the Member States regarding the proper scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of an EAW. On both a literal and teleological reading, Article 4a(1) thus precluded, in any of the four situations carefully specified therein, the executing judicial authority from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence. It necessarily followed that the executing Member State might *not* avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* always conditional upon the conviction being open to review in the issuing Member State. The amended Framework Decision 2009/299/JHA expressly ruled out that possibility if the conditions applicable to one of the four situations there identified were satisfied.

It is also worth noting that the “chapeau” (the opening words) to Article 4a(1) states that, “The executing judicial authority may also refuse to execute the [EAW] issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the [EAW] states that ... [one of the four sets of conditions leading to automatic enforcement is satisfied]”. Theoretically, therefore, the *default value* remains the possibility of refusing to execute the EAW: a final safety net to ensure that fundamental rights are safeguarded. In practice, the requesting Member State has every incentive to ensure that the common rules (carefully framed to respect the Charter’s norms for protecting the rights of the defence) *are* complied with so that the EAW will automatically be executed.

I understand very well that the CJEU’s decision in *Melloni* has not been received with unbridled enthusiasm by colleagues in constitutional courts. But it is important to emphasise that *Melloni* represents the relatively rare case where the Member States, legislating together, have put in place an instrument of EU secondary law that contains a *complete harmonisation* of the relevant applicable rules: a harmonised approach that, when interpreted consistently with the Charter, itself incorporates all the necessary guarantees to protect fundamental rights. In those very particular circumstances, it would be inconsistent still to leave unfettered scope for national diversity under national constitutional law in a case where the agreed common rules *are* complied with. That option was ruled out by the Member States themselves when they agreed on a complete harmonisation approach. Moreover, a final “fundamental rights safety net” was still left in place. If the EAW issued in an individual case does

not state in terms that one of the four agreed sets of conditions has been fulfilled, the executing judicial authority *still retains the right* to refuse to execute that particular EAW.

Compare and contrast the ruling in *Melloni* with *F*, a case that turned on the specialty rule in the EAW. There, the key question was whether EU law prevented the person surrendered under an EAW from bringing an appeal having suspensive effect against a decision taken by the executing judicial authority by which it gave its consent to his surrender. The CJEU found that the EAW Framework Decision as interpreted in the light of Article 47 of the Charter *neither imposed nor opposed* such a right of appeal. Here, the rules had *not* been harmonised completely at EU level. The principle of effective judicial protection in EU law afforded an individual the right of access to a court, but not to a number of levels of jurisdiction. Thus, *it was for the constitutional law of the executing Member State* – and only for that law – to determine whether such a right did, or does not, exist at national level. I emphasise that – unlike the situation which led to the decision in *Melloni* – it follows from that that the answer may be different under the constitutional law of different Member States. EU law sees no difficulty with such national diversity in the *absence* of complete harmonisation of the relevant rules at EU level.

Importantly, in both cases the CJEU referred expressly to ECtHR case law in reaching its decision: in *Melloni*, to *Medenica v. Switzerland*,¹⁵ *Sejdovic v. Italy*,¹⁶ and *Haralampiev v. Bulgaria*;¹⁷ and in *F*, to *Chahal v. United Kingdom*,¹⁸ *Khodzhamberdijev v. Russia*,¹⁹ and *Marturana v. Italy*.²⁰ Article 52(3) of the Charter expressly provides, indeed, that, “in so far as the Charter contains rights which correspond to rights guaranteed by the [ECHR] [...], the meaning and scope of those rights shall be the same as those laid down by [the ECHR]”. The “Explanations” relating to the Charter,²¹ which under Article 6(1) TEU and Article 52(7) of the Charter are to be given “due regard” by the courts of the EU and of the Member States, give an extensive list of those corresponding fundamental rights.

¹⁵ ECtHR, judgment of 14 June 2001, *Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI.

¹⁶ ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II.

¹⁷ ECtHR, judgment of 24 April 2012, *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33.

¹⁸ ECtHR, judgment of 15 November 1996, *Chahal v. United Kingdom*, § 126, Reports of Judgments and Decisions 1996-V.

¹⁹ ECtHR, judgment of 5 June 2012, *Khodzhamberdijev v. Russia*, no. 64809/10, § 103.

²⁰ ECtHR, judgment of 4 March 2008, *Marturana v. Italy*, no. 63154/00, § 110.

²¹ OJ 2007 C 303, p. 17, at p. 32.

Two recent Grand Chamber judgments of the CJEU, relating to a different element of criminal law (prescription), illustrate that provided it is adequately informed, the CJEU is sensitive to the need to strike the right (delicate) balance between EU law and national constitutional law. The fact that there are *two* cases highlights another aspect of the CJEU's work. The procedure for a preliminary ruling under Article 267 TFEU is one of cooperation between the national court and the CJEU. That has the incidental effect that, because the CJEU "sees" the case through the eyes of the referring court, it may not necessarily be alive to all the potential issues in the first case referred.

*Taricco*²² arose out of criminal proceedings against a number of individuals for forming and organising a conspiracy to commit various offences in relation to value added tax. VAT forms part of the EU's "own resources"²³ and a number of provisions of EU law require the Member States to act to counter activities adversely affecting the EU's financial interests.²⁴ The Italian Penal Code made provision for prosecution for various categories of offences to become prescribed after specified periods of time.²⁵ The referring court (the Tribunale di Cuneo) pointed out in its order for reference that criminal proceedings in relation to tax evasion, such as the accused were alleged to have committed, usually involved very complex investigations. As a result, the preliminary investigation stage of the proceedings already took a considerable amount of time. The duration of the entire proceedings was such that in Italy, in that type of case, *de facto* impunity was a normal, rather than exceptional, occurrence. Furthermore, it was often impossible for the Italian tax authorities to recover the amount of the taxes evaded through the offence in question. The national court considered that, if it were able to disapply the national provisions at issue, it would be possible to ensure the effective application of EU law in Italy.

The CJEU rephrased the national court's questions and approached the problem by asking "whether a national rule in relation to limitation periods for criminal offences such as that laid down by the national provisions at issue —

²² Judgment of 8 September 2015, *Taricco and Others* ("*Taricco I*"), C-105/14, EU:C:2015:555.

²³ See Article 2(1)(b) of Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

²⁴ See, in particular, Article 325(1) and (2) TFEU, Articles 1(1)(b) and 2(1) of the Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 49; "the PFI Convention") and Article 131 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

²⁵ See paragraphs 11 to 17 of the judgment. Unfortunately the English translation refers to "limitation periods" rather than to prosecution being "prescribed" after a certain period of time has elapsed. This makes it correspondingly difficult for an English speaker to grasp what the case was really about. I am indebted to Sir David Edward, a former UK judge at the CJEU, for drawing this to my attention.

which provided, at the material time in the main proceedings, that the interruption of criminal proceedings in relation to VAT offences had the effect of extending the limitation period by only a quarter of its initial duration, with the result that accused persons were liable to enjoy *de facto* impunity — amounts to introducing a VAT exemption which is not laid down in Article 158 of Directive 2006/112". If the response to that question was affirmative, should the referring court be told that it could disapply those national provisions?

The CJEU stressed that the Member States must ensure that cases of serious fraud against the EU's financial interests were punishable by criminal penalties which were, in particular, effective and dissuasive. Moreover, the measures adopted in that respect must be the same as those which the Member States adopted in order to combat equally serious cases of fraud affecting their own financial interests. It was for the referring court to determine, taking into account all the relevant facts and points of law, whether the applicable national provisions allowed the effective and dissuasive penalisation of cases of serious fraud affecting the financial interests of the European Union. The national court also needed to verify whether the national provisions in question applied to cases of VAT evasion in the same manner as they applied to fraud affecting the Italian Republic's own financial interests, as required under Article 325(2) TFEU.

If the national court concluded that the application of the national provisions in relation to the interruption of the limitation period had the effect that, in a considerable number of cases, the commission of serious fraud would escape criminal punishment, since the offences would usually be time-barred before the criminal penalty laid down by law could be imposed by a final judicial decision, it would follow that the measures laid down by national law to combat fraud and any other illegal activity affecting the financial interests of the European Union could not be regarded as being effective and dissuasive. That would be incompatible with Article 325(1) TFEU, Article 2(1) of the PFI Convention as well as Directive 2006/112, read in conjunction with Article 4(3) TEU. The national court would then have to ensure that EU law was given full effect, if need be by disapplying those provisions, without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure.

The CJEU did briefly examine whether a problem might arise in relation to the fundamental rights of the persons accused.²⁶ The focus was exclusively on Article 49 of the Charter (non-retroactivity of offences or penalties) and the Court concluded that its ruling respected that provision.

²⁶ See paragraphs 53 to 58 of the judgment.

The issue returned to the CJEU in *M.A.S and M.B.* (commonly referred to as “*Taricco II*”).²⁷ This time the reference was from the Corte Costituzionale (Constitutional Court, Italy), which had been seized with questions of constitutionality emanating both from the Corte suprema di cassazione (Court of Cassation, Italy) and from the Corte d’appello di Milano (Court of Appeal, Milan, Italy). The Corte costituzionale carefully drew the CJEU’s attention to Article 25 of the Italian Constitution, which provides inter alia that, “No one may be punished except under a law already in force before the act was committed. No one may be subjected to preventive measures except in cases provided for by law”. In its order for reference, the Corte costituzionale went on to explain that in the Italian legal system the rules on prescription in criminal matters are substantive in character, and consequently fall within the scope of the principle of legality referred to in Article 25 of the Italian Constitution. Those rules must therefore be established by provisions that are precise and are in force at the time when the offence in question was committed.

Against that background, the Corte costituzionale expressed doubts as to whether the approach that seemed to be required by the CJEU’s ruling in *Taricco I* was compatible with the overriding principles of the Italian constitutional order and with observance of the inalienable rights of the individual. In particular, according to that court, that approach was liable to interfere with the principle that offences and penalties must be defined by law, which requires that rules of criminal law are precisely determined and cannot be retroactive.

In its preliminary observations, the CJEU highlighted the fact that the new reference from the Corte Costituzionale required it to look at the problem in a different light. Might a possible breach of the principle that offences and penalties must be defined by law “follow from the obligation stated in the *Taricco* judgment to disapply the provisions of the Criminal Code at issue, having regard, first, to the substantive nature of the limitation rules in the Italian legal system, which means that those rules must be reasonably foreseeable by individuals at the time when the alleged offences are committed and cannot be retroactively altered *in peius*, and, second, to the requirement that any national rules on criminal liability must be founded on a legal basis that is precise enough to delimit and guide the national court’s assessment”? The questions

²⁷ Judgment of 5 December 2017, *M.A.S. and M.B.* (“*Taricco II*”), C-42/17, EU:C:2017:936. The same issues arise, in the English translation of the judgment, with the inaccurate use of “limitation” for prescription as plague the English text of *Taricco I*. Whereas rules on *limitation* might, to a common lawyer, appear more akin to procedural rules, rules as to *prescription* may readily be conceived to be substantive. If a cause of action is prescribed by the passage of time, it is dead and buried; whereas the possibility sometimes exists – for good cause – of overriding a limitation period.

raised by the referring court with regard to that principle had *not* been drawn to the CJEU’s attention in *Taricco I*. It was therefore necessary “to clarify the interpretation of Article 325(1) and (2) TFEU given in that judgment”.²⁸

The CJEU did not resile from the importance that it had placed in *Taricco I* on the fight against fraud adversely affecting the EU’s financial interests.²⁹ However, it then stressed that it was primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU. Protecting the financial interests of the EU was a shared EU-Member State competence. At the material time for the main proceedings, the rules on prescription applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature, and harmonisation had since taken place only to a partial extent by the adoption of Directive (EU) 2017/1371.³⁰

Italy was thus, at that time, free to arrange matters so that in its legal system those rules, like the rules on the definition of offences and the determination of penalties, formed part of substantive criminal law and were therefore, like those rules, subject to the principle that offences and penalties must be defined by law. The competent national courts, for their part, were required to ensure that the fundamental rights of persons accused of committing criminal offences were observed. In that respect, *the national authorities and courts remained free to apply national standards of protection of fundamental rights*, provided that the level of protection provided for by the Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law were not thereby compromised. In particular, where the imposition of criminal penalties was concerned, the competent national courts had to ensure that the rights of defendants flowing from the principle that offences and penalties must be defined by law were guaranteed.³¹

After a careful survey of the applicable ECtHR case-law, the CJEU concluded that the national courts would *not* be obliged to disapply the prescription rules in the Italian Criminal Code if (a) there would be a situation of uncertainty in the Italian legal system as regards the determination of the applicable prescription rules; or (b) penalties might be imposed on those persons which, in all likelihood, would not have been imposed if those provisions had been applied, so that those persons could thus be made subject, retroactively, to conditions of criminal liability that were stricter than those in force at the time

²⁸ See paragraphs 27 and 28 of the judgment.

²⁹ See paragraphs 30 to 40 of the judgment.

³⁰ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (OJ 2017 L 198, p. 29).

³¹ See paragraphs 45 to 48 of the judgment.

the infringement was committed.³² The CJEU concluded that, “If the national court were thus to come to the view that the obligation to disapply the provisions of the Criminal Code at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied ... It will then be for the national legislature to take the necessary measures [to remedy the situation]”.³³

The CJEU accordingly ruled that, “Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to VAT, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.”

I suggest that the Grand Chamber’s judgment in *Taricco II* demonstrates the willingness of the CJEU to respect national diversity where EU rules have not been fully harmonised and a situation of potential conflict arises between respecting constitutional norms and ensuring the effective application of EU law. It also highlights the pitfalls inherent in the preliminary ruling procedure. Sometimes the CJEU knows less than might be desirable when it finds itself giving an initial ruling – if so, it may be necessary to clarify and nuance that ruling in replying to a subsequent reference. The delicacy of the situation is reflected in the elaborate reasoning of *Taricco II*.

Mention should also be made here of the ECtHR’s ruling in *Bosphorus*,³⁴ in which that court held that there was a rebuttable presumption that ECHR rights are given equivalent protection by the EU, notwithstanding that the EU is not a party to the ECHR.³⁵ Perhaps it is not over-fanciful to regard that judgment as

the ECtHR’s equivalent of the Bundesverfassungsgericht’s ruling in *Solange II*. Much has been made of the fact that the ECtHR was prepared to enunciate that presumption. It seems to me that one should not overlook the equally important fact that the ECtHR expressly indicated that the presumption is *rebuttable*. Were the CJEU *manifestly* to disregard the need to give effective protection to individual rights in a particular case, the presumption would cease to apply.

The CJEU is not unaware of this point. Thus, in *Aranyosi and Căldăraru*³⁶ (two more cases concerned with the execution of EAWs), the CJEU held that in very specific circumstances, a Member State may decline to surrender a requested person under an EAW where, because of the specific conditions in which that person would be detained in the prison system of the requesting Member State, execution of the EAW would result in a violation of Article 4 of the Charter (the prohibition on inhuman or degrading treatment, equivalent to Article 3 ECHR). Again, the CJEU made specific reference to ECtHR case law: *Bouyid v. Belgium*³⁷ and *Torreggiani and Others v. Italy*.³⁸

It is also important to note that the ECtHR has made use of CJEU case law to update ECHR rights. Thus, in *Scoppola v. Italy (no 2)*,³⁹ the ECtHR departed from its earlier line of case law and interpreted Article 7 ECHR as including the right to benefit from a more lenient penalty provided for in a law enacted after the commission of the offence for which the penalty was to be imposed. In so doing, it referred to the CJEU’s decision in *Berlusconi*⁴⁰ and to the fact that Article 49 of the Charter (a much younger text than the ECHR) expressly recognises that right. The ECtHR’s rulings in *Povse v. Austria*⁴¹ and in *Avotiņš*

for which the Convention provides [...]. By “equivalent” the Court means “comparable”; any requirement that the organisation’s protection be “identical” could run counter to the interest of international cooperation pursued [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. [156.] If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. ...”

³⁶ Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198.✓

³⁷ ECtHR, judgment of 28 September 2015, *Bouyid v. Belgium*, No 23380/09, § 81.

³⁸ ECtHR, judgment of 8 January 2013, *Torreggiani and Others v. Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, § 65.

³⁹ ECtHR, judgment of 17 September 2009, *Scoppola v. Italy (no 2)*, Application no. 10249/03.

⁴⁰ Judgment of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270.✓

⁴¹ ECtHR, Decision of 18 June 2013, *Povse v. Austria*, Application no. 3890/11; c.f. judgment of 1 July 2010, *Povse*, C-211/10 PPU, EU:C:2010:400.✓

³² See paragraphs 49 to 60 of the judgment.

³³ Paragraph 61 of the judgment.

³⁴ ECtHR, judgment of 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98.

³⁵ See paragraphs 155 and 156: “[155.] In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that

*v. Latvia*⁴² suggest, in the same way as does the CJEU's ruling in *Aranyosi and Căldăraru*, that the strong preference is to achieve convergence between different courts' approaches, rather than divergence.

Conclusion

To sum up this short introductory intervention: we are speaking here of supreme level courts, each enjoying judicial independence, each with its own remit, whose judges are bound by their judicial oath to defend the rule of law and to apply the specific legal rules that their court is required to administer and interpret. All are "at the top of the pyramid", in the sense that all are supreme. In those circumstances, it seems to me inherently problematic and ultimately unhelpful to think of hierarchy between courts or to speak of deference. It is much more appropriate and productive to think in terms of comity and cross-fertilisation.

The process is therefore one in which the work of each court keeps the other courts on their toes. It is about avoiding unnecessary conflict. It is about dialogue; about information and open-mindedness; about willingness to start from the premise that, where other good judicial minds have explored an analogous problem, they may well have come up with a quality solution that bears closer examination and that, in any event, should not be discarded merely because it is "foreign".

If we adopt that approach, there is a real chance that the process of comparison may indeed "keep us all on our toes" and may lead to a situation in which individual rights are generally *better* protected than they would be if we were merely to look at our own legal instruments and our own case-law. Such a result will be greatly to the benefit of the citizens whose rights we are all, in our different ways, pledged to protect by ensuring that "the law is observed".

⁴² ECtHR, judgment of 23 May 2016, *Avotiņš v. Latvia*, Application no. 17502/07. In that judgment, the ECtHR again reviewed and upheld the "Bosphorus presumption".



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Interaction between the Constitutional Courts and the European Court of Human Rights

I. Introduction

When viewed from Strasbourg perspective, constitutional courts¹ are domestic human rights courts. The interaction between the constitutional courts and the European Court of Human Rights (the Court) is inevitable. The term "interaction" presupposes reciprocal action and impact. While the impact of the judgments delivered by the Court on the domestic legal systems is a well-researched topic, this article will explore the less researched side of this process – the potential impact of the rulings of the Constitutional Courts on the work of the Court.

Subject to their competencies, the constitutional courts may be remedies that need to be exhausted in terms of Article 35(1) of the European Convention on Human Rights (the Convention) before submitting application to the Court. Even if not required to be exhausted, the rulings of the constitutional courts provide authoritative interpretation of the domestic law. Besides, these rulings may provide also inspiration to the Court for interpretation of the Convention. Thus, there are various modalities how rulings of the constitutional courts may manifest themselves in a judgment of the Court.

For the sake of clarity, a distinction will be made between two situations: first, when the rulings of constitutional courts are from the countries that

¹ The term "constitutional courts" in this article refers also to the highest domestic courts in countries where there are no constitutional courts established.

are parties to the case, and, second, when the Court refers to the rulings of constitutional courts from countries that are not parties to the case. With respect to the first situation, three modalities will be further explored: (1) judicial dialogue; (2) acceptance of the national standard as the Convention standard, and (3) replacement of the Court's reasoning by that of constitutional court. As to the second situation, two examples will be provided and then conclusion made by putting the findings into broader doctrinal framework. It must be noted that the above distinctions are not exhaustive,² however they are helpful in getting to the point under examination.

II. Rulings of constitutional courts from the countries – parties to the case

1. Judicial dialogue

This is the most prominent and discussed form of interaction between the constitutional courts and the Court. The concept of judicial dialogue is used in different contexts and may well cover all aspects that are being discussed, however, it will be used in this article in narrow meaning. Namely, as tuning of the domestic and inevitably also the Convention standard through consecutive judgments delivered by the relevant domestic court and the Court. There have been many such cases discussed already, but one of the most illustrative examples is *Al-Khawaja and Tahery v. the United Kingdom* where the Court refined the standard on the use of evidence given by absent witnesses under Article 6 of the Convention following an express invitation by the Supreme Court of the United Kingdom.

The Chamber of the Court, following the established case-law, found a violation of the right to fair trial under Article 6 of the Convention in respect of both applicants since impossibility to cross-examine the witness, on the basis of whose testimonies they were essentially convicted, was not effectively counterbalanced.³ The approach of the Chamber was carefully assessed but not followed by the Supreme Court of the United Kingdom in the case of

² For example, when the Court needs to clarify practice in the member states as part of its assessment of the margin of appreciation, the domestic law and its interpretation by the constitutional courts may be widely reflected in the Comparative Law part of the judgment and may serve as one of the arguments in the process of establishing the Convention standard.

³ *Al-Khawaja and Tahery v. the United Kingdom*, Applications nos. 26766/05 and 22228/06, 20 January 2009.

R. v. Horncastle and others.⁴ The main critique was directed at inflexibility of the sole or decisive evidence test as applied by the Chamber which, allegedly, did not sufficiently take into account specificity of the common-law system and the available counterbalancing factors.

The Grand Chamber, after the ruling in *R. v. Horncastle and others*, carried out detailed analysis of the Court's case-law and the arguments advanced by the Supreme Court.⁵ It pointed out that admission of evidence based on a sole or decisive test would not automatically render the trial unfair, however, such conviction would require most careful scrutiny, including sufficient counterbalancing factors. The analysis of the Grand Chamber shifted towards counterbalancing factors and it established a violation concerning one applicant, but not with respect to the other.

Nicolas Bratza, national judge at the time, explained in his concurring opinion the above shift as follows:

“The judgment of the Grand Chamber, in which I concur, not only takes account of the views of the Supreme Court on the sole or decisive test and its application by the Chamber but re-examines the safeguards in the [domestic law]. While (...) the Court has not been able to accept all the criticisms of the test, it has addressed what appears to be one of the central problems identified by the Supreme Court, namely the inflexible application of the test or rule, as reflected in the Chamber's *Lucà v. Italy* judgment (...), whereby a conviction based solely or to a decisive degree on the statements of an absent witness is considered incompatible with the requirements of fairness in Article 6, notwithstanding any counterbalancing procedural safeguards within the national system. (...)”⁶

This case illustrates establishment of the Convention standard in a careful and reasoned judicial dialogue between the Court and the Supreme Court of the United Kingdom. The impact from this dialogue goes into both directions – the domestic legal system and that of the Convention.

2. Acceptance of the national standard

In a pilot judgment *Orchowski v. Poland* a Chamber of the Court dealt with the question of overcrowding in prisons under Article 3 of the Convention.⁷ The Court referred to the judgment of the Polish Constitutional Court which

⁴ *R. v. Horncastle and others*, UKSC 14, 9 December 2009.

⁵ *Al-Khawaja and Tahery v. the United Kingdom* [GC], Applications nos. 26766/05 and 22228/06, 15 December 2011.

⁶ *Ibid.*, Concurring opinion of judge Bratza, § 3.

⁷ *Orchowski v. Poland*, Application no. 17885/04, 22 October 2009.

had found that a person cannot be afforded humane treatment if the size of the prison cell is less than 3 m² and made the following observation and conclusion:

“The Court observes that Article 40 of the [Polish] Constitution is drafted almost identically to Article 3 of the Convention. Therefore, the Court, mindful of the principle of subsidiarity, finds that the above-mentioned ruling of the Constitutional Court can constitute a basic criterion in the Court’s assessment whether the overcrowding in Polish detention facilities breaches the requirements of Article 3 of the Convention. In consequence, all situations in which a detainee is deprived of the minimum of 3 m² of personal space inside his or her cell, will be regarded as creating a strong indication that Article 3 of the Convention has been violated.”⁸

This standard was later confirmed by the Grand Chamber in the case of *Mursic v. Croatia*.⁹ A different line of case-law had started to develop that did not accept personal space of less than 4 m² per prisoner. The Grand Chamber did not see grounds for departing from the pilot judgment in *Orchowski* case and the other leading cases and confirmed 3 m² as the minimum standard for the assessment of a personal space under Article 3 of the Convention.

Thus, *Orchowski* case is an example of express recognition by the Chamber of the Court that the national standard can serve as a basic criterion for its assessment under the Convention. Importantly though, the Grand Chamber made it clear that the national standards “although capable of informing the Court’s decision in a particular case [with a reference to *Orchowski* case], cannot be considered decisive for its finding under Article 3 (...)”.¹⁰

3. Replacement of the Court’s reasoning

In two recent Chamber judgments concerning Turkey the findings of the Turkish Constitutional Court were sufficient for the Court to conclude that there have been violations of Articles 5 and 10 of the Convention without carrying out its own substantive assessment. The cases *Sahin Alpay v. Turkey*¹¹ and *Mehmet Hasan Altan v. Turkey*¹² dealt with pre-trial detention of two journalists who were charged with attempted overthrowing of the constitutional order following an attempted coup in Turkey in 2016. The Turkish Constitutional

⁸ Ibid., § 123.

⁹ *Mursic v. Croatia* [GC], Application no. 7334/13, 20 October 2016.

¹⁰ Ibid., § 111.

¹¹ *Sahin Alpay v. Turkey*, Application no. 16538/17, 20 March 2018,

¹² *Mehmet Hasan Altan v. Turkey* Application no. 13237/17, 20 March 2018.

Court had found that their pre-trial detention had violated the right to liberty and security under Article 19 of the Turkish Constitution because there were no strong indications of the crimes charged of as well as because the detention had amounted to unnecessary and disproportionate interference with the freedom of expression under Articles 26 and 28 of the Turkish Constitution. The trial court, however, considered these judgments of the Constitutional Court unlawful and refused to take any follow up action.

With respect to Article 5 the Court noted that the Constitutional Court had found their pre-trial detention in breach of Article 19(3) of the Constitution and considered that this conclusion amounted in substance to an acknowledgment of violation of the right to liberty and security under Article 5(1) of the Convention. Then Court continued that it “endorses the findings which the Constitutional Court reached following a thorough examination”¹³ and turned to examine whether the national authorities afforded appropriate and sufficient redress for the established violation.

Similar approach was taken under Article 10 of the Convention where the Court established an interference with the applicants’ rights to freedom of expression “in the light of the Constitutional Court’s judgment”.¹⁴ When it came to the assessment of the necessity of interference, the Court summarised conclusions of the Turkish Constitutional Court that the applicant’s pre-trial detention could not be regarded as a necessary and proportionate interference for the purposes of Articles 26 and 28 of the Turkish Constitution and that it could have had a chilling effect on freedom of expression and of the press. Having done so, the Court concluded that it “can see no reason to reach a different conclusion from that of the Constitutional Court”.¹⁵ After that the Court proceeded with the assessment of a general problem in Turkey concerning the interpretation of anti-terrorism legislation as highlighted by the third parties.

It must be noted that the methodological approach of referring to the analysis of the domestic courts and then approving it is not a novelty in the case-law of the Court. Recent example is a judgment in the case of *Ndidi v. the United Kingdom* when, in the context of balancing of the right to private and family life against the public interest of deportation under Article 8, the Chamber indicated that where the domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately carried out the balancing, it is not the Court’s

¹³ *Alpay v. Turkey*, § 108; *Altan v. Turkey*, § 129.

¹⁴ *Alpay v. Turkey*, § 170; *Altan v. Turkey*, § 200.

¹⁵ *Alpay v. Turkey*, §§ 177-178; *Altan v. Turkey*, §§ 207-208.

task to carry out assessment afresh, including its own assessment of the factual details of proportionality.¹⁶ What may be seen as unusual in the two Turkish cases is the application of this methodology outside the scope of margin of appreciation doctrine in the context of Article 5¹⁷ and the express endorsement of the domestic reasoning throughout the judgment.

The circumstances in these cases, though, were unusual as well. It is difficult to find examples in a democracy when lower courts declare judgments of the Constitutional Court not being in compliance with the law because they consider that the Constitutional Court did not have jurisdiction to assess the evidence in the case. The endorsement made by the Court of the reasoning provided by the Turkish Constitutional Court may be seen as confirming legitimacy and raising authority of the Turkish Constitutional Court.

It can be concluded that in both cases the Court established substantive violations under Article 5 and 10 of the Convention solely on the basis of the analysis carried out by the Turkish Constitutional Court under the Turkish Constitution.

In this context it is important to note that five out of seven judges of the Court in a concurring opinion added the following explanation:

“It follows that the operationalisation of the principle [of subsidiarity] towards a more process-based review of domestic decision-making, within the conceptual framework of the margin of appreciation doctrine, does not in any way limit the Court’s competence to ultimately review substantive findings at national level at the stage of the application of Convention principles embedded in the domestic legal systems. In short and to be clear, the robust and coherent application of the principle of subsidiarity by the Court has nothing to do with taking power away from the Court.”¹⁸

III. Rulings of constitutional courts from the countries non-parties to the case

In all above cases constitutional courts were part of the domestic proceedings. However, the Court in its legal analysis may also refer, among many other sources, to the rulings of the constitutional courts that do not have any link with the domestic proceedings.

¹⁶ *Ndidi v. the United Kingdom*, Application no. 41215/14, 14 September 2017, § 76.

¹⁷ Article 5(1) of the Convention, however, refers to the “procedure prescribed by [domestic] law”.

¹⁸ *Alpay v. Turkey*; *Altan v. Turkey*, Concurring opinion of judge Spano joined by judges Bianku, Vučinić, Lemmens And Grieco, § 3.

1. Case of *Vinter and Others v. the United Kingdom*

One such example is the case of *Vinter and Others v. the United Kingdom* that dealt with the question whether life imprisonment without possibility of release or review of the sentence contravened Article 3 of the Convention.¹⁹ When setting standard under Article 3 in this case, the Grand Chamber referred to broad range of comparative law material and, in particular, referred to two judgments delivered by the German Federal Constitutional Court:

“(…) as the German Federal Constitutional Court recognised in the Life Imprisonment case (…), it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentenced prisoner’s rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. Indeed, the Constitutional Court went on to make clear in the subsequent War Criminal case that this applied to all life prisoners, whatever the nature of their crimes, and that release only for those who were infirm or close to death was not sufficient (…). Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity (…).”²⁰

Thus, in this case the reasoning of the German Federal Constitutional Court inspired the Court to develop one argument among a number of others, albeit a strong one, in setting a standard under Article 3 of the Convention, namely, an obligation on the states to provide for both prospect of release and a possibility of review of a life imprisonment.

2. Case of *Perincek v. Switzerland*

The case of *Perincek v. Switzerland* is another example.²¹ The Grand Chamber had to establish whether the criminal punishment of the applicant for denial of the “Armenian genocide” carried out by the Ottoman Empire violated his freedom of expression under Article 10 of the Convention. The Comparative Law part of the judgment contained extensive review of state practice and, in particular, detailed review of two rulings: the decision of the French Constitutional Council in which it declared unconstitutional,

¹⁹ *Vinter and Others v. the United Kingdom* [GC], Applications nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

²⁰ *Ibid.*, § 113.

²¹ *Perincek v. Switzerland* [GC], Application no. 27510/08, 15 October 2015.

inter alia, criminalisation of denial of genocide defined non-exhaustively, and the judgement of the Spanish Constitutional Court which declared as unconstitutional denial of the crime of genocide, but as constitutional – justification of the crime of genocide. The latter reasoning underpinning this distinction left its marks in both judgments delivered by the Chamber and the Grand Chamber.

While the standard under which the restriction of the freedom of expression was assessed (in particular, whether the actions could be seen as a call for violence) was derived from its own case law, the Grand Chamber explained the essence of the genocide justification by the words and with a reference to the Spanish Constitutional Court:

“It would here just add that, as explained by the Spanish Constitutional Court, genocide justification does not consist in assertions that a particular event did not constitute a genocide, but in statements which express a value judgment about it, relativising its gravity or presenting it as right (...)”.²²

Then the Grand Chamber concluded that the applicant’s actions did not amount to genocide justification.

Thus, the concept as explained by the Spanish Constitutional Court was one among many arguments addressed by the Court in its assessment under the Convention and formed part of the interpretation of the Convention.

It is interesting to note that the Chamber in its judgment (which however did not enter into force because the case was referred to the Grand Chamber) justified the use in its own analysis of the rulings of the French Constitutional Council and the Spanish Constitutional Court by explaining that “although these two developments strictly do not constitute precedents that are binding on it, the Court can not remain impervious to them”.²³

Altogether, the two examples discussed indicate that, like the constitutional courts who can get inspired by case-law of the Court and interpret respective constitutions in the light of the interpretation of the Convention, the Court too may get inspired by the arguments developed by constitutional courts and apply them in interpreting the Convention.

IV. Concluding remarks

All the examined cases demonstrate that the interaction between the Court and the constitutional courts indeed is reciprocal. If placed in a doctrinal framework, the relationships may be viewed as evidence reflecting

²² Ibid., § 240.

²³ *Perincek v. Switzerland*, Application no. 27510/08, 17 December 2013, § 123.

the existence of plurality of legal systems which interact on horizontal level rather according to constitutionally organised framework and which has been claimed to be remarkably harmonious, stable and normally based on mutual accommodation and convergence.²⁴ This means that a judge nowadays has to work in environment of plurality of legal systems which constantly interact with each other and the challenge is to keep them in harmony as far as it is possible.

Indeed, be it through the judicial dialogue, acceptance of the national standard as the Convention standard, replacement of own reasoning with that of constitutional courts or by providing inspiration for the interpretation of the Convention, the constitutional courts can take part in shaping the Convention standards. However, it is also true that the Court sends reminders that it is in control of the impact from the domestic courts.

Overall, this must be viewed as a positive development. Protection of human rights gain if the competence of and its interpretation by the constitutional courts is as inclusive as possible so that the grievances of individuals are addressed at the domestic level by the highest court. Then, if the reasoning of the domestic courts is carefully crafted and it applies the domestic human rights standards in line with the Convention and its case law or applies the Convention directly, the need for a detailed assessment afresh by the Court decreases and the potential impact of the domestic courts on the interpretation of the Convention increases. This is a straightforward implementation of the principle of subsidiarity from which benefit all legal systems involved.

Recently France was the tenth country that acceded to Protocol No. 16 to the Convention and now this Protocol is set to enter into force on 1 August 2018.²⁵ From this date on the constitutional courts will have opportunity to engage in a new form of interaction with the Court – by much faster means of an advisory opinion and without the need to enter into judicial dialogue through the series of consecutive judgments. Efficiency of this procedure primarily will depend on its use by the constitutional courts.

The examined interaction raises also serious questions that should not be overlooked, such as legal aspects of non-compliance with the binding ruling of the Court as part of the judicial dialogue, the exact compatibility of the domestic and convention standards when the domestic standard is

²⁴ Nico Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press: Oxford, 2012, 152.

²⁵ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 2 October 2013, CETS No. 214, <https://www.coe.int/en/web/conventions/home>.

followed, the indirect impact of the referred to domestic jurisdiction on other states parties to the Convention through the Convention standard and consistency and foreseeability of the methodological approach applied by the Court.

Notwithstanding this, the above study gives good reasons to end on a positive note by joining Christos Rozakis, former judge of the Court, who saw the fact that the law alien to case-law of the Court has gained ground and is increasingly gaining ground as a good sign for the founders of the Convention, i.e., “for the founders of a court of law protecting values which by their nature are inherently indivisible and global.”²⁶ Indeed, human rights are universal.

²⁶ Christos Rozakis “The European Judge as Comparatist” in 80 Tulane Law Review 257, 2005, 279.



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The digital world: what relationship between the jurisdictions?

The current public debate on social networks and the use of personal data fostered by them gave me the idea to suggest a pragmatic reading of what has been called in France the “dialogue of judges”, a formula that, in my mind, summarizes well the theme that our host wished to propose for these days of meetings.

Why choose the digital world? Because it is not only a great ally of freedom for individuals and businesses, but also a vehicle for significant threats to the right to privacy and security. It is such a powerful tool that it becomes a daunting challenge for actors who are traditionally defending fundamental rights. For constitutional courts it is appropriate to agree to accept the logic of the benefits made available by the digital environment; however they should not stay blind to the perils that these powerful tools represent.

As a first step we should note that the digital technology has been at the origin of new forms of expression of constitutionally recognized rights and freedoms. It has helped to enrich the dialogue of judges which are all facing the same developments.

As a second step, we must recognize that the Internet contributes to the blurring of borders. I will try to show some of the issues and challenges we are already facing that are calling for new solutions and for an even stronger dialogue between jurisdictions. I will be certainly asking more questions than suggesting any answers.

In France, this “dialogue” is all the more complicated as it is carried out on several levels: the Constitutional Council carries out solely the review

of the constitutionality of laws, the administrative or judicial judges are in charge of ensuring the conformity with treaties and conventions, and, in individual cases, they are therefore directly concerned by relations with the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU).

I will present here several insights from the point of view of the Constitutional Council.

The first area which has been changed by the digital technology is the freedom of expression and communication¹.

Internet access has become an issue related to fundamental freedoms. In fact, the importance of the Internet in the social, economic and democratic life has stimulated the development of the capacity of networks and the increasing presence of public services on the Internet. It has helped to create a sort of “right” to access the Internet. Even though the Council has not recognised the existence of such a right, it has declared, in the negative, that only a court is competent to decide on interruption of Internet access following the usual proportionality test from the area of fundamental rights. This implicit recognition happened simultaneously with the affirmation of a fundamental right of access to the Internet by the European Union via the so called *Third Telecom Package*.

To my knowledge, there is no topical jurisprudence on this subject developed by the ECHR; however, there are numerous decisions on the use of Internet.

Thus, since the Internet connection network is a vehicle of the freedom of expression, the access to specific sites may not be prosecuted; however, it may be limited. That is so because the Internet is also a vehicle of encroachment on the rights of other persons, for example copyrights, or a vehicle for dangerous or false ideas against which all states are called upon to protect themselves. For example, the Constitutional Council has authorized the blocking by an administrative authority of addresses giving access to certain sites that contain pornographic images of minors. In this case, the Constitutional Council set three criteria for allowing this restriction. These include the protection of Internet users themselves and the fight against the sexual exploitation of minors, similarly recognized as criteria of “legitimate aim” by the ECHR, allowing a restriction upon the use of network.

On the other hand, in the name of the freedom of information and communication, the Constitutional Council rejected the suggestion that merely the consultation of services of communication made available to the online public containing messages, images or representations was an offence of direct

¹ Article 11 of the Declaration of the Rights of Man and of the Citizen: the free communication of thoughts and of opinions is one of the most precious rights of man.

incitement of commission of acts of terrorism or vindication thereof. Beyond the protection of the freedom of information, it should be noted that the question of access to certain contents of the network is a challenge of the same degree of difficulty to all European judges in criminal matters and particularly in the context of the fight against terrorism: how to distinguish between simple curiosity, which is to be protected, an intention to commit an offense and a preparatory act of this offense.

The focus of attention in the recent years has been mainly the access to the connection data by the police and intelligence authorities.

Already in 2006, and again in 2016, the Constitutional Council was able to clarify several particularly important points: to whom were the electronic communications operators subject to the obligation to give access, what was the information or documents to which the access had to be granted, explicitly excluding the content of correspondence, and prohibiting the intelligence services to have direct access to such data. The successive laws strengthening the means available for the war against terrorism have revived the fears of mass surveillance which has been made possible by the new technologies, and this, as we know, has happened not only in France. The judgments of the ECHR and the CJEU today appear to be in line with the principles laid down by the Constitutional Council, in particular insisting on a high level of protection for both substantive and procedural guarantees.

In this regard, I would like to point out the confusion that has arisen in France and elsewhere in the European Union from the CJEU ruling in the “Digital Rights” case which called into question the 2006 directive. The principal claim coming out of this judgment was perfectly clear in its wording and understandable; however by condemning the interference in the fundamental rights which is the indirect but necessary consequence of the general obligation of keeping traffic data, the Court of Justice could have misled to the thinking that not only the generalized and undifferentiated preservation of data was prohibited, but also that access by public authorities to data could be refused or very strictly limited, regardless of the reason why there is a need to access the information. The *Télé2 Sverige* judgment was reassuring in this regard, since it was specified there what is strictly necessary to authorise the interference invoked in the case. On the one hand, it was pointed out that fight against serious crime may justify the interference, on the other hand, that a certain number of guarantees are necessary, notably a system of prior control of access to these data. It is possible to find a consensus on these points. However, some uncertainties still subsist. The judgment took the Charter of Fundamental Rights of the European Union as a reference. While its compatibility with the requirements of the European Convention on Human Rights is a postulate of principle, the practical application

by the competent courts applying the national law is still under a risk of divergent application. This is a concrete example of the effects of the entanglement of national and Community rules and consequently the position of the courts.

However, the digital world has been most important to the Constitutional Council beyond the scope of this subject, concerning the official recognition of multiple forms of the necessary respect for private life. Both social and technological developments have extended the scope of this right that is protected in the case-law of the Constitutional Council in France by Article 2 of the Declaration of the Rights of Man and the Citizen of 1789². Unlike the right to respect for private life guaranteed by the European Convention on Human Rights, Article 2 of the Declaration of 1789 is distinct from the right to a normal family life or the right to a healthy environment. However, as the European Court of Human Rights acknowledges and as the Charter of Fundamental Rights provides, it includes the right to respect for one's home and communications.

This protection has been developed first of all in line with the case-law of the ECtHR. First of all it was by raising the level of guarantees for the creation or interconnection of police and justice files. I am referring here to the genetic sample database and to the reported offence processing system. Returning to 2010, to a previous decision on this subject, the Constitutional Council has held that each person has the right to rectify errors or to remove records concerning them. Are we not here already entering into the question of the right to be forgotten or the right to be delisted?

Here, too, the power of the digital world gives rise to fears and calls for increased vigilance, including certain tools and data processing techniques. By going a long way in the analysis of digital tools that the state wanted to put in place to fight against the identity theft, despite the obvious interest of the files concerned, the Constitutional Council has obtained a revision of the modalities of access to these files: the complexity of the technical tools ran the risk of misuse and invasion of privacy. It is by thoroughly analysing the digital tools which were in the plans of the Government that the Constitutional Council obtained a revision of the modalities of access to these files: the complexity of the technical tools ran risks of misuse and violation of privacy.

The right to respect for private life now covers almost every field of personal data protection. First it seemed necessary to defend oneself against the state; however, it is no longer only the public authorities that are the ones concerned.

² Article 2: The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.

The criteria for refusing an otherwise legitimate data processing were stated in a 2014 decision: large amount of personal information, lack of information on the sharing or disposal of such data, lack of verification of the mentions of the persons and absence of limits likely to be assigned to the conservation of certain mentions. This is a summary of legal problems concerning social networks.

Two additional examples can be given of new issues involving the fundamental rights to which citizens and public authorities are each in their way exposed by the digital world.

The first example is that of the use of very sophisticated means of encrypted messages, accessible to a very large number of users. We have not forgotten a recent controversy in the US on a similar subject for its societal importance. In a recent case before the Constitutional Council, the defence of privacy was invoked as a reason for not communicating the encryption keys during a criminal investigation, the second argument being the right not to incriminate oneself. The Council did not follow the reasoning of the applicants. I do not believe that the ECtHR has already decided on this subject, and the case-law of the other European courts does not allow us to conclude on a principle commonly implemented. And yet the fight against cybercrime of any kind must now deal with this type of technique of which the "darkweb" is so fond.

The second example is that of the proliferation of the use of sophisticated algorithms, also called the artificial intelligence. On the one hand, it implies the massive use of a very large volume of personal data, whose collection conditions are not always clear. On the other hand, algorithms in no way guarantee the transparency of collective and individual decision-making processes and in particular that of public choices. Knowing who is responsible is already one concrete question that will be hard to answer. But the difficulties do not stop here; it is the protection of fundamental rights which becomes problematic here: it is enough only to think about the implementation of the principle of equality.

The main feature of the digital world, however, is that it does not know borders and traditional limits of national jurisdictions. The effectiveness of traditional ways of protecting rights is certainly called into question. Here I will not speak only about the power of the "GAFA" tools. For example, we know that states are only partners among others in the internet governance. Beyond that, the hierarchical and pyramidal conception of the power of the state is undermined by the modes of regulation of the digital world. The block chains and other data flow systems follow processes that are totally outside the structure of a network that we have tried to control with no success. Will there be new legal rules invented, including "constitutional" rules?

We therefore need a real collaboration from all levels of jurisdictions, national or European, to solve these many questions.

First questions are of a legal nature. What are the principles that allow collaboration now and in the future that I will call righteous collaboration, in the face of an inevitable and above all very rapid digital development that is uncertain in its manifestations?

First observation: the basis of the competence of the European Union that could have been called into question about the 1995 directive is no longer an issue. The logic of the EU intervention, supported today by the existence of the Charter of Fundamental Rights, has, if not closed the debate, then at least has made it less important. The judgment in the *Google Spain* case has thus allowed the emergence of the demand for the right to be delisted on social networks. Negotiations with Facebook are another proof of how useful are the different levels of handling of digital world issues. It was nonetheless criticised as “one of the most extensive examples of censorship ever seen on the Internet” by the founder of Wikipedia.

Specifically, it is true that the intervention by the European Union may raise many questions, albeit the usefulness, or even the necessity, of its intervention in this digital world without borders is difficult to dispute. The legal discussions on the direct and indirect effects of the Charter of Fundamental Rights and secondary legislation are certainly not closed. As far as secondary legislation is concerned, in a monist country like France the legal instruments do not fit together in a way that makes it possible to draw a clear framework. Regulations are directly applicable but nowadays they are accompanied by one or more directives which must be transposed. In addition, regulations today therefore call for national implementing legislation. How to ensure the constitutionality of instruments necessarily combined but subject to different controls? We have, in France, already encountered this problem with the Dublin II regulation. We see it today with the General Data Protection Regulation.

This regulation thus highlights a particular legal question: how to ensure the effectiveness of the integration of the common rules on data processing into national legislation? It is now up to the actors themselves, mainly companies, to be responsible for protecting the data they transmit and use. Administrative authorization is no longer the start and the finish of data processing, private or public. It is therefore necessary that post factum reviews by courts should be effective, so that jurisdictions “go in the same direction” in order to avoid leaks. On the one hand, experience shows that the logic of self-certification raises difficulties in itself. On the other hand, in any case, protection remains ultimately a responsibility on the national level.

Some other specific challenging questions for the courts may be added here, such as who is going to be the other party in a dispute over data processing in a given country? Normally, the other party would be located at the place of establishment of the data processing controller. However in case of multiple places of establishment, or in the absence of recognition of such a place, a principal place of establishment must be designated. It will be the place from which the case will be decided in its entirety. How to ensure the coordination? How to avoid, in the end, the forum shopping of service providers that is well known in tax matters?

Another example of difficulties that judges will face is the identification of the source of any violation found. Even if the IP address frequently allows to identify the nationality of the source, it is not 100% sure. In addition, it is necessary to define the criteria which will allow one or another jurisdiction to intervene. The criterion of accessibility of information multiplies the competent jurisdictions. It is true that the idea according to which a given site should be “directed” towards a given country to give it the jurisdiction has long prevailed, but perhaps this solution should be revised? And I’m not going to mention here the resolution of contractual disputes related to the digital world.

To continue shortly on the subject of personal data protection alone, it seems to me that there are two issues of principle, of a rather different kind which are caused by the expansion of the digital technology.

The first is the manner in which a dispute can be settled that puts the judge in conflict with either a norm external to his legal order or any instrument that falls outside his territorial jurisdiction, but has effects on fundamental rights.

As far as the legal rules are concerned, one first solution is the already taken approach of the equivalence of protections. However, this concept is not very simple. For example, the case-law of the ECtHR, the CJEU and in France the Council of State show that the assessment can be made only on the applicable right in the given case or on the whole set of guarantees presented by the system of protection. Besides, the concept must be applicable to a situation of free international movement. Does it not remind the question of “Safe Harbour”?

It is not absolutely necessary to introduce in constitutions a right to protection of personal data, such as it already exists in Article 8 of the Charter of Fundamental Rights. National or international jurisdictions are fully capable of giving substance to this protection provided that their legitimacy and the effectiveness of their decisions are not contested. Convention no. 108 of the Council of Europe may be old, but it is not anachronistic.

The second question of principle concerns the definition of the right which is attached to the data. The big data is a challenge in itself; it is an economic, societal and a political challenge, and consequently undoubtedly a legal one

as well. The question of the “value” of data is at the centre of the debate in which the interests at stake are perfectly contradictory. In a conception that seems widely accepted today, data is not a property that gives rise to a right of ownership. Ownership is fraught with danger (we see it in bioethics), and besides, data is something that, taken in isolation, has no value. Yet it assumes a special qualification so that it can be protected. The notion of informational self-determination is very seductive and probably very powerful, but it is not yet sufficiently developed, especially in a universe in which the person concerned is not aware of all the risks!

What to remember from all these considerations? A banality: the rapid evolution of the digital world leads to asking more questions than solving them. The current trends are worrisome: the national state is no longer necessarily at the centre of the game. The concept of digital sovereignty does not yet have a precisely identified content. However, we can hope that through a shared understanding of the issues and risks, each staying at home but sharing the objectives, the courts will be able to put in place robust solutions to ensure the protection of everyone’s fundamental rights.



Claire Bazy-Malaurie
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Le monde du numérique : quelles relations entre les juridictions?

Le débat public actuel sur les réseaux sociaux et l’utilisation des données personnelles qu’ils véhiculent m’ont donné une piste pour proposer une lecture pragmatique de ce que l’on a appelé en France le « dialogue des juges », formule qui résume bien, je pense, le thème que notre hôte a souhaité proposer pour ces journées de rencontre.

Pourquoi avoir choisi le monde numérique? Parce que le numérique est un formidable allié de la liberté des individus et des entreprises, mais qu’il est aussi le vecteur de menaces significatives sur le droit à la vie privée et la sécurité et que sa puissance même est lourde de défis pour les acteurs traditionnels de la défense des droits fondamentaux. Pour le juge constitutionnel, il convient d’accepter d’entrer dans la logique des bénéfices rendus par le numérique, mais de ne pas céder à l’aveuglement devant les risques soulevés par la puissance des outils.

Dans un premier temps, il est possible de noter que le numérique a été à l’origine de formes d’expression nouvelles des droits et libertés reconnues au niveau constitutionnel. Il a contribué à enrichir le dialogue des juges, tous confrontés aux mêmes évolutions.

Dans un second temps, il nous faut reconnaître qu’Internet contribue à la dilution des frontières. Je vais essayer de montrer quelques enjeux et défis aux quels nous sommes déjà confrontés et qui appellent des solutions nouvelles et un dialogue encore renforcé entre juridictions. Je vais alors sûrement poser plus de questions qu’apporter de réponses.

En France, ce « dialogue » est d’autant plus compliqué qu’il est mené à plusieurs niveaux : le juge constitutionnel est juge de la seule constitutionnalité

des lois, les juges administratifs ou judiciaires sont chargés d'assurer la conformité avec les traités et conventions, et, devant juger les cas d'espèce, ils sont donc directement concernés par les relations avec la Cour européenne des droits de l'homme (CrEDH) et la Cour de justice de l'union européenne (CJUE).

Je présenterai ici quelques points à retenir du point de vue du Conseil constitutionnel.

Le premier terrain sur lequel le numérique a entraîné des évolutions est celui de la liberté d'expression et de communication¹.

L'accès à Internet est devenu un enjeu de liberté fondamentale. De fait, son importance dans la vie sociale, économique et démocratique a motivé les encouragements à la montée en puissance des réseaux et la présence croissante des services publics sur Internet. Elle a contribué à fonder une sorte de « droit » d'accès à Internet. Le Conseil n'a pas énoncé un tel droit, mais a jugé, en négatif, que seule une juridiction est habilitée à prendre des mesures d'interruption d'accès à Internet au terme de l'examen de proportionnalité habituel en matière de droits fondamentaux. Cette reconnaissance implicite a été contemporaine de l'affirmation par l'Union européenne, au travers de ce qu'on appelé le troisième paquet Télécom, du caractère de droit fondamental de l'accès à internet.

A ma connaissance, il n'y a pas de jurisprudence topique à ce sujet à la CrEDH mais en revanche, sur les usages d'Internet, les exemples de décisions allant dans la même direction sont nombreux.

Ainsi, c'est parce que le réseau est vecteur de la liberté d'expression que l'accès à certains sites ne peut pas être en soi un objet d'incrimination, mais en revanche, il peut être limité. Car Internet est aussi un vecteur d'empiètement sur d'autres droits, par exemple le droit d'auteur, ou un vecteur d'idées dangereuses ou fausses contre lesquelles tous les Etats sont appelés à se prémunir. Par exemple, est permis par le Conseil le blocage par l'autorité administrative d'adresses donnant accès à certains sites diffusant des images pornographiques représentant des mineurs. En l'occurrence, le Conseil constitutionnel a posé trois critères qui lui ont permis de l'autoriser. Parmi ceux-ci : la protection des internautes eux-mêmes et la lutte contre l'exploitation sexuelle des mineurs, reconnus de même comme critères du « but légitime » par la CrEDH, permettant une limitation de l'utilisation du réseau.

En revanche, au nom de la liberté d'information et de communication, le Conseil constitutionnel n'a pas admis que la seule consultation de services de communication au public en ligne mettant à disposition des messages, images ou représentations soit provoquant directement à la commission d'actes

¹ Article 11 de la Déclaration des droits de l'homme et du citoyen : la libre communication des pensées et des opinions est un des droits les plus précieux de l'homme

de terrorisme, soit faisant l'apologie de ces actes. Au-delà de la protection de la liberté d'information, il faut noter que la question de l'accès à certains contenus du réseau confronte tous les juges européens à la même difficulté en matière pénale, et particulièrement en matière de lutte contre le terrorisme : faire le départ entre une curiosité, qui doit bénéficier d'une protection, une intention de commettre une infraction et un acte préparatoire à cette infraction.

C'est sur l'accès aux données de connexion par les autorités de police et de renseignement que s'est focalisée l'attention ces dernières années.

Déjà en 2006, de nouveau en 2016, le Conseil a pu préciser plusieurs points particulièrement importants : qui étaient les opérateurs de communications électroniques soumis à l'obligation de donner accès, ce qu'étaient les informations ou documents auxquels il peut être accédé, en excluant explicitement le contenu des correspondances, et l'interdiction faite aux services de renseignement d'accéder directement à ces données. Les lois successives renforçant les moyens de la lutte contre le terrorisme ont ressuscité les craintes de la surveillance de masse que permettent les nouvelles technologies, et ceci, comme on le sait, pas seulement en France. Les arrêts de la CrEDH et de la CJUE paraissent aujourd'hui s'accorder avec les principes dégagés par le Conseil en insistant notamment sur un niveau élevé de garanties à la fois de fond et de procédure.

A ce propos, je tiens à remarquer le trouble qu'a fait naître, en France comme ailleurs dans l'Union Européenne, l'arrêt de la CJUE « Digital Rights » qui a remis en cause la directive de 2006. La pétition de principe de l'arrêt était parfaitement claire dans son énoncé et compréhensible : mais en dénonçant l'ingérence dans les droits fondamentaux que comporte l'obligation générale de conservation des données relatives au trafic, il a pu faire croire que non seulement cette conservation généralisée et indifférenciée des données n'était pas possible, mais aussi que l'accès des autorités publiques aux données pouvait être refusé ou très strictement limité, quelle qu'en soit la raison. L'arrêt Télé2 Sverige a permis de rassurer en précisant ce qu'est le strict nécessaire permettant l'ingérence alors invoqué. Il a précisé d'une part, que la lutte contre la criminalité grave est susceptible de la justifier, d'autre part, qu'un certain nombre de garanties sont nécessaires, notamment un dispositif de contrôle préalable de l'accès à ces données. Sur ces points, il est possible de trouver un consensus. Cependant, toutes les incertitudes ne sont pas encore levées. L'arrêt a en effet retenu comme référence la Charte des droits fondamentaux de l'Union européenne. Si sa compatibilité avec les exigences de la Convention européenne des droits de l'homme est un postulat de principe, l'application pratique par les juridictions compétentes des lois nationales recèle encore des risques de divergences. La question sur les effets de l'intrication des règles nationales et communautaires et la position des juridictions en conséquence trouve là une expression très concrète.

C'est cependant, au-delà de ce thème, sur la reconnaissance officielle de multiples formes du nécessaire respect de la vie privée que le numérique a eu le plus d'importance au Conseil constitutionnel. Tant les évolutions sociales que technologiques ont en effet conduit à un enrichissement de ce droit, protégé dans la jurisprudence du Conseil constitutionnel en France par l'article 2 de la Déclaration des droits de l'homme et du citoyen de 1789². A la différence du droit de la Convention européenne des droits de l'homme, il est distinct du droit à une vie familiale normale ou du droit à un environnement sain. Il intègre cependant, comme la Cour européenne des droits de l'homme le reconnaît et comme la Charte des droits fondamentaux le prévoit, le droit au respect du domicile et de ses communications.

C'est d'abord en résonance avec la jurisprudence de la CrEDH que s'est développée cette protection. L'élévation du niveau des garanties en matière de construction ou d'interconnexion des fichiers de police et de justice en a été le premier bénéficiaire. Je pense au fichier des empreintes génétiques et au système de traitement des infractions constatées. En revenant en 2010 sur une précédente décision à ce sujet, le Conseil a rappelé que chaque personne bénéficie d'un droit de rectification des erreurs ou de retrait de fiches les concernant. Ne sommes-nous pas ici déjà un pied dans la question du droit à l'oubli ou au déréférencement ?

Là aussi, la puissance du numérique fait naître des craintes et elle appelle une vigilance particulière, y compris sur certains outils et certaines techniques de traitement. C'est en allant loin dans l'analyse des outils numériques que l'Etat souhaitait mettre en place pour lutter contre les usurpations d'identité, malgré l'intérêt évident des fichiers concernés, que le Conseil constitutionnel a obtenu une révision des modalités d'accès à ces fichiers : la complexité des outils techniques faisait courir des risques d'utilisation détournée et d'atteinte à la vie privée.

Le droit au respect de la vie privée couvre désormais presque tous les champs de la protection des données personnelles. Si c'est d'abord vis-à-vis de l'Etat qu'il a paru nécessaire de se prémunir, ce ne sont plus les seules autorités publiques qui sont concernées. Les critères de refus d'un traitement de données par ailleurs légitime, ont été énoncés dans une décision de 2014 : grand nombre d'informations nominatives, absence d'informations sur le partage ou la cession de ces données, absence de vérification des mentions des personnes et absence de limites susceptibles d'être assignées à la conservation de certaines mentions. La problématique des réseaux sociaux est posée.

² Article 2 : Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression

Deux exemples supplémentaires peuvent être donnés des questions nouvelles impliquant les droits fondamentaux auxquelles citoyens et autorités publiques sont chacun dans leur genre exposés par le numérique.

Le premier exemple est celui de l'utilisation de moyens très sophistiqués de cryptologie, accessibles à un très grand nombre d'utilisateurs. On se souvient de la polémique récente aux EU sur un sujet similaire dans ses enjeux. Dans une instance récente devant le Conseil constitutionnel, la défense de la vie privée a été avancée comme un motif pour ne pas communiquer les clés de cryptage lors d'une enquête pénale, le second argument étant le droit de ne pas s'auto-accuser. Le Conseil n'a pas suivi le raisonnement des requérants. Je ne crois pas que la CrEDH ait déjà abordé ce sujet, et la jurisprudence des autres juridictions européennes ne permet pas de conclure à un principe communément mis en œuvre. Or la lutte contre la cybercriminalité de quelque nature qu'elle soit doit désormais composer avec ce type de technique dont le « darkweb » est friand.

Le deuxième exemple est celui de la multiplication de l'usage d'algorithmes sophistiqués, de ce que l'on a appelé l'intelligence artificielle. Or, d'une part, celle-ci suppose l'utilisation massive d'un très grand nombre de données personnelles, dont les conditions de recueil ne sont pas toujours claires. D'autre part, les algorithmes n'assurent aucunement la transparence des processus de décision collectives et individuelles et en particulier celle des choix publics. Savoir qui est responsable est déjà une question concrète à laquelle il sera difficile de répondre. Mais c'est au-delà, la protection des droits fondamentaux qui en devient elle aussi bien difficile : que l'on songe seulement à la mise en œuvre du principe d'égalité.

La principale caractéristique du monde numérique est cependant qu'il ne connaît pas les frontières et les limites traditionnelles des juridictions nationales. L'effectivité des modes traditionnels de protection des droits est très certainement remise en cause. Je ne parlerai pas ici seulement de la puissance des outils des « GAFA ». On sait par exemple que les Etats ne sont que des partenaires parmi d'autres de la gouvernance d'internet. Au-delà encore, la conception hiérarchique et pyramidale du pouvoir de l'Etat est mis à mal par les modes de régulation du monde numérique. Les bloc-chains et autres systèmes de circulation des données suivent des processus qui échappent totalement à la structure d'un réseau que l'on a pourtant cherché à maîtriser. Le droit pourra-t-il inventer de nouvelles règles, y compris des règles de type « constitutionnel ».

Nous avons donc besoin d'une véritable collaboration de tous les niveaux de juridictions, nationales ou européennes, pour résoudre de très nombreuses questions.

Les premières sont juridiques. Quels sont les principes qui permettent et permettront une collaboration que j'appellerai vertueuse devant un

développement inévitable et surtout très rapide du numérique, mais incertain dans ses manifestations?

Premier constat : le fondement de la compétence de l'Union européenne qui avait pu être mis en doute à propos de la directive de 1995 ne l'est plus. La logique de son intervention, soutenue aujourd'hui en outre par l'existence de la Charte des droits fondamentaux a sinon clos le débat, du moins l'a rendu moins prégnant. L'arrêt Google Spain a ainsi permis l'éclosion de la demande du droit au déréférencement sur les réseaux sociaux. Les négociations avec Facebook sont une preuve concrète supplémentaire de l'utilité des différents niveaux de traitement des questions liées au numérique. Il a pourtant alors été dénoncé comme « l'une des censures les plus étendues jamais vues sur Internet » par le fondateur de Wikipedia.

Concrètement, il est vrai que l'intervention de l'Union européenne peut soulever bien des questions même si l'utilité, voire la nécessité, de son intervention dans ce monde numérique qui ne connaît pas les frontières est difficilement contestable. Mais les discussions juridiques sur les effets directs ou non de la Charte des droits fondamentaux et du droit dérivé ne sont certainement pas closes. Pour ce qui concerne le droit dérivé, dans un pays moniste comme la France, les instruments juridiques ne s'emboîtent plus de la manière qui avait permis de dessiner un cadre clair. Le règlement est d'application directe mais il est aujourd'hui accompagné par une ou des directives qui doivent être transposées. En plus, le règlement appelle donc aujourd'hui des législations nationales d'application. Comment assurer le contrôle de constitutionnalité d'instruments nécessairement combinés mais objet de contrôles différents ? Nous avons, en France, déjà rencontré ce problème avec le règlement Dublin II. Nous le voyons aujourd'hui avec le RGPD (Règlement général sur la protection des données publiques).

Ce règlement met ainsi en lumière une question juridique particulière : comment s'assurer de l'effectivité de l'intégration des règles communes sur le traitement des données dans les législations nationales ? C'est désormais aux acteurs eux-mêmes, principalement les entreprises, d'être responsables de la protection des données qu'elles émettent et qu'elles utilisent. L'autorisation administrative n'est plus l'alpha et l'oméga des traitements, privés ou publics. Il faut alors que les contrôles a posteriori soient efficaces, donc que les juridictions « aillent dans le même sens » afin d'éviter les fuites. Or, d'une part, l'expérience montre que la logique d'auto-certification soulève en elle-même des difficultés. D'autre part, en tout état de cause, la protection reste in fine due par le niveau national.

Je peux ajouter d'autres points concrets, qui peuvent interpeller les juridictions : qui sera l'autre partie dans un contentieux sur un traitement de données dans un pays? Normalement, elle est située au lieu d'établissement du

responsable du traitement. Mais en cas de lieu d'établissement multiples, ou en l'absence de reconnaissance d'un tel lieu, il faut désigner un lieu d'établissement principal. Et celui-ci devra prendre en charge l'ensemble de la question. Comment assurer la coordination ? Comment in fine éviter le forum shopping des fournisseurs de services que l'on connaît bien en matière fiscale?

Une autre des illustrations de la difficulté à laquelle les juges vont être confrontés est l'identification de la source d'une infraction constatée, quelle qu'elle soit. Peut-être l'adresse IP permet-elle fréquemment de connaître la nationalité de la source, mais ce n'est pas sûr à 100%. En outre, il faut définir le critère qui permettra à telle ou telle juridiction d'intervenir. Le critère d'accessibilité de l'information multiplie les juridictions compétentes. Si l'idée selon laquelle le site devait être « dirigé » vers un pays donné pour lui donner compétence a longtemps prévalu, peut être cette solution a-t-elle vécu? Et je n'évoquerai pas ici la résolution des contentieux contractuels liés au numérique.

