Constitutional Court
Republic of Bulgaria

Volume II

CONSTITUTIONAL STUDIES

CONSTITUTIONAL STUDIES

Volume II

2020

Constitutional Court of the Republic of Bulgaria

MISSION

Constitutional Studies is a forum for studying constitutionalism and constitutional democracy, the core being the theory and practice of constitutional justice in the 21st century. It is dedicated to the theory and practice of modern constitutionalism and constitutional government and publishes contributions of the highest quality that promote our understanding of the institutions in constitutional democracies and the grounds for their legitimacy, the practices of constitutional self-government, approaches to constitutional jurisprudence and related issues.

Interdisciplinary and open to comparative, empirical, historical, normative and analytical views from scholars from all social sciences, *Constitutional Studies* promotes innovative and critical perspectives.

Published by the Constitutional Court of the Republic of Bulgaria

ISSN 2682-988 (print)

Contacts
Constitutional Court of the Republic of Bulgaria,
1 "Knjaz Dondukov" blvd., Sofia-1594, Bulgaria
Dr. Radoslava Yankulova, secretary of the Editorial Board
r.yankulova@constcourt.bg, ☎ +359 2 940 23 08

CONTENT

Authors in Volume II

Juan José GONZÁLEZ RIVAS
Professor of Constitutional and Administrative Law,
President of the Constitutional Court of the Kingdom of Spain

Jean Paul JACQUÉ
Emeritus Professor at the University of Strasbourg, Doctor honoris causa
of the St Kliment Ohridski University of Sofia,
Honorary General Director at the Council of the European Union

Yanaki STOILOV
Professor of Theory of Law at the St Kliment Ohridski University of Sofia,
former Deputy Chair of the National Assembly and Minister of Justice,
Judge at the Constitutional Court of the Republic of Bulgaria

Atanas SEMOV
Professor of EU Law at the St Kliment Ohridski University of Sofia,
Jean Monnet Chair, former Deputy Chair of the National Assembly,
Judge at the Constitutional Court of the Republic of Bulgaria

REFLECTIONS ON COMMON EUROPEAN CONSTITUTIONAL TRADITIONS AND JUDICIAL INDEPENDENCE

Juan José González Rivas

Introduction

I will try to correspond to the momentum and enthusiasm that our colleagues in Bulgaria have put in the success of this editorial project.

From a historical point of view, the formulation of the right to due process comes from the Anglo-Saxon tradition. In terms of time, it was first reflected in Clause 39 of the 1215 Magna Charta, and then, in amendments V (of 15-12-1791) and XIV (of 9-7-1868) to the U.S. Constitution of 17 September 1787, when they forbid the Federation and the Federated States *"to deprive any person of life, liberty, or property, without due process of law"*, thus establishing the procedural guarantee and the substantive guarantee of due process. However, this formula is a mere glimpse of the development that the right to a fair trial will later achieve in Anglo-Saxon and European case law.

It should be said as a preamble that the notion of the fundamental right to trial with all the guarantees of Article 24(2) of the Spanish Constitution, which has been assumed in Spanish constitutional law, has been framed – and profoundly conditioned – by the incardination of the Spanish system for the protection of fundamental rights in the European system for the protection of these rights, in which our Constitutional Legal Order has been framed since the early 80's of the last century, and in which, in addition to the national way of protection, there is a double supranational protection mechanism – on the one hand – through the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and – on the other

hand – within the framework of the Charter of Fundamental Rights of the European Union (CFREU).

Therefore, I believe that an analysis of the right to a fair trial with full guarantees requires, first of all, to explain our fundamental right under Article 24(2) SC (both from a substantive and procedural perspective) in the context of the "right to an independent and impartial tribunal" cited in the case-law of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU). As we will see below, both courts have experienced some evolution in the exegesis of the guarantee of judicial independence and impartiality (as part of the right to due process), from an *individual* conception (as the right of the individual to the *objective* and *subjective* impartiality of the judge) to an *institutional* conception (which would include the guarantee of impartiality in the appointment of the judge, and thus of the governing body of judges).

1. Judicial Independence as Part of the Right to a Fair Trial under Article 6 ECHR:

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950 (to which Spain adhered on 4-10-1979) sets out the following:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: *(a)* to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; *(b)* to have adequate time and facilities for the preparation of his defence; *(c)* to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; *(d)* to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; *(e)* to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Pursuant to Article 6 ECHR, in the broad sense of the right to the independence of the judge, the ECtHR handed down the first judgments (at the request of litigants): *Campbell and Fell v. United Kingdom* of 28-6-1984, *Sramek v. Austria* of 22-10-1984 and *Langborger v. Sweden* of 22-6-1989. In these judgments, while proclaiming judicial irremovability, the possible non-jurisdictional nature of the body or the presence of non-judicial members in courts was accepted, although the right to an independent judge was declared to be violated by the "administrative linkage or dependence" of members of the judging body. This criterion was subsequently extended, for example, to the Council of State of Luxembourg (case *Procola v. Luxembourg*, 28-9-1995), to the British military courts *(Findlay v. United Kingdom*, 25-2-1997) or to the Danish impeachment court *(Ninn Hanssen v Denmark*, 18-5-1999). However, it is not until the beginning of this 21st century that the ECtHR undertakes to analyse the lack of independence of members of the courts *stricto sensu*, in *Daktaras v Lithuania* of 10-10-2000 and *Clarke v United Kingdom* of 25-8-2005 on illegal appointments of judges, and in *Agrokompleks v Ukraine* 6-11-2011 regarding pressure on judges; *Bochan v Ukraine* of 3-5-2007 and *Parlov-Talcic v Croatia* of 22-12-2009 analysing the issue of hierarchical judicial dependence; or *Brumarescu v Romania* of 28-10-1999 in the post-Soviet framework of reopening already completed proceedings.

From this case-law, the most well-known categories of fair trial in Article 6 ECHR were extracted: *judicial independence* and *impartiality*, which are part of the fundamental right to a trial with full guarantees, without any undue influence (whether external or internal). Despite the joint treatment nearly always given to them by the ECtHR, this allows us to distinguish *independence* (as a guarantee of "absence of extra-procedural pressure") and *impartiality* (as the "absence of leverage or prejudices in the process itself" with respect to the parties or the interests to be tried). As regards impartiality, two more categories may be distinguished: subjective impartiality (the lack of interest of the judge – which is presumed *iuris tantum* – with respect to the case and the parties) and objective impartiality (absence of grounds that may justify prejudices about the judge – the so-called English adage "justice should not only be done but should be seen to be done"). In addition, the ECtHR reiterates the ban on pressure from other powers on the courts, without prejudice to the possible appointment of judges from other powers (potential absence of independence *at source*), while prohibiting any kind of pressure or influence on the exercise of their judicial functions (requirement of independence *in the exercise* of their duties).

This ECtHR doctrine on impartiality as a guarantee of the process of Article 6 ECHR was applied to Spain, for example in cases *Vera Fernández-Huidobro v Spain* of 6-1-2010 (impartiality despite the enmity of the judge), *Alony Kate v Spain* of 17-1-2012 (violation of impartiality due to the judge's previous participation in the case) and *Cardona Serrat v Spain* of 26-10-2010 (partiality due to the preliminary investigation carried out by the judge).

Other characteristics applicable to the appointment regime of judges, the duration and guarantees of their mandate (prohibition of external pressure from the executive, legislative or judicial branches), the appearance of independence (even with respect to the judicial governing body itself), which constitute the genesis of the doctrine on the institutional status of the European judge, can also be extracted from those judgments (from *Daktaras* to *Brumarescu).*

However, it will be from 2007 [with the application of the doctrine of the *Eskelinen v Finland* of 19-4-2007), and especially with cases *Olujic v Croatia* of 5-2-2009 (on the removal of the President of the Supreme Court), *Volkov v Ukraine* of 28-5-2013 (on the judicial disciplinary system), *Baka v Hungary* of 23-6-2016 (on the constitutional reduction of the mandate of the President of the Supreme Court, who was critical with the legislative reforms affecting the judiciary), *Ramos Nunes de Carvalho e Sá v Portugal* of 6-11-2018 (on the review of sanctions on judges), *Kovesi v Romania* of 5-5-2020 (on the ministerial removal of anti-corruption prosecutor), *Bogdan v Romania* of 20-10-2020 (on the suspension of a judge by the Judicial Council) and *Guomundur Andri Astraosson v Iceland* of 1-12-2020 (on the appointment of judges of Iceland's Court of Appeal)], when a new exegesis of the ECtHR arises in respect of complaints, not by individuals but by judges, for violating their own subjective rights to independence and impartiality in the exercise of their mandate, linked to the guarantee of Article 6 of the ECHR, which integrates or complements the guarantees of a *fair trial* with those of the *right to an institutionally independent tribunal established by law*; The ECtHR has ventured to rule on systemic or operational 'judicial deficiencies' in these judgments (e.g. in the absence of review of decisions affecting judges) and demands the imperative of independence, including that of the judicial governing body (against the original abstention expressed, for example, in ECtHR judgment *Kleyn and Others v. the Netherlands* of 6-5-2003, § 193).

2. The right to a fair trial in the EU legal system (Art. 47 CFREU) linked to judicial independence

As is well known, the regulatory and institutional system of the European Union has a certain degree of technical and methodological complexity, as European law overlaps and prevails over the national rule (principles of primacy and direct effect), in the spheres of competence of the supranational organisation to which part of national sovereignty is transferred (the so-called European Union). If this structure is complicated, it is even

more so in the field of fundamental rights, and in particular with regard to the guarantees of a fair trial, for it can be protected, when European law is directly or indirectly applied, both from national law [as is the case in Spain with Article 24(2) SC] and from EU law (as would follow from Article 47 CFREU) and by the very influence of the system of protection of the ECHR which we have just described in the previous section [as provided for in Article 6(3) TEU, and referred to in Articles 52(3) and 53 CFREU, regarding the coincidence between the rights catalogue of the European Convention on Human Rights and that of the Charter of Fundamental Rights of the EU], with respect to Article 6(1) ECHR. Moreover, the question may be further complicated by the fact that, under Article 19(1) TEU, judges of the Member States have the dual status of national judges and European judges, when they – independently – refer questions to the CJEU for a preliminary ruling (Art. 267 TFEU).

In particular, the Charter of Fundamental Rights of the European Union of 7-12-2000 (adopted in Strasbourg on 12-12-2007), which entered into force with the Treaty of Lisbon of 1-12-2009, establishes in Article 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by **an independent and impartial tribunal previously established by law**. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

The right to a fair trial within the European Union (which as a general principle *was part of the constitutional legal traditions of the Member States)* has now become a fundamental right of the EU (with the meaning, content and extension given by the ECtHR to Article 6 ECHR), which has the independence of judges and courts as a prerequisite. In this regard, the case law of the Court of Justice of the EU (CJEU) has dealt with the unique transposition and metabolisation of the right to a fair trial (of the ECHR) by the EU.

In the first stage, the CJEU did not focus on the subjective aspect of the right of the parties to a trial with full guarantees, but on the objective aspect (inasmuch as the independence of the judge was an essential prerequisite for the European preliminary ruling mechanism, which ensured the unity and uniformity of the superior system). As an expression of that objective conception, we may mention CJEU case *Wilson* C-506/04 of 19 September 2006 (preliminary ruling on the possibility of appeal against the decision to not admit the applicant in the Luxembourg Bar Association). This judgment declares *access to jurisdiction as part of effective judicial protection* and formulates the autonomous concept of *court* (within the scope of Article 267 TFEU), setting out a certain number of criteria that must be satisfied by the body concerned, such as *whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes , whether it applies rules of law and its independence.*

The concept has two other aspects. The first aspect, which is *external* (guarantee of *irremovability)* presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The second aspect, which is *internal*, is linked to *impartiality* and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings and the absence of any interest in the outcome of the proceedings. This doctrine of independence would then be reiterated in the context of the questions referred for a preliminary ruling, for example in Cases *Pilato* C-109/07 (request for a preliminary ruling from the Prud'homie de pêche de Martigues), *Miles* C-196/09 (request for a preliminary ruling from the Complaints Board of the European Schools), the Bulgarian case *Belov* C-394/11 (request for a preliminary ruling from the Komisia za zashtita ot diskriminatsia - Bulgaria), *Devillers* C-318/12 (request for a preliminary ruling from the Conseil régional d'expression française de l'ordre des médecins vétérinaires), *TDC* C-222/13 (request for a preliminary ruling from the Teleklagenævnet – Denmark) or *Panicello* C-503/15

(request for a preliminary ruling from the Secretario Judicial del Juzgado de Violencia sobre la Mujer Único de Terrassa – Spain).

However, the subjective conception of the right to a process with full guarantees (including judicial independence) was formulated in substantive – and *prima facie* – case-law, not in the requests for a preliminary ruling, but in the CJEU judgments *Johnston* C-222/84 of 15-5-1986 (on judicial control of administrative certificates), *Heylens e.a* C-222/86 of 15-10-1987 (judicial review of the legality and the reasons for the decision) and *Unión de Pequeños Agricultores* C-50/00 of 25-7-2002 (standing to bring an action for annulment of a regulation) which proclaimed the right to a fair trial as part of the fundamental rights of litigants of Member States.

Subsequently, the right to a fair trial, through independent courts, was formally reiterated (in the context of the preliminary rulings) with regard to Article 47 CFREU, in CJEU cases *DA* C-175/11 of 31-1-2013 *(Refugee Appeals Tribunal* - Ireland) and *El Hassani* C-403/16 (decision to refuse a visa by a Polish consular authority), demanding clear rules, particularly as regards the *composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members.* These bases of judicial independence included in Article 47 CFREU are those assumed in the subsequent judgments of the CJEU in order to preserve the rule of law (Article 2 TEU) in respect of Poland and Hungary, and which mark a turning point in Luxembourg's case law.