Pour poursuivre quelques minutes sur le seul sujet de la protection des données personnelles, il me semble qu'il y a deux questions de principe, d'ordre assez différent, qui sont suscitées par l'explosion du numérique.

La première est celle de la manière de trancher un litige mettant le juge aux prises avec soit une norme extérieure à son ordre juridique soit un instrument quelconque qui échappe à sa compétence territoriale, mais emporte des effets sur les droits fondamentaux.

S'agissant des normes, une première solution est la voie déjà empruntée de l'équivalence des protections. Pourtant ce concept n'est pas d'application très simple. Par exemple, les jurisprudences de la CrEDH, de la CJUE et en France du Conseil d'Etat montrent que l'appréciation peut se faire sur le seul droit en cause ou sur un ensemble de garanties présenté par le système de protection. En outre, le concept doit pouvoir être appliqué à la circulation internationale. N'est-ce pas la question du « Safe Harbour »?

L'introduction dans les Constitutions du droit à cette protection des données personnelles, au même titre qu'elle existe à l'article 8 de la Charte des droits fondamentaux n'est pas un préalable indispensable. Les juridictions nationales ou internationales sont tout à fait en capacité de donner corps à cette protection pourvu que leur légitimité et l'effectivité de leurs décisions ne soit pas contestée. La convention 108 du Conseil de l'Europe peut être ancienne, elle n'en est pas anachronique.

La deuxième question de principe porte sur la définition du droit qui est attaché à la donnée. Le big data est un défi en soi, économique, sociétal et politique, donc, bien sûr, juridique. La question de la « valeur » des données est au centre d'un débat dans lequel les intérêts en jeu sont parfaitement contradictoires. Dans une conception qui paraît aujourd'hui largement acceptée,

la donnée n'est pas un bien, susceptible de donner lieu à un droit de propriété. La patrimonialité est grosse de danger (on le voit en matière de bioéthique), et d'ailleurs, la donnée est une chose qui, marginalement, n'a aucune valeur. Pourtant, elle suppose une qualification particulière afin qu'elle puisse être protégée. La notion d'auto-détermination informationnelle est très séduisante et probablement très puissante, mais elle n'est pas encore suffisamment développée, surtout dans un univers dans lequel la personne concernée n'est pas consciente des enjeux!

Que retenir de toutes ces considérations? Une banalité : l'évolution rapide du monde numérique conduit à poser plus de questions qu'à en résoudre. Le constat est inquiétant : l'Etat national n'est plus forcément au centre du jeu. Le concept de souveraineté numérique n'a pas encore de contenu précisément identifié. On peut cependant espérer que grâce à une lecture partagée des enjeux et des risques, chacun restant chez soi mais partageant les objectifs, les juridictions pourront mettre en place les solutions robustes permettant d'assurer à chacun la protection de ses droits fondamentaux.

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The influence of the Belgian constitutional court on the case-law of the European Court of Human Rights and the European Court of Justice

Introduction

1. The influence of one court on another is often treated in terms of “dialogue”. According to Habermas,¹ a genuine dialogue requires six preconditions:

- (I) the existence of different views or conflicting interests;
- (II) a common ground of understanding between the parties in dispute;
- (III) a total absence of authority in regard to each other (*«herrschaftsfreie Kommunikation»*);
- (IV) mutual recognition and respect;
- (V) an equal possibility to participate;
- (VI) a continuity of the dialogue.

This terminology has been applied also to the dialogue between the national and supranational courts in Europe, especially in the field of

¹ J. Habermas, *Theorie des kommunikativen Handelns*, Suhrkamp, 1981.

human rights.² The purpose here is to show, taking the Constitutional Court of Belgium as an example, that the principles mentioned above should apply in the relationships between the national constitutional courts and the two supranational courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR), however, these conditions are not always met.

1. The language of dialogue: the application of European law and the Convention by the Constitutional Court of Belgium

2. A genuine dialogue between a national and a supranational court according to Habermas requires a «common ground of understanding», or, in other words, the use of a common language that would allow for both of the participants of a discussion to understand each other. This is not a problem since the constitutional courts as well as the CJEU and the ECHR operate in the European legal culture and all of them are concerned with the protection of the fundamental rights.³ Regarding the Constitutional Court of Belgium the aspect of the common language is even more apparent since this court regularly applies the supranational norms as well as the case-law of the CJEU and the ECHR.

3. However, this view on the international and supranational law should not be taken for granted since Article 152 of the Constitution and the Special Law on the Constitutional Court of 6 January 1989 allows the Court to exercise a direct review of the legal norms only with relation to the norms on the repartition of the competencies and the fundamental rights guaranteed by Section II and Articles 170, 172 and 191 of the Constitution. Therefore, the Court has no competence to review the compatibility of legislative acts with European and international law. On the contrary, the authors of the Constitution had the wish to maintain the diffuse review of the compatibility of laws with the Convention which the *Cour de cassation* of Belgium has limited to general courts, tribunals and administrative courts.⁴ A direct review of the compatibility

² A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford, OUP, 2009, 118-130.

³ A. Torres Pérez, *o.c.*, 121-123.

⁴ Cass. 27 May 1971, *Fromagerie Franco-Suisse Le Ski*, *J.T.* 1971, 460, concl. W.J. Ganshof Van der Meersch. V. *Doc. parl.* Sénat, 1979-1980, n° 435/1, 11 et 39 et l'annexe, 5-7; *Doc. parl.* Sénat, 1988-1989, n° 483/2, 44 and 59; *Doc. parl.* Sénat, 2000-2001, n° 897/6, 14. See on this subject: P. Popelier, *Procederen voor het Grondwettelijk Hof*, Antwerp, Intersentia, 2008,

with the Convention by the Constitutional Court would require an amendment of the Constitution.⁵

Nevertheless, the Constitutional Court has developed two techniques for an *indirect* review of the compatibility of legislative acts with European and international law. The indirect control means that the Constitutional Court uses as a formal reference a norm in respect of which it is competent to exercise direct review; then further the Court interprets this norm of formal reference together with a norm of European or international law in respect of which it lacks competence to exercise direct control. It is through these two techniques that *de facto* review of compatibility with European and international law by the Constitutional Court becomes possible.⁶

1.1. The review through Articles 10 and 11 of the Constitution

4. In the *Biorim* judgment the Constitutional Court took the view that Articles 10 and 11 of the Constitution prohibit «any discrimination, regardless of its origin».⁷ Therefore, the Court may establish that there has been an infringement of the principle of equality and non-discrimination if the legislator has provided for an unjustified distinction when implementing its obligations that derive from other superior legal norms. These indirect norms of reference are the constitutional rules in respect of which the Court may not exercise

136; M.-F. Rigaux et B. Renauld, *La Cour constitutionnelle*, Bruxelles, Bruylant, 2008, 99; M. Verdussen, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, 123-125.

⁵ Such a revision was intended in 2003, however the proposed Article 32bis of the Constitution was not adopted (*Doc. Parl.* Sénat, 2000-2001, n° 2-575/1 et n° 2-897/1; *id.*, 2002-2003, n° 2-897/6; v. J. Theunis et A. Vandaele, «De (geplande) wijzigingen inzake de bevoegdheid en de werking van het Arbitragehof», in A. Alen (éd.), *De vijfde Staatshervorming van 2001*, Bruges, die Keure, 2002, 277-305).

⁶ A. Alen, J. Spreutels, E. Peremans et W. Verrijdt, «Cour constitutionnelle de Belgique», in R. Huppman et R. Schnabl (eds.), *La coopération entre les Cours constitutionnelles en Europe. Situation actuelle et perspectives*, Vienne, Verlag Österreich, 295-303.

⁷ C.C. [the Constitutional Court of Belgium] n° 23/89, 13 October 1989. Since 1993 this technique has been employed with the following wording: «Articles 10 and 11 of the Constitution are of general application. They prohibit any form of discrimination, regardless of its origin: the constitutional provisions on equality and non-discrimination are applicable with regard to all the rights and liberties that are guaranteed to the Belgians, including the rights deriving from international conventions binding upon Belgium [...]» (C.C. n° 62/93, 15 July 1993).

a direct review⁸, the general non-written principles of law⁹ and European and international law.¹⁰

When the Court exercises a review according to Articles 10 and 11 of the Constitution, read in conjunction with human rights treaties, it includes in this review the criteria that may be used to restrict the rights and freedoms enshrined in those conventions.¹¹

5. In its subsequent jurisprudence the Constitutional Court has shown that international treaties or the law of the European Union may serve as indirect norms of reference even when these norms lack direct effect in the internal legal order: it is enough if they are binding upon Belgium.¹²

Similarly, it is not required that these treaties or norms of the European Union law should confer rights or freedoms. The Court often exercises an indirect control, taking into account the international or supranational obligations which do not concern fundamental rights, such as directives of the European Union.¹³ Indeed, Articles 10 and 11 of the Constitution prohibit any kind of discrimination, not only discrimination that affects fundamental rights.

The parties involved, however, must prove that the alleged breach of European or international law creates a distinction between categories of persons. Otherwise the Court would no longer exercise its indirect control through Articles 10 and 11 of the Constitution.¹⁴ In practice, nevertheless, the Constitutional Court has shown great flexibility and almost always it has admitted a link with principle of equality and non-discrimination. As to fundamental rights or other fundamental guarantees the link with Articles 10 and 11 is to be constructed by showing that there has been created a differential treatment by excluding a category of persons from the benefit

⁸ See as example, after the *Biorim judgment*, C.C., n° 14/97, 18 March 1997; C.C. n° 81/95, 14 December 1995; C.C. n° 34/96, 15 May 1996; C.C. n° 17/97, 25 March 1997; C.C. n° 122/98, 3 December 1998, etc.

⁹ C.C. n° 72/92, 18 November 1992 (the rights of defence); C.C. n° 49/96, 12 July 1996 (the principle of legal certainty); C.C. n° 46/2000, 3 May 2000 (attorney-client privilege); C.C. n° 43/2001, 29 March 2001 (the individual nature of punishment); C.C. n° 107/2004, 16 June 2004 (the respect of legitimate expectations); C.C. n° 154/2004, 22 September 2004 (access to a court); C.C. n° 138/2006, 14 September 2006 (court's review of administrative sanctions); C.C. n° 81/2007, 7 June 2007 (the proportionality of the sentence), etc.

¹⁰ C.C. n° 18/90, 23 May 1990; C.C. n° 57/93, 8 July 1993; C.C. n° 62/93, 15 July 1993; C.C. n° 122/98, 3 December 1998; C.C. n° 105/2000, 25 October 2000, etc.

¹¹ C.C. n° 45/96, 12 July 1996; C.C. n° 124/2000, 29 November 2000, etc.

¹² C.C. n° 106/2003, 22 July 2003; C.C. n° 92/2004, 19 July 2004; C.C. n° 189/2004, 24 November 2004.

¹³ C.C. n° 105/2000, 25 October 2000.

¹⁴ C.C. n° 136/2000, 21 December 2000; P. Popelier, *op. cit.*, 140.

of a guarantee when such a guarantee is applied to all other persons.¹⁵ In respect of European law the Court has already decided that a provision of law contrary to the free movement of goods and services is, *ipso facto*, contrary to the principle of equality and non-discrimination since that measure negatively affects the manufacturers or service providers originating from other member states concerning the access to the Belgium market.¹⁶ Even if European directives provide only for formal prescriptions, the Court combines them with the principle of equality and non-discrimination.¹⁷

6. It follows from the above that, even though Articles 10 and 11 of the Constitution are the “official” norms of reference, often the indirect norms of reference are the ones that are the most pertinent norms of reference. Indeed these indirect norms of reference confer a normative content to the principle of equality and non-discrimination that *per se* is nothing more than an empty shell.¹⁸ Therefore, a frequent consequence of the review that takes into account the European and international law by means of Articles 10 and 11 of the Constitution is that its solution on the merits is identical to the solution that would follow from a direct review. Thus, these constitutional norms are only a necessary bypass that makes the advocates’ task more difficult and lengthens the motive part of the judgments but they seem to make almost no difference as to the contents of the decisions.¹⁹

1.2. The review by means of “analogous” fundamental rights

7. The objective of the extension of the competences of the Constitutional Court in 2003 concerning the review relating to respect of fundamental rights guaranteed by the Constitution was to address the difficulties that

¹⁵ C.C. n° 29/2010, 18 March 2010; A. Alen and K. Muylle, *Handboek van het Belgisch Staatsrecht*, Mechelen, Kluwer, 2011, 500-501.

¹⁶ C.C. n° 149/2010, 22 December 2010.

¹⁷ C.C. no 7/95 and 8/95, 2 February 1995; C.C. n° 94/2003, 2 July 2003; C.C. n° 149/2010, 22 December 2010.

¹⁸ P. Martens, «L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur la Cour constitutionnelle», *CDPK* 2010, 351.

¹⁹ R. Ergec, «La Cour constitutionnelle belge et le droit européen», in A. De Walsche et L. Levy (eds.), *Mélanges en hommage à Georges Vandersanden. Promenades au sein du droit européen*, Bruxelles, Bruylant, 2008, 172; P. Martens et B. Renauld, «L'interprétation et la qualification de la norme de contrôle et de la norme contrôlée», in A. Arts e. a. (eds.), *Les rapports entre la Cour d'arbitrage, le Pouvoir judiciaire et le Conseil d'Etat*, Bruges, La Charte, 2006, 45; P. Vanden Heede et G. Goedertier, «De doorwerking van het internationaal recht in de rechtspraak van het Arbitragehof», in J. Wouters et D. Van Eeckhoutte (eds.), *Doorwerking van internationaal recht in de Belgische rechtsorde*, Anvers, Intersentia, 2006, 243; M. Verdussen, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, 129.

were arising from the previously described bypass *through* Articles 10 and 11 of the Constitution.²⁰ This is why the Special Law of 9 March 2003 made it possible to exercise a direct review concerning the fundamental rights guaranteed by Title II and Articles 170, 172 and 191 of the Constitution. In its judgment n° 136/2004 the Court established that numerous fundamental rights provided in the Constitution have an equivalent norm in one or several international treaties. In such cases the “*analogous*” constitutional and conventional provisions form “*an indivisible whole*”.²¹ Consequently, when the Court exercises review on the basis of a fundamental right provided under Title II of the Constitution, the Court must “*take into account*”²² norms of international law which guarantee analogous rights or freedoms.²³ It may be a complete or partial analogy.²⁴ When the Constitution does not guarantee a fundamental right that is analogous to a fundamental right protected by a provision of a treaty that is binding upon Belgium, the bypass through Articles 10 and 11 still remains necessary.²⁵

8. The main advantage of a review on the basis of an analogous fundamental right is that the Constitutional Court may apply the case-law of the European Court of Human Rights, and it does so extensively. In this way the Constitutional Court is able to confer an evolving interpretation to the Belgian constitutional provisions, most of which have not changed since 1831, thus making them match the contemporary interpretation of the ECHR, the International Covenant on Civil and Political Rights and the Charter of Fundamental Rights of the European Union. The primacy of the principle of the most extensive legal protection possible is consequently respected and

²⁰ *Doc.parl.* Sénat, 2000-2001, n° 2-897/1, 2. V. J. Theunis, «De toetsing door het Arbitragehof aan de grondrechten», in A. Alen et P. Lemmens (eds.), *Themis-Cahier Staatsrecht*, Bruges, die Keure, 2006, 29.

²¹ V. G. Rosoux, *Vers une dématérialisation des droits fondamentaux?*, Bruxelles, Bruylant, 2015, 135-183.

²² The wording is cautious: the Court does not say that it “applies” the analogous conventional norm, it merely “takes it into account” (P. Martens, *o.c.*, 351).

²³ C.C. n° 136/2004, 22 July 2004; see subsequently, in particular C.C. n° 162/2004, 20 October 2004; C.C. n° 189/2005, 14 December 2005; C.C. n° 71/2006, 10 May 2006; C.C. n° 2/2008, 17 January 2008; C.C. n° 195/2009, 3 December 2009; C.C. n° 29/2010, 18 March 2010; C.C. n° 23/2011, 10 February 2011, etc.

²⁴ Some other examples of partial analogy are: Article 16 of the Convention and Article 1 of Protocol No. 1 of the Convention on Human Rights; Article 13 of the Constitution and Article 6 of the Convention; Articles 12 and 14 of the Constitution and Article 7 of the ECHR and Article 15 of the International Covenant on Civil and Political Rights.

²⁵ A. Alen et K. Muylle, *o.c.*, 524. For example, see the judgment on systematic body search of inmates: C.C. n° 20/2014, 29 January 2014 (Article 3 of the ECHR).

allows to escape from the conflict between the constitutional jurisprudence and the supranational jurisprudence.²⁶

One more advantage of the aforementioned review technique is that it allows to maximise the legal protection²⁷. When a fundamental right guaranteed in the Constitution and its conventional equivalent are concerned, the Constitutional Court requires, regarding restrictions, that there should be satisfied simultaneously, on the one hand, the formal restrictive conditions laid down in the Constitution and, on the other hand, the material restrictive conditions provided in the treaty concerned, especially in the ECHR. As a consequence, an analogous fundamental right may only be restricted when the restriction satisfies four conditions: (1) the restriction is laid down – as far as it is required by the Constitution – in a legal provision which, in addition, must be sufficiently precise and accessible; (2) it corresponds to a pressing social need (3) it pursues a legitimate aim; (4) the effects of the restriction are proportionate to this aim.²⁸

1.3. Benefits from the Constitutional Court’s approach

9. The approach followed by the Constitutional Court has many advantages. First, concerning the dissemination of the European Union law and the ECHR in the Belgian legal order, the force of the *res judicata* pertaining to the Constitutional Court’s judgments confers a higher protection against the legislator. The consequence of an annulment having the effects of *ex tunc* and *erga omnes*, is that the annulled provision may no longer be applied. A judgment handed down after a question referred for a preliminary ruling has a greater *res judicata* authority between the parties: such a judgment is binding upon the court that referred the question for a preliminary ruling as well as upon all other courts that may have to render a judgment in the same case²⁹ and even all other courts that would be required to decide other cases having the same subject matter.³⁰

²⁶ A. Alen, K. Muylle et W. Verrijdt, “De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens”, in A. Alen et J. Theunis (éds.), *Leuvense Staatsrechtelijke Standpunten 3: De Europese dimensie in het Belgische staatsrecht*, Brugge, die Keure, 2012, 22 ; M. Verdussen, *o.c.*, 126.

²⁷ However see M. Verdussen, *o.c.*, 134-135, who fears that in the future the Convention and the case-law of the European Court of Human Rights will constitute a unique standard without applying the specific constitutional protection.

²⁸ C.C. n° 202/2004, 21 December 2004; A. Alen et K. Muylle, *o.c.*, 526; P. Vanden Heede et G. Goedertier, *o.c.*, 275-277.

²⁹ Article 28 of the Special Law of 6 January 1989 on the Constitutional Court.

³⁰ Article 26, § 2, paragraph 2, 2°, of the Special Law of 6 January 1989 on the Constitutional Court.

Next, the Constitutional Court's approach helps to avoid a situation that Belgium might be censured by the CJEU in the framework of an infringement procedure initiated by the Commission, should the Belgian legislation be contrary to European law, or condemnation by the ECHR, should the Belgian legislation cause violations of the Convention. Even though the indirect review did not originate from an intention to avoid such condemnations, this review technique that encompasses the implementation of the Luxembourg and Strasbourg case-law has already proven sufficient to prevent a number of condemnations. The Constitutional Court points by his own motion to principles deriving from the European Union law³¹ as well it refers questions for a preliminary ruling by its own motion.³² Likewise the Court applies the Strasbourg case-law even if the parties have not made a reference to it. These attitudes can be seen as attempts to avoid infringement procedures or findings of violations emanating from Strasbourg. Indeed it is preferable to acknowledge in the internal law a violation of European law or the ECHR norms compared to the international exposure caused by a European condemnation that may be accompanied by considerable fines.

The flexible relationship between Articles 10 and 11 of the Constitution and the European Union law according to several authors may be explained by the willingness to avoid negative consequences for the parties of the case of a Belgian origin *vis-à-vis* the nationals of other member states. Indeed, if Belgium is the only state that does not comply with the European law, it will be primarily the Belgian nationals that will suffer from the negative consequences.³³ The same reasoning applies to the ECHR: annulment of a Belgian law because of a violation of the Convention will mostly benefit Belgian nationals.

One more advantage lies in the fact that the applicants have realised that the Constitutional Court is a «European law court».³⁴ That is how *Centre européen du consommateur*, to which also belongs *Test-Achats*, and for whom,

³¹ See for example C.C. n° 97/2011, 31 May 2011. The applicants had challenged the approval in a legislative provision of a Royal Decree on the basis of Article 6 of the ECHR, however the Court indicated by its own motion that the legislative provision in question was contrary to the second electricity directive and that the Court of Justice had already condemned the Belgium for the same reason (CJEU 29 October 2009, *Commission v. Belgium*, C-474/08, para. 29).

³² See inter alia C.C. n° 149/2010, 22 December 2010; C.C. n° 18/2013, 21 January 2013. See also the judgment *Bressol*, *infra*, n° 27. In that case the Commission had initiated an infringement procedure which was later suspended since the French speaking Community had requested a five-year postponement in order to demonstrate the necessity of a decree.

³³ P. Vanden Heede et G. Goedertier, *o.c.*, 264-265.

³⁴ As example see C.C. n° 145/2013, 7 November 2013.

since it is an association, it is almost impossible to bring an action for annulment before the European Court of Justice, chose the Belgian Constitutional Court as an intermediary to refer a question on validity of a provision of a directive to the Court of Justice.³⁵ The procedural model in the Belgian Constitutional Court lends itself to such strategies – it combines the indirect review regarding the European Union law with a right to access the court that is more open to the interest groups³⁶ and with reinforced *res judicata* authority of the final judgments.

The last advantage is the most important mentioned in this article. The attitude of the Constitutional Court indeed makes easier the dialogue with the CJEU and the ECHR. The Court creates the “common ground for understanding”, as formulated by Habermas, by referring to norms of the European Union law as well as norms of the Convention, but also by referring to or even quoting Luxembourg and Strasbourg judgments.³⁷ Thus, the Constitutional Court makes sure that it speaks the language of the supranational courts. This attitude may also have the consequence that its judgments can influence these two supranational courts.

2. To influence the CJEU: the direct and indirect dialogue

10. Regarding the attempts to influence the CJEU, they may take the form of a direct or indirect dialogue. The direct dialogue is the formal preliminary

³⁵ See *infra*, n° 22.

³⁶ The Constitutional Court is very flexible when exercising the review on the standing to bring legal action for annulment, especially in the case of non-profit organizations defending a collective interest. See R. Ryckeboer, “De belangvereiste bij beroepen tot vernietiging bij het Arbitragehof inzonderheid wat betreft het collectief belang van verenigingen zonder winstoogmerk”, in A. Alen (éd.), *Twintig jaar Arbitragehof*, Malines, Kluwer, 2005, 153-160 (also published in *TBP* 2005, 361-370).

³⁷ The Constitutional Court has made a reference to the Convention in 49 judgments out of 201 in 2011, in 38 judgments out of 166 in 2012, in 35 judgments out of 183 in 2013 and in 55 judgments out of 191 in 2014. In the same period, the Court made reference to the European Union law in 18 judgments out of 201 in 2011, in 14 judgments out of 166 in 2012, in 18 judgments out of 183 in 2013 and in 17 judgments out of 191 in 2014. In these judgments the Court almost always applies the CJEU's jurisprudence: the Luxembourg judgments are mentioned in 16 judgments in 2011, in 5 judgments in 2012, in 26 judgments in 2013 and in 18 judgments in 2014. The figures of 2013 and 2014 show that the references to the Luxembourg case-law are not limited to the cases in which the European law provisions appear as the indirect norm of reference.

ruling procedure.³⁸ The indirect dialogue means all kinds of dialogues that exist apart from the preliminary ruling technique.

2.1. Preliminary questions referred by the Belgian Constitutional Court

11. The Belgian Constitutional Court is a “court [...] against whose decisions there is no judicial remedy under national law” within the meaning of article 267(3) of the TFEU. Therefore, it often has an obligation to refer preliminary questions to the CJEU, taking into account the CJEU cases *CILFIT*³⁹ and *Foto-Frost*⁴⁰. Indeed, as soon as the Constitutional Court decides to use the European Union law as the indirect norm of reference, it becomes evident that it must pose questions to the European Court of Justice now and again, whereas a constitutional court that applies a watertight separation between the review of constitutionality and compatibility with treaties does not have a frequent opportunity to ask for a preliminary ruling. In this way one of the preconditions for dialogue identified by Habermas, e.g. an equal possibility to participate, is attained without any doubts.

12. The Constitutional Court shows willingness to participate in this kind of dialogue. Until now the Constitutional Court has already referred preliminary questions in 29 cases, 104 distinct questions altogether. This amount of questions surpasses the total amount of preliminary questions referred by all other European constitutional courts taken together. It is also possible to observe that there has been an acceleration of dialogue with the Court of Justice, since 92 out of these 104 questions have been referred in the last decade.

The preliminary questions concern both interpretation of the EU law and the validity of secondary EU norms. The questions are referred either by the Court on its own motion or after one of the parties suggests it. Moreover, the preliminary questions are referred not only in cases where the EU law is applicable because of the obligation of transposition, but also when the EU law is applicable because free movement of persons, goods, services or capital has been restricted.

A large majority of the preliminary ruling dialogues with the CJEU result from actions of annulment: 21 out of 29 judgments where the question was

referred (encompassing 70 out of the 104 preliminary questions) were rendered after an action for annulment was initiated, 7 judgments (with 23 preliminary questions) in the procedure of Belgian internal preliminary ruling procedure and 1 (encompassing 11 preliminary questions) in a complex case where the action for annulment was addressed in a joint procedure with the Belgian internal preliminary ruling procedure. The reason why the Constitutional Court refers few preliminary questions to the CJEU in the cases where the Constitutional Court itself has received a preliminary referral from a national court, may probably be explained by the fact that the courts, tribunals and the administrative courts themselves have a full competence to examine the compatibility of the formal legislation with EU law and to pose questions to the CJEU in this respect.

2.2. Compliance with the obligation to refer a preliminary question

13. If the Constitutional Court refuses to refer a preliminary question that has been suggested by the parties in the case, it states the reasons for this refusal according to the criteria used in the jurisprudence derived from the cases *CILFIT* or *Foto-Frost*.⁴¹ Lack of motives in this regard could lead to a finding by the ECHR of a violation of the right of access to a court guaranteed by Article 6 of the Conventions, as it was already the case concerning the Italian Court of Cassation.⁴²

The ECHR has addressed the Constitutional Court's refusal to refer preliminary ruling to the CJEU once. In the case *Deurganckdok*, the Constitutional Court indeed had refused, in two judgments, to refer preliminary questions to the Court of Justice claiming that the raised interpretative questions had nothing to do with the directives invoked,⁴³ that these questions should have rather been addressed in a case before the Commission and that their purpose was to extend the subject matter of the case beyond the scope of the initial application.⁴⁴ Since this motivation was linked to the exception provided in the case *CILFIT* which addressed the issue of the lack of pertinence of a preliminary question, the ECHR found that there had not been a violation of Article 6 of the Convention.⁴⁵

³⁸ Concerning the preliminary ruling dialogue between the Belgian constitutional court and the CJEU, see A. Alen and W. Verrijdt, “Le dialogue préjudiciel de la Cour constitutionnelle belge avec la Cour de justice de l'Union européenne”, in D. Renders, M. Verdussen et P. D'Argent (eds.), *Les visages de l'Etat. Liber amicorum Yves Lejeune*, Bruxelles, Bruylant, 2017, 33-74.

³⁹ CJEU 6 October 1982, *CILFIT*, 283/81.

⁴⁰ CJEU 22 October 1987, *Foto-Frost*, 314/85.

⁴¹ See, however, this critical view on the motivation of refusals: E. Cloots, “Germs of pluralist judicial adjudication: Advocaten voor de Wereld and other references from the Belgian Constitutional Court”, *CMLR* 2010, 654-655.

⁴² ECHR 8 April 2014, *Dahabi v. Italy*, §§ 31-34.

⁴³ Directive 79/409/CEE (on the conservation of wild birds) and Directive 92/43/CEE (on the conservation of natural habitats and of wild fauna and flora).

⁴⁴ C.C. n° 94/2003, 2 July 2003; C.C. n° 151/2003, 26 November 2003.

⁴⁵ ECHR (decision), 10 April 2012, *Vergauwen e.a. v. Belgium*, §§ 87-92.

2.3. Delays due to the preliminary ruling dialogue

14. The preliminary ruling dialogue consists of three stages: judgment on referral of the question, judgment including the answer to that question and the final judgment. The sum of duration of each of these periods is the total length of the case. The sum of two latter periods is the delay caused by the preliminary ruling dialogue or the “loss of time” due to the fact that a preliminary question has been referred.

15. In the 29 judgments on referral of the question that have been rendered so far, the Constitutional Court has rendered its judgment, on average, within 13 months after a case has been initiated wither pursuant to an action for annulment or on the basis of a preliminary question. The normal time within which the Court should render its judgments is 12 months. The fact that this length of time has been exceeded in 16 out of 29 preliminary ruling dialogues shows that the cases are often complex or sensitive.

In 24 cases the CJEU has already given its judgment including the answer to the questions.⁴⁶ In these cases the duration of review by the CJEU was 20 months on the average, in the longest case it took 27 months to render a judgment.⁴⁷

The 26 final judgments were rendered on the average 6 months after the answering judgment was delivered. Even though the Constitutional Court always reopens the debates to let the parties express their opinion upon the impact of the judgment of the Court of Justice, the Constitutional Court does not wait until the reception of the CJEU’s judgment by post; it restarts the examination of the case immediately after CJEU’s judgment is delivered and available on its website.

As a result, in the 26 preliminary dialogues that have been terminated by a final judgment, the total duration of the procedure was 40 months on average. The applicants in the cases before the Constitutional Court or the parties in the original procedure in the Belgian courts referring a preliminary question to the Constitutional Court have not always taken into account this duration.

⁴⁶ The case in which the CJEU adopted an order since it had already answered to the questions in another case and the case which was removed from the list of cases since the CJEU had in the meantime condemned Belgium in the infringement proceedings, are not taken into account. The duration of these cases was respectively 10 and 5 months.

⁴⁷ CJEU 17 May 2017, *X v. Conseil des ministres*, C68/15.

The case that took the longest time took almost 58 months,⁴⁸ even though it concerned access to 4 year-long university education.⁴⁹

The real duration of the preliminary ruling dialogue in these cases was 26 months on the average. It should be noted, however, that this “loss of time” which in most cases is due to the obligations deriving from the EU law, does not cause problems having regard to reasonable length if proceedings. In fact the ECHR does not take into account the preliminary ruling procedure in the CJEU to assess the reasonability of the length of the procedure in the national courts.⁵⁰ From a national law perspective it does not cause any problem either, since the maximum length of the proceedings of 12 months provided in Article 109 of the Special Law on the Constitutional Court is a time-limit of a purely indicative character. Nonetheless, we need to consider that in some cases there is a need to take provisional measures in order to guarantee the effectiveness of the final judgment.

2.4. Influence on the CJEU through the preliminary ruling dialogue

16. In most cases the preliminary ruling dialogue does not have as an objective or a consequence to influence the CJEU. All that is expected is a judgment answering to a question on interpretation or validity. However, there have been some cases in which the Constitutional Court has tried to influence the CJEU.

(I) To emphasise the particularity of the Belgian federalism

17. Some Belgian authors suggest that the Constitutional Court should use the preliminary ruling dialogue to emphasise the particularity of the Belgian federalism, in order to encourage the CJEU to grant to Belgium more discretionary power with regard to certain obligations deriving from the EU law.⁵¹

⁴⁸ The action for annulment was lodged on 7 August 2006. The referral judgment C.C. n° 12/2008 was adopted on 14 February 2008. The answering judgment by the CJEU was delivered on 13 April 2010, *Bressol e.a. and Chaverot e.a.*, C-73/08. The final judgment C.C. n° 89/2011 was delivered on 31 May 2011.

⁴⁹ See before, n° 27.

⁵⁰ ECHR 26 February 1998, *Pafitis e.a. v. Greece*, § 95; ECHR 24 April 2008, *Mathy v. Belgium*, § 28.

⁵¹ E. Cloots, *o.c.*, 653-654; C. Van de Heyning, «Grondwettelijke conversaties: een meerwaarde voor de bescherming van fundamentele rechten», *TBP* 2012, 412-414.

18. The Constitutional Court tried to do this in a case concerning the “*Flemish care insurance*”. At issue was whether the Flemish community was entitled to provide for non-medical help and services for persons with reduced autonomy and, in particular, to limit these advantages for persons domiciled in Flanders. The Constitutional Court in its referral judgment highlighted the crucial importance of the exclusive division of the territorial competences in the Belgian federalism which means that any given situation has to be regulated by one single legislator and that the Court has to verify whether this criteria of localization of a legislative norm does not exceed the subject-matter and territorial competences of the respective legislator.⁵²

In the answering judgment the CJEU made it clear that it does not decide on “*purely internal situations*” and that neither does it intend to do so by employing the notion of Union citizenship. However, the CJEU added immediately that it is not a purely internal situation when a case where persons residing in a federal entity (Region of Wallonia, for example) and who in the past have used their right to free movement in another Member state are employed in a different federal entity (in this case Flanders or Brussels – Capital). The fact that on the basis of the fundamental rules of the Belgian federalism the Flemish Community lacks competence in respect of persons not residing in the Flanders, has no relevance in this regard, given that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that state, to justify the failure to observe obligations deriving from European Union law. Concerning both – this category of persons and the citizens of another member state working in Flanders, the Court of Justice held that their exclusion from the Flemish care insurance on the grounds that they are not residents in Flanders amounts to an unjustified restriction hindering the free movement of persons.⁵³

In its final judgment the Constitutional Court applied the CJEU judgment by applying the same distinction between situations governed by provisions of European Union law and purely internal situations. As to the first category of situations to which belongs persons residing in one of the federal entities (in this case in the French-speaking region or the German-speaking region) who have exercised the right to freedom of movement and who are employed in another federal entity (in this case in the Dutch-speaking region or the bilingual region of Brussels-Capital), the Constitutional Court applied the CJEU’s judgment and found that there has been a violation. With respect to the second category of

⁵² C.C. n° 51/2006, 19 April 2006, B.9.1-B.9.2.

⁵³ CJEU 1 April 2008, *Gouvernement de la Communauté française et Gouvernement wallon contre Gouvernement flamand*, C-212/06.

situations, that is to say, Belgian citizens who have never exercised their right to freedom of movement in another Member State, the Constitutional Court found that there was no breach of Articles 10 and 11 of the Constitution, given the specificities of the exclusive repartition of territorial competences.⁵⁴

As a result, this attempt to influence the CJEU did not have the expected result and, on the contrary, the preliminary ruling dialogue led the Constitutional Court to temper one of the basic principles of the Belgian federalism.

19. Another preliminary ruling dialogue initiated by a different Belgian court led to the same outcome. A Flemish decree provided that all contracts of employment signed with an enterprise domiciled in Flanders have to be drafted in Dutch. Labour Court of Antwerp asked the CJEU whether such a rule constitutes a restriction on the freedom of movement for workers. The Belgian state defended itself invoking the principle of national identity, arguing that linguistic aspects are core elements of the bipolar Belgian federalism and that they remain a very sensitive matter. In the answering judgment the CJEU agreed that the Belgian policy having the objective to defend and promote more than one official language can be qualified as an element of the national identity. However, it also stressed as well that it is up to the CJEU to review the proportionality of the measures adopted with an aim to pursue this element of the national identity. In this case the CJEU found that there was a violation of the principle of the freedom of movement for workers, since the invoked linguistic objectives may be attained by other means that are less intrusive in the freedom of movement: the Court of Justice suggested that the contracts of employment could be drafted in both languages: Dutch and the language of the employee.⁵⁵

(II) The European arrest warrant

20. The Constitutional Court has also tried to influence the CJEU regarding the validity of the framework decision on the European arrest warrant. At that time it was an unusual strategy since several Constitutional Courts had already taken their decisions on the constitutionality of the (transposition) of the framework decision without referring preliminary questions.⁵⁶

The Constitutional Court was particularly interested in the question whether the framework decision was compatible with the principle of lawfulness

⁵⁴ C.C. n° 11/2009, 21 January 2009.

⁵⁵ CJEU 16 April 2013, *Anton Las*, C-202/11, paras. 26 and 32.

⁵⁶ D. Sarmiento, “European Union: The European Arrest Warrant and the quest for constitutional coherence”, *I-Con* 2008, 171-183.

in criminal matters and with the principle of non-discrimination, insofar as it eliminated the control on double jeopardy for 32 categories of offences.⁵⁷ Since these offences are defined in the law of the Member State issuing the arrest warrant, which has to be compatible with the principle of lawfulness in criminal matters, and since the respective categories of offences are of such a gravity that it is justified not to require the control on double jeopardy, the Court of Justice found that the framework decision is valid.⁵⁸

The Constitutional Court complied with the answering judgment of the CJEU by rejecting the actions for annulment that were introduced with respect to the transposition law. The Constitutional Court held: «*the reasoning of the CJEU's judgment regarding the framework decision 2002/584/JAI applies mutatis mutandis to the Law of 19 December 2003 that implements the aforementioned framework decision in the Belgian law*».⁵⁹

The Constitutional Court, however, provided its interpretation that the judge, by taking into account the specific circumstances of each situation, shall refuse the execution of a European arrest warrant if there are serious grounds for believing that its execution would infringe the fundamental rights of the person concerned.⁶⁰ The CJEU nuanced its case-law only later.⁶¹

21. Even after this preliminary ruling dialogue the European arrest warrant is still a source of constitutional conflicts as is illustrated by the fact that this framework decision was the subject of the first references for preliminary ruling originating from the French *Conseil constitutionnel*⁶² and the Spanish *Tribunal Constitucional*.⁶³

(III) Equality between men and women in insurance contracts

22. One case where the Belgian Constitutional Court was successful in influencing the CJEU, and which had some significant consequences for the entire European legal order is the *Test-Achats* case.

⁵⁷ C.C. n° 124/2005, 13 July 2005.

⁵⁸ CJEU 3 May 2007, *Advocaten voor de Wereld VZW*, C-303/05.

⁵⁹ C.C. n° 128/2007, 10 October 2007, B.16.

⁶⁰ *Ibid.*, B.20.

⁶¹ CJEU 5 April 2016, *Aranyosi*, C-404/15; CJEU 5 April 2016, *Căldăraru*, C-659/15 PPU.

⁶² Conseil constitutionnel Decision N° 2013-314 QPC, 4 April 2013, *Jeremy F. c. Premier ministre*; see A. Dyèvre, "If You Can't Beat Them, Join Them", *EuConst* 2014, 154-161.

⁶³ Tribunal Constitucional (ATC 86/2011, 9 June 2011). After this judgment the Court of Justice of European Union adopted the important judgment in the *Melloni* case (CJEU 26 February 2013, *Melloni*, C-399/11); see A. Torres Pérez, "Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's door", *EuConst* 2012, 105-127. See also before, n° 29.

A directive⁶⁴ prohibiting discrimination between men and women in the access to and supply of goods and services, provided one exception regarding the insurance contracts: insofar as there existed objective differences between men and women, the national legislators were entitled to create a difference of treatment. The Belgian legislator made use of this possibility by granting permission to the insurance companies to charge higher life insurance premiums from men, on the grounds that women, on the average, have a slightly longer life expectancy. The Consumer Rights Protection Centre *Test-Achats* challenged this legal norm before the Constitutional Court. However, the genuine aim of this action was to submit the directive's norm to a review by the CJEU.

After the Constitutional Court made a preliminary reference,⁶⁵ the CJEU found that the possibility provided for in the directive was contrary to Articles 21 and 23 of the Charter of Fundamental Rights of the European Union, prohibiting any discrimination on the ground of sex and guaranteeing equality between men and women in all spheres.⁶⁶ Thus, the *CJEU* specified that a distinction between men and women is difficult to combine with the principle of equality.

Finally, the Constitutional Court annulled the transposition law because of a violation of Articles 10, 11 and 11bis of the Constitution, together with, in particular, Articles 21 and 23 of the Charter, after having quoted the argumentation developed by the Court of Justice in its entirety.⁶⁷

2.5. Influence on the CJEU outside the preliminary ruling dialogue

23. The indirect dialogue with the CJEU seems to be a rather ineffective approach. It would presuppose that the CJEU would be aware of all the jurisprudence of the high national courts, which is probably not the case. However, some of the Constitutional Court's judgments have an ambition to influence the CJEU without referring a preliminary question.

(I) The indirect continuation of a direct dialogue

24. Within the preliminary ruling dialogue the referring judgment and the answering judgment are two clearly different stages of a direct dialogue, since these judgments are targeted exclusively to the court which has engaged

⁶⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁶⁵ C.C. n° 103/2009, 18 June 2009.

⁶⁶ CJEU 1 March 2011, *Association belge des Consommateurs Test-Achats e.a.*, C-236/09, paras. 30-34 (from 21 December 2012).

⁶⁷ C.C. n° 116/2011, 30 June 2011.

in the dialogue. This is not the case with the final judgment of the same case, the main objective of which is the termination of the case in question. If the Constitutional Court disagrees with the answer, it is still obliged to apply it in a loyal manner. However, it can, at same time, put forward arguments explaining why it does not agree with the answering judgment. This is an indirect follow-up to the direct dialogue and the aim of this approach is to influence the subsequent case-law of the CJEU. This approach reconciles the legal obligation to respect and to implement, in a loyal manner, the answering judgments with another precondition which is required by Habermas for a genuine dialogue: the continuity of the dialogue in the time. Be that as it may, it should be noted that the Constitutional Court has already used this approach to continuation of dialogue on three occasions.

25. The first time, already mentioned, concerns the European arrest warrant. In fact the Constitutional Court added to the response received from the CJEU that a judge must refuse to execute the European arrest warrant if there are serious grounds for believing that its execution would infringe fundamental rights of the person concerned.⁶⁸

This example also shows that one can never be really sure that a subsequent modification of the Luxembourg case-law really is the consequence of this type of indirect dialogue. The CJEU, in turn, has developed case-law that imposes an obligation on a judge to refuse the execution of the arrest warrant if the risk of human rights violations is too high, for example, if the conditions in the prisons of the issuing Member State are despicable.⁶⁹ However, given that the CJEU's judgments do not refer to judgments of national courts, one can never know which court has inspired the reversal of the case-law of the CJEU. It is even more so in such cases as *Aranyosi* and *Căldăraru*, where the Advocate General had come to an opposite conclusion.

26. The second time the Constitutional Court used this approach to dialogue concerns the directive on prevention of money laundering.⁷⁰ In order to implement this directive, the Belgian legislator had extended the scope of the reporting obligation on suspect transactions to attorneys. Some bar associations claimed before the Constitutional Court that this obligation is contrary to the principles professional secrecy and independence of attorneys and the attorney-client privilege.

⁶⁸ See *supra*, n° 20.

⁶⁹ CJEU 5 April 2016, *Aranyosi*, C-404/15; CJEU 5 April 2016, *Căldăraru*, C-659/15 PPU.

⁷⁰ Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.

In accordance with the *Foto-Frost* jurisprudence, the Constitutional Court referred this question to the CJEU. However, it mentioned solely Article 6 of the Convention as the reference norm, even though the parties had invoked also Article 8 of the Convention.⁷¹ The Court of Justice found that there was no violation.⁷² In the final judgment the Constitutional Court, however, provided some interpretations that are consistent with the Convention, even though it was on the basis of the review that was exercised also with regard to Article 8 of the Convention.⁷³

According to one scholar the Constitutional Court has gone further than the CJEU.⁷⁴ In reality the Constitutional Court followed the CJEU's decision relating to Article 6 of the Convention, however, the referring court, as it was suggested by the Advocate General Poiares Maduro in his opinion, in addition associated Article 8 of the Convention in conjunction with Article 22 of the Constitution to the review of the transposition law.

However, the consistency would have been ensured better, if the CJEU had been seized by one more preliminary question on this aspect. It would have been preferable to continue the dialogue in a direct way instead of the indirect approach.

27. The third case concerns the access to higher education. The French-speaking Community of Belgium had imposed a *numerus clausus* to the access to some (para)medical courses in the higher education institutions; the entrance criteria were manifestly more unfavourable for foreign students. In order to justify this measure the French-speaking community referred to the very high cost of these courses and the inflow of the students coming from France. Considering themselves affected by these criteria a certain number of the potential students, both Belgian nationals and foreigners, lodged actions for annulment against this decree before the Constitutional Court.

By responding to the preliminary questions referred to the Constitutional Court⁷⁵, the CJEU considered that the concerns about an excessive burden in relation to the financing of higher education cannot justify an unequal treatment of resident students and non-resident students based on nationality. Only

⁷¹ C.C. n° 126/2005, 13 July 2005, A.4.2, A.6.3 et A.7.2.

⁷² CJEU, 26 June 2007, *Ordre des barreaux francophones et germanophone e.a.*, C-305/05.

⁷³ C.C. n° 10/2008, 23 January 2008. The Court held that the information known to an attorney due to the exercise of essential activities of his profession, namely the assistance to and defence of a client and legal advice, even outside any court proceedings, remain covered by professional secrecy. Only when the lawyer carries out activities outside the aforementioned framework he comes under the scope of the obligation to communicate to the authorities the information he is aware of and, even in this case, it has to be communicated through the president of a bar association (B.9.6, B.10 and B.14.4).

⁷⁴ E. Cloots, *o.c.*, 666-667.

⁷⁵ C.C. n° 12/2008, 14 February 2008.

the safeguarding of public health could serve as a justification in that regard. The Court of Justice entrusted the Constitutional Court to verify whether on the basis of quantitative data and the indications given by the CJEU the public health was in fact endangered.⁷⁶

Instead of proceeding immediately to this kind of review, the Constitutional Court started with a critique that the CJEU had not sufficiently taken into account the financial burden while the Constitutional Court had underlined in its referral judgment that a considerable inflow of French students would adversely affect the public finances. The Constitutional Court regrets explicitly that following the answering judgment the smaller member states cannot defend themselves against the educational policy of a large member state that has the same language.⁷⁷

After this critical intermezzo, the Constitutional Court applied properly the answering judgment: it examined whether the protection of public health could justify, for each educational programme in question, the challenged norms. Therefore, the Constitutional Court did not misconstrue the judgment of the Court of Justice; it simply continued the dialogue in an indirect way.

(II) The primacy of the most extensive possible protection of human rights

28. Part of the doctrine criticizes the CJEU because it disrupts the internal hierarchy of laws: by granting exclusive rights to each judicial and administrative court and tribunal in all the Member States, it allows these judges to refuse to apply the jurisprudence of the highest national courts in favour of direct application of the EU law. According to this doctrine, the Constitutional Courts are the victims of the European integration process since they could be ignored systematically by all other national courts.⁷⁸ Even though this conflictual and strategic approach is not the only vision of the complex relationship between constitutional courts and the CJEU, it still concerns another aspect of a genuine

⁷⁶ CJEU, 13 April 2010, *Bressol e.a. and Chaverot e.a.*, C-73/08.

⁷⁷ C.C. n° 89/2011, 31 May 2011, B.4.5. In this regard the Court was relying on the Opinion of Advocate General Sharpston, who wrote that the European Union must not “ignore the very real problems that may arise for Member States that host many students from other Member States”, and that “it is incumbent on both the host Member State and the home Member State actively to seek a negotiated solution”.

⁷⁸ See as example: A. Dyèvre, «Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach», LSE Working Paper 2013, <http://ssrn.com/abstract=2204592>; *id.*, «Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?», *Yearbook of European Law* 2016, 106-144; J. Komarek, «The place of constitutional courts in the EU», *ECL Rev.* 2013, 420-450.

dialogue according to Habermas, e.g. the existence of different opinions or opposing interests.

29. The *Melloni* case is an important example of what this doctrine calls the «displacement» of constitutional courts. In the *Melloni* judgment the consequence of this reasoning was the prohibition issued against the Spanish *Tribunal Constitucional* to apply constitutional protection of the human rights which was more extensive than that offered by the Charter.⁷⁹

This judgment has caused a widespread discontent among the European constitutional courts. Following this judgment, the constitutionality review of national legal acts has become almost impossible whenever the European Union law is applicable, if the national constitution offers a more extensive human rights protection than the Charter. In addition, uniform application of the constitution has been endangered, in the sense that two human rights protection standards may now co-exist; one outside the scope of application of the European Union law and the another within this scope.⁸⁰

30. Several constitutional courts have developed case-law according to which they do not accept the absolute character of the principles of primacy, effectiveness and uniform application of European Union law, as applied by the CJEU. The Belgian Constitutional Court joined this movement in 2016 with the judgment n° 62/2016 of 28 April 2016 concerning appeals for annulment of the legislative provisions approving the Treaty on Stability, Coordination and Governance in Belgium within the Economic and Monetary Union, done in Brussels on 2 March 2012.⁸¹

Some of the applicants were afraid that the Treaty would diminish the importance of the elected representative bodies on the budgetary policy and consequently also the importance of the electors of these representative bodies.

⁷⁹ CJEU, 26 February 2013, *Melloni*, C-399/11, para. 60. See A. Torres Pérez, «Melloni in Three Acts: From Dialogue to Monologue», *EuConst* 2014, 308-330.

⁸⁰ A. Alen, *Hoe 'Belgisch' is het 'Belgische' staatsrecht nog?*, Anvers, Intersentia, 2015, 36; J. Sovdat, «The Constitutional Court of the Republic of Slovenia and European Union Law», *Croatian and Comparative Public Administration*, 2013, 905.

⁸¹ The norms in question were, more specifically, the Law of 18 July 2013 approving this Treaty, the cooperation agreement of 13 December 2013 between the Federal State, the Communities, the Regions and the Community Commissions concerning the implementation of Article 3(1) of the same Treaty and the Flemish Decree of 21 March 2014 approving this cooperation agreement. Although this Treaty has been adopted outside the European Union's legal framework, it is applied and interpreted by the contracting parties in accordance with the European Union law (Article 2(1)) and the contracting parties rely on the institutions of the European Union (Articles 3 and 8). In addition, the contracting parties have planned to integrate the Treaty into the legal framework of the European Union (Article 16).

Indeed, Article 174 of the Belgian Constitution provides that the Chamber of Deputies annually approves the budget.

The Court dismissed the application because the applicants had no standing to bring legal action. The legislator enjoys a large margin of discretion in the matters of budget and the debt management. It is incumbent on the legislator to fix mid-term budgetary objectives and to make commitments by cooperating, *inter alia* by way of a treaty, with states who share a common currency and who are following a coordinated economic policy, based on the principle of sound public finances and monetary conditions and the will to avoid excessive deficits in public finances.⁸²

The Court could have stopped there. Instead it added that the Treaty on Stability in addition to providing for a rigid budgetary framework, is also granting some competencies to the European Union institutions, in particular the Commission and the CJEU. Further the Court laid down a clear warning to both the Belgian legislator, who, pursuant to Article 34 of the Constitution, delegates the exercise of certain powers to the international institutions, and also these institutions, when they are exercising these delegated powers. Paragraph B.8.7 of the judgment n° 62/2016 reads as follows:

«When the legislator confers his approval to a treaty with this kind of scope of application, he must respect the Article 34 of the Constitution. By virtue of this provision, the exercise of determined powers may be delegated by a treaty or a law to public international law institutions. While it is true that these institutions may then decide how they are going to exercise the powers which have been delegated to them, nonetheless Article 34 of the Constitution may not be seen as conferring a generalised carte blanche either to the legislator when it is approving the treaty or to the institutions concerned when they exercise these powers which have been delegated to them. In any case Article 34 of the Constitution does not authorise a discriminatory conduct against the national identity inherent in the fundamental political or constitutional structures or against the fundamental values of protection which are conferred to subjects of law by the Constitution».

The Court thus subjected the primacy of the European Union law, which does not result from the European Union law itself but from Article 34 of the Constitution of Belgium, to certain limits: both the delegation of determined powers to the European Union institutions and the exercise of these powers by these institutions cannot be allowed to prejudice “the national identity” or the fundamental values of protection guaranteed by the Constitution. The Court did not comment explicitly on the issue whether it is going annul

⁸² C.C. n° 62/2016, 28 avril 2016, B.8.4.

the European Union’s institutions’ decisions that are adopted *ultra vires*.⁸³ Should this be the case, these limits would be exactly the same as those imposed on the European Union law primacy by the German Federal Constitutional Court in its “*Honeywell*” case-law.⁸⁴

31. This position of the Constitutional Court of Belgium may be surprising, taking into account its previously mentioned Europhile attitude. It could be understood as an answer to *Melloni* case and other Luxembourg judgments which are not taking sufficiently into account the constitutionality review of national legislative acts. Insofar as the Constitution of Belgium confers a more extensive protection for some of the human rights, it may be explained by the Belgian constitutional history: the Belgian revolution in 1830 was a reaction against the King of the United Kingdom of the Netherlands, William I, who restricted some of the liberties, such as use of languages, freedom of press, freedom of education, and freedom of religion, and did not accept the review of legality, nor the review of constitutionality of his decrees. This is the reason why the aforementioned human rights are better protected in the Constitution of Belgium than in European or international treaties. Article 159 of the Constitution prescribes that any judge is entitled to refuse application of illegal acts adopted by the executive power. If the Constitutional Court had thought to recognise these constitutional aspects as belonging to “the national identity” or as “the fundamental values of protection granted by the Constitution”, it could have deviated from the *Melloni* jurisprudence.⁸⁵

If this *obiter dictum* had to be interpreted as a reaction against some of the Luxembourg jurisprudence, it should clearly be seen as an indirect dialogue since the Constitutional Court sends a message to Luxembourg in a form that is not a referral of a preliminary question.

Nevertheless the Constitutional Court of Belgium will not apply this jurisprudence with regard to secondary EU law without asking first a preliminary question to the CJEU, in order to give it the opportunity to increase the degree of protection guaranteed by the Charter.⁸⁶ This track shouldn’t be seen as purely illusory as shown the dialogue that was initiated by the Constitutional Court of Italy in the case called “*Taricco II*”.⁸⁷

⁸³ According to Ph. Gérard et W. Verrijdt, «Belgian Constitutional Court adopts national identity discourse», *EuConst* 2017, 182-207, the Court has said it implicitly.

⁸⁴ BVerfG, 30 June 2009, 2 BvE 2/08; BVerfG 6 July 2010, 2 BvR 2661/06; BVerfG, 21 June 2016, 2 BvR 2728/13.

⁸⁵ A. Alen, «De nationale identiteit – Slotwoord», *TBP* 2017, 371.

⁸⁶ A. Alen, *o.c.*, 371 ; Ph. Gérard et W. Verrijdt, *o.c.*, 202-204.

⁸⁷ CJEU, 5 December 2017, *M.A.S. et M.B.*, C-42/17.

2.6. Conclusion

32. The dialogue with the CJEU shows some difficulties. First of all, neither the direct nor the indirect dialogue guarantees a genuine dialogue.

If one opts for the direct dialogue, there is a certainty that the dialogue is taking place since CJEU is obliged to take part in it. However, the drawback of this option is that the CJEU can give an undesirable response, which will nevertheless be binding upon the referring court. From this point of view the dialogue is not completely “*herrschaftsfrei*”, as required by Habermas.

By contrast, the indirect dialogue avoids receiving an immediate response with unfavourable consequences for the internal law or the Constitutional Court; however, this option does not guarantee that the CJEU will participate in the debate and therefore the existence of the dialogue itself is not assured.

33. Another difficulty arises from the style of argumentation adopted by the CJEU. Since it refers only to its own decisions and has a very syllogistic style, it is difficult to identify whether a revision of the jurisprudence is the consequence of a dialogue initiated by a national court.

34. These disadvantages, however, are not serious enough to stop the practice of dialogues with the CJEU, including outside the legal obligations in a particular case. It is only by presenting all the arguments and all the interests at stake to the CJEU that makes it possible for that Court to take them into account.

3. To influence the ECHR: an indirect dialogue

3.1. Preliminary ruling procedure not (yet) applicable

35. At the moment there is no procedure of preliminary referral before the ECHR. The optional system introduced by Protocol No. 16 to the Convention, which entered into force on 1 August 2018,⁸⁸ is the only procedure in this regard; however, it is not mandatory. For now Belgium has not signed the Protocol No. 16 and its ratification is not planned.⁸⁹

36. According to its explanatory report, the objective of Protocol No. 16 is to “foster dialogue between courts” and “to enhance the ‘constitutional’ role of the [ECHR].”

For these reasons, Article 1 of Protocol No. 16 makes it possible for the highest courts of High Contracting Parties to address the ECHR with

⁸⁸ 10 ratifications were required for entry into force of this Protocol. After France ratified it on 12 April 2018, this number was reached. The Protocol has entered into force for Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine.

⁸⁹ Contrary to Protocol No. 15, ratified by Belgium on 4 April 2018 (*Moniteur belge*, 3 May 2018).

a request for an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or its Protocols thereto. These opinions may be asked only if they are related to a pending case. According to Article 5 of Protocol No. 16, advisory opinions are not binding. Article 10 entitles each High Contracting Party to indicate the national courts or tribunals that it designates for the purposes of asking for an advisory opinion.

37. Since Belgium has not ratified Protocol No. 16, the Constitutional Court is not entitled to initiate a direct dialogue with the ECHR.

The opinions concerning Protocol No. 16 are very diverse.

According to some, the intended dialogue could be useful to avoid contradictory interpretations of a specific fundamental right. In addition, it would allow the highest courts to influence the jurisprudence of the ECHR, while today the influence is more one-sided. Moreover, one can never be sure that a court will be aware of a judgment that seeks to initiate an indirect dialogue, or that it will respond to it.

The dialogue established by Protocol No. 16 will probably not be too “time-consuming” for the internal procedure, given that the ECHR must give priority to dealing with a request for an opinion.⁹⁰

The advisory opinion procedure can only be used if a new and important question arises concerning the interpretation or application of the Convention. When the domestic court resolves this question itself, there is always the possibility of a finding of a violation by the ECHR, whereas this finding could be avoided by applying the advisory opinion procedure. In addition, the high court which sends the request for an advisory opinion would promote legal certainty for the 47 States Parties, given that all European jurisdictions can immediately apply a new interpretation in their jurisprudence.

The court which submits the request also plays an important role in order to guarantee subsidiarity in the context of the advisory opinion’s procedure. To allow the ECHR to focus on the question of principle, the court making the request must set out in detail the factual and legal context and define precisely what aspect of the interpretation or application of the Convention is wanted for clarification.⁹¹ In doing so, the highest national courts can express their objections to the existing Strasbourg case-law and indicate which particularities and national interests should be taken

⁹⁰ Explanatory Report to Protocol No. 16, para. 17.

⁹¹ Explanatory Report to Protocol No. 16, para. 11.

into account.⁹² A formal request for an advisory opinion procedure would ensure that such critique actually reaches the ECHR, and it would also answer the critique that the ECHR does not sufficiently take into account the national specificities of the Council of Europe member states.

Interpreted in this way, the advisory opinion procedure would help to take into account the principle of subsidiarity.⁹³

38. According to others, one might wonder why the advisory opinion is non-binding. A binding nature of the opinion would prevent the same case from being returned to the ECHR a second time by means of an individual complaint, after the judgment of the national court. The opinion would be more binding for each judge of the Council of Europe Member States, which could avoid an influx of repetitive cases.

Moreover, as the preliminary ruling dialogue between the Constitutional Court of Belgium and the CJEU shows, the obligation to apply the answering judgments in a loyal manner does not prevent the court which requested the opinion from explaining its reservations in relation to this opinion, by indirectly extending the dialogue that was initiated in a direct way.

3.2. Indirect dialogue with the ECHR

39. In the absence of a formal procedure for preliminary rulings or advisory opinions, the other conditions for a real dialogue, as set out by Habermas, are for the most part fulfilled with regard to the dialogue between the Constitutional Court of Belgium and the ECHR.

The common mission of these two courts is to guarantee the effectiveness of human rights. The slight differences between the two texts of reference, the Belgian Constitution and the Convention, are neutralized by the principle of the most extensive protection, and by the aforementioned jurisprudence of the Constitutional Court of Belgium which takes into account the Strasbourg case-law to interpret constitutional rights.

However, differences of opinion are possible because human rights are rather vague norms that can lend themselves to several interpretations, especially

⁹² ECHR itself sees this as a benefit of the advisory opinion: ECHR, “Opinion on the extension of Court’s competence to give advisory opinions on the interpretation of the Convention”, *www.coe.int*, para. 4.

⁹³ A. Alen, “Kanttekeningen bij de samenwerking tussen de hogere rechtscollages inzake mensenrechten”, in A. Alen, V. Joosten, R. Leysen en W. Verrijdt (eds.), *Liber amicorum Marc Bossuyt*, Anvers, Intersentia, 2013, 14; J.-P. Jacqué, “Le renvoi préjudiciel devant la Cour européenne des droits de l’homme”, *Dialogues entre juges*, 2012, *www.echr.coe.int*, 3-4.

when they have to be applied to concrete cases. Differences of opinion may also arise from the fact that the Constitutional Court acts within the framework of an objective dispute, while the ECHR attaches great importance to examination of the facts of each case.

Mutual recognition and respect is not a problem. Both courts refer to each other’s case-law. Both courts also have an identic opportunity to participate in the dialogue: the Constitutional Court does this each time it applies the Strasbourg case-law and the ECHR does this when it examines an individual complaint in a case in which the Constitutional Court has intervened, or even in the case when the party concerned refers to the case-law of the Constitutional Court. The continuity of the dialogue is also assured, given the number of cases judged by the two courts.

The condition of absence of total authority poses fewer problems in the relationship with the ECHR than in the relationship with the CJEU. The Luxembourg jurisprudence concerning primacy, effectiveness and uniform application simply does not exist in Strasbourg. As we have argued elsewhere, the Constitutional Court does not use a hierarchical model of relationship between the national Constitution and supranational law, but rather subscribes to a model of constitutional pluralism.⁹⁴

40. The will of the ECHR to enter into dialogue with national judges is obvious. Every year it organises a seminar called “*Dialogue entre juges / Dialogue between Judges*”. Its research service examines the case-law of the highest courts of the Member States, and the ECHR refers to it in its own case-law. In October 2015, it also launched the “Superior Courts Network” (“*Réseau des cours supérieures*”), aimed at the exchange of information between the ECHR and the highest national courts.

Contrary to the style of motivation of the CJEU, the ECHR gives an explanation when it modifies its jurisprudence following a criticism from the highest national courts. *Al-Khawaja and Tahery*⁹⁵ judgment regarding the admissibility of hearsay evidence and *Lautsi*⁹⁶ judgment regarding crucifixes in schools are the best examples.

⁹⁴ A. Alen et W. Verrijdt, “La relation entre la Constitution belge et le droit international et européen”, in I. Riassetto, L. Heuschling et G. Ravarani (eds), *Liber amicorum Rusen Ergec*, Pasicrisie luxembourgeoise, 2017, 31-54.

⁹⁵ ECHR (GC), 15 December 2011, *Al-Khawaja and Tahery v. the United Kingdom*.

⁹⁶ ECHR (GC), 18 March 2011, *Lautsi v. Italy*.

3.3. The judgments of the Constitutional Court of Belgium judged by the ECHR

(I) Review in 2012

41. A research carried out in 2012 showed that among the 909 judgments and decisions of the ECHR concerning Belgium, 19 included reference to the case-law of the Constitutional Court of Belgium.⁹⁷ Not all of these judgments or decisions concerned cases in which the ECHR examined whether the case-law of the Constitutional Court was in conformity with the Convention. Some judgments and decisions contain only one single reference to the Belgian constitutional jurisprudence.⁹⁸ In other judgments and decisions the Constitutional Court is only mentioned when examining the question whether, according to Article 35 of the Convention, the applicant has exhausted the domestic remedies.⁹⁹ It has happened once that the ECHR refers to the intervention of the Constitutional Court in order to conclude that because of such an intervention the case has become complex and that, therefore, the right to a final decision within a reasonable time has not been violated.¹⁰⁰

42. In most cases the ECHR agrees with the vision of the Belgian Constitutional Court and does not conclude that there has been a violation.¹⁰¹ This

⁹⁷ This review was carried out on 17 May 2012. V. A. Alen, K. Muylle et W. Verrijdt, “De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens”, in A. Alen et J. Theunis (eds.), *Leuvense Staatsrechtelijke Standpunten 3. De Europese dimensie in het Belgische publiekrecht*, Bruges, die Keure, 2012, 34.

⁹⁸ ECHR (decision), 6 September 1994, *Laboratoire médical Saint-Pierre and Marie-France Leclercq* (referring to judgment n° 5/94); *ECommHR* (decision), 15 January 1997, *M.C.* (referring to judgment n° 32/96); ECHR 30 January 2003, *Göcke e.a.* (referring to judgment n° 92/98); ECHR (decision), 2 March 2010, *Bouglame* (referring to judgment n° 59/2001); ECHR 20 September 2011, *Ullens de Schooten et Rezabek* (referring to judgment n° 160/2007); ECHR (decision), 20 March 2012, *Boelens e.a.* (referring to judgment n° 73/2003).

⁹⁹ *ECommHR*, 2 September 1996, *Aerts*; ECHR 22 June 2000, *Coëme e.a.*; ECHR, 5 November 2000, *Wynen et Centre hospitalier interrégional Edith-Cavell*; ECHR 15 July 2003, *Ernst*; ECHR (decision), 6 April 2004, *S.B. e.a.*; ECHR, 13 October 2005, *asbl GERFA*.

¹⁰⁰ ECHR (decision) 9 December 2004, *Stevens*.

¹⁰¹ *ECommHR* (decision) 14 January 1998, *ny Remo Milieubeheer* (following judgment n° 51/95 about the fact that expropriation cases are judged by a justice of peace and not by the Council of State; ECHR (decision) 10 November 2005, *EEG-Slachthuis Verbist* (following judgment n° 17/2000 about a retroactive law); ECHR (decision) 8 January 2008, *Epstein* (following judgment n° 149/2004 about war victims); ECHR (decision) 14 February 2012, *Gallez e.a. et Verhaegen* (following judgment n° 64/2008 about a retroactive law); ECHR (decision) 10 April 2012, *Vergauwen e.a.* (following judgment n° 116/2002 and judgment n° 94/2003 about a retroactive law).

could probably be explained by the Belgian Constitutional Court's technique of complying with the Strasbourg case-law in its own judgments

Another explanation lies in the observation that the ECHR engages in a more limited proportionality examination when the higher courts have already substantiated in depth the non-violation of the Convention.¹⁰²

43. In cases where there is conflicting case-law of the Court of Cassation of Belgium and the Constitutional Court of Belgium, constitutional jurisprudence is often more protective, and the ECHR frequently agrees with it.

Thus, in its *RTBF* judgment, the ECHR condemned Belgium because a judge hearing an application for interim measures had prohibited a broadcast of a programme on the alleged illegal practices of a doctor. As there was a difference between the case-law of the Court of Cassation, according to which such a preventive prohibition does not violate Article 19 of the Constitution,¹⁰³ and that of the Constitutional Court which prohibits any preventive measure concerning freedom of opinion and considers that misconduct in the dissemination of an opinion can be sanctioned only *a posteriori*,¹⁰⁴ the ECHR concluded that, since the case-law is divergent, the prohibition lacks a foreseeable legal basis.¹⁰⁵

Case *Silvester's Horeca Service* concerned the divergent case-law of the Court of Cassation and the Constitutional Court concerning the access to a court in the case of an administrative fine. According to the Court of Cassation, courts lack competence to amend, reduce or quash an administrative penalty after carrying out a proportionality test, since no legislative provision grants them this competence.¹⁰⁶ The Constitutional Court held, however, that if the administration has the power of amending, reducing or quashing the penalty, the courts must have the same competence.¹⁰⁷ The ECHR agreed to the constitutional jurisprudence, indicating that the Constitutional Court's case-law had corrected the violation of Article 6 of the Convention in Belgian law; it found that this case-law had come too late for the applicant and therefore a violation by Belgium was found.¹⁰⁸

¹⁰² V. S. Lambrecht, “The attitude of four supreme courts towards the European Court of Human Rights: Strasbourg has spoken...”, in S. Besson and A. Ziegler (eds.), *Le juge en droit international et européen – The Judge in International and European Law*, Zurich, Schulthess, 2013, 304-305.

¹⁰³ Cass., 2 June 2006, *AM* 2006, 355.

¹⁰⁴ C.C. n° 157/2004, 6 October 2004.

¹⁰⁵ ECHR, 29 March 2011, *RTBF v. Belgium*.

¹⁰⁶ Cass., 5 February 1999, *Arr.Cass.* 1999, 142.

¹⁰⁷ C.C. n° 96/2002, 12 June 2002.

¹⁰⁸ ECHR, 4 March 2004, *Silvester's Horeca Service v. Belgium*.

In the *Loncke* case, the ECHR was confronted with divergent case-law concerning the obligation to make a deposit of a VAT fine before challenging it in a court. According to the Constitutional Court this obligation violated the right of access to a court insofar as it deprived the taxpayer of any judicial review if the fine was too high to comply with the obligation to make a deposit. The Constitutional Court added that this legislative provision could be interpreted in accordance with the Constitution, if it were interpreted as meaning that the tax authorities can and must waive the deposit obligation if it is contrary to the taxpayer's financial situation.¹⁰⁹ The Court of Cassation accepted this interpretation of the Constitutional Court, but at the same time it found that the Ghent Court of Appeal had correctly ruled that the taxpayer had not proved that his financial situation made it impossible to fulfil the obligation to make a deposit. Subsequently, it did not want to examine itself whether this legislative provision violated Article 6(1) of the Convention, because a tax fine is not of a criminal character and Article 6(1) of the Convention is not applicable in tax cases.¹¹⁰ The ECHR condemned this position, stating that a fine amounting to twice the unpaid tax is of a criminal nature and that Article 6(1) of the Convention therefore applies. Further, the ECHR found that the applicant, a used car salesman, had shown that his financial situation precluded the possibility of making a deposit, since the fine amounted to 152 million Belgian francs (EUR 3.77 million). Since the administration and the Court of Appeal of Ghent knew about this lack of proportionality but refused to take it into account the ECHR found that Belgium had violated the Convention.¹¹¹

The *Cottin* judgment concerned the adversarial nature of the reports of an expert in a criminal case. According to the Court of Cassation such reports could not be disputed by the defendant or the civil parties unless the law provided for such a right. According to the Constitutional Court, the principle of equality and non-discrimination precludes the situation where expert reports in civil matters are always adversarial, whereas expert reports in criminal cases do not always have an adversarial character.¹¹² The Constitutional Court then formulated an interpretation according to which civil procedural law applies to expert reports in criminal cases, so that all expert reports may be disputed. The ECHR endorsed the position of the Constitutional Court, holding that expert reports must always

be subject to adversarial debate if they are important to the outcome of the case and if they concern a technical matter outside the expertise of the court.¹¹³

44. The number of judgments of the ECHR in which the case-law of the Constitutional Court is criticized, is small.

First, there is the judgment in the case *Pressos Compania Naviera*.¹¹⁴ The Court of Cassation had always held that sea pilotage, imposed by Belgian legislation on commercial vessels entering the Scheldt estuary, cannot imply extra-contractual liability on the part of the Belgian state. When the Court of Cassation overturned this case-law admitting that the responsibility of the state could be engaged, the Belgian state feared an influx of claims for damages. It adopted legislation with a retroactive effect of thirty years that the organizers of the pilotage service were not responsible for the errors of pilots. Some shipping companies challenged the law in the Constitutional Court, which ruled that the infringement of the principle of legal certainty was not disproportionate and that Article 1 of the Protocol No. 1 to the Convention covers only property that has been already acquired and does not apply to future damage as receivables.¹¹⁵ The ECHR not only condemned the retroactivity but also established a new principle according to which a legitimate expectation of receiving receivables for compensation may be considered as property, if it has a sufficient basis in domestic law.

It must be emphasized, however, that this is not a refusal by the Constitutional Court to apply case-law of the ECHR. The *Pressos Compania Naviera* case was indeed the first case in which the ECHR extended the scope of Article 1 of Protocol No. 1. The Constitutional Court has, moreover, adapted its case-law, by granting Article 1 of Protocol No. 1 the same extended scope of application.¹¹⁶

45. The case-law of the Constitutional Court on sentencing in absentia and the right to challenge a judgment adopted in absentia has also twice been disavowed by the ECHR. Article 187 of the Code of Criminal Procedure did not require that the defendant sentenced in absentia and to whom the judgment in absentia has been served, be specifically informed of the time-limits for challenging a judgment. According to the Constitutional Court, this lack of information did not violate Articles 10 and 11 of the Constitution, read in conjunction with Article 6 of the Convention. The referring court had asked the Constitutional Court to compare Article 187 with the procedure in

¹¹³ ECHR, 2 June 2005, *Cottin v. Belgium*.

¹¹⁴ ECHR, 20 November 1995, *Pressos Compania Naviera SA v. Belgium*.

¹¹⁵ C.C. n° 25/90, 5 July 1990.

¹¹⁶ C.C. n° 17/2000, 9 February 2000, validated by the ECHR in its judgment of 10 November 2005, in the case *EEG-Slachthuis Verbist*.

¹⁰⁹ C.C. n° 73/92, 18 November 1992; C.C. n° 75/95, 9 November 1995.

¹¹⁰ Cass., 3 January 2003, *Pas*, 2003, I, 26.

¹¹¹ ECHR, 25 September 2007, *Loncke v. Belgium*.

¹¹² C.C. n° 24/97, 30 April 1997.

administrative cases, according to which a unilateral administrative act must mention remedies. The Constitutional Court ruled that these two procedures were not comparable in terms of the principle of equality and non-discrimination.¹¹⁷ The ECHR, however, decided in two judgments that a person sentenced in absentia must be informed of the applicable remedies and deadlines.¹¹⁸

Thus, in this case the Constitutional Court did not examine the merits of the question and could not consider whether Article 187 of the Code of Criminal Procedure violates Article 6 of the Convention. This is because provisions of the Convention are not norms of direct reference standards and a detour, either by Articles 10 and 11 of the Constitution or by a similar constitutional right, is necessary. In that case, the detour went through the principle of equality and non-discrimination; however, the referring court had chosen to compare this criminal procedure with administrative procedure which had too little resemblance.

(II) The situation since 2012

46. Since 2012 the situation has remained the same. From 18 May 2012 to 24 April 2018, the Constitutional Court was mentioned in 26 cases concerning Belgium. Some of these references are only of marginal interest, mentioning that the Constitutional Court has also exercised its review over the law in question; however, this review was not related in any way to the violations alleged in Strasbourg.

For example, in the case of *Bamouhammad*, a very dangerous prisoner, the ECHR found a violation of Article 3 of the Convention. He was regularly transferred from one prison to another because prison guards no longer wanted to work in his presence. He was also subjected to very strict security measures, which implied that at each departure from the cell he was subjected to a body search facing the wall, legs apart and handcuffed in the back. His clothes were searched as well. On his return to the cell, he was still handcuffed and then he had to place his hands so that his handcuffs could be removed, and he could get dressed. Once dressed, the officer handed him the handcuffs and the gate opened. A complete search of the cell was also carried out each time he was absent from his cell. According to the ECHR, *“the manner in which the applicant’s detention was carried out, subject to repeated transfers from penitentiary institutions and repetitive exceptional measures, combined with the delay by the prison administration in setting up a therapy, and the refusal*

¹¹⁷ C.C. n° 210/2004, 21 December 2004.

¹¹⁸ ECHR, 29 June 2010, *Hakimi v. Belgium*; ECHR, 1 March 2011, *Faniel v. Belgium*.

*of the authorities to consider the slightest adjustment of the sentence despite the negative evolution of the applicant’s state of health, may have caused him distress that exceeded the inevitable level of suffering inherent in detention. In those circumstances, the Court cannot consider that the Belgian authorities did what could reasonably be expected of them in view of the requirements of Article 3 of the Convention”.*¹¹⁹ In this case, the case-law of the Constitutional Court was mentioned only in the statement on domestic law, mentioning that the Court had annulled a legislative provision concerning the systematic body search of detainees after each visit.¹²⁰

Another example of a purely formal mention concerns the mention of the Constitutional Court’s judgment on a legislative provision amending the law on foreigners from “safe countries of origin”.¹²¹ This provision had been partially annulled by the Constitutional Court on the grounds that the Aliens Litigation Council was not obliged to take into consideration any new evidence presented before it, nor to examine the present situation of those concerned arriving from a safe country, that is to say the situation at the time of its decision, in relation to the situation prevailing in the applicant’s country of origin. Therefore, the action for suspension of extreme urgency and the action for annulment before that court did not allow to exercise the review of the situation of the petitioners as required by the ECHR. The ECHR sometimes mentions this judgment in the event of refusal of stay because of a dangerous illness of the applicant.¹²²

The purely formal references also appear in cases declared inadmissible by the ECHR, as in the case of the limitation period in tax cases. In this case the Court of Cassation ruled that the tax authorities could not suspend the limitation period by using an “order”, since the legislation in question did not mention this method.¹²³ This judgment implied that many cases of unpaid contributions - often in a context of tax evasion - were all of a sudden time-barred, costing the Belgian State more than 1.7 billion euros. This is the reason why the legislator adopted the legislation in question retroactively, adding an order to the list of techniques that can be used to suspend a time-limit. According to the Constitutional Court this retroactive law affecting the outcome of the pending judicial proceedings was justified because the budgetary stakes

¹¹⁹ ECHR, 17 November 2015, *Bamouhammad v. Belgium*.

¹²⁰ C.C. n° 20/2014, 29 January 2014.

¹²¹ C.C. n° 1/2014, 16 January 2014.

¹²² ECHR, 27 February 2014, *S.J. v. Belgium* (concerning AIDS); ECHR, 7 July 2015, *V.M. e.a. v. Belgium* (concerning a neurologic illness); ECHR (GC), 13 December 2016, *Paposhvili v. Belgium* (concerning leukaemia).

¹²³ Cass., 10 October 2002, C.01.0067.F; Cass., 21 February 2003, C.01.0287.N.

constituted “overriding reasons of public interest”.¹²⁴ Before the ECHR the applicants relied on Article 6 of the Convention and Article 1 of Protocol No. 1. After having amply quoted the decision of the Constitutional Court when describing the circumstances of the case, the ECHR declared this case inadmissible: Article 6(1) of the Convention does not apply in tax matters¹²⁵ and Article 1 of the Protocol No. 1 does not apply to disputed taxes which have not been adjudicated by domestic courts.¹²⁶

The final example is related to a judgment of the Constitutional Court on particular methods of investigation. These include, for example, “informers” or people who have regular contact with police officers and who provide information or data on “persons for whom there is a strong indication that they are committing or would be committing offenses”. Another particular method of investigation is the use of infiltrators, police officers who come under another identity in the criminal world to collect evidence against a criminal organization. The Constitutional Court validated these particular investigatory techniques, even though the names of the police officers concerned or the informers appear only in a confidential file separate from the criminal file and to which the defendant does not have access. However, the Constitutional Court ruled that an independent judge must always be able to control the contents of the confidential file and require the transfer of certain documents to the criminal procedure file.¹²⁷ The ECHR has referred to this judgment in several cases which did not concern the legislative framework itself: it had to decide whether, after the application of the particular methods of investigation, the criminal procedure as a whole did not lose its fairness.¹²⁸

47. Most mentions illustrate that the distinct mandates of the Constitutional Court and the ECHR may lead to a result where the Constitutional Court is not always able to avoid findings of violation by the ECHR. The Constitutional Court operates in the framework of an objective dispute, in which the legislative norm itself is judged, while the ECHR relies mainly on the facts of the applicant’s case (see *supra*, n° 39).

Thus, in the pilot judgment *W.D. Belgium* of 6 September 2016, by which the ECHR orders Belgium to “take appropriate measures to ensure that the system of internment of delinquent persons is in conformity with

¹²⁴ C.C. n° 177/2005, 7 December 2005.

¹²⁵ The ECHR is referring here to the well-known jurisprudence in this matter: ECHR (GC) 12 July 2001, *Ferrazzini v. Italy*.

¹²⁶ ECHR (decision) 11 September 2012, *Optim et Industerre v. Belgium*.

¹²⁷ C.C. n° 202/2004, 21 December 2004.

¹²⁸ ECHR 17 January 2017, *Habran et Dalem v. Belgium* (regarding the use of informers); ECHR 23 May 2017, *Van Wesenbeeck v. Belgium* (regarding police infiltration).

the principles relating to Articles 3, 5 §§ 1 and 4, and 13 combined with Article 3 of the Convention”, the Constitutional Court was mentioned twice. First, the statement of facts shows that in the applicant’s case the Court of Cassation refused to refer a question to the Constitutional Court for a preliminary ruling, finding “that the suggested questions were extraneous to the complaints”. Secondly, the ECHR refers to a judgment of the Constitutional Court in which it finds that the authorities must accommodate a person interned by a decision of the social defence committee, but that the refusal to do so does not mean that the legislation in question becomes contrary to the Constitution; it is up to the courts and tribunals and not the Constitutional Court to control whether the authorities respect the law in specific cases.¹²⁹ The large number of violations in cases against Belgium for the internment of persons with psychiatric disorders mainly concern the insufficiency of places available in specialized and adapted institutions. Such a situation concerns the application of law and therefore falls outside the competence of the Constitutional Court.

48. The law of foreigners presents the same problems. In *Singh*, Belgium was found to have violated Articles 3 and 13 of the Convention, because the Office of the Commissioner General for Refugees and Stateless Persons (the administrative authority that examines asylum applications, *CGRS* hereinafter) and the Litigation Council for Aliens (an administrative court, *the Council* hereinafter) had not examined whether the applicant’s and his family’s expulsion to Russia exposed them to a real risk of being returned to Afghanistan, where they would face a real risk of inhuman and degrading treatment as a result of their Sikh religion. One of the elements in this case concerned the admission of new evidence by the Council. The applicants could not prove their Afghan nationality before the CGRS. Before the Council, they had introduced copies of the documents prepared by the Office of the United Nations High Commissioner for Refugees (hereinafter: UNHCR). As the Council considered that the veracity of these documents was questionable they were rejected.

Regarding this matter, the Constitutional Court ruled in 2008 that the legislative provision which limits the possibility of invoking new evidence before the Council pursues legitimate aims: “the legislator aims to create a balance between, on the one hand, the characteristics specific to the problem of asylum and, on the other hand, the principle according to which the claim sets

¹²⁹ C.C. n° 142/2009, 17 September 2009. This judgment has also been mentioned in other Strasbourg judgments concerning the detention of persons with psychiatric condition (for example, see ECHR, 2 October 2012, *L.B. v. Belgium*; ECHR 10 January 2013, *Swennen v. Belgium*; ECHR, 10 January 2013, *Claes v. Belgium*; ECHR 10 January 2013, *Dufoort v. Belgium*).

the limits of the jurisdictional debate. In addition, the intention of the legislator was to prevent prolonged debates”. However, the Court added that this provision was constitutional only if interpreted so that it does not limit the full jurisdiction of the Council to rule on the decisions of the CGRS. More precisely, “*the intention to prevent prolonged debates cannot lead to a result where the [Council] is allowed to refuse to examine new evidence presented by the asylum seeker that are likely to demonstrate in a certain way the well-founded character of the claim. [...] Therefore, the condition that the new evidence should find a basis in the procedural file may allow to exclude only evidence which is not related in any way to the fears expressed in the asylum application and during the administrative review thereof.*”¹³⁰

In the *Singh* case the ECHR ruled that the new documents submitted by the applicants to the Council were significant, important and credible. However, the examination of these documents was overshadowed by the examination of the applicants’ credibility and the doubts as to the sincerity of their statements. The Council gave no weight to these documents on the ground that they were easily falsified and that the applicants had not provided the originals. The ECHR concluded that the only important issue, whether the documents supported the allegations of risk in Afghanistan, has not been investigated by, for example, contacting the UNHCR office in New Delhi. As a result, Articles 3 and 13 of the Convention had been breached.¹³¹

In this case, it is not so much the case-law of the Constitutional Court that has been condemned, but rather the behaviour of the asylum authorities. The judgment of the Constitutional Court is rather consistent with the considerations of the ECHR, but as the Constitutional Court exercises only an abstract control of the legislation, its case-law was not able to avoid each violation of the Convention in its application to particular cases.

3.4. The burqa ban cases

49. The Belgian Constitutional Court undoubtedly has influenced the case-law of the ECHR on the sensitive subject of the ban on the burqa.

50. After intense debates, both in Parliament and in the media, the Belgian legislator adopted the law of 1 June 2011 to prohibit the wearing of any clothing concealing totally or mainly the face. The violation of this prohibition is punishable by “a fine of fifteen euros to twenty-five euros and imprisonment from one day to seven days or one of these penalties only”. According to

the preparatory works, this law was intended to prohibit the wearing, in the public space, of any garment concealing the face in a complete or predominant way, insisting that this prohibition was not based solely on considerations of public order and security, but more fundamentally on social considerations, essential, according to the authors of the proposal, for “living together” in an emancipatory society and protecting the rights of everyone. The legislator considered that clothes totally or predominantly hiding the face also challenge us at the level of principle. A reference was made to the philosopher Levinas who felt that it is through the face that our humanity is appearing to the outside world. Several MPs also indicated that the burqa was “a shocking regression for women’s rights, freedoms and the equality of men and women”, “an attack on women’s human rights”, and “a symbol of submission”.

51. Several applicants brought actions for annulment of that law. There were Muslim applicants whose wish was to wear a burqa, but also atheist applicants who wanted to wear any garment without restriction.

The most important grounds of application were related to freedom of expression and freedom of religion. According to the applicants, the contested measure constituted a restriction on freedom of religion which does not meet the conditions of interference within the meaning of Article 9(2) of the Convention as interpreted in the ECHR’s case-law.

The Constitutional Court explained that “*clothing requirements may vary according to the time and place. However, certain limits may be imposed imperatively in public spaces. Not all behaviour can be authorized for the simple reason that it is justified by a religious motive. Freedom of expression and freedom of worship are indeed not absolute*”. The legislator has a certain margin of appreciation in imposing restrictions on these freedoms deemed to be necessary in the democratic society in which he exercises his powers.

The Constitutional Court accepted that the impugned law may interfere with the religious freedom of women who want to wear the full veil for religious reasons. But the impugned law pursued three legitimate aims, namely public security, equality between men and women, and a certain conception of “living together” in society. These objectives also fell within the category of those listed in Article 9(2) of the Convention: the maintenance of public safety, the defence and the protection of the rights and freedoms of others.

In order to examine the proportionality of the measure, the Court first referred to the law of 5 August 1992 on the functioning of the police, which empowers police officers to control the identity of any person if they have reasonable grounds to believe, based on their behaviour, material clues or circumstances of time and place, that they are being sought, that they have attempted or are planning to commit an offense, that they might disturb public

¹³⁰ C.C. n° 148/2008, 30 October 2008.

¹³¹ ECHR, 2 October 2012, *Singh e.a. v. Belgium*.

order or have done so. According to the Court, “this identity check could be impeded if the person concerned had a hidden face and refused to cooperate in case of such a control. In addition, persons with concealed faces would generally not be recognizable at all or with difficulty if they committed offenses or disturbed public order”. To the applicants’ argument that the number of burqas in Belgian society is very limited, it was answered that “it is not because behaviour has not yet reached a scale to put at risk public order or security that the legislator would not be allowed to intervene. The legislator cannot be criticized for anticipating such a risk in good time by repressing behaviour when it is established that the spread of such risks would entail a real danger”.

Secondly, the Court examined the concept of “living together” in a society based on fundamental values, as proposed by the legislator. The Court held that “the individuality of any subject of law in a democratic society cannot be conceived without the perception of its face, which constitutes a fundamental element. In view of the essential values which it intends to defend, the legislator has been able to consider that circulation in the public sphere, which concerns in essence the collectivity, of persons whose fundamental element of individuality does not appear, makes it impossible to establish human relationships essential to a life in a society. If pluralism and democracy imply the freedom to manifest one’s convictions, especially by wearing religious symbols, the state must take care of the conditions under which these signs are carried and the consequences that the wearing of these signs may have. Since the concealment of the face has the effect of depriving the legal subject, a member of society, of any possibility of individualisation by the face, whereas this individualisation constitutes a fundamental condition related to the very essence of the society, the prohibition to wear in places accessible to the public such clothing, even if it is an expression of religious conviction, pursues a pressing social need in a democratic society”.

Thirdly, the Court examined the equality between men and women, in relation to the argument of the legislator that some women were forced to wear burqas. According to the Court, “the legislator may have considered that the fundamental values of a democratic society preclude women from being forced to hide their faces under the pressure of family members or their community and thus be deprived, against their will, of their freedom to decide for themselves. However, as is the case for [some] applicants, the wearing of the full veil may correspond to the expression of a religious choice. This choice can be guided by various motivations with multiple symbolic meanings. Even when the wearing of the full veil is the result of a deliberate choice on the part of the woman, gender equality, which the legislator rightly regards

as a fundamental value of the democratic society, justifies the state being able to oppose, in the public sphere, the manifestation of a religious belief by a behaviour that cannot be reconciled with this principle of equality between men and women. The wearing of an integral veil concealing the private face prohibits the woman, the only beneficiary of this belief, a fundamental element of her individuality, essential to life in society and the establishment of social ties”.

The Court had yet to consider whether the use of a criminal sanction to ensure compliance with the prohibition provided for by law did not have disproportionate effects in relation to the aims pursued. In this regard the Court applied its case-law according to which “where the legislator considers that certain breaches must be repressed, it is within its discretion to decide whether it is expedient to adopt criminal sanctions *sensu stricto* or administrative sanctions”. Moreover, in view of the disparities between the municipalities and the differences of case-law that have emerged in this area, the legislator may have considered that it was necessary to ensure legal certainty by making uniform the sanction imposed when wearing a clothing concealing the face in places accessible to the public. The most essential argument, however, was that “since the individualisation of persons whose face is a fundamental element is an essential condition for the functioning of a democratic society in which each member is a subject of law, the legislator could have considered that hiding one’s face could jeopardize the functioning of the society thus conceived and should, therefore, be criminally repressed”. Nevertheless, the Court formulated an important interpretation: the penal sanction cannot be applied for wearing of a full veil in places intended for worship. The wearing of clothes corresponding to the expression of a religious choice, such as the veil that fully covers the face in such places, could not be restricted without disproportionately affecting the freedom to manifest one’s religious beliefs.

Subject to this interpretation, the applicants’ pleas were rejected and the Court thus found that the ban on the wearing of any clothing that conceals the face in a complete or predominant manner is constitutional.¹³²

52. This judgment of the Belgian Constitutional Court was approved by the ECHR in its judgment *S.A.S. v. France* of 1 July 2014. In this judgment the ECHR amply quotes from the judgment of the Belgian Constitutional Court. This may probably be explained by the intervention of the Belgian government in this case.

According to the ECHR, however, public security or safety does not constitute a justification: “in view of its impact on the rights of women who wish

¹³² C.C. n° 145/2012, 6 December 2012.

to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety’.

The only legitimate goal is the concept of “living together” as part of “the protection of the rights and freedoms of others”. The ECHR accepts that France considers that “*face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of “living together” and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.*” The ECHR also accepts the proportionality of the interference, since French law does not affect the freedom to wear in public space any clothing or an element of clothing that does not have the effect of concealing the face, and that the prohibition of wearing the full veil in the public space is not based on religious animus. Finally, “*in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight*”.

This case shows the reciprocity of the dialogue between the high courts. The Constitutional Court amply quoted the Strasbourg jurisprudence in its judgment and applied it in a conscious manner, and afterwards the European Court referred to this Belgian judgment to justify a similar prohibition in another Member State of the Council of Europe.

53. A few years later the ECHR also had the opportunity to examine the Belgian ban. The applicants had not been punished under the Burqa Law but on the basis of the municipal regulations containing similar prohibitions. As in the case of *S.A.S.*, it was only the concept of “living together” that was accepted by the Court as a legitimate aim. Recalling its subsidiary role, the Court reiterates that State authorities are in principle better placed than the international judge to assess local needs and circumstances. It relied on the judgment of the Constitutional Court, noting that the legislator had wanted to prohibit a practice considered incompatible with the terms of social communication and the establishment of human relationships essential to life in society. It is therefore a societal choice. The Court must

therefore exercise restraint in the exercise of its control of compatibility with the Convention, as it leads it to evaluate decision-making carried out according to democratic methods within Belgian society. Indeed, the Court notes that “*the decision-making process [...] lasted several years and was marked by a wide debate within the House of Representatives as well as by a detailed and complete examination of all the interests at stake by the Constitutional Court*”. After these remarks, which concern mainly the law subsequent to the municipal regulations in question, the Court concludes that these regulations may be considered proportionate to the aim pursued, given the extent of the margin of appreciation available to Belgium.¹³³ It is interesting to note that the ECHR thus confines itself to an abstract review of the regulation in question, without examining *in concreto* the application of these principles in the individual cases.

3.5. Conclusion

54. If the wish of the Belgian Constitutional Court is to enter into a dialogue with the ECHR, it cannot opt for a direct dialogue, since Belgium has not yet ratified Protocol No. 16. On the other hand, indirect dialogue does not yet take place in a dialectical way. While the Constitutional Court systematically applies Strasbourg jurisprudence, the references to the Constitutional Court in the jurisprudence of the ECHR are rather fewer. Most of these references are only of documentary interest, and the judgments mentioned are not always directly related to the issue to be resolved by the ECHR. There is only one case in which the Constitutional Court has really been able to influence the Strasbourg case-law. On the other hand, there are some cases in which the ECHR has disavowed a judgment of the Constitutional Court. There are also some cases in which the Constitutional Court was in line with the conclusions of the ECHR, but in which its case-law could not avoid or eliminate the violation of human rights in the case of the applicant.

4. The general conclusion

55. Neither the dialogue of the Belgian Constitutional Court with the CJEU nor its dialogue with the ECHR fulfils the six Habermas’ requirements for a genuine dialogue. The possibility of dialogue with the CJEU is guaranteed by the preliminary ruling procedure, which does not yet exist in Belgium to initiate a direct dialogue with the ECHR. The dialogue with the CJEU implies, on

¹³³ ECHR, 11 July 2017, *Belkacemi and Oussar v. Belgium*; ECHR, 11 July 2017, *Dakir v. Belgium*.

the one hand, a total implementation of its response judgments and, on the other hand, the fact that the CJEU does not deviate from the principles of primacy, effectiveness and uniform application of the law of the European Union, even if they limit the freedom of action of constitutional courts.

When a constitutional court wants to influence the case-law of the European courts, it can do so by convincingly criticizing judgments of these courts. So far, the Belgian Constitutional Court has not chosen to follow this approach. On the contrary, it mentions the Strasbourg and Luxembourg judgments in order to apply them.

When a constitutional court influences the jurisprudence of European courts, this does not always appear clearly from their judgments. In fact, the CJEU does not refer to national judgments, and the ECHR often does so only in the statement of facts, without referring back to them in the legal assessment of the case. In this context, one can only welcome the initiatives taken by both the ECHR and the CJEU to establish networks for exchange of documents with the highest national courts.¹³⁴ As these must feed the national part of their databases, an official method now exists to communicate a judgment that can initiate a dialogue.

¹³⁴ These are “Réseau des cours supérieures” / “Superior Courts Network” (<https://www.echr.coe.int/Pages/home.aspx?p=court/network&c=fre>) (see *supra*, n° 40) and “Réseau judiciaire de l’Union européenne” / “Judicial Network of the European Union”.



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L’influence de la Cour constitutionnelle belge sur la Cour européenne des droits de l’homme et sur la Cour de justice de l’Union européenne

Introduction

1. L’influence d’une Cour sur une autre est souvent traitée en utilisant la terminologie du « dialogue ». D’après Habermas,¹ un vrai dialogue nécessite six conditions :

- (I) l’existence d’une différence d’opinion ou d’intérêts conflictuels ;
- (II) un terrain d’entente entre les parties en litige;
- (III) l’absence totale d’autorité vis-à-vis de l’autre (« *herrschaftsfreie Kommunikation* »);
- (IV) la reconnaissance et le respect mutuels;
- (V) la possibilité identique de participer;
- (VI) la continuité du dialogue.

Cette terminologie a été appliquée aussi au dialogue entre les juges nationaux et supranationaux en Europe, surtout en matière de droits de l’homme.² Le but est de montrer, avec la Cour constitutionnelle belge comme

¹ J. Habermas, *Theorie des kommunikativen Handelns*, Suhrkamp, 1981.

² A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication*, Oxford, OUP, 2009, 118-130.

exemple, que les conditions précitées devraient s'appliquer dans la relation entre les cours constitutionnelles et les deux cours supranationales, la Cour de justice de l'Union européenne (CJUE) et la Cour européenne des droits de l'homme (CEDH), mais que ces conditions ne sont pas toujours remplies.

1. La langue du dialogue : l'application du droit européen et de la Convention par la Cour constitutionnelle belge

2. Un vrai dialogue entre une cour nationale et une juridiction supranationale requiert, selon Habermas, un « terrain d'entente », ou autrement dit l'usage d'un langage commun qui permette aux deux discutants de se comprendre. Cela ne pose pas de grands problèmes, puisque tant les cours constitutionnelles que la CJUE et la CEDH opèrent dans la culture juridique européenne et ont le souci de protéger les droits fondamentaux.³ En ce qui concerne la Cour constitutionnelle belge, l'aspect du langage commun est encore plus apparent, puisqu'elle applique régulièrement des normes supranationales ainsi que la jurisprudence de la CJUE et de la CEDH.

3. Ce regard vers le droit international et supranational n'est pourtant pas évident, puisque l'article 142 de la Constitution et la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle n'habilitent la Cour qu'à exercer un contrôle direct des normes législatives au regard des normes répartitrices de compétences et des droits fondamentaux garantis par le Titre II et les articles 170, 172 et 191 de la Constitution. La Cour n'est donc pas compétente pour contrôler la législation au regard du droit européen et international. Au contraire, le Constituant a voulu maintenir le contrôle diffus de conventionnalité réservé par la Cour de cassation aux cours et tribunaux et au juge administratif.⁴ Un contrôle direct de conventionnalité par la Cour constitutionnelle nécessiterait une révision de la Constitution.⁵

³ A. Torres Pérez, *o.c.*, 121-123.

⁴ Cass. 27 mai 1971, *Fromagerie Franco-Suisse Le Ski*, J.T. 1971, 460, concl. W.J. Ganshof Van der Meersch. V. *Doc. parl.* Sénat, 1979-1980, n° 435/1, 11 et 39 et l'annexe, 5-7 ; *Doc. parl.* Sénat, 1988-1989, n° 483/2, 44 et 59 ; *Doc. parl.* Sénat, 2000-2001, n° 897/6, 14. V. à ce sujet P. Popelier, *Procederen voor het Grondwettelijk Hof*, Anvers, Intersentia, 2008, 136 ; M.-F. Rigaux et B. Renauld, *La Cour constitutionnelle*, Bruxelles, Bruylant, 2008, 99 ; M. Verdussen, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, 123-125.

⁵ Une telle révision était envisagée en 2003, mais l'article 32bis de la Constitution proposé n'a pas été adopté (*Doc. Parl.* Sénat, 2000-2001, n° 2-575/1 et n° 2-897/1 ; *id.*, 2002-2003, n° 2-897/6 ; v. J. Theunis et A. Vandaele, « De (geplande) wijzigingen inzake de bevoegdheid en de werking van het Arbitragehof », in A. Alen (éd.), *De vijfde Staatshervorming van 2001*, Bruges, die Keure, 2002, 277-305).

La Cour constitutionnelle a cependant développé deux techniques afin de contrôler *indirectement* la législation au regard du droit européen et international. Ce contrôle indirect implique que la Cour constitutionnelle fait usage, en tant que norme de référence formelle, d'une norme au regard de laquelle elle peut exercer un contrôle direct, mais qu'elle interprète cette norme de référence formelle en combinaison avec une norme de droit européen ou international au regard de laquelle elle ne peut pas exercer un contrôle direct. Grâce à ces deux techniques, un contrôle *de facto* au regard du droit européen et international par la Cour constitutionnelle est possible.⁶

1.1. Le contrôle par le biais des articles 10 et 11 de la Constitution

4. Dans son arrêt *Biorim*, la Cour constitutionnelle a considéré que les articles 10 et 11 de la Constitution interdisent « toute discrimination, quelle que soit son origine ». Par conséquent, la Cour peut constater une violation du principe d'égalité et de non-discrimination lorsque le législateur établit une distinction injustifiée en mettant en œuvre les obligations qui reposent sur lui en vertu d'autres normes juridiques supérieures. Ces normes de référence indirectes sont les dispositions constitutionnelles au regard desquelles la Cour ne peut pas exercer un contrôle direct⁸, les principes généraux du droit non écrits⁹ et le droit européen ou international.¹⁰

⁶ A. Alen, J. Spreutels, E. Peremans et W. Verrijdt, « Cour constitutionnelle de Belgique », in R. Huppmann et R. Schnabl (éds.), *La coopération entre les Cours constitutionnelles en Europe. Situation actuelle et perspectives*, Vienne, Verlag Österreich, 295-303.

⁷ C.C. n° 23/89, 13 octobre 1989. Depuis 1993, cette technique est formulée comme suit : « Les articles 10 et 11 de la Constitution ont une portée générale. Ils interdisent toute discrimination, quelle qu'en soit l'origine : les règles constitutionnelles d'égalité et de non-discrimination sont applicables à l'égard de tous les droits et de toutes les libertés reconnus aux Belges, en ce compris ceux résultant des conventions internationales liant la Belgique [...] » (C.C. n° 62/93, 15 juillet 1993).

⁸ Par exemple, après l'arrêt *Biorim*, C.C., n° 14/97, 18 mars 1997 ; C.C. n° 81/95, 14 décembre 1995 ; C.C. n° 34/96, 15 mai 1996 ; C.C. n° 17/97, 25 mars 1997 ; C.C. n° 122/98, 3 décembre 1998, etc.

⁹ C.C. n° 72/92, 18 novembre 1992 (les droits de la défense) ; C.C. n° 49/96, 12 juillet 1996 (le principe de la sécurité juridique) ; C.C. n° 46/2000, 3 mai 2000 (le secret professionnel de l'avocat) ; C.C. n° 43/2001, 29 mars 2001 (le caractère personnel de la peine) ; C.C. n° 107/2004, 16 juin 2004 (le respect des attentes légitimes) ; C.C. n° 154/2004, 22 septembre 2004 (l'accès au juge) ; C.C. n° 138/2006, 14 septembre 2006 (le contrôle du juge sur les sanctions administratives) ; C.C. n° 81/2007, 7 juin 2007 (la proportionnalité de la peine), etc.

¹⁰ C.C. n° 18/90, 23 mai 1990 ; C.C. n° 57/93, 8 juillet 1993 ; C.C. n° 62/93, 15 juillet 1993 ; C.C. n° 122/98, 3 décembre 1998 ; C.C. n° 105/2000, 25 octobre 2000, etc.

Lorsque la Cour exerce un contrôle au regard des articles 10 et 11 de la Constitution, lus en combinaison avec les conventions relatives aux droits de l'homme, elle inclut dans son contrôle les critères en vertu desquels des restrictions peuvent être apportées aux droits et libertés consacrés par ces conventions.¹¹

5. La jurisprudence ultérieure de la Cour constitutionnelle a montré que les traités internationaux ou le droit de l'Union européenne peuvent figurer comme normes indirectes de référence, même si elles n'ont pas d'effet direct dans l'ordre interne : il suffit que ces normes lient la Belgique.¹²

De même, il n'est pas requis que ces traités ou ces normes de droit de l'Union européenne confèrent des droits ou libertés. La Cour exerce souvent un contrôle indirect au regard d'obligations internationales ou supranationales qui ne contiennent pas de droits fondamentaux, comme les directives de l'Union européenne.¹³ En effet, les articles 10 et 11 de la Constitution interdisent toute discrimination, et pas seulement les discriminations qui portent sur les droits fondamentaux.

Les parties en cause doivent par contre prouver que la prétendue violation du droit européen ou international crée une distinction entre des catégories de personnes. Sinon, la Cour n'exercerait plus un contrôle indirect via les articles 10 et 11 de la Constitution.¹⁴ Cependant, dans la pratique, la Cour constitutionnelle fait preuve d'une grande souplesse et admet presque toujours le lien avec le principe d'égalité et de non-discrimination. Pour les droits fondamentaux ou d'autres garanties fondamentales, le lien avec les articles 10 et 11 de la Constitution consiste en ce qu'une différence de traitement est instaurée en privant une catégorie de personnes d'une garantie, alors que cette garantie s'applique à toute autre personne.¹⁵ Pour ce qui est du droit européen, la Cour a déjà jugé qu'une disposition législative qui est contraire à la libre circulation des biens et des services est, *ipso facto*, contraire au principe d'égalité et de non-discrimination parce qu'une telle mesure lèse les producteurs ou prestataires de services d'autres États membres en ce qui concerne l'accès au marché belge.¹⁶ Même si les directives européennes contiennent uniquement

des prescriptions de forme, la Cour les combine avec le principe d'égalité et de non-discrimination.¹⁷

6. Il résulte de ce qui précède que, bien que les articles 10 et 11 de la Constitution soient les normes de référence « officielles », ce sont souvent les normes de référence indirectes qui constituent les normes de contrôle les plus pertinentes. En effet, ces normes de référence indirectes donnent un contenu normatif au principe d'égalité et de non-discrimination qui, en soi, n'est qu'une coquille vide.¹⁸ Un contrôle au regard du droit européen et international par le biais des articles 10 et 11 de la Constitution aboutit dès lors souvent, quant au fond, à une solution identique à celle qui découlerait d'un contrôle direct. Ces dispositions constitutionnelles ne constituent donc qu'un détournement nécessaire, qui complique la tâche des avocats et allonge la motivation des arrêts, mais qui est plutôt indifférent quant au contenu.¹⁹

1.2. Le contrôle par le biais des droits fondamentaux « analogues »

7. L'extension des compétences de la Cour constitutionnelle en 2003 visait, en ce qui concerne le contrôle du respect des droits fondamentaux garantis par la Constitution, à remédier aux difficultés provoquées par le détournement *via* les articles 10 et 11 de la Constitution.²⁰ C'est pourquoi la loi spéciale du 9 mars 2003 a rendu possible un contrôle direct au regard des droits fondamentaux garantis par le Titre II et les articles 170, 172 et 191 de la Constitution. Dans son arrêt n° 136/2004, la Cour a constaté que de nombreux droits fondamentaux qui sont consacrés par la Constitution ont un équivalent dans un ou plusieurs traités internationaux. Dans ces cas, les dispositions constitutionnelles et les dispositions

¹⁷ C.C. nos 7/95 et 8/95, 2 février 1995; C.C. n° 94/2003, 2 juillet 2003 ; C.C. n° 149/2010, 22 décembre 2010.

¹⁸ P. Martens, « L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur la Cour constitutionnelle », *CDPK* 2010, 351.

¹⁹ R. Ergec, « La Cour constitutionnelle belge et le droit européen », in A. De Walsche et L. Levy (éds.), *Mélanges en hommage à Georges Vandersanden. Promenades au sein du droit européen*, Bruxelles, Bruylant, 2008, 172 ; P. Martens et B. Renauld, « L'interprétation et la qualification de la norme de contrôle et de la norme contrôlée », in A. Arts e. a. (éds.), *Les rapports entre la Cour d'arbitrage, le Pouvoir judiciaire et le Conseil d'Etat*, Bruges, La Charte, 2006, 45 ; P. Vanden Heede et G. Goedertier, « De doorwerking van het internationaal recht in de rechtspraak van het Arbitragehof », in J. Wouters et D. Van Eeckhoutte (éds.), *Doorwerking van internationaal recht in de Belgische rechtsorde*, Anvers, Intersentia, 2006, 243 ; M. Verdussen, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, 129.

²⁰ *Doc.parl.* Sénat, 2000-2001, n° 2-897/1, 2. V. J. Theunis, « De toetsing door het Arbitragehof aan de grondrechten », in A. Alen et P. Lemmens (éds.), *Themis-Cahier Staatsrecht*, Bruges, die Keure, 2006, 29.

¹¹ C.C. n° 45/96, 12 juillet 1996 ; C.C. n° 124/2000, 29 novembre 2000, etc.

¹² C.C. n° 106/2003, 22 juillet 2003 ; C.C. n° 92/2004, 19 juillet 2004 ; C.C. n° 189/2004, 24 novembre 2004.

¹³ C.C. n° 105/2000, 25 octobre 2000.

¹⁴ C.C. n° 136/2000, 21 décembre 2000 ; P. Popelier, *op. cit.*, 140.

¹⁵ C.C. n° 29/2010, 18 mars 2010 ; A. Alen et K. Muylle, *Handboek van het Belgisch Staatsrecht*, Mechelen, Kluwer, 2011, 500-501.

¹⁶ C.C. n° 149/2010, 22 décembre 2010.

conventionnelles « analogues » constituent « un ensemble indissociable ».²¹ Par conséquent, lorsqu'elle exerce un contrôle au regard d'un droit fondamental du Titre II de la Constitution, la Cour doit « tenir compte »²² des dispositions de droit international qui garantissent des droits ou libertés analogues.²³ Il peut s'agir d'une analogie complète ou partielle.²⁴ Lorsque la Constitution ne garantit pas un droit fondamental analogue à un droit fondamental consacré par une disposition conventionnelle liant la Belgique, le détournement par les articles 10 et 11 de la Constitution reste nécessaire.²⁵

8. Le contrôle au regard des droits fondamentaux analogues a pour avantage principal que la Cour constitutionnelle peut appliquer la jurisprudence de la Cour européenne des droits de l'homme, ce qu'elle fait amplement. De cette manière, la Cour constitutionnelle peut donner aux dispositions constitutionnelles belges relatives aux droits fondamentaux, dont la plupart n'ont pas changé depuis 1831, une interprétation évolutive qui les fait correspondre à l'interprétation contemporaine de la Conv. EDH, du Pacte international relatif aux droits civils et politiques et de la Charte des droits fondamentaux de l'Union européenne. Le principe de la primauté de la protection juridique la plus étendue est ainsi respecté et l'on évite un conflit entre la jurisprudence constitutionnelle et la jurisprudence supranationale.²⁶

Un second avantage est que le contrôle précité maximise la protection juridique²⁷ : si tant un droit fondamental garanti par la Constitution que son équivalent dans une disposition conventionnelle sont en cause, la Cour

constitutionnelle exige, quant aux limitations, qu'il soit simultanément satisfait, d'une part, aux conditions restrictives formelles contenues dans la Constitution et, d'autre part, aux conditions restrictives matérielles contenues dans le traité concerné, en particulier la Conv. EDH. Un droit fondamental analogue ne peut donc être limité que s'il est satisfait à quatre conditions : (1) la restriction est prescrite - pour autant que la Constitution l'exige - par une disposition législative qui est en outre suffisamment précise et accessible; (2) elle correspond à un besoin social impérieux; (3) elle poursuit un objectif légitime; (4) les effets de la restriction sont proportionnés à cet objectif.²⁸

1.3. Avantages de l'attitude de la Cour constitutionnelle

9. La stratégie suivie par la Cour constitutionnelle a beaucoup d'avantages. D'abord, en ce qui concerne la diffusion du droit de l'Union européenne et de la Conv. EDH dans l'ordre juridique belge, l'autorité de la chose jugée des arrêts de la Cour constitutionnelle offre une protection renforcée contre le législateur. Une annulation, ayant des effets *ex tunc* et *erga omnes*, a comme conséquence que la disposition annulée ne peut plus être appliquée. Un arrêt rendu sur question préjudicielle a une autorité renforcée de la chose jugée *inter partes* : un tel arrêt lie la juridiction qui a posé la question préjudicielle ainsi que toute autre juridiction appelée à statuer dans la même affaire²⁹ et même toute juridiction appelée à se prononcer dans d'autres affaires ayant un même objet.³⁰

Ensuite, l'attitude de la Cour constitutionnelle tend à éviter que la Belgique soit condamnée par la CJUE sur la base d'une procédure en manquement intentée par la Commission si la législation belge est contraire au droit européen, ou par la CEDH si la législation belge entraînait des violations de la Conv. EDH. Bien que le développement du contrôle indirect ne trouve pas sa source dans la volonté d'éviter des condamnations, ce contrôle, qui englobe la mise en œuvre de la jurisprudence de Luxembourg et de Strasbourg, a déjà permis d'empêcher un certain nombre de condamnations. La Cour constitutionnelle soulève d'office des moyens déduits du droit de l'Union européenne³¹ et

²¹ V. G. Rosoux, *Vers une dématérialisation des droits fondamentaux ?*, Bruxelles, Bruylant, 2015, 135-183.

²² Cette formulation est prudente : la Cour ne dit pas qu'elle « applique » la disposition conventionnelle analogue, mais uniquement qu'elle « en tient compte » (P. Martens, *o.c.*, 351).

²³ C.C. n° 136/2004, 22 juillet 2004 ; v. ultérieurement notamment C.C. n° 162/2004, 20 octobre 2004 ; C.C. n° 189/2005, 14 décembre 2005 ; C.C. n° 71/2006, 10 mai 2006 ; C.C. n° 2/2008, 17 janvier 2008 ; C.C. n° 195/2009, 3 décembre 2009 ; C.C. n° 29/2010, 18 mars 2010 ; C.C. n° 23/2011, 10 février 2011, etc.

²⁴ Des exemples d'une analogie partielle sont l'article 16 de la Constitution et l'article 1er du Premier Protocole additionnel à la Conv. EDH ; l'article 13 de la Constitution et l'article 6 de la Conv. EDH ; les articles 12 et 14 de la Constitution et les articles 7 de la Conv. EDH et 15 du Pacte international relatif aux droits civils et politiques.

²⁵ A. Alen et K. Muylle, *o.c.*, 524. V. par exemple l'arrêt concernant la fouille au corps systématique de détenus : C.C. n° 20/2014, 29 janvier 2014 (article 3 de la Conv. EDH).

²⁶ A. Alen, K. Muylle et W. Verrijdt, « De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens », in A. Alen et J. Theunis (éds.), *Leuvense Staatsrechtelijke Standpunten 3: De Europese dimensie in het Belgische staatsrecht*, Brugge, die Keure, 2012, 22 ; M. Verdussen, *o.c.*, 126.

²⁷ V. cependant M. Verdussen, *o.c.*, 134-135, qui craint qu'après un certain temps, la Convention et la jurisprudence de la Cour européenne des droits de l'homme constitueront l'unique véritable standard, sans application de la protection constitutionnelle spécifique.

²⁸ C.C. n° 202/2004, 21 décembre 2004 ; A. Alen et K. Muylle, *o.c.*, 526 ; P. Vanden Heede et G. Goedertier, *o.c.*, 275-277.

²⁹ Article 28 de la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle.

³⁰ Article 26, § 2, alinéa 2, 2°, de la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle.

³¹ V. par exemple C.C. n° 97/2011, 31 mai 2011. Les parties requérantes avaient attaqué la validation législative d'un arrêté royal sur la base de l'article 6 de la Conv. EDH, mais la Cour a soulevé d'office que tant l'arrêté royal que la disposition législative étaient contraires à la deuxième directive sur l'électricité et que la Cour de justice avait déjà condamné la Belgique pour la même raison (CJUE 29 octobre 2009, *Commission c. Belgique*, C-474/08, point 29).

pose aussi d'office des questions préjudicielles.³² De même, elle applique la jurisprudence strasbourgeoise même si les parties n'y ont pas fait référence. Ces attitudes peuvent être considérées comme des tentatives destinées à prévenir des procédures en manquement ou des condamnations strasbourgeoises. Le constat en droit interne d'une violation du droit européen ou de la Conv. EDH est en effet préférable à la visibilité internationale d'une condamnation européenne, laquelle peut en outre entraîner des amendes importantes.

La relation souple qui existe entre les articles 10 et 11 de la Constitution et le droit de l'Union européenne s'explique, selon certains auteurs, par la volonté d'éviter que les justiciables belges soient lésés par rapport aux ressortissants d'autres États membres. En effet, si la Belgique est l'un des seuls États à méconnaître le droit européen, ce sont en premier lieu les ressortissants belges qui en supporteront les effets préjudiciables.³³ Un même raisonnement s'applique à la Conv. EDH : l'annulation d'une loi belge en raison de la violation de la Convention bénéficiera surtout aux ressortissants belges.

Un autre avantage se situe sur le plan des parties requérantes, qui ont entre-temps découvert en la Cour constitutionnelle « un juge de droit européen ».³⁴ C'est ainsi que le *Centre européen du consommateur*, dont fait partie *Test-Achats* et qui, en tant qu'association, est dans la quasi-impossibilité d'introduire un recours en annulation devant la Cour de justice, a choisi la Cour constitutionnelle belge comme intermédiaire pour soumettre à la Cour de justice une question de validité de la disposition d'une directive.³⁵ La procédure devant la Cour constitutionnelle belge se prête à de telles stratégies : elle combine en effet un contrôle indirect au regard du droit de l'Union européenne avec un droit d'accès aisé pour les groupements d'intérêts³⁶ et avec une autorité renforcée des arrêts finaux.

Le dernier avantage est le plus important dans le cadre de la présente contribution. L'attitude de la Cour constitutionnelle facilite en effet le dialogue

avec la CJUE et avec la CEDH. La Cour crée « le terrain d'entente », comme formulé par Habermas, en mentionnant tant les normes du droit de l'Union européenne que celles de la Conv. EDH, mais aussi en se référant à ou même en citant des arrêts luxembourgeois et strasbourgeois.³⁷ Ainsi, la Cour constitutionnelle veille à parler la langue des cours supranationales. Cette attitude peut aussi avoir pour conséquence que ses arrêts peuvent influencer les deux cours supranationales.

2. Influencer la CJUE : le dialogue direct et indirect

10. En ce qui concerne la CJUE, les tentatives visant à l'influencer peuvent prendre la forme d'un dialogue direct ou d'un dialogue indirect. Le dialogue direct est la procédure formalisée de la question préjudicielle.³⁸ Le dialogue indirect comprend chaque forme de dialogue en dehors de la technique de la question préjudicielle.

2.1. Les questions préjudicielles de la Cour constitutionnelle belge

11. La Cour constitutionnelle belge est une « juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne » au sens de l'article 267, alinéa 3, du TFUE. Elle est donc souvent obligée de poser des questions préjudicielles à la CJUE, en tenant compte de la jurisprudence *CILFIT*³⁹ et *Foto-Frost*⁴⁰ de la CJUE. En effet, une fois que la Cour constitutionnelle a choisi d'utiliser le droit de l'Union européenne comme norme indirecte de référence, il est évident qu'elle doit parfois interroger la Cour de justice, tandis qu'une cour constitutionnelle qui connaît une séparation

³² V. entre autres C.C. n° 149/2010 du 22 décembre 2010 ; C.C. n° 18/2013 du 21 février 2013. V. aussi l'arrêt *Bressol*, *infra*, n° 27. Dans cette affaire, la Commission avait d'abord entamé une procédure en manquement, qui avait ensuite été suspendue au motif que la Communauté française avait demandé un délai de cinq ans pour démontrer la nécessité du décret.

³³ P. Vanden Heede et G. Goedertier, *o.c.*, 264-265.

³⁴ Par exemple C.C. n° 145/2013, 7 novembre 2013.

³⁵ V. *infra*, n° 22.

³⁶ La Cour constitutionnelle apprécie en effet de manière très souple l'intérêt requis pour introduire un recours en annulation, notamment lorsqu'il s'agit d'une ASBL défendant un intérêt collectif. V. R. Ryckeboer, « De belangvereiste bij beroepen tot vernietiging bij het Arbitragehof inzonderheid wat betreft het collectief belang van verenigingen zonder winstoogmerk », in A. Alen (éd.), *Twintig jaar Arbitragehof*, Malines, Kluwer, 2005, 153-160 (aussi publié dans *TBP* 2005, 361-370).

³⁷ La Cour constitutionnelle a fait référence à la Conv. EDH dans 49 arrêts sur 201 en 2011, dans 38 sur 166 arrêts en 2012, dans 35 des 183 arrêts en 2013 et dans 55 des 191 arrêts en 2014. Dans la même période, la Cour a fait référence au droit de l'Union européenne dans 18 arrêts sur 201 en 2011, dans 14 des 166 arrêts en 2012, dans 18 des 183 arrêts en 2013 et dans 17 des 191 arrêts en 2014. Dans ces arrêts, la Cour applique presque toujours la jurisprudence de la CJUE : des arrêts luxembourgeois sont mentionnés dans 16 arrêts en 2011, dans 5 arrêts en 2012, dans 26 arrêts en 2013 et dans 18 arrêts en 2014. Les chiffres de 2013 et 2014 montrent que les références à la jurisprudence luxembourgeoise ne se limitent pas aux cas dans lesquels des normes de droit européen figurent comme norme de référence indirecte.

³⁸ V. en ce qui concerne le dialogue préjudiciel entre la Cour constitutionnelle belge et la CJUE A. Alen et W. Verrijdt, « Le dialogue préjudiciel de la Cour constitutionnelle belge avec la Cour de justice de l'Union européenne », in D. Renders, M. Verdussen et P. D'Argent (éds.), *Les visages de l'Etat. Liber amicorum Yves Lejeune*, Bruxelles, Bruylant, 2017, 33-74.

³⁹ CJUE 6 octobre 1982, *CILFIT*, 283/81.

⁴⁰ CJUE 22 octobre 1987, *Foto-Frost*, 314/85.

étanche entre le contrôle de constitutionnalité et le contrôle de conventionnalité n'a pas souvent l'opportunité de poser des questions préjudicielles. Ainsi, une des conditions pour un vrai dialogue identifiées par Habermas est sans doute atteinte, à savoir la possibilité identique de participer.

12. La Cour constitutionnelle fait preuve de la volonté de participer à ce type de dialogue. Jusqu'à présent, la Cour constitutionnelle a déjà posé des questions préjudicielles dans 29 arrêts, totalisant 104 questions distinctes. Ce nombre de questions dépasse la totalité des questions préjudicielles posées par les autres cours constitutionnelles européennes. On peut aussi constater une accélération du dialogue avec la Cour de justice : 92 des 104 questions préjudicielles ont été posées dans les dix dernières années.

Les questions concernent tant l'interprétation du droit de l'Union européenne que la validité du droit européen dérivé, et elles sont posées soit d'office, soit après une suggestion d'une des parties en cause. De plus, les questions préjudicielles sont posées non seulement quand l'applicabilité du droit de l'Union européenne provient du devoir de transposition ou d'application d'un acte de droit européen dérivé, mais aussi quand son applicabilité est en cause suite à une restriction apportée à la libre circulation des personnes, des biens, des services ou des capitaux.

Une large majorité de dialogues préjudiciels avec la CJUE résulte d'un recours en annulation : 21 des 29 arrêts de renvoi (comprenant au total 70 des 104 questions préjudicielles) ont été rendus sur un recours en annulation, 7 (avec 23 questions préjudicielles) sur une question préjudicielle et 1 (comprenant 11 questions préjudicielles) dans une affaire complexe dans laquelle des recours en annulation et des questions préjudicielles avaient été joints. La raison pour laquelle la Cour constitutionnelle renvoie peu de questions préjudicielles à la CJUE dans le cadre du contentieux préjudiciel réside probablement dans le fait que les cours et tribunaux et le juge administratif sont eux-mêmes pleinement compétents pour examiner la législation formelle au regard du droit de l'Union européenne et pour interroger dans ce cadre la Cour de justice.

2.2. Respect de l'obligation du renvoi préjudiciel

13. Si la Cour constitutionnelle refuse de poser une question préjudicielle suggérée par les parties en cause, elle motive ce refus par rapport aux critères utilisés dans la jurisprudence *CILFIT* ou *Foto-Frost*.⁴¹ Un manque

⁴¹ V. cependant pour une critique quant à la motivation de ces refus : E. Cloots, « Germs of pluralist judicial adjudication: Advocaten voor de Wereld and other references from the Belgian Constitutional Court », *CMLR* 2010, 654-655.

d'argumentation à cet égard pourrait d'ailleurs mener à une condamnation par la CEDH pour violation du droit d'accès à un juge, garanti par l'article 6 de la Conv. EDH, comme le montre une affaire concernant la Cour de cassation italienne.⁴²

La CEDH s'est prononcée à une occasion sur le refus de la Cour constitutionnelle belge de soumettre des questions préjudicielles à la Cour de justice. Dans l'affaire *Deurganckdok*, la Cour constitutionnelle avait en effet refusé dans deux arrêts de déférer des questions préjudicielles à la Cour de justice au motif que les questions d'interprétation soulevées étaient étrangères aux directives invoquées,⁴³ qu'elles concernaient davantage une affaire à porter devant la Commission et qu'elles avaient pour but d'étendre l'objet de l'affaire par rapport aux requêtes initiales.⁴⁴ Ces motifs étant liés à l'exception « CILFIT » relative au défaut de pertinence, la CEDH a jugé que l'article 6 de la Conv. EDH n'avait pas été violé en l'espèce.⁴⁵

2.3. Retard suite au dialogue préjudiciel

14. Le dialogue préjudiciel contient trois phases : l'arrêt de renvoi, l'arrêt de réponse et l'arrêt final. La somme de la durée de chaque phase est la durée totale de l'affaire. La somme des deux dernières phases est le délai causé par le dialogue préjudiciel ou la « perte de temps » suite à une question préjudicielle.

15. Dans les 29 arrêts de renvoi prononcés jusqu'à présent, la Cour a rendu son arrêt de renvoi, en moyenne, 13 mois après un recours en annulation ou une question préjudicielle. Le délai normal dans lequel la Cour devrait rendre ses arrêts est de 12 mois. Le dépassement de ce délai dans 16 des 29 dialogues préjudiciels montre qu'il s'agit souvent de dossiers complexes et sensibles.

Dans 24 affaires, la CJUE a déjà rendu un arrêt de réponse.⁴⁶ Dans ces affaires, l'examen par la CJUE a duré en moyenne 20 mois, avec comme record une affaire qui a nécessité 27 mois.⁴⁷

⁴² CEDH 8 avril 2014, *Dhahbi c. Italie*, §§ 31-34.

⁴³ Directives 79/409/CEE (directive concernant la conservation des oiseaux sauvages) et 92/43/CEE (directive concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages).

⁴⁴ C.C. n° 94/2003, 2 juillet 2003; C.C. n° 151/2003, 26 novembre 2003.

⁴⁵ CEDH (déc.), 10 avril 2012, *Vergauwen e.a. c. Belgique*, §§ 87-92.

⁴⁶ L'affaire dans laquelle la CJUE a répondu par une ordonnance puisqu'elle avait entretemps répondu aux questions dans une autre affaire, et l'affaire rayée du rôle par la CJUE parce qu'elle avait entretemps condamné la Belgique dans une procédure en manquement, ne sont pas prises en compte. La durée de ces affaires était respectivement de 10 et 5 mois.

⁴⁷ CJUE 17 mai 2017, *X c. Conseil des ministres*, C68/15.

Les 26 arrêts finaux ont, en moyenne, été rendus 6 mois après le prononcé de l'arrêt de réponse. Pourtant, la Cour rouvre toujours les débats pour permettre aux parties de se prononcer sur l'incidence de l'arrêt de la Cour de justice. La Cour constitutionnelle n'attend pas jusqu'à ce que l'arrêt de la Cour de justice lui soit transmis par la poste, mais elle reprend l'examen de l'affaire dès que l'arrêt de la Cour de justice est rendu et est disponible sur le site Internet de cette Cour.

Il en résulte que, dans les 26 dialogues préjudiciels clôturés par un arrêt final, la durée totale était de 40 mois en moyenne. Les parties requérantes ou les parties devant le juge *a quo* n'avaient pas toujours tenu compte de cette durée. L'affaire qui a pris le plus de temps a duré presque 58 mois,⁴⁸ bien qu'il s'agissait d'une affaire concernant l'accès à des études universitaires de 4 ans.⁴⁹

La durée réelle du dialogue préjudiciel dans ces affaires s'élevait en moyenne à 26 mois. Il faut pourtant noter que cette « perte de temps », découlant le plus souvent des obligations du droit de l'Union européenne, ne cause pas de problèmes en ce qui concerne le délai raisonnable. En effet, la CEDH ne prend pas en compte la procédure préjudicielle devant la CJUE pour apprécier le délai raisonnable d'une procédure devant les juridictions nationales.⁵⁰ Du point de vue du droit interne, il n'y a aucun problème non plus, puisque la durée maximale de 12 mois pour rendre un arrêt imposée par l'article 109 de la loi spéciale sur la Cour constitutionnelle n'est qu'un délai d'ordre. Il faut néanmoins envisager dans certains cas qu'il faille prendre des mesures conservatoires afin de garantir l'effectivité de l'arrêt final.

2.4. Influence sur la CJUE par le dialogue préjudiciel

16. Dans la plupart des cas, le dialogue préjudiciel n'a pas comme but ni comme effet d'influencer la CJUE, mais simplement de recevoir un arrêt de réponse sur une question d'interprétation ou de validité. Il y a cependant des affaires dans lesquelles la Cour constitutionnelle a essayé d'influencer la CJUE.