Indeed, in addition to enshrining the right to the effective protection from the Courts in matters of European law as a *subjective* dimension of the due process [Article 47(1) CFREU], CJEU case *Associaçao Sindical dos Juizes Portugueses* (ASJP) C-64/16 of 27-2-2018 (reference for a preliminary ruling on the reduction of remuneration of the judges from the Portuguese Court of Auditors in the context of the bailout) proclaims independence as an *objective* prerequisite for a fair trial, the guarantee of – European and national – judicial independence [Article 47(2) CFREU], and notes that it covers *external* independence (autonomy) and *internal* independence

(irremovability, including *economic sufficiency).* Subsequently, in the CJEU case *Minister of Justice and Equality of Ireland* C-216/18 PPU of 25-7-2018 (reference for a preliminary ruling on the non-execution of a European arrest warrant on account of systemic deficiencies in Poland's judiciary) declares judicial independence as essential content of the right to a fair trial [Article 47(2) CFREU] and demands clear rules, particularly as regards the *composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, as well as their disciplinary regime.*

And in the subsequent judgments of the CJEU, *Commission v Poland* C-619/18 of 24-6-2019 (appeal on failure to fulfil obligations, for lowering the retirement age of judges of the Supreme Court of Poland), *Commission v. Poland* C-192/18 of 5-11-2019 (appeal on failure to fulfil obligations, discrimination for establishing different retirement ages for men and women holding the position of judge of the ordinary Polish courts); *Miasto Lowicz* C-558/18 and *Prokurator Generalny* C-563/18 of 23-3-2020 (references for a preliminary ruling from Polish courts for fear of losing their independence); *AK v CNPJ* C-585/18 and *CP and DO v Supreme Court of Poland* C-624 and 625/18 of 19-11-2019 (references for a preliminary ruling on independence of the Disciplinary Chamber of the Supreme Court and Council of the Judiciary of Poland), extend the guarantee of judicial independence [essential content of *effective judicial protection* of Article 47(1) CFREU and of the *right to a fair trial* under Article 47(2) CFREU] as a condition of the governing bodies of judges.

This doctrine is finally reiterated in the CJEU case *AB e.a c. Krajowa Rada Sądownictwa* C-824/18 of 2-3-2021 (reference for a preliminary ruling on the procedure for appointment to a position as judge at the Polish Supreme Court) and in the Opinion of Advocate General in *Asociatia Forumul Judecatorilor c/ Consiliul Superior al Magistraturii* C-83/19 of 23-9-2020 (reference for a preliminary ruling on the appointment of the judicial inspector and the specialised sections for crimes committed by the members of the judiciary in Romania), which allows us to distinguish three categories of judicial independence: "judicial

independence" as a *subjective right of the person at trial*, "judicial independence" as an *institutional guarantee* of the judiciary and "judicial independence" as a *statutory guarantee* in the legal regime of judges.

3. The right to a trial with full guarantees under Article 24(2) of the Spanish constitution and its impact on judicial independence and impartiality

The Spanish Constitution of 27 December 1978 sets out in Article 24(2): "Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self incriminating statements; to not declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences".

Art. 24(2) SC covers a set of rights or guarantees of a procedural nature (which may be invoked before the ordinary courts) and legal structure. Besides, it can be subject [Article 53(2) SC] to constitutional protection *(amparo)* before the Constitutional Court.

Traditionally, the Constitutional Court has considered the following guarantees to be included in Article 24(2) SC: *(1)* the right to the ordinary judge predetermined by law; *(2)* the rights of defence and assistance of a lawyer; *(3)* the right to be informed of the charges brought against them; *(4)* the right to a trial without undue delays; *(5)* the right to a public trial with full guarantees; *(6)* the right to the use of evidence appropriate to their defence; *(7)* the right to not make self incriminating statements and to not declare themselves guilty; and *(8)* the "substantive" right to be presumed innocent. We should point out that any breach of the above guarantees shall result in a material lack of defence of the person awaiting trial. (STC 89/1986, 145/1990 and 106/1993, among others). Likewise, this right established in Article 24(2)

SC appears frequently linked in the case law to the right to the effective protection of the courts of Article 24(1) SC.

Therefore, the right to a legally-predetermined judge is a prerequisite or guarantee of a fair trial under Article 24(2) SC. SSTC 47/1982 of 12-7-1982 (LG 3) and 47/1983 of 31-5-1983 (LG 2) define it as *the need for the judicial body to have been created by law, for it to have been invested with jurisdiction and competence prior to the event motivating the judicial action or process, and for its organisational or procedural regime not to allow it to be classified as a special or exceptional body.* This guarantee also requires that the composition of the judicial body be determined by law and that in each individual case the procedure laid down by law for the appointment of the members to form the relevant body is followed. However, it is a right whose violation has been assessed on rare occasions by our Constitutional Court (e.g. misdemeanour proceedings STC 35/2000 of 14-2-2000; in accordance with Article 14 of the Criminal Procedure Act, the jurisdiction to hear the case was for the justice of the peace of the place where the misdemeanour was committed, but an investigating judge heard it instead).

Likewise, it should not be forgotten that the guarantee of the right to a legally-predetermined judge of Article 24(2) SC is intrinsically linked to the right to a fair trial under Article 6(1) ECHR, as set out in STC 204/1994 of 11-7-1994. LG 4 of this judgment establishes that "in accordance with Article 10(2) SC, the interpretation of the right to a legally-predetermined judge and to a trial with full guarantees [Article 24(2) SC] cannot particularly conflict with the right of everyone to a fair and public hearing within a reasonable time by an 'independent and impartial tribunal' established by law [Article 6(1) ECHR]".

Therefore, the Constitutional Court extended the virtuality of Article 24(2) SC by linking the right to a legally-predetermined judge with judicial impartiality and independence, as noted in SSTC 238/1998, of 15-12-1998 (LG 5), and 162/2000, of 12-6-2000 (LG 2). In these judgments, the court stated that "the purpose [of the guarantee to a legally-predetermined judge] is more modest, and more important: i.e. to ensure the independence and

impartiality of the judges that are part of the Chamber of Justice, thus avoiding the maintenance of the court and the arbitrary alteration of its members at the same time. This has already been pointed out in STC 137/1994 of 9-5-1994 (LG 3) when the Court stated that "infringements of the judge's impartiality may constitute violations of the right to a trial with full guarantees (SSTC 145/1988 and 164/1988), since such violations must be subsumed into infringements of the right to the legally-predetermined judge. In particular, 'the right to be tried by a legally-predetermined judge includes the possibility to challenge any public officials that have allegedly committed actions legitimately classified as circumstances depriving subjective suitability or the conditions of neutrality and impartiality' (STC 47/1982). Thus, by "Law", for the purposes of Article 24(2) SC, it is also necessary to understand our own basic law or, to be more precise, those essential requirements established by the Constitution that shape the design of the legal-constitutional judge. Among these requirements, the independence and impartiality of the judge stands out, as jurisdictional power can only be entrusted to judges who are 'independent, irremovable, responsible and subject only to the rule of law' [Art. 117(1)]. But judicial independence does not appear in the Constitution and cannot be defined by it, since it integrates a complex legal status of the judicial staff and a set of guarantees of the judge vis-à-vis the parties, the society, the self-government and the other powers of the State which, when the most essential guarantees are infringed, it can lead to the violation of this fundamental right of legal configuration".

Finally, it should be analysed how judicial independence and impartiality are one of the judges' own rights under Article 117(1) SC [and not under Article 24(2) SC], within the scope of Title VI (on the Judiciary) of the Constitution. In this regard, the Constitutional Court made the following statements in STC 108/1986 of 29-7-1986, regarding the constitutional complaint brought against the Organic Law of the Judiciary 6/1985:

– (LG 6): "The Judiciary consists of the power to exercise jurisdiction, and each and every judge shall be independent

when performing this function. Judges make up the judiciary or are members of it because they are responsible for exercising jurisdiction. This is clear from Article 117(1) SC. Judicial independence (i.e. that of each judge or court in the exercise of their jurisdiction) must be respected both within the judicial organisation (Art. 2 of the Organic Law of the Judiciary) and by "all" (Art. 13 of the same Law). The Constitution itself provides for a number of guarantees to ensure independence. First, irremovability, which is its essential guarantee [Art. 117(2)]; but also the impossibility to delegate legislation to determine the constitution, functioning and governance of courts, as well as the legal status of judges [Art. 122(1)], and their regime of incompatibilities [Art. 127(2)]. This independence is counterbalanced by the responsibility and strict distribution of judges in their judicial function, as well as any others expressly attributed to them by law in defence of any right [Art. 117(4)]; this latter provision aims at ensuring the separation of powers".

– (LG 16): "The rights and duties of judges must be determined by law and, more specifically, by Organic Law [Art. 122(2) of the Spanish Constitution]. This means that this 'status' cannot be regulated by the Public Administration or through regulations".

– (LG 26): "The independence of judges as members of the judiciary, that is, as holders of judicial power, is recognised by the Constitution itself. This independence means that judges may not be subject, in principle, to rules of lower rank than the law and, in particular, to regulations that may be issued by the Government [Art. 117(1) of the Constitution]. This not only applies when exercising judicial power, but also to their own status, since otherwise it would be possible to influence their personal situation, and this would pose a risk regarding the judicial function".

And regarding STC 37/2012 of 19-3-2012 (and later STC 58/2016 of 17-3-2016) I would reiterate the doctrine on judicial independence, but by linking it to the guarantee of the rule of law:

– (LG 5): "If the judiciary is not independent in a State (each and every judge of the judiciary shall be independent), then there is no rule of law, which is an essential element of a genuinely

constitutional State, as everybody knows. In the exercise of their constitutional function, judges are as they are only subject to the rule of law. Or, in other words, judges and courts are independent because they are only subject to the law. Judicial independence and submission to the rule of law are, in short, the obverse and the reverse of the same coin".

– (LG 6): "In addition, the constitutional proclamation of the independence of the judiciary is accompanied by the establishment of various guarantees appropriate to ensure its effectiveness, such as, inter alia, irremovability, impartiality, the legal status of judges, and the responsibility regime".

In short, the right to a trial with full guarantees, as regards the right to a legally-predetermined judge (which would include the configuration of judicial bodies and the qualities and status of judges) seeks to preserve the independence and impartiality of judges and courts. However, one may infer from SSTC 56/1990 and 108/1986 (on the Organic Law 6/1985, on the Judiciary) that this subjective right under Article 24(2) SC would not reach the institutional guarantee of the judiciary or its governing body: in other words, the Constitutional Court has never held – as was the case in the last case-law of the ECtHR and the CJEU – that the possible lack of independence of the Council of the Judiciary affects the fundamental right to judicial independence and impartiality, let alone the guarantee of a fair trial under Article 24(2) SC.

Final Reflections

The above statements are not exhaustive, but they give me the chance to make three conclusions – at the very least:

There is no doubt that there are parallelisms between the regulation of the right to a trial with full guarantees and the right to due process: both are frequently linked to the right to the effective protection of the courts in case law; both are integrated by a set of procedural guarantees or rights that have been extended by case law, from criminal proceedings to all types of proceedings; both include the right to an independent and impartial judge provided for by law (as a prerequisite or as a guarantee); both

have the subsidiary protection of the constitutional court; both comprise the substantive and procedural aspects; both assume the doctrine of the external character of independence and the internal nature of impartiality, and within the latter, the distinction between subjective and objective impartiality.

On the other hand, we can see that the protection of the right to judicial independence and impartiality in the field of international courts is more intense than in national Constitutional Courts, as an institutional guarantee for judges and courts, and even – at European level – as an attribute of the Judiciary (and also of its governing body, in its capacity as elector of judges). Perhaps this circumstance responds to the very subsidiary nature of international courts, as a mechanism for guaranteeing human rights and the rule of law (as provided for in the International Covenants and Conventions), and constitutes an indication of the proper functioning of international mechanisms for the protection and effectiveness of human rights.

Finally, there is certain similarity between recent cases and judgments from the European Regional Courts (ECtHR and CJEU) and the American Commission (IACHR) in matters of judicial independence and fundamental rights, not regarding litigants but judges; this would allow me to talk about it (similarly with the terminology coined in Europe of *"dialogue between national and international courts"*, to describe their relations) as an authentic *"mimesis between international courts"* (between the European Courts and the Inter-American Court).

LE JUGE CONSTITUTIONNEL FACE À LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE

Jean Paul Jacqué

C'est aujourd'hui un lieu commun que d'écrire que le juge national est le juge commun du droit de l'Union sous réserve de l'intervention de la Cour de justice notamment par la voie du renvoi préjudiciel. Dans ce cadre, les rapports entre droit communautaire et droit national se sont longtemps situés dans une logique kelsenienne. En raison du principe de primauté, les règles nationales contraires devaient s'effacer lorsqu'elles entraient en conflit avec le droit de l'Union. Cette situation a été progressivement acceptée par les juridictions constitutionnelles nationales sous la réserve de « contre limites » tenant à l'identité constitutionnelle nationale, au respect des droits fondamentaux et au respect par la Communauté de ses compétences[1]. Dans ces conditions, la primauté sur la loi nationale a fini par s'imposer et le juge national s'est vu reconnaître le pouvoir d'écarter la règle nationale contraire. Il ne s'est jamais agi d'un contrôle de validité puisque la Cour de justice est privée du pouvoir d'annuler une loi nationale et que les juridictions nationales ne peuvent déclarer invalide une législation de l'Union. Tout simplement, la loi nationale contraire devient inapplicable dans la limite de la contrariété consacrée. Dans ce contexte, puisque le pouvoir de déclarer les dispositions nationales inapplicables sous réserve du renvoi préjudiciel appartient au juge national sans qu'il soit nécessaire,

[1] Comme l'a montré avec vigueur la Cour constitutionnelle allemande dans son jugement du 5 mai 2020 où elle juge, contrairement à la position de la Cour de justice quelle avait sollicitée par voie préjudicielle (arrêt du 11 décembre 2018, gr.ch., C-493/17) que le programme d'assouplissement quantitatif (*quantitative easing*) de la Banque centrale européenne est fondée sur une décision ultra vires de la Banque et prive celui-ci de tout effet en Allemagne à moins que la Banque ne prenne une nouvelle décision respectant le principe de proportionnalité.

en application de la jurisprudence *Simmenthal*[2], d'avoir recours au juge constitutionnel, les juridictions ordinaires ont acquis un pouvoir considérable. Elles peuvent non seulement remettre en cause l'œuvre du législateur, mais aussi la jurisprudence des cours qui lui sont supérieures en interrogeant la Cour de justice sur la conformité de celle-ci au droit de l'Union. Cette situation a toujours interpellé les juges constitutionnels d'où l'instauration des diverses formes de contre-limites pour préserver certaines normes constitutionnelles. Mais, malgré les différences d'approche entre la Cour de justice et les juges constitutionnels nationaux, les conflits directs ont été rares. Une certaine réserve appuyée sur un dialogue entre les juges souvent fondé sur des mises en garde réciproques a permis au système de fonctionner sans accrocs majeurs[3] jusqu'au jugement de la Cour constitutionnelle allemande du 5 mai 2020, encore que celui-ci, sévère pour la Cour de justice, ouvre au fond une issue de secours à la Banque centrale européenne[4], issue qu'elle a su utiliser si bien que l'arrêt de Karlsruhe, malgré son importance symbolique, n'a pas eu d'effets pratiques.

En attribuant à la Charte des droits fondamentaux de l'Union européenne une valeur contraignante au niveau du droit primaire, les auteurs des traités ont profondément modifié la situation. Jusqu'à l'entrée en vigueur du traité de Lisbonne, la Cour de justice fondait sa jurisprudence en matière de droits fondamentaux sur les traditions constitutionnelles communes aux États membres ce qui ouvrait la porte à un certain pluralisme dont on trouve trace dans l'affaire *Oméga*[5]. La présence d'un catalogue écrit rend les choses plus difficiles parce qu'elle fait apparaître plus clairement d'éventuelles contradictions entre la manière dont les droits sont

[2] Arrêt du 9 mars 1978, 106/77.

[3] Jusqu'à l'arrêt de la Cour constitutionnelle allemande, il n'existait que deux cas de conflits dans lesquels une juridiction suprême s'était opposée à un arrêt de la Cour de justice : Cour constitutionnelle tchèque, *Landtova*, 31 janvier 2012, Pl. ÚS 5/12 et Cour suprême danoise, *Ajos*, 6 décembre 2016, 15/2014 auxquels est venu s'ajouter l'arrêt du Conseil d'État français du 21 avril 2021, *French Data Network et autres.*

[4] **Bundesverfassungsgericht,** 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

[5] Arrêt du 14 octobre 2004, C-36/02.

garantis par la Charte et celle dont ils sont protégés par les constitutions nationales. La hiérarchie est renforcée au profit de la Cour de justice qui détient le pouvoir exclusif d'interpréter la Charte et le recours au pluralisme paraît alors limité.

En outre, l'élargissement des compétences de l'Union multiplie les risques de conflits. Si ceux-ci restaient faibles lorsque l'on traitait de la politique agricole commune, elles s'amplifient considérablement dès lors que l'on aborde la politique pénale ou la protection des données personnelles. Le risque est encore accru avec la possibilité de voie se développer une double voie de renvoi préjudiciel tant devant le juge constitutionnel que devant la Cour de justice. Le juge national a ainsi la possibilité de frustrer de son droit de regard la Cour constitutionnelle nationale au profit de l'appel à la Cour de justice ou alors de risquer de remettre en cause la primauté en faisant jouer le renvoi national. Ces évolutions appelaient à une réévaluation des rapports entre les Cours tant à Luxembourg que dans les capitales nationales. Elle s'est faite, de part et d'autre, par la voie jurisprudentielle au moyen d'un dialogue, en apparence respectueux, mais qui conduit à sortir d'une vision strictement hiérarchique des rapports de système pour envisager les possibilités de mise en œuvre d'un pluralisme sur la base de ce que l'on qualifie parfois de « multilevel constitution ».

I. Les difficultés pour les Cours constitutionnelles liées à la Charte

En soi, la Charte ne semble pas poser de problèmes particuliers pour les juridictions nationales. Comme les traités, elle revêt l'habit du droit primaire et jouit de sa primauté. Mais la difficulté vient de ce que, contrairement à la Convention européenne des droits de l'homme, la Charte ne s'impose pas à l'ensemble du droit national, mais seulement dans le cadre des compétences de l'Union. Ainsi, la Charte ne couvre qu'une partie de l'activité des États membres, mais lorsque tel est le cas, ses dispositions peuvent entrer en conflit avec les normes constitutionnelles nationales relatives aux droits fondamentaux, dont certaines re-

lèvent éventuellement de l'identité constitutionnelle nationale. Dans ce cas, lorsqu'une question relève du champ d'application de la Charte, le juge national qui est en saisi peut choisir soit de solliciter l'interprétation de la Cour au risque d'empiéter sur le rôle du juge constitutionnel, soit de s'adresser au juge constitutionnel mettant alors en péril la primauté. On conçoit que ni la Cour de justice, ni les juges constitutionnels nationaux ne peuvent rester indifférents à la coexistence des voies de droit ainsi ouvertes dans le cadre de l'Union et dans celui des États membres.

A. Les problèmes posés par l'interprétation des dispositions générales de la Charte

La nécessité d'obtenir un consensus sur la Charte a conduit ses auteurs à accepter certaines ambiguïtés, notamment quant au sens de certaines dispositions générales de celle-ci. Celles-ci ont perduré jusqu'à ce que la Cour de justice se soit vu contrainte de les lever. Mais les clarifications apportées ont conduit à remettre en cause la position traditionnelle des juridictions constitutionnelles sur la place du droit de l'Union dans l'ordre interne et surtout sur leur rôle dans ce cadre.

1. Les incertitudes nées de la détermination du champ d'application de la Charte

Une des ambiguïtés liées aux dispositions générales de la Charte concerne le champ d'application de celle-ci. Le texte de la Charte indique qu'elle n'est applicable aux États membres qu'« uniquement » lorsqu'ils mettent en œuvre le droit de l'Union tandis que les explications de l'article 51 remplace la référence à la mise en œuvre par celle au champ d'application du droit de l'Union. Se fondant sur les explications, La Cour a opté pour le champ d'application le plus large et décidé que la Charte s'appliquait dans le champ d'application du droit de l''Union[6]. Celle-ci couvre donc toutes les situations dans lesquelles les États membres sont astreints au respect d'une règle de l'Union quelle

[6] Arrêt du 26 février 2013, *Akerberg Fransson*, C-617/10.

que soit son origine. La notion de mise en œuvre va alors bien au-delà de la transposition d'une directive ou l'application d'un règlement de l'Union puisqu'elle vise toutes les situations dans lesquelles s'applique le droit de l'Union.

Cette jurisprudence a pour conséquence de mettre l'accent sur la question de la définition du champ d'application ou plus concrètement sur le lien qui doit être établi entre une mesure nationale et le droit de l'Union pour que la Charte devienne applicable. Pour le Président de la Cour, la Charte est l'ombre du droit de l'Union, au sens que chaque fois qu'est applicable une règle de droit de l'Union la Charte l'est aussi. Mais une ombre est susceptible de nuances. La jurisprudence de le Cour qui a tenté de préciser la nature de ce lien dans l'arrêt *Iida,* le montre bien : « il y a lieu de vérifier, parmi d'autres éléments, si la réglementation nationale en cause a pour but de mettre en œuvre une disposition du droit de l'Union, le caractère de cette réglementation et si celle-ci poursuit des objectifs autres que ceux couverts par le droit de l'Union, même si elle est susceptible d'affecter indirectement ce dernier, ainsi que s'il existe une réglementation du droit de l'Union spécifique en la matière ou susceptible de l'affecter »[7].

Cette formulation n'établit guère de critères positifs à l'exception du recours à la notion de mise en œuvre qui est une simple répétition du texte de la Charte, mais donne quelques indices d'exclusion tels que l'objectif de la mesure nationale et l'affectation seulement indirecte du droit de l'Union[8]. L'analyse du champ d'application est par nature dynamique et ne peut être établie qu'au cas par cas. Cette situation est perturbante pour les juridictions constitutionnelles qui avaient adopté des doctrines selon laquelle elles s'abstenaient d'intervenir en présence d'une harmonisation complète laissant jouer la primauté du droit de

[7] Arrêt du 8 novembre 2012, C-40/11 ; voir aussi l'arrêt du 6 mars 2014, *Siragusa*, C-206/13, ECLI:EU:C:2014:126.

[8] Voir l'étude de **Marek SAFJAN, Dominik DÜSTERHAUS et Antoine GUÉRIN** (*La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux, de la mise en œuvre à la mise en balance*, RTDeur, 2016, p. 219 qui illustre la diversité et la complexité des hypothèses dans lesquelles une mesure nationale peut entrer dans le champ d'application du droit de l'Union.

l'Union[9] ou qui conditionnaient leur abstention à l'existence d'une règle d'effet direct[10]. Désormais leur rôle est fonction du champ d'application de la Charte lié à celui du champ d'application du droit de l'Union qui se détermine au cas par cas. Les distinctions traditionnelles sont brouillées et le pouvoir de contrôle au regard des droits fondamentaux reconnus dans la constitution risque de se voir limité en lui substituant un contrôle au regard de la Charte dont le champ d'application est dynamique. Compte tenu de l'incertitude liée à la définition du champ d'application, le recours à l'un des catalogues de droits applicables (national ou Charte) n'est plus évident.

Cette remise en cause de certaines jurisprudences nationales est d'autant plus importante que la Cour juge que le champ d'application recouvre même des hypothèses dans lesquelles le droit de l'Union reconnaît aux États une marge d'appréciation. Déjà, dans l'arrêt *N.S.*, la Cour estimait que la clause de souveraineté du règlement Dublin qui permettait aux États de ne pas renvoyer un demandeur d'asile dans l'État d'entrée dans l'Union devait s'appliquer dans le respect de la Charte transformant ainsi la faculté de ne pas renvoyer en une obligation[11]. Cette solution a été confirmée par l'arrêt *Spiegel on line* : « il y a lieu de relever sur ce point que, dès lors que la transposition d'une directive par les États membres relève en tout état de cause de la situation, visée à l'article 51 de la charte des droits fondamentaux de l'Union européenne (ci-après la « Charte »), dans laquelle les États membres mettent en œuvre le droit de l'Union, le niveau de protection des droits fondamentaux prévu par la Charte doit être atteint lors d'une telle transposition, indépendamment de la marge d'appréciation dont disposent les États membres lors de cette transposition »[12], ce qui met à mal la conception visée sur le caractère complet ou non de l'harmonisation élaborée par la Cour constitutionnelle allemande puisque que, même en cas

[9] C'était le cas de la Cour constitutionnelle allemande depuis *Solange II*.

[10] C'était le cas de la Cour constitutionnelle italienne, voir *Granital*, 113/1985 et *Provincia di Bolzano*, 389/1989.

[11] Arrêt du 21 décembre 2011, C-411/10 et C-493/10.

[12] Arrêt du 29 juillet 2019, C-516/17.

d'harmonisation incomplète, la Charte peut être l'instrument de référence pour ce qui est laissé à la discrétion des États.

De même, l'effet direct reconnu par la Cour de justice à certaines dispositions de la Charte[13] pourrait avoir conséquence d'imposer aux juridictions italiennes d'utiliser celle-ci comme instrument de référence à la place des droits fondamentaux consacrés par la constitution puisque la jurisprudence de la Cour constitutionnelle impose le respect de la primauté pour les dispositions d'effets direct. Les réponses apportées par la Cour à la question du champ d'application contribue ainsi à étendre celui-ci et donc les effets de la Charte au détriment de l'application des droits fondamentaux reconnus par les juridictions nationales. Elle remet en cause la position des Cours constitutionnelles dans le cadre interne puisqu'elle fait échapper au contrôle de constitutionnalité des matières qui y étaient soumises ou tant au moins qu'elle rend incertaine la distinction entre les matières qui relèvent de ce contrôle et celles dont la conformité doit être appréciée par rapport à la Charte.

2. Les relations entre la Charte et le droit constitutionnel national mises en cause ?

Cette tendance à la remise en cause est renforcée par la réponse apportée par la Cour à la question des relations entre la Charte et le droit constitutionnel national. La question est régie par l'article 53 de la Charte qui dispose que les dispositions de celle-ci ne limitent pas les droits reconnus par les États membres

[13] Arrêt du 17 avril 2018, *Egenberger*, C-414/16 : « L'interdiction de toute discrimination fondée sur la religion ou les convictions revêt un caractère impératif en tant que principe général de droit de l'Union. Consacrée à l'article 21, paragraphe 1, de la Charte, cette interdiction se suffit à elle-même pour conférer aux particuliers un droit invocable en tant que tel dans un litige qui les oppose dans un domaine couvert par le droit de l'Union… D'autre part, il convient de souligner que, à l'instar de l'article 21 de la Charte, l'article 47 de celle-ci, relatif au droit à une protection juridictionnelle effective, se suffit à lui-même et ne doit pas être précisé par des dispositions du droit de l'Union ou du droit national pour conférer aux particuliers un droit invocable en tant que tel ». Voir aussi arrêt du 15 janvier 2014, *Association de médiation sociale*, C-176/12. L'affaire *Egenberger* a fait l'objet d'une recours individuel de constitutionnalité devant la Cour constitutionnelle allemande sur la base des dispositions de la Loi fondamentale relatives à l'organisation des églises.

dans leurs champs d'application respectifs. On aurait pu déduire de la référence aux champs d'application respectifs que seule la Charte était applicable dans le champ du droit de l'Union. Cette solution aurait totalement exclu le recours aux constitutions nationales. Ce n'est pas la voie choisie par la Cour qui a préféré une voie médiane. Le recours aux droits garantis par les constitutions nationales n'est pas exclu à condition que le niveau de protection assuré par la Charte soit respecté.

Cette ouverture est cependant limitée lorsque l'Union a mis en place un système uniforme de protection des droits fondamentaux. Dans ce cas, la règle nationale plus protectrice n'est pas applicable dès lorsparce qu'elle remettrait en cause la primauté. La seule exigence est que le niveau de protection uniforme soit conforme à celui imposé par la Charte, faute de quoi la mesure adoptée par l'Union serait invalide. Cette solution permet le jeu effectif de la confiance mutuelle puisque les États sont assurés que tous respectent un niveau au moins égal à celui de la Charte et que lorsque le droit de l'Union impose un régime uniforme conforme à la Charte, celui-ci sera respecté par tous.

C'est la solution retenue dans l'arrêt *Melloni*[14] dont le président de la Cour estime qu'elle ne tranche pas un conflit de droits concurrents, mais respecte le choix politique fait par le législateur s'il décide d'uniformiser la protection[15]. Cette solution est confirmée par l'arrêt *Jeremy F.* qui admet le recours à une règle constitutionnelle nationale plus protectrice en l'absence de

---

[14] Arrêt du 26 février 2013, C-399/11, § 63 : « Par conséquent, permettre à un État membre de se prévaloir de l'article 53 de la Charte pour subordonner la remise d'une personne condamnée par défaut à la condition, non prévue par la décision-cadre 2009/299, que la condamnation puisse être révisée dans l'État membre d'émission, afin d'éviter qu'une atteinte soit portée au droit à un procès équitable et aux droits de la défense garantis par la Constitution de l'État membre d'exécution, aboutirait, en remettant en cause l'uniformité du standard de protection des droits fondamentaux défini par cette décision-cadre, à porter atteinte aux principes de confiance et de reconnaissance mutuelles que celle-ci tend à conforter et, partant, à compromettre l'effectivité de ladite décision-cadre ».