(I) Souligner la spécificité du fédéralisme belge

17. Une certaine doctrine belge suggère que la Cour constitutionnelle devrait utiliser le dialogue préjudiciel pour souligner la spécificité du fédéralisme

belge, afin d'inciter la CJUE à accorder à la Belgique plus de latitude par rapport à certaines obligations découlant du droit de l'Union européenne.⁵¹

18. La Cour constitutionnelle l'a tenté dans l'affaire concernant « l'assurance-soins flamande ». La question était de savoir si la Communauté flamande pouvait prévoir une aide et des services non médicaux pour des personnes ayant une capacité réduite d'autonomie et, notamment, en limitant ces avantages aux personnes domiciliées en Flandre. La Cour constitutionnelle a souligné dans son arrêt de renvoi l'importance de la répartition exclusive des compétences territoriales dans le fédéralisme belge, ce qui implique que toute relation ou situation concrète doit être réglée par un seul législateur et que la Cour doit vérifier si le critère de localisation d'une norme législative n'excède pas les compétences matérielles et territoriales du législateur concerné.⁵²

Dans son arrêt de réponse, la Cour de justice a souligné qu'elle ne se prononce pas sur des « situations purement internes » et qu'elle ne le ferait pas davantage par le détour de la citoyenneté de l'Union. Mais elle a ajouté immédiatement qu'il ne s'agit pas d'une situation interne si des personnes résidant dans une entité fédérée (par exemple dans la Région wallonne) et ayant, dans le passé, fait usage de leur droit de libre circulation dans un autre État Membre, travaillent dans une autre entité fédérée (en l'espèce en Flandre ou à Bruxelles-Capitale). Le fait qu'en vertu des règles fondamentales du fédéralisme belge, la Communauté flamande n'est pas compétente à l'égard des personnes qui n'habitent pas en Flandre n'a aucune importance à cet égard, étant donné que les États membres ne peuvent exciper de dispositions, pratiques ou situations de leur ordre juridique interne, y compris celles découlant de l'organisation constitutionnelle, pour justifier l'inobservation des obligations résultant du droit de l'Union européenne. Tant en ce qui concerne cette catégorie de personnes qu'en ce qui concerne les ressortissants d'un autre État membre qui travaillent en Flandre, la Cour de justice a jugé que leur exclusion de l'assurance-soins flamande, au motif qu'ils ne résidaient pas en Flandre, constituait une entrave injustifiée à la libre circulation des personnes.⁵³

Dans son arrêt final, la Cour constitutionnelle a appliqué cet arrêt en faisant la même distinction entre les situations régies par le droit de l'Union européenne et les situations purement internes. Pour la première catégorie de

⁴⁸ Le recours en annulation a été introduit le 7 août 2006. L'arrêt de renvoi était C.C. n° 12/2008 du 14 février 2008. L'arrêt de réponse était CJUE 13 avril 2010, *Bressol e.a. et Chaverot e.a.*, C-73/08. L'arrêt final était C.C. n° 89/2011 du 31 mai 2011.

⁴⁹ *V. infra*, n° 27.

⁵⁰ CEDH 26 février 1998, *Pafitis e.a. c. Grèce*, § 95; CEDH 24 avril 2008, *Mathy c. Belgique*, § 28.

⁵¹ E. Cloots, *o.c.*, 653-654; C. Van de Heyning, « Grondwettelijke conversaties: een meerwaarde voor de bescherming van fundamentele rechten », *TBP* 2012, 412-414.

⁵² C.C. n° 51/2006, 19 avril 2006, B.9.1-B.9.2.

⁵³ CJUE 1er avril 2008, *Gouvernement de la Communauté française et Gouvernement wallon contre Gouvernement flamand*, C-212/06.

situations, à laquelle appartiennent les personnes qui habitent dans une entité fédérée (en l'espèce dans la région de langue française ou allemande), qui ont fait usage de leur droit à la libre circulation et qui travaillent dans une autre entité fédérée (en l'espèce dans la région de langue néerlandaise ou dans la région bilingue de Bruxelles-Capitale), la Cour constitutionnelle a appliqué l'arrêt de la Cour de justice et a constaté une violation. En ce qui concerne la seconde catégorie de situations, à savoir les ressortissants belges qui n'ont jamais fait usage de leur droit à la libre circulation dans un autre État Membre, la Cour constitutionnelle a considéré que les articles 10 et 11 de la Constitution n'avaient pas été violés, eu égard aux spécificités de la répartition exclusive des compétences territoriales.⁵⁴

Il en résulte que cette tentative d'influencer la CJUE n'a pas eu le résultat prévu et que, par contre, le dialogue préjudiciel a amené la Cour constitutionnelle à nuancer un principe de base du fédéralisme belge.

19. Un dialogue préjudiciel d'un autre juge belge avec la CJUE a mené au même résultat. Un décret flamand dispose que chaque contrat de travail signé avec une entreprise localisée en Flandre doit être établi en néerlandais. Le Tribunal du travail d'Anvers avait demandé à la CJUE si cette règle violait le principe de libre circulation des travailleurs. L'État belge s'est défendu en faisant appel au principe de l'identité nationale avec l'argumentation que les aspects linguistiques sont des éléments clés du fédéralisme bipolaire belge et qu'ils restent une matière très sensible. Dans son arrêt de réponse, la CJUE a accepté que la politique belge qui vise à la défense et à la promotion d'une ou de plusieurs langues officielles puisse être qualifiée comme étant un élément d'identité nationale. Mais elle a aussi souligné qu'il appartient à la CJUE d'examiner la proportionnalité des mesures prises pour poursuivre cet élément d'identité nationale. *In casu*, elle a constaté une violation du principe de libre circulation des travailleurs, puisque les objectifs linguistiques invoqués peuvent être atteints par d'autres moyens moins attentatoires à la liberté de circulation : elle a suggéré que les contrats de travail soient établis tant en néerlandais qu'en la langue de l'employé.⁵⁵

(II) Le mandat d'arrêt européen

20. La Cour constitutionnelle a aussi essayé d'influencer la CJUE concernant la validité de la décision-cadre sur le mandat d'arrêt européen. C'était à ce moment-là une stratégie atypique, puisque plusieurs cours constitutionnelles

s'étaient déjà prononcées sur la constitutionnalité de (la transposition de) la décision-cadre sans poser des questions préjudicielles.⁵⁶

La Cour constitutionnelle voulait surtout savoir si la décision-cadre était compatible avec le principe de légalité en matière pénale et avec le principe d'égalité et de non-discrimination, dans la mesure où elle supprimait le contrôle de la double incrimination pour 32 catégories d'infractions.⁵⁷ Étant donné que ces infractions sont définies dans le droit de l'État membre d'émission du mandat d'arrêt, lequel doit respecter le principe de légalité en matière pénale, et étant donné que les catégories d'infractions concernées font partie de celles dont la gravité justifie que le contrôle de la double incrimination ne soit pas exigé, la Cour de justice a jugé que la décision-cadre était valide.⁵⁸

La Cour constitutionnelle s'est conformée à l'arrêt de réponse de la Cour de justice en rejetant le recours en annulation introduit contre la loi de transposition. Selon la Cour, « la motivation de l'arrêt de la Cour de justice concernant la décision-cadre 2002/584/JAI vaut également mutatis mutandis à l'égard de la loi du 19 décembre 2003 qui met en œuvre en droit belge la décision-cadre précitée ». ⁵⁹

La Cour constitutionnelle a toutefois précisé, comme réserve d'interprétation, que le juge, en tenant compte des circonstances concrètes de chaque situation, doit refuser l'exécution d'un mandat d'arrêt européen s'il y a des raisons sérieuses de croire que l'exécution du mandat aurait pour effet de porter atteinte aux droits fondamentaux de la personne concernée.⁶⁰ La CJUE n'a nuancé sa jurisprudence que plus tard.⁶¹

21. Même après ce dialogue préjudiciel, le mandat d'arrêt européen reste une source de conflits constitutionnels, comme l'illustre d'ailleurs le fait que cette décision-cadre a donné lieu à la première question préjudicielle tant du Conseil constitutionnel français⁶² que du *Tribunal Constitucional* espagnol.⁶³

⁵⁶ D. Sarmiento, « European Union: The European Arrest Warrant and the quest for constitutional coherence », *I-Con* 2008, 171-183.

⁵⁷ C.C. n° 124/2005, 13 juillet 2005.

⁵⁸ CJUE 3 mai 2007, *Advocaten voor de Wereld VZW*, C-303/05.

⁵⁹ C.C. n° 128/2007, 10 octobre 2007, B.16.

⁶⁰ *Ibid.*, B.20.

⁶¹ CJUE 5 avril 2016, *Aranyosi*, C-404/15 ; CJUE 5 avril 2016, *Căldăraru*, C-659/15 PPU.

⁶² Conseil constitutionnel Déc. N° 2013-314 QPC, 4 avril 2013, *Jeremy F. c. Premier ministre* ; v. A. Dyèvre, « If You Can't Beat Them, Join Them », *EuConst* 2014, 154-161.

⁶³ Tribunal Constitucional (ATC 86/2011, 9 juin 2011) Cet arrêt a donné lieu à l'important arrêt *Melloni* de la Cour de justice (CJUE 26 février 2013, *Melloni*, C-399/11) ; v. A. Torres Pérez, « Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's door », *EuConst* 2012, 105-127. V. aussi *infra*, n° 29.

⁵⁴ C.C. n° 11/2009, 21 janvier 2009.

⁵⁵ CJUE 16 avril 2013, *Anton Las*, C-202/11, points 26 et 32.

(III) L'égalité entre hommes et femmes dans les contrats d'assurance

22. Une affaire dans laquelle la Cour constitutionnelle belge a réussi à influencer la CJUE et qui a eu des conséquences significatives pour l'ordre juridique européen est l'affaire *Test-Achats*.

Une directive⁶⁴ interdisant les discriminations entre hommes et femmes dans l'accès à des biens et services, contenait une exception pour les contrats d'assurance : pour autant qu'il y ait des différences objectives entre hommes et femmes, les législateurs nationaux pouvaient créer une différence de traitement. Le législateur belge a utilisé cette possibilité en autorisant les compagnies d'assurance à demander aux hommes une prime plus élevée d'assurance-vie, au motif que les femmes ont, en moyenne, une espérance de vie légèrement supérieure. Le centre de protection des consommateurs *Test-Achats* a attaqué cette disposition légale devant la Cour constitutionnelle, mais le véritable but de l'action était de soumettre la disposition de la directive au contrôle de la CJUE.

Saisie par une question préjudicielle de la Cour constitutionnelle,⁶⁵ la Cour de justice a jugé que la possibilité prévue par la directive violait les articles 21 et 23 de la Charte des droits fondamentaux de l'Union européenne, qui interdisent toute discrimination fondée sur le sexe et qui garantissent l'égalité entre les femmes et les hommes dans tous les domaines.⁶⁶ La Cour de justice a ainsi précisé qu'une distinction entre hommes et femmes est difficilement compatible avec le principe d'égalité.

Enfin, la Cour constitutionnelle a annulé la loi de transposition pour violation des articles 10, 11 et 11*bis* de la Constitution, combinés avec notamment les articles 21 et 23 de la Charte, après avoir cité intégralement l'argumentation développée par la Cour de justice.⁶⁷

2.5. Influence sur la CJUE en dehors du dialogue préjudiciel

23. Le dialogue indirect avec la CJUE semble être une stratégie plutôt inefficace. En effet, il suppose que la CJUE prenne connaissance de toute la jurisprudence des hautes cours nationales, ce qui n'est probablement pas

le cas. Néanmoins, certains arrêts de la Cour constitutionnelle font preuve d'une ambition d'influencer la CJUE sans poser une question préjudicielle.

(I) La continuation indirecte d'un dialogue direct

24. Dans le dialogue préjudiciel, l'arrêt de renvoi et l'arrêt de réponse constituent certainement des étapes dans un dialogue direct, puisque ces arrêts sont destinés à la juridiction avec laquelle le dialogue est mené. Ceci n'est pas le cas de l'arrêt final dans la même affaire, qui a surtout pour objectif de terminer l'affaire en cause. Si la Cour constitutionnelle n'est pas d'accord avec la réponse, elle est quand même obligée de l'appliquer de manière loyale, mais elle peut en même temps faire valoir les arguments pour lesquels elle n'est pas d'accord avec l'arrêt de réponse. Ceci constitue la poursuite indirecte d'un dialogue direct, et cette stratégie a pour but d'influencer la jurisprudence ultérieure de la CJUE. Cette approche concilie l'obligation juridique de respecter et de mettre en œuvre de manière loyale les arrêts de réponse avec une autre condition exigée par Habermas pour un vrai dialogue, à savoir sa continuité dans le temps. Quoi qu'il en soit, force est de constater que la Cour constitutionnelle a déjà utilisé cette approche du prolongement du dialogue à trois reprises.

25. La première fois, déjà mentionnée, concerne le mandat d'arrêt européen. En effet, la Cour constitutionnelle a ajouté à la réponse de la CJUE que le juge doit refuser l'exécution d'un mandat d'arrêt européen s'il y a des raisons sérieuses de croire que l'exécution du mandat aurait pour effet de porter atteinte aux droits fondamentaux de la personne concernée.⁶⁸

Cet exemple montre aussi qu'on ne peut jamais être sûr qu'une modification ultérieure dans la jurisprudence luxembourgeoise est vraiment la conséquence de ce type de dialogue indirect. La CJUE a à son tour développé une jurisprudence qui exige du juge de refuser l'exécution d'un mandat d'arrêt si le risque de violation des droits de l'homme est trop grand, par exemple si les conditions des prisons dans l'Etat d'émission sont méprisables.⁶⁹ Mais étant donné que les arrêts de la CJUE ne contiennent pas de références à des arrêts des cours nationales, l'on ne peut jamais savoir quel juge a inspiré le revirement de jurisprudence de la CJUE. Ceci est surtout le cas quand, comme dans les affaires *Aranyosi* et *Căldăraru*, l'avocat général avait conclu dans l'autre sens.

⁶⁸ V. *supra*, n° 20.

⁶⁹ CJUE 5 avril 2016, *Aranyosi*, C-404/15 ; CJUE 5 avril 2016, *Căldăraru*, C-659/15 PPU.

⁶⁴ Directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en œuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et services et la fourniture de biens et services.

⁶⁵ C.C. n° 103/2009, 18 juin 2009.

⁶⁶ CJUE 1er mars 2011, *Association belge des Consommateurs Test-Achats e.a.*, C-236/09, points 30-34 (à partir du 21 décembre 2012).

⁶⁷ C.C. n° 116/2011, 30 juin 2011.

26. La deuxième fois que la Cour constitutionnelle a utilisé cette approche du prolongement du dialogue concerne la directive sur le blanchiment d'argent.⁷⁰ Afin de transposer cette directive, le législateur belge avait étendu aux avocats l'obligation d'information relative aux transactions suspectes. Certains Ordres des barreaux soutenaient devant la Cour constitutionnelle que cette obligation était contraire aux principes du secret professionnel et de l'indépendance de l'avocat et de la confidentialité qui régit la concertation entre l'avocat et son client.

Conformément à la jurisprudence *Foto-Frost*, la Cour constitutionnelle a renvoyé cette question à la Cour de justice, en ne mentionnant toutefois que l'article 6 de la Conv. EDH comme norme de référence, alors que les parties requérantes avaient également invoqué la violation de l'article 8 de la Conv. EDH.⁷¹ La Cour de justice n'a constaté aucune violation.⁷² Dans son arrêt final, la Cour constitutionnelle a néanmoins imposé certaines interprétations conformes à la Convention, fût-ce sur la base d'un contrôle effectué aussi au regard de l'article 8 de la Conv. EDH.⁷³

D'après un auteur, la Cour constitutionnelle est allée plus loin que la Cour de justice.⁷⁴ En réalité, la Cour constitutionnelle a suivi la décision de la Cour de justice relative à l'article 6 de la Conv. EDH, mais elle a, en plus, comme l'avait suggéré l'avocat général Poiares Maduro dans ses conclusions, associé l'article 8 de la Conv. EDH, lu en combinaison avec l'article 22 de la Constitution, à l'examen de la loi de transposition.

Cependant, il aurait été plus cohérent d'associer la CJUE en posant une nouvelle question préjudicielle sur cet aspect. Le dialogue aurait donc mieux été poursuivi de manière directe au lieu de l'être de manière indirecte.

27. Le troisième cas concerne l'accès à l'enseignement supérieur. La Communauté française avait imposé un *numerus clausus* pour l'accès à certains cursus (para)médicaux d'établissements de l'enseignement supérieur,

les critères d'accès étant manifestement plus défavorables pour les étudiants étrangers. Afin de justifier la mesure, la Communauté française invoquait le coût trop élevé de telles formations et l'afflux d'étudiants venant de France. S'estimant lésés par ces critères, un certain nombre d'étudiants potentiels, nationaux et étrangers, ont introduit devant la Cour constitutionnelle des recours en annulation contre ce décret.

En réponse aux questions préjudicielles posées par la Cour constitutionnelle⁷⁵, la Cour de justice a estimé que la crainte d'une charge excessive pour le financement de l'enseignement supérieur ne peut justifier l'inégalité de traitement entre étudiants sur la base de la nationalité. Seule la protection de la santé publique pourrait constituer une justification à cet égard. La Cour de justice a confié le soin à la Cour constitutionnelle de vérifier, à l'aide de données chiffrées et sur la base des indications de la Cour de justice, si la santé publique était effectivement compromise.⁷⁶

Au lieu de procéder immédiatement à ce contrôle, la Cour constitutionnelle critique d'abord le fait que la Cour de justice n'a pas suffisamment tenu compte des inconvénients financiers, alors même qu'elle avait précisé dans son arrêt de renvoi que l'afflux considérable d'étudiants français menaçait effectivement d'obérer les finances publiques. La Cour constitutionnelle regrette explicitement qu'à la suite de l'arrêt de réponse, les petits États membres ne puissent pas s'armer contre les effets de la politique relative à l'enseignement d'un grand État membre qui partage la même langue.⁷⁷

Après cet intermezzo critique, la Cour a appliqué correctement l'arrêt de réponse : elle a examiné si la protection de la santé publique justifiait, pour chaque formation en cause, les dispositions attaquées. La Cour constitutionnelle n'a donc pas méconnu l'arrêt de la Cour de justice, mais elle a poursuivi de manière indirecte le dialogue.

(II) La primauté de la protection des droits de l'homme la plus étendue

28. Une partie de la doctrine critique la CJUE parce qu'elle perturberait la hiérarchie des normes interne : en accordant un mandat exclusif à chaque juge

⁷⁵ C.C. n° 12/2008, 14 février 2008.

⁷⁶ CJUE 13 avril 2010, *Bressol e.a. et Chaverot e.a.*, C-73/08.

⁷⁷ C.C. n° 89/2011, 31 mai 2011, B.4.5. Pour ce considérant, la Cour s'est appuyée sur le point 151 des conclusions de l'avocat général Sharpston, qui a écrit que l'Union européenne ne doit pas « ignorer les problèmes très réels des États membres qui accueillent un grand nombre d'étudiants d'autres États membres », et qu'il « incombe à l'État membre hôte et à l'État membre d'origine de négocier activement une solution ».

⁷⁰ Directive 2001/97/CE du Parlement européen et du Conseil du 4 décembre 2001 modifiant la directive 91/308/CEE du Conseil du 10 juin 1991 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux.

⁷¹ C.C. n° 126/2005, 13 juillet 2005, A.4.2, A.6.3 et A.7.2.

⁷² CJUE 26 juin 2007, *Ordre des barreaux francophones et germanophone e.a.*, C-305/05.

⁷³ C.C. n° 10/2008, 23 janvier 2008. La Cour a jugé que les informations connues de l'avocat à l'occasion de l'exercice des activités essentielles de sa profession, à savoir l'assistance et la défense en justice du client et le conseil juridique, même en dehors de toute procédure judiciaire, demeurent couvertes par le secret professionnel. Ce n'est que lorsque l'avocat exerce une activité en dehors du cadre précité qu'il peut être soumis à l'obligation de communication aux autorités des informations dont il a connaissance et, même dans ce cas, cette communication doit toujours intervenir par l'intermédiaire du bâtonnier (B.9.6, B.10 et B.14.4).

⁷⁴ E. Cloots, *o.c.*, 666-667.

judiciaire ou administratif dans tous les États membres, elle permettrait que ces juges refusent d'appliquer la jurisprudence des plus hautes cours nationales en faveur d'une application directe du droit de l'Union européenne. Dans cette doctrine, les cours constitutionnelles sont présentées comme les grandes victimes du processus d'intégration européenne, parce qu'elles pourraient être mises systématiquement hors-jeu par toutes les autres juridictions nationales.⁷⁸ Bien que cette approche conflictuelle et stratégique ne soit pas la vision unique sur la relation complexe entre les cours constitutionnelles et la CJUE, elle concerne un autre aspect d'un vrai dialogue d'après Habermas, à savoir l'existence d'une différence d'opinion ou d'intérêts opposés.

29. L'affaire *Melloni* est un exemple important de ce que cette doctrine appelle le « déplacement » des cours constitutionnelles. Dans l'arrêt *Melloni*, la conséquence de ce raisonnement était l'interdiction faite au *Tribunal Constitucional* espagnol d'appliquer une protection constitutionnelle des droits de l'homme qui était plus étendue que celle offerte par la Charte.⁷⁹

Cet arrêt a causé un grand mécontentement parmi les cours constitutionnelles européennes. Suite à cet arrêt, le contrôle de la constitutionnalité de la législation nationale devient *quasi* impossible lorsque le droit de l'Union européenne est applicable, dans la mesure où la Constitution nationale offre une protection des droits de l'homme plus étendue que la Charte. En outre, l'application uniforme de la Constitution est mise en péril, de sorte que deux standards de protection des droits de l'homme peuvent subsister, l'un hors du champ d'application du droit de l'Union européenne et l'autre dans ce champ d'application.⁸⁰

30. Plusieurs cours constitutionnelles ont développé une jurisprudence d'après laquelle elles n'acceptent pas le caractère absolu des principes de la primauté, de l'effet utile et de l'application uniforme du droit de l'Union européenne, tels qu'ils sont appliqués par la CJUE. En 2016, la Cour constitutionnelle belge s'est inscrite dans ce mouvement avec l'arrêt n° 62/2016 du 28 avril 2016 concernant des recours en annulation contre les dispositions

législatives portant assentiment au Traité sur la stabilité, la coordination et la gouvernance au sein de l'Union économique et monétaire, fait à Bruxelles le 2 mars 2012.⁸¹

Certaines parties requérantes craignaient que le Traité diminue l'emprise des organes représentatifs élus sur la politique budgétaire et par conséquent aussi l'influence des électeurs de ces organes représentatifs. En effet, l'article 174 de la Constitution belge dispose que la Chambre des représentants approuve annuellement le budget.

La Cour a rejeté l'intérêt des parties requérantes. Il appartient au législateur, qui dispose d'un large pouvoir d'appréciation en matière de budget et de gestion de la dette, de fixer les objectifs budgétaires à moyen terme et de contracter ses engagements en concertation, notamment sous la forme d'un traité, avec des États qui ont une monnaie commune et qui mènent une politique économique coordonnée, fondée sur le principe de finances publiques et de conditions monétaires saines et sur la volonté d'éviter les déficits publics excessifs.⁸²

La Cour aurait pu se limiter à ce constat. Elle a cependant ajouté que le Traité sur la stabilité ne prévoit pas seulement un cadre budgétaire rigide, mais qu'il confie également certaines compétences aux institutions de l'Union européenne, notamment à la Commission et à la CJUE. Ensuite, la Cour a clairement lancé un avertissement tant au législateur belge qui attribue, en application de l'article 34 de la Constitution, l'exercice de pouvoirs déterminés à des institutions internationales qu'à ces institutions elles-mêmes, quand elles exercent les pouvoirs qui leur sont attribués. Le considérant B.8.7 de l'arrêt n° 62/2016 est libellé comme suit :

« Lorsque le législateur donne assentiment à un traité qui a une telle portée, il doit respecter l'article 34 de la Constitution. En vertu de cette disposition, l'exercice de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public. Il est vrai que ces institutions peuvent ensuite décider de manière autonome comment elles

⁷⁸ Par exemple A. Dyèvre, « Domestic Judicial Non-Compliance in the European Union: a Political Economic Approach », LSE Working Paper 2013, <http://ssrn.com/abstract=2204592>; *id.*, « Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law? », *Yearbook of European Law* 2016, 106-144; J. Komarek, « The place of constitutional courts in the EU », *ECL Rev.* 2013, 420-450.

⁷⁹ CJUE 26 février 2013, *Melloni*, C-399/11, point 60. V. A. Torres Pérez, « Melloni in Three Acts : From Dialogue to Monologue », *EuConst* 2014, 308-330.

⁸⁰ A. Alen, *Hoe 'Belgisch' is het 'Belgische' staatsrecht nog?*, Anvers, Intersentia, 2015, 36; J. Sovdat, « The Constitutional Court of the Republic of Slovenia and European Union Law », *Croatian and Comparative Public Administration*, 2013, 905.

⁸¹ Les normes en cause étaient, plus précisément, la loi du 18 juillet 2013 portant assentiment audit Traité, l'accord de coopération du 13 décembre 2013 entre l'État fédéral, les Communautés, les Régions et les Commissions communautaires relatif à la mise en œuvre de l'article 3, § 1er, du même Traité, et le décret flamand du 21 mars 2014 portant assentiment à cet accord de coopération. Bien que ce Traité ait été adopté en dehors du cadre juridique de l'Union européenne, il est appliqué et interprété par les parties contractantes conformément au droit de l'Union européenne (article 2, paragraphe 1) et les parties contractantes s'appuient sur les institutions de l'Union européenne (articles 3 et 8). Par ailleurs, les parties contractantes ont prévu d'intégrer le Traité dans le cadre juridique de l'Union européenne (article 16).

⁸² C.C. n° 62/2016, 28 avril 2016, B.8.4.

exercent les pouvoirs qui leur sont attribués, mais l'article 34 de la Constitution ne peut être réputé conférer un blanc-seing généralisé, ni au législateur, lorsqu'il donne son assentiment au traité, ni aux institutions concernées, lorsqu'elles exercent les compétences qui leur ont été attribuées. L'article 34 de la Constitution n'autorise en aucun cas qu'il soit porté une atteinte discriminatoire à l'identité nationale inhérente aux structures fondamentales, *politiques et constitutionnelles ou aux valeurs fondamentales de la protection que la Constitution confère aux sujets de droit* ».

La Cour a donc assujéti la primauté du droit européen, qui ne découle pas du droit européen lui-même, mais de l'article 34 de la Constitution belge, à certaines limites : tant l'attribution de l'exercice de pouvoirs déterminés aux institutions de l'Union européenne que l'exercice de ces pouvoirs par ces institutions ne peuvent pas porter atteinte à « l'identité nationale » ni aux valeurs fondamentales de la protection constitutionnelle, en particulier les droits fondamentaux. La Cour ne s'est pas prononcée explicitement sur le point de savoir si elle sanctionnera les décisions *ultra vires* des institutions de l'Union européenne.⁸³ En cas de réponse affirmative, il s'agirait des mêmes limites que celles que la Cour constitutionnelle fédérale allemande impose à la primauté du droit de l'Union européenne dans sa jurisprudence dite « Honeywell ».⁸⁴

31. Cette position de la Cour constitutionnelle belge peut surprendre, vu son attitude europhile précitée. Elle pourrait être comprise comme une réponse à l'arrêt *Melloni* et à d'autres arrêts luxembourgeois qui ne tiennent pas suffisamment compte de l'examen de constitutionnalité de la législation nationale. En effet, dans la mesure où la Constitution belge offre une protection plus étendue de certains droits de l'homme, elle trouve ses sources dans l'histoire constitutionnelle belge : la révolution belge en 1830 était une réaction contre le Roi du Royaume-Uni des Pays-Bas, Guillaume Ier, qui limitait plusieurs libertés comme l'emploi des langues, la liberté de presse, la liberté de l'enseignement et la liberté de religion, et qui n'acceptait pas l'examen de légalité ni de constitutionnalité de ses arrêtés. C'est la raison pour laquelle les droits de l'homme précités sont mieux protégés dans la Constitution belge que dans les traités européens et internationaux. L'article 159 de la Constitution prescrit à chaque juge de refuser l'application des actes illégaux du pouvoir exécutif. Si la Cour constitutionnelle avait songé à reconnaître ces aspects

constitutionnels comme faisant partie de « l'identité nationale » ou comme des « *valeurs fondamentales de la protection que la Constitution confère aux sujets de droit* », elle pourrait s'écarter de la jurisprudence *Melloni*.⁸⁵

Si cet *obiter dictum* devait être interprété comme une réaction contre une certaine jurisprudence luxembourgeoise, il s'agirait clairement d'un dialogue indirect, puisque la Cour envoie un message à Luxembourg qui ne prend pas la forme d'une question préjudicielle.

Cependant, la Cour constitutionnelle belge ne mettra pas en œuvre cette jurisprudence vis-à-vis du droit secondaire de l'Union européenne sans d'abord poser une question préjudicielle à la CJUE, afin de lui donner l'occasion d'augmenter le standard de protection garanti par la Charte.⁸⁶ Cette piste n'est pas du tout illusoire, comme le montre le dialogue entamé par la Cour constitutionnelle italienne dans l'affaire dite « Tarricco II ».⁸⁷

2.6. Conclusion

32. Le dialogue avec la CJUE présente quelques difficultés. D'abord, ni le dialogue direct, ni le dialogue indirect ne garantissent un vrai dialogue.

Si on opte pour le dialogue direct, on est certain que le dialogue a vraiment lieu, puisque la CJUE est tenue d'y participer. Mais cette piste a comme désavantage que la CJUE peut donner une réponse défavorable, qui lie néanmoins la juridiction qui a posé la question. De ce point de vue, le dialogue n'est pas tout à fait « herrschaftsfrei », comme l'exige Habermas.

Par contre, le dialogue indirect évite une réponse immédiate ayant des conséquences défavorables pour le droit interne ou pour la Cour constitutionnelle, mais cette piste ne garantit pas la participation de la CJUE, et donc même pas l'existence d'un dialogue.

33. Une autre difficulté est le style d'argumentation de la CJUE. Comme elle ne fait référence qu'à ses propres arrêts et comme elle utilise un style très syllogistique, il est difficile d'identifier si un revirement de jurisprudence est le résultat d'un dialogue entamé par une juridiction nationale.

34. Ces inconvénients ne suffisent pourtant pas pour ne plus entamer des dialogues avec la CJUE, même hors des obligations juridiques en la matière. En effet, ce n'est qu'en présentant tous les arguments et tous les intérêts en cause à la CJUE qu'on lui offre la possibilité d'en tenir compte.

⁸³ D'après Ph. Gérard et W. Verrijdt, « Belgian Constitutional Court adopts national identity discourse », *EuConst* 2017, 182-207, la Cour l'aurait reconnu implicitement.

⁸⁴ BVerfG 30 June 2009, 2 BvE 2/08; BVerfG 6 July 2010, 2 BvR 2661/06; BVerfG 21 June 2016, 2 BvR 2728/13.

⁸⁵ A. Alen, « De nationale identiteit – Slotwoord », *TBP* 2017, 371.

⁸⁶ A. Alen, *o.c.*, 371 ; Ph. Gérard et W. Verrijdt, *o.c.*, 202-204.

⁸⁷ CJUE 5 décembre 2017, *M.A.S. et M.B.*, C-42/17.

3. Influencer la CEDH : un dialogue indirect

3.1. Pas (encore) de procédure préjudicielle

35. Pour l'instant, il n'y a pas de procédure de question préjudicielle devant la CEDH. Le système non obligatoire instauré par le Protocole n° 16 à la Conv. EDH, qui est entré en vigueur le 1er août 2018,⁸⁸ constitue la seule procédure à cet égard, mais elle n'est pas obligatoire. Pour le moment, la Belgique n'a pas signé le Protocole n° 16, et sa ratification n'est pas envisagée.⁸⁹

36. D'après son Rapport explicatif, le Protocole n° 16 vise « à favoriser le dialogue entre les juges » et « à renforcer le rôle 'constitutionnel' de la [CEDH] ».

Pour ces raisons, l'article 1er du Protocole n° 16 permet aux plus hautes juridictions d'une Haute Partie contractante d'adresser à la CEDH des demandes d'avis consultatifs sur des questions de principe relatives à l'interprétation ou à l'application des droits et libertés définis par la Convention ou ses Protocoles. Ces avis ne peuvent être demandés que dans le cadre d'une affaire pendante. D'après l'article 5 du Protocole n° 16, les avis consultatifs ne sont pas contraignants. L'article 10 habilite chaque Haute Partie contractante qui ratifie le Protocole à indiquer quelles juridictions nationales peuvent demander un avis consultatif.

37. Comme la Belgique n'a pas ratifié le Protocole n° 16, la Cour constitutionnelle ne dispose pas d'une possibilité d'entamer un dialogue direct avec la CEDH.

Les opinions relatives au Protocole n° 16 sont très divisées.

D'après les uns, le dialogue visé pourrait être utile afin d'éviter des interprétations contradictoires d'un même droit fondamental. En plus, il permettrait aux plus hautes juridictions d'influencer la jurisprudence de la CEDH, tandis qu'aujourd'hui, l'influence est plus unilatérale. De surcroît, l'on ne peut jamais être sûr qu'une juridiction prenne connaissance d'un arrêt qui vise à entamer un dialogue indirect, ni qu'elle y répondra.

Le dialogue instauré par le Protocole n° 16 ne sera probablement pas trop « chronophage » pour la procédure interne, étant donné que la CEDH doit traiter la demande d'avis en priorité.⁹⁰

⁸⁸ Pour l'entrée en vigueur de ce Protocole, 10 ratifications étaient requises. Après la ratification de la France le 12 avril 2018, ce nombre a été atteint. Le Protocole est entré en vigueur pour l'Albanie, l'Arménie, l'Estonie, la Finlande, la France, la Géorgie, la Lituanie, la République de Saint-Marin, la Slovaquie et l'Ukraine.

⁸⁹ Contrairement au Protocole n° 15 ratifié par la Belgique le 4 avril 2018 (*Moniteur belge* du 3 mai 2018).

⁹⁰ Rapport explicatif du Protocole n° 16, point 17.

La procédure d'avis ne peut être utilisée que s'il surgit une question nouvelle et importante relative à l'interprétation ou à l'application de la Conv. EDH. Lorsque la juridiction interne résout cette question elle-même, il y a toujours la possibilité d'une condamnation par la CEDH, tandis que cette condamnation pourrait être évitée en appliquant la procédure de l'avis consultatif. En outre, la haute juridiction qui adresse la demande d'avis favoriserait la sécurité juridique pour les quarante-sept Etats parties, étant donné que toutes les juridictions européennes peuvent immédiatement appliquer une nouvelle interprétation dans leur jurisprudence.

La juridiction qui est à l'origine de la demande joue par ailleurs un rôle important en vue de garantir la subsidiarité dans le cadre de la procédure d'avis. En effet, afin de permettre à la CEDH de se concentrer sur la question de principe, la juridiction qui procède à la demande doit exposer de manière approfondie le contexte factuel et juridique et définir avec précision sur quel aspect de l'interprétation ou de l'application de la Conv. EDH elle souhaite un éclaircissement.⁹¹ Ce faisant, les plus hautes juridictions nationales pourraient exprimer leurs objections à propos de la jurisprudence strasbourgeoise existante et indiquer de quelles spécificités et de quels intérêts nationaux il doit être tenu compte.⁹² Une procédure formelle d'avis offrirait l'assurance que de telles critiques parviennent effectivement à la CEDH, et elle répondrait aussi à la critique que la CEDH ne tient pas suffisamment compte des spécificités nationales des Etats membres du Conseil de l'Europe.

Interprétée de cette manière, la procédure de l'avis consultatif contribuerait à la prise en compte du principe de subsidiarité.⁹³

38. D'après les autres, on pourrait se demander pourquoi l'avis consultatif est non contraignant. Un caractère contraignant de l'avis éviterait que la même affaire soit renvoyée à la CEDH une deuxième fois, par plainte individuelle, après l'arrêt de la haute juridiction nationale. L'avis serait en plus contraignant pour chaque juge des Etats membres du Conseil de l'Europe, ce qui pourrait éviter un afflux d'affaires répétitives.

⁹¹ Rapport explicatif du Protocole n° 16, point 11.

⁹² La CEDH elle-même voit ceci comme un avantage de l'avis consultatif : CEDH, « Document de réflexion sur la proposition d'élargissement de la compétence consultative de la Cour », *www.coe.int*, point 4.

⁹³ A. Alen, « Kanttekeningen bij de samenwerking tussen de hogere rechtscolleges inzake mensenrechten », in A. Alen, V. Joosten, R. Leysen en W. Verrijdt (éds.), *Liberæ Cogitationes. Liber amicorum Marc Bossuyt*, Anvers, Intersentia, 2013, 14 ; J.-P. Jacqué, « Le renvoi préjudiciel devant la Cour européenne des droits de l'homme », *Dialogues entre juges*, 2012, *www.echr.coe.int*, 3-4.

En outre, comme le montre le dialogue préjudiciel entre la Cour constitutionnelle belge et la CJUE, l'obligation d'appliquer de manière loyale les arrêts de réponse n'empêche pas la juridiction qui a demandé l'avis d'expliquer ses réserves par rapport à cet avis, en prolongeant de manière indirecte le dialogue qui a été entamé de manière directe.

3.2. Le dialogue indirect avec la CEDH

39. En l'absence d'une procédure formelle de questions préjudicielles ou d'avis consultatifs, les autres conditions d'un vrai dialogue, comme exposées par Habermas, sont pour la plus grande partie remplies en ce qui concerne le dialogue entre la Cour constitutionnelle belge et la CEDH.

Il s'agit de deux juridictions qui ont pour mission commune de garantir l'effectivité des droits de l'homme. Les différences de nuance entre les deux textes de base, la Constitution belge et la Conv. EDH, sont neutralisées par le principe de la protection la plus étendue, et par la jurisprudence précitée de la Cour constitutionnelle belge qui prend en compte la jurisprudence strasbourgeoise pour interpréter les droits constitutionnels.

Toutefois, des différences d'opinion sont possibles, car les droits de l'homme sont des normes plutôt vagues qui peuvent se prêter à plusieurs interprétations, surtout quand ils doivent être appliqués à des cas concrets. Les différences de vues peuvent aussi naître du fait que la Cour constitutionnelle s'inscrit dans le contentieux objectif, tandis que la CEDH attache beaucoup d'importance à un examen des faits en cause.

La reconnaissance et le respect mutuels ne posent pas de problème. Les deux cours font référence à la jurisprudence de l'autre. Les deux cours ont aussi une possibilité identique de participer au dialogue : la Cour constitutionnelle le fait chaque fois qu'elle applique la jurisprudence strasbourgeoise, et la CEDH le fait quand elle examine une plainte individuelle dans une affaire dans laquelle la Cour constitutionnelle est intervenue, ou même en dehors de ce cas, si la partie concernée fait référence à la jurisprudence de la Cour constitutionnelle. La continuité du dialogue est aussi assurée, vu le nombre d'affaires jugées par les deux cours.

La condition d'une absence d'autorité totale pose moins de problèmes dans la relation avec la CEDH que dans la relation avec la CJUE. La jurisprudence luxembourgeoise concernant la primauté, l'effet utile et l'application uniforme n'est pas présente à Strasbourg. Comme nous l'avons argumenté ailleurs, la Cour constitutionnelle n'utilise pas un modèle hiérarchique de la relation

entre la Constitution nationale et le droit supranational, mais s'inscrit plutôt dans un modèle de pluralisme constitutionnel.⁹⁴

40. La volonté de la CEDH d'entrer en dialogue avec les juges internes est manifeste. Elle organise chaque année un séminaire appelé « Dialogue *entre juges* / *Dialogue between Judges* ». Son service de documentation examine la jurisprudence de chaque haute cour des États membres, et elle s'y réfère dans sa propre jurisprudence. En octobre 2015, elle a aussi lancé le « Réseau des cours supérieures » (« Superior Courts Network »), visant à l'échange d'informations entre la CEDH et les hautes cours nationales.

Contrairement au style de motivation de la CJUE, la CEDH s'explique quand elle modifie sa jurisprudence suite à une critique des hautes cours nationales. L'arrêt *Al-Khawaja et Tahery*⁹⁵ concernant l'admissibilité de « hearsay evidence », et l'arrêt *Lautsi*⁹⁶ concernant les crucifix dans l'école, en sont les meilleurs exemples.

3.3. Les arrêts de la Cour constitutionnelle belge jugés par la CEDH

(I) L'examen de 2012

41. Une recherche opérée en 2012 a montré que parmi les 909 arrêts et décisions de la CEDH concernant la Belgique, 19 faisaient référence à la jurisprudence de la Cour constitutionnelle belge.⁹⁷ Il ne s'agissait pas toujours d'arrêts ou de décisions dans lesquels la CEDH examinait si la jurisprudence de la Cour constitutionnelle est conforme à la Convention. Certains arrêts et décisions ne contiennent qu'une référence à la jurisprudence constitutionnelle belge.⁹⁸ Dans d'autres arrêts et décisions, la Cour constitutionnelle est seulement

⁹⁴ A. Alen et W. Verrijdt, « La relation entre la Constitution belge et le droit international et européen », in I. Riassetto, L. Heuschling et G. Ravarani (éds), *Liber amicorum Rusen Ergec*, Pasicrisie luxembourgeoise, 2017, 31-54.

⁹⁵ CEDH (GC) 15 décembre 2011, *Al-Khawaja et Tahery c. Royaume-Uni*.

⁹⁶ CEDH (GC) 18 mars 2011, *Lautsi c. Italie*.

⁹⁷ Cet examen a eu lieu le 17 mai 2012. V. A. Alen, K. Muylle et W. Verrijdt, « De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens », in A. Alen et J. Theunis (éds.), *Leuvense Staatsrechtelijke Standpunten 3. De Europese dimensie in het Belgische publiekrecht*, Bruges, die Keure, 2012, 34.

⁹⁸ CEDH (déc.), 6 septembre 1994, *Laboratoire médical Saint-Pierre et Marie-France Leclercq* (qui mentionne l'arrêt n° 5/94); CommEDH (déc.), 15 janvier 1997, *M.C.* (qui mentionne l'arrêt n° 32/96); CEDH 30 janvier 2003, *Göcke e.a.* (qui mentionne l'arrêt n° 92/98); CEDH (déc.), 2 mars 2010, *Bouglame* (qui mentionne l'arrêt n° 59/2001); CEDH 20 septembre 2011, *Ullens de Schooten et Rezabek* (qui mentionne l'arrêt n° 160/2007); CEDH (déc.), 20 mars 2012, *Boelens e.a.* (qui mentionne l'arrêt n° 73/2003).

mentionnée lors de l'examen si, en vertu de l'article 35 de la Convention, le requérant a épuisé les voies de recours internes.⁹⁹ Il est arrivé une fois que la CEDH fasse référence à l'intervention de la Cour constitutionnelle pour juger que l'affaire est devenue complexe et que, par conséquent, le droit à une décision finale dans un délai raisonnable n'a pas été violé.¹⁰⁰

42. Dans la plupart des cas, la CEDH est d'accord avec la vision de la Cour constitutionnelle belge, et ne conclut pas à une violation.¹⁰¹ Cette constatation est probablement liée à la technique de la Cour constitutionnelle belge consistant à se conformer à la jurisprudence strasbourgeoise dans ses propres arrêts.

Une autre explication réside dans le constat que la CEDH se limite à un examen de proportionnalité plus marginal quand les hautes juridictions ont déjà motivé de manière approfondie la non-violation de la Convention.¹⁰²

43. Dans les affaires qui présentent une jurisprudence divergente entre la Cour de cassation belge et la Cour constitutionnelle belge, la jurisprudence constitutionnelle est souvent plus protectrice, et la CEDH s'y rallie fréquemment.

Ainsi, dans son arrêt *RTBF*, la CEDH a condamné la Belgique parce qu'un juge des référés avait interdit l'émission d'un reportage sur les pratiques appelées illégales d'un médecin. Comme il y avait une différence de jurisprudence entre la Cour de cassation, selon laquelle une telle interdiction préventive ne viole pas l'article 19 de la Constitution,¹⁰³ et la Cour constitutionnelle, qui interdit toute mesure préventive concernant la liberté d'opinion et juge que les fautes commises dans la diffusion d'une opinion ne peuvent être sanctionnées qu'*a posteriori*¹⁰⁴, la CEDH a conclu que, vu cette jurisprudence divergente, l'interdiction manquait de base légale prévisible.¹⁰⁵

Dans l'affaire *Silvester's Horeca Service*, la jurisprudence divergente de la Cour de cassation et de la Cour constitutionnelle concernant l'accès au juge en cas d'amende administrative était en jeu. Selon la Cour de cassation, ce juge n'est pas compétent pour moduler, diminuer ou enlever une peine administrative après un contrôle de proportionnalité, puisqu'aucune disposition législative ne lui accorderait cette compétence.¹⁰⁶ La Cour constitutionnelle a jugé par contre que si l'administration possède la compétence de modulation, de diminution ou d'enlèvement, le juge doit avoir cette même compétence.¹⁰⁷ La CEDH s'est ralliée à la jurisprudence constitutionnelle : précisant que la jurisprudence de la Cour constitutionnelle a corrigé la violation de l'article 6 de la Conv. EDH en droit belge, elle a constaté que cette jurisprudence est venue trop tard pour le requérant et elle a donc condamné la Belgique.¹⁰⁸

Dans l'affaire *Loncke*, la CEDH était confrontée à la jurisprudence divergente relative à l'obligation de consigner l'amende TVA avant de l'attaquer devant un juge. D'après la Cour constitutionnelle, cette obligation violait le droit d'accès à un juge dans la mesure où elle privait le contribuable de tout contrôle juridictionnel si cette amende était trop élevée pour se conformer à cette obligation de consignation. Elle ajoutait que cette disposition législative se prêtait à une interprétation conforme à la Constitution, si elle était interprétée en ce sens que l'administration fiscale peut et doit renoncer à l'obligation de consignation si elle était contraire à la situation financière du contribuable.¹⁰⁹ La Cour de cassation a accepté cette réserve d'interprétation de la Cour constitutionnelle, mais en même temps elle a constaté que la Cour d'appel de Gand avait, à juste titre, jugé que le contribuable n'avait pas prouvé que sa situation financière s'opposait à la consignation. Ensuite, elle ne voulait pas examiner elle-même si cette disposition législative violait l'article 6.1 de la Conv. EDH, parce qu'une amende fiscale n'a pas de caractère pénal et que l'article 6.1 de la Conv. EDH n'est pas applicable en matière fiscale.¹¹⁰ La CEDH a condamné cette position, en précisant qu'une amende s'élevant au double de la taxe non payée a quand même un caractère pénal et que l'article 6.1 de la Conv. EDH s'applique donc. Ensuite, elle constate que le requérant, un vendeur de voitures d'occasion, avait bien montré que sa situation financière s'opposait à la consignation, puisque l'amende s'élevait à 152 millions de francs belges (3,77 millions EUR). Comme

⁹⁹ CommEDH 2 septembre 1996, *Aerts* ; CEDH 22 juin 2000, *Coëme e.a.* ; CEDH 5 novembre 2000, *Wynen et Centre hospitalier interrégional Edith-Cavell* ; CEDH 15 juillet 2003, *Ernst* ; CEDH (déc.) 6 avril 2004, *S.B. e.a.* ; CEDH 13 octobre 2005, *asbl GERFA*.

¹⁰⁰ CEDH (déc.) 9 décembre 2004, *Stevens*.

¹⁰¹ CommEDH (déc.) 14 janvier 1998, *nv Remo Milieubeheer* (après l'arrêt n° 51/95 concernant le fait que les expropriations sont jugées par le juge de paix et non par le Conseil d'Etat) ; CEDH (déc.) 10 novembre 2005, *EEG-Slachthuis Verbist* (après l'arrêt n° 17/2000 concernant une loi rétroactive) ; CEDH (déc.) 8 janvier 2008, *Epstein* (après l'arrêt n° 149/2004 concernant les victimes de guerre) ; CEDH (déc.) 14 février 2012, *Gallez e.a. et Verhaegen* (après l'arrêt n° 64/2008 concernant une loi rétroactive) ; CEDH (déc.) 10 avril 2012, *Vergauwen e.a.* (après l'arrêt n° 116/2002 et l'arrêt n° 94/2003 concernant une loi rétroactive).

¹⁰² V. S. Lambrecht, « The attitude of four supreme courts towards the European Court of Human Rights: Strasbourg has spoken... », in S. Besson and A. Ziegler (éds.), *Le juge en droit international et européen – The Judge in International and European Law*, Zurich, Schulthess, 2013, 304-305.

¹⁰³ Cass. 2 juin 2006, *AM* 2006, 355.

¹⁰⁴ C.C. n° 157/2004, 6 octobre 2004.

¹⁰⁵ CEDH 29 mars 2011, *RTBF c. Belgique*.

¹⁰⁶ Cass. 5 février 1999, *Arr.Cass.* 1999, 142.

¹⁰⁷ C.C. n° 96/2002, 12 juin 2002.

¹⁰⁸ CEDH 4 mars 2004, *Silvester's Horeca Service c. Belgique*.

¹⁰⁹ C.C. n° 73/92, 18 novembre 1992 ; C.C. n° 75/95, 9 novembre 1995.

¹¹⁰ Cass. 3 janvier 2003, *Pas.* 2003, I, 26.

l'administration et la Cour d'appel de Gand connaissaient cette disproportion, mais ont refusé de la prendre en compte, la CEDH a condamné la Belgique.¹¹¹

L'arrêt *Cottin* avait trait au caractère contradictoire des rapports d'un expert judiciaire en matière pénale. D'après la Cour de cassation, ces rapports ne pouvaient pas être contredits par le prévenu ou par les parties civiles à moins que la loi en disposait autrement. Selon la Cour constitutionnelle, le principe d'égalité et de non-discrimination s'oppose à ce que les rapports des experts en matière civile soient toujours contradictoires, tandis que leurs rapports en matière pénale ne le sont pas toujours.¹¹² La Cour constitutionnelle a formulé ensuite une réserve d'interprétation d'après laquelle le droit judiciaire civil s'applique aux rapports des experts en droit pénal, de sorte qu'ils peuvent tous être contredits. La CEDH s'est ralliée à la position de la Cour constitutionnelle, en jugeant que les rapports des experts doivent toujours être assujettis au débat contradictoire s'ils sont importants pour le résultat de l'affaire et s'ils concernent une matière technique hors des spécialités des juges.¹¹³

44. Le nombre d'arrêts de la CEDH dans lesquels la jurisprudence de la Cour constitutionnelle est critiquée, est limité.

D'abord, il y a l'arrêt *Pressos Compania Naviera*.¹¹⁴ La Cour de cassation avait toujours jugé que le pilotage de mer, imposé par la législation belge aux navires de commerce qui pénètrent dans l'estuaire de l'Escaut, ne peut pas impliquer la responsabilité extracontractuelle de l'Etat belge. Quand la Cour de cassation a bouleversé cette jurisprudence en admettant que la responsabilité de l'Etat puisse être engagée, l'Etat belge craignait un afflux de demandes en dommages et intérêts. Il a légiféré avec un effet rétroactif de trente ans que l'organisateur d'un service de pilotage n'était pas responsable pour les fautes des pilotes. Quelques compagnies maritimes ont attaqué la loi devant la Cour constitutionnelle, qui a jugé que l'atteinte au principe de la sécurité juridique n'était pas disproportionnée et que l'article 1er du Premier Protocole Additionnel à la Convention ne couvre que la propriété déjà acquise et ne s'applique pas au dommage futur comme des créances.¹¹⁵ La CEDH a non seulement condamné la rétroactivité mais elle a aussi établi sa jurisprudence selon laquelle une espérance légitime de voir concrétiser les créances en indemnisation peut être considérée comme une propriété, si elle a une base suffisante en droit interne.

Il faut cependant souligner qu'il ne s'agit pas d'un refus de la part de la Cour constitutionnelle d'appliquer la jurisprudence de la CEDH. L'arrêt *Pressos Compania Naviera* était en effet la première affaire dans laquelle la CEDH a étendu le champ d'application de l'article 1er du Premier Protocole Additionnel. La Cour constitutionnelle a d'ailleurs adapté sa jurisprudence, en accordant à l'article 1er précité le même champ d'application étendu.¹¹⁶

45. La jurisprudence de la Cour constitutionnelle en matière de défaut et d'opposition a aussi, à deux reprises, été désavouée par la CEDH. L'article 187 du Code d'instruction criminelle n'exigeait pas que le condamné par défaut et auquel le jugement de défaut est signifié, soit informé notamment des délais pour faire opposition. Selon la Cour constitutionnelle, ce manque d'information ne violait pas les articles 10 et 11 de la Constitution, lus en combinaison avec l'article 6 de la Convention. Le juge *a quo* avait demandé à la Cour constitutionnelle de comparer cet article 187 avec la procédure en matière administrative, d'après laquelle un acte administratif unilatéral doit mentionner les voies de recours. La Cour constitutionnelle a jugé que ces deux procédures n'étaient pas comparables quant au principe d'égalité et de non-discrimination.¹¹⁷ La CEDH a, par contre, décidé dans deux arrêts qu'un condamné par défaut doit être informé des voies de recours applicables et des délais.¹¹⁸

Dans ce cas, la Cour constitutionnelle n'a donc pas examiné le bien-fondé de la question préjudicielle, et n'a pas pu examiner si l'article 187 du Code d'instruction criminelle viole l'article 6 de la Conv. EDH. Ceci s'explique par le fait que les dispositions conventionnelles ne sont pas des normes de référence directes, et qu'un détournement, soit par les articles 10 et 11 de la Constitution, soit par un droit constitutionnel analogue, est nécessaire. *In casu*, le détournement se faisait par le principe d'égalité et de non-discrimination, mais le juge *a quo* avait choisi de comparer cette procédure pénale avec une procédure administrative qui présentait trop peu de ressemblance.

(II) La situation depuis 2012

46. Depuis 2012, la situation est restée la même. Du 18 mai 2012 au 24 avril 2018, la Cour constitutionnelle a été mentionnée dans 26 affaires concernant la Belgique. Certaines de ces références ne présentent qu'un intérêt documentaire, en mentionnant que la Cour constitutionnelle a aussi contrôlé

¹¹¹ CEDH 25 septembre 2007, *Loncke c. Belgique*.

¹¹² C.C. n° 24/97, 30 avril 1997.

¹¹³ CEDH 2 juin 2005, *Cottin c. Belgique*.

¹¹⁴ CEDH 20 novembre 1995, *Pressos Compania Naviera SA c. Belgique*.

¹¹⁵ C.C. n° 25/90, 5 juillet 1990.

¹¹⁶ C.C. n° 17/2000, 9 février 2000, validé par la CEDH dans son arrêt du 10 novembre 2005, *EEG-Slachthuis Verbist*.

¹¹⁷ C.C. n° 210/2004, 21 décembre 2004.

¹¹⁸ CEDH 29 juin 2010, *Hakimi c. Belgique*; CEDH 1er mars 2011, *Faniel c. Belgique*.

la loi en cause, mais sans que ce contrôle eût trait aux violations alléguées à Strasbourg.

Par exemple, dans l'affaire *Bamouhammad*, un prisonnier très dangereux, la CEDH a conclu à la violation de l'article 3 de la Convention. Il était régulièrement transféré d'une prison à l'autre parce que les gardiens de prison ne voulaient plus travailler en sa présence. Il était aussi soumis à des mesures de sécurité très sévères, qui impliquaient que, à chaque sortie de cellule, le requérant faisait l'objet d'une fouille au corps face au mur, jambes écartées et menottes dans le dos. Ses vêtements étaient fouillés également. Il réintégrait sa cellule, menotté, plaçait ses mains pour que ses menottes soient enlevées et qu'il puisse se rhabiller. Une fois rhabillé, l'agent lui remettait les menottes et la grille s'ouvrait. Une fouille complète de la cellule était en outre effectuée chaque fois qu'il était absent de sa cellule. Selon la CEDH, « *les modalités d'exécution de la détention du requérant, soumis à des transferts répétés d'établissements pénitentiaires et à des mesures d'exception répétitives, combinées avec le retard mis par l'administration pénitentiaire à mettre en place une thérapie, et le refus des autorités à envisager le moindre aménagement de la peine malgré l'évolution négative de l'état de santé du requérant, ont pu provoquer chez lui une détresse qui a excédé le niveau inévitable de souffrance inhérent à la détention. Dans ces conditions, la Cour ne saurait considérer que les autorités belges ont fait ce qu'on pouvait raisonnablement attendre d'elles vu les exigences de l'article 3 de la Convention* ». ¹¹⁹ Dans cette affaire, la jurisprudence de la Cour constitutionnelle n'a été communiquée que dans l'exposé du droit interne, en mentionnant que la Cour a annulé une disposition législative concernant la fouille au corps systématique des détenus après chaque visite. ¹²⁰

Un autre exemple d'une mention purement documentaire concerne la mention de l'arrêt de la Cour constitutionnelle relative à une disposition législative modifiant la législation sur des étrangers provenant de « pays d'origine sûrs ». ¹²¹ Cette disposition a été partiellement annulée par la Cour constitutionnelle au motif que le Conseil du contentieux des étrangers n'est pas tenu de prendre en considération les éventuels éléments de preuve nouveaux présentés devant lui, ni d'examiner la situation actuelle des intéressés venant d'un pays sûr, c'est-à-dire la situation au moment où il statue, par rapport à la situation prévalant dans son pays d'origine. Par conséquent, le recours en suspension d'extrême urgence et le recours en annulation devant cette

juridiction ne permettaient pas le contrôle de la situation des intéressés exigé par la CEDH. La CEDH mentionne parfois cet arrêt en cas de refus de séjour pour une maladie dangereuse du requérant. ¹²²

Les mentions purement documentaires se présentent aussi dans des affaires déclarées irrecevables par la CEDH, comme dans l'affaire de la prescription des affaires fiscales. Cette affaire a été abordée avec un arrêt de la Cour de cassation jugeant que le fisc ne pouvait pas suspendre le délai de prescription en utilisant un « commandement », puisque la législation en cause ne mentionnait pas cette méthode. ¹²³ Cet arrêt impliquait que de nombreuses affaires de cotisations non payées - souvent dans un contexte de fraude fiscale - étaient tout d'un coup prescrites, coûtant à l'Etat belge plus de 1,7 milliard d'euros. C'est pourquoi le législateur a adapté la législation en cause rétroactivement, en ajoutant le commandement dans la liste des techniques utilisables pour suspendre une prescription. Selon la Cour constitutionnelle, cette loi rétroactive affectant l'issue des procédures judiciaires pendantes était justifiée parce que les enjeux budgétaires constituaient des « motifs impérieux d'intérêt général ». ¹²⁴ Devant la CEDH, les requérants invoquaient l'article 6 de la Convention et l'article 1er du Premier Protocole Additionnel. Après avoir amplement cité l'arrêt de la Cour constitutionnelle dans l'évocation des circonstances de l'espèce, la CEDH a déclaré cette affaire irrecevable : l'article 6.1 de la Conv. EDH ne s'applique pas en matière fiscale ¹²⁵ et l'article 1er du Premier Protocole Additionnel ne s'applique pas à des impôts contestés qui n'ont pas été jugés par les juridictions internes. ¹²⁶

Une dernière illustration concerne un arrêt de la Cour constitutionnelle sur les méthodes particulières de recherche. Il s'agit par exemple des « indicateurs » ou des personnes entretenant des contacts réguliers avec des policiers et qui fournissent des renseignements ou des données sur des « personnes à propos desquelles il existe des indices sérieux qu'elles commettent ou commettraient des infractions ». Une autre méthode particulière de recherche concerne les infiltrants, des policiers qui entrent sous une autre identité dans le monde criminel pour ramasser des preuves contre une organisation criminelle. La Cour constitutionnelle a validé ces techniques particulières de recherche, même si les noms des policiers concernés ou des indicateurs ne figurent que dans

¹²² CEDH 27 février 2014, *S.J. c. Belgique* (concernant le SIDA) ; CEDH 7 juillet 2015, *V.M. e.a. c. Belgique* (concernant une maladie neurologique) ; CEDH (GC) 13 décembre 2016, *Paposhvili c. Belgique* (concernant le leucémie).

¹²³ Cass. 10 octobre 2002, C.01.0067.F ; Cass. 21 février 2003, C.01.0287.N.

¹²⁴ C.C. n° 177/2005, 7 décembre 2005.

¹²⁵ La CEDH se réfère à sa jurisprudence connue en la matière: CEDH (GC) 12 juillet 2001, *Ferrazzini c. Italie*.

¹²⁶ CEDH (déc.) 11 septembre 2012, *Optim et Industerre c. Belgique*.

¹¹⁹ CEDH 17 novembre 2015, *Bamouhammad c. Belgique*.

¹²⁰ C.C. n° 20/2014, 29 janvier 2014.

¹²¹ C.C. n° 1/2014, 16 janvier 2014.

un dossier confidentiel séparé du dossier pénal et auquel le prévenu n'a pas accès. La Cour constitutionnelle a cependant jugé qu'un juge indépendant doit toujours être en mesure de contrôler le contenu du dossier confidentiel et d'exiger le transfert de certaines pièces au dossier pénal.¹²⁷ La CEDH a fait référence à cet arrêt dans quelques affaires, sans que le cadre législatif lui-même fût en cause devant elle : elle devait juger dans ces cas si, après l'application des méthodes particulières de recherche, la procédure pénale dans son ensemble n'a pas perdu son caractère équitable.¹²⁸

47. La plupart des mentions illustrent que les missions distinctes de la Cour constitutionnelle et de la CEDH peuvent avoir pour conséquence que la Cour constitutionnelle n'est pas toujours en mesure d'éviter les constats de violation par la CEDH. En effet, la Cour constitutionnelle opère dans le cadre d'un contentieux objectif, dans lequel la norme législative elle-même est jugée, tandis que la CEDH s'appuie surtout sur les faits de la cause du requérant (V. déjà *supra*, n° 39).

Ainsi, dans l'arrêt pilote *W.D. c. Belgique* du 6 septembre 2016, par lequel la CEDH condamne la Belgique à « prendre des mesures appropriées pour que le système d'internement des personnes délinquantes soit en conformité avec les principes relatifs aux articles 3, 5 §§ 1er et 4, et 13 combiné avec l'article 3 de la Convention », la Cour constitutionnelle a été mentionnée à deux reprises. En premier lieu, l'exposé des faits montre que dans l'affaire du requérant, la Cour de cassation a refusé de poser une question préjudicielle à la Cour constitutionnelle, en constatant « que les questions suggérées étaient étrangères aux griefs ». En second lieu, la CEDH fait référence à un arrêt de la Cour constitutionnelle dans lequel celle-ci constate que les autorités doivent accueillir une personne internée par une décision de la commission de la défense sociale, mais que le refus de le faire ne signifie pas que la législation en cause devient contraire à la Constitution; il incombe aux cours et tribunaux et pas à la Cour constitutionnelle de contrôler si les autorités respectent la loi dans des cas concrets.¹²⁹ Le grand nombre de condamnations de la Belgique en matière d'internement des personnes ayant des troubles psychiatriques concerne surtout l'insuffisance de places disponibles dans des établissements spécialisés

¹²⁷ C.C. n° 202/2004, 21 décembre 2004.

¹²⁸ CEDH 17 janvier 2017, *Habran et Dalem c. Belgique* (concernant l'usage des indicateurs) ; CEDH 23 mai 2017, *Van Wesenbeeck c. Belgique* (concernant une infiltration policière).

¹²⁹ C.C. n° 142/2009, 17 septembre 2009. Cet arrêt a aussi été mentionné dans d'autres arrêts strasbourgeois concernant l'internement des personnes ayant des difficultés psychiatriques (par exemple CEDH 2 octobre 2012, *L.B. c. Belgique* ; CEDH 10 janvier 2013, *Swennen c. Belgique* ; CEDH 10 janvier 2013, *Claes c. Belgique* ; CEDH 10 janvier 2013, *Dufoort c. Belgique*).

et adaptés. Une telle situation concerne l'application de la loi et échappe par conséquent à la compétence de la Cour constitutionnelle.

48. Le droit des étrangers présente la même difficulté. Dans l'arrêt *Singh*, la Belgique a été condamnée pour violation des articles 3 et 13 de la Convention, parce que le *Commissariat* général aux réfugiés et aux apatrides (une administration qui examine les demandes d'asile; ci-après : CGRA) et le *Conseil du contentieux des étrangers* (une juridiction administrative; ci-après : CCE) n'avaient pas examiné si l'éloignement du requérant et de sa famille vers la Russie les exposait à un risque réel d'être refoulés vers l'Afghanistan, où ils subiraient un risque réel d'un traitement inhumain et dégradant suite à leur religion sikhe. Un des éléments dans cette affaire concernait l'admission de nouveaux éléments par le CCE. Les requérants ne pouvaient pas prouver leur nationalité afghane devant le CGRA. Devant le CCE, ils avaient introduit des copies des documents établis par le Haut-Commissariat des Nations Unies aux Réfugiés (ci-après : HCR). Comme le CCE estimait que la véracité de ces documents était douteuse, il les a rejetés.