[15] **Koen LENAERTS et José A. GUTIÉRREZ-FONS,** *Les méthodes d'interprétation de la Cour de justice dfe l'Union européenne*, Bruylant, 2020, voir en particulier p.149 et suivantes.

règles uniformes fixées par l'Union[16]. Le fait que dans certains cas, l'exigence de primauté amène à écarter les dispositions constitutionnelles nationales conduit à remettre en cause le pluralisme qui semblait admis avant Lisbonne au titre des traditions constitutionnelles commune.

L'affaire *Taricco*[17] qui a entrainé un vif débat dans la sphère juridique italienne illustre bien la sensibilité liée à l'acceptation du pluralisme en matière de droits fondamentaux. Sans entrer dans les détails de l'affaire, la question était de déterminer si les délais de prescription en matière de fraude à la TVA pouvaient être considérés comme conformes au droit de l'Union. La Cour de justice avait appliqué sa jurisprudence traditionnelle en indiquant que les sanctions liées à l'application du droit de l'Union devaient être effectives et dissuasives et qu'en l'absence harmonisation, il appartenait au juge national d'assurer le respect de cette règle et, le cas échéant, d'écarter la règle nationale contraire fixant un délai de prescription trop bref et qui ne peut être interrompu par de nouveaux actes d'instruction[18].

---

[16] Arrêt du 30 mai 2013, C-168/13 PPU, § 51-53 : « Il convient toutefois de constater que, indépendamment des garanties expressément prévues par la décision-cadre, l'absence de réglementation dans cette dernière d'un éventuel droit de reCours suspensif contre les décisions relatives au mandat d'arrêt européen n'empêche pas les États membres de prévoir un tel droit. En effet, en l'absence de plus amples précisions dans les dispositions mêmes de la décision-cadre et eu égard à l'article 34 UE, qui accorde aux instances nationales la compétence quant à la forme et aux moyens nécessaires afin d'atteindre le résultat voulu par les décisions-cadres, il convient de constater que la décision-cadre laisse aux autorités nationales une marge d'appréciation quant aux modalités concrètes de mise en œuvre des objectifs qu'elle poursuit, notamment en ce qui concerne la possibilité de prévoir un reCours suspensif à l'encontre des décisions relatives au mandat d'arrêt européen. À cet égard, il y a lieu de rappeler que, pour autant qu'il n'est pas fait échec à l'application de la décision-cadre, celle-ci n'empêche pas un État membre, ainsi que le relève le second alinéa de son considérant 12, d'appliquer ses règles constitutionnelles relatives, notamment, au respect du droit à un procès équitable ».

[17] Arrêt du 8 septembre 2015, C-105/14.

[18] La Cour notait cependant que le juge national devait prendre en compte les droits fondamentaux des personnes qui n'auraient pas été condamnées en application de la loi de prescription nationale et qui le seraient si la loi était écartée.

Cette solution divisa le monde judiciaire italien parce qu'en Italie, les règles relatives à la prescription font partie du droit pénal matériel et sont de ce fait soumises au principe de la légalité des délits et des peines ce qui implique la précision de la loi et la non rétroactivité . Or appliquer la solution dégagée par la Cour de justice imposait d'écarter une loi en vigueur pour un régime plus sévère et d'utiliser pour apprécier le caractère effectif et dissuasif de la législation nationale des critères déterminés par le seul juge et non établis par la loi. Sur ce point, l'Italie s'écartait de la majeure partie des États membres qui considèrent en accord avec la Cour européenne des droits de l'homme[19] que les règles de prescription ne sont pas soumises au principe de légalité qui ne trouve à s'appliquer qu'à la détermination des infractions et des sanctions, les règles relatives à la prescription n'étant que des règles de procédures soumises au principe tempus regit actum.

C'est la raison pour laquelle la Cour constitutionnelle et la Cour de cassation renvoyèrent chacune pour leur part une question préjudicielle, la question de la Cour constitutionnelle était fortement motivée et fondée sur le respect des principes suprêmes de l'ordre italien et des droits fondamentaux. Elle évoque la théorie des contre limites et l'identité constitutionnelle italienne.

Sans entrer dans le débat de fond relatif à la nature des règles de prescription, la Cour de justice admet que le juge national n'est pas tenu d'écarter les règles nationales dès lorsqu'elle seraient en conflit avec le principe de légalité des délits et des peines tel qu'il le conçoit[20]. Dans ce cas, la Cour renvoie la responsabilité du

[19] Arrêt du 22 juin 2000, *Coëme et autres c. Belgique*, § 145.

[20] Arrêt du 5 décembre 2017, *M.A.S. et M. B.*, C-42/17 § 59-60 : « Il en résulte, d'une part, qu'il incombe au juge national de vérifier si le constat requis par le point 58 de l'arrêt Taricco, selon lequel les dispositions du code pénal en cause empêchent l'infliction de sanctions pénales effectives et dissuasives dans un nombre considérable de cas de fraude grave portant atteinte aux intérêts financiers de l'Union, conduit à une situation d'incertitude dans l'ordre juridique italien, quant à la détermination du régime de prescription applicable, qui méconnaîtrait le principe de précision de la loi applicable. Si tel est effectivement le cas, le juge national n'est pas tenu de laisser inappliquées les dispositions du code pénal en cause. D'autre part, les exigences mentionnées au point 58 du présent arrêt font obstacle à ce que, dans des procédures concernant des personnes accusées d'avoir commis des infractions en matière de TVA avant le prononcé de l'arrêt Taricco, le juge national laisse

respect de l'ordre juridique communautaire au seul législateur italien[21] et dispense le juge national d'appliquer une loi contraire aux principes fondamentaux de l'ordre juridique italien. Ainsi, sans renoncer à la préservation du droit de l'Union, elle prend implicitement en considération les spécificités constitutionnelles italiennes[22].

B. La question de la double préjudicialité, source d'éventuels conflits

La jurisprudence de la Cour sur le champ d'application de la Charte multiplie les hypothèses dans lesquelles une mesure peut être testée à la fois tant au regard de la Charte qu'à celui de la constitution nationale. Face à une mesure entrant dans le champ d'application du droit de l'Union, le juge national ordinaire peut s'interroger sur sa compatibilité soit avec la Charte, soit avec la Constitution, soit avec les deux. Quel mécanisme de renvoi préjudiciel doit-il privilégier, l'appel à la Cour de justice ou l'appel à la cour constitutionnelle nationale ?

---

inappliquées les dispositions du code pénal en cause. En effet, la Cour a déjà souligné, au point 53 dudit arrêt, que ces personnes pourraient, en raison de la non-application de ces dispositions, se voir infliger des sanctions auxquelles, selon toute probabilité, elles auraient échappé si lesdites dispositions avaient été appliquées. Ainsi, lesdites personnes pourraient être rétroactivement soumises à des conditions d'incrimination plus sévères que celles en vigueur au moment de la commission ».

[21] « Si le juge national était ainsi amené à considérer que l'obligation de laisser inappliquées les dispositions du code pénal en cause se heurte au principe de légalité des délits et des peines, il ne serait pas tenu de se conformer à cette obligation, et ce même si le respect de celle-ci permettrait de remédier à une situation nationale incompatible avec le droit de l'Union (voir, par analogie, arrêt du 10 juillet 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, points 58 et 59). Il incombe alors au législateur national de prendre les mesures nécessaires, ainsi qu'il a été constaté aux points 41 et 42 du présent arrêt » – ibid, § 61.

[22] Sur les affaires *Taricco* et *M.A.S*, voir **Nicoletta PERLO,** *L'affaire Taricco, la voie italienne pour préserver la collaboration des juges dans l'Union européenne*, RTDeur 2017, p. 739. À la suite de l'arrêt *M.A.S.*, la Cour constitutionnelle italienne a jugé que la solution *Taricco* portait atteinte au principe de sécurité juridique qui revêt une valeur absolue en faisant ainsi un élément de l'identité constitutionnelle italienne, Jugement du 10 avril 2018, 115/2018.

Pour la Cour de justice, la préservation de son monopole d'interprétation et d'appréciation de validité des actes de l'Union est essentiel. Il s'agit d'éviter que le contrôle de constitutionnalité ne se substitue au contrôle par rapport aux traités. D'autre part, la clef de voute du système que constitue le pouvoir du juge national d'écarter une mesure nationale contraire doit à tout prix être préservée. Dans l'affaire *Melki*, la Cour a précisé que le caractère prioritaire de contrôle de constitutionnalité en France ne pouvait conduire à priver le juge national du droit d'adresser à tout moment une demande préjudicielle à la Cour de justice ou d'adopter des mesures provisoires ou encore de laisser inappliquée la mesure nationale contraire au droit de l'Union[23]. L'exercice prioritaire du contrôle de constitutionnalité ne doit pas priver la Cour de justice de son pouvoir exclusif d'interpréter les actes de l'Union ou d'apprécier leur validité. Or tel serait le cas si, dans le cadre d'un contrôle prioritaire, le juge constitutionnel déclarait inconstitutionnelle une loi de transposition d'une directive ne laissant aucune marge d'appréciation aux États membres. Dans ce cas, il serait porté atteinte à l'uniformité d'application du droit de l'Union. Un acte inconstitutionnel n'est pas nécessairement contraire au droit de l'Union et le principe d'application uniforme l'emporte. Aussi la Cour impose-t-elle dans ce cas que le juge constitutionnel avant de se prononcer fasse usage du renvoi préjudiciel parce que la question de validité au regard du droit de l'Union est préalable à celle de la constitutionnalité[24].

---

[23] Arrêt du 22 juin 2010, *Melki et Abdeli*, C-188 et 189/10.

[24] «Avant que le contrôle incident de constitutionnalité d'une loi dont le contenu se limite à transposer les dispositions impératives d'une directive de l'Union puisse s'effectuer par rapport aux mêmes motifs mettant en cause la validité de la directive, les juridictions nationales, dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, sont, en principe, tenues, en vertu de l'article 267, troisième alinéa, TFUE, d'interroger la Cour de justice sur la validité de cette directive et, par la suite, de tirer les conséquences qui découlent de l'arrêt rendu par la Cour à titre préjudiciel, à moins que la juridiction déclenchant le contrôle incident de constitutionnalité n'ait elle-même saisi la Cour de justice de cette question sur la base du deuxième alinéa dudit article. En effet, s'agissant d'une loi nationale de transposition d'un tel contenu, la question de savoir si la directive est valide revêt, eu égard à l'obligation de transposition de celle-ci, un caractère préalable. En outre, l'encadrement dans un délai strict de la durée d'examen par les juridictions nationales ne saurait

Mais la situation peut se présenter de manière différente. Dans l'affaire *Winner Wetten*[25], la Cour constitutionnelle avait censuré la législation relative au jeu du Land de Rhénanie-Nord Westphalie, mais en avait maintenu les effets pour une période limitée. La question posée à la Cour de justice était de savoir si ce maintien en vigueur provisoire pouvait persister au cas où la mesure en cause serait contraire au droit de l'Union. On se trouvait dans la situation que voulait éviter l'arrêt *Melki*, c'est-à-dire une décision sur la constitutionnalité d'une loi dans le champ d'application du droit de l'Union. La solution la plus simple eut été de purger le contentieux au regard du droit de l'Union et, si besoin, de statuer ensuite sur la conformité de la loi à la Constitution dans la seule mesure où l'État disposait d'une marge de manœuvre.

Mais ici, cette voie n'était pas ouverte puisque la Cour constitutionnelle s'était prononcée la première ce qui pouvait aboutir à laisser inappliquée la décision du juge constitutionnel en cas d'incompatibilité de la mesure nationale avec le droit de l'Union. Certes, en l'espèce, la Cour constitutionnelle allemande n'avait pas examiné la compatibilité avec le droit de l'Union estimant qu'elle n'avait pas compétence pour le faire. La législation était simultanément incompatible tant avec la loi fondamentale qu'avec le droit de l'Union et le problème résultait du maintien provisoire des effets de la loi. Or les exigences liées à l'unité et à l'efficacité du droit de l'Union exigeaient l'éviction immédiate de la législation en cause et il appartenait à la seule Cour de justice de décider si des considérations de sécurité juridique imposaient le maintien provisoire de ses effets. Dans la mesure où tel n'était pas le cas, comme en l'espèce, il convenait d'écarter les effets de la décision de la Cour constitutionnelle.

Une dernière hypothèse est celle dans lequel le droit national accorde une valeur constitutionnelle au droit de l'Union. Dans ce cas, le juge constitutionnel pourrait être amené à apprécier lui-même la validité d'une législation de transposition par rapport à la

---

faire échec au renvoi préjudiciel relatif à la validité de la directive en cause » – ibid. § 56.

[25] Arrêt du 8 septembre 2010, C-409/06.

constitution. Cette situation s'est présentée en Autriche[26] puisque la Cour constitutionnelle a placé la Charte des droits fondamentaux de l'Union européenne au rang constitutionnel[27]. Dès lors, le juge national est-il soumis à l'obligation de soumettre un recours incident de constitutionnalité à la Cour constitutionnelle dès lors qu'une question de conformité à la Charte d'une disposition impérative d'une directive reprise dans la loi de transposition est invoquée ? La réponse de la Cour de justice est dans la ligne de celle donnée dans les cas précédents[28]. Le juge national ne saurait être privé de son droit de former une demande préjudicielle à la Cour de justice et il n'appartient pas au juge constitutionnel de se prononcer à priori sur la validité d'une disposition impérative d'une norme de l'Union transposée dans la législation nationale faute de quoi serait mise en cause l'efficacité du droit de l'Union. Ce juge peut bien entendu saisir lui-même la Cour de justice d'une demande préjudicielle. Par contre, il retrouve sa liberté lorsque le droit de l'Union laisse une marge de manœuvre aux États membres

[26] Elle existe également en Belgique, voir Cour constitutionnelle belge, Arrêt n° 291/2018 du 15 mars 2018 qui accorde le même statut à la Convention européenne des droits de l'homme.

[27] Arrêt du 11 septembre 2014, *A. contre B. e. a.*, C-112/13.

[28] «Avant que le contrôle incident de constitutionnalité d'une loi dont le contenu se limite à transposer les dispositions impératives d'une directive de l'Union puisse s'effectuer par rapport aux mêmes motifs mettant en cause la validité de cette directive, les juridictions nationales, dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, sont, en principe, tenues, en vertu de l'article 267, troisième alinéa, TFUE, d'interroger la Cour de justice sur la validité de ladite directive et, par la suite, de tirer les conséquences qui découlent de l'arrêt rendu par la Cour à titre préjudiciel, à moins que la juridiction déclenchant le contrôle incident de constitutionnalité n'ait elle-même saisi la Cour de justice de cette question sur la base du deuxième alinéa dudit article. En effet, s'agissant d'une loi nationale de transposition d'un tel contenu, la question de savoir si la directive est valide revêt, eu égard à l'obligation de transposition de celle-ci, un caractère préalable (arrêt *Melki et Abdeli*, EU:C:2010:363, § 56). Par ailleurs, lorsque le droit de l'Union accorde aux États membres une marge d'appréciation dans le cadre de la mise en œuvre d'un acte du droit de l'Union, il reste loisible aux autorités et aux juridictions nationales d'assurer le respect des droits fondamentaux garantis par la Constitution nationale, pourvu que l'application des standards nationaux de protection des droits fondamentaux ne compromette pas le niveau de protection prévu par la Charte, telle qu'interprétée par la Cour, ni la primauté, l'unité et l'effectivité du droit de l'Union (voir, en ce sens, arrêt *Melloni*, C-399/11, EU:C:2013:107, § 60).

à condition que le niveau de protection offert par la constitution ne soit pas inférieur à celui garantit par la Charte puisque l'on se situe dans le champ d'application du droit de l'Union.

En résumé, l'existence d'une double préjudiciabilité ne saurait en aucun cas limiter le pouvoir du juge national de faire usage du renvoi préjudiciel à la Cour de justice avant la saisine de la Cour constitutionnelle ou après la décision de celle-ci. Si la Cour constitutionnelle se prononce en priorité, elle ne saurait statuer sur la validité d'une mesure de l'Union ayant un caractère impératif sans avoir saisi elle-même la Cour de justice. Enfin, il est toujours possible à la Cour constitutionnelle d'examiner la mesure nationale au regard de la constitution si le droit de l'Union laisse à l'État une marge d'appréciation, mais dans le seul cadre de cette marge et à condition que ne soit pas retenu un niveau de protection inférieur au standard garanti par la Charte.

La jurisprudence de la Cour de justice tant sur la Charte que sur la double priorité ne pouvait manquer d'avoir un impact sur les Cours constitutionnelles. Aux incertitudes liées au champ d'application, viennent s'ajouter les recoupements entre les droits contenus dans la Charte et ceux qui résultent du droit constitutionnel national. Ils portent, sans exclure l'existence de dispositions spécifiques nationales, sur des droits qui sont largement communs, mais peuvent faire l'objet d'appréciations différentes dans leur application. En ce domaine, la double préjudiciabilité peut engendrer une compétition entre les juges ordinaires et les Cours constitutionnelles ainsi qu'entre ces dernières et la Cour de justice. Dans ces conditions, il n'est pas surprenant que l'aggiornamento opéré par la Cour de justice engendre des réactions en retour des Cours constitutionnelles.

II. La réponse apportée par les Cours constitutionnelles à la jurisprudence de la Cour de justice

L'évolution est principalement le fait des Cours allemande[29] et italienne[30], ce qui n'est pas surprenant puisque, dans des systèmes dualistes, l'effort pour régler les rapports de système entre le droit national et le droit de l'Union a toujours été primordial, la reconnaissance de la primauté n'allant pas naturellement de soi. Jusqu'à présent, cette évolution porte moins sur des questions de validité du droit de l'Union[31] que sur l'application de

[29] Dans deux décisions rendues le même jour et consacrés au droit à l'oubli en matière de protection des données, Décisions du 6 Novembre 2019, **Bundesverfassungsgericht,** 1 BvR 7/13 et 1 BvR 276/17. Parmi la nombreuse littérature consacrée à ces décision, on retiendra notamment **Paul FRIEDL,** *A New European Fundamental Rights Court: The German Constitutional Court on the Right to Be Forgotten, European Papers*, 24 mars 2020 **; *Klaus Ferdinand GÄRDITZ,*** *Grundrechts-mobile staat starrer Kompetenz-schichten, Die Beschlüsse des BVerfG in Recht auf Vergessenwerden I & II, Verfassungsblog, 19 janvier 2020* ; **Sara GEIGER,** *Allemagne : césure jurisprudentielle en matière de protection des droits fondamentaux européens*, à paraître RTDeur 2020 ; **Lucia Serena ROSSI,** *Il "nuovo corso" del Bundesverfassungsgeright nei ricorsi diretti di constituzionalità: bilanciamento fra diritti confliggenti e applicazione del diritto dell'Unione*, Federalismi.it, 5 Février 2020, la version anglaise a été publiée sur le blog EU Law Analysis, 16 avril 2020.

[30] Dans deux arrêts successifs, le second corrigeant le premier, Arrêt du 7 novembre 2017, 269/17 et arrêt du 23 janvier 2019, 20/19. Parmi la très nombreuse littérature consacrée à ces arrêts, lire **D. GALLO,** *Challenging EU constitutional law: The Italian constitutional Court's new stance on direct effect and the preliminary reference procedure*, Eur Law J. 2019, p. 1 ; **G. MARTINICO,** *Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order*, International Journal of Constitutional Law, 2012, p. 871 ; **O. POLLICINO,** *Not to be pushed aside, The Italian Constitutional Court and the European Court of Justice*, Verfassungsblog, 27 février 2019 ; **N. PERLO,** *L'affaire Taricco : la voie italienne pour préserver la collaboration des juges dans l'Union européenne*, RTDeur 2017, p. 739, et du même auteur, *Dualisme adieu ? La nouvelle configuration des rapports entre les ordres italien et de l'Union en matière de droits fondamentaux. Les suites effervescentes de l'affaire Taricco*, RTDeur 2020.

[31] Les questions de validité ont été appréciées sous l'angle des contre limites (*ultra vires*) par la Cour constitutionnelle allemande dans le jugement du 5 mai 2020, précité note 3, et notamment de l'identité nationale dans l'ordonnance de renvoi dans l'affaire *M.A.S.* par la Cour constitutionnelle italienne (décision du 23 novembre 2016).

celui-ci en droit interne et plus particulièrement sur l'exercice qui consiste à effectuer une balance entre différents droits. La protection des données personnelles constitue un des domaines privilégiés où doivent être mis en balance la protection de la vie privée, la liberté d'expression, la protection de la propriété intellectuelle et la liberté d'entreprise. Ces questions sont à l'origine d'un contentieux important tant devant la Cour de justice que devant les juridictions nationales. Il n'est donc pas surprenant qu'il s'agisse du domaine principal dans lequel s'est manifesté l'effort de reconstruction ou de rationalisation des jurisprudences nationales. Si ces jurisprudences diffèrent en fonction des visions nationales sur les rapports de système, elles reposent sur des préoccupations communes visant à préserver le rôle des Cours dans le cadre d'un système qu'elles veulent pluralistes.

A. Garantir le rôle central des Cours constitutionnelles dans un cadre pluraliste

Pour les Cours constitutionnelles allemande et italienne, la Charte vient bouleverser le système des rapports entre droit interne et droit de l'Union. Auparavant, en application de l'article 6 TUE, la conformité des règles nationales au droit de l'Union était appréciée au regard des traditions constitutionnelles nationales, ce qui laissait une place à la reconnaissance d'un certain pluralisme dans lequel s'inséraient les spécificités constitutionnelles nationales. Ainsi, dans l'arrêt *Omega*[32], la Cour de justice avait reconnu les exigences allemandes quant à la protection de la dignité humaine, principe que reconnaît également le droit communautaire, bien qu'elles soient plus exigeantes que celle des autres États membres dès lors qu'elles respectaient le principe de proportionnalité[33]. C'est à la survie de ce régime que semblent s'attacher les Cours constitutionnelles.

1. Réaffirmer le pluralisme

Dès lors que l'on est en présence d'un instrument comme la Charte qui énumère les droits et fixe leur régime, la diversité of-

[32] Précité, note 4.
[33] Arrêt du 14 octobre 2004, C-36/02.

ferte par le recours aux traditions constitutionnelles communes n'est plus assurée puisque le seul texte de la Charte suffit. On n'est plus en présence que de deux instruments, l'un national, l'autre de l'Union qui se recoupent et peuvent donc diverger sur certains droits. Compte tenu du champ d'application de la Charte qui coïncide avec celui du droit de l'Union, la primauté peut aboutir à écarter les règles nationales de protection, même dans des domaines où le droit de l'Union offre une liberté d'appréciation aux États membres. Aussi la Cour constitutionnelle italienne constate-t-elle qu'en raison des recoupements entre les droits et principes consacrés par la Charte et les droits et principes qui résultent de la Constitution italienne, l'examen d'une mesure peut relever à la fois de la Charte et de la Constitution[34]. Pour la Cour constitutionnelle allemande, la Charte et la loi fondamentale constituent deux régimes juridiques distincts, car on ne peut affirmer que la Charte institue un cadre identique à celui reconnu par la Loi fondamentale en raison notamment de la diversité des expériences nationales et de l'identité des États membres, la Convention européenne des droits de l'homme constituant le seul niveau commun[35].

Face à cette situation, le seul remède réside pour les deux Cours dans l'affirmation du pluralisme. Cette voie a été explorée dans la doctrine italienne par Maria Cartabia, vice-présidente de

[34] "Granted the principles of the primacy and direct effect of European Union law as consolidated in both European and constitutional case law, it bears considering that the aforementioned Charter of Rights is a part of Union law that is endowed with particular characteristics due to the typically constitutional stamp of its contents. The principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions). It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter, as recently occurred in reference to the principle of the legality of crimes and punishments (European Court of Justice, Grand Chamber, Judgment of 5 December 2017, case C-42/17, *M.A.S., M.B.*)". Arrêt du 7 novembre 2017, 269/2017, traduction de l'italien publiée par la Cour constitutionnelle.

[35] Décision du 6 novembre 2019, **Bundesverfassungsgericht,** 1 BvR 14/13.

la Cour constitutionnelle italienne[36] et dans la doctrine allemande notamment par Ingo Pernice[37]. L'accent est mis sur l'article 53 de la Charte et particulièrement sur la référence aux traditions constitutionnelles nationales qu'il contient. Cette importance du pluralisme est affirmée avec force par la Cour constitutionnelle italienne qui indique que dans les cas de recoupements entre la Charte et la Constitution, elle se prononcera avec l'objectif d'assurer que la Charte est interprétée de manière compatible avec les traditions constitutionnelles nationales mentionnées à l'article 6 TUE et à l'article 52, paragraphe 4, de la Charte[38] bien que ce dernier article constitue une règle d'interprétation adressée, dans l'esprit des auteurs de la Charte, à la Cour de justice seule compétente pour interpréter la Charte et non aux juridictions nationales[39]. La Cour constitutionnelle allemande se fait également l'avocate du pluralisme qu'elle fonde sur le fait que les droits garantis par la Charte et la Loi fondamentale s'enracinent dans la même tradition de protection des droits fondamentaux, sur le principe de subsidiarité et sur l'article 51, paragraphe 1, qui rappelle au respect des compétences d'attribution. Elle en conclut que lorsque le droit de l'Union laisse une marge d'appréciation aux États membres, les droits fondamentaux doivent servir de base à son examen même si la Charte est applicable en vertu de la jurisprudence *Fransson*[40].

2. Préserver le rôle central du juge constitutionnel

Pour garantir cette vision pluraliste, les Cours sont conduites à affirmer leur rôle central en leur qualité de juge des droits fon-

---

[36] *Convergenze e divergenze nell'interpretazione delle clausole finale della Carta dei diritti fondamentali dell'Unione europea*, Rivista dell'Associazione italiania di constituzionalisti, 16 juillet 2017, n° 3/2017.

[37] **Ingo PERNICE et Ralf KANITZ,** *Fundamental Rights and Multilevel Constitutionnalism in Europe*,Walter Hallstein-Institut für Europaïsches Verfassungsrecht, Humboldt-Universtät zu Berlin, WHI Paper 7/04.

[38] Arrêt 269/2017 précité, cette affirmation est répétée dans l'arrêt du 23 janvier 2019, 20/2019.

[39] Ce paragraphe ne figurait pas dans la version originaire de la Charte et a été ajouté par la Convention qui a élaboré le projet de traité établissant une constitution pour l'Europe à la demande notamment du Royaume-Uni.

[40] Cité note 6.

damentaux. Les raisons données par les juges constitutionnelles sont diverses, mais, au fond, il s'agit de préserver leur position hiérarchique dans le système interne. En effet, par le biais de la question préjudicielle, les juges ordinaires ont la faculté de faire arbitrer d'éventuels conflits en matière de droits fondamentaux par la Cour de justice ce qui altère l'autorité du juge constitutionnel dans le contexte national. Ainsi, dans l'affaire *Taricco*, la Cour de justice a statué à la demande du juge de Lucca qui, comme en atteste, la longue justification de sa question préjudicielle entendait remettre en cause la législation italienne sur la prescription adoptée pour protéger le premier ministre Berlusconi. Le détour par la Cour de justice était en grande partie un artifice pour atteindre cet objectif même si le litige avait un rapport avec le droit de l'Union. Dans ce type de cas, le juge constitutionnel national se voit frustré de son rôle central de garant des droits fondamentaux inscrits dans la Constitution au profit de la Cour de justice statuant sur la base de la Charte. C'est cette voie transversale qu'il s'agit de fermer. Dans l'arrêt 269/2017, la Cour constitutionnelle rappelle que l'existence d'un système centralisé de contrôle juridictionnel est à la base de la structure constitutionnelle nationale. De plus, le renvoi préjudiciel opéré par le juge ordinaire n'aboutit pas à purger l'inconstitutionnalité en raison de son effet relatif tandis que ses propres jugements ont un effet *erga omnes*. C'est pourquoi, dans les cas dans lesquels la Charte et la Constitution sont impliquées, la priorité devrait être donnée par le juge ordinaire à la question de constitutionnalité et, compte tenu de l'obligation loyale de coopération avec la Cour de justice, la Cour constitutionnelle manifeste son intention, si le besoin s'en faire sentir, de poser elle-même une question préjudicielle à la Cour de justice.