Dans cette matière, la Cour constitutionnelle avait jugé en 2008 que la disposition législative qui limite la possibilité d'invoquer de nouveaux éléments devant le CCE poursuit des objectifs légitimes : « le législateur vise à créer un équilibre entre, d'une part, les caractéristiques propres à la problématique de l'asile et, d'autre part, le principe selon lequel c'est la requête qui fixe les limites du débat juridictionnel. En outre, il a entendu éviter les débats dilatoires ». Mais la Cour a ajouté que cette disposition n'était constitutionnelle que dans l'interprétation selon laquelle elle ne limite pas la compétence de pleine juridiction du CCE statuant sur les décisions du CGRA. Plus précisément, « le souci d'éviter les débats dilatoires ne saurait conduire à ce que le [CCE] puisse se dispenser d'examiner des éléments nouveaux présentés par le demandeur d'asile qui sont de nature à démontrer d'une manière certaine le caractère fondé du recours. [...] Dès lors, la condition que les éléments nouveaux trouvent un fondement dans le dossier de procédure peut permettre d'écarter uniquement les éléments qui ne présentent pas de lien avec la crainte exprimée dans la demande d'asile et au cours de l'examen administratif de celle-ci ». ¹³⁰

Dans l'affaire *Singh*, la CEDH a jugé que les nouveaux documents introduits par les requérants devant le CCE étaient significatifs, importants et crédibles. Pourtant, l'examen de ces documents a été occulté par l'examen de la crédibilité des requérants et les doutes quant à la sincérité de leurs déclarations. Le CCE n'a accordé aucun poids à ces documents au motif qu'ils étaient faciles à falsifier

¹³⁰ C.C. n° 148/2008, 30 octobre 2008.

et que les requérants restaient en défaut de fournir les originaux. La CEDH en conclut que la seule question importante à ses yeux, à savoir si les documents présentés étaient les allégations de risques en Afghanistan, n'a pas fait l'objet d'investigations, par exemple en contactant le bureau du HCR à New Delhi. Par conséquent, les articles 3 et 13 de la Convention ont été violés.¹³¹

Dans cette affaire, ce n'est pas tellement la jurisprudence de la Cour constitutionnelle qui a été condamnée, mais plutôt le comportement des autorités d'asile. L'arrêt de la Cour constitutionnelle est plutôt concordant avec les considérations de la CEDH, mais comme la Cour constitutionnelle n'opère qu'un contrôle abstrait de la législation, sa jurisprudence n'était pas en mesure d'éviter chaque violation de la Convention dans son application aux cas concrets.

3.4. Les affaires sur l'interdiction de la burqa

49. La Cour constitutionnelle belge a sans aucun doute influencé la jurisprudence de la CEDH relative à la matière sensible de l'interdiction de la burqa.

50. Après de vifs débats, tant au Parlement que dans les médias, le législateur belge a adopté la loi du 1er juin 2011 visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage. La violation de cette interdiction est punie « d'une amende de quinze euros à vingt-cinq euros et d'un emprisonnement d'un jour à sept jours ou d'une de ces peines seulement ». D'après les travaux préparatoires, cette loi visait à interdire le port, dans l'espace public, de tout vêtement dissimulant totalement ou de manière principale le visage, insistant sur le fait que cette interdiction ne reposait pas seulement sur des considérations d'ordre public et de sécurité, mais plus fondamentalement sur des considérations sociales, indispensables, à l'estime des auteurs de la proposition, au « vivre ensemble » dans une société émancipatrice et protectrice des droits de tous et de chacun. Le législateur estimait que les vêtements cachant totalement ou de manière principale le visage nous interpellent également au niveau de leur principe. En référence au philosophe Levinas, qui estimait que c'est par le visage que se manifeste notre humanité. Plusieurs députés ont aussi indiqué que la burqa constituait « une régression choquante au regard des femmes pour leurs droits, leurs libertés et l'égalité des hommes et des femmes », « une atteinte aux droits fondamentaux de la femme », et « un symbole de soumission ».

51. Plusieurs requérants ont introduit des recours en annulation contre cette loi. Il y avait des requérantes musulmanes qui voulaient porter une burqa, mais

aussi des requérant(e)s athéistes qui voulaient porter n'importe quel vêtement sans restriction.

Le moyen le plus important concernait la liberté d'expression et la liberté de religion. D'après les parties requérantes, la mesure attaquée constituerait une restriction à la liberté de culte qui ne répondrait pas aux conditions d'ingérence au sens de l'article 9.2 de la Conv. EDH, telles qu'elles se dégagent de la jurisprudence de la CEDH.

La Cour constitutionnelle explique que « les prescriptions vestimentaires peuvent varier selon le temps et le lieu. Cependant, certaines limites peuvent être imposées à celles-ci de manière impérative dans les espaces publics. Tout comportement ne saurait être autorisé pour la simple et unique raison qu'il est justifié par un motif religieux. La liberté d'expression et la liberté des cultes ne sont en effet pas absolues ». Le législateur dispose d'une certaine marge d'appréciation pour déterminer les restrictions aux libertés précitées qui peuvent être réputées nécessaires dans la société démocratique dans laquelle il exerce ses compétences.

La Cour constitutionnelle admet que la loi attaquée peut constituer une ingérence dans la liberté religieuse des femmes qui veulent porter le voile intégral pour des motifs religieux. Mais la loi attaquée poursuit trois buts légitimes, à savoir la sécurité publique, l'égalité entre l'homme et la femme et une certaine conception du « vivre ensemble » dans la société. Ces objectifs entrent aussi dans la catégorie de ceux énumérés à l'article 9.2 de la Conv. EDH que constituent le maintien de la sûreté publique, la défense de l'ordre ainsi que la protection des droits et libertés d'autrui.

Pour examiner la proportionnalité de la mesure, la Cour se réfère en premier lieu à la loi du 5 août 1992 sur la fonction de police, qui habilite les fonctionnaires de police à contrôler l'identité de toute personne s'ils ont des motifs raisonnables de croire, en fonction de son comportement, d'indices matériels ou de circonstances de temps et de lieu, qu'elle est recherchée, qu'elle a tenté de commettre une infraction ou se prépare à la commettre, qu'elle pourrait troubler l'ordre public ou qu'elle l'a troublé. D'après la Cour, « ce contrôle d'identité pourrait être entravé si la personne concernée avait le visage dissimulé et refusait de coopérer à un tel contrôle. En outre, les personnes qui ont le visage dissimulé ne seraient en général pas ou difficilement reconnaissables si elles commettaient des infractions ou troublaient l'ordre public ». A l'argument des parties requérantes selon lequel le nombre de burqas dans la société belge est très limité, il est répondu que « ce n'est pas parce qu'un comportement n'aurait pas encore pris une ampleur de nature à mettre l'ordre social ou la sécurité en péril que le législateur ne serait pas autorisé à intervenir. Il ne peut lui être

¹³¹ CEDH 2 octobre 2012, *Singh e.a. c. Belgique*.

reproché d'anticiper en temps utile un tel risque en réprimant des comportements lorsqu'il est établi que la généralisation de ceux-ci entraînerait un danger réel ».

En deuxième lieu, la Cour examine la conception du « vivre ensemble » dans une société fondée sur des valeurs fondamentales, telle que retenue par le législateur. La Cour a jugé que « l'individualité de tout sujet de droit d'une société démocratique ne peut se concevoir sans que l'on puisse percevoir son visage, qui en constitue un élément fondamental. Compte tenu des valeurs essentielles qu'il entend défendre, le législateur a pu considérer que la circulation dans la sphère publique, qui concerne par essence la collectivité, de personnes dont cet élément fondamental de l'individualité n'apparaît pas, rend impossible l'établissement de rapports humains indispensables à la vie en société. Si le pluralisme et la démocratie impliquent la liberté de manifester ses convictions notamment par le port de signes religieux, l'Etat doit veiller aux conditions dans lesquelles ces signes sont portés et aux conséquences que le port de ces signes peut avoir. Dès lors que la dissimulation du visage a pour conséquence de priver le sujet de droit, membre de la société, de toute possibilité d'individualisation par le visage alors que cette individualisation *constitue une condition fondamentale liée à son essence même, l'interdiction de porter dans les lieux accessibles au public un tel vêtement, fût-il l'expression d'une conviction religieuse, répond à un besoin social impérieux dans une société démocratique* ».

En troisième lieu, la Cour a examiné l'égalité entre hommes et femmes, par rapport à l'argument du législateur que certaines femmes auraient été obligées de porter la burqa. D'après la Cour, « le législateur a pu considérer que les valeurs fondamentales d'une société démocratique s'opposent à ce que des femmes soient contraintes de dissimuler leur visage sous la pression de membres de leur famille ou de leur communauté et soient privées ainsi, contre leur gré, de la liberté de disposer d'elles-mêmes. Toutefois, comme c'est le cas pour [certaines] requérantes, le port du voile intégral peut correspondre à l'expression d'un choix religieux. Ce choix peut être guidé par diverses motivations aux significations symboliques multiples. Même lorsque le port du voile intégral résulte d'un choix délibéré dans le chef de la femme, l'égalité des sexes, que le législateur considère à juste titre comme une valeur fondamentale de la société démocratique, justifie que l'Etat puisse s'opposer, dans la sphère publique, à la manifestation d'une conviction religieuse par un comportement non conciliable avec ce principe d'égalité entre l'homme et la femme. Le port d'un voile intégral dissimulant le visage prive, en effet, la femme, seule destinataire de ce prescrit, d'un élément fondamental de son individualité, indispensable à la vie en société et à l'établissement de liens sociaux ».

La Cour devait encore examiner si le recours à une sanction de nature pénale en vue de garantir le respect de l'interdiction que la loi prévoit n'avait pas des effets disproportionnés par rapport aux objectifs poursuivis. La Cour a appliqué ici

sa jurisprudence d'après laquelle « lorsque le législateur estime que certains manquements doivent faire l'objet d'une répression, il relève de son pouvoir d'appréciation de décider s'il est opportun d'opter pour des sanctions pénales sensu stricto ou pour des sanctions administratives ». En outre, compte tenu des disparités constatées entre les communes et des divergences jurisprudentielles qui sont apparues dans cette matière, le législateur a pu considérer qu'il s'imposait d'assurer la sécurité juridique en uniformisant la sanction infligée lorsque le port d'un vêtement dissimulant le visage dans les lieux accessibles au public est constaté. L'argument le plus essentiel était cependant que « dès lors que l'individualisation des personnes, dont le visage est un élément fondamental, constitue une condition essentielle au fonctionnement d'une société démocratique dont chaque membre est un sujet de droit, le législateur a pu considérer que dissimuler son visage pouvait mettre en péril le fonctionnement de la société ainsi conçue et devait, partant, être pénalement réprimé ». Néanmoins, la Cour a formulé une réserve d'interprétation importante : la sanction pénale ne peut pas être appliquée pour le port du voile intégral dans les lieux destinés au culte. Le port de vêtements correspondant à l'expression d'un choix religieux, tels que le voile qui couvre intégralement le visage dans de tels lieux, ne pourrait faire l'objet de restrictions sans que cela porte atteinte de manière disproportionnée à la liberté de manifester ses convictions religieuses.

Moyennant cette dernière réserve d'interprétation, les moyens des requérants étaient rejetés et la Cour a donc constaté que l'interdiction du port de tout vêtement cachant totalement ou de manière principale le visage est constitutionnelle.¹³²

52. Cet arrêt de la Cour constitutionnelle belge a été approuvé par la CEDH, dans son arrêt *S.A.S. c. France* du 1er juillet 2014. Dans cet arrêt, la CEDH cite amplement l'arrêt de la Cour constitutionnelle belge. Ceci peut probablement s'expliquer par l'intervention du gouvernement belge dans cette affaire.

D'après la CEDH, la sécurité ou la sûreté publiques ne constituent pas toutefois une justification : « *vu son impact sur les droits des femmes qui souhaitent porter le voile intégral pour des raisons religieuses, une interdiction absolue de porter dans l'espace public une tenue destinée à dissimuler son visage ne peut passer pour proportionnée qu'en présence d'un contexte révélant une menace générale contre la sécurité publique* ».

Il n'y a que la conception du « vivre ensemble », en tant qu'élément de « la protection des droits et libertés d'autrui », comme but légitime. La CEDH accepte que la France « considère que le visage joue un rôle important dans l'interaction sociale. Elle peut comprendre le point de vue selon lequel les personnes qui se trouvent dans les lieux ouverts à tous souhaitent que ne s'y développent pas

¹³² C.C. n° 145/2012, 6 décembre 2012.

des pratiques ou des attitudes mettant fondamentalement en cause la possibilité de relations interpersonnelles ouvertes qui, en vertu d'un consensus établi, est un élément indispensable à la vie collective au sein de la société considérée. La Cour peut donc admettre que la clôture qu'oppose aux autres le voile cachant le visage soit perçue par l'État défendeur comme portant atteinte au droit d'autrui d'évoluer dans un espace de sociabilité facilitant la vie ensemble. Cela étant, la flexibilité de la notion de « *vivre ensemble* » et le risque d'excès qui en découle commandent que la Cour procède à un examen attentif de la nécessité de la restriction contestée ». La CEDH accepte aussi la proportionnalité de l'ingérence, étant donné que la loi française n'affecte pas la liberté de porter dans l'espace public tout habit ou élément vestimentaire qui n'a pas pour effet de dissimuler le visage, et que l'interdiction de porter le voile intégral dans l'espace public n'est pas fondée sur des motifs religieux. Enfin, « *lorsque des questions de politique générale sont en jeu, sur lesquelles de profondes divergences peuvent raisonnablement exister dans un État démocratique, il y a lieu d'accorder une importance particulière au rôle du décideur national* ».

Cette affaire montre la réciprocité du dialogue entre les hautes juridictions. La Cour constitutionnelle a amplement cité la jurisprudence strasbourgeoise dans son arrêt et l'a appliquée de manière consciente, et, après, la Cour européenne a fait référence à cet arrêt belge pour justifier une interdiction semblable dans un autre Etat membre du Conseil de l'Europe.

53. Quelques années après, la CEDH a aussi eu l'opportunité d'examiner l'interdiction belge. Les requérantes n'avaient pas été sanctionnées en application de la loi sur la burqa, mais sur la base des règlements communaux contenant des interdictions semblables. Comme dans l'affaire *S.A.S.*, la Cour n'accepte que le « *vivre ensemble* » comme but légitime. En rappelant son rôle subsidiaire, la Cour répète que les autorités de l'Etat se trouvent en principe mieux placées que le juge international pour évaluer les besoins et le contexte locaux. Elle s'appuie sur l'arrêt de la Cour constitutionnelle, en remarquant que le législateur a voulu interdire une pratique qu'il jugeait incompatible avec les modalités de communication sociale et l'établissement de rapports humains indispensables à la vie en société. Il s'agit donc d'un choix de société. La Cour se doit donc de faire preuve de réserve dans l'exercice de son contrôle de conventionnalité dès lors qu'il la conduit à évaluer un arbitrage effectué selon des modalités démocratiques au sein de la société belge. En effet, la Cour relève que « *le processus décisionnel [...] a duré plusieurs années et a été marqué par un large débat au sein de la Chambre des représentants ainsi que par un examen circonstancié et complet de l'ensemble des intérêts en jeu par la Cour constitutionnelle* ». Après ces remarques, qui concernent surtout la loi postérieure aux règlements communaux en cause, la Cour conclut que ces règlements peuvent passer pour proportionnés au but poursuivi, étant donné l'ampleur de la marge

d'appréciation dont disposait la Belgique.¹³³ Il est intéressant de remarquer que la CEDH se limite ainsi à un contrôle *in abstracto* de la réglementation en cause, sans examiner *in concreto* l'application de ces principes dans les cas d'espèce.

3.5. Conclusion

54. Si la Cour constitutionnelle belge veut entamer un dialogue avec la CEDH, elle ne peut pas opter pour un dialogue direct, puisque la Belgique n'a pas encore ratifié le Protocole n° 16. Par contre, le dialogue indirect ne se présente pas encore d'une manière dialectique. Certes, la Cour constitutionnelle applique de manière systématique la jurisprudence strasbourgeoise, mais les références à la Cour constitutionnelle dans la jurisprudence de la CEDH sont plutôt peu nombreuses. La plupart de ces références ne présentent qu'un intérêt documentaire, et les arrêts mentionnés ne sont pas toujours directement liés à la question à résoudre par la CEDH. Il n'y a qu'une affaire dans laquelle la Cour constitutionnelle a vraiment pu influencer la jurisprudence strasbourgeoise. Par contre, il y a quelques affaires dans lesquelles la CEDH a désavoué un arrêt de la Cour constitutionnelle. Il y a aussi quelques affaires dans lesquelles la Cour constitutionnelle était en ligne avec les conclusions de la CEDH, mais dans lesquelles sa jurisprudence ne pouvait pas éviter ou éliminer la violation des droits de l'homme dans le cas du requérant.

4. Conclusion générale

55. Ni le dialogue de la Cour constitutionnelle belge avec la CJUE, ni son dialogue avec la CEDH ne remplissent les six conditions posées par Habermas pour un vrai dialogue. La possibilité du dialogue avec la CJUE est garantie par la procédure préjudicielle, qui n'existe pas encore en Belgique pour entamer un dialogue direct avec la CEDH. Le dialogue avec la CJUE implique, d'une part, une implémentation totale de ses arrêts de réponse et, d'autre part, le fait que la CJUE ne s'écarte pas des principes de primauté, d'effet utile et d'application uniforme du droit de l'Union européenne, même s'ils limitent la liberté d'action des cours constitutionnelles.

Lorsqu'une cour constitutionnelle veut influencer la jurisprudence des juridictions européennes, elle peut le faire en critiquant de manière convaincante un arrêt de ces cours. Jusqu'à présent, la Cour constitutionnelle belge n'a pas appliqué ce procédé. Au contraire, elle mentionne les arrêts strasbourgeois et luxembourgeois afin de les appliquer.

¹³³ CEDH 11 juillet 2017, *Belkacemi et Oussar c. Belgique* ; CEDH 11 juillet 2017, *Dakir c. Belgique*.

Quand une cour constitutionnelle influence la jurisprudence des cours européennes, ceci n'apparaît pas toujours clairement de leurs arrêts. En effet, la CJUE ne fait pas référence à des arrêts nationaux, et la CEDH ne le fait souvent que dans l'exposé des faits, sans y revenir dans l'appréciation juridique de l'affaire. Dans ce contexte, on ne peut que saluer les initiatives prises tant par la CEDH que par la CJUE en vue d'établir des réseaux d'échanges de documents avec les hautes cours nationales.¹³⁴ Comme celles-ci doivent alimenter la partie nationale de ces bases de données, une méthode officielle existe à présent pour communiquer un arrêt pouvant entamer un dialogue.

¹³⁴ Il s'agit du « Réseau des cours supérieures » / « *Superior Courts Network* » (<https://www.echr.coe.int/Pages/home.aspx?p=court/network&c=fre>) (V. déjà *supra*, n° 40) et du « Réseau judiciaire de l'Union européenne » / « *Judicial Network of the European Union* ».



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The role of the German Federal Constitutional Court in dealing with cases of a supra- or international nature

First of all, I would like to thank you very much for the invitation to speak to you here in Riga today. I would like to extend the best wishes of our President, Andreas Voßkuhle, and convey to our hosts my colleagues' congratulations on the occasion of the 100th anniversary of the Latvian state.

I. Introductory Remarks

The description of the topic of our conference is accurate in pointing out that in today's globalised world, constitutional courts operate in a legal environment made up of three levels of laws: domestic law with its many particular features, European Union law, which takes precedence over domestic law based on its supranational nature and which already covers many areas of the domestic legal orders, and international law, whose rank and impact on domestic legal orders depends on the respective constitutional provisions. When interpreting and applying domestic constitutional law, constitutional courts and supreme courts must always be mindful of European Union law and international law.

First and foremost, the aim is to keep constitutional law in line with European Union law and international law and to avoid violations as far as possible. Therefore, the constitutional courts have to develop mechanisms that can give effect to supranational and international law in the domestic legal and constitutional order. However, since each constitutional court is the guardian of

its own constitution and protects the essential parts of that constitution, its role is to also set absolute limits regarding the claim to validity of supranational and international law in case of conflicts. Constitutional courts must explore these limits and handle them responsibly. The courts must be aware that resolving a conflict of laws in a manner that favours one's own fundamental constitutional principles may involve a violation of European Union law or international law. At the level of European Union law, such a violation may result in infringement proceedings with all the ensuing consequences, while at the level of international law, it may result in countermeasures or liability claims.

In my presentation, I would like to give a broad outline – more will not be possible due to the time constraints – of the mechanisms and standards of review developed by the Federal Constitutional Court that are designed to give effect to supranational and international law in the German legal and constitutional order, but that also set limits to it in exceptional cases. As all European constitutional courts are faced with this problem, I think that the decisions of our Court might provide certain guidance or have already done so. In particular, this pertains to the principle of openness to international law and – regarding European Union law – to the *ultra vires* and the identity review. Finally, I would like to briefly remark on the measures taken by the Federal Constitutional Court to ensure that selected decisions are acknowledged faster and better than in the past.

II. The Principle of Openness to International Law and the Use of International Treaties When Interpreting the Basic Law

1. The unwritten principle of openness to international law reflects the fundamental decision of the 1948/49 constitutional legislature to integrate the new German state into the international community and to grant special status to the general rules of international law. In this respect, the Basic Law follows the guiding principle of “open statehood” that is characterised by the willingness to engage in international cooperation and to adopt supranational and international law.¹ The principle of openness to international law serves the purpose of establishing far-reaching congruency between the domestic legal situation and the obligations of the Federal Republic of Germany under international law, without giving absolute precedence to

¹ The term “open statehood” was coined by Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, 1964, p. 35; cf. in this respect, e.g., Knop, *Völker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze*, 2013, pp. 13 et seq.

international law.² The Federal Constitutional Court derived from this principle the requirement to interpret both statutory law and the Basic Law in a way that is open to and in conformity with international law where possible, in order to avoid conflicts with international law. If a legal provision seems to be contrary to international law at first sight, the Court works on the assumption that the legislature wanted to act in conformity with its obligations under international law. The interpretation in conformity with international law reaches its limits only if the legislature clearly expresses that it wants to deviate from an obligation under international law.³

In addition, the obligation to respect international law follows from the Basic Law's openness to international law. First, German state authorities are obliged to comply with the provisions of international law that are binding on the Federal Republic of Germany and to refrain from violations where possible. Second, the legislature must ensure that with respect to the domestic legal order, violations of international law committed by German state organs can be remedied. Third, German state organs may also be under a duty to enforce international law within their respective area of responsibility if violations are to be committed by foreign states.⁴ The third obligation plays an important role, particularly in extradition law. When other states violate international law, German authorities and courts must not lend them a hand. Consequently, an extradition is precluded if, for instance, the person to be extradited has to expect the death penalty, torture or degrading or inhuman treatment or punishment in the receiving state. The same applies where a flagrant denial of a fair trial is foreseeable in the receiving state.⁵

However, when the Second Senate decided on a so-called “Treaty Override” in 2015, it pointed out that the principle of openness to international law does not entail an unreserved constitutional duty to comply with all international treaties. It stated that the legislature remained free to revise legislative acts determined by an international treaty and undertaken by earlier legislatures. This derived in particular from the principle of democracy and from a systematic interpretation of the provisions concerning the implementation and rank of international law in the domestic sphere. The Senate held that an international treaty – in this case a double taxation treaty with Turkey – only became effective at the domestic

² Payandeh, *Völkerrechtsfreundlichkeit als Verfassungsprinzip*, Jahrbuch des öffentlichen Rechts (JöR) 57 (2009), p. 465 (481, 483 with further references).

³ Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 74, 358 (370); 141, 1 (30 para. 72).

⁴ BVerfGE 112, 1 (26).

⁵ Order of the Second Chamber of the Second Senate of 26 February 2018 – 2 BvR 107/18 –, juris, para. 31 and 32

level through the act of approval and in principle only had the rank of statutory federal law. On the basis of the *lex posterior* principle, subsequent statutes may thus deviate from the treaty provisions.⁶

2. Yet human rights covenants, and in particular the European Convention on Human Rights, have a special status based on Art. 1 (2) of the Basic Law, which contains the commitment of the German people to inviolable and inalienable human rights.⁷ The European Convention on Human Rights only has the same rank as statutory law; yet the Federal Constitutional Court draws on it – as interpreted by the European Court of Human Rights – as a “guideline for interpretation” to determine the content and scope of the fundamental rights and rule-of-law principles laid down in the Basic Law. This case-law is based on acknowledging that the judgments of the European Court of Human Rights serve as factual guidelines and indicators, and thus have a factual precedent effect. This has to be considered by all contracting states in order to avoid violations of the Convention where possible. Therefore, especially in comparable cases, the regular courts and the Federal Constitutional Court itself must consider the case-law of the European Court of Human Rights.⁸

However, drawing on the European Convention on Human Rights and the judgments of the European Court of Human Rights is not a process of systematically establishing parallel legal or constitutional concepts, but a process focussing on outcomes. It is necessary to actively adopt and, in the course of doing so, to “adapt” the human rights contents of the European Convention on Human Rights to the context of the receiving constitutional order. In doing so, similarities between certain concepts must not distract from the differences resulting from the different contexts of the legal orders. This approach can be compared to a high-quality translation process, in which certain expressions are not translated into the other language word for word, but in which the translator tries to come up with a phrase that best conveys the sense and meaning of the original expression. Furthermore, the case-law of the European Court of Human Rights has to be integrated into the existing domestic legal order with its differentiated doctrines as gently as possible.⁹ As, for this reason, an indiscriminate adoption of international law concepts is already precluded, particularly the unwritten constitutional principle of proportionality can be

⁶ BVerfGE 141, 1 (30 et seq. para. 73 et seq.) with separate opinion of Justice König, 44 et seq.

⁷ BVerfGE 141, 1 (32 para. 76).

⁸ Cf. BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 et.al. -, juris, para. 132.

⁹ Cf. BVerfGE 111, 307 (327); 128, 326 (371); BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 et.al. -, juris, para. 135.

drawn on to include assessments of the European Court of Human Rights in the constitutional balancing test.¹⁰

There are, of course, limits to an interpretation in conformity with the Convention. These are derived from the Basic Law. First, such an interpretation is not permissible where it no longer appears adequate based on the accepted methods of interpretation of statutes and of the Constitution.¹¹ If there are several possible interpretations in accordance with the accepted methods, the regular courts must choose the interpretation that is in conformity with the European Convention on Human Rights.¹² However, the regular courts may disregard a judgment of the European Court of Human Rights if it turns out that taking it into account leads, due to circumstances that have changed in the meantime, to an outcome that violates clearly conflicting statutory law or Basic Law provisions, in particular fundamental rights of third parties.¹³ Yet they must provide valid reasons for such disregard. Where regular courts violate their obligation to take into account the case-law of the European Court of Human Rights, such a violation may be asserted by way of a constitutional complaint. Second, if taking into account the case-law of the European Court of Human Rights resulted in less protection of fundamental rights than that guaranteed by the Basic Law in the specific case, this would constitute another limit to an interpretation of fundamental rights that is in conformity with the Convention, and has to be considered.¹⁴ Article 53 of the European Convention on Human Rights itself already precludes the possibility of lowering the level of protection in such a way. This problem can mainly occur in multipolar fundamental rights situations, in which more freedom for one holder of fundamental rights entails less freedom for another. Third, the legislature and the courts may disregard the interpretation of the Convention by the European Court of Human Rights, if this interpretation violates fundamental principles of the Basic Law.¹⁵

In my view, this approach, which is open to international law and at the same time flexible, enables the Federal Constitutional Court to integrate the guarantees of the European Convention on Human Rights and other international (human

¹⁰ Cf. BVerfGE 111, 307 (324); 128, 326 (371 and 372).

¹¹ Cf. BVerfGE 111, 307 (324).

¹² Cf. BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 et.al. -, juris, para. 133.

¹³ Cf. BVerfGE 111, 307 (329); BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 et.al. -, juris, para. 133.

¹⁴ Cf. BVerfGE 111, 307 (317); BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 et.al. -, juris, para. 134.

¹⁵ Cf. BVerfGE 111, 307 (319); BVerfG, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12 et.al. -, juris, para. 133.

rights) treaties into the German legal order in an accommodating way, while avoiding violations of international law as far as possible.

III. The Principle of Openness to European Union Law, the Precedence of European Union Law and its Limits

1. The principle of openness to international law is complemented by the principle of openness to European Union law, which was first expressly stated by the Federal Constitutional Court in its Lisbon judgment from 2009.¹⁶ The Court has to take into account the principle of openness to European Law when it exercises its review competence in two types of review proceedings, which it has reserved with regard to European Union law: the *ultra vires* and the identity review. Consequently, both types of review have to be undertaken with due restraint. Still, in exceptional cases both review proceedings may lead to a situation in which the precedence of application of the respective act of European Union law is ruled out in Germany.

In principle, the Federal Constitutional Court has recognised the precedence of application of European Union law over domestic law, even over national constitutional law that is contrary [to European Union law].¹⁷ Art. 23 of the Basic Law contains the authorisation to transfer sovereign powers to the European Union. It thus accepts the precedence of application accorded to European Union law by the Act of Approval to the Treaties. Yet at the same time, there are two types of limits to the precedence of application. For one thing, precedence only applies to the extent that the Basic Law and the Act of Approval transferred sovereign powers to the European Union and, for another thing, to the extent that they were allowed to transfer them. Therefore, a distinction must be made between what has been transferred – a case for the *ultra vires* review – and what may be transferred – a case for the identity review.

2. In its Lisbon judgment, the Federal Constitutional Court emphasised that it must remain possible within the German jurisdiction to review the overstepping of boundaries when organs of the European Union, including the Court of Justice of the European Union, make use of competences. To do so, it has created the possibility of the *ultra vires* review. In this type of proceedings, the Court reviews whether legal acts of EU organs are within the boundaries of the sovereign powers transferred to them by the *Bundestag* and the *Bundesrat*. Yet, taking into account the principle of openness to European law, a violation of the *ultra vires* doctrine can only be established if the EU organs exceed their

¹⁶ BVerfGE 123, 267 (354).

¹⁷ Cf. only BVerfGE 126, 286 (301); 129, 78 (100).

competences in a sufficiently significant manner. This requires that an EU organ evidently acts in breach of its competences and that the challenged measure leads to a structurally significant shift in the division of competences between the Member States and the European Union at the expense of the Member States.¹⁸ The *ultra vires* review falls exclusively within the remit of the Federal Constitutional Court. Insofar as the Court of Justice of the European Union has not yet clarified the questions raised, the Federal Constitutional Court provides it with the opportunity to interpret the challenged legal acts of the European Union and to decide on their validity by way of a preliminary ruling before it establishes an *ultra vires* act.

3. Regarding the openness of the Basic Law to European Union law, the same applies to the identity review,¹⁹ i.e. the review of the limits of what may be transferred. These limits are set by the inviolable core content of the Basic Law's constitutional identity. In particular, this includes the guarantee of human dignity and the principle of democracy. On the one hand, the Federal Constitutional Court carries out the identity review regarding acts of approval that transfer sovereign powers, such as in the judgment on the Lisbon Treaty. On the other hand, the identity review serves to review whether – after sovereign powers have been transferred – actions of EU organs violate the principles declared inviolable in Art. 79 (3) of the Basic Law.²⁰ This ensures that the precedence of application of European Union law only applies within the limits of what is authorised under constitutional law. First and foremost, the identity review serves to safeguard the democratic process in Germany, but also at the European level. In this regard, the Federal Constitutional Court is primarily concerned with protecting the state as the primary sphere of democratic decision-making and democratic responsibility, for instance by securing Parliament's budgetary sovereignty, which must not be delegated to the European Union. Moreover, the identity review serves to guarantee that the integration process is democratically bound to the people as the sovereign power, namely by way of granting the German *Bundestag* far-reaching rights of information and oversight as a basis of parliamentary participation. At a procedural level, oversight is made possible by a far-reaching individual "claim to democracy" which follows from the right to vote and to be elected, and is, in particular, directed at the *Bundestag* and the Federal Government. In the context of their responsibility with respect

¹⁸ BVerfGE 126, 268 (303 et seq.).

¹⁹ BVerfGE 140, 317 (339 para. 46).

²⁰ Art. 79(3) of the Basic Law reads as follows: Amendments to this Basic Law affecting the division of the Federation into *Laender*, their participation on principle in the legislative process, or principles laid down in Articles 1 and 20 shall be inadmissible.

to European integration, the *Bundestag* and the Federal Government have to ensure that the democratic process at the national level is not undermined in the course of continuing European integration. Any citizen can assert this “claim to democracy” by way of a constitutional complaint.

Yet the identity review can also be drawn upon in the context of protection of fundamental rights. In a decision from 2015, the Federal Constitutional Court reviewed a potential violation of the constitutional identity due to the execution of the EU Framework Decision on the European arrest warrant. Specifically, this decision concerned a violation of human dignity, as a 30-year prison sentence was to be enforced in Italy against a person who had been convicted in absentia without his knowledge. This raised the question of a violation of human dignity, which in accordance with the principle of individual guilt requires that the accused can defend him- or herself before a court. The Federal Constitutional Court established that it guarantees, unconditionally and in any individual case, the protection of fundamental rights that is indispensable under the Basic Law.²¹ However, it has to be emphasised that, in the context of the identity review, a general review of fundamental rights is in principle not undertaken, for it only concerns the guarantee of the protection of human dignity that is indispensable under Art. 1 (1) of the Basic Law. The Court of Justice of the European Union reacted to this decision by strengthening the protection of fundamental rights in the context of executing European arrest warrants in its *Aranyosi* decision taken several months later, thus eliminating the basis for future conflicts between European Union law and German law from the outset. This example illustrates how the dialogue between domestic constitutional and supreme courts and the Court of Justice of the European Union can have beneficial effects.

I would like to add that in this decision, the Federal Constitutional Court made comprehensive references to the case-law of constitutional or supreme courts of several other EU Member States, including Latvia, to support its view that national constitutional law can set limits to the precedence of application.²² This shows that the Court increasingly engages with the decisions of the apex courts in other Member States, in particular in the context of the European Union, and draws on them for its own case-law in this area. Conversely, it seems that the underlying idea of the identity review, i.e. safeguarding fundamental constitutional principles and human dignity, is shared by constitutional courts of other Member States. By way of example, I would like to mention the “controlimiti decision” by the Corte Costituzionale and the Lisbon judgment by the Czech Constitutional Court. In order to avoid conflicts with European

²¹ BVerfG 140, 317 (341 para. 49).

²² BVerfGE 140, 317 (339 and 340 para. 47); also BVerfGE 142, 123, (197 and 198 para. 142).

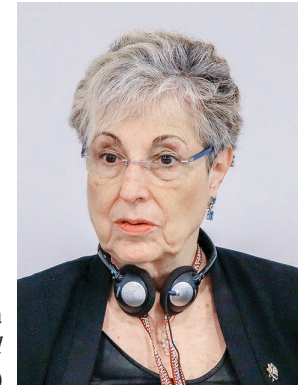
Union law and international law where possible, the national courts should, however, invoke the boundaries set by their constitutional identity only rarely and carefully.

IV. Preconditions for Better Acknowledgment of the Judgments of National and International Courts

In my view, the collaboration between the constitutional and supreme courts of EU Member States has intensified considerably over the past decade; this development has also been fostered by mutual working visits and improved access to the respective decisions. The courts are meeting the challenges associated with European Union law and adapting their way of working to the changed and more complex circumstances. I doubt whether the same can be said already regarding international law. In this respect, most national highest courts – and in my opinion, this also applies to international courts – have only just embarked on the path towards better mutual awareness and acknowledgement. Not least, this is due to practical difficulties, from the necessity to translate one’s own decisions at least into English in due time to the lack of the capacities required to follow and analyse the case-law of the other courts.

Over the past few years, the Federal Constitutional Court has significantly increased its staffing for translating its decisions and for following and analysing relevant decisions of other national and international courts. This is based on the understanding that our decisions can only be better acknowledged if they are translated at least into English in due time – in shortened form – and published on our website. German and English press releases are now published simultaneously for important decisions. Since the start of 2017, our translation team, which consists of both highly skilled translators and judicial clerks with excellent language skills, has been publishing an e-mail newsletter in English, which has reached more than 250 subscribers in a very short time period. And since mid-2017, the team has been publishing an internal online newsletter, in which the most important decisions of the Court of Justice of the European Union, the European Court of Human Rights and other international courts as well as foreign European and non-European constitutional and supreme courts are briefly summarised and analysed. These initiatives considerably support the work of the Justices and judicial clerks and enable them to obtain a good overview of relevant foreign decisions. If desired, users can access the original decisions or, where available, a translation and the respective press release with one click. This is complemented by special newsletter issues on the occasion of working visits of foreign courts, presenting the most important recent decisions of these courts in a concise way.

The court has thus laid the necessary foundations to be better placed in the globalised world of the 21st century and to adapt its way of working to today's changed circumstances. Certainly, more could still be done, but at least this is a promising start. The way Constitutional Court Justices work has certainly changed profoundly and has become more complex compared to 20, 70, let alone 100 years ago. In many areas, the role of constitutional courts can no longer be adequately fulfilled without the knowledge of decisions of other constitutional and supreme courts as well as supranational and international courts. Therefore, continuous cooperation with other courts is very important. Today's conference is another occasion to bring us together and contributes to the success of this cooperation. Thank you very much for this!



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The role of constitutional courts in the globalized world of the 21st century. The Spanish experience¹

Summary

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¹ Speech delivered by Vice President of the Spanish Constitutional Court in occasion of her participation in the Conference organized by the Constitutional Court of the Republic of Latvia. Riga, the 25th May 2018. Text prepared with helpful assistance of Dr. Carlos Padros, Counsel of the Spanish Constitutional Court.

1. Globalisation. Mobility and its effects

Much has been written about globalisation as an economic and social phenomenon. However, less emphasis is placed on the impact on legal systems that the driving forces of globalisation present.

We are experiencing a true social revolution mainly characterized by:

- **Technological advances:** Since the 1990s, the enhancement related to telecommunications and Information Technology (IT) has shown remarkable improvements in the access to and the flow of information.
- **Free trade.** This advancement in technologies and transportation facilities has led to the growth of various sectors of economies throughout the world. Apart from this, the improvement in technology and communication networks has facilitated the exchange of goods and services, resources and ideas, irrespective of their geographical locations. For many economic activities, the market dimension is, at present, global.
- **Increasing mobility.** Mobility of individuals, information and knowledge has smoothened the growth process of globalisation. Several complex and sensitive issues are inherent in the process of globalisation, including the role of culture and political/social acceptance of attitudes towards the involvement of States in the global arena.

The course of globalization is set by those driving forces, which interact in the political and economic decision-making structures of a society in a particular moment. For our purposes, globalisation can be seen as a process of intensification of social relations on the local, regional, continental or global scale, followed by the increase in interconnectedness and interdependence of human society which manifests itself in many spheres of social life – in the sphere of social being (economics, technology, culture, etc.) and in the sphere of social organisation (ideology, politics, law).

This revolution has altered the scale of legal regulation in the sense of broadening the traditional boundaries of social organisation. And since globalisation affects not only the economy but also society as a whole, new norms and decision-making structures are required. In other words, global economy demands global legal regulation.

However, this new paradigm affects not only the dimension and scale of legal systems but also presents a qualitative element: a new method of legal production and enforcement.

Two examples can be taken into account: Company Law and Private International Law in family matters. I would like to make a minor reference at the end of this presentation to the challenges that globalisation and nationalism

combined can pose to national and plurinational States as well as to Constitutions and Constitutional Courts.

a. Company law

Companies can choose their place of registration with quite a remarkable flexibility. A German investor can decide to create a company and to register it in Luxemburg or Ireland in order to operate in the European market. This implies a range of different domestic models of company law (or, a unified model as shown by Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE)).

Different legal orders and legal models are available and, therefore, put under pressure. Owners of internationally mobile factors of production, mainly capital, will direct these resources to those locations where legal conditions are the most favourable to them. If the exit of capital reduces the overall social welfare of a State, it may result in reactions of citizens asking for domestic legal reform.

This exemplifies how global economic mobility fosters local legal reform. In exploring this phenomenon, it is analytically useful to distinguish between two interdependent phases or moments in a process of legal globalisation:

- **institutional search:** this is the process which involves the choice of rules made by the mobile resources. It is normally characterized by a positive action of those factors implying a movement (normally abandoning one jurisdiction in an exit-option).
- **institutional entrepreneurship:** it is constituted by the reactions of local institutions to a mix of incentives that drive them to legal changes.

Thus, institutional search and institutional entrepreneurship are two partial processes of legal globalisation. The potentialities of legal substitution depend, firstly, on the freedom of companies to leave one institutional domain and to enter others. At the same time, they are contingent on the freedom of politicians and regulators to provide regulatory alternatives.

At the end of the day, global mobility becomes a powerful tool for domestic legal changes, most of the times, beyond direct State control.

b. Private International Law

A couple of rich Italian nationals, married under French law, die in Paris where they mainly used to live, and among the goods that form their estate there is a villa in the Croatian seaside. Which law is applicable to a legal dispute between the two heir sons of the husband – one of them born from a former wife?

This fictional example – now related to family and succession law – explains the flourishing of Private International Law (PIL). Although family law remains the competence of EU countries, the EU can legislate on family law if there are cross-border implications. The EU has adopted a number of measures designed to help citizens with cross-border litigation and the three immediate examples that come to mind are:

- **Regulation (EC) No 864/2007** of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
- **Regulation (EC) No 44/2001** of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).
- **Regulation (EU) No 650/2012** of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

Thus, PIL can be conceptualized as a contemporary effort to devise and theorize a global law that would bypass the State's institutional structure and revisit its shortcomings. In other words, while traditional PIL is only a legal tool to choose among different legal regimes, globalisation has rised the need for a true form of supranational family law which includes common shared values. We will come back to this matter later on.

PIL shows that globalisation in law is not limited to markets but also involves societies, cultures and ideologies. Moreover, it is not because globalization multiplies foreign encounters and smoothes differences that ethnocentrism has disappeared. On the contrary, it is reproduced and displaced by a form of **global-centrism**.

Regardless of the concrete examples and viewpoints we select, at the end of the day, globalisation means a redefinition of the traditional **equation law-territory**. As opposed to Bodin's notion of sovereignty, globalisation gives birth to "inter-sovereignty", in order to explain the relinquishment of sovereignty by the States in fields of common interest, where the decisions are shared with the other members of the international community. A given national jurisdiction applies not only its own domestic law but a constellation of other applicable norms. In turn, this implies a redefinition of the concept of national sovereignty. As Stacey puts it, "**relational sovereignty** describes the role of the sovereign government as one of meeting its citizens' civil and political needs, since those needs are asserted by actors that are external to

the nation-state. Properly seen, sovereignty is a quantitative function rather than an unconditional status"².

2. Constitutional openness and interdependence

The process of interdependence and globalization affects not only private law and mobile factors but also the very foundation of the national constitutional texts. This is particularly true in relation to the protection of human rights.

Constitutional openness towards supranational regulation in the field of human rights has been verified in a twofold manner in the Spanish legal order:

a. Art. 10.2. SC. Constitutional interdependence

According to art. 10.2 SC, the principles relating to fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain. This provision has been frequently labelled as the expresion of the international openness of the Spanish Constitution in relation to fundamental rights.

Article 10.2. SC imposes an interpretative rule on those applying and interpreting the domestic legal order. Courts, including the Constitutional Court, have to ensure the compatibility of their reasonings with international obligations and decisions taken by international institutions.

The Constitutional Court of Spain has taken very seriously the interpretative potential of article 10.2 in the reading of the fundamental rights and public freedoms that the Constitution recognizes and, as regards the European Convention on Human rights, it has assumed the principle of "**res interpretata**" (as opposed to "res iudicata").³ Although in accordance with art. 46.1 of the ECHR, the obligatory force of the judgments of the European Court is limited to the members states that have been a party during a litigation and, therefore, lacks any "*erga omnes*" effect, one has to admit that the scope and the authority of the pronouncements of the European Court entail a true harmonization effect. Indeed, the Court itself has emphasized that its judgments

² STACY, Helen "Relational sovereignty" *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 99 (MARCH 30-APRIL 2, 2005), pp. 396-400.

³ See QUERALT, Argelia. "Chronicle of an Enforcement Foretold: The Effectiveness of the Del Río Prada ECtHR Judgement in Spain", in *Multilevel Protection of the Principle of Legality in Criminal Law*. Springer, 2017. Pp. 195-212.

serve not only to solve the cases it adjudicates, but, more widely, to clarify, to safeguard and to develop the Convention.

To sum up, the European standard arises today as the minimum and common standard for all States Parties to the Council of Europe, since the jurisdictional nature of the highest Court guarantees respect for citizens' rights. This can be considered as a manifestation of globalisation – or a regional integration – in the field of human rights protection.

It must be noted that this invisible harmonisation takes place *via* a process of cross-fertilization among constitutional courts opened now to a European-scale dialogue. This way, globalisation excludes the vertical subordination of domestic legal orders to supranational courts but, instead, creates a horizontal network of Courts. This dialogue implies a strong antidote against the so-called “**constitutional laziness**”, since it prevents from automatic assumption of human rights standards.⁴

This tool of globalisation of human rights through judicial interpretation and cooperation is further reinforced by Protocol No. 16 to the ECHR, currently under ratification, and the introduction of the “*advisory opinions*” submitted to the Strasbourg Court by the Highest domestic courts and tribunals relating to the interpretation or application of rights and freedoms defined in the Convention.⁵

b. Enactment of Act 41/2015 of October 5th 2015, amending the Spanish Criminal Procedure Code

Together with the ex-ante mechanism that constitutional interdependence implies, there is also a pressure to guarantee the effectiveness of supranational judgements. This may eventually require domestic legal reforms.

⁴ VAN DE HEYNING, Catherine. “The constitutionalisation of the Convention through domestic constitutional adjudication” in P. POPELIER et al. *The Role of Constitutional Courts in Multilevel Governance*, Intersettia, Cambridge 2013, p. 35

⁵ France has very recently (12 April 2018) ratified Protocol No. 16 to the Convention in Copenhagen, during the High level Conference on the Reform of the system of the European Convention on Human Rights. Protocol No. 16 will come into force on 1 August 2018. The countries having already ratified the Protocol are: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine. The President of the European Court of Human Rights, Guido Raimondi, warmly welcomed this tenth ratification, with the following words: “The entry into force of Protocol No. 16 will strengthen dialogue between the European Convention on Human Rights and the national higher courts. This is a milestone in the history of the Convention and a major step forward in human rights protection in Europe, as well as being a fresh challenge for our Court”.

Quite early, the Constitutional Court of Spain held in its judgment 245/1991, of December 16th,⁶ that judgments of the ECHR should have an effect of reopening the previous criminal proceedings whenever:

- a) The ECHR has declared a violation of the Convention that implies a violation of the fundamental rights established in the Spanish Constitution which may give way to bring an “Amparo appeal” before it.
- b) The violation stems from a decision by a Criminal Court.
- c) The effects of the violation still remain in existence.
- d) The personal freedom of the applicant is at stake.

In those cases, the Constitutional Court considered that the judgment of the ECHR – declaring a violation of the right to a fair trial in criminal matters (art 6.1 of the Convention) – had the effect of bringing the lawsuit back to the point where the violation took place (that is to say, the effect of reopening the criminal procedure).

In the ECHR Great Chamber's Judgment of October 21st 2013 on the Del Río Prada vs. Spain Case, the European Court indicated an individual measure consisting in the release of the applicant from jail as soon as possible. The Spanish doctrine on accumulation of different imprisonment judgements was thus quashed. The effectiveness of the supranational decision implied that national jurisdictional decisions had to be immediately revised.

This led to the reopening of all the national procedures where the Spanish jurisprudence was applied, and those persons still in prison who had to benefit from the ECHR judgment were immediately released. The Spanish Supreme Court adopted a general internal rule declaring that all these decisions could be subject to revision before it. Following this, the Spanish Parliament passed **Organic Law 7/2015**, of July 21st including a new legal possibility to request the revision of a final judgment following an ECHR judgment. This revision is now provided for by the new piece of legislation (art. 5bis). This new procedure is regulated by **Act 41/2015** of October 5th, amending art. 954.3 of the Spanish Criminal Procedure Code.

This constitutes an example of how constitutional openness and the need to guarantee effective enforcement of European rulings has led the Spanish law-makers to modify its procedural regulations in order to accommodate them to European requirements. Contrary to the previous example, this is closer to a case of vertical harmonisation or hierarchical power to reverse national final judgements.

⁶ The Constitutional Court developed this jurisprudence in its judgements on cases 96/2001, 240/2005, 313/2005 and 197/2006, as a consequence of several judgments of the ECHR. National Courts have followed this criteria ever since.

Both previous examples illustrate the end of constitutional autarchy in the field of human rights. Even though Constitutions of the XX Century were considered the social contract regulating the relationship of citizens with the nation-State at the highest level, nowadays, Constitutions are open to international integration (either regional or global). The main difference is, however, the lack of a global constituency.

Current global constitutionalism is not based on a central authority and a formalized process but, instead on an atomistic network without a central authority where different Courts interact and interplay. The analogy with the economy is self-evident: from “*brick and mortar*” constitutionalism to “*Internet*” constitutionalism. It must be taken into account that the very foundation of the second was to lay the foundations of a system that had to be both interoperable and robust, on the one hand, and fault-tolerant, on the other.

This last aspect brings us to the concept of constitutional pluralism.

3. Constitutional pluralism. Challenges ahead

a. United but diverse

On a constitutional level, the previous reasoning is concerned with the manner of organising a society in terms of institutions (i.e. centralisation versus decentralisation; unity versus pluralism). On an ideological level, diverging views in Europe also appear on such issues as confidence in the functioning of markets (liberalism) versus some type of control and interventionism; sovereignty of the consumer versus the need for his or her “protection”; the role and the size of government; spontaneity of autonomous decision-making and decentralised processes versus constructionism.

Constitutional globalization is in a quest to find its institutions, and before the showdown between uniformity and pluralism.

According to the constitutional tradition that has dominated our political and legal thought for centuries, every law and political power of a given territory derives, in some ultimate sense, from a single and ultimately hierarchical source of constitutional authority, such as that territory’s sovereign people. Over the last twenty years, however, globalisation transcends the monist paradigm and opens the door to a whole new constitutional vision. According to constitutional pluralism, the nation-state Constitutions (their peoples) and the European Constitution (the European people) are ultimately equally self-standing sources

of constitutional authority that overlap heterarchically over a shared piece of territory, and ought to overlap.⁷

This has its immediate translation in the use of the concept of “national constitutional identities”. Under Article 4(2) TEU, this treaty provision refers to the Member States’ national identities, inherent in their fundamental structures.⁸ Certain domestic constitutional courts which present themselves as the ultimate defenders of the identity of their constitution have pointed to Article 4(2) TEU to legitimize their assumed power to review secondary EU law against their constitutional identity (German Bundesverfassungsgericht, 2 BvE 2/08, 30 June 2009, paras 234, 240, 332 and 339; 2 BvR 2735/14, 15 December 2015, para 44. See also, regarding the Spanish Constitutional Court, Declaración 1/2004, 13 December 2004, paras 35, 37–45 and 58; Sentencia 26/2014, 13 February 2014, para II.3; and the French Conseil Constitutionnel, Décision No 2004–505 DC, 19 November 2004, paras 10 and 12–13).

The forge of the new constitutional principle of subsidiarity tries to provide a bridge between these two worlds.

We are in front of a new political principle in Europe which has the difficult task of matching two opposite perspectives by way of a dynamic conceptualisation of the constitutional issue of territorial distribution of powers: the ever-growing competence of the Community and the loss of jurisdiction by the Member States. Subsidiarity suggests that a larger margin of appreciation should be left to local actors on how they regulate certain areas of social policy, so as to allow the interaction in conditions of competition without a central authority.

According to Protocol No. 15 of the ECHR a new recital shall be added at the end of the preamble to the Convention, which shall read as follows:

*“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the **primary responsibility** to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”*

An outstanding characteristic of the multilevel protection of fundamental rights is its high degree of sophistication. Rights recognized in national constitutions overlap with those of the European Convention of Human rights and also, for countries belonging to the European Union, with those of the Charter

⁷ JAKLIC, K. Constitutional Pluralism in the EU. Oxford, 2014.

⁸ Case C-399/11, Melloni, Opinion of AG Bot, EU:C:2012:600, paras 137–8 and 142; Case C-62/14, Gauweiler, Opinion of AG Cruz Villalón, EU:C:2015:7, para 59.

of Fundamental Rights of the European Union. They are all superimposed bills of rights that turn out to be, in all cases, endorsed by the jurisdiction of an interpreting Court.

Rights recognized in those constitutional or conventional instruments are not always coincidental and, neither are, in occasions, the interpretations thereof made by the respective courts. Inevitably, there have been – and there are going to be in the future – jurisprudential discrepancies that will naturally lead to diverse levels and standards of protection.

The challenge of constitutional globalisation is, for that very reason, to reach a subtle equilibrium between common standards and national identity.

b. National identity hard-cases. Abortion and Same sex marriage

1. **Voluntary interruption of pregnancy** is one – if not the most – delicate issue in respecting national constitutional identities and the protection of the fundamental right to life.

With some exceptions, such as the situation where the mother's life is at risk, abortion is illegal in Cyprus, Ireland⁹ and Malta. In nine Member States, abortion is only allowed without parental consent from the age of 18 years onwards (Bulgaria, Denmark, Greece, Hungary, Italy, Luxembourg, Poland, Slovakia and Spain). In some of these Member States, abortion before the age of 18 years may be permissible with judicial or administrative consent.

In the other Member States, young women can have access to abortion services only under specific medical circumstances, depending on the maturity of the foetus and on the doctor's assessment. Under a certain age, parental consent might also be needed. Abortion is only possible within a certain timeframe, which is also the case for adult women. In France and Luxembourg, if the pregnant woman expresses the desire to maintain confidentiality, she can designate an adult other than one of her parents to be given the information and to be with her during the procedure.

Ireland has voted on the 25th May 2018, "Yes" to end the country's ban on abortion after a historic referendum. Voters were deciding whether to repeal the eighth amendment of the Irish Constitution, which recognises the equal right to life of both mother and unborn child, effectively banning abortion. The Republic of Ireland has voted overwhelmingly to overturn the abortion ban by 66.4% to 33.6%. This vote in favour of repeal paves the way for the Irish Parliament to legislate for change which would see the introduction of a much

⁹ Abortion is only allowed when a woman's life is at risk, but not in cases of rape, incest or fatal foetal abnormality..

more liberal regime. In 2015 the country also voted overwhelmingly to legalise same-sex marriage in another historic referendum.

In 2010, judgement A, B and C v Ireland of the European Court of Human Rights dealt with the right to privacy under Article 8 ECHR. The court rejected the argument that article 8 conferred a right to abortion, but found that Ireland had violated the European Convention on Human Rights by failing to provide an accessible and effective procedure by which a woman can ascertain whether she qualifies for a legal abortion under Irish law. In 2013, Ireland passed the Protection of Life During Pregnancy Act.

Article 2.1. of the EU Charter of Fundamental Rights recognizes that everyone has the right to life.

The European Union Agency for Fundamental Rights endorses the Committee on the Rights of the Child vision on the right of the child to the enjoyment of the highest attainable standard of health.¹⁰ This document states that "*States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services. States should work to ensure that young women can make autonomous and informed decisions on their reproductive health*". The Committee recommends "*that States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal*".

In the ECJ Judgment of 4 October 1991 (The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others. Case C-159-90) a reference for a preliminary ruling was requested by the High Court of Ireland. The question was approached as one relating to freedom to provide services and prohibition on the distribution of information on clinics carrying out voluntary terminations of pregnancy in other Member States.

The Court upheld the Irish prohibition but, nonetheless, considered medical interruption of pregnancy as a medical service. The public order exception was not applicable. The fear of a progressive erosion of Ireland's constitutional identity in relation to abortion led European institutions to adopt the PROTOCOL on the concerns of the Irish people on the Treaty of Lisbon. (OJ L-60/131 of March 2nd 2013).

Article 1 of the aforementioned Protocol establishes that: "*Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3,*

¹⁰ <https://www.crin.org/en/library/publications/crc-general-comment-right-health>

the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland.”

2. A second example is provided by the recognition of **same sex marriage** across different European legislations. ECHR case-law consistently confirms the freedom of States to make marriage available to persons of the same sex, (Chapin and Charpentier v. France of 9 June 2016). This is a very sensitive question on the definition of the concept of family attributed to domestic law. However, the Strasbourg Court also considered that it was ‘artificial to continue to take the view that, unlike a heterosexual couple, a homosexual couple could not have a “family life” for the purposes of Article 8 [of the ECHR]’. The ECHR has also confirmed that Article 8 of the ECHR required States to afford homosexual couples a legal recognition and the legal protection of their relationship. (Oliari and other v- Italy of 21 July 2015).

Article 9 of the EU Charter of Fundamental Rights states that “*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*”.

In 2005, Spanish Parliament passed Act 13/2005 of 1 July, amending the Civil Code concerning the right to marriage of same sex couples. This reform legalized marriage between same-sex couples, including the right of adoption. Homosexual and heterosexual couples have the same rights and duties. The Act was challenged before the Constitutional Court, and was declared to be in accordance with our constitutional text (CCJ 198/2012, of 6th November).¹¹

Now, the question arises as regards a question for a preliminary ruling submitted by the Romanian Constitutional Court (Case C-673/16). The Advocate General’s opinion was recently delivered on 11 January 2018. The development in the understanding of family life has indisputably had an impact on the right of residence of nationals of third countries. Although Article 8 of the ECHR does not entail a general obligation to accept the installation of non-national spouses or to authorise family reunion in the territory of a Contracting State, decisions taken by States in the immigration sphere can in some cases amount to an interference with the right to respect for private and family life secured by Article 8 of the ECHR. That is the case, in particular, when the persons concerned possess sufficiently strong personal or family ties in the host country that are liable to be seriously affected by the application of the measure in question. (Taddeucci and McCall v. Italy of 30 June 2016)

¹¹ - SÁEZ, Macarena (ed.) Same Sex Couples – Comparative Insights on Marriage and Cohabitation. Springer 2015.

According to the AG’s opinion, although ‘protection of the traditional family may, in some circumstances, amount to a legitimate aim ..., [the ECtHR] considers that, regarding the matter in question here – granting a residence permit for family reasons to a homosexual foreign partner – cannot amount to a “particularly convincing and weighty” reason capable of justifying, in the circumstances of the present case, discrimination based on the grounds of sexual orientation’.

The ECJ has issued its judgement following AG opinion. ECJ (Grand Chamber) judgement of 5th June 2018. Case Relu Adrian Coman. C-673/16. The Court has ruled that “Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.”

The issue is interesting enough to illustrate our proposition. Neither the Convention nor EU Law can impose a direct modification of the Romanian Civil code which expressly excludes foreign same sex marriage from recognition. However, the protection of fundamental rights such as family life impose a non discriminatory treatment of that kind of families. Thus, in an indirect way, fundamental rights are a tool for the development of a global concept of family.¹²

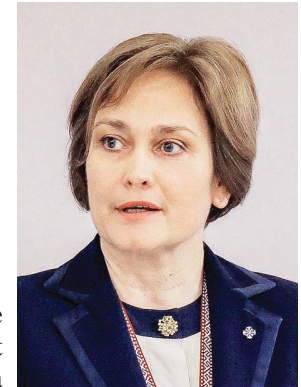
The development of European society – which is reflected in the number of Member States whose legislation permits marriage between persons of the same sex and in the current definition of family life in Article 7 of the Charter – leads to the concept of ‘spouse’ being interpreted independently of sexual orientation as an autonomous interpretation of EU law.

¹² The final decision rendered by ECJ has been labelled by academic commentators as “legal acrobatics” SARMINETO, D. “The Legal Acrobatics of Fundamental Rights – Coman and Gay Marriage as a Case Study”. Available at <https://despiteourdifferencesblog.wordpress.com> Accessed 25th June 2018. “It is a very welcome development that the Court is willing to openly state that the recognition of gay marriage has a fundamental rights dimension. But the way it does it is a good example of how tricky the implementation of fundamental rights can be in EU Law. Because Coman is a free movement case, the issue of fundamental rights appears when the Court explores the justification to a restriction. But Coman is not so much about restrictions on the grounds of fundamental rights (Omega, Schmidberger, etc...), it is a more sophisticated case which has its roots in the ERT case-law. Coman raises the issue of fundamental rights as a means of review of the justifications invoked by Member States. In other words, the question is not whether Romania could invoke the protection of fundamental rights to restrict Mr. Coman’s free movement rights, but whether such restrictions are in line with fundamental rights. It is a much more incisive approach that puts the Member State under a fundamental rights scrutiny by the Court of Justice in light of EU law (usually coined as the “derogation situation”). And that’s exactly what the Court does, although in such a cryptic way that we hardly know what standard it is aiming at.”

c. Some final remarks

The disappearance of economic and social borders between nation-states has led, on one hand, to global interdependence, and, on the other hand, to renewed responsibilities for the nation-state of the 21st century, in order to sustain the very idea of globalisation. In spite of everything said thus far, States continue to be nowadays the fundamental building blocks of all globalizing trends. What is more, it could be argued that without the previous existence of democratic States sustained by open societies, globalisation could not have existed and could not continue to exist.

Globalisation has a huge say in processes of evolution of company or civil law, where national identities versus supranational integration schemes come together. Despite what some argue, International Constitutional Law has yet to emerge. Constitutional Courts remain State-centered, as Constitutions are. Therefore, Constitutional Courts in the 21st century, can help preserve humanistic and cosmopolitan values, and orderly receive the benefits of globalisation, by protecting Rule of Law, Democracy and the respect for Human Rights.



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Constitutional courts as lock-gates in the globalised world¹

Introduction

The role of constitutional courts in maintaining the balance between the constitutional and the international courts as the two basic components of the global legal order is constantly increasing. My approach is based on the presumption that with the consolidation of the international community the universal or the global law, which is horizontal, pronouncedly plural, and decentralised by its nature, becomes stronger. I'll point out that the concept of sovereignty that was slightly "improved" in the middle of the 20th century² is insufficient or deficient to respond to the challenges of the 21st century within the framework of legal concepts and methods that are known and are available to us. In conclusion, I'll offer certain elements of a theoretical answer.

¹ This report was given at the international conference organised by the Constitutional Court of the Republic of Latvia in the framework of Latvia's centenary in Riga on 24-25 May 2018. The topic of the conference was: "The Role of the Constitutional Courts in the Globalised World of the 21st Century". I express my gratitude to the lawyers of the Legal Department of the Constitutional Court for valuable discussions, as well as for pointing to noteworthy sources of doctrine and case-law that were useful in preparing this report.

² See Kelsen H. *Principles of International Law* (2nd ed. Tucker, Holt, Rhinehart & Winston, 1966), pp. 553 -558.

The Paradox of Sovereignty

The contemporary world is still characterised by the state as the main form for organising the society. The sovereignty of the state in relationships with other states and the sovereign as the source of power, on the constitutional level, are still the dominant paradigms in our worldview. These concepts have originated historically and, admittedly, are the outcome of a certain coincidence, because, for example, the separation of the national and the international law in the historical form known to us might not have evolved.³

The development of science and technologies has created a situation where the distance between continents has become relative and the borders between the states – transparent. This causes new challenges and poses new questions in connection with the models for organising the society and the philosophical and legal concepts explaining them, because the aims remain unchanged, i.e. to ensure, in a more effective way, peace, security, welfare, and life worthy of human dignity.

The consistent development of international law and international organisations, in particular the project of the European Union, and the growing significance thereof confirms what has been proven repeatedly by history, i.e., that unilateral and fragmented solutions have never been adequate for coping with internal and external challenges. At the same time, neither in practice nor in the legal science have we abandoned such understanding of the sovereignty that provides: “The constitutional order of a sovereign state is the highest legal authority above which there can be no higher authority that is its source of validity, regulating and determining its conduct. Sovereignty as supremacy is a negative legal concept. Accordingly, international law as an autonomous legal system that authorizes and obligates states must be denied on the sovereignty thesis.”⁴ In other words, sovereignty is (a) absolute power over the particular society, (b) absolute independence externally, and (c) full legal capacity in international law. With this understanding of sovereignty, international law is impossible and supra-national law – even less so. I call it the paradox or the myth of sovereignty because, on the other hand, international obligations are imposed on states and the source of these universally binding obligations is not at all the sovereign of each state. Essentially, we have created a series

³ See Allot P. *The Health of Nations. Society and Law beyond the State*. Cambridge: Cambridge University Press, 2002, p. 58.