Par une voie différente, la Cour constitutionnelle allemande arrive au même résultat. La solution retenue auparavant était de laisser le juge ordinaire faire un renvoi préjudiciel et au cas où il s'abstenait de le sanctionner en application du droit au juge naturel. Mais, en raison du changement intervenu avec la Charte, lorsqu'un litige à propos de mesures nationales d'application du droit de l'Union concerne les droits garantis par la

Charte, la Cour décide qu'elle assurera elle-même leur respect notamment par le biais du recours constitutionnel individuel (*Verfassungsbeschwerde)*. La Cour note que sa jurisprudence précédente s'appliquant à la validité du droit de l'Union, il ne s'agit donc pas d'un retour sur celle-ci puisqu'il s'agit ici de l'application de la Charte au regard des droits fondamentaux. Elle appuie cette démarche sur le fait que l'article 23 de la Loi fondamentale impose aux autorités publiques allemandes de concourir à la réalisation de l'intégration européenne et que cette obligation s'applique également à elle. À ce titre, elle contribue à l'intégration européenne. En outre, le système ancien, fondé sur le renvoi préjudiciel à la Cour de justice, comportait une lacune quant à la protection juridictionnelle puisque les particuliers ne pouvaient contester directement une violation de leurs droits devant le juge de l'Union en raison des limitations apportées par les traités au recours en annulation. La nouvelle jurisprudence vient combler cette lacune en confiant cette protection à la Cour constitutionnelle qui étant saisie directement pourra contribuer au respect de la Charte. Ainsi, dans tous les cas, où le droit de l'Union n'offre aucune marge de manœuvre aux États, le contrôle sera exercé par la Cour constitutionnelle sur la base des droits garantis par l'Union dans le respect de la Cour de justice qui est l'interprète final de ce droit et qui pourra être saisie par la voie du renvoi préjudiciel[41]. De même, lorsque le droit de l'Union laisse une marge de manœuvre aux États, le contrôle sera effectué également par la Cour constitutionnelle, mais cette fois-ci sur la base des droits garantis par la Loi fondamentale[42].

Ainsi, dans un double mouvement, le contrôle de la Charte est centralisé entre les mains des cours constitutionnelles allemande et italienne lesquelles favorisent vision pluraliste qui doit concilier la Charte et les traditions constitutionnelles nationales et surtout celle des États dans lesquels chaque Cour intervient. Cette nouvelle vision appelle une adaptation des procédures de contrôle.

---

[41] **Bundesverfassungsgericht,** 1 BvR 276/17 précité.

[42] Arrêt du 6 novembre 2019, 1 BvR 16/13.

B. L'adaptation des procédures de contrôle

Au vu de leur « nouvelle » jurisprudence, les deux Cours constitutionnelles ont été appelées à préciser leurs modalités d'intervention ainsi que la place qu'ils réservaient au juge ordinaire lorsqu'ils se trouvaient en situation de double préjudiciabilité. Sur le premier point, les situations diffèrent tandis que sur le second, après des hésitations, elles se sont rapprochées.

1. La rationalisation des méthodes d'intervention des Cours constitutionnelles

S'agissant des modalités d'intervention, la Cour constitutionnelle italienne se reconnaît compétente pour se prononcer dans une matière couverte par le droit de l'Union sur le respect des droits fondamentaux garantis par la Constitution. Elle statue sur la base des dispositions constitutionnelles nationales et de la Constitution et, le cas échéant, également sur le droit de l'Union en fonction de ce qui est le plus approprié[43]. Cette intervention de la Cour constitutionnelle n'interdit pas à celle-ci de s'adresser à la Cour de justice par la voie préjudicielle s'il est besoin d'interpréter, voire d'apprécier la légalité, du droit de l'Union aux fins de son propre examen. En atteste le renvoi adressé à la Cour de justice à propos du droit au silence devant la CONSOB (Commissionne nazionale per le societa et la Borza). La Cour constitutionnelle devait décider si le fait d'infliger des sanctions à une personne qui garde le silence pour ne pas s'incriminer dans le cadre d'une procédure administrative est conforme à la Constitution. À cette fin, elle demande à la Cour de justice d'interpréter la réglementation de l'Union sur les abus de marché afin de vérifier s'ils permettent de recourir au droit au silence dans le cadre de procédures administratives conduisant à des sanctions pu-

[43] « This Court's opportunity to intervene with *erga omnes* effect must be preserved, by virtue of the principle that places centralized review for constitutionality at the bedrock of the constitutional architecture (Article 134 of the Constitution), specifying that, in these cases, the Constitutional Court will make a judgment in light of internal constitutional provisions, and, if applicable, European ones as well (per Articles 11 and 117(1) of the Constitution), in accordance with whichever system is most appropriate to the specific case", Arrêt 20/2019, précité.

nitives et, si tel n'est pas le cas, de statuer sur la validité de cette réglementation au regard de l'article 47 de la Charte[44]. La Cour constitutionnelle ne met pas en cause la volonté de collaboration et le dialogue avec la Cour de justice, mais elle veut conserver un rôle central dans le processus. Cette jurisprudence s'applique en cas de litiges mettant en cause la Constitution et la Charte, les juges ordinaires conservant la possibilité de d'écarter la loi nationale pour les normes de l'Union directement applicables dans les autres cas.

La solution allemande est plus complexe. Elle distingue entre les cas dans lesquels existe une harmonisation totale, encore qu'il vaudrait peut-être mieux parler de domaines entièrement couverts par des règles impératives de l'Union, et ceux qui laissent un marge de manœuvre aux États membres. Lorsque le domaine est complètement harmonisé, la Cour constitutionnelle, saisie d'un recours constitutionnel direct, affirme son respect de la primauté du droit de l'Union. Elle se prononcera sur la base des droits fondamentaux reconnus par l'Union dans le respect du principe de coopération étroite avec la Cour de justice dont elle reconnaît l'autorité finale pour l'interprétation du droit de l'Union. Elle la saisira d'un renvoi au cas où une interprétation du droit de l'Union serait nécessaire ou si la solution ne résulte pas également des principes d'interprétation, par exemple, fondés sur la jurisprudence de la Cour européenne des droits de l'homme. Ceci n'exclut pas la réserve classique relative aux droits fondamentaux, mais la Cour reproduit la constatation de l'arrêt *Solange II* selon laquelle le niveau de protection offert par l'Union est comparable à celui offert par la loi fondamentale[45]. Par contre,

[44] Ordonnance de la Cour constitutionnelle du 6 mars 2019, affaire C-481/19. La Cour de Cassation qui est à l'origine de la saisine préjudicielle de la Cour constitutionnelle avait indiqué qu'après le jugement de cette Cour, elle saisirait la Cour de justice d'un renvoi préjudiciel et la Cour constitutionnelle lui a épargné cette peine en opérant elle-même ce renvoi, ce qui confirme sa volonté d'exercer un contrôle centralisé tant sur la constitutionnalité que sur la conformité du droit de l'Union à la Charte. Cependant la Cour laisse planer le doute sur une possible invocation des contre limites puisqu'elle précise que le droit au silence fait partie des droits inaliénables qui caractérisent l'identité constitutionnelle italienne.

[45] Décision du 22 octobre 1986, BvG 73, 339.

lorsque le droit de l'Union laisse une marge de manœuvre aux États membres, le contrôle s'exercera sur la base de la Loi fondamentale même si la Charte peut être applicable. Ceci ne devrait pas poser de problèmes puisque la Cour observe que le niveau de protection est généralement équivalent. Mais il s'agit d'une présomption qui peut être renversée s'il est établi que le droit de l'Union exige un niveau plus élevé. Cependant la Cour se montre exigeante sur ce point qui requiert des « indications spécifiques et suffisantes ». Celles-ci peuvent résulter du texte même de la disposition applicable du droit de l'Union et du contexte législatif, une seule référence générale dans le texte au respect de la Charte n'étant pas suffisante. Ce peut être également le cas si la loi fondamentale ne garantit pas le droit en question ou le protège à un niveau inférieur. Dans ces cas, la Cour incorporera celui-ci dans son contrôle sous réserve d'un éventuel renvoi préjudiciel à Luxembourg en présence de difficultés d'interprétation.

Deux questions méritent cependant d'être soulevées. Tout d'abord la référence à la jurisprudence de la Cour européenne des droits de l'homme pour décider de la nécessité d'adresser une question préjudicielle à la Cour de justice peut être problématique en raison des divergences possibles d'interprétation entre les deux Cours. L'expérience a montré que le risque, pour n'être pas fréquent, existait, comme par exemple en ce qui concerne le principe *non bis in idem*. Ensuite qui déterminera si un domaine est entièrement couvert par droit de l'Union ? Le seul appel à une harmonisation complète n'est pas suffisant comme en atteste le principe de non-discrimination ou celui de la reconnaissance mutuelle qui peuvent trouver à s'appliquer en l'absence d'une harmonisation complète. Dans ces cas, il faut espérer que la Cour ne substituera pas son appréciation à celle de la Cour de justice portant ainsi atteinte au monopole d'interprétation de cette dernière[46].

[46] Avec cette prise en considération des domaines dans lesquels le droit de l'Union laisse une marge d'appréciation, mais auxquelles la Charte peut s'appliquer, la Cour constitutionnelle devrait être plus à l'aise avec la jurisprudence *Fransson* sur laquelle elle avait exprimé des réserves en estimant qu'il s'agissait d'un cas d'espèce, Arrêt du 23 avril 2013, **Bundesverfassungsgericht,** 1 BvR 1215/07.

Deux Cours, deux méthodes. Pour la Cour italienne, la volonté de centralisation des contrôles et d'application d'une optique pluraliste l'amène à intervenir dans toutes les hypothèses dans lesquelles une mesure nationale se situe dans le champ d'application du droit de l'Union et où une question relative à la protection des droits fondamentaux se pose. Pour la Cour allemande, la marge de manœuvre laissée aux États détermine les paramètres d'un contrôle que l'on souhaite centralisé. En l'absence d'une telle marge, le contrôle se fait principalement sur la base de la Charte au vu des traditions constitutionnelles communes. Lorsqu'une telle marge existe, le contrôle repose sur la Loi fondamentale, mais peut se faire sur la base du droit de l'Union lorsque celui contient des dispositions spécifiques. Mais cette centralisation interdit-elle aux juridictions ordinaires d'avoir recours à la Cour de justice dans le respect de la jurisprudence *Melki* lorsqu'elles l'estiment nécessaire ? C'est tout le problème de la double préjudiciabilité.

2. S'accommoder de la double préjudicialité

La volonté de centraliser le contrôle du respect des droits fondamentaux entre les mains des Cours constitutionnelles se heurte à la jurisprudence de la Cour de justice qui impose que soit maintenue la liberté du juge national d'adresse à tout moment un renvoi préjudiciel à Luxembourg. Accorder une priorité à l'examen de la constitutionnalité heurte de plein fouet les facultés et les obligations qui résultent de l'article 267 TFUE. Il a fallu faire preuve d'une certaine ingéniosité pour concilier la centralisation nationale du contrôle et le respect de l'article 267.

Dans ce domaine, c'est sans doute la Cour constitutionnelle italienne qui a eu le plus de difficultés à réaliser cette conciliation. La première tentative prend la forme d'un *obiter dictum* dans l'arrêt 269/17. En effet, l'affaire ne concernait pas le droit de l'Union, mais une situation purement interne, et les considérations de la Cour contenues dans ce passage de l'arrêt n'étaient pas nécessaire à la résolution du cas sous examen. Après avoir, comme il a été dit plus haut avoir souligné la nécessité de la saisir afin d'obtenir une décision opposable *erga omnes* sur la constitutionnalité de

la loi lorsque se pose simultanément la question du respect des droits fondamentaux garantis tant par la Constitution que le droit de l'Union, la Cour n'exclut pas le renvoi préjudiciel par le juge ordinaire après sa propre décision. Cependant elle indique que ce renvoi préjudiciel porte « pour d'autres motifs »[47] sur les questions qui ont survécu à son examen constitutionnel. Cette formulation implique qu'il ne serait pas possible de revenir sur les questions déjà examinées par la Cour constitutionnelle. Ainsi l'arrêt rendu par la Cour constitutionnelle ne pourrait faire l'objet d'un examen de la Cour de justice même s'il n'est pas conforme à la jurisprudence *Melloni*. La Cour prétend qu'une telle restriction serait conforme à l'arrêt *Melki* de la Cour de justice puisqu'elle laisse en place la possibilité d'un renvoi préjudiciel, mais en fait son objet serait limité aux questions non tranchées par elle. Est-ce pour cette raison que la Cour de justice a rappelé à peine trois mois après l'arrêt de la Cour constitutionnelle sa jurisprudence[48] en disant pour droit que « l'article 267, paragraphe 3, TFUE doit être interprété en ce sens que la juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel est tenue, en principe, de procéder au renvoi préjudiciel d'une question d'interprétation du droit de l'Union même si, dans le cadre de la même procédure nationale, la Cour constitutionnelle de l'État membre concerné a apprécié la constitutionnalité des règles nationales au regard des normes de référence d'un contenu analogue à celles du droit de l'Union ». Il va sans dire que, soucieux de préserver leur possibilité de saisir la Cour de justice, les juridictions italiennes n'ont pas adhéré aux principes dégagés par la Cour constitutionnelle. Dans la mesure où ils émanaient d'un *obiter dictum*, elles les ont tout au plus considérés comme constituant une proposition de méthode ne s'imposant pas strictement[49].

[47] En italien : « per altri profili ».

[48] Arrêt du 20 décembre 2017, *Global Starnet,* C-322/16.