⁴ Cohen J. L. Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective. In: Besson S., Tasioulas J. *The Philosophy of International Law*. Oxford: Oxford University Press, 2010, p. 266.

of legal myths, the co-existence of which is possible, but only up to a certain moment.

For example, the Constitutional Court of the Republic of Latvia encountered the paradox of sovereignty that I referred to in the Lisbon Agreement Case of 2008. In this case the Court examined whether the new competences of the EU, to be introduced by means of the Lisbon Agreement, restricted the sovereignty of the people, which is encompassed and safeguarded by Article 2 of the *Satversme* [the Constitution of the Republic of Latvia]. The Court found that it had not identified such provisions of the Lisbon Agreement that would infringe upon the principle of the people's sovereignty included and enshrined in Article 2 of the *Satversme*. The Court arrived at this conclusion because it had defined the relationship between the state and international commitments as follows: “When analysing legal consequences that emerge when a state undertakes international liabilities, in international law sovereignty was evaluated as exercise of sovereign rights rather than restriction thereof. The right to undertake international liabilities is an element of State sovereignty. For example, the Permanent Court of International Justice has indicated: “The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty.””⁵ Already in this understanding of sovereignty we see deviations from the concept of sovereignty as an unlimited supreme power. However, this does not change the fact that constitutional courts are at the centre of the sovereignty paradox. Constitutional courts resolve this situation in different ways but, in general, it is rather a still-having-the-eaten-cake (to have one's cake and to eat it, too) solution.

The Relationship between the Constitutional and the European Courts

A dualism like this can exist; however, there is the risk of losing the balance and it increases in the situation of a growing tension between competing legal regimes. I would say that disturbances of this balance may be observed now, which has partly facilitated, for example, the resurrection of interest in the concept of constitutional identity in Europe.⁶ This disturbing of the balance has been

⁵ Judgment of the Constitutional Court of the Republic of Latvia of 7 April 2009 in the case no. 2008-35-01, para. 17.

⁶ It has already been noted in the Latvian legal science that the concept of constitutional identity was relevant in Europe at the time when modern states and their constitutional order were consolidating at the end of the 19th century. See *Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas viedoklis un*

caused, *inter alia*, also by the activities of the European Courts (the Court of Justice of the European Union and the European Court of Human Rights). In one way or another, the intensification of the discourse on constitutional identity points to the sense of an internal or external threat to the sovereign in the classical understanding of this term. The Constitutional Court defined already in 2008, in the Lisbon Agreement Case, the red lined of the Latvian constitutional order. Namely, the Court stated: “Consequently, delegation of competencies [to the European Union] cannot violate the basis of an independent, sovereign and democratic republic based on human rights and the rule of law. Likewise, it cannot affect the right of citizens to decide upon the issues that are essential in a democratic state.”⁷ The Committee on Constitutional Law, in its opinion of 2012 on the unalterable core of the *Satversme*, defined that the meaning of the core of the *Satversme* was the prohibition for the legislator to change the constitutional identity of Latvia. Thus, the unalterable core of the *Satversme* is the constitutional identity of Latvia.⁸

However, Advocate General in *Gauweiler* case commented on the concept or idea of constitutional identity as such with great concern because:

“it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity”. That is particularly the case if that “constitutional identity” is stated to be different from the “national identity” referred to in Article 4(2) TEU”. Such a “reservation of identity”, independently formed and interpreted by the competent — often judicial — bodies of the Member States, would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the [*Gauweiler* case] provide a good illustration of the scenario I have just outlined.”⁹

materiāli. Rīga: Latvijas Vēstnesis, 2012.

⁷ Judgment of the Constitutional Court of the Republic of Latvia of 7 April 2009 in the case no. 2008-35-01, para. 17

⁸ *Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas viedoklis un materiāli*. Rīga: Latvijas Vēstnesis, 2012.

⁹ Opinion of Advocate General Pedro Cruz Villalón in the case C-62/14 *Peter Gauweiler*, delivered on 14 January 2015, paras. 59–60. In this case, the Constitutional Court of Germany turned to the Court of Justice of the European Union with questions regarding decisions by the Council of the European Central Bank (ECB) on several technical features with respect to direct cash transactions of the Eurosystem in the secondary sovereign bond markets.

Article 4(2) of the Treaty on European Union comprises the provision that “the Union shall respect ... the national identity [of the Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” Many battles have been fought both in the doctrine and the case-law of the Court of Justice of the EU and the constitutional and supreme courts of the Member States in attempts to reach an agreement as to what “the national identity” means and what it means that the Union “respects” this identity.

The first issue with respect to which no consensus has been reached is whether “the national identity” of Member States is the same as “the constitutional identity”. Some authors believe that “the national identity” should not be regarded as anything beyond “the instantiation of basic moral principles that require a multinational political community to show respect for the identity of its constituent national groups”.¹⁰ However, the majority of commentators hold that it is complicated or even impossible to differentiate between the concepts of “the constitutional” and “the national identity”. Neither has the Court of Justice of the European Union or its Advocates General provided a precise definition of “the national identity” but rather have limited themselves to casuistic assessment that, for example, “the national identity ... includes protection of a State’s official national language”¹¹, as well as that the status of the State as a republic¹² is an element of the national identity.

On the national level, the constitutional identity is defined in different ways, which is understandable, because the constitutional frameworks differ. For example, the Polish Constitutional Tribunal noted in its *Lisbon* judgement that elements of the Polish constitutional identity were affected by decisions on the fundamental principles of the Constitution and an individual’s rights, including the principle of social justice, the principle of statehood, the principle of subsidiarity, prohibition to delegate the authorisation to amend the Constitution, etc.¹³ The German Federal Constitutional Court in its *Lisbon* judgement expressed the opinion that its constitutional identity was affected by decisions on substantial and procedural aspects of criminal law, on authorisation of the police and army to use force, by fundamental decisions on fiscal revenue and expenditure, decisions that affected living conditions

¹⁰ Cloots E. National Identity, Constitutional Identity, and Sovereignty in the EU. *Netherlands Journal of Legal Philosophy*, vol. 45 (2016), no. 2, p. 93.

¹¹ Judgment of 12 May 2011 of the European Court of Justice in the case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn*, para. 86.

¹² *Ibid.*, para. 92.

¹³ Judgment of 24 November 2010 of the Constitutional Court of the Republic of Poland in the case no. K 32/09, para. 2.1.

in a socially responsible state, as well as decisions of special importance for culture, for example, decisions on family law, on the system of education, and religious life.¹⁴ The Constitutional Council of France, in turn, has noted that, although it has not had to define the constitutional identity, it was inclined to think that the constitutional identity of France was something that it did not share with other countries and was special only for France.¹⁵

In doctrine, Article 4(2) of the Treaty on European Union has been called “the legal nuclear weapon”,¹⁶ therefore it is of particular importance to establish who controls the launching device of this weapon.

Insofar the Advocate General in his opinion in the *Gauweiler* case turns to the constitutional identity, we can see that his concern is about the hierarchy of legal orders. I.e., if the constitutional identity is left exclusively within the competence of constitutional courts this may undermine the primacy of the EU legal order. An insight into the discourse on the constitutional identity and the principle of the supremacy of the EU law reveals that the supremacy of the legal order is at the centre of international/national tension but the supremacy of a legal system is the key to the classical sovereignty concept. This dilemma needs to be resolved so that in terms of a legal and political thought we could move forward.

The Advocate General in the *Gauweiler* case formulated the sovereignty dilemma in the context of the procedural dialogue between the Court of Justice and the German Constitutional Court as follows: “there is a national constitutional court which, on the one hand, ultimately accepts its position as a court of last instance for the purposes of Article 267 TFEU, and does so as the expression of a special “cooperative relationship” and a general principle of openness to the so-called “integration programme” but which, on the other hand, wishes, as it makes clear, to bring a matter before the Court of Justice without relinquishing its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own State is concerned. (...) That ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to

¹⁴ Judgment of 30 June 2009 of the Federal Constitutional Court of the Federal Republic of Germany in the case no. 2 BvE 2/08, para. 252.

¹⁵ “*Les seules normes constitutionnelles opposables à la transposition d’une directive communautaire sont les dispositions expresses de la Constitution française et propres à cette dernière*”. *Commentaire de la décision n° 2004-498 DC du 29 juillet 2004*. Les Cahiers du Conseil constitutionnel. Cahier n° 17.

¹⁶ Faraguna P. A Living Constitutional Identity: The Contribution of Non-Judicial Actors. *Jean Monnet Working Paper*, No. 10/15, p. 28 (available: <https://jeanmonnetprogram.org/paper/a-living-constitutional-identity-the-contribution-of-non-judicial-actors/>).

disregard it entirely when analysing the case.”¹⁷ In the context of the Advocate General’s position the question arises whether a constitutional court in an EU member state should not have the ultimate responsibility for the constitutional identity of the State concerned in connection with the project of European integration?

Perhaps the question needs to be asked whether it is meaningful to phrase the question like this because in the world where the order is still defined by states, the answer will obviously be confrontational to the supremacy claim of a supranational legal system. Advocate General offers the following solution to the confrontation referred to above. Further in his opinion, he refers to the principle of sincere cooperation in Article 4(3) of the Treaty on European Union, which in the Latvian legal order is very much reciprocated through the principle of openness to international law and the direct effect of the EU law. However, these principles evidently do not *per se* address the supremacy claim of all legal systems in relationships with other legal systems. Advocate General cautiously introduces a notion of common constitutional culture of the EU, which is constructed on the basis of constitutional traditions common to the Member States. “Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a ‘community imbued with a constitutional culture’. That common constitutional culture can be seen as **part of the common identity of the Union**, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course *is specific to the extent necessary*, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.”¹⁸ It must be noted that the space granted to the constitutional identity of the Member States, in the Advocate’s General opinion, is “to the extent necessary”, assuming that sooner or later the constitutional identities of the EU and the Member States will merge.

However, yet again the question remains who and in what way will determine the extent necessary, as well as the question of how the convergence of constitutional identities will happen remains open and is obviously controversial.

¹⁷ Opinion of Advocate General Pedro Cruz Villallón in the case C-62/14 *Peter Gauweiler*, delivered on 14 January 2015, para. 49.

¹⁸ *Ibid.*, para 61.

As far as the EU legal order is concerned, in the view of the Court of Justice it is a kind of constitutional order, which is based on the principle of primacy of the EU law, among other principles. Just to recall the Court's language in the *Kadi* Case: "In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions [...]".¹⁹ It is a legal order with a claim to a sort of constitutional character, which has, however, a different source of legitimacy and not the sovereign people as compared to the constitutional orders in democratic states.

Each court protects the legal order or legal regime that it is mandated to protect and develop. I already mentioned some fundamental features that characterise the system of the EU law and, respectively, define the EU's view on its competence and the aim to be attained. The European Court of Human Rights, likewise, looks at matters from its own vantage point. When dealing with issues pertaining to the interaction and co-existence of legal systems, it is worth turning to those rulings in which ECtHR has confronted the constitutional identity of a state. However, Article 53 of the European Human Rights Convention needs to be mentioned, which, in principle, deals with the question of relationship between the Convention and the national constitutions, i.e., the Convention provides that the national legal systems may establish a more extensive scope of the guarantees for human rights. The constitutional order of the state was in the centre of the case *Sejdić and Finci v Bosnia and Herzegovina* case, which was about the constitutional structure, i.e., the House of Peoples and Presidency of Bosnia and Herzegovina put in place by the Dayton Peace Agreement. The main principle was to provide three constituent peoples (Bosniacs, Croats and Serbs) with equal opportunities to elect their representatives to the House of Peoples and Presidency.²⁰ The applicants were of Roma and Jewish origin and could only stand for elections if they belonged to any of the three people. The ECtHR considered that to be discrimination based on Protocol 12 and Article 14 in

¹⁹ Judgment of 3 September 2008 of the Grand Chamber of the European Court of Justice in cases C-402/05 P and C-415/05 P *Kadi*, para. 281.

²⁰ Judgment of 22 December 2009 of the Grand Chamber of the European Court of Human Rights in the case "*Sejdić and Finci v. Bosnia and Herzegovina*", applications no. 27996/06 and 34836/06.

conjunction with Article 3 of Protocol 1. The judgment received an undivided acclamation by human rights groups. It has not yet been executed.

I think the true nature of the difficult task in front of the Court was aptly described by the dissenting judge Bonello. He noted as follows: "These two cases may appear to be the simplest the Court had had to deal with to date, but they may well be, concurrently, among the more insidious. ... Only the action of that filigree construction extinguished the inferno that had been Bosnia and Herzegovina. It may not be perfect architecture, but it was the only one that induced the contenders to substitute dialogue for dynamite. Now this Court has taken it upon itself to disrupt all that. Strasbourg has told both the former belligerents and the peace-devising do-gooders that they got it all wrong. ... The Dayton formula was inept, the Strasbourg non-formula henceforth takes it place."²¹ It is true that the Strasbourg Court guarantees the rights of an individual set forth in the Convention. The issue of constitutional structure of a state or its constitutional identity normally is not contradictory to individual human rights, at least in the European cultural space. However, it may happen and the Strasbourg Court is not too unfamiliar with such situations. Another case with a different outcome is, for example, the *S.A.S. v France* case with regards to prohibition of wearing niqab or burka in public. The Court here ruled that the prohibition did not violate the ECHR and recognized the fundamental constitutional character of the French principle *vivre ensemble*.²² It is important to note that both *Conseil d'Etat* and *Conseil Constitutionnel* had meticulously debated the prohibition, which the Court took into consideration and which points to respect for the national identity and the debate that had scrutinized it.

To sum it all up, the legal space, in particular, the European one, is rather saturated with many actors pulling sovereignty, supremacy, and influence in all directions. We continue to live in the world of states based on an out-dated concept of state sovereignty for this legal landscape. We have supranational collective and control institutions, which as to the consequences of their actions, confront the classical principles that characterise the sovereignty of a state, i.e., legitimisation, hierarchy, etc. What is the way forward? This is today the question debated in European political fora and we as lawyers should clearly anticipate in the world of legal thought some of that debate and the outcome.

²¹ "*Sejdić and Finci v. Bosnia and Herzegovina*", dissenting opinion of judge Bonello.

²² Judgment of 1 July 2014 of the Grand Chamber of the ECHR in the case "*S.A.S. v France*", application no. 43835/11.

Based on experience, I would say that after all these decades of development of international and European law it is striking how relatively little regard for the international there is at the national level, on the one hand, and how little sensitivity towards the national is there at the European and international level, on the other hand. It is this that is crux of the matter.

I would like to repeat Neil MacCormick's very pointed invitation which is valid today: "One thing which it is necessary for jurisprudence or the philosophy of law to do in the present state of affairs is to guard against taking a narrow one-state or [Union]-only perspective, a monocular view of these things. The difficulty about sovereignty theory is that it seems to point inevitably in that direction".²³ For the constitutional courts it is important to begin to accept not the hierarchical meaning of sovereignty but the heterarchical and the horizontal one.²⁴ While the European Courts cannot run ahead of social and political discourse. The future of the legal and political thought should move away from the supremacy of legal order discourse and situate itself within the framework of the global or universal legal order, which is formed of national and international legal orders on equal basis. It is in fact constitutional courts, which stand at the gates between international and national. It is, in fact, the constitutional courts, which stand at the gates of the international and the national. A workable conception of interaction and mutual application of constitutions and international and European law, i.e., of the sovereignty, is within the hands of constitutional courts with the support of European courts. Given that the current world of still state-centred structures was built over centuries, it is naïve to think that we can move beyond it within decades.

Concluding Observations

I have been inspired by the theory of constitutional pluralism in my talk and my work. In concluding, let me recall the view that belongs to the constitutional pluralist discourse that "what is required in acknowledging and handling competing claims to authority coming from national and supranational constitutional sites is an ethic of political responsibility premised on mutual recognition and respect."²⁵ It is with this understanding that all

²³ MacCormick N. 'Beyond the Sovereign State'. *The Modern Law Review*, vol. 56 (1993), no. 1, p. 5.

²⁴ Cohen J. L. Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective. In: Besson S., Tasioulas J. *The Philosophy of International Law*. Oxford: Oxford University, 2010, p. 275.

²⁵ Ibid.

forms of dialogue among courts that have emerged over last 15 years are of crucial importance and more effort should go into making the dialogue genuine and all-embracing. As for the European Courts, they should understand that there is a limit to the principles of openness to international law, direct application, direct effect and priority and primacy and the name of that limit is the sovereignty paradox. The way forward is to re-conceptualize the discourse and move away from competing authority claims towards accepting that all legal orders form a universal legal order. That also requires to accept the proper roles that each court has, be it constitutional or European.



Prof., Ph.D. (Cantab.) **Ineta Ziemele**
Satversmes tiesas priekšsēdētāja

Konstitucionālās tiesas kā slūžas globalizētajā pasaulē¹

Ievads

Konstitucionālo tiesu loma līdzsvara noturēšanā konstitucionālo un starptautisko tiesību kā globālās tiesiskās kārtības divu pamata komponentu vidū arvien pieaug. Mana pieeja balstās prezumpcijā, ka līdz ar starptautiskās sabiedrības konsolidēšanos nostiprinās universālās jeb globālās tiesības, kas ir horizontālas, izteikti plurālas un decentralizētas pēc savas dabas. Es norādīšu uz to, ka XX gs. vidū nedaudz “uzlabotā” suverenitātes koncepcija² ir nepietiekama vai nepilnīga, lai atbildētu uz XXI gs. izaicinājumiem mums zināmo un pieejamo juridisko koncepciju un metožu ietvaros. Nobeigumā es piedāvāšu zināmus teorētiskās atbildes elementus.

Suverenitātes paradokss

Mūsdienu pasauli vēl arvien raksturo valsts kā galvenā sabiedrības organizēšanās forma. Valsts suverenitāte attiecībās ar citām valstīm un

¹ Šis ir referāts, kas tika nolasīts Satversmes tiesas organizētajā starptautiskajā konferencē Latvijas valsts simtgades ietvaros Rīgā, 24.–25. maijā. Konferences tēma bija “Konstitucionālo tiesu loma globalizētajā pasaulē 21. gadsimtā”. Pateicos Satversmes tiesas Juridiskā departamenta juristiem par vērtīgām diskusijām, kā arī norādēm uz vērā ņemamiem doktrīnas un judikatūras avotiem, kas palīdzēja darbā pie šī referāta.

² Skat.: Kelsen H. *Principles of International Law*. Tucker R. W. (ed.) 2nd ed. New York: Holt, Rinehart and Winston, 1966, pp. 553–558.

suverēns kā varas avots konstitucionālā līmenī vēl arvien ir dominējošās paradigmas mūsu pasaules skatījumā. Šie koncepti ir vēsturiski radušies un, jāsaka, ir rezultāts zināmai sakrītībai, jo, piemēram, nacionālo un starptautisko tiesību nošķirtība vēsturiski tādā formā, kā mēs to pazīstam, varēja arī neizveidoties.³

Savukārt zinātnes un tehnoloģiju attīstība radījusi situācijā, kurā attālums starp kontinentiem ir kļuvis relatīvs un valstu robežas transparentas. Tas rada jaunus izaicinājumus un uzdod jaunus jautājumus saistībā ar sabiedrības organizēšanās modeļiem un tos skaidrojošām filozofijām un tiesību koncepcijām, jo mērķi paliek tie paši, proti, efektīvāk nodrošinātu mieru, drošību, labklājību, cilvēkam cieņpilnu dzīvi.

Starptautisko tiesību un starptautisko organizāciju un, jo īpaši, Eiropas Savienības projekta konsekvanta attīstība un nozīmes pieaugums apstiprina to, ko vēsture vairākkārt ir pierādījusi, ka vienpusēji un sadrumstaloti risinājumi nekad nav bijuši adekvāti, lai tiktu galā ar iekšējiem un ārējiem izaicinājumiem. Vienlaicīgi nedz praksē, nedz tiesību zinātnē neesam atteikušies no tādas suverenitātes izpratnes, kura nosaka, ka: “Suverēnā valstī noteiktā konstitucionālā kārtība ir augstākā juridiskā vara, pār kuru nevar būt citas augstākas juridiskās varas, kas būtu šīs konstitucionālās kārtības spēkā esības avots. Suverenitāte kā augstākā vara ir negatīva juridiska koncepcija, proti, starptautiskās tiesības kā autonoma tiesību sistēma, kura atpazīst valstis un uzliek tām pienākumus, ir jānoliedz atbilstoši šādai suverenitātes izpratnei.”⁴ Proti, suverenitāte ir (a) absolūta vara pār konkrēto sabiedrību, (b) absolūta ārējā neatkarība un (c) pilnīga tiesībspēja starptautiskajās attiecībās. Ar šādu suverenitātes izpratni starptautiskās tiesības un vēl jo vairāk pārnacionālās tiesības nav iespējamās. Es to saucu par suverenitātes paradoksu jeb mītu, jo, no otras puses, valstīm tiek uzlikti starptautiskie pienākumi un šo vispāršaistošo pienākumu avots nebūt nav katras valsts suverēns. Būtībā mēs esam radījuši virkni juridisko mītu, kuru līdzāspastāvēšana ir iespējama, bet līdz zināmam brīdim.

Piemēram, Satversmes tiesa saskārās ar manis minēto suverenitātes paradoksus 2008. gada Lisabonas līguma lietā. Šajā lietā tiesa vērtēja, vai ar Lisabonas līguma palīdzību ieviešamās jaunās ES kompetences ierobežo tautas suverenitāti, ko ietver un aizsargā Satversmes 2. panta. Tiesa secināja, ka tā

³ Skat. Allot P. *The Health of Nations. Society and Law beyond the State*. Cambridge: Cambridge University, 2002, p. 58.

⁴ Cohen J. L. Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective. In: Besson S., Tasioulas J. *The Philosophy of International Law*. Oxford: Oxford University, 2010, p. 266.

nav konstatējusi tādas Lisabonas līguma normas, kas aizskartu Satversmes 2. pantā ietvertu un nostiprinātu tautas suverenitātes principu. Tiesa nonāca līdz šim secinājumam, jo tā bija definējusi valsts un starptautisko saistību attiecības šādi: “Starptautiskajās tiesībās, analizējot tiesiskās sekas, kas rodas valstij uzņemoties starptautiskas saistības, suverenitāte ir tikusi vērtēta kā suverēno tiesību izmantošana, nevis kā to ierobežošana. Piemēram, Pastāvīgā Starptautiskā tiesa nepiekrīta viedoklim, ka jebkura tāda līguma noslēgšana, atbilstoši kuram valsts apņemas veikt noteiktu darbību vai atturēties no noteiktas darbības veikšanas, nozīmētu šīs valsts atteikšanos no savas suverenitātes.”⁵ Jau šajā suverenitātes izpratnē mēs varam vērot atkāpes no suverenitātes kā neierobežotas augstākās varas koncepta. Tomēr tas nemaina faktu, ka konstitucionālās tiesas ir suverenitātes paradoksa centrā. Veidi, kā konstitucionālās tiesas risina šo situāciju, ir dažādi, bet kopumā tas ir tāds vilkpaēdīgs (vilks paēdis un kaza dzīva) risinājums.

Konstitucionālo un Eiropas tiesu attiecības

Šāds duālisms var pastāvēt, tomēr risks pazaudēt līdzsvaru pastāv un pieaugošas konkurējošo tiesību režīmu spriedzes situācijā pieaug. Es teiktu, ka šāda līdzsvara sašūpošanās ir novērojama pašreiz, kas arī ir daļēji sekmējis, piemēram, intereses par konstitucionālās identitātes koncepciju atdzimšanu Eiropā.⁶ Šo līdzsvara sašūpošanos citstarp ir izraisījusi arī Eiropas tiesu (ES Tiesas un Eiropas Cilvēktiesību tiesas) dažbrīd aktīvā darbība. Vienādi vai otrādi konstitucionālās identitātes diskursa pastiprināšanās norāda uz sajūtām par iekšēju vai ārēju apdraudējumu suverēnam klasiskā šī jēdziena izpratnē. Satversmes tiesa jau 2008. gadā Lisabonas līguma lietā definēja Latvijas konstitucionālās kārtības sarkanās līnijas. Proti, tiesa teica: “Kompetenču nodošana [Eiropas Savienībai – autores piezīme] nevar sniegties tiktāl, ka tā pārkāptu uz likuma varu un pamattiesībām balstītas neatkarīgas, suverēnas un demokrātiskas republikas pamatus. Tāpat tā nevar ietekmēt pilsoņu tiesības lemt par demokrātiskai valstij būtiskiem jautājumiem.” Konstitucionālo tiesību komisija savā 2012. gada viedoklī par negrozāmo Satversmes kodolu definēja, ka tā jēga ir aizliegumā likumdevējam mainīt Latvijas konstitucionālo

⁵ Satversmes tiesas 2009. gada 7. aprīļa spriedums lietā Nr. 2008-35-01.

⁶ Latvijas tiesību zinātnē jau ticis pieminēts tas, ka konstitucionālās identitātes koncepts Eiropā bija aktuāls, nostiprinoties modernajām valstīm un to konstitucionālajām iekārtām XIX gs. beigās. Skat.: *Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo Satversmes kodolu. Konstitucionālo tiesību komisijas viedoklis un materiāli*. Rīga: Latvijas Vēstnesis, 2012.

identitāti. Proti, Satversmes negrozāmais kodols ir Latvijas konstitucionālā identitāte.⁷

Savukārt EST *Gauweiler* lietā ģenerālvokāts komentēja konstitucionālās identitātes jēdzienu kā tādu, kas radot lielas bažas, jo:

“Pirmkārt, (..) ir maz ticams, ka ir iespējams īstenot uzdevumu saglabāt šo Savienību, kāda tā pašlaik pastāv, ja tā tiek pakļauta absolūtai atrunai, kas gandrīz nav konkretizēta un praktiski ir atstāta katras dalībvalsts ziņā un ir iekļauta tā sauktajā “konstitucionālās identitātes” kategorijā, un it īpaši, ja tiek uzskatīts, ka šī “konstitucionālā identitāte” atšķiras no LES 4. panta 2. punktā paredzētās “nacionālās identitātes”. Šāda “identitātes atruna”, kuru dalībvalstu (..) kompetentās struktūras, bieži vien tiesas, nosaka un interpretē patstāvīgi, visticamāk, Savienības sistēmu noplicinātu, vismaz kvalitatīvā nozīmē. Neiedziļinoties detaļās un necenšoties veikt jebkādu vērtējumu, izskatāmās lietas [proti, *Gauweiler* lietas] iezīmes var būt labs piemērs tikko minētajai situācijai.”⁸

Līguma par Eiropas Savienību 4. panta 2. punkts ietver nosacījumu, ka “Savienība respektē ... [dalībvalstu] nacionālo identitāti, kas raksturīga to politiskajām un konstitucionālajām pamatstruktūrām, tostarp reģionālajām un vietējām pašvaldībām.” Daudzas cīņas izcīnītas gan doktrīnā, gan Eiropas Savienības Tiesas un dalībvalstu konstitucionālajās un augstākajās tiesās, mēģinot panākt vienošanos par to, ko nozīmē “nacionālā identitāte” un ko nozīmē tas, ka Savienība “respektē” šo identitāti.

Pirmais jautājums, kurā nav vienota viedokļa, ir tas, vai dalībvalstu “nacionālā identitāte” ir tas pats, kas “konstitucionālā identitāte”. Daži autori uzskata, ka par “nacionālo identitāti” nevajadzētu uzskatīt neko tādu, kas pārsniedz “morālo pamatprincipu īstenošanu, kas pieprasa, lai daudznacionālā politiskā kopiena izrādītu cieņu to veidojošo nacionālo grupu identitātei”.⁹ Tomēr vairums komentētāju uzskata, ka nošķirt “konstitucionālās” un “nacionālās” identitātes jēdzienus ir sarežģīti vai pat neiespējami. Ne Eiropas Savienības Tiesa, ne ģenerālvokāti nav snieguši precīzu “nacionālās identitātes” definīciju, bet drīzāk aprobežojušies ar katra gadījuma atsevišķu izvērtējumu, piemēram,

⁷ Turpat.

⁸ Opinion of Advocate General Pedro Cruz Villalón in the case C-62/14 *Peter Gauweiler*, delivered on 14 January 2015, paras. 59–60. Šajā lietā Vācijas Federālā Konstitucionālā tiesa vērsās EST ar jautājumiem par Eiropas Centrālās bankas (ECB) padomes lēmumiem par vairākām tehniskām iezīmēm attiecībā uz Eurosistēmas tiešajiem naudas darījumiem sekundārajos valsts obligāciju tirgos.

⁹ Cloots E. National Identity, Constitutional Identity, and Sovereignty in the EU. *Netherlands Journal of Legal Philosophy*, vol. 45 (2016), no. 2, p. 93.

norādot, ka “nacionālā identitāte ... ietver valsts valodas aizsardzību”¹⁰, kā arī, ka valsts kā republikas statuss¹¹ ir nacionālās identitātes elements.

Nacionālajā līmenī konstitucionālo identitāti definē dažādi, kas ir saprotams, jo atšķiras konstitucionālie ietvari. Piemēram, Polijas Konstitucionālais tribunāls savā *Lisabonas* spriedumā atzīmēja, ka Polijas konstitucionālo identitāti skarot lēmumi, kas attiecas uz Konstitūcijas pamatprincipiem un indivīda tiesībām, tostarp sociālā taisnīguma principu, valstiskuma principu, subsidiaritātes principu, un aizliegumu deleģēt pilnvarojumu Konstitūcijas grozīšanai, utt.¹² Vācijas Federālā Konstitucionālā tiesa savā *Lisabonasspriedumā* pauda viedokli, ka tās konstitucionālo identitāti skarot lēmumi, kas attiecas uz krimināltiesību materiālajiem un procesuālajiem aspektiem, atļauju policijai un armijai pielietot spēku, fundamentāli lēmumi par fiskālajiem ieņēmumiem un tēriņiem, lēmumi, kas ietekmē dzīves apstākļus sociāli atbildīgā valstī, kā arī lēmumi, kuriem ir īpaša nozīme attiecībā uz kultūru, piemēram, lēmumi par ģimenes tiesībām, par izglītības sistēmu un reliģisko dzīvi.¹³ Savukārt Francijas Konstitucionālā padome, atzīstot, ka tai nav jādefinē konstitucionālo identitāti, sliecas domāt, ka Francijas konstitucionālā identitāte ir kas tāds, kas tai nav kopējs ne ar vienu citu valsti un kas ir īpašs tikai Francijai.¹⁴

Doktrīnā Līguma par Eiropas Savienību 4. panta 2. punkts ir nosaukts par “juridisku kodolieroci”,¹⁵ tāpēc ir svarīgi, kurš kontrolē šī ieroča palaišanu.

Ciktāl ģenerālvokāts savos secinājumos *Gauweiler* lietā pievēršas konstitucionālajai identitātei, redzams, ka viņš ir nobažījies par tiesību sistēmu hierarhiskām attiecībām. Proti, ja konstitucionālo identitāti atstāj konstitucionālo tiesu ekskluzīvā jurisdikcijā, tas varot graut ES tiesību sistēmas pārākumu. Ieskats konstitucionālās identitātes un ES tiesību pārākuma principa diskursā norāda uz to, ka starptautiskās–nacionālās spriedzes centrā

¹⁰ Judgment of 12 May 2011 of the European Court of Justice in the case C-391/09 *Malgožata Runevič-Vardyn and Lukasz Pawel Wardyn*, para. 86.

¹¹ Ibid., para. 92.

¹² Judgment of 24 November 2010 of the Constitutional Court of the Republic of Poland in the case no. K 32/09, para. 2.1.

¹³ Judgment of 30 June 2009 of the Federal Constitutional Court of the Federal Republic of Germany in the case no. 2 BvE 2/08, para. 252.

¹⁴ “Les seules normes constitutionnelles opposables à la transposition d’une directive communautaire sont les dispositions expresses de la Constitution française et propres à cette dernière”. *Commentaire de la décision n° 2004-498 DC du 29 juillet 2004*. Les Cahiers du Conseil constitutionnel. Cahier n° 17.

¹⁵ Faraguna P. A Living Constitutional Identity: The Contribution of Non-Judicial Actors. *Jean Monnet Working Paper*, No. 10/15, p. 28 (pieejams: <https://jeanmonnetprogram.org/paper/a-living-constitutional-identity-the-contribution-of-non-judicial-actors/>).

ir tiesību sistēmu pārākuma jautājums, bet tiesību sistēmas pārākums ir arī klasiskā suverenitātes jēdziena centrālais elements. Lai virzītos uz priekšu tiesiskās un politiskās domas attīstībā globalizētajā pasaulē, ir nepieciešams atrisināt minēto dilemmu.

Gauweiler lietā ģenerālvokāts sekojoši noformulēja suverenitātes paradoksus Eiropas Savienības Tiesas un Vācijas Konstitucionālās tiesas dialoga kontekstā: “Tādējādi ... pirmkārt, valsts konstitucionālā tiesa beigu beigās atzīst, ka tā ir pēdējās instances tiesa LESD 267. panta izpratnē, tādējādi norādot uz īpašām “sadarbības attiecībām” un uz vispārēju atvērtību tā sauktajai “integrācijas programmai”. Tomēr, otrkārt, valsts tiesa vēlas vērsties ES Tiesā un skaidri norāda, ka tā to dara, neatsakoties no savas galīgās atbildības spriest par integrācijas Eiropā nosacījumiem un ierobežojumiem, kas ir noteikti un izriet no tās konstitūcijas. (...) aplūkojamajā lūgumā sniegt prejudiciālu nolēmumu šī pretruna ir visur klātesoša, tāpēc ir ļoti grūti to pilnībā izslēgt no šīs lietas analīzes.”¹⁶ Ģenerālvokāta pozīcijas kontekstā rodas jautājums, vai ES dalībvalsts konstitucionālajai tiesai nevajadzētu būt galīgai atbildībai par attiecīgās valsts konstitucionālo identitāti saistībā ar Eiropas integrācijas projektu?

Iespējams, ir jāuzdod jautājums, vai ir jēgpilni šādi formulēt jautājumus, jo atbilde pasaulē, kurā kārtību joprojām nosaka valstis, būs acīmredzami konfrontējoša ar pārnacionālās tiesību sistēmas prasību uz pārākumu. Ģenerālvokāts sniedza šādu risinājumu minētajai konfrontācijai. Viedoklī turpmāk viņš atsaucas uz Līguma par Eiropas Savienību 4. panta 3. punktā noteikto lojālas sadarbības principu, kura ievērošanu Latvijas tiesību sistēmā sekmē arī tādi principi kā atvērtība starptautiskajām tiesībām, kā arī tiešs Eiropas Savienības tiesību pārākuma principa akceptēts Latvijas tiesībās. Taču šie principi acīmredzot paši par sevi nerisina ikvienas tiesību sistēmas pārākuma prasību attiecībās ar citām tiesību sistēmām. Savukārt Ģenerālvokāts piesardzīgi ievieš ES kopējas konstitucionālas kultūras jēdzienu, kas konstruēts, pamatojoties uz visām dalībvalstīm kopīgām konstitucionālajām tradīcijām. “Tiesa ilglaicīgi ir izmantojusi dalībvalstu “kopīgo konstitucionālo tradīciju” kategoriju, kad tā veidoja Savienības pamatā esošu vērtību sistēmu. It īpaši, pamatojoties uz šīm kopīgajām konstitucionālajām tradīcijām, Tiesa vispirms ir mēģinājusi izveidot īpašu tiesību kultūru – Savienības tiesību kultūru. Tādējādi Savienība ir kļuvusi ne tikai par tiesību kopienu, bet arī par “konstitucionālās kultūras kopienu”. Šī kopīgā konstitucionālā kultūra ir **Savienības kopīgas identitātes sastāvdaļa**, kas, manuprāt, izraisa tādas būtiskas sekas, ka

¹⁶ Opinion of Advocate General Pedro Cruz Villalón in the case C-62/14 *Peter Gauweiler*, delivered on 14 January 2015, para. 49.

ikvienas dalībvalsts konstitucionālā identitāte, kas tik tiešām ir konkrēta katrā atsevišķā gadījumā, nevar būt, izsakoties piesardzīgi, astronomiskā attālumā no kopīgās konstitucionālās kultūras. Gluži otrādi, labi izprastai un atvērtai attieksmei pret Savienības tiesībām vidējā termiņā un ilgtermiņā principā būtu jāveicina Savienības konstitucionālās identitātes un katras atsevišķas dalībvalsts konstitucionālās identitātes saplūšana.¹⁷ Jāatzīmē, ka dalībvalstu konstitucionālajai identitātei atvēlēta telpa ģenerālvokāta viedoklī “ir tiktāl, ciktāl nepieciešams”, pieņemot, ka agri vai vēl ES un dalībvalstu konstitucionālās identitātes saplūst.

Tomēr jautājums par to, kas un kā noteiks šo nepieciešamo nacionālās konstitucionālās identitātes apjomu, kā arī – kā notiks konstitucionālo identitāšu saplūšana, ir atvērts un acīmredzami strīdīgs. Ciktāl tas attiecas uz ES tiesisko iekārtu, Eiropas Savienības Tiesa to jau uzskata par sava veida konstitucionālo iekārtu, kas balstās, cita starpā, uz tādu principu kā ES tiesību pārākuma princips. Atsaucot atmiņā Tiesas teikto *Kadi* lietā: “Šajā sakarā ir jāatgādina, ka Kopiena ir tiesību kopiena tajā ziņā, ka ne dalībvalstis, ne arī Kopienas iestādes nevar izvairīties no kontroles pār to rīcības atbilstību konstitucionālajam pamatlikumam, tas ir, EK līgumam, [...]”.¹⁸ Tā ir tiesiskā iekārta, kura pretendē uz konstitucionalitāti, kurai savukārt ir gluži citāds leģitimitātes avots, proti, tā nav suverēna tauta, kas savukārt ir demokrātisko valstu konstitucionālo iekārtu leģitimitātes avots.

Katra tiesa aizsargā to tiesisko iekārtu jeb sistēmu, ko tā ir pilnvarota aizsargāt un attīstīt. Jau pieminēju atsevišķās principiālas iezīmes, kas raksturo ES tiesību sistēmu un attiecīgi nosaka EST skatījumu uz savu kompetenci un sasniedzamo mērķi. Arī Eiropas Cilvēktiesību tiesa (turpmāk – ECT) skatās uz lietām no sava skatpunkta. Risinot jautājumu par tiesisko sistēmu mijiedarbību un līdzāspastāvēšanu, ir vērtīgi pievērsties tiem nolēmumiem, kuros ECT ir konfrontējusi valsts konstitucionālo identitāti. Taču jāpiemin Eiropas Cilvēktiesību konvencijas 53. pants, kurš principā risina Konvencijas un nacionālo konstitūciju attiecību jautājumu, proti, Konvencija nosaka, ka nacionālās tiesību sistēmas var noteikt plašāku cilvēktiesību garantiju apjomu. Lietā *Sejdič and Finci v. Bosnia and Herzegovina* centrā bija valsts konstitucionālā iekārta, proti, Deitonas Miera līguma izveidotās Bosnijas un Hercegovinas Tautas palāta un Bosnijas un Hercegovinas prezidentūra.¹⁹ Galvenais princips,

¹⁷ Ibid., para 61.

¹⁸ Judgment of 3 September 2008 of the Grand Chamber of the European Court of Justice in cases C-402/05 P and C-415/05 P *Kadi*, para. 281

¹⁹ Judgment of 22 December 2009 of the Grand Chamber of the European Court of Human Rights in the case “Sejdič and Finci v. Bosnia and Herzegovina”, applications no. 27996/06 and 34836/06.

kurš gūla konstitucionālās iekārtas izveidošanas pamatā, bija nodrošināt trim tautām (bosniešiem, horvātiem un serbiem) vienlīdzīgas iespējas ievēlēt savus pārstāvjus Tautas palātā un prezidentūrā, jo tikai tā varēja panākt kara apturēšanu. Pieteicēji bija romu un ebreju izcelsmes un varētu kandidēt vēlēšanās tikai tad, ja piederētu kādai no trim tautām. ECT uzskatīja to par diskrimināciju, pamatojoties uz 12. protokolu un 14. pantu kopsakarībā ar 1. protokola 3. pantu. Spriedums saņēma cilvēktiesību aizstāvju nedalītu atzinību. Tas vēl nav izpildīts.

Manuprāt, tiesas sarežģītā uzdevuma patiesā daba precīzi aprakstīta tiesneša Bonello atsevišķajās domās. Viņš piezīmēja: “Varētu šķist, ka abas lietas ir visvienkāršākās no visām, ar kurām Tiesa līdz šim saskārusies, taču vienlaikus tās varētu būt arī starp vismānīgākajām. .. Vienīgi tik smalki konstruēta darbība nodzēsa to elli, kas bija Bosnija un Hercegovina. Iespējams, ka arhitektūra nav perfekta, taču tā bija vienīgā, kas mudināja sāncensus aizvietot dinamītu ar dialogu. Tagad šī Tiesa uzņēmusies to visu izjaukt. Strasbūra pateikusi bijušajām karojošajām pusēm un mieru plānojošajiem labdariem, ka viss bijis nepareizi. ... Deitonas formula bijusi neatbilstoša, tāpēc tās vietā nāk Strasbūras neformula.”²⁰ Ir taisnība, ka Strasbūras tiesa garantē Konvencijā noteiktās indivīdu tiesības. Parasti valsts konstitucionālās uzbūves vai tās konstitucionālās identitātes jautājums nav pretrunā indivīda cilvēktiesībām, vismaz Rietumu kultūrtelpā. Taču tā var notikt, un Strasbūras tiesai šādas situācijas ir zināmas. Cita lieta, ar citādāku iznākumu, ir, piemēram, *S.A.S. v France*, attiecībā uz aizliegumu sabiedriskā vietā valkāt nikabu vai burku. Šajā lietā tiesa sprieda, vai aizliegums nepārkāpa Eiropas Cilvēktiesību konvenciju un atzina Francijas principa *vivre ensemble* konstitucionālo dabu Francijas tiesību sistēmā.²¹ Ir svarīgi atzīmēt, ka gan *Conseil d'État*, gan *Conseil Constitutionnel* bija rūpīgi diskutējušas par šo aizliegumu, ko tiesa ņēma vērā un kas norāda uz cieņu pret nacionālo identitāti un debati, kas to bija vērtījuši.

Kopsavilkumam, īpaši Eiropas tiesiskā telpa ir piesātināta, proti, dažādas iesaistītās puses velk suverenitāti, pārākumu un ietekmi uz visām pusēm. Mēs turpinām dzīvot valstu pasaulē, kas balstās tādā priekšstatā par valstu suverenitāti, kas šai ainavai ir novecojis. Mums ir pārnacionālās kolektīvās un kontroles institūcijas, kuras to darbības seku ziņā konfrontē ar klasiskajiem valsts suverenitāti raksturojošiem principiem, proti, leģitimitāci, hierarhiju u.tml. Kāds ir turpmākais ceļš? Šodien šo jautājumu apspriež Eiropas

²⁰ “Sejdič and Finci v. Bosnia and Herzegovina”, dissenting opinion of judge Bonello.

²¹ Judgment of 1 July 2014 of the Grand Chamber of the ECHR in the case “S.A.S. v France”, application no. 43835/11

politiskajos forumos, un mums kā juristiem vajadzētu skaidri prognozēt dažas no šīm diskusijām un rezultātus tiesiskās domas pasaulē.

Pamatojoties uz pieredzi, es teiktu, ka pēc daudzajiem starptautisko un Eiropas tiesību attīstības gadu desmitiem ir uzkrītoši tas, cik, no vienas puses, nacionālajā līmenī maz tiek ņemts vērā starptautiskais, un, no otras puses, cik Eiropas un starptautiskajā līmenī salīdzinoši maza ir jutība pret nacionālo. Tā ir daļa no lietas būtības.

Jānorāda uz Nīla Makkormika ļoti precīzo aicinājumu, kas vēl arvien ir aktuāls šodien: “Pašreizējā situācijā jurisprudenci vai tiesību filozofijai ir svarīga viena lieta – nosargāt pret tikai vienas valsts vai [Savienības] perspektīvas pieņemšanu, pret monokulāru skatījumu uz šīm lietām. Ar suverenitātes teoriju saistītās grūtības ir tās, ka tā, šķiet, nenovēršami rāda tajā virzienā”.²² Konstitucionālajām tiesām ir svarīgi nevis turpināt suverenitātes hierarhisko koncepciju, bet drīzāk attīstīt tās heterarhiskās un horizontālās dimensijas.²³ Vienlaikus Eiropas tiesām nevajadzētu apsteigt sociālo un politisko diskursu sabiedrībā. Tiesiskās un politiskās domas nākotnei jāvirzās prom no tiesību sistēmas pārākuma diskursa un jāievietojas globālās vai universālās tiesību sistēmas ietvarā, ko uz vienlīdzīgiem pamatiem veido nacionālās un starptautiskās tiesību sistēmas. Patiesībā tieši konstitucionālās tiesas stāv starptautiskā un nacionālā satikšanās punktā. Konstitūciju un starptautisko un Eiropas tiesību mijiedarbības un savstarpējas piemērošanas koncepcija ir konstitucionālo tiesu rokās mijiedarbībā ar Eiropas tiesām. Tomēr, ņemot vērā to, ka pašreizējā aizvien vēl uz valsti vērstu struktūru pasaule ir būvēta gadsimtu gaitā, būtu naivi domāt, ka varam aiziet viņpus tās pāris gadu desmitu laikā.

Noslēguma piezīmes

Savā referātā un savā darbā iedvesmojos no konstitucionālā plurālisma teorijas. Nobeigumā ļaujiet man atgādināt tēzi, kas pieder konstitucionālā plurālisma diskursam, “lai atzītu un rīkotos ar konkurējošām pretenzijām uz autoritāti jeb pārākumu, kas nāk no nacionālajām un pārnacionālajām konstitucionālajām vietām, ir nepieciešama savstarpējā atzīšanās un cieņā prezumēta politiskās atbildības ētika.”²⁴ Izšķiroša nozīme ir tam, ka tieši šīs

sapratnes gaismā pēdējo 15 gadu laikā ir izveidojušās visdažādākās tiesu dialoga formas, un ir vēl vairāk jācenšas padarīt šo dialogu patiesu un visaptverošu. Kas attiecas uz Eiropas tiesām, tām vajadzētu saprast, ka principiem, kas nosaka atvērtību starptautiskajām tiesībām, tiešo piemērojamību, tiešo iedarbību, kā arī prioritāti un pārākumu, ir robežas un ka šo robežu nosaukums ir suverenitātes paradokss. Turpmākais ceļš ir jaunas diskursa koncepcijas veidošana un atkāpšanās no konkurējošu autoritāšu prasībām, pieņemot, ka visas tiesību sistēmas veido universālu tiesisko iekārtu. Tas arī prasa katras tiesas, vai tā būtu konstitucionālā vai Eiropas tiesa, lomas pilnvērtīgu atzīšanu.

²² McCormick N. ‘Beyond the Sovereign State’. *The Modern Law Review*, vol. 56 (1993), no. 1, p. 5.

²³ Cohen J. L. Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective. In: Besson S., Tasioulas J. *The Philosophy of International Law*. Oxford: Oxford University, 2010, p. 275.

²⁴ Ibid.



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Rule of law and mutual trust: a short note on constitutional courts as “institutions of pluralism”

1. Expanding constitutional pluralism

On behalf of the President of the Italian Constitutional Court, I wish to express gratitude and appreciation for the invitation to be part of this Latvian anniversary, which gathers national and supranational institutions around the celebration of common values of democracy and the rule of law.

I want to develop the notion of constitutional pluralism, which has been recalled, among others, by Professor Encarnación Roca Trías, Vice President of the Spanish Tribunal Constitucional. I will also try to elaborate on the implications of President Ziemele's final remark in her opening speech, whereby all legal orders should be interpreted as universal legal orders.¹ This is so because of the multiplicity of sources – national, supranational, international – all relevant and significant in constitutional adjudication. Legal sources appear more and more interconnected, despite their different origins and their different functions.

The core issue of current constitutional preoccupations is pluralism of sources, all insisting on the enforcement of fundamental rights. Such diverse levels of protection imply the combination of diverse standards and multiple interpretations of the same. National constitutional courts necessarily become, at the same time, interpreters of supranational and international standards

¹ Internal references to chapters in the conference proceedings

and for this reason embody the role of “**institutions of pluralism**”. This suggestion implies to expand even further a – by now deeply grounded – notion of constitutional pluralism, which has been so central in the construction of modern constitutional scholarship, as well as in the everyday practice of courts.

In the European tradition constitutional pluralism is nourished by a rich variety of sources at national level. The acknowledgment of such a variety marked a step forward in legal developments and represented the end of states' monopoly on the production of norms as well as the increasing incidence of social realities, built on diversified social expectations and on common, shared interests. Scholarly work has magnified this multifaceted pluralism and has, in some cases, accentuated the role of spontaneous orders, where law is produced at the periphery of state centered legal systems. In countries like Italy and Spain constitutional pluralism was also the outcome of conflicting ideologies and conveyed historical and cultural implications. It was, as such, at the core of states reactions to undemocratic and dictatorial regimes.

This leads me to describe constitutional pluralism with an emphasis on “**styles**” developed over the years by constitutional courts. Courts have been hesitant and resilient; at times they have been defensive or aggressive. Certainly, they have echoed their own constitutional history and interpreted their own democratic heritages, obeying to the rule of law.

In the last decade or so, European constitutional courts have been under pressure because of the consequences inflicted on individual and collective rights by austerity measures adopted by national parliaments, in contemplation of EU obligations. The tension in all countries most severely affected by such measures has been such to create, at times, split loyalties and to shake the equilibrium of legal systems.

Judicial activism took place even in countries, which were not signatories of Memoranda of Understandings with the European institutions but were, nevertheless, under severe budgetary restrictions.

For example, the Italian Constitutional Court ruled unconstitutional a wage freeze in the public sector, implemented as a quick and efficient response to the crisis in 2011 and then prolonged in the following years. The statute, which originally introduced the wage freeze, and all subsequent measures, were found in contrast with freedom of association and the right to organize (Art. 39 para. 1 of the Constitution).

Because of a lack of resources, in turn due to the absence of governmental initiative, no collective bargaining took place, following the original measure adopted in 2011. In holding unconstitutional the original measure and all subsequent ones confirming the wage freeze, the Court explicitly stated the enforceability of its own ruling for the future, thus imposing an obligation

on government to act consequentially. In particular, the Court, which also recalled the judgment of 8 October 2013, *António Augusto da Conceição Mateus and Lino Jesus Santos Januário v. Portugal*, of the European Court of Human Rights, argued that:

“the (...) systematic nature of this suspension has thus crossed the line, thereby now striking an unreasonable balance between trade union freedom (Article 39(1) of the Constitution), which is indissolubly related to other values of constitutional standing and already subject to legislative limits and far-reaching auditory controls (Articles 47 and 48 of Legislative Decree no. 165 of 2001), and the requirements relating to the rational distribution of resources and control of spending within a coherent financial programme (Article 81(1) of the Constitution). (...) It is only now that the structural nature of the suspension of bargaining procedures has been made fully evident that it may hence be concluded that it has become unconstitutional on a supervening ex post basis, the effects of which will apply following publication of this judgment. 18.– Having removed with future effect the limits applicable to the conduct of bargaining procedures in relation to the financial aspect, it will be for the legislator to provide a new impulse to the ordinary contractual dialectic, choosing the arrangements and forms that best reflect its nature, in a manner detached from any requirement as to the result. The essentially dynamic and procedural nature of collective bargaining may only be redefined by the legislator, in accordance with spending constraints, and will be without prejudice to the financial effects resulting from the provisions examined for the period that has already elapsed”.²

As the passage above shows, the implications of the Court’s decision are closely connected to the peculiarities of collective bargaining and to the ongoing, open function of negotiations, which are autonomously carried on by representatives of administrations and workers. The choice to make the judgment only enforceable in the future – a technique not too common in the Italian Court’s tradition – implies respect for the autonomy of negotiators and for budgetary policies agreed at a critical stage of the crisis. The Court’s ruling did not enter the technicalities of collective bargaining neither it considered wage

² English translation of ruling no. 178/2015 at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S178_2015_en.pdf Comments in G. Frosecchi. “The Supremacy of the Right to Collective Bargaining: A Judgment of the Italian Constitutional Court on Austerity Measures”, 2 *International Labor Rights Case Law* (2016), 313-318; F. Trillo Parraga, “Políticas De Austeridad Y Negociación Colectiva En El Sector Público. Algunas Reflexiones En Torno A La Experiencia Italiana”, 71 *Revista de Derecho Social* (2015), 201-218.

increases that were lost as a consequence of the freeze. Respect for the autonomy of the social partners – which is also at the core of Art. 152 TFEU – was linked in the Court’s ruling to the centrality of the fundamental social right to organize, notwithstanding economic constraints.

The point to underline here is that in Italy, similarly to what happened in other countries, the frame of time in which austerity measures had to be enforced became a crucial point to address in constitutional adjudication. Sacrifices justified by the crisis on a temporary basis, may become unreasonable when prolonged for too long, since they infringe the fundamental right to organize and bargain collectively. As already recalled, the Italian Constitutional Court’s ruling explicitly refers to significant international and EU sources, as a confirmation of the linkages that keep together labour standards and of the urgency to recall them all, when exceptional circumstances occur.³

However, to show how flexible constitutional adjudication must be when dealing with issues of public spending in a situation of restricted resources, the Italian Constitutional Court ruled constitutional legislation entered into force in 2011 and reiterated in 2014, setting an upper threshold on remunerations within the public sector and a maximum limit for the cumulative total of remuneration and pensions. The test was on reasonableness of the measures adopted, all aimed at rationalizing public spending.⁴

The example of the Portuguese Constitutional Court is also revealing, inasmuch as it shows all dilemmas raised by cuts in public spending. In twelve decisions taken in different phases of the crisis, the Court was asked to rule on pay cuts for public sector workers in the years from 2011 up to 2015. Cuts and other forms of economic reductions, described as solidarity measures, affected also retired people. In the latter cases the Court had to take into account legitimate expectations of the pensioners and consider this a relevant argument to rule unconstitutional some norms in the 2012 and the 2013 State budget laws.

As for pay cuts in the public sector, the Court’s case law can, at first sight, appear incoherent. However, differences in the rulings are justified by the reiteration of the reductions imposed on public employees. Whereas in a first decision (396/2011) the Court declared that limited sacrifices are constitutional, rejecting the violation of the principle of equality, in a second one (353/2012) it found that additional cuts could not be justified by the urgency to pursue public

³ I have developed these points in S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis* (CUP 2018).

⁴ English translation of Judgment n.124/2017 at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_124_2017_EN.pdf

interest. However, the ruling was effective for 2012 and not for the past, due also to the fact that previous pay cuts were maintained. The State budget law for 2013 was also challenged before the Court, among others, by the Head of state, who found that wage cuts were in violation of the “proportional equality” principle, since they could be assimilated to taxes. The Court rejected this definition and found the law unconstitutional on the ground of unequal treatment, since the pay cuts hit public sector workers only.

It is worth mentioning that proportional equality – a new terminology adopted by the Portuguese Court in the so-called case law of the crisis – clearly portrays the adaptation of legal reasoning in exceptional circumstances. Inequality caused by compliance with European obligations – the Court maintained – should be accepted as long as it is proportional.⁵

The example of Portugal continues to raise interest, framed in a comparative perspective. In a recent case dealing with the reduction of remuneration for judges of the Court of Auditors, provided for in law n. 75/2014, the CJEU, in a Grand Chamber decision, clearly states that Article 19 TEU “which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals”.⁶ The duty of collaboration is associated with the obligation to observe the law; the latter is fulfilled, when interpreting the Treaties. Cuts in salaries were, in this case, the result of measures aiming at eliminating an excessive budget deficit, in the context of a EU program of financial assistance and did not, as such – the CJEU maintained – affect judicial independence.

In this case – not to be reckoned as a marginal one – a justiciable rule of law clause is asserted by the CJEU, acting – as it has been pointed out – as a constitutional court in defense of judicial independence⁷ and interpreting Art. 19 TEU “in a federal sense, as a judiciary of the federation and its States. And the guarantor of the judiciary, the ultimate guarantor, is the Court of Justice”.⁸ In particular, the Court links together Art. 19 to Art. 2 TEU and explicitly recalls the rule of law as a founding value of the EU, common to the Member States. This step forward taken by the Court adds yet another dimension to an expanded notion of constitutional pluralism.

⁵ See A. M. Guerra Martins, “Constitutional Judge, Social Rights and Public Debt Crisis”, 22 *Maastricht Journal of European and Comparative Law* (2015), 695-696.

⁶ *Associação Sindical dos Juizes Portugueses*, C-64/16, at para. 32.

⁷ See M. Krajewski, “Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma”, 3 *European Papers* (2018), 395-407.

⁸ See D. Sarmiento, “On Constitutional Mode”, 6 March 2018, available at <https://despiteourdifferencesblog.wordpress.com/2018/03/06/on-constitutional-mode>.

In a parallel and yet very different context the Polish Supreme Court lodged a preliminary reference to the CJEU, while suspending the application of the Polish law providing for early retirement of 65 years old judges of the Supreme Court, including the President of the Court, whose six years mandate is guaranteed by the Constitution. The government, in potential conflict with the rule of law, introduced a drastic change in legislation on retirement age. The timing of this reference is noteworthy, since it intersects numerous warnings sent by the European Commission on violation of judicial independence and the consequential infringement of Art. 19.1 TEU, as well as of Art. 47 of the Charter of Fundamental Rights. On 2 July 2018 the Commission’s initiative culminated in the formal notice of an infringement procedure against Poland, followed by a reasoned opinion sent on 14 August 2018.⁹

This stimulating climate of judicial activism finds yet another confirmation in the CJEU’s decision (C-216/18 *PPU, LM*)¹⁰ taken in response to a preliminary reference lodged by an Irish court with regard to the recognition of Polish arrest warrants, for an alleged contrast with the rule of law. In its 25 July 2018 ruling the Grand Chamber of the Court made important assertions with regard to the common values stated in Art. 2 TEU, on which the EU is founded. This “implies and justifies the existence of mutual trust between the Member States that those values will be recognized, and therefore that the EU law that implements them will be respected” (at para. 15). It also pointed out very clearly, referring to Art. 19 TEU “which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU” (at para. 50), that effective judicial review “designed to ensure compliance with the rule of law is of the essence of the rule of law” (at para. 51).

In the Advocate General’s Opinion, the point had been made that “in principle” denial of justice may occur when the lack of judicial independence “is so serious that it destroys the fairness of the trial” (at para. 93). The Court elaborated on this and let a full notion of judicial independence emerge in *PPU, L.M.*, strengthened by the frequent quotations that it makes to its own ruling *Associação Sindical dos Juizes Portugueses*.

2. National constitutional protagonists

It can be maintained that, in all such cases, strenuous defenses of what is conceived as the underlying rationale of national constitutional orders may

⁹ https://ec.europa.eu/cyprus/news/20180814_en

¹⁰ A commentary at: <https://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html?m=1>

disentangle new fears, as if a national integrity of each order could be shaken, if not disrupted.

“**Fear**” – certainly not a technical legal term – is a metaphor for exacerbated self-inclusiveness and perhaps even intolerance towards open exchanges with other institutional counter-parts. “Fear” is opposed to “**trust**”, which should, in my view, constitute the leading theory supporting constitutional pluralism. “Trust” implies overcoming barriers and widening the horizon of international standards to be interpreted, to be enforced and, if necessary, to be adapted.

A too arduous defense of national constitutional legal orders may signal the danger of setting apart interchanges with other courts, thus generating what I suggest to call “**national constitutional protagonists**”. This may happen whenever constitutional courts attempt to ascertain their own undisputable centrality within the “universal legal order”, to mention once more President Ziemele’s powerful expression. Courts overemphasizing national constitutional pride and diminishing trust in open arguments, if necessary in clarifications about the peculiarities of their own legal systems, become “constitutional protagonists” and interrupt the necessary discursiveness of constitutional pluralism.

At the other end of the scale we find cases of preoccupied claims for democracy and the rule of law, which intensify the centrality of constitutional courts as guards of common EU values. The previously mentioned Polish preliminary reference stands as a remarkable case of judicial activism, which runs in parallel to actions already taken by the Commission in announcing sanctions under Art. 7 TEU. The “style” here is not to act as protagonist; it is rather an articulated initiative within a sound institutional framework.

In EU law, recourse to preliminary ruling procedures is the paramount example of how constitutional courts act as powerful interlocutors of the Court of Justice. Their initiatives imply compliance with EU law and, at the same time, deliver coherence with the European legal system as a whole. In doing so, constitutional courts do not ignore national constitutional values, neither they neglect them. They pursue a broad general interest and share the ultimate goal of further integration within the EU legal system. I am inclined, at this regard, to underline the notion of “**deference**”, which should complement “trust”. None of these notions imply subordination, nor insinuate hierarchies among courts. On the contrary, they rely on the unique architecture thought of by Europe’s founding fathers, whereby, despite the absence of a federal state, national judges were all called to be interpreters of a common supranational law and to strengthen in such a common effort all underlying values.

An equally open discourse on how to further the objective of coherence and improvement of constitutional guarantees takes place whenever Council of

Europe sources are at stake. As an added value to the long lasting conversation that the Italian Constitutional Court has established with the Strasbourg Court, it is worth pointing to a recent case, in which the Italian Constitutional Court acknowledged the European Social Charter as a relevant parameter, with regard to freedom of association for the armed forces.¹¹ Here again, albeit with very different legal implications from the ones enshrined in the EU legal order, notions of “trust” and “deference” do not diminish the independence of constitutional courts, neither they affect the originality of their judgments.

The open circulation of international standards among courts is confirmed by a recent judgment delivered by the Supreme Court of Spain, arguing in favour of the legally binding nature of decisions taken by the UN Committee on the Elimination of Discrimination against Women (CEDAW). Obligations stemming from Art. 24 of the UN Convention on All Forms of Discrimination Against Women – the Court maintained – are such to impose on states parties the adoption of all measures “aimed at achieving the full realization of the rights recognized”. Art. 7(4) of the Optional Protocol provides that states parties “shall give due consideration to the views of the [CEDAW] Committee”.¹² Notwithstanding the specificity of this case (and of the underlying facts at the origin of the litigation), the Spanish Supreme Court took a very important step, which is now echoed in the international community of scholars and courts.

“Trust” is part of the legal culture well described in Advocate General Sharpston’s presentation in this conference, when she portrays an open and cross-fertilized EU legal system.¹³ “Trust” can be seen as a direct consequence, in my view, of legitimacy of international sources, which have to be fully acknowledged. Hence, “trust” is developed through a constant response to supranational and international sources. This brings me back to the suggestion made earlier on, about different “styles” adopted by constitutional courts; they imply a special mode of conversation in talking to Luxembourg and to Strasbourg.

¹¹ English version of judgment no. 120/2018 is available at <https://www.cortecostituzionale.it/actionJudgment.do>,

¹² *María de los Ángeles González Carreño v Ministry of Justice*, Judgment No. 1263/2018 A commentary at: <https://altadvisory.africa/2018/08/01/spanish-supreme-court-affirms-that-decisions-of-un-treaty-bodies-are-legally-binding/>

¹³ On the connection between pluralism and cross-fertilization processes see e.g. N. Walker, “The Idea of Constitutional Pluralism”, 65 *Modern Law Review* (2008), 317-359; M. Delmas-Marty, *Ordering Pluralism* (Bloomsbury 2009); L. Pierdominici, “The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?”, 9 *Perspectives on Federalism* (2017), 119-153.

Widespread attention has been shown to the conversation initiated by the Italian Constitutional Court in “*Taricco*”. I shall attempt my own recollection of this – by now famous – case, concentrating on the final judgment delivered by the Italian Constitutional Court, hoping to interpreter correctly a collegial point of view.¹⁴

In its final ruling, which closes the circle opened with the preliminary reference,¹⁵ the Court carries out a constitutional review and, at the same time, verifies what was required by the CJEU, namely that in the Italian legal system “an institution that impacts the liability of persons to punishment, by linking the passage of time with the effect of blocking the application of a punishment, falls within the scope of the constitutional principle of substantive legality in criminal matters laid down by Article 25(2) of the Constitution in particularly broad terms” (at para. 10).

Furthermore, accepting that “it is the exclusive competence of the Court of Justice to provide a uniform interpretation of EU law and to specify whether or not it has direct effect, it is likewise indisputable, as the *M.A.S.* judgment acknowledges, that an interpretive outcome that does not comply with the principle of legal certainty in criminal matters has no place in our legal system” (at para. 12).