[49] « Questa Corte ritiene non opportuno … seguire l'impostazione di cui alla sentenza n. 269/2017 della Corte costituzione (e quindi sollevare incidente di costituzionalità sul punto) in quanto in primo luogo la Corte ha già seguito la strada del rinvio pregiudiziale per valutare la compatibilità della normativa interna con il diritto dell'Unione cui la Corte di giustizia ha dato una univoca

La Cour constitutionnelle n'est pas restée sourde à cet appel. Dans son arrêt du 23 janvier 2019, elle atténue sa position. Le renvoi pour examen de la constitutionnalité n'est plus une exigence prioritaire, il devient une simple opportunité. Ainsi, la Cour indique que l'opportunité pour elle « d'intervenir avec un effet *erga omnes* doit être préservée en vertu du principe qui place l'examen centralisé de la constitutionnalité à la base de l'architecture constitutionnelle »[50]. Quant au renvoi préjudiciel à Luxembourg, l'arrêt reconnaît que les juges peuvent y avoir recours pour toutes les questions qu'ils jugeront nécessaires. Bien entendu, la Cour est consciente du risque que pourrait entrainer une divergence d'appréciation entre une appréciation de constitutionnalité et un arrêt préjudiciel rendu par la Cour de justice. C'est pourquoi dans l'arrêt 269/17, elle mettait l'accent sur la coopération des juges, ce qui implique qu'elle-même utilise la voie préjudicielle pour être éclairée sur l'interprétation ou la validité du droit de l'Union[51]. La conformité de la situation italienne au droit de l'Union semble rétablie puisque le juge ordinaire peut faire jouer l'opportunité de saisir la Cour constitutionnelle ce qui

---

risposta positiva cui si tratta dì dare effettività nel rispetto del principio costituzionale (e sovranazionale) del giusto processo, cui è demandato il giudice di merito….In secondo luogo ritiene che il principio affermato nel punto 5.2 della citata sentenza (discussa in dottrina per i suoi effetti in ordine all'immeditato e tempestivo esercizio dei poteri che al Giudice ordinario attribuisce l'ordinamento dell'Unione onde garantire una pronta effettività ai diritti che sono garantiti a livello sovranazionale) costituisca un mero obiter dictum, in quanto la sentenza è (sul punto) di inammissibilità e sotto altro profilo di rigetto e quindi non ha natura obbligante per il Giudice ordinario offrendo solo una proposta metodologica ». Cour de cassation italienne, arrêt du 17 mai 2018, n°12108. Pour plus de développements sur cette « révolte » des juges, voir Nicoletta Perlo, *Dualisme adieu ? La nouvelle configuration des rapports entre les ordres italien et de l'Union en matière de droits fondamentaux. Les suites effervescentes de l'affaire Taricco*, RTDeur, à paraître.

[50] Arrêt 20/2 à 19, traduction de l'auteur.

[51] Ce qu'elle a fait dans l'affaire C-481/19 actuellement à l'examen devant la Cour de justice. Cette affaire est révélatrice de la démarche suivie par la Cour constitutionnelle italienne. Elle concernait le droit au silence dans des procédures pouvant conduire à des sanctions administratives si lourdes qu'elles revêtent un caractère pénal. La Cour de justice suit la voie suggérée par la Cour constitutionnelle et reconnaît le droit au silence en étant obligée pour ce faire d'interpréter, *a contrario* pourrait-on dire, le droit dérivé de l'Union en conformité avec la Charte.

ne l'empêchera après le jugement de cette Cour de saisir la Cour de justice et d'écarter ensuite la loi contraire au droit de l'Union quelle qu'ait été l'appréciation de constitutionnalité. Il pourra également saisir la Cour de justice en priorité.

La situation en Allemagne est plus simple puisque les arrêts ont été rendus sur des recours constitutionnels lesquels ne peuvent être ouverts qu'après épuisement des voies de recours existantes devant les tribunaux ordinaires. Ces derniers auront la faculté ou l'obligation s'ils statuent en dernier ressort de saisir la Cour de justice. S'en seraient-ils abstenus, la Cour constitutionnelle s'est déclarée prête à saisir la Cour de justice d'un renvoi. Cependant, un problème pourrait naître si la Cour, manifestant une volonté de contrôle complet des droits fondamentaux, décidait d'étendre sa jurisprudence à tous les cas dans lesquels la Charte est invoquée devant une juridiction ordinaire. Mais tel n'est encore pas le cas.

Conclusion

Ces nouvelles jurisprudences des juges constitutionnels peuvent être considérées comme constituant un progrès en ce sens que les droits fondamentaux garantis par la Charte deviennent des paramètres du contrôle de constitutionnalité. Il convient de saluer cette ouverture au droit de l'Union. Cependant, l'approche suivie est pluraliste et ne repose pas uniquement sur la Charte, mais aussi sur les traditions constitutionnelles nationales et la Convention européenne des droits de l'homme. Il n'est pas certain que ce patchwork réponde toujours à l'analyse de la Charte menée par la Cour de justice. D'un autre côté, ces jurisprudences consacrent la volonté des Cours constitutionnelles de devenir l'instrument central du contrôle du respect des droits fondamentaux comme elles le sont dans le cadre purement interne. Cette approche conduit à discipliner les juridictions ordinaires lorsqu'elles sont appelées à statuer sur des litiges qui impliquent un examen des droits garantis au niveau de l'Union. Poussée à l'extrême, cette revendication de l'exclusivité du contrôle aurait pu conduire à priver le juge ordinaire du pouvoir de faire un renvoi préjudiciel à Luxembourg. Tel n'est pas le cas pour le moment au prix d'une inflexion de la position de la Cour italienne, mais on peut pense

que l'évolution n'est pas terminée. Des réponses ne peuvent être apportées par la Cour de justice qu'au prix d'une démarche qui prend en compte le pluralisme et par les Cours constitutionnelles nationales qu'au prix du maintien d'un dialogue approfondi avec la Cour de justice dans le cadre du respect de la primauté. Mais il est vrai que, s'agissant particulièrement des droits de l'homme, les Cours nationales disposent de l'arme nucléaire que constitue l'invocation de l'identité constitutionnelle nationale. Celle-ci peut jouer comme instrument de dissuasion, mais son emploi risque de non seulement de ruiner l'équilibre du système comme en atteste l' arrêt de la Cour constitutionnelle allemande du 5 mai 2020, mais aussi de servir de justification à des États où le respect de l'État de droit ne constitue pas une priorité.

DISCREPANCIES IN THE CONSTITUTIONAL COURT'S JURISPRUDENCE

Yanaki Stoilov

I. The problem of discrepancies in constitutional courts' jurisprudence

The problem of discrepancies in jurisprudence is a focus of both the theory of law and of the justice administering authorities. The operation of courts is coordinated within a hierarchy topped by a supreme court. Article 124 and Article 125 (1) of the Constitution of the Republic of Bulgaria entrust the Supreme Court of Cassation and the Supreme Administrative Court with the exercise of oversight as to the accurate and uniform application of the laws. Certain categories of cases, however, are not subject to review by a supreme court. Even when such review is exercised, there are cases where different supreme court panels hand down conflicting judgments on similar matters. For these two reasons, the accurate and uniform application of the law in some judgments is questionable. Therefore, a special mechanism is legislated to reconcile discrepancies in jurisprudence. Article 124 of the Judicial System Act provides that if there is conflicting or erroneous case-law in the interpretation and application of the law, the Supreme Court of Cassation and the Supreme Administrative Court adopt interpretative decisions and rulings. In this way, discrepancies in future jurisprudence are prevented.

I will not elaborate on the scope and nature of jurisprudence, as legal theory abounds in such details. The most succinct and, at the same time, comprehensive definition of jurisprudence covers all acts handed down by a particular court or by the courts that belong to a definite system. In this sense, the entire body of enforceable decisions handed down by the court constitutes

its jurisprudence[1]. This definition of jurisprudence is clear, exhaustive and appropriate for the practical examination of the subject in question. It entails that a discrepancy may arise between two or more acts of the constitutional court[2]. Of course, non-discrepant acts by far outnumber the problematic acts in the aspect considered. Otherwise, constitutional justice and justice in general would be unable to perform their assigned function at all.

The constitutional court contributes to turning the constitution into not just applicable but a jurisdictionally applicable and jurisdictionally guaranteed law[3]. The constitutional court gives the final and binding assessment as to whether certain legal acts comply with the constitution. The constitutional court is supposed to make sure that its jurisprudence is consistent so as to be free of discrepancies. The Constitutional Court has repeatedly stated that it relies on "its consistent and non-discrepant jurisprudence" (e.g. Decision No. 1 of 16 January 2018 in Constitutional Case No. 3 of 2017). Albeit seldom, though, the Constitutional Court has found discrepancies in its decisions. When it does so, it considers abandoning the established case-law. The Constitutional Court "is not bound *ad aeternum* by its legal conceptions. The arguments of certainty of jurisprudence and of uniform rulings in similar cases *ex nunc* do not override the considerations of law as a product of the development of society and the evolution of legal thought." (Decision No. 3 of 28 April 2020 in Constitutional Case No. 5 of 2019). The opinion cited shows that the Constitutional Court is not perturbed by manifestations of judicial revisionism. No doubt, law is not fossilised, yet account must be taken of the boundary, albeit conventional, between the legal protection of

---

[1] **Rosen TASHEV**, *Obshta teoriya na pravoto. Osnovni pravni ponyatiya. 4-to izdanie* [General Theory of Law. Basic Legal Concepts. 4th Edition], Sofia, Sibi, 2010, p. 112.

[2] I lowercase "constitutional court" when I refer to general characteristics of the institution, and I capitalize the term when I point to and comment on acts and problems of the Bulgarian Constitutional Court. The same applies to the use of the term "constitution".

[3] **Neno NENOVSKI**, *Konstitutsionno pravosadie* [Constitutional Justice], in: **Neno NENOVSKI, Evgeni TANCHEV, Emilia DRUMEVA et al.**, *Konstitutsionen sad. Yurisprudentsiya (1991–1996)* [Constitutional Court. Jurisprudence (1991–1996)], Open Society, Sofia, 1997, p. 597.

the Constitution, on the one hand, and its evolution, on the other. The former is a legal activity, and the latter is a political activity.

The issue of discrepancies in the jurisprudence of a specialised institution (a constitutional court/a constitutional council) has been raised sporadically in the doctrine of law and in the administration of justice when discussing such a court's/council's acts, whether particular decisions on the merits or on the admissibility of motions. This is done with a measure of self-restraint on account of the constitutional jurisdiction's high institutional standing that precludes a review and revision of its acts by another institution. A realistic and critical approach to constitutional justice, however, requires raising the issue of discrepancies in it, the way this issue is raised in conventional justice. Alongside, account should be taken of the specificity of the constitutional jurisdiction. It is standalone and should not contradict itself. The *stare decisis* doctrine seems inapplicable to constitutional courts' decisions in a number of cases[4]. Formal logic, including legal logic, however, quite often diverges from the logic of life. Constitutional court members are often faced with a dilemma: either to ensure certainty (in the sense of consistency) of their jurisprudence or seek the most appropriate (in the sense of relevance) interpretation/application of the constitution to the case at issue.

The Bulgarian constitutional doctrine is looking for a meeting point between the formal aspect of the state committed to the rule of law, that is associated with certainty of jurisprudence, and the substantive aspect of the rule of law, that emphasises the fairness of any judicial act. The intricate balance between the two points of reference is not always achievable and tips the scales towards one or the other. This makes the court manoeuvre as it is not empowered to revise its jurisprudence. The Constitutional Court's acts are binding on all, including on the Court itself. "The Court may not repeal, amend or invalidate its own decisions.

[4] **Evgeni TANCHEV**, *Konstitutsionniyat control v sravnitelna i bulgarska perspektiva* [Constitutional review in comparative and Bulgarian perspective], in: **Evgeni TANCHEV, Emilia DRUMEVA, Mariana KARAGIOZOVA-FINKOVA et al.**, *Konstitutsionen sad. Yurisprudentsiya (1997–2006)* [Constitutional Court. Jurisprudence (1997–2006)], Open Society Institute, Sofia, 2010, p. 29.

The Constitutional Court has no such vested power and may not ...re-resolve cases decided on the merits" (Procedural Order No. 4 of 18 April 1996 in Constitutional Case No. 6 of 1996). In practice, however, the Constitutional Court often shows flexibility by deviating from previously adopted decisions despite the unavailability of an official procedure and a legal technique to do so. The problem raised merits special attention, especially in terms of the theory of law, as it concerns the authority, consistency and certainty of the constitutional court's jurisprudence.

Arguments of discrepancies allowed by the constitutional court can be found in a number of dissenting opinions of constitutional court members by which they substantiate a view which differs from the view of the constitutional court's majority. Such opinions invite an analysis and discussion on possible deviations from settled case-law. It is above all the theory of law that is tasked with examining, in depth and without prejudice, the jurisprudence of the bodies that monitor compliance with the constitution and identify discrepancies in this jurisprudence. Discrepancies may sometimes be detected even between the views of the same constitutional court member in similar cases. My analysis, though, is not concerned with the personal (in) consistencies of particular constitutional court members.

The Constitutional Court's jurisprudence, as a set of its acts, presumably has three characteristic features: universal binding effect, consistently building up on previous acts, and a high degree of immutability[5]. Hundreds of decisions that the Constitutional Court of the Republic of Bulgaria has handed down over a period of almost three decades and concerning the growing number of constitutional provisions, comprise ample and more or less consistent case-law for the interpretation and application of the Constitution. The Constitutional Court's jurisprudence is assessed as highly stable, which makes constitutional justice certain and predictable[6]. Without denying

[5] **Pencho PENEV**, *Advokatat, Konstitutsiyata, prilozhimoto pravo s anotirana praktika na Konstitutsyonniya sad* [The lawyer, the Constitution, the applicable law with annotated Constitutional Court case-law], Faber, Veliko Tarnovo, 2018, p. 72.

[6] **Ibid.,** p. 73.

the consistency evident in many Constitutional Court acts, I suggest that the reality is more complex and the assessment of this reality cannot be unambiguous. The Constitutional Court has changed its jurisprudence on a number of matters, moreover in a manner that has not always been consistent[7]. Some authors, while avoiding the term "discrepancies", list debatable issues that the Constitutional Court encounters[8]. Other authors, resorting to terminology used by the Constitutional Court itself, speak about "streamlining" the previous jurisprudence[9]. In a number of cases it is indeed streamlined, but in other cases already settled case-law is rectified and practically abandoned. While such opinions are not thorough, they are sufficiently indicative of a problem existing with the certainty and consistency of the Constitutional Court's jurisprudence. A conception of "discrepancies" in the constitutional court's jurisprudence needs to be defined, so as to be able to address the problem seriously and seek a solution.

The jurisprudence of a constitutional court is discrepant if some of its acts (on admissibility and/or on the merits) in similar matters that presuppose the application of identical reasons in law contain opposite or significantly diverging conclusions. Discrepant jurisprudence finds expression in a mismatch between procedural orders/decisions of the court, including between their reasonings.