This argument, developed throughout the Court’s ruling, marked the end of the conversation and brought to declaring the questions initially raised “unfounded, because, irrespective of the additional grounds for unconstitutionality that have been deduced, the violation of the principle of legal certainty in criminal matters serves as an absolute bar, without exceptions, on the introduction of the “*Taricco* rule” into our legal system” (at para. 14).

The “style” of the Italian Constitutional Court was, without any doubt, very firm, but not intimidating, since it aimed at confirming the supreme values of the Italian legal order. At the same time, the Court meant to be deferential to the European Court of Justice. To go back to the metaphor I mentioned before, this was an attempt to control all possible “fears” of losing centrality and seeing national sovereignty somehow weakened. It is clear, instead, that making recourse to preliminary references and establishing a correct exchange of information is a way to bring forward the long-lasting process of integration

within the EU. The CJEU, on its side, showed a truly open attitude and an interest in feeding a virtuous communication.

A communicative attitude is displayed in a recent judgment delivered by the CJEU, whereby an emphasis is put on the function of preliminary references and on the obligation, laid down in Art. 267 (3) TFEU, to refer questions concerning the interpretation of EU law. The Court argued that “a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law even if, in the course of the same national proceedings, the constitutional court of the Member State concerned [in this case the Italian Constitutional Court] has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law”.¹⁶ This clarification goes into the direction of diminishing the appeal for “constitutional protagonists” and edging constitutional adjudication within its own legal framework.

The CJEU’s confidence in strengthening an open supranational legal order is also confirmed by a recent initiative taken in Luxembourg, aimed at bringing together all national supreme courts and constitutional courts within a formally structured network, thought of as the place in which EU legal standards, adopted and applied at national level, are circulated and shared. The intrinsic value of this initiative is to be found in its institutional standing, well beyond a mere academic exercise. This is the enduring confirmation that integration through law has practical and political implications, as it constitutes the backbone of a common project, built on common values.

The ECtHR too promotes a “*réseau des cours supérieures*”. First announced in 2015, then followed by the Brussels Declaration, proclaimed during the Belgian presidency of the Council of Europe, this network, including 23 Supreme Courts of 17 member states at the end of 2016, is now joined by 68 courts of 35 member states and has been acting as a privileged channel of communication among them. An even stronger cooperative function in non-jurisdictional procedures will be enhanced within the Council of Europe after the entering into force of Protocol n. 16.¹⁷

¹⁶ C-322/16 Global Starnet, at 26

¹⁷ This is the recollection of the ECtHR’s President G. Raimondi, La Convention européen des droits de l’homme et les cours constitutionnelles et supremes européennes, in *Mélanges en l’honneur de M. le professeur Jean Spreutels*, président de la Cour constitutionnelle de Belgique, forthcoming

¹⁴ English version of judgment no. 115/2018 is available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf.

¹⁵ Order no. 24 of 2017, available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.

3. Styles in constitutional discourses

In the way of a short conclusion, I want to underline the main points made in my intervention, which have been inspired by the intense discussion developed in this conference. I have suggested that “styles” adopted by constitutional courts, when they engage in conversations with the Court of Justice of the EU and with the European Court of Human Rights, are the ultimate outcome of national heritages, enriched by a never-ending acquisition of new communicative tools.¹⁸ Constitutional discourses taking into account supranational, as well as international standards, empower even further constitutional adjudication and constitutional courts, so much so that they act as “institutions of pluralism”.

This optimal function covered by constitutional courts should be valued and framed in a comparative perspective, with a view to understanding why and in which context some of them act as “constitutional protagonists”. The latter – I have argued – are the courts overemphasizing the centrality of national legal orders, cultivating “fears”, rather than “trust”.

Thank you for your attention.

¹⁸ At this regard, see in general P.-G. Monateri, *Legge, linguaggio e costume* (Editoriale scientifica 2013).



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Organizational and methodological aspects of the work of the Constitutional Court of Ukraine in the context of the challenges of the modern globalized world

The term “globalization” in a broad sense is a process of large-scale quantitative changes, the totality of which, according to the generally accepted rule of philosophy, at a certain stage in the evolution of human civilization turns into qualitative changes in the life activity of individuals and also of the society as a whole.

De facto there is a slow but inevitable process of transformation of the current world order in which separate national states with different levels of sovereignty coexist into a global transnational community. At the same time, globalization processes influence all spheres of social reality, including philosophical and ideological, moral, ethical, sociopolitical, legal, and other factors of human existence.

“Legal, including constitutional, globalization,” writes Professor N. Bondar, “reflects not as much the spatial (quantitative) characteristics of the internationalization of legal life as the qualitative characteristics thereof. The attention of the legal globalization is centered on the growth of modern civilization which is all-encompassing and with universal normative and legal standards of existence. It is well known that in a system of universal legal standards the leading role belongs to the democratic institutions of modern

constitutionalism, the central place among which is occupied by human rights and international mechanisms for their protection”¹.

One can agree with this in general, although, in my opinion, international mechanisms for the protection of human rights have a secondary role; the main role in the implementation of constitutional principles of a modern democratic state in the protection of individual rights and freedoms still belongs to the national legal systems. One of the main elements of such a nationwide system in Ukraine is the Constitutional Court (hereinafter – the CCU, the Court), as the guarantor of the supremacy of the Constitution of an independent and sovereign Ukrainian state throughout its territory.

It is significant in this regard that during more than 20 years of its activity, the Court has considered about 150 cases of human rights violations and has established violations of these rights in more than 100 laws and other legal acts. In particular, the Court has dealt with the right to life, the right to liberty and security of person, the right to social assistance, the right to judicial protection, housing, medical care, education and other rights guaranteed by the Constitution of Ukraine.

However, this does not mean that CCU’s activities are isolated; rather the contrary– when drafting its decisions about the constitutionality or unconstitutionality of a legal act the Court constantly refers to the provisions of generally accepted instruments of international law which constitute the legal basis of the globalization process in the field of human and civic rights and freedoms, including:

- The Universal Declaration of Human Rights (adopted at the third session of the UN General Assembly by resolution 217 A (III) of 10 December 1948);
- International Covenant on Civil and Political Rights (New York, 19 December 1966);
- International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966);
- Convention for the Protection of Human Rights and Fundamental Freedoms ETS N 005 (Rome, 4 November 1950);
- European Charter of Local Self-Government ETS N 122 (Strasbourg, 15 October 1985).

The legal positions of the European Court of Human Rights, the recommendations of the European Union, the conclusions of the Venice

Commission and other influential international legal organizations are also taken into account.

A characteristic feature of global constitutionalism in modern democratic states is also the modernization of law on the basis of recognition and approval of the axiological and ontological worldview in the study of the contents and the essence of a legal act. We are talking, in particular, about the formation of the doctrine of primacy of universal human values over positivism as the starting point of constitutional control.

One of such fundamental human values is the right of citizens to directly petition a body of constitutional adjudication in order to defend their constitutional rights and freedoms. Until recently the only means by which natural and legal persons could address the CCU was a constitutional petition concerning an official interpretation of the Constitution and the laws of Ukraine. At the same time, in the states that are active participants of the process of constitutional globalisation the body of constitutional adjudication may be seized by means of an individual constitutional complaint.

In line with the direction towards European integration the Ukrainian Parliament in 2016, within the framework of constitutional justice reform, modernized the constitutional provisions that regulate the activities of the Court, introducing, in particular, the institute of a constitutional complaint. The modernization also touched upon such important aspects of the functioning of the CCU as the procedure for the appointment and dismissal of judges, their financial and logistical support.

In this way the legal basis of the functioning of the Ukrainian body of constitutional control in its form and its content to the largest extent possible approached the international standards of a democratic state based on the rule of law.

At the same time, it should be noted that there are a number of organizational and methodological shortcomings. So, despite the adoption of a new law “On the Constitutional Court of Ukraine”, the archaic structure of its predecessors (laws of 1993 and 1996) was preserved. The point is that in this law an attempt was again made to settle the issues of both a functional-organizational and procedural-methodological plan at the same time. As a result, none of these aspects of the work of the CCU has been fully settled.

So, despite the recognition in the domestic scientific circles of the fact that constitutional legal proceedings, in contrast to the proceedings in courts of general jurisdiction, is a *de facto* research activity, there is no mention in the law at all of “proof”, “evidence”, “internal conviction of the subject of proof” and other equally important elements of the formation of an objective and reasoned decision of the Court.

¹ Бондарь Н.С. Конституционная модернизация российской государственности: в свете практики конституционного правосудия. Монография. - М.: Юнити-Дана, 2014.- 198 с.

It should also be noted that constitutional globalization as a political and socio-economic process does not in any way impair the rights of territorial communities and civil society institutions, therefore it is at least surprising that, as a result of the constitutional judicial reform, legal entities of public law were excluded from the range of subjects with the right to petition the CCU.

There are some other shortcomings, but it is certain that the general direction of the constitutional reforms in Ukraine, including in the area of judicial constitutional review, is focused on the value criteria that form the basis of the legal globalization and the legal progress of a democratic state, the immutability of the primacy of universal constitutional values as the common heritage of human civilization to which should be attributed: the freedom and personal inviolability of a person, social justice and equality of all persons before the law, separation of powers, political, ideological and economic pluralism.

At the end of my speech, I want to note that the organizers of the conference have very successfully chosen its topic, the relevance of which is emphasized by the fact that in the context of globalization takes place the constitutionalisation of international legal relations, which, in turn, significantly increases the role of constitutional control in respect of acts and activities of supranational entities with independent legal orders.

Therefore, in the process of constructing common supranational constitutional control, first of all in the European political and legal space, issues related to defining common approaches to solving constitutional problems, common methods of interpretation and application of constitutional norms and principles become increasingly relevant. These fundamental organizational principles of a democratic society are reflected in the provisions of generally recognized instruments of public international law. However, in my opinion, their implementation still requires the formation of a scientifically based and practically tested theoretical framework.

In particular, this concerns the definition of the essence of such concepts as “supranational judicial control”, its “supranational impact”, “supranational nature of decisions of a body of constitutional control” and many others that are the subject of discussion of this international forum.

At the same time, it is necessary to take into account the tendencies of the strengthening of national traditions of state-building, preservation of the constitutional legal identity which are reflected in the recognition of the principle of subsidiarity in modern international law. In practice this means that public authority on the scale of the world community does not have the goal of restricting the sphere of action of public authority of a single state, even less so of taking its place.

Thus, in accordance with one of the main laws of classical philosophy – “the unity and the struggle of the opposites”, the task of supranational constitutional control in the context of globalization can be defined as a sustainable compromise between the desire of the society for large-scale integration changes and the legal rights of public powers to form legislation by taking into account national and religious characteristics, historically established traditions and customs of their people.

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National constitutional justice and international law: relationship and impact

The problems of ensuring a decent standard of living for a person, safe conditions of his existence in the modern world have no boundaries and cannot be fully settled by the efforts of a single state. They require the coordinated cooperation of different countries, determine the processes of globalisation and integration, relevant directions of development of national legal systems and international law, formation of a common international legal space.

Various aspects of these problems are being actively developed in world science. For separate national states as well as for international communities, the knowledge of the factors and phenomena that are basic for the internationalisation of legal regulation in various spheres of relations, mutual influence of international and national law is topical. The experience of the most effective legal regulation of social relations, ensuring the sustainability of various socio-economic development models in different countries, is also important. Scientific research in this field should be based on the achievements of the global legal heritage, recognised scientific and legal paradigms, as well as on the national experience of legal reforms. Their goal would be the formation of a holistic concept of the sustainable functioning of national and international legal systems in modern conditions.

One of the objective prerequisites for the processes of legal globalisation is the perception of law as a universal social regulator, based in its essence on the values proclaimed to be uniform for all civilised humanity.

One cannot but take into account that these values have been formed in line with the legal traditions of mostly western civilisation. As is known, the western legal tradition is represented by Romano-Germanic and Anglo-American legal families. The public law sphere of most countries of the world, as well as international law, is being developed on their basis. The conformity of not so much the form of law, but of the core values and a number of other key elements of the international and national legal systems largely determines their openness to interaction, development of their components in the processes of mutual influence, common legal ideas and principles, similar democratic institutions, need for harmonisation of the legislation and case-law.

However, in these processes, awareness of legal community is balanced by the desire to preserve legal identity, based on the Constitution as the basis of the legal self-determination of a nation and the sovereignty of national states.

Interconnection and mutual influence of the international and national legal systems, as well as national legal systems among themselves are the most obvious processes in the fields of mutual interest. These fields include protection of the environment, exploration of outer space, use of the seabed, use of information on the Internet, regulation of migration and countering terrorism, movement of capital, etc.

The body of law as the basis for interstate cooperation in these fields includes the rules of national and international law, as well as their interpretation by authorised actors.

A special role in these processes belongs to the constitutional review bodies. Based on the unity of their human rights protective and regulatory functions, these bodies, through their decisions and legal positions, provide for revealing and uniform understanding of the values, principles and rules of the Constitution, taking into account the provisions of international documents. Thus, they contribute to the sustainable functioning of the legal environment, achievement and preservation of national legal identity.

Thus, at present Europe could be justifiably called the territory of constitutional interdependence. European constitutional courts exercise their powers in the conditions of simultaneous operation in their territories of rules of national, integration and international law. Under these conditions, the significance of decisions of constitutional courts goes far beyond the framework of national states. The activity of constitutional courts has supranational influence, contributes to the formation and sustainable functioning of international, regional and supranational legal orders.

The Republic of Belarus also seeks to actively participate in solving global problems. The role of the Constitutional Court of the Republic of

Belarus in this direction is determined by the constitutional provisions on the relationship between national and international law and the powers of the Constitutional Court.

The Constitution does not define the place of international treaties in relation to legislative acts of the Republic of Belarus. The Basic Law stipulates that the Republic of Belarus, as a sovereign state based on the rule of law, shall recognise the supremacy of the generally acknowledged principles of international law and shall ensure the compliance of laws therewith. This constitutional provision is the basis for the direct action of the generally recognised principles of international law in domestic relations.

The generally recognised principles of international law are widely used by the Constitutional Court when analysing constitutional provisions, as well as when grounding legal positions and conclusions, making proposals for the implementation of constitutional principles and rules in domestic legislation, and strengthening domestic mechanisms for the protection of human rights and freedoms.

In accordance with Article 116 of the Constitution of the Republic of Belarus and Article 22 of the Code on Judicial System and Status of Judges, the Constitutional Court shall produce a ruling on the conformity of instruments of interstate formations of which the Republic of Belarus is part, edicts of the President of the Republic of Belarus which are issued to the execution of the law, the Constitution, instruments of international law ratified by the Republic of Belarus, laws and decrees and shall make a decision on the conformity of international treaties of the Republic of Belarus that have not entered into force to the Constitution of the Republic of Belarus.

It follows from these legislative provisions that, when fulfilling its tasks, the Constitutional Court should proceed from ensuring compliance of the normative acts in force within the state territory with both the Constitution and international legal instruments ratified by the Republic of Belarus. Ultimately, the aforementioned powers of the Constitutional Court contribute to the implementation of the principle of *pacta sunt servanda* in national case-law, the most effective operation of the rules of international law in the territory of Belarus. Thus, the Constitutional Court in the decision of 7 May 2018 “On the Conformity of the Law of the Republic of Belarus “On Making Alterations and Addenda to the Law of the Republic of Belarus “On International Treaties of the Republic of Belarus” to the Constitution of the Republic of Belarus” noted that the rules of international treaties of the Republic of Belarus along with the rules of domestic legislation are an integral part of the legal regulation in force within the territory of the Republic of Belarus. Such an approach is based on the principle of openness to international law with respect for the requirements

of equivalency and efficiency. It is at the heart of the harmonious functioning of the national legal system in the context of its interaction with the rules of international law.

The Constitutional Court refers to international law in many of its decisions. This approach is one of the system bases for the exercise of its powers.

The Constitutional Court refers to the international legal principles and rules in order to ground its legal positions, to reveal the constitutional and legal meaning of the rules of normative acts under the constitutional review. Such reference makes it possible to fully reveal the content of the constitutional rules, to specify a particular constitutional right of a person with due regard to the existing international legal regulation. At the same time, the understanding of the importance of international law for the implementation of constitutional legal relations becomes more noticeable in the national case-law.

The Constitutional Court proceeds from the fact that its interpretation of the provisions of the Constitution in order to fully elucidate its principles and rules, to reveal the meaning of the constitutional provisions should be based on as many as possible sources with legal content. In this regard, it takes into account the fundamental documents of international organisations.

Thus, the reference to the resolutions of the UN General Assembly is conditioned by their influence on the formation of international law. These resolutions have accumulated a generally recognised interpretation of the provisions of the UN Charter and have embodied the international understanding of justice.

The reference of the Constitutional Court to international documents specifying the rules of international law in this context allows it to give a fuller and more comprehensive interpretation of the provisions of national law. The Constitutional Court, in order to implement the provisions of the Constitution stipulating that the individual, his rights, freedoms and guarantees for their attainment manifest the supreme goal and value of society and the State, compares international and national standards in the field of human rights. Herewith, it determines the due level of ensuring and protection of human rights and, if necessary, makes proposals to improve the legislation and law enforcement in the constitutional and legal sense.

Thus, in the decisions of the Constitutional Court it has been repeatedly noted that the right to judicial protection is one of the fundamental human rights that are recognised and guaranteed in accordance with generally acknowledged principles of international law. At the same time, the Constitutional Court has pointed out the directions of improving the mechanism for implementation of this right in national legislation, taking into account the provisions of international acts.

The Constitutional Court in its decisions takes into account the case-law of the European Court of Human Rights. The Republic of Belarus has not yet assumed obligations to harmonise national legislation and law enforcement with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, the Constitutional Court forms its legal positions, focusing on conventional provisions and their interpretation by the ECHR. This contributes to the harmonisation of ensuring and protecting human rights from the point of view of national and international law.

The competence of the Constitutional Court includes the adoption of judgments on the conformity of instruments of interstate formations of which the Republic of Belarus is part, to the Constitution and instruments of international law ratified by the Republic of Belarus.

Taking into account the obligations of the Republic of Belarus in the framework of the Eurasian Economic Union (EAEU), the Constitutional Court stresses the need to implement the law of the EAEU in the national legislation, to enforce the decisions of its bodies in Belarus. In the Message of the Constitutional Court to the President of the Republic of Belarus and the Houses of the National Assembly of the Republic of Belarus “On Constitutional Legality in the Republic of Belarus in 2017” it is noted that under conditions of multi-vector and multi-level legal regulation, interaction of international, supranational and national law, the legislator’s efforts should be directed to timely and effective perception of integration processes by national law. To ensure a clear balance between different legal orders and national legislation, appropriate legal mechanisms and procedures are required.

The Constitutional Court, when formulating legal positions regarding the relationship between the rules of international, integration and national law, draws attention to the need to develop common principles and approaches to the harmonisation and unification of legislation in the EAEU member countries. At the same time, it should be noted that the processes of the formation and implementation of the law of the EAEU should be accompanied by ensuring the supremacy of constitutional provisions on the human rights and freedoms, taking into account their understanding in international law.

The potential of the relevant legal positions of the constitutional review body as a significant factor in influencing the development of the law of integration formation requires further implementation in the operation of the law of the EAEU and the national law order.

Acknowledging the growing role of international law in the national legal system, the Constitutional Court constantly draws attention to the need to ensure and protect the constitutional values. The Constitutional Court points out that in the processes of interaction between national and integration law, the supremacy

of the Constitution, the fundamental constitutional bases of the Belarusian state, that condition constitutional identity, should be the guiding principles. In its decisions the Constitutional Court has also noted that legal sovereignty is the most important substantive element of state sovereignty. In domestic policy, legal sovereignty is manifested in the functioning of state power on the basis of the supremacy of the Constitution, and in foreign policy, in the recognition by the state of generally recognised principles of international law.

In that way, when exercising its powers, the Constitutional Court consistently extends its activities to the sphere of international law through the application of its principles and rules in order to ensure the supremacy of the Constitution and its direct action, to protect the constitutional rights and freedoms of individuals as the basis of national identity. When applying the provisions of international law, the Constitutional Court determines their role in the legal system of the Republic of Belarus, the procedure for their operation in relation to the rules of national and integration law, the direction of harmonisation of national legislation with the principles and rules of international law.

It is obvious that the formation of a new international legal order requires qualitatively new mechanisms of interaction between national and international law. At the same time, it is the constitutional justice that plays an important role in the processes of formation of these mechanisms, as well as in determining the substantive directions for the further development of international law conditioning its conflict-free relationship with national legal systems.

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Benchmarks to the jurisprudence of the constitutional court of Romania in the field of tax law and tax proceedings

Abstract. *This publication aims to show the Romanian Constitutional Court's case by presenting a summary of two recent rulings in matters of tax procedures. It is about checking the constitutionality of legal provisions relating to the fulfilment of tax obligations by a taxpayer with special status and that the legal conditions in which interest must be paid to a taxpayer who has made an unlawful payment to the budget.*

Résumé. *Cette publication vise à indiquer le cas de la Cour Constitutionnelle de la Roumanie en présentant un résumé de deux décisions récentes en matière de procédures fiscales. Il s'agit du contrôle de la constitutionnalité des dispositions légales relatives à l'accomplissement des obligations fiscales par un contribuable ayant un statut spécial et des conditions légales dans lesquelles des intérêts doivent être payés à un contribuable qui a fait un paiement illicite au budget.*

Until “the encounter” with the provisions of the new laws recently adopted in tax matters (Law no. 227/2015 – Tax Code and Law no. 207/2015 – Code of Fiscal Procedure), the Constitutional Court has been “confronted” with numerous provisions of – now – old codes, making decisions confirming the constitutionality of some rules and declaring others unconstitutional. We will try, below, to illustrate the case-law of the Constitutional Court of Romania on

tax procedure and tax law, presenting the summary of some recently delivered solutions.

I. A. By decision no. 270/2014¹ the Constitutional Court upheld the objection of unconstitutionality with regard to the provisions of Article 114, paragraph (1), subparagraphs 4 and 6 of the government ordinance no. 92/2003 on the Code of Fiscal Procedure,² finding that the provisions of Article 139(1) of the Constitution represent the constitutional basis conferring on the legislator an exclusive competence to establish taxes and to set up their legal regime. The aforementioned norms also provide that it is the exclusive competence of the legislator to regulate the rights and obligations of the parties in the context of the fiscal legal relationship [see also Article 1(1) of the Code of Fiscal Procedure]. In these circumstances, the legislator may regulate procedures and establish time-limits and conditions for determining tax obligations. In view of the foregoing, the Court also held that by its manner of regulation the legislator has also indirectly set up the taxpayers' legal treatment in tax matters, including their rights and fundamental freedoms which the legislator had an obligation to respect.

The Constitutional Court invoked the case-law of the Strasbourg Court according to which during the implementation of policies, in particular social and economic policy, the legislator must have a margin of appreciation in order to rule on the existence of a problem of public interest requiring a normative act, or on the choice of the modalities of application of such an act.³ Similarly, the Constitutional Court emphasized the need to strike a balance between the general

¹ Decision no. 270 of 7 May 2014 concerning the constitutional challenge of the provisions of Article 114(6) of the government ordinance no. 92/2003 on the Code of Fiscal Procedure in the wording prior to the amendment of these provisions by Law no. 126/2011 approving the government emergency ordinance no. 88/2010 amending and supplementing the government ordinance no. 92/2003 on the Code of Fiscal Procedure, and the provisions of Article 114(1) and (4) of the same ordinance, published in the Official Gazette no. 554 of 28.07.2014.

² The challenged legal norms provide as follows:

“(1) Payments to the tax authorities shall be made through banks, treasuries and other institutions authorized to carry out payment transactions [...]

(4) For tax claims administered by the National Tax Administration Agency and its subordinate units, the tax authority, at the request of the debtor, shall correct the errors in the debtor's payment documents and shall consider them to have been valid at the time of payment of the amount in the debtor's account as mentioned in the payment document, provided that his account is debited and a budgetary account credited. [...]

(6) The application may be filed within one year after the date of payment, otherwise this right shall be lost.”

³ Judgment of 4 September 2012 in the case *Dumitru Daniel Dumitru and Others v. Romania*, para. 49.

interests of society and the particular interests of individuals,⁴ citing the fact that in this respect there is also case-law of the European Court of Human Rights which has found that the state, especially in the development and implementation of a tax policy, enjoys a wide margin of appreciation, subject to the existence of a “fair balance” between the demands of the general interest and the imperatives of the defence of fundamental human rights.⁵ In these circumstances, it is up to the Constitutional Court to analyse whether the legislator’s margin of appreciation in tax matters, reflected with regard to taxpayers, complies with the constitutional provisions relating to the property rights.

For this purpose, the Constitutional Court has carried out the structured proportionality “test”,⁶ according to which limitations of fundamental rights must comply with certain requirements. The Court verified whether the limits imposed by the legislator on the taxpayers’ property rights imposing a time-limit constituted a reasonable limitation that is not disproportionate to the aim pursued by the legislator.⁷ Thus, the Court held that, although Article 114(6) of the Code of Fiscal Procedure was not directly aimed at the property interests of the taxpayer, the sanction for not submitting in due time the application generated, indirectly, in favour of the state, a claim on the taxpayer’s assets. In this way, the taxpayer’s ownership of his property is affected by action of the state. The Court found that according to Article 44(1) of the Constitution, the legislature was entitled to establish the content and limitations of property rights. In principle, these limitations are related to the subject-matter of property rights and their attributes, being established for the protection of general social and economic interests or the protection of the rights and fundamental freedoms of others; an essential requirement being that the property rights may not be completely annihilated.⁸ The Court also held that according to Article 44

⁴ See the decision of the Constitutional Court of Romania no. 1.533 of 28 November 2011, published in the Official Gazette of Romania, Part I, no. 905 of 20 December 2011.

⁵ See also the judgment of the European Court of Human Rights of 23 February 2006 in the case *Stere and Others v. Romania*, para. 50.

⁶ According to the principle of proportionality, a principle implicitly incorporated into the normative content of the rights and freedoms provided by the Constitution, any measure taken must be **adequate** – objectively capable of leading to the attainment of the aim, **necessary** – not exceed what is necessary for the achievement of the aim and **proportional** – specific to the aim pursued. Thus, in order to carry out the proportionality test, the Court must establish the aim pursued by the legislator by the challenged measure and verify whether it is legitimate, considering that the test of proportionality can relate to only one legitimate aim.

⁷ See also Decision of the Constitutional Court of Romania no. 266 of 21 May 2013, published in the Official Gazette of Romania, Part I, no. 443 of 19 July 2013.

⁸ In this regard, see also Decision of the Constitutional Court of Romania no. 19 of 8 April 1993, published in the Official Gazette of Romania, Part I, no. 105 of 24 May 1993.

of the Constitution the ordinary legislator was competent to establish the legal framework for the exercise of property rights, in the sense of principle conferred by the Constitution; however, it has to be done in a way that does not collide with general interests or with legitimate private interests of other subjects of law, thus establishing reasonable limitations to use it as a guaranteed subjective right.⁹ Therefore, the text of Article 44 of the Constitution expressly provides for a special provision under paragraph (1) whereby the legislator is competent to determine the content and limits of property rights, including by introducing limits to the attributes of property rights. In these circumstances, the Court found that property rights are not absolute but may be subject to certain limitations pursuant to Article 44(1) of the Constitution; however, the limits of property rights, regardless of their nature, are not to be confused with the complete removal of the rights to property.

The Court found that the aim pursued, to empower, discipline and punish the taxpayer’s faulty budgetary behaviour, was legitimate. In addition, such a measure ensures the stability of legal relations, appearing as a corollary of the need to ensure sufficient financial resources for the state budget. Second, examining whether the challenged legal provisions are adequate and necessary for the aim pursued, it was held that the establishment of a time-limit for the request for rectification was an appropriate measure to make the taxpayer responsible and disciplined. The measure appears necessary to punish the taxpayer, when the correction of material errors must be made within a certain time.

However, the measure was not proportionate to the legitimate aim pursued. The Court found that the timing of the calculation of ancillary tax receivables was such as to create a fiscal treatment that did not take into account the legitimate aim pursued.

On the basis of joint reading of the legal rules the Court held that the tax authorities could issue decisions establishing ancillary tax claims after the expiry of the time period for the exercise of the rights of the taxpayer established by the legislator, but within the limitation period provided for the right of establishment of tax obligations, with the direct consequence of affecting the property of the debtor. In addition, the tax authorities will always be interested in issuing these decisions after the expiry of the time-limit for the exercise of the rights of the taxpayer, exploiting the lack of attention / error of the taxpayer.

However, legislative acts must be designed in such a way as to enable their addressees to be able to adapt their behaviour in a real and effective

⁹ See Decision of the Constitutional Court of Romania no. 59 of 17 February 2004, published in the Official Gazette of Romania, Part I, no. 203 of 9 March 2004.

way, according to the normative assumption of the law. In these circumstances, the challenged rules rather confer an illusory right to the taxpayer, since these errors are often detected *post factum*.

Here one cannot speak of a legitimate aim but the question arises as to unjust enrichment of the state when it does not aim at the taxpayer's accountability / fiscal discipline or the sanction of his behaviour but a corresponding diminution of his assets, with consequent appropriation of money by the state.

Consequently, the fact that the time-limit begins to run from the date of the actual payment and not from the date of the discovery of the error committed, with such a short time limit, is such as to detract from the legitimate aim that the legislator seeks to achieve, namely, to make the taxpayer responsible and / or to discipline and sanction the taxpayer, generating, instead, an interest of the state in issuing a decision to establish ancillary tax claims after the expiry of the foreclosure period. In those circumstances the Court held that the challenged measure was not proportional to the aim pursued which results in the infringement of the property rights of the taxpayer, the latter having to bear a disproportionate decrease of his assets.

Moreover, if the taxpayer submits a claim to the commission of errors after the expiry of the one-year period, ancillary tax debts can be imposed to him, even if the sums due have been transferred to the accounts of the fiscal authorities, and that they have been used by the state. The taxable accessories must be paid (by the combined interpretation with the other provisions of the Code of Fiscal Procedure) even if the payer, at a certain moment, obtains the recognition of the payment made, using the existing legal means.

For the reasons set out above, the Court found a violation of Articles 44 and 139 of the Constitution, since the state had exceeded its margin of appreciation conferred by this constitutional text.¹⁰

B. A dissenting opinion was submitted to this decision arguing, for the reasons that will be set out below, that the complaint should have been rejected as ill-founded.

¹⁰ The final argument of the Court was that the legislator has redressed the shortcomings of the criticized normative act, among others, by the Law no. 126/2011 approving the government emergency ordinance no. 88/2010 amending and serving as a supplement to the government ordinance no. 92/2003 on the Code of Fiscal Procedure (published in the Official Gazette of Romania, Part I, no. 433 of 21 June 2011), it amended the provisions of Article 114(6) of the Code of Fiscal Procedure which, at present, read as follows: "The application may be lodged within 5 years limitation period. That period begins to run from 1 January of the year following the year in which the payment was made." Even if this time-limit still is a limitation period (prescriptive date), the period of time during which potential errors may be disputed is more reasonable and this could, in theory, prevent undesirable situations in which accessory tax receivables arise.

The petitioner challenges the provisions of Article 114(4) and (6) of the Code of Fiscal Procedure, but – *de facto* – he is unsatisfied only with the time-limit provided for in paragraph (6).

Article 114(4) of the Code of Fiscal Procedure represents a favourable regulation: the legislator offers the taxpayer (who has incorrectly made the payment of tax) the possibility of asking the taxing authority with territorial jurisdiction to proceed with the correction of errors in the payment documents established by the debtor and consider valid the payment at the time it takes place.

In accordance with the provisions of Article 114(6) of the same code (in force at the time of the erroneous payment¹¹), the request addressed to the tax authority may be filed within one year, after which the taxpayer loses his right to do so.

Since the norm was challenged after the amendment of the text of Article 114(6), the claimant argues the unconstitutionality of this norm by comparing the original legal provision (providing for one-year limitation period) to the amended provision in 2011 (extending the limitation period to 5 years).

In accordance with Article 73 of the Code of Fiscal Procedure,¹² the debtor taxpayer must indicate on the payment documents his own tax identification number. Failure to comply strictly with this obligation makes it impossible for the tax authority to identify and ascertain the payment by the taxpayer, with the consequence that it is considered that the tax obligation has not been fulfilled within the deadline.

The claimant alleging the unconstitutionality – a notary – paid the tax collected in accordance with article 771(6) of the Tax Code,¹³ drafting payment documents in which he incorrectly indicated the tax identification number of the Chamber of Notaries instead of his own tax identification number.

¹¹ The text of Article 114(6) of the Code of Fiscal Procedure was amended in 2011 (by Law no. 126/2011 approving the government emergency ordinance no. 88/2010 amending and supplement to the government ordinance no. 92/2003 on the Fiscal Procedure Code) in that the one-year limitation period has been replaced by a five-year limitation period.

¹² Article 73 of the Code of Fiscal Procedure established the obligation to indicate the tax identification number on documents, specifying that "the payers of taxes, contributions and other amounts due to the consolidated general budget have the obligation to mention on the invoices, letters, offers, orders or on any other issued document their tax identification number."

¹³ According to the provisions of article 771(6) of the Tax Code, the tax on the transfer of real estate property of personal assets is calculated and collected by a notary before the authentication of the act of alienation or of establishment of the cessation of the completion of the succession and it is paid into the state budget – by the same notary – no later than on the 25th day of the month following the month in which it was retained.

However, the payment of the sums due has been made within the period prescribed by law.¹⁴

A public notary draws up regularly (monthly) payment documents (on the transfer to the budget of amounts collected on the occasion of the transfer of real estate), as well he has the opportunity and the possibility to check the accuracy of the information provided in these documents (for current or prior payments) in order to be able to correctly fulfil its legal obligation (in this case that of the indication of his own tax identification number) or to seize the tax authority [under the terms of the Article 114(4) of the Code of Fiscal Procedure]; however, in such circumstances, the time within which he could refer the matter to the tax authority for rectification of the errors made seems more than reasonable. Given that, obviously, he and only he made that mistake, the debtor must bear the legal consequences (i.e. the assumption of the accessory tax obligations,¹⁵ calculated from the day which immediately follows the deadline for the payment and until the payment is made).

The fact that the amounts deposited on behalf of the state budget (without the correct indication of the tax identification code, therefore in violation of the provisions of Article 73 of the Code of Fiscal Procedure) were – from the date of their filing – at the “disposal” of the state is irrelevant, since as long as the taxpayer-debtor could not be identified, the payment of tax obligations could not be considered lawful and fulfilled within the due time-limit to consider him free of his obligations. The fact that the amounts deposited within the time-limit (however without the correct indication of the depositor) have “remained” not identified in the consolidated general budget of the state may not as such exonerate the debtor of the sanction for the failure to comply with the tax obligations.

Under the conditions of due diligence, the debtor of the tax obligation filled in incorrectly should have discovered the error made and seized the tax authority, asking to correct the error in the payment documents (within the time-limit for the exercise of the rights) and the payment effected would have been considered lawful and made within the time-limit¹⁶ (in which case,

¹⁴ Tax obligations of this kind must be fulfilled within the time-limit prescribed by law; therefore, as they are not established by the tax authorities, they are not brought to the knowledge of the debtor by means of administrative tax acts (tax assessment).

¹⁵ For the main and ancillary tax obligations, see Articles 21 and 22 of the Code of Fiscal Procedure.

¹⁶ It should be emphasized that the provisions of Article 114 (4) relate exclusively to payment documents drawn up, with errors, by the debtor, and not to the tax returns of the taxpayer or to other fiscal administrative acts issued by the tax authority responsible for the application of the law on the fixing, modification or extinction of tax rights and obligations (see, for these latter documents, the provisions of Article 84 and respectively Articles 41, 43 and 44 of the Code of Fiscal Procedure).

according to law, he would have been exempted from payment of the ancillary obligations). Otherwise, just as the Constitutional Court ruled in this regard, “the fact that the debtor who made a payment that was vitiated by material errors, although he knew or should have known the time-limit within which he could request the correction of errors in payment documents, as well as the legal consequences of non-compliance, has not complied with the legal requirement, gives expression of his own fault, in accordance with the principle *nemo auditur propriam turpitudinem allegans*”,¹⁷ which is the reason why he must bear the consequences of disobedience and failure to comply with the conditions laid down in the law.

The Code of Fiscal Procedure provides for two kinds of limitation periods: time period for the exercise of rights¹⁸ and the limitation period.¹⁹ Between these two types of deadlines there are important differences which concern both their nature and legal regime, as well as the aim pursued by the legislator.

The time period for the exercise of rights is the period of time during which the owner of a subjective right is required to exercise his right, otherwise the right ceases to exist. This time period for the exercise of rights which results in the loss of the subjective right itself cannot be suspended or interrupted and may not be renewed. These time-limits are usually short.

The limitation period is the period of time fixed by law during which the non-exercise of the right to initiate proceedings, in the material sense, has the effect of extinguishing the possibility of obtaining the conviction of the defendant. This time period may be suspended, interrupted or renewed.²⁰ The limitation period is always longer than the time period for the exercise of rights.

Although between these two types of delay there are substantive differences (which normally should not lead to a confusion), the legislator – by mixing apples and pears – has confused them and mixed them, establishing for them practically the same legal regime, retaining only their different names. Indeed, by the amendment, adopted in 2011, to the text of Article 114(6) of the Code of Fiscal Procedure, the legislator has assimilated the time period for the exercise of rights²¹ with the limitation period concerning

¹⁷ See the Decision of the Constitutional Court no. 268 of 22 March 2012, published in the Official Gazette of Romania, Part I, no. 425, of 25 June 2012.

¹⁸ See the deadline set by Article 114(6) of the Code of Fiscal Procedure.

¹⁹ Such as those established by Articles 91, 131 and 135 of the Code of Fiscal Procedure.

²⁰ See M. N. Costin in M. N. Costin, I. Leș, M. St. Minea, C. M. Costin, S. Spinei, *Dicționar de procedură civilă*, 2nd edition, Ed. Hamangiu, Bucurest, 2007, pp. 877 and 879.

²¹ In the amended version currently in force, the text of article 114(6) of the Code of Fiscal

the legal regime that it follows. It is obvious that there was a confusion made by the legislator when he conferred to the time period for the exercise of rights the legal effect of the limitation period. Normally these two types of time-limits are completely different and there should not be added nothing more.

Such a confusion – and its consequence, the unification of the legal regime of deadlines – may not be accepted, since it involves completely different issues: one is that within the time period for the exercise of rights must be corrected – by the tax authority, at the request of the debtor – the errors made when the payment documents are completed (by which certain tax obligations are fulfilled)²² and others are situations where – within the statutory limitation period – tax returns may be rectified,²³ tax obligations may be established,²⁴ forced execution of tax obligations may be carried out,²⁵ that is, taxpayers may claim compensation or restitution of tax debt.²⁶

Finally, there is no doubt that the unconstitutionality of a legal provision cannot be concluded from the comparison of a piece of legislation with another piece of legislation²⁷ (as alleged by the claimant). Moreover, it has been held that an unclear regulation cannot have the effect of transforming a constitutional rule into an unconstitutional rule (so that the mere extension, as a lapse of time, of the time period for the exercise of a right cannot confer unconstitutional character to the regulation previously in force); in other words, why would

Procedure reads as follows: “The application may be lodged within five years or otherwise it is forfeited. The period begins to run from 1 January of the year following the year in which the payment was made”.

²² See the provisions of article 114 (4) and (6) of the Code of Fiscal Procedure.

²³ According to Article 84 of the Code of Fiscal Procedure, tax declarations may be adjusted at the initiative of the taxpayer whenever he finds errors in the initial declaration, by filing a corrigendum, until the expiry of the limitation period of the right to set tax obligations.

²⁴ According to provisions of Article 91 of the Code of Fiscal Procedure, the right of the tax authority to set a tax obligation has a limitation period of 5 years, which begins on 1 January of the year following the year during which the tax claim originated.

²⁵ Article 131 of the Code of Fiscal Procedure provides that the right to apply for the enforcement of tax claims is subject to a limitation period of 5 years from 1 January of the year following the year during which the right arose.

²⁶ According to provisions of Article 135 of the Code of Fiscal Procedure, the right of taxpayers to claim compensation or restitution of tax claims is subject to a limitation period of 5 years from 1 January of the year following that in the course of which the right to compensation or restitution arose.

²⁷ Article 114(6) of the Code of Fiscal Procedure in its initial version (which provided for a one-year limitation period, which began to run from the date of payment made with errors) and the same provision as amended in 2011, which provides for a five-year limitation period beginning on January 1 of the year following the year in which the payment was made.

the one-year time period for the exercise of rights be unconstitutional and the five-year time period for the exercise of rights would be “more constitutional”?!

II. By Decision no. 694/2015²⁸ the Constitutional Court upheld the claim of unconstitutionality of the provisions of Article 124(1) of the Code of Fiscal Procedure²⁹ for the following reasons.

The Court first observed that the applicant had challenged the extrinsic and intrinsic constitutionality, arguing that the challenged legal provisions violated the constitutional provisions contained in Article 52(1) and (2) on the rights of the individual affected by a public authority, as well as in Article 44(1) and (3) on the right to property.

The extrinsic criticism relates to Article 52 of the Constitution. The claimant argued that since this matter is related to the right to compensation for damages, by awarding an interest payment, it must be made by means of an organic law, and not by a normative act which can only have the legal force of an ordinary law, namely an order of the government. The Court noted that the conditions and limits referred to in Article 52(2) are governed by Administrative Law no. 554/2004 which is to be applied to this dispute. The provisions of Article 52 (1) of the Constitution are contained in Article 1(1) of the said Law. In addition, Article 5(1) and (2) of the Law no. 554/2004, as regards acts which are not open to challenge in administrative proceedings, provide examples of the limitation of the complex right provided for in Article 52 (1) of the Constitution. The provisions of Article 10 on jurisdiction, those of Article 11 on the time-limit for

²⁸ Decision no. 694 of 20 October 2015, on the challenge of constitutionality of the provisions of Article 124(1), compared with those of Article 70 of the government ordinance no. 92/2003 on the Code of Fiscal Procedure, published in Official Journal no. 948 of 22.12.2015.

²⁹ It should be specified that the claim of unconstitutionality, as it is specified in the referral judgment, is directed against Article 124(1) of the government ordinance no. 92/2003 on the Code of Fiscal Procedure, republished in the Official Gazette of Romania, Part I, no. 513 of 31 July 2007, as subsequently amended and completed. The Court finds that, in fact, the rule challenged is Article 124(1), referred to in Article 70 of the government ordinance no. 92/2003 on the Code of Fiscal Procedure as regards the amounts to be refunded from the budget. The text of the challenged legal norms is the following: “(1) *For amounts of the budget to be returned or refunded the taxpayers are entitled to interest payment from the day following the end of the period provided for, where applicable, in Article 117(2) or Article 70. The granting of interest payment is at the request of taxpayers.*” (Article 70 of the government ordinance no. 92/2003 on the Fiscal Procedure Code provides: “(1) *Applications filed by the taxpayer in accordance with the present code shall be settled by the tax authority within 45 days from their registration. (2) In the event that it is necessary to receive additional information relevant for the decision to resolve an application, this period shall be extended to an interval between the date of the request and the date of receipt of the information required*”).

appeal and Article 19 on the limitation period for compensation are examples of regulations governing the conditions for the exercise of this right.

In addition, Article 18(3) of the Law no. 554/2004 provides that, in the case of the resolution of the request pursuant to Article 8(1), the court will also rule on compensation for the material and moral damage caused if the applicant has so requested. Furthermore, Article 28(1) of the Law no. 554/2004 provides that the provisions of this law are supplemented by the provisions of the Civil Code and the Code of Civil Procedure, insofar as they are not inconsistent with the specificity of the balance of power between public authorities, on the one hand, and persons injured in their rights or legitimate interests, on the other. Therefore, any interested party may bring a claim in the administrative courts, including claims to award the interest payments.

Under these circumstances, the Court found that the challenged legal provisions, such as they were designed by the legislator, were rules whose main purpose was to require the tax authorities to fulfil their obligations as soon as possible, but also to recover the loss of profits, in the alternative. In fact, the Court held that these aspects did not concern the conditions and limits governing the exercise of the right to compensation for damage to which Article 52 of the Constitution refers, and that their regulation by organic law was not required. Therefore, the extrinsic challenge to constitutionality was rejected.

As regards the intrinsic challenge to constitutionality in relation to Article 44(1) and (3) on the right of private property, the Court declared them well-founded.

The Court observed that the starting premise for the analysis is when tax authorities issue a tax notice in breach of legal provisions. The taxpayer has the right to address the tax authorities with a claim who then may acknowledge the lack of a basis for the tax notice and order the return of the sums paid. In addition, the taxpayer has the right to go to the court, to make use of the applicable legal procedure, and the court can establish the validity of the claim for restitution of the amount of money paid under the illegal tax notice. In these cases, the taxpayer must submit an application concerning the return of amounts paid [in accordance with Article 117(1) of the government ordinance no. 92/2003 on the Code of Fiscal Procedure]. Such a request is examined, as a rule, within 45 days from the date of submission of the application to the tax authority.

The Court held that the challenged legal provisions regulated the taxpayers' right to receive the interest payment for the sums to be returned by the tax authorities. The taxpayers have the right to receive an interest payment after the recognition of the right to the restitution of a sum of money by a decision of justice or an admission by the fiscal authorities of an error made by them, when the sum of money according to the illegal tax notice was debited. According

to the challenged legal provisions the taxpayer could only submit the refund claim after the recognition of the right to a restitution of the amount paid by the taxpayer, and after that the tax authority has issued the illegal tax notice.

The interest payment provided by the government ordinance no. 92/2003 on the Code of Fiscal Procedure was not to be awarded from the date of the actual payment by the taxpayer of the amounts indicated in the tax notice, but at a later date, after a period of at least 45 days from the date of filing of the taxpayer's application for interest payment.

The Court also held that according to Article 44(1) of the Constitution the legislator was entitled to define the content and limits of the right to property. In principle, these limits are related to the object of the right to property and the attributes of this right and they are established with a view to protect overriding social and economic interests or rights and fundamental freedoms of persons, the essential point being that this measure may not completely eradicate the right to property.³⁰ Furthermore the Court held that under Article 44 of the Constitution the ordinary legislator was competent to set up the legal framework for the exercise of the attributes of the right to property, in line with the principle of the right to property provided in the Constitution, in such a way that does not breach the general interests or legitimate private interests of other legal subjects, thereby establishing reasonable limitations for the use of this right as a guaranteed subjective right.³¹ Therefore, the text of Article 44 of the Constitution expressly provides in paragraph (1) a special provision under which the legislator is entitled to determine the content and limits of the right to property, including setting the limits regarding the attributes of the right to property.

In these circumstances, the Court held that the right to property is not an absolute right, but it could be subject to certain limitations, according to Article 44(1) of the Constitution; however the limits of the right to property, irrespective of their nature, should not have as consequence a total eradication of the right to property.

The Court also observed that the Court of Justice of the European Union has held that the principle of effectiveness requires, in a situation of restitution of a tax levied by a Member State in breach of the EU law, that the national rules relating in particular to the calculation of any interest due must not have the effect of depriving the taxpayer of an adequate indemnity for the loss

³⁰ In this respect, see also Decision no. 19 of 8 April 1993, published in the Official Gazette of Romania, Part I, no. 105 of 24 May 1993.

³¹ See Decision no. 59 of 17 February 2004, published in the Official Gazette of Romania, Part I, no. 203, of 9 March 2004.

occasioned through the undue payment.³² The Court found that the legal regulation such as that at issue in the main proceedings, limiting interest to the period running from the day following the date of the application for the refund of the tax unduly levied, did not meet that requirement. Indeed, this loss depends in particular on the duration of the unavailability of the sum unduly paid in breach of Union law and thus, in principle, occurs in the period between the day of the undue payment of the tax in question and the day of return of this sum.

The Constitutional Court also held that the High Court of Cassation and Justice ruled, by analysing the provisions of Article 124(1) and Article 70(1) of the government ordinance no. 92/2003 on the Code of Fiscal Procedure, republished as subsequently amended and supplemented, that the initial date for tax interest payment for the amounts collected in respect of the tax of first registration, concerning the tax on pollution and tax on pollutant emissions, that were returned pursuant to court decisions, was the date of payment of these taxes.³³

In examining the legal provisions and the criticisms made, the Court finds that the compensation for the material damage should be made through the payment of the tax interests which, according to the law, is the monetary value of the damage caused to the creditor, by ensuring the restoration of the financial situation in which he/she would have been if the debtor's obligation had been properly executed. In order to satisfy this requirement, the interest granted must cover both the amount of the loss actually suffered by the creditor (*damnum emergens*) and the value of the loss of revenue (*lucrum cessans*). As a general rule, these should cover only direct and foreseeable damage, and not indirect and unforeseeable damage. The Court found that the amount of interest payment due to the entitled taxpayer on unduly paid tax were those provided for in Article 124 and Article 120(7) of the government ordinance no. 92/2003 on the Code of Fiscal Procedure.

If the returned interest covered the damage for only a limited period, a question arises of unjust enrichment of the state, since the assets of the taxpayer will have diminished because of the impossibility to use the sum of illegally collected money and deprivation of the right to receive a compensation for

the loss of revenue. The measure provided by the challenged legal provisions is not sufficient to fully compensate the incurred damage, since the interest payment is not awarded at the time of payment, but at a later date. In other words, the challenged legal provisions do not provide for a full compensation for the incurred damage.

The application of these legal provisions generates a situation where the taxpayer is suffering a loss in favour of the state which uses sums of money collected in breach of the law. In other words, the taxpayer suffers a diminution of his assets and he is deprived of the possibility to use these sums of money, whereas the state is enriched without any legal basis by the free use of same amounts.

Therefore the Constitutional Court found the provisions of Article 124(1), compared to those of Article 70 of the government ordinance no. 92/2003 on the Code of Fiscal Procedure, even if they guarantee the interest payment in case where the obligation of restitution is not fulfilled, do not allow a thorough compensation of the damage that the taxpayer might have incurred because of his/her voluntary performance of a tax obligation which he considered illegal, which was later confirmed to be such by a court decision or by the tax authority itself. There is thus a reduction in the taxpayer's assets through the action of the government, thus affecting the right to property.

Undoubtedly the interest must be calculated from the date of the preventive seizure of the amount for which the restitution is ordered. In this way, reasonable and fair treatment can be ensured between the parties: if, according to Article 119 of the government ordinance no. 92/2003 on the Code of Fiscal Procedure for non-payment within the time-limit the debtor owes an interest payment the interest and penalties for late payment are due counting from this date, in the same way the interest on the amounts to be refunded from the budget must be granted from the date of payment and not from a later date (i.e. after 45 days from the date of the request, or even after more time, according to Article 70 of the Code of Fiscal Procedure). The same idea is also apparent from the analysis of Article 131 in conjunction with Article 135 of the same Code of Fiscal Procedure, according to which the limitation period for the recovery of tax debts, e.g. the sums be returned from the budget is the same – 5 years from 1 January of the year following the year when this right has entered into existence. A joint analysis of all the provisions of the Code of Fiscal Procedure relevant in this matter does not indicate the existence of any objective justification on which is based the significant difference of legal treatment between the state and the taxpayers.

It should be added that the legislator has addressed these shortcomings of the challenged normative act. The government emergency ordinance

³² See: Judgment of 18 April 2013, case C-565/11, *Mariana Irimie v Administrația Finanțelor Publice Sibiu and Administrația Fondului pentru Mediu*, paragraphs 26 - 28; judgment of 19 July 2012, case C-591/10, *Littlewoods Retail and others*, paragraph 29.

³³ See the High Court's Decision no. 14 of 22 June 2015, on appeal in the interest of law, published in the Official Gazette of Romania, Part I, no. 728 of 29 September 2015. This decision is applying the case-law of the Court of Justice of the European Union (Case C-565/11 *Mariana Irimie*).

no. 8/2014³⁴ introduced paragraph (11) of Article 124 of the Code of Fiscal Procedure (the provisions of this code are not applicable in this case), which reads as follows: “(11) *In case of a claim by a taxpayer resulting from the annulment of a fiscal administrative act establishing tax obligations for payment and which have been extinguished before cancellation, the taxpayer is entitled to claim interest from the day on which he has made use of his right to cancel the individualized tax claim in the annulled administrative act until the day of repayment or compensation of the taxpayer’s claim resulting from the cancellation of the fiscal administrative act. This provision does not apply in the situation where the taxpayer has claimed damages under the conditions of Article 18 of the Law on Administrative Proceedings no. 554/2004, as subsequently amended and supplemented, as in the situation referred to in Article 83(41).*”

However, the Court found that a legislative solution similar to that considered in the present case was taken by the legislator in Article 182(1) of Law no. 207/2015 of the new Code of Fiscal Procedure, which will come into force according to its Article 353 on 1 January 2016.

As a consequence, the public authorities concerned, including the courts, are called upon to interpret and apply this law in accordance with the effects of this decision as regards the moment from which the tax interests are awarded. In fact, even after these decisions the tax authorities will still have 45 days for processing the application, with the possibility to extend this deadline; however, the interest payment must be awarded counting from the day of the extinction of the tax obligation.

At the end of the reasoning of the decision, the Court made two essential clarifications, namely:

- the unconstitutionality of the challenged legal provisions does not concern the situation in which a taxpayer has requested and obtained compensation under the conditions of Article 18 of the Law of Administrative Litigation no. 554/2004, since otherwise there would be an unjust enrichment of the taxpayer.
- the finding of the unconstitutionality of the legal provisions of Article 124(1) in relation to Article 70 of the Code of Fiscal Procedure does not concern the amounts to be reimbursed from the state budget, such as the Value Added Tax, which is subjected to a specific legal regime.

³⁴ Government emergency ordinance no. 8/2014 amending and supplementing normative acts and other fiscal-budgetary measures was published in the Official Gazette of Romania, Part I, no. 151 of 28 February 2014.

III. Finally, in the area of tax law, I would suggest that you take a look at Decision no. 293 of 26 April 2018 (not yet published), by which the Constitutional Court rejected as unfounded the challenge of constitutionality of Article 461, paragraphs (5) and (7), second sentence, of Article 466(3) and Article 471(4), second sentence of the Law no. 227/2015 – the Tax Code.³⁵ In essence, in the reasoning of this decision, it was held that the legislator was free to introduce new taxes in order to provide public revenues necessary for the budget, as well as the right to establish specific rules of applying the tax on taxpayers.

Following a critical analysis of this decision and – above all – the legal provisions that were the subject of constitutional challenge, I would like to expound on the following.

In Romania – as in any other state, for that matter – the system of taxes and duties is based on a set of principles and rules that define and establish the general framework for positioning tax burdens on taxpayers. According to the principles of taxation governed by the provisions of Article 3 of the Tax Code, the legal norms by which taxes are introduced must be clear, they must not lead to arbitrary interpretations, and the time-limits, the modality and the amounts to be paid must be accurately established for each taxpayer, so that they can follow and understand the tax burden imposed on them (the certainty of taxation), and the calibration of the tax burden for each taxpayer must take into account their ability to pay, the size of the revenues or properties (the fairness of taxation / fiscal fairness).

The specificity of direct local taxes on assets – this category was covered by the unconstitutionality claim in this case – is that they are based on the tax value of the construction,³⁶ the land³⁷ or the vehicle,³⁸ therefore they are based on the fortune of the taxpayer, characterized by the fact that the local taxes are due, paid and incurred by the taxpayer (at the charge of which taxes have been established).³⁹ In these circumstances, since there is a direct relationship between the tax value of the property / goods and the period

³⁵ According to the legal provisions mentioned above, the tax on constructions, land and means of transport – which are the property of natural persons – is due for the whole fiscal year if, on the last day of the previous year these were registered as property of the taxpayer.

³⁶ The tax value of a building is based on the area, building materials and the type of construction – main or additional.

³⁷ The fiscal value of the land is based on its size, the location of the settlement, the area and the land use category.

³⁸ The tax value of the means of transport is established according to different criteria, according to the category to which they belong: common vehicles, heavy vehicles, trailers, water transport (according to the provisions of Article 470 of the Tax Code).

³⁹ See M. Șt. Minea, C. F. Costas, *Dreptul finanțelor publice*, vol. II – *Drept fiscal*, Edit. Universul Juridic, București, 2014.

during which they are a property of the taxable person, it appears obvious that the tax is due only for the period during which the taxpayer possesses the taxable assets (the property or the goods according to the value of which the tax burden is established).

The European Court of Human Rights has held in its jurisprudence that Contracting States enjoy a wide margin of appreciation in the development and implementation of tax policy, provided that it ensures / that there exists a *fair balance* between the demands of the general interest and the imperatives of safeguarding the fundamental human rights.⁴⁰ Similarly, the European Court of Human Rights has emphasized that the national legislator should enjoy, in the implementation of economic and social policies, an appropriate margin of appreciation, allowing it to combine/harmonize, by means of the regulation it adopts, both the existence of a public interest problem calling for regulation, and the choice of methods of application of the latter, *making it possible to maintain a balance between the interests in question*⁴¹.

In view of the above, the principle of the fair distribution of the tax burden – provided for in Article 56 of the Constitution⁴² – is breached as long as the tax due for the whole financial year is determined exclusively by reference to a moment of ownership of the taxable property (respectively the last day of the year preceding the year for which the tax is applied), regardless of the period of the current fiscal year in which the taxpayer owns the property; at the same time, the same principle is also breached in relation to equality and tax fairness, as long as there is no difference (from the point of view of the application of taxes in time) between the taxpayer owning the taxed property throughout the fiscal year and the taxpayer owning it only for a fraction of that fiscal year. As a result, the challenged legal provisions are not able to strike the right balance between the contemporary moment of ownership of the property (real estate or movable property), against which the tax is established, and the taxpayer's corresponding tax liability under such tax law relationship. For this reason, this may not be recognized as a fair distribution of the tax burden, which is contrary to the provisions of Article 56(2) of the Constitution.

Lastly, as regards taxes on wealth, the method of establishing taxes on buildings, land and means of transport introduced by the provisions of the new Tax Code may also affect the property rights of taxpayer, guaranteed by

⁴⁰ See the Judgment of 23 February 2006, case *Stere and Others v. Romania*, § 50.

⁴¹ See the Judgment of 4 September 2012, case *affaire Dumitru Daniel Dumitru and Others v. Romania*, §§ 41 and 49.

⁴² In accordance with Article 56(2) of the Constitution of Romania, the legal system of taxation must ensure a fair distribution of tax burdens.

the provisions of Article 44(1) and (2) of the Constitution.⁴³ Indeed, to provide for an obligation for the taxpayer to pay the wealth tax for the entire calendar year, even if he sells / loses – during the year – the property subject to the tax, violates his/her right to property (because he/she is required to pay a tax which – at least in part – is undue).

For the reasons summarized above, we considered that the challenge to constitutionality should be upheld and the impugned provisions of the Tax Code should be found to be contrary to the constitutional norms mentioned above.

In conclusion, we can say that – by its jurisprudence – the Constitutional Court contributes to the overall effort to clarify the law by requiring the legislator – primary or secondary – to comply with Article 1(5) of the Basic Law, according to which “In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”. This constitutional text follows the general obligation for the legislator to adopt legislation that meets all the qualities required to be understood and fully respected, this is clear, predictable and predictable.⁴⁴

⁴³ Under Article 44(1) and (2) of the Basic Law, the right to property is guaranteed in accordance with law, private property being also guaranteed and protected by law irrespective of the fact who is the owner.

⁴⁴ In fact, by Decision no. 1 of 11 January 2012 (published in the Official Gazette no. 53 of 23 January 2012), the Constitutional Court held that – in principle – any draft law must meet certain qualitative conditions, among them is predictability, which means that the law must be sufficiently precise and clear to apply.



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Repères de la jurisprudence de la Cour constitutionnelle de Roumanie en matière de droit fiscal et de procédure fiscale

Abstract. *This publication aims to show the Romanian Constitutional Court's case by presenting a summary of two recent rulings in matters of tax procedures. It is about checking the constitutionality of legal provisions relating to the fulfillment of tax obligations by a taxpayer with special status and that the legal conditions in which interest must be paid to a taxpayer who has made an unlawful payment to the budget.*

Résumé. *Cette publication vise à indiquer le cas de la Cour Constitutionnelle de la Roumanie en présentant un résumé de deux décisions récentes en matière de procédures fiscales. Il s'agit du contrôle de la constitutionnalité des dispositions légales relatives à l'accomplissement des obligations fiscales par un contribuable ayant un statut spécial et des conditions légales dans lesquelles des intérêts doivent être payés à un contribuable qui a fait un paiement illicite au budget.*

Jusqu'à « rencontrer » les dispositions des nouveaux codes récemment adoptées en matière fiscale (Loi n° 227/2015 – Code fiscal et Loi n° 207/2015 – Code de procédure fiscale), la Cour Constitutionnelle a été « confrontée » à nombreuses dispositions des – désormais – anciens codes, en rendant des décisions confirmant la constitutionnalité de certaines règles, respectivement constatant l'inconstitutionnalité d'autres. Nous allons essayer, ci-dessous,

d'illustrer la jurisprudence de la Cour Constitutionnelle de la Roumanie en matière de procédure fiscale et de droit fiscal, présentant le résumé de quelques solutions récemment livrées.

I. A. Par la Décision n° 270/2014¹ la Cour Constitutionnelle a fait droit à l'exception d'inconstitutionnalité ayant comme objet les dispositions de l'article 114, paragraphe (1), points 4 et 6 de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale², en retenant que les dispositions de l'article 139, paragraphe (1) de la Constitution représentent la base constitutionnelle conférant au législateur la compétence exclusive d'établir les taxes et les impôts et de leur configurer le régime juridique. Ledit texte prévoit également qu'il est de la compétence exclusive de celui-ci de réglementer les droits et les obligations des parties dans le cadre du rapport juridique fiscal [voir aussi l'article 1, paragraphe (1) du Code de procédure fiscale]. Dans ces conditions, le législateur peut réglementer des procédures, établir des délais et des conditions afin de déterminer les obligations fiscales. Compte tenu de ce qui précède, la Cour a également retenu que par sa manière de réglementation le législateur configurait aussi indirectement le traitement juridique du contribuable en matière fiscale, dont les droits et libertés fondamentales il devait respecter.

La Cour Constitutionnelle a invoqué la jurisprudence de la Cour de Strasbourg selon laquelle le législateur doit disposer, lors de la mise en œuvre de ses politiques, notamment sociales et économiques, d'une marge d'appréciation afin de statuer tant sur l'existence d'un problème d'intérêt public nécessitant un acte normatif, que sur le choix des modalités d'application de celui-ci³. De même, la Cour Constitutionnelle a souligné la nécessité de créer

¹ Décision n° 270 du 7 mai 2014 concernant l'exception d'inconstitutionnalité des dispositions de l'article 114, paragraphe (6) de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale dans le libellé antérieur à la modification de ces dispositions par la Loi n° 126/2011 portant approbation de l'Ordonnance d'urgence du Gouvernement n° 88/2010 portant modification et complément de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale, et des dispositions de l'article 114, paragraphes (1) et (4) de la même ordonnance, publiée au Moniteur officiel n° 554 du 28.07.2014.

² Les dispositions légales critiquées sont libellées comme suit : « (1) Les paiements vers les autorités fiscales sont effectués au moyen des banques, des trésoreries et des autres institutions autorisées à dérouler des opérations de paiement.[...] (4) Pour les créances fiscales administrées par l'agence nationale d'administration fiscale et par ses unités subordonnées, l'autorité fiscale, à la demande du débiteur, corrigera les erreurs des documents de paiement du débiteur et considérera valable au moment du paiement du montant dans le compte du débiteur tel que mentionné dans le document de paiement, à condition que son compte soit débité et un compte budgétaire soit crédité.[...] (6) La requête peut être déposée dans un délai d'un an après la date du paiement, sous peine de déchéance. »

³ L'Arrêt du 4 septembre 2012, rendu dans l'affaire *Dumitru Daniel Dumitru et autres c. Roumanie*, alinéa 49.

un équilibre entre les intérêts généraux de la société et les intérêts particuliers des personnes⁴, invoquant le fait qu'à cet égard est aussi la jurisprudence de la Cour européenne des droits de l'homme qui a jugé que l'État, surtout lors de l'élaboration et de la mise en œuvre d'une politique en matière fiscale, bénéficiait d'une large marge d'appréciation, sous réserve de l'existence d'un « juste équilibre » entre les exigences de l'intérêt général et les impératifs de la défense des droits fondamentaux de l'homme⁵. Dans ces conditions, il revient à la Cour Constitutionnelle d'analyser si la marge d'appréciation du législateur en matière fiscale, reflétée en ce qui concerne les contribuables, respecte les dispositions constitutionnelles relatives au droit de propriété.

À cette fin, la Cour Constitutionnelle a effectué le « test » de proportionnalité structuré⁶, selon lequel la limitation des droits fondamentaux doit être subordonnée à la satisfaction de certaines exigences et elle a vérifié si les limites imposées par le législateur au droit de propriété du contribuable imposant un délai de forclusion représentaient une limitation raisonnable non-disproportionnée par rapport à l'objectif poursuivi par le législateur⁷. Ainsi, la Cour a retenu que l'article 114, paragraphe (6) du Code de procédure fiscale, bien que ne visant pas directement un intérêt patrimonial du contribuable, la sanction de la non-soumission dans les délais de la demande générerait, indirectement, en faveur de l'État, un droit de créance sur le patrimoine du contribuable. De cette façon, le droit de propriété du contribuable à l'égard de son patrimoine est affecté par une action de l'État. La Cour a constaté que, selon l'article 44, paragraphe (1) de la Constitution, le législateur était en droit d'établir le contenu et les limites du droit de propriété. En principe, ces limites ont en vue l'objet du droit de propriété et ses attributs, étant établies aux fins de la défense des intérêts sociaux et économiques généraux ou de la défense des droits et des libertés fondamentales d'autres personnes, étant essentiel que le droit de propriété ne soit

⁴ Voir la Décision de la Cour Constitutionnelle de la Roumanie n° 1.533 du 28 novembre 2011, publiée au Moniteur officiel de la Roumanie, Partie I, n° 905 du 20 décembre 2011.

⁵ Voir aussi l'Arrêt de la Cour européenne des droits de l'homme du 23 février 2006, rendu dans l'affaire *Stere et autres c. Roumanie*, alinéa 50.

⁶ Selon le principe de la proportionnalité, principe intégré implicitement au contenu normatif des droits et des libertés prévues par la Constitution, toute mesure prise doit être **adéquate** – capable objectivement de mener à la réalisation de l'objectif, **nécessaire** – ne dépasse pas ce qui est nécessaire pour la réalisation de l'objectif et **proportionnelle** – propre au but poursuivi. Ainsi, afin de réaliser le test de proportionnalité, la Cour doit établir le but poursuivi par le législateur par la mesure critiquée et vérifier si celui-ci est légitime, considérant que le test de proportionnalité ne pourra se rapporter qu'à un seul but légitime.

⁷ Voir aussi la Décision de la Cour Constitutionnelle de la Roumanie n° 266 du 21 mai 2013, publiée au Moniteur officiel de la Roumanie, Partie I, n° 443 du 19 juillet 2013.

pas complètement anéanti⁸. La Cour a également jugé qu'en vertu de l'article 44 de la Constitution le législateur ordinaire était compétent pour établir le cadre juridique pour l'exercice des attributs du droit de propriété, dans l'acception de principe conférée par la Constitution, de sorte qu'il n'entre pas en collision avec les intérêts généraux ou avec les intérêts particuliers légitimes d'autres sujets de droit, établissant ainsi des limitations raisonnables à l'utiliser comme droit subjectif garanti⁹. Par conséquent, le texte de l'article 44 de la Constitution contient expressément dans le cadre du paragraphe (1) une disposition spéciale en vertu de laquelle le législateur est compétent pour déterminer la teneur et les limites du droit de propriété, y compris par l'introduction de limites visant les attributs du droit de propriété. Dans ces conditions, la Cour retient que le droit de propriété n'est pas un droit absolu, mais il peut être soumis à certaines limitations, selon l'article 44, paragraphe (1) de la Constitution ; toutefois, les limites du droit de propriété, indépendamment de leur nature, ne se confondent pas avec la suppression-même du droit de propriété.

La Cour a constaté que le but poursuivi, de responsabiliser, discipliner et sanctionner le comportement budgétaire fautif du contribuable, était légitime. En outre, une telle mesure assure la stabilité des relations juridiques, apparaissant comme un corollaire de la nécessité d'assurer des ressources financières suffisantes pour le budget de l'État. Ensuite, examinant si les dispositions légales critiquées sont adéquates et nécessaires au but poursuivi, il a été retenu que l'établissement d'un délai de forclusion pour la demande de rectification était une mesure adéquate pour responsabiliser et discipliner le contribuable. La mesure apparaît nécessaire pour sanctionner le contribuable, lorsque la rectification d'erreurs matérielles doit être effectuée dans un laps de temps.

Toutefois, la mesure n'est pas proportionnelle au but légitime poursuivi. La Cour a constaté que le moment où commencent à être calculées les créances fiscales accessoires était de nature à créer un traitement fiscal ne tenant pas compte du but légitime poursuivi.

En effet, d'une lecture combinée des règles juridiques la Cour a retenu que les autorités fiscales pouvaient délivrer des décisions établissant des créances fiscales accessoires après l'expiration du délai de forclusion établi pour le contribuable, mais à l'intérieur du délai de prescription du droit d'établissement des obligations fiscales, avec pour conséquence directe l'affectation du patrimoine du débiteur. En outre, les autorités fiscales seront toujours intéressées à émettre

⁸ À cet égard, voir aussi la Décision de la Cour Constitutionnelle de la Roumanie n° 19 du 8 avril 1993, publiée au Moniteur officiel de la Roumanie, Partie I, n° 105 du 24 mai 1993.

⁹ Voir la Décision de la Cour Constitutionnelle de la Roumanie n° 59 du 17 février 2004, publiée au Moniteur officiel de la Roumanie, Partie I, n° 203 du 9 mars 2004.

ces décisions après l'expiration du délai de forclusion, en exploitant le manque d'attention/l'erreur du contribuable.

Or, les actes normatifs doivent être conçus de manière à permettre aux destinataires de pouvoir adapter leur comportement de manière réelle et effective, selon l'hypothèse normative de la loi. Dans ces conditions, le texte critiqué confère plutôt un droit illusoire au contribuable, puisque ces erreurs sont détectées souvent *post factum*.

En effet, on ne saurait parler d'un but légitime, mais se pose la question de l'enrichissement sans cause de l'État, lorsqu'il ne vise ni la responsabilisation/la discipline fiscale du contribuable ni la sanction de son comportement, mais une diminution correspondante de son patrimoine, avec pour conséquence l'appropriation des sommes d'argent par l'État.

Par conséquent, le fait que le délai commence à courir à compter de la date du paiement effectif et non de la date de la découverte de l'erreur commise, moyennant un délai de forclusion aussi bref, est de nature à détourner le but légitime que le législateur cherche à atteindre, à savoir de responsabiliser et/ou discipliner et sanctionner le contribuable, générant, plutôt, un intérêt de l'État à émettre la décision d'établissement des créances fiscales accessoires après l'expiration du délai de forclusion. Dans ces conditions, la Cour a retenu que la mesure critiquée n'était pas proportionnelle au but poursuivi, ce qui se traduit par la violation du droit de propriété du contribuable, celui-ci ayant à supporter une diminution disproportionnée de son patrimoine.

De plus, si le contribuable saisit la commission des erreurs après l'expiration du délai d'un an, des créances fiscales accessoires peuvent lui être imposées, même si les sommes d'argent dues sont entrées dans les comptes des autorités fiscales, et qu'elles ont été utilisées par l'État. Les accessoires fiscaux doivent être payés (par l'interprétation combinée avec les autres dispositions du Code de procédure fiscale) même si le payeur, à un certain moment, obtient la reconnaissance du paiement effectué, en recourant aux moyens légaux existants.

En effet, pour les raisons ci-dessus exposées, la Cour a constaté la violation des dispositions de l'article 44 de la Constitution, ainsi que de l'article 139 de la Constitution, l'État dépassant sa marge d'appréciation conférée par ce texte constitutionnel¹⁰.

¹⁰ Un dernier argument de la Cour était que le législateur a saisi les lacunes de l'acte normatif critiqué, ainsi que, par la Loi n° 126/2011 portant approbation de l'Ordonnance d'urgence du Gouvernement n° 88/2010 portant modification et complément de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale (publiée au Moniteur officiel de la Roumanie, Partie I, n° 433 du 21 juin 2011), elle a modifié les dispositions de l'article 114, paragraphe (6) du Code de procédure fiscale qui, à l'heure actuelle, sont libellées comme suit : « La requête peut être introduite dans un délai de 5 ans, sous peine de déchéance. Le délai

B. À cette décision, une opinion dissidente a été formulée soutenant, pour les raisons qui seront exposées ci-après, que l'exception d'inconstitutionnalité devait être rejetée comme non fondée.

L'auteur de l'exception critique les dispositions de l'article 114, paragraphes (4) et (6) du Code de procédure fiscale, mais – de fait – il est mécontent uniquement du délai prévu au paragraphe (6) du texte mentionné.

L'article 114, paragraphe (4) du Code de procédure fiscale représente une réglementation de faveur : le législateur offre au contribuable (qui a effectué à tort le paiement d'obligations fiscales) la possibilité de demander à l'autorité fiscale territorialement compétente de procéder à la rectification des erreurs dans les documents de paiement établis par le débiteur et de considérer valide le paiement au moment où il se déroule.

Conformément aux dispositions de l'article 114, paragraphe (6) du même code (en vigueur au moment du paiement erroné¹¹), la demande adressée à l'autorité fiscale pouvait être déposée dans le délai d'un an, sous peine de déchéance.

L'exception étant soulevée après la modification du texte de l'article 114, paragraphe (6), l'auteur critique la disposition légale ci-dessus lui déduisant l'inconstitutionnalité par la comparaison de la disposition légale initiale (qui fixait le délai de forclusion d'un an) avec la disposition modifiée en 2011 (qui a prolongé le délai de forclusion à 5 ans).

Conformément aux dispositions de l'article 73 du Code de procédure fiscale¹², le contribuable débiteur est tenu d'indiquer sur les documents de paiement son propre numéro d'identification fiscale. Le non-respect strict de cette obligation rend impossible l'identification et la constatation – par l'autorité fiscale – du paiement par le contribuable, avec pour conséquence la considération comme non remplie dans le délai de l'obligation fiscale.

commence à courir à partir du 1 janvier de l'année suivant celle au cours de laquelle le paiement a été effectué. » Même si le délai reste un délai de forclusion, la période de temps dans laquelle peuvent être saisies les éventuelles erreurs est plus raisonnable, ce qui pourrait donner lieu, en théorie, à l'écartement des situations peu souhaitables dans lesquelles s'appliquent des créances fiscales accessoires.

¹¹ Le texte de l'article 114, paragraphe (6) du Code de procédure fiscale a été modifié en 2011 (par la Loi n° 126/2011 portant approbation de l'Ordonnance d'urgence du Gouvernement n° 88/2010 portant modification et complément de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale) en ce sens que le délai de forclusion d'un an a été remplacé par un délai de forclusion de 5 ans.

¹² L'article 73 du Code de procédure fiscale établit l'obligation d'indiquer le numéro d'identification fiscale sur les documents, en jugeant que « les payeurs d'impôts, taxes, contributions et d'autres sommes dues au budget général consolidé ont l'obligation de mentionner sur les factures, lettres, offres, commandes ou sur tout autre document émis le numéro d'identification fiscale propre. »

L'auteur de l'exception d'inconstitutionnalité – notaire – a versé l'impôt encaissé conformément à l'article 771, paragraphe (6) du Code fiscal¹³ rédigeant des documents de paiement dans lesquels il a indiqué, à tort, le numéro d'identification fiscale de la Chambre des Notaires en remplacement de son numéro d'identification fiscale propre. Toutefois, le paiement des sommes dues a été fait dans le délai prévu par la loi.¹⁴

Le notaire public établit régulièrement (mensuellement) des documents de paiement (sur le virement au budget de montants encaissés à l'occasion du transfert de biens immobiliers), ainsi qu'il a l'opportunité et la possibilité de vérifier l'exactitude de l'établissement de ces documents (pour paiements courants ou antérieurs) pour pouvoir accomplir correctement son obligation légale (en l'espèce, celle de l'indication du numéro d'identification fiscale propre) ou pour saisir l'autorité fiscale [en vertu de l'article 114, paragraphe (4) du Code de procédure fiscale] ; or, dans de telles circonstances, le délai dans lequel il pouvait saisir l'autorité fiscale lui demandant la rectification des erreurs commises semble plus que raisonnable. Étant donné que, manifestement, l'erreur lui appartient en exclusivité, le débiteur doit supporter les conséquences légales (à savoir la prise en charge des obligations fiscales accessoires¹⁵, calculés à partir du jour qui suit immédiatement l'échéance – le délai de paiement – et jusqu'à l'identification du paiement effectué).

La circonstance que les sommes déposées pour le compte du budget de l'État (sans l'indication correcte du code d'identification fiscale propre, donc en violation des dispositions de l'article 73 du Code de procédure fiscale) ont été – à partir de la date de leur dépôt – à la « disposition » de l'État n'est pas pertinente, puisque aussi longtemps que le contribuable-débiteur n'a pas pu être identifié, le paiement des obligations fiscales ne pouvait être considéré comme licite et effectué dans le délai pour le pouvoir absoudre des obligations accessoires. Le fait que les montants déposés dans le délai (mais sans l'indication correcte du déposant) ont « restés » non identifiées dans le budget général

¹³ Selon les dispositions de l'article 771, paragraphe (6) du Code fiscal, l'impôt sur le transfert de propriétés immobilières du patrimoine personnel est calculé et perçu par le notaire avant l'authentification de l'acte d'aliénation ou d'établissement de l'arrêté d'achèvement de la succession et il est versé au budget de l'État – par le même notaire – au plus tard le 25 du mois suivant celui au cours duquel il a été retenu.

¹⁴ Les obligations fiscales de ce genre doivent être remplies dans les délais prévus par la loi ; par conséquent, n'étant pas établies par les autorités fiscales, elles ne sont pas portées à la connaissance du débiteur au moyen d'actes administratifs fiscaux (avis d'imposition).

¹⁵ En ce qui concerne des obligations fiscales principales et accessoires, voir les articles 21 et 22 du Code de procédure fiscale.

consolidé de l'État n'est pas de nature à exonérer le débiteur de la sanction du manquement conforme aux obligations fiscales.

Dans les conditions d'une diligence normale, le débiteur de l'obligation fiscale remplie incorrectement devait découvrir l'erreur commise et saisir l'autorité fiscale, en demandant de corriger l'erreur dans les documents de paiement (à l'intérieur du délai de forclusion) et le paiement effectué aurait été considéré comme licite et effectué dans le délai¹⁶ (auquel cas, en vertu de la loi, il aurait été exonéré du paiement des obligations accessoires). Autrement, tout comme la Cour Constitutionnelle a statué en la matière, « la circonstance que le débiteur ayant effectué un paiement entaché d'erreurs matérielles, bien qu'il connaissait ou aurait dû connaître le délai dans lequel il pouvait demander la rectification des erreurs dans les documents de paiement, ainsi que les conséquences juridiques du non-respect de celui-ci, ne s'est pas conformé à l'exigence légale donne une expression à sa propre faute, conformément au principe *nemo auditur propriam turpitudinem allegans* »¹⁷, raison pour laquelle il doit supporter les conséquences de la désobéissance et du non-respect des conditions prévues par la loi.

Par le Code de procédure fiscale sont fixés tant des délais de forclusion¹⁸ que des délais de prescription.¹⁹ Entre les deux types de délais il y a des différences importantes qui concernent tant la nature et leur régime juridique, ainsi que la finalité poursuivie par le législateur.

Le délai de forclusion est la période de temps pendant laquelle le titulaire d'un droit subjectif est tenu d'exercer ce droit, sous peine d'extinction de ce droit. Le délai de forclusion, qui a pour effet la perte du droit subjectif lui-même, ne peut être suspendu ou interrompu et il est incompatible avec l'institution de remise dans les délais. Ces délais sont généralement des délais courts.

Le délai de prescription est la période de temps, fixée par la loi, dans laquelle le non-exercice du droit de recours au sens matériel par son titulaire a pour effet l'extinction de la possibilité d'obtenir la condamnation du défendeur.

¹⁶ Il convient de souligner que les dispositions de l'article 114, paragraphe (4) portent exclusivement sur les documents de paiement établis, avec erreurs, par le débiteur, et non sur les déclarations fiscales du contribuable ou sur d'autres actes administratifs fiscaux émis par l'autorité fiscale compétente dans l'application de la législation sur la fixation, la modification ou l'extinction des droits et des obligations fiscales (voir, pour ces derniers documents, les dispositions de l'article 84 et respectivement des articles 41, 43 et 44 du Code de procédure fiscale).

¹⁷ Voir la Décision de la Cour Constitutionnelle n° 268 du 22 mars 2012, publiée au Moniteur officiel de la Roumanie, Partie I, n° 425, du 25 juin 2012.

¹⁸ Voir le délai fixé par l'article 114, paragraphe (6) du Code de procédure fiscale.

¹⁹ Tels ceux établis par les dispositions des articles 91, 131 et 135 du Code de procédure fiscale.

Ce délai est susceptible de suspension, interruption et remise dans les délais.²⁰ Les délais de prescription sont toujours plus longs que les délais de forclusion.

Bien qu'entre les deux types de délais il y a ces différences de substance (qui, normalement, ne devraient pas entraîner de confusion), le législateur – en mélangeant des pommes et des poires – les a confondus et les a mélangés, leur établissant pratiquement le même régime juridique, ne conservant que leurs dénominations différentes. En effet, par la modification apportée en 2011 au texte de l'article 114, paragraphe (6) du Code de procédure fiscale, le législateur a assimilé le délai de forclusion²¹ au délai de prescription concernant le régime juridique qu'il suit. Si évidence est la confusion dans laquelle se trouvait le législateur lorsqu'il a conféré au délai de forclusion les velances d'un délai de prescription, entre les deux types de délais n'existant aucune ressemblance, qu'elle nous dispense de tout autre commentaire.

Une telle confusion – et sa conséquence, l'unification du régime juridique des délais – n'est pas recevable, car il s'agit de questions totalement différentes : l'une est qu'à l'intérieur du délai de forclusion doivent être corrigées – par l'autorité fiscale, sur demande du débiteur – les erreurs commises lors du complément de documents de paiement (par lesquels sont remplies certaines obligations fiscales)²² et d'autres sont les situations où – dans le délai de prescription prévu par la loi – peuvent être rectifiées les déclarations fiscales²³, peuvent être établies des obligations fiscales²⁴, il peut être procédé à l'exécution forcée des obligations fiscales²⁵, c'est-à-dire que les contribuables peuvent demander une compensation ou une restitution des créances fiscales.²⁶

²⁰ Voir M. N. Costin dans M. N. Costin, I. Leș, M. St. Minea, C. M. Costin, S. Spinei, *Dicționar de procedură civilă*, 2e édition, Maison d'édition Hamangiu, Bucarest, 2007, p. 877 et 879.

²¹ Dans la version modifiée, en vigueur actuellement, le texte de l'article 114, paragraphe (6) du Code de procédure fiscale est libellé comme suit : « La requête peut être introduite dans un délai de 5 ans, sous peine de déchéance. Le délai commence à courir à partir du 1 janvier de l'année suivant celle au cours de laquelle le paiement a été effectué ».

²² Voir les dispositions de l'article 114, paragraphes (4) et (6) du Code de procédure fiscale.

²³ Conformément à l'article 84 du Code de procédure fiscale, les déclarations fiscales peuvent être corrigées de propre initiative par le contribuable chaque fois qu'il constate des erreurs dans la déclaration initiale, par le dépôt d'une déclaration rectificative, jusqu'à l'expiration du délai de prescription du droit de fixer des obligations fiscales.

²⁴ Conformément aux dispositions de l'article 91 du Code de procédure fiscale, le droit de l'autorité fiscale de fixer des obligations fiscales se prescrit dans un délai de 5 ans, qui commence à courir le 1 janvier de l'année suivant celle au cours de laquelle est née la créance fiscale.

²⁵ L'article 131 du Code de procédure fiscale prévoit que le droit de demander l'exécution forcée des créances fiscales se prescrit dans un délai de 5 ans à partir du 1 janvier de l'année suivant celle au cours de laquelle ce droit a pris naissance.

²⁶ Conformément aux dispositions de l'article 135 du Code de procédure fiscale, le droit des contribuables de demander la compensation ou la restitution des créances fiscales se prescrit

Enfin, il est hors de doute que l'inconstitutionnalité d'une disposition légale ne peut être tirée de la comparaison d'un texte de loi avec un autre texte de loi²⁷ (tout comme soutenu par l'auteur de l'exception). Par ailleurs, il a été estimé qu'une réglementation confuse du législateur ne saurait avoir pour effet de transformer une règle juridique constitutionnelle dans une règle inconstitutionnelle (pour que la simple prolongation, comme laps de temps, du délai de forclusion ne peut pas conférer un caractère inconstitutionnel à l'ancienne réglementation) ; autrement dit, en quoi serait inconstitutionnel le délai de forclusion d'un an et serait « plus constitutionnel » le délai de forclusion de 5 ans?!

II. Par la Décision n° 694/2015²⁸, la Cour Constitutionnelle a fait droit à l'exception d'inconstitutionnalité des dispositions de l'article 124, paragraphe (1) du Code de procédure fiscale²⁹, en motivant comme suit.

La Cour a tout d'abord observé que l'auteur de l'exception a formulé des critiques d'inconstitutionnalité extrinsèque et intrinsèque, en faisant valoir

dans un délai de 5 ans à partir du 1 janvier de l'année suivant celle au cours de laquelle a pris naissance le droit à compensation ou restitution.

²⁷ L'article 114, paragraphe (6) du Code de procédure fiscale, dans sa forme initiale (qui prévoyait un délai de forclusion d'un an, qui commençait à courir à compter de la date du paiement effectué avec erreurs) et la même disposition légale, modifiée en 2011, qui prévoit un délai de forclusion de 5 ans, qui commence à courir le 1 janvier de l'année suivant celle au cours de laquelle le paiement a été effectué.

²⁸ Décision n° 694 du 20 octobre 2015 sur l'exception d'inconstitutionnalité des dispositions de l'article 124, paragraphe (1) rapportées à celles de l'article 70 de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale, publiée au Moniteur officiel n° 948 du 22.12.2015.

²⁹ Il convient de préciser que l'objet de l'exception d'inconstitutionnalité, ainsi qu'il ressort de l'arrêt de saisine, est prévu par les dispositions de l'article 124, paragraphe (1) de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale, republiée au Moniteur officiel de la Roumanie, Partie I, n° 513 du 31 juillet 2007, telle que modifiée et complétée ultérieurement. La Cour constate qu'en réalité, l'objet de l'exception d'inconstitutionnalité est prévu par les dispositions de l'article 124, paragraphe (1) rapporté à l'article 70 de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale en ce qui concerne les sommes à restituer du budget. Les dispositions légales critiquées sont libellées comme suit : « (1) *Pour les montants du budget à restituer ou à rembourser les contribuables ont le droit à l'intérêt à partir du jour suivant la fin du délai prévu, le cas échéant, à l'article 117, paragraphe (2) ou à l'article 70. L'octroi des intérêts se fait à la demande des contribuables.* » (L'article 70 de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale prévoit : « (1) *Les demandes déposées par le contribuable conformément au code présent sont solutionnées par l'autorité fiscale dans un délai de 45 jours à compter de leur enregistrement.* (2) *Au cas où il est nécessaire de recevoir des informations complémentaires utiles pour la prise de la décision en vue de solutionner une demande, ce délai est étendu à un intervalle compris entre la date de la demande et la date de la réception des informations requises.* »).

que les dispositions légales critiquées violent les dispositions constitutionnelles figurant à l'article 52, paragraphes (1) et (2) sur le droit de la personne lésée par une autorité publique, ainsi que de l'article 44, paragraphes (1) et (3) sur le droit de propriété.

Les critiques extrinsèques se rapportent à l'article 52 de la Constitution, l'auteur de l'exception d'inconstitutionnalité estimant que cette matière portant sur la question du droit à la réparation du dommage, par l'octroi d'intérêts, doit être faite par le biais d'une loi organique, et non par un acte normatif qui ne peut avoir que la force juridique d'une loi ordinaire, à savoir une ordonnance du Gouvernement. La Cour constate que les conditions et les limites auxquelles se réfère l'article 52, paragraphe (2) sont régies par la Loi du contentieux administratif n° 554/2004 qui constitue le siège général de la matière. Les dispositions de l'article 52, paragraphe (1) de la Constitution sont reprises dans l'article 1, paragraphe (1) de ladite loi. En outre, l'article 5, paragraphes (1) et (2) de la Loi n° 554/2004, en ce qui concerne les actes qui ne sont pas attaquables dans le contentieux administratif, fournit des exemples de la limitation du droit complexe prévu à l'article 52, paragraphe (1) de la Constitution. Les dispositions de l'article 10 concernant la juridiction compétente, celles de l'article 11 sur le délai de recours et celles de l'article 19 sur le délai de prescription pour compensations sont des exemples de réglementation des conditions d'exercice de ce droit.

En outre, l'article 18, paragraphe (3) de la Loi n° 554/2004 prévoit que, dans le cas de la solution de la demande de l'article 8, paragraphe (1), la juridiction statuera aussi sur les compensations pour les dommages matériels et moraux causés, si le requérant l'a demandé. En outre, l'article 28, paragraphe (1) de la Loi n° 554/2004 prévoit que les dispositions de cette loi sont complétées par les dispositions du Code civil et du Code de procédure civile, dans la mesure où elles ne sont pas incompatibles avec la spécificité des rapports de force entre les autorités publiques, d'une part, et les personnes lésées dans leurs droits ou leurs intérêts légitimes, d'autre part. Par conséquent, toute partie intéressée peut demander devant la juridiction de contentieux administratif y compris l'octroi d'intérêts.

Dans ces conditions, la Cour a constaté que les dispositions légales critiquées, tels que conçues par le législateur, étaient des règles ayant pour objet principal d'obliger les autorités fiscales à remplir dans les meilleurs délais les obligations leur incombant, mais aussi à récupérer le manque à gagner, à titre subsidiaire. En effet, la Cour a retenu que ces aspects ne concernaient pas les conditions et limites régissant l'exercice du droit à la réparation du dommage à laquelle se réfère l'article 52 de la Constitution, ainsi que leur réglementation par loi organique n'était pas requise. Par conséquent, la critique

extrinsèque formulée par l'auteur de l'exception d'inconstitutionnalité ne peut pas être retenue.

En ce qui concerne les critiques d'inconstitutionnalité intrinsèque par rapport aux dispositions de l'article 44, paragraphes (1) et (3) sur le droit de propriété privée, la Cour constate qu'elles sont fondées.

La Cour observe que la prémisse à partir de laquelle doit commencer son analyse est celle où les autorités fiscales émettent un avis d'imposition en méconnaissance des dispositions légales. Le contribuable a le droit d'exercer un recours auprès des autorités fiscales, qui peuvent reconnaître l'absence de fondement de l'avis d'imposition et ordonner la restitution des sommes versées. En outre, le contribuable a le droit de s'adresser à la juridiction, à faire usage de la procédure légale applicable, et celle-ci peut constater le bien-fondé de la demande de restitution de la somme d'argent payée au titre de l'avis d'imposition illégal. Dans ces hypothèses, le contribuable doit introduire une demande concernant la restitution des sommes payées [selon les dispositions de l'article 117, paragraphe (1) de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale], demande qui est examinée, en règle générale, dans un délai de 45 jours à compter de la date de dépôt de la demande auprès de l'autorité fiscale.

La Cour a retenu que les dispositions légales critiquées régissaient le droit du contribuable à percevoir des intérêts fiscaux pour les sommes devant être restituées par les autorités fiscales. Il a droit à la réception des intérêts après la constatation de son droit à la restitution d'une somme d'argent par une décision de justice ou après la reconnaissance par les autorités fiscales d'une erreur commise par elles lors du prélèvement de la somme d'argent en vertu d'un avis d'imposition illégal. Le contribuable ne peut introduire la demande de restitution, selon les dispositions légales critiquées, qu'après la reconnaissance du droit à la restitution de la somme versée par le contribuable à la suite du prononcé d'un avis d'imposition par les autorités fiscales, émis en violation des dispositions légales.

L'octroi des intérêts prévus par l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale n'est pas fourni pourtant à compter de la date du paiement effectif par le contribuable des montants prévus dans l'avis d'imposition, mais à une date ultérieure, après un délai d'au moins 45 jours à compter de la date du dépôt de la demande d'octroi des intérêts par le contribuable.

La Cour a également retenu que, selon l'article 44, paragraphe (1) de la Constitution, le législateur était en droit de définir le contenu et les limites du droit de propriété. En principe, ces limites ont en vue l'objet du droit de propriété et les attributs de celui-ci et elles sont établies en vue de défendre les intérêts sociaux et économiques généraux ou les droits et les libertés

fondamentales des personnes, l'essentiel étant que par cela le droit de propriété ne soit pas complètement anéanti.³⁰ La Cour a également jugé qu'en vertu de l'article 44 de la Constitution le législateur ordinaire était compétent pour fixer le cadre juridique afin d'exercer les attributs du droit de propriété, dans l'acception de principe prévue par la Constitution, de manière à ne pas entrer en collision avec les intérêts généraux ou avec les intérêts particuliers légitimes des autres sujets de droit, mettant ainsi en place des limitations raisonnables dans son exploitation, en tant que droit subjectif garanti.³¹ Par conséquent, le texte de l'article 44 de la Constitution contient expressément au paragraphe (1) une disposition spéciale en vertu de laquelle le législateur est compétent pour déterminer la teneur et les limites du droit de propriété, y compris par l'introduction de limites visant les attributs du droit de propriété.

Dans ces conditions, la Cour a retenu que le droit de propriété n'était pas un droit absolu, mais il pouvait être soumis à certaines limitations, selon l'article 44, paragraphe (1) de la Constitution ; pourtant les limites du droit de propriété, indépendamment de leur nature, ne se confondent pas avec la suppression-même du droit de propriété.

La Cour a également observé que la Cour de justice de l'Union européenne a jugé que le principe d'effectivité exigeait, dans une situation de restitution d'une taxe perçue par un État membre en violation du droit de l'Union, que les règles nationales relatives notamment au calcul des intérêts éventuellement dus n'eussent pas pour effet de priver le contribuable d'une indemnisation adéquate pour la perte occasionnée par le paiement indu de la taxe³². La Cour a constaté qu'un régime tel que celui en cause dans le litige au principal, limitant les intérêts à ceux courant à partir du jour suivant la date de la demande de restitution de la taxe indûment perçue, ne répondait pas à cette exigence. En effet, cette perte dépend notamment de la durée de l'indisponibilité de la somme indûment payée en violation du droit de l'Union et survient ainsi, en principe, dans la période entre la date du paiement indu de la taxe en cause et la date de restitution de celle-ci.

La Cour Constitutionnelle a retenu aussi que la Haute cour de cassation et de justice a jugé, en analysant les dispositions de l'article 124, paragraphe (1)

³⁰ À cet égard, voir aussi la Décision n° 19 du 8 avril 1993, publiée au Moniteur officiel de la Roumanie, Partie I, n° 105 du 24 mai 1993).

³¹ Voir la Décision n° 59 du 17 février 2004, publiée au Moniteur officiel de la Roumanie, Partie I, n° 203, du 9 mars 2004.

³² Voir : Arrêt du 18 avril 2013, rendu dans l'affaire C-565/11, *Mariana Irimie contre l'Administration des Finances Publiques Sibiu et l'Administration du Fonds pour l'environnement*, alinéas 26 à 28 ; Arrêt du 19 juillet 2012, rendu dans l'affaire C-591/10, *Littlewoods Retail et autres*, point 29.

et de l'article 70, paragraphe (1) de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale, republiée, telle que modifiée et complétée ultérieurement, que la date de départ de ces intérêts fiscaux pour les montants perçus au titre de la taxe de première immatriculation, de la taxe sur la pollution et de la taxe sur les émissions polluantes, restitués en application des décisions de justice, était représentée par la date du paiement de ces taxes³³.

En examinant les dispositions légales et les critiques formulées, la Cour constate que la couverture du préjudice devrait se faire par le versement des intérêts fiscaux qui, en vertu de la loi, est la valeur monétaire du préjudice causé au créancier, en assurant sa mise en situation patrimoniale dans laquelle il se serait trouvé si l'obligation du débiteur avait été exécutée correctement. Afin de satisfaire cette exigence, les intérêts accordés devront couvrir tant le montant de la perte effectivement subie par le créancier (*damnum emergens*) que la valeur du manque à gagner (*lucrum cessans*). En règle générale, celles-ci ne doivent couvrir que les dommages directs et prévisibles, et non ceux indirects et imprévisibles. La Cour a retenu que les intérêts courus au contribuable qui avait droit à la restitution de montants s'avérant avoir été indûment acquittés étaient ceux prévus à l'article 124 et à l'article 120, paragraphe (7) de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale.

Si les intérêts restitués ne couvrent pas les dommages visés que pour une durée limitée, se pose la question de l'enrichissement sans cause de l'État, par une diminution du patrimoine du contribuable en raison de l'impossibilité d'utiliser la somme d'argent perçue illégalement et la privation du droit de bénéficier de la couverture du manque à gagner. La mesure prévue par les dispositions légales critiquées ne suffit pas à la réparation intégrale du dommage subi par le contribuable, car les intérêts ne sont pas accordés au moment du paiement, mais à une date ultérieure. En d'autres termes, les dispositions légales critiquées ne couvrent pas la réparation intégrale des dommages subis.

L'application de ces dispositions légales génère la situation dans laquelle le contribuable subit une perte patrimoniale, un dommage, en faveur de l'État qui utilise des sommes d'argent perçues sans satisfaire aux conditions légales. En d'autres termes, le contribuable subit une diminution de son actif patrimonial et il est privé de la possibilité d'utiliser ces sommes d'argent, tandis que l'État s'enrichit sans base juridique par l'utilisation à titre gratuit des mêmes montants.

³³ Voir la Décision HCCJ n° 14 du 22 juin 2015, rendu dans un recours dans l'intérêt de la loi, publiée au Moniteur officiel de la Roumanie, Partie I, n° 728 du 29 septembre 2015, décision qui fait l'application de la jurisprudence de la Cour de justice de l'Union européenne en la matière (affaire C-565/11 *Mariana Irimie*).

Par conséquent, la Cour Constitutionnelle constate que les dispositions de l'article 124, paragraphe (1) par rapport à celles de l'article 70 de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale, tout en garantissant l'octroi d'intérêts pour le non-respect de l'obligation de restitution, ne couvrent pas complètement le dommage que pourrait subir le contribuable d'avoir entendu de donner exécution de son plein gré à une obligation fiscale qu'il a considéré illégale, ce qui a été ensuite constaté par une décision de justice ou par l'autorité fiscale elle-même. Il y a ainsi une diminution du patrimoine du contribuable, au moyen d'une action de l'État, affectant ainsi le droit de propriété privée.

Or, il est évident que les intérêts doivent être calculés à compter de la date de la saisie conservatoire du montant dont la restitution est ordonnée. De cette manière, on pourra assurer un traitement raisonnable et équitable entre les parties : si, selon l'article 119 de l'Ordonnance du Gouvernement n° 92/2003 sur le Code de procédure fiscale, pour le non-paiement jusqu'à l'échéance par le débiteur contribuable des obligations de paiement, sont dus à compter de cette date des intérêts et des pénalités de retard, de même les intérêts sur les montants à restituer du budget doivent être accordés à compter de la date de leur paiement et non à compter d'une date ultérieure (à savoir après 45 jours à compter de la date de la demande, voire après plus de temps, selon l'article 70 du Code de procédure fiscale). La même idée transparaît aussi de l'analyse de l'article 131 en liaison avec l'article 135 du même Code de procédure fiscale, selon lequel le délai de prescription en matière de recouvrement des créances fiscales, c'est-à-dire des sommes à restituer par le budget est le même – 5 ans à partir du 1 janvier de l'année suivant la naissance du droit. En effet, l'analyse conjointe de toutes les dispositions du Code de procédure fiscale incidentes en la matière n'indique pas l'existence d'une quelconque justification objective sur laquelle se fonde la forte différence de traitement juridique entre l'État et les contribuables.

Par ailleurs, le législateur a saisi ces lacunes de l'acte normatif critiqué, ainsi que par l'Ordonnance d'urgence du Gouvernement n° 8/2014³⁴ il a introduit le paragraphe (11) à l'article 124 du Code de procédure fiscale (dont les dispositions ne sont pas applicables en l'espèce), qui est libellé comme suit : « (11) Dans le cas des créances du contribuable résultant de l'annulation d'un acte administratif fiscal établissant des obligations fiscales de paiement et qui ont été éteintes avant l'annulation, **le contribuable est en droit de réclamer**

³⁴ L'Ordonnance d'urgence du Gouvernement n° 8/2014 portant modification et complément d'actes normatifs et d'autres mesures fiscales-budgétaires a été publiée au Moniteur officiel de la Roumanie, Partie I, n° 151 du 28 février 2014.

des intérêts à compter du jour où il a exploité l'extinction de la créance fiscale individualisée dans l'acte administratif annulé jusqu'au jour du remboursement ou de la compensation de la créance du contribuable résultant de l'annulation de l'acte administratif fiscal. Cette disposition ne s'applique pas dans la situation où le contribuable a demandé l'octroi de dommages-intérêts, dans les conditions de l'article 18 de la Loi du contentieux administratif n° 554/2004, telle que modifiée et complétée ultérieurement, ainsi que dans la situation visée à l'article 83, paragraphe (41). »

Cependant, la Cour a constaté qu'une solution législative analogue à celle examinée dans la présente affaire a été reprise par le législateur à l'article 182, paragraphe (1) de la Loi n° 207/2015 sur le nouveau Code de procédure fiscale, qui entrera en vigueur, selon les dispositions de l'article 353, le 1 janvier 2016.

Par conséquent, les autorités publiques concernées, y compris les juridictions, sont appelées à procéder à une interprétation et à une application conforme de cette loi avec les effets de la présente décision en ce qui concerne le moment à partir duquel sont octroyés les intérêts fiscaux. En effet, les autorités fiscales auront toujours la possibilité de procéder au traitement de la demande dans un délai de 45 jours à compter de l'enregistrement, avec la possibilité de prorogation de ce délai, mais les intérêts devront être accordés à compter du jour de l'extinction de l'obligation fiscale constatée comme indue dans les conditions légales.

À la fin de la motivation de la décision, la Cour a apporté deux précisions essentielles à savoir :

- l'inconstitutionnalité des dispositions légales critiquées ne concerne pas la situation dans laquelle le contribuable a demandé et a obtenu des indemnités dans les conditions de l'article 18 de la Loi du contentieux administratif n° 554/2004, car autrement il y aurait un enrichissement sans cause du contribuable.
- la constatation de l'inconstitutionnalité des dispositions légales de l'article 124, paragraphe (1) par rapport à celles de l'article 70 du Code de procédure fiscale ne concerne ni les montants à rembourser du budget de l'État, telle que la taxe sur la valeur ajoutée, qui a un autre régime juridique relevant de sa spécificité.

III. En fin, dans le domaine du droit fiscal, je suggère que vous jetiez un coup d'oeil sur la Décision n° 293 du 26 avril 2018 (pas encore publiée), par laquelle la Cour Constitutionnelle a rejeté, comme non-fondée, l'exception d'inconstitutionnalité relative aux dispositions de l'article 461, paragraphes (5) et (7), deuxième phrase, de l'article 466, paragraphe (3) et de l'article 471,

paragraphe (4), deuxième phrase de la Loi n° 227/2015 – le Code Fiscal³⁵. En essence, dans les motifs de la décision, on a retenu que le législateur avait la liberté d'introduire des taxes et des impôts afin d'assurer les revenus publics nécessaires au budget, ainsi que le droit d'établir la modalité d'appliquer les charges fiscales sur les contribuables.

Suite à une analyse critique de cette décision et – surtout – des dispositions légales ayant fait l'objet de l'exception d'inconstitutionnalité, nous avons retenu ce qui suit.

En Roumanie – comme dans tout autre État, d'ailleurs – le système de taxes et impôts repose sur un set de principes et règles qui définissent et dressent le cadre général de positionnement des charges fiscales sur les contribuables. Selon les principes de la fiscalité, régis par les dispositions de l'article 3 du Code fiscal, les normes juridiques par lesquelles on introduit des taxes et des impôts doivent être claires, elles ne doivent pas mener à des interprétations arbitraires, et les délais, la modalité et les montants à payer doivent être établis de manière exacte pour chaque contribuable, de sorte qu'ils puissent suivre et comprendre la charge fiscale qui leur incombe (la certitude de l'imposition), et la calibration de la charge fiscale de chaque contribuable doit tenir compte de la capacité contributive, des dimensions des revenus ou de ses propriétés (la justesse de l'imposition/l'équité fiscale).

La spécificité des taxes locales directes visant le patrimoine – catégorie qui inclut aussi celles qui font l'objet de l'exception d'inconstitutionnalité invoquée dans cette affaire – est qu'elles sont établies en fonction de la valeur fiscale de la construction³⁶, du terrain³⁷ ou du moyen de transport³⁸, donc elles reposent sur la fortune du contribuable, en se caractérisant par le fait qu'elle sont dues, payées et encourues par le contribuable débiteur (à la charge duquel on a établi les taxes et les impôts)³⁹. Dans ces conditions, puisqu'il y a un rapport direct

³⁵ Selon les dispositions légales mentionnées ci-dessus, la taxe sur les constructions, les terrains et sur les moyens de transport – qui sont la propriété des personnes physiques – est due pour toute l'année fiscale si, le dernier jour de l'année précédente, ceux-ci étaient enregistrés comme propriétés des contribuables débiteurs.

³⁶ La valeur fiscale de la construction s'établit en fonction de la superficie, des matériaux de construction et de la nature de la construction – principale ou dépendance.

³⁷ La valeur fiscale du terrain s'établit en fonction de sa superficie, du rang de la localité où il est situé, ainsi que de la région et de la catégorie d'usage du terrain.

³⁸ La valeur fiscale des moyens de transport s'établit selon des critères différents, en fonction de la catégorie à laquelle ils appartiennent : véhicules communs, véhicules lourds, remorques-semi-remorques-roulottes, moyens de transport sur voie navigable (selon les dispositions de l'article 470 du Code fiscal).

³⁹ Voir M. Șt. Minea, C. F. Costas, Dreptul finanțelor publice, vol. II – Drept fiscal, Edit. Universul Juridic, Bucarest, 2014.

entre la valeur fiscale du bien/des biens et la période pendant laquelle il(s) se trouve(nt) dans la propriété de l'assujetti, il apparaît comme évident le fait que l'impôt/la taxe est dû/due seulement pour la période pendant laquelle le contribuable détient la fortune imposable (le bien ou les biens en fonction de la valeur duquel/desquels la charge fiscale est établie).

La jurisprudence de la Cour européenne des droits de l'homme a statué que les États contractants jouissaient d'une large marge d'appréciation lors de l'élaboration et de la mise en œuvre d'une politique en matière fiscale, pourvu qu'on assure/qu'il existe un *juste équilibre* entre les exigences de l'intérêt général et les impératifs de la sauvegarde des droits fondamentaux de l'homme⁴⁰. De même, la Cour européenne des droits de l'homme a souligné que le législateur national devait jouir, lors de la mise en œuvre de ses politiques économiques et sociales, d'une marge d'appréciation appropriée, lui permettant de combiner/harmoniser, par la réglementation qu'il adopte, tant l'existence d'un problème d'intérêt public appelant une réglementation, que le choix des modalités d'application de cette dernière, *rendant possible le maintien d'un équilibre entre les intérêts en cause*⁴¹.

Compte tenu de ce qui précède, le principe de la juste répartition de la charge fiscale – prévu à l'article 56 de la Constitution⁴² – est méconnu pour autant que l'impôt dû pour tout l'exercice financier est déterminé exclusivement par référence à un moment de la détention en propriété du bien imposable (respectivement le dernier jour de l'année précédant celle pour laquelle l'impôt est appliqué), quelle que soit la période de l'exercice financier en cours pendant laquelle le contribuable détient le bien en propriété ; en même temps, le même principe est aussi méconnu par rapport à l'égalité et l'équité fiscale, dès lors que l'on ne fait aucune différence (du point de vue de l'application dans le temps des taxes et impôts) entre le contribuable détenant le bien imposé pendant tout l'exercice financier et celui qui ne le détient que pendant une fraction de cet exercice financier. Par conséquent, les dispositions légales critiquées ne sont pas en mesure d'assurer un juste équilibre entre le moment contemporain à la détention des droits de propriété sur le bien (immobilier ou mobilier), par rapport auquel on établit l'impôt, et l'obligation fiscale corrélative incombant au contribuable en vertu d'un tel rapport de droit fiscal. Pour cette raison, nous

⁴⁰ Voir l'Arrêt du 23 février 2006, dans l'affaire *Stere et autres c. Roumanie*, § 50.

⁴¹ Voir l'Arrêt du 4 septembre 2012, dans l'affaire *Dumitru Daniel Dumitru et autres c. Roumanie*, §§ 41 et 49.

⁴² Conformément aux dispositions de l'article 56, paragraphe (2) de la Constitution de la Roumanie, le système légal d'impositions doit assurer la juste répartition des charges fiscales.

ne pouvons pas parler d'une juste répartition de la charge fiscale, ce qui est contraire aux dispositions de l'article 56, paragraphe (2) de la Constitution.

Enfin, s'agissant des impôts sur la fortune, la modalité d'établir les taxes sur les constructions, les terrains et sur les moyens de transport introduite par les dispositions du nouveau Code fiscal, est susceptible de porter atteinte aussi au droit de propriété des contribuables, garanti et sauvegardé par les dispositions de l'article 44, paragraphes (1) et (2) de la Constitution⁴³. En effet, obliger le contribuable à payer l'impôt sur la fortune pour toute l'année civile, même s'il vend/perd – au cours de l'année – le bien faisant l'objet de l'imposition, porte atteinte à son droit de propriété (par le fait qu'il est tenu de verser un impôt qui – au moins en partie – est indu).

Pour les raisons résumées ci-dessus, nous avons estimé que l'exception d'inconstitutionnalité devait être accueillie et qu'il fallait constater l'inconstitutionnalité des dispositions critiquées du Code fiscal comme étant contraires aux dispositions constitutionnelles mentionnées ci-dessus.

En conclusion, nous pouvons dire, ici, que – par sa jurisprudence – la Cour Constitutionnelle contribue à l'effort global visant à clarifier la loi en exigeant que le législateur – primaire ou secondaire – pour se conformer à l'article 1-er, paragraphe 5 de la Loi fondamentale, selon laquelle « en Roumanie, la Constitution, de sa suprématie et des lois est obligatoire ». Et ce texte constitutionnel suit l'obligation générale du législateur d'adopter une législation qui répond à toutes les qualités requises pour être comprises et pleinement respecté, cela est clair, prédictible et prévisible⁴⁴.

⁴³ En vertu des dispositions de l'article 44, paragraphes (1) et (2) de la Loi fondamentale, le droit de propriété est garanti dans les conditions de la loi, la propriété privée étant également garantie et protégée par la loi quel qu'en soit le titulaire.

⁴⁴ En fait, par la Décision n° 1 du 11 Janvier 2012 (publiée au Journal Officiel n° 53 du 23 Janvier 2012), la Cour constitutionnelle a jugé que – en principe – tout projet de loi doit répondre aux certaines conditions qualitatives, parmi eux est la prévisibilité, ce qui signifie que la loi doit être suffisamment précise et claire à appliquer.



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The EU Charter of Fundamental Rights in the Polish legal system

1. Introduction

During the jubilee conference held by the Constitutional Court of the Republic of Latvia, there were intense discussions on matters concerning certain aspects of the Charter of Fundamental Rights (hereinafter: the Charter). Due to the nature of Poland's approach to the Charter, it seems crucial to provide some clarification, although it should be noted that issues related to that document still raise numerous doubts expressed by legal scholars.

The Charter was incorporated into EU primary law in the Reform Treaty adopted in Lisbon in October 2007. This way the Charter has been given binding legal force. The Charter has been assigned the same legal value as the Treaties. The declared purpose for such incorporation was to enhance the protection of fundamental rights in the European Union. The Charter has become the basic legal act protecting the individual's rights in the EU. The jurisdiction within that scope has been granted to the Court of Justice of the European Union (hereinafter: the CJEU).

This new construction of fundamental rights was also aimed at equipping the EU with tools that shaped its identity.¹ It was to comprise rights arising from the system of human rights, supplemented with certain economic and social rights (although it should be noted that, in the literature on the subject, fundamental

¹ J. Piskorski, *Legitymizacja prawa karnego Unii Europejskiej*, Poznań 2013, pp. 46-47.

rights are generally regarded as tantamount to human rights).² Those rights were to become the foundation of societies and states. The Charter was to constitute a cohesive set of norms for creating the future law of the EU.³ An attribute of the Charter was to be its universality guaranty that every EU citizen that moved about the territory of the EU could be sure that s/he would be treated in accordance with common fundamental values so that s/he could say “*civis europeus sum*”.⁴ As a result of such rendering of fundamental rights, an approach was developed to interpret the said rights not by means provided by law, but by methods that are typical for political science – namely, as a goal that needs to be achieved, as a common good which should be attained and maintained. The purpose for adopting the Charter was to preserve the European system of the protection of the individual’s rights as well as to enhance the cohesion of the system of European law. However, it should be noted here that the idea for the Charter was based on the compilation of rights and freedoms guaranteed in various legal acts derived from different sources and interpreted in different ways.⁵ This was linked with the general conviction that the Charter did not have its own legal force, but it only declared and codified the already existing Community values.⁶ Indeed, the Charter comprises both the rights enshrined in international conventions as well as those that belong to the constitutional traditions of EU Member States. The human rights included therein belong to the so-called different generations. As a result, the clarity of the legal system became distorted; this, in turn, caused the necessity to institutionalise the elimination of the said distortion, which was done by the introduction of the so-called principle of correspondence between the rights contained in the Charter and the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 52(3) of the Charter).⁷

² See M. Adamczak-Retecka, “Konstrukcja praw podstawowych w projekcie Konstytucji Unii Europejskiej”, [in:] C. Mik (ed), *Unia Europejska w dobie reform. Konwent europejski – Traktat Konstytucyjny – Biała Księga w sprawie rządzenia Europą*, Toruń 2004, pp. 144-145.

³ Andrzej Szejna, Aleksander Kosicki, *Karta Praw Podstawowych Unii Europejskiej i jej znaczenie dla Polski i Europy*, Warszawa 2008, p. 5.

⁴ Case C-168/91 *Konstantinidis v Stadt Altensteig* [1993] ECR I-1191, pp. 1211-1212.

⁵ Cf. A. Jackiewicz, “Problematyka praw człowieka w świetle Karty Praw Podstawowych w aspekcie integracji Polski z Unią Europejską”, *Studia Europejskie* 2003, no 2, pp. 53-72.

⁶ A. Wróbel, “O niektórych problemach sądowego stosowania Karty Praw Podstawowych”, [in:] A. Wróbel (ed), *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, Warszawa 2009, p. 83 *et seq.*

⁷ B. Drzewiecka, “Koncepcja praw człowieka w pracach Konwentu Europejskiego w ujęciu politologicznym”, [in:] C. Mik (ed), *Unia Europejska w dobie ...*, p. 193 *et seq.*; B. Sidi Diallo, *Międzynarodowe instrumenty ochrony praw człowieka*, Poznań 2010, p. 146 *et seq.*

Already at the stage of preparing subsequent drafts of the Charter (in 2000 and 2004) as well as during disputes over a Constitutional Treaty, concerns were raised as to an excessive impact of the Charter on the law of the EU Member States. The discussions resulted in the addition of Title VII to the Charter, the content of which comprises general provisions governing the interpretation and application of the Charter (clarification). A highly important norm has been included in Article 51 of the said Title, pursuant to which: “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”. Further on, in the said Article, it has also been declared that “the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. The wording used in the Charter has given rise to a dispute over the scope of the CJEU’s competence to review the conformity of the Member States’ law with fundamental rights (the problem of the so-called *Wachauf* and *ERT* lines of cases). The provisions of the aforementioned Title VII of the Charter also include the guarantees of “due regard for the principle of subsidiarity” (Art. 51(1)) as well as the guarantees that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties (Art. 51(2)). Further on, it is stressed that the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, and that those rights are to be interpreted in harmony with those traditions (Art. 52(4)).

2. Reservations raised by Poland

In 2007, during negotiations held with regard to the Treaty of Lisbon, the United Kingdom negotiated a special protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (originally Protocol no 7, ultimately Protocol no 30), which described in detail the scope of application of the Charter with regard to that state. Poland acceded to the Protocol.⁸

⁸ It should also be recalled that similar reservations were raised with regard to the Charter by the Government of the Czech Republic; however, this was not done in the form of a protocol,

The Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom comprises a relatively extensive preamble as well as two articles. The articles read as follows:

Article 1

- 1 The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”

From the very beginning, considerable doubts were raised as to the meaning of the content of those provisions. Interestingly, in each of the two states, the goal of the Protocol was presented differently. A teleological interpretation presented by the United Kingdom appeared to indicate the necessity to ensure that the Charter would not become a source of subjective rights which individuals could assert before the courts of the two states.⁹ By contrast, in Poland, the Protocol was presented as an instrument ruling out the binding force of the entirety or part of the Charter with regard to our country.

As a result of a domestic debate pertaining to Title IV of the Charter, in October 2007, Poland submitted Declaration No. 53 [ultimately No. 62¹⁰] concerning the Protocol on the application of the Charter of Fundamental

but by submitting Declaration No 53. A declaration is merely an interpretative instrument, and – unlike a protocol – it is not binding. See M. Księżniakiewicz, “Stosowanie Karty Praw Podstawowych Unii Europejskiej: Protokół brytyjski i Sprawozdania ze stosowania KPP UE”, *Rocznik Integracji Europejskiej* 2012, No 6, p. 339 *et seq.*

⁹ K. Kowalik-Bańczyk, “Konsekwencje przyjęcia protokołu polsko-brytyjskiego dotyczącego stosowania Karty Praw Podstawowych”, [in:] A. Wróbel (ed), *Karta Praw Podstawowych w europejskim i krajowym porządku prawnym*, Warszawa 2009, p. 131 *et seq.*

¹⁰ The updated numbers of the declarations mentioned in this paper are based on the 2016 consolidated versions of the declarations and other relevant documents, as available in the EUR-Lex database, under the following link: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016ME/TXT>].

Rights of the European Union, pursuant to which: “Poland declares that, having regard to the tradition of social movement of ‘Solidarity’ and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.” The purpose behind that declaration was to exclude the applicability of Article 1(2) of the Protocol with regard to Poland.

However, what constituted the actual political and social background of Poland’s approach of distancing itself from the Charter was a number of concerns about a potential infringement of a certain moral standard when interpreted on the basis of the provisions of anti-discrimination law. Poland submitted a declaration on public morality already with regard to the Treaty of Accession. This was Declaration No. 39, pursuant to which: “The Government of the Republic of Poland understands that nothing in the provisions of the Treaty on European Union, of the Treaties establishing the European Communities and the provisions of treaties amending or supplementing those treaties prevents the Polish State in regulating questions of moral significance, as well as those related to the protection of human life”.¹¹ The said Declaration pertains to entire *acquis communautaire*. Moreover, as regards the Charter, Poland also submitted yet another declaration (previously marked as No. 51, and ultimately as No. 61¹²) on the Charter of Fundamental Rights of the European Union, with the following wording: “The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity”.

That complex legal situation, which consists of several, in a sense layered, limitations, has not been the subject of a lucid official analysis.¹³ However, what is striking, is that the provisions limiting the scope of the Charter were accepted by the subsequent governments of various provenance, presenting diverse views on moral and political issues (beginning with the post-communist left that was in power at the time of Poland’s accession to the EU, moving on to the conservative government that had impact on negotiations concerning the Treaty of Lisbon, and ending with the liberal government that upheld reservations as to the Charter). Thus, it may be assumed that the said reservations were the outcome of a cross-party consensus.

¹¹ Declaration No 39 is available on the European Parliament’s website, under the heading “Final act, Declarations and Exchange of Letters”: http://www.europarl.europa.eu/enlargement_new/treaty/default_en.htm .

¹² See note 10 above.

¹³ A. Wyrozumska, “Karta Praw Podstawowych – polskie obiekcje”, *Sprawy Międzynarodowe* 2007, no 4, p. 69 *et seq.*

3. The Charter of Fundamental Rights within the Polish system of the sources of law

It is not entirely clear whether the Charter is binding within the Polish legal system – and if it is binding, then to what extent. These doubts arise in the course of interpreting the aforementioned Protocol, the meaning of which has not been sufficiently clarified. The said issue has been interpreted in two ways. On the one hand, the binding force of the Charter and the meaning of the Protocol became the subject of examination by the Court of Justice of the European Union, which concluded that the content of the Protocol is concurrent with Article 51 of the Charter, i.e. it does not limit the binding force of the Charter in Poland and the United Kingdom.¹⁴ A similar stance has been taken by numerous representatives of the academia in Poland. On the other hand, interestingly, courts have rarely referred to the Charter as a basis of adjudication. In few rulings, courts resorted to the content of the Charter not as a legal basis, but rather as a source of inspiration justifying the stance of a given court.¹⁵ This was also an approach presented by some representatives of the doctrine.¹⁶

In order to evaluate the position of the Charter within the Polish system of the sources of law, it is necessary to take account of the position and significance of that document in international law. Difficulties with assessing if we are dealing with a legal document, or rather a political one, point to the inappropriate origin of the Charter. It ought to be recalled that the structural problem of the Charter is related to the process of departing from a Constitution for Europe, within which the Charter occupied a significant and systemically appropriate place. However, the rejection of the Constitution caused the transformation of many of its provisions into a treaty amending previously adopted Community Treaties.¹⁷ As a result of such a solution, the Charter did not become part of the Treaty of Lisbon, or even a protocol or an annex to the Treaty. A relevant act promulgated by the Polish Parliament – namely the Act of 1 April 2008 on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community – did not mention the Charter. Thus,

¹⁴ Cases C-411/10 and C-493/10: *N.S. v. Secretary of State for the Home Department (C-411/10); M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (C-493/10)*.

¹⁵ Cf. T. T. Koncewicz, A. Podolska, “Karta Praw Podstawowych w sądach polskich. Mit, marzenie czy rzeczywistość?”, *Palestra* 2014, Nos 3-4, p. 247 *et seq.*

¹⁶ D. Kornobis-Romanowska, “Znaczenie prawne Karty praw podstawowych Unii Europejskiej”, *Kwartalnik Prawa Publicznego* 2003, No 3/3, p. 201.

¹⁷ J. Menkes, “Karta Praw Podstawowych Unii Europejskiej a konstytucja Europy”, *Studia Europejskie* 2001, No 2, pp. 25-43.

the Charter was not covered by the ratification procedure. The said lack of the ratification of the Charter seems to determine that the Charter may not be regarded as a national source of law. Pursuant to Article 87 of the Constitution of the Republic of Poland, the sources of the universally binding law of the Republic of Poland are: the Constitution, statutes, ratified international agreements, and regulations. By contrast, Article 89(1) of the Constitution requires that international agreements concerning any freedoms, rights or obligations of citizens, as specified in the Constitution, be subject to ratification upon prior consent granted by statute. In this context, an attempt at assigning the Charter with the status of an international agreement by means of the phrase ‘shall have the same legal value as the Treaties’ should be regarded as bypassing the provisions of the Polish Constitution, which in its Article 8 stipulates that the Constitution is the supreme law of the Republic of Poland.

Such a legal situation may be a source of potential problems in the context of conflicts of laws between national law and the provisions of the Charter. One should agree with the view that the Charter constitutes a separate catalogue of political norms with a particular system of reviewing the observance thereof within EU institutions, where actually the norms are not binding in the Polish legal order, but must be considered when other binding norms are applied.¹⁸ Consequently, in accordance with that view, the Polish-British Protocol results in: (a) excluding the principle of primacy, which applies to treaties; (b) ruling out the possibility that the Commission or a Member State could lodge a complaint against Poland with the CJEU as regards an infringement of the Charter; (c) ruling out the possibility that individuals could rely on the provisions of the Charter in proceedings before Polish courts so as to argue for the non-conformity of national law to the Charter; (d) undermining the competence of national courts as regards making referral to the CJEU for preliminary rulings, insofar as the outcome of such referral might be the determination of non-conformity of national law to the Charter; as well as (e) prohibiting the CJEU from determining a clash between the system of Polish law and the Charter. Moreover, the literature on the subject suggests that, in the future, the said Protocol may serve as a tool for eliminating any conflicts between the ECJ’s established ‘principle of primacy’ and the Polish constitutional catalogue of the sources of law.¹⁹ Any attempts at bypassing the provisions of the Protocol should be regarded as controversial,

¹⁸ M. Muszyński, “Polska a Karta praw podstawowych po traktacie lizbońskim. Charakter prawny i granice związania”, *Przegląd Sejmowy* 2009, No 1, p. 64.

¹⁹ *Ibid.*, pp. 72-78.

since the Protocol belongs to primary law by virtue of shaping the catalogue of general principles of EU law.²⁰

4. The Charter of Fundamental Rights in the jurisprudence of the Polish Constitutional Tribunal

It needs to be stressed that the Constitution of the Republic of Poland comprises a highly extensive catalogue of the rights and freedoms, being comparable to the catalogue included in the EU Charter of Fundamental Rights. Certain discrepancies are compensated by relevant interpretations which make it possible to ensure equivalence between the guarantees arising from the Charter and those provided for in the Polish Constitution. The standards of the Charter are binding in Poland as constitutional standards, or international ones.²¹ What also requires clarification is that in constitutional reviews commenced by constitutional complaints, i.e. those conducted with regard to specific cases, higher-level norms for the reviews may only be indicated from among constitutional norms. Pursuant to Article 79(1) of the Constitution of the Republic of Poland, in accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, has the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his/her freedoms, rights or obligations specified in the Constitution. Therefore, the Polish Constitutional Tribunal has no possibility of adjudicating, in reviews conducted with regard to specific cases, on the basis of the EU Charter. A constitutional complaint filed solely on the basis of the provisions of the Charter would not be admitted for substantive examination.

Prior to the entry into force of the Treaty of Lisbon, the Constitutional Tribunal declined to adjudicate on the conformity of the provisions of Polish law with the Charter, holding the view that, above all, the Charter had no binding legal force (“An obvious conclusion that should be drawn from this is that neither Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms nor Article 47 of the Charter of Fundamental Rights of the European

²⁰ M. Jaśkowski, “Konsekwencje prawne Protokołu nr 30 w sprawie stosowania Karty praw podstawowych Unii Europejskiej do Polski i Zjednoczonego Królestwa”, *Zeszyty Prawnicze BAS* 2013, No 4 (40), p. 50.

²¹ S. Biernat, “Czy Karta Praw Podstawowych Unii Europejskiej obowiązuje w Polsce” [in:] *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, Warszawa 2012, p. 59.

Union may be indicated as a higher-level norm in review proceedings commenced by a constitutional complaint”). Also, the Constitutional Tribunal noted that in other types of review proceedings, commenced by applications or questions of law, pursuant to Article 188(1) and (2) of the Polish Constitution, the Tribunal is to adjudicate on the conformity of statutes to the Constitution or ratified international agreements. The Tribunal pointed out that the EU Charter did not constitute a ratified international agreement, and it was inadmissible for the Tribunal to adjudicate on the conformity of statutory norms to the Charter. Therefore, the Tribunal concluded that the examination of the conformity of statutory norms to the norms of the Charter did not fall within the remit of the Tribunal’s competence.²²

Nevertheless, this does not entail that the Tribunal rejects the European standard of fundamental rights protection in its jurisprudence; however, the said protection is derived from sources other than the EU Charter.²³

5. Conclusion

The unclear legal character of the Charter and the reservations as to the position of the Charter within the hierarchy of the sources of international and domestic law are the reasons why the Charter is rightly bypassed as a source of adjudication in the practice of courts. Yet, this process is not tantamount to restricting the scope of protection to which individuals are entitled; the said scope of protection is indicated in the Charter, but is guaranteed in other sources that are of legal significance.

Summary:

The EU Charter of Fundamental Rights was adopted as a result of departing from the construct of a Constitution for Europe. The said process has led to the situation where it is unclear whether the Charter is binding in the system of law. The Republic of Poland has expressed its concerns as to the construct of the Charter. They were presented both in the Polish-British Protocol as well as in Poland’s unilateral Declarations. An attempt at assigning the Charter with the status of an international agreement by means of the phrase ‘shall have the same legal value as the Treaties’ should be regarded as an infringement

²² The Polish Constitutional Tribunal’s decision of 9 May 2007 (ref.no. SK 98/06).

²³ M. Pyziak-Szafnicka, “Karta Praw Podstawowych w orzecznictwie Trybunału Konstytucyjnego”, *Europejski Przegląd Sądowy*, August 2016, p. 26.

of the Polish constitutional standard. Polish courts (the Supreme Court and the Constitutional Tribunal) rightly bypass the Charter as a source of law. However, this does not diminish the scope of fundamental rights protection guaranteed to individuals on the basis of the Polish Constitution and international law binding on the Republic of Poland.