There are several underlying causes for potential, as well as real discrepancies in the jurisprudence of constitutional courts. One such cause is the way in which the constitutional jurisdiction is constituted. The body is single, but its complement is relatively variable and reflects different political and other preferences. The complement of the Constitutional Court is formed mainly by political institutions (the National Assembly and the President). The discretionary power of the authorities that render up the Constitutional Court members is almost unlimited. The only

[7] According to P. Penev, the Constitutional Court (with the reservation that the reference is to the period by 2018 and to the case-law that is relevant to justice in Bulgaria) has changed its jurisprudence only three times – **Ibid.**

[8] cf. **Evgeni TANCHEV**, op. cit., p. 26–29.

[9] cf. **Mariana KARAGIOZOVA-FINKOVA**, *Konstitutsionen sad* [Constitutional Court], in: *Konstitutsionen sad. Yurisprudentsiya* (1997–2006) [Constitutional Court. Jurisprudence (1997–2006)], op. cit., p. 678.

formal eligibility requirement for holding office as Constitutional Court member is a long period of practicing law, which ensures relevant experience in the legal profession. The other two requirements are judgmental: high professional standing and moral integrity (Article 147 (3) of the Constitution). However, these accomplishments cannot be challenged through an institutional procedure. "If the Constitutional Court, relying on Item 2 of Article 149 (1) [of the Constitution], could exercise control over the selection..., this would imply ... ultimately having a decisive say on the recruitment of its own complement... The assessment for the election or appointment, including the assessment of moral integrity, falls within the exclusive competence of the authority empowered to make it". (Decision No. 11 of 20 October 1994 in Constitutional Case No. 16 of 1994).

Various circumstances and especially political, economic and other changes arguably impact not only the selection of constitutional court members but also the constitutional cases to which the general public is most sensitive. Placing cases in the concrete social and political context in which they are brought, examined and decided reveals, at least in some of them, a link between a particular legal instrument and factors beyond the law. This finding calls for a polyetiological analysis of the constitutional court jurisprudence, which I do not specifically busy myself with here.

Another reason for the emergence of discrepancies between constitutional court decisions is the so called evolutive interpretation. It reaches a critical level that at some point changes the accepted understanding of the content of particular constitutional provisions. The more immutable the wording of the constitution and the longer it is in effect, the more the content of the rules adapts to the changing conditions.

A third reason for the existence of discrepancies in the constitutional court's jurisprudence is the interaction between the domestic legal order and some other legal order, including a supranational one. The handing down of decisions and the use of concepts with diverging content that come from different but interacting legal systems sometime give rise to discrepancies

between legal acts from these systems, including between acts of the constitutional jurisdiction itself. None of the above-mentioned reasons for discrepancies in the constitutional court's jurisprudence can be fully eliminated, but it can be contained.

The constitutional court's independent power to interpret the constitution deserves special attention as this power likewise has a bearing on the court's jurisprudence. The prevailing opinion is that this power helps stabilise the constitutional court's case-law. The main function of the interpretation of the Constitution by the Constitutional Court is to facilitate the building of a clear, non-discrepant and comprehensive system of constitutional rules[10]. The operative part of the interpretative decision becomes a secondary constitutional rule (in the sense of being derivative from, dependent on, and inseparable from, the provision that is interpreted – my note, Y.S.) because it is an integral part of that provision[11]. The official interpretation, however, is a cognitive activity, but also volition, i.e. exercise of public authority. Therefore, apart from contributing to the clarification of laws and regulations so as to prevent and reconcile discrepancies in jurisprudence, the official interpretation itself may lead to discrepant decisions. Constitutional court members must always differentiate between what the constitution prescribes (knowledge of the constitution) and what the constitution should be (the meaning they want to lend it through their own will). By ignoring this boundary, judges step into the field of politics and, moreover, generate discrepancies in the jurisprudence of the court.

The more abstract the constitutional wordings are, the more options the lawmaker has to handle them, but more options are available to the constitutional court, too, to lend them a

[10] **Jivko STALEV**, *Problemi na Konstitutsiyata i na konstitutsionnoto pravosadie. Sbornik statii* [Problems of the Constitution and of constitutional justice. Collection of articles], Ciela, Sofia, 2002, p. 155. This should be particularized in the sense that the Constitutional Court's interpretation function is to elucidate, when necessary, the content of the constitutional provisions rather than evolve a "complete system of constitutional rules". The Court is not involved in rule setting in the accepted meaning of this term.

[11] **Pencho PENEV, Yavor ZARTOV**, *Konstitutsionno pravosadie na Republika Bulgaria* [Constitutional justice of the Republic of Bulgaria], Sofia, Ciela, 2004, p. 94.

meaning that it deems appropriate through interpretation. The power to give an rule-setting interpretation to the constitutional provisions vests the constitutional court with too much power to shape its own idea of the "appropriate" content of these provisions or accept such an idea prompted from quarters beyond its complement. Thus, in some cases the interpretation restricts the potential of the constitutional texts and "bars" them from subsequent interpretations, whereafter an attempt is made to refresh and rectify previous jurisprudence by another interpretation. In other cases, the constitutional court supplements or amends the constitution, thereby turning into a positive constitutional legislator.

We can hardly expect that, given the large number of decisions handed down in the course of several decades, the interpretative and other jurisprudence of the Constitutional Court would remain unchanged. A distinction should be drawn, however, between deviations reaching a critical point which rigidly and permanently determines the further jurisprudence of the court and decisions that discourage the consistent and uniform application of certain constitutional provisions. Changes in the court's jurisprudence usually occur as a result of a build-up of opinions (mostly dissenting opinions of constitutional court members) and arguments that prevail. We say then that the court's jurisprudence has evolved in a certain direction and has revised the previous jurisprudence. The discrepancies at issue affect the certainty of the legal system but are inevitable and at least partly justified. It is a different matter when conflicting acts are handed down within a relatively short period of time and fail to live up to the justified expectations of the subjects of law about the constitutional court's decisions. Such discrepancies undermine the rationale of the administration of justice and erode the operation of several principles of law: primacy of the constitution, legality, predictability and, ultimately, the principle of the rule of law.

Conversely, the build-up of decisions on the same subject matter in similar cases stabilises the constitutional court's jurisprudence on certain matters. Examples include the decisions that confirm the power of the prosecutor general to exercise

general supervision as to legality on the work of all prosecutors (Decision No. 1 of 14 January 1999 in Constitutional Case No. 34 of 1998; Decision No. 13 of 16 February 2002 in Constitutional Case No. 17 of 2002; Decision No. 8 of 13 September 2005 in Constitutional Case No. 7 of 2005; Decision No. 8 of 13 September 2006 in Constitutional Case No. 7 of 2006). A subsequent constitutional case raised the question as to whether this power of the prosecutor general applies with regard to a prosecutor who checks or investigates the prosecutor general. The Constitutional Court answered that the supervision as to legality and the provision of methodological guidance regarding the work of all prosecutors by the prosecutor general within the meaning of Article 126 (2) of the Constitution of the Republic of Bulgaria exclude cases in which a prosecutor carries out a check, an investigation or other procedural steps responding to alerts against the prosecutor general (Decision No. 11 of 23 July 2020 in Constitutional Case No. 15 of 2019). The decision cited introduces an exception to the general competence of the prosecutor general in regard to the rest of the prosecutors in line with the principle of independence of the judicial authorities and in particular with the principle of *nemo iudex in causa sua* (no one should be judge in their own case). Such exceptions complicate the established case-law of interpretation and application of the Constitution but do not abandon it. In such cases it is not a question of discrepancies in the constitutional court's jurisprudence but of justified exceptions to the rule that reflect the specificity of the case at issue. It is another matter that despite the Constitutional Court's interpretation, acting under external pressure and because of internal mistrust, legislation was amended to institutionalise a strange and questionable figure of a permanent prosecutor whose sole function is to investigate, where necessary, the prosecutor general. The Constitutional Court subsequently declared unconstitutional the provisions of the Criminal Procedure Code and of the Judicial System Act that introduced the figure of a prosecutor investigating the prosecutor general or a deputy prosecutor general.[12]

[12] See Decision No. 7 of 11 May 2021 in Constitutional Case No. 4 of 2021

The admission of exceptions to the court's established case-law is usually based on legal principles that serve to decide a certain category of cases. These cases are generally cases involving legal complications. Complicated cases are those in which the court has to choose between two or more interpretations in order to decide.[13] In the common law system, the adjudication of complicated cases often sets legal precedents, but a similar situation is not unfamiliar to the continental law system, either, especially considering the mutual influence of the two systems. Complicated cases in constitutional justice are even more common than in conventional justice. This is due to the main purpose of constitutional review, which is to compare and assess the compliance of some abstract rules with other rules rather than to classify individual facts and their consequences according to the legal rules that govern them.

Henceforth, my task is to identify and systematise the types of discrepancies in the constitutional court's jurisprudence and exemplify them with legal acts of the Bulgarian Constitutional Court. Naturally, the legal profession is often divided as to whether there are any discrepancies at all in the court's jurisprudence on certain matters. I am not really concerned with the debate on one Constitutional Court act or another to which I refer; my focus is rather on commenting them *vis-à-vis* the discrepancies in the Court's jurisprudence. The approach proposed covers the main types of discrepancies between Constitutional Court's acts. This approach provides a framework and can serve as a basis for identifying and studying the discrepancies in the jurisdiction of the Bulgarian Constitutional Court whose amount and thematic diversity is already significant. The model designed is subject to completion and analysis, using acts of both the existing and future case-law of the Constitutional Court.

[13] **Ronald DWORKIN**, *Law's Empire*, Harvard University Press, Cambridge, Massachusetts, 1997, p. 39, 255-266.

II. Types of contradictions in the Constitutional Court's jurisprudence

Criteria for separating and grouping the discrepancies in the Constitutional Court's jurisprudence are the nature of the matters and the type of the acts in which they manifest themselves. I discuss successively the types (groups) and subgroups of discrepancies, citing examples from the Constitutional Court's case-law:

– *discrepancies on matters concerning the admissibility of motions to establish unconstitutionality or of motions to give a rule-setting interpretation;*

– *discrepancies in rulings on the merits on similar matters, where the motion to establish unconstitutionality was granted in some cases and was denied in other cases;*

– *discrepancies between interpretative decisions on similar matters.*

1. Discrepancies regarding the admissibility of motions to establish unconstitutionality

1.1. Change in the Constitutional Court's jurisprudence regarding the admissibility of motions to declare unconstitutionality of acts adopted prior to the Constitution's entry into force.

In its early years the Constitutional Court refused to institute cases on motions to declare unconstitutionality of laws whose entry into force predated the present Constitution. The Constitutional Court held that its power was confined to the laws that were adopted while the Constitution of 1991 was in effect (Procedural Order of 29 December 1991 in Constitutional Case No. 1 of 1991 and Procedural Order No. 5 of 4 June 1992 in Constitutional Case No. 11 of 1992). The Constitutional Court changed its jurisprudence when it admitted to consideration a Resolution of the Grand National Assembly passed while the previous constitution was in effect (Procedural Order of 18 July 1995 in Constitutional Case No. 19 of 1995 and the ensuing Decision No. 16 of 19 September 1995 in Constitutional Case No. 19 of 1995). The Constitutional Court continued this line

of conduct, arguing that "the law enforcement authorities, including the administrative ones, find it difficult to apply § 3 (1) of the Transitional and Final Provisions of the Constitution… Considering the above, as well as bearing in mind the fact that the time limits in the situations referred to in § 3 (2) and (3) of the Constitution have expired, conditions are created for the inaccurate and non-uniform application of the laws that were passed before the basic law, which impedes the legal order and the primacy of the Constitution." The Constitutional Court, invoking its power under Item 2 of Article 149 (1) of the Constitution, in its capacity as a supreme body that ensures compliance with and application of the Constitution, was therefore compelled to change its jurisprudence and hold that motion to establish compatibility with the Constitution of laws and laws rules that predated the Constitution were admissible (Procedural Order No. 1 of 11 January 1996 in Constitutional Case No. 31 of 1995).

Before that the Constitutional Court had partly revised its understanding and had held that it had jurisdiction to rule on the compliance of laws that were adopted prior to the Constitution's entry into force but not on laws that had already lost purpose (Procedural Order No. 3 of 14 July 1994 in Constitutional Case No. 7 of 1994). This position of the Constitutional Court is balanced. On the one hand, it guarantees that laws predating the Constitution that continue in effect, i.e. continue to give rise to legal consequences, would not be exempted from the Constitutional Court's review. On the other hand, this position takes into account the limited options of justice, be it even constitutional justice, to intervene in the field of the judiciary and to re-regulate decades-old juridical facts and their consequences arising from laws, most often incidental ones, that have lost purpose. This balance was upset by the admission to examination on the merits of cases and the adoption of Decision No. 12 of 4 June 1998 in Constitutional Case No. 13 of 1998. The Court's inconsistent approach is exemplified by its opinion in a similar case that was examined just a few months later. By Procedural Order No. 1 of 19 January 1999 in Constitutional Case No. 37 of 1998, the Constitutional Court reverted to the opinion that it "does not

rule on the merits regarding a law predating the Constitution of the Republic of Bulgaria if that law was incidental." On these grounds the Constitutional Court refused to consider the matter of unconstitutionality of the Act on a Plebiscite on the Abolition of the Monarchy and Proclamation of a People's Republic and on Convocation of a Grand National Assembly of 1946, given the fact that less than an year earlier the Court had found it admissible to deal with the Act on Declaring State Property the Properties of the Families of the Former Kings Ferdinand and Boris and their Heirs. Any further legal comment on this matter is superfluous. Sometimes, instead of looking for intricate legal arguments for the "volatile" and, as the case stands, discrepant jurisprudence of the Constitutional Court, we need to follow the shift in the political environment. This environment is apparently in a position to be more elucidating about the reasons for discrepancies in the Constitutional Court's jurisprudence than the intricate legal reasons that justify it. Albeit rarely, Constitutional Court members go public about that after the end of their term in office.

The problem at issue is exacerbated by Constitutional Court Decision No. 3 of 28 April 2020 in Constitutional Case No. 5 of 2019. By this interpretative decision the Court went even farther, ruling that the laws that had been declared unconstitutional in the formal sense had been invalid since their passage[14]. This is a bold, not to say arbitrary, interpretation in terms of ensuring the certainty of the body of law in force and the accurate application of the Constitution. Apart from that, an attempt was made to revise an entire historical era with a fundamentally different political and legal system. Two more questions arise. One question is particular: does the decision discussed seek to influence the outcome of cases that are in the final phase of examination by the conventional courts? The other question is general: what is

[14] See *Konstitutsionen sad na Republika Bulgaria. Godishnik 2020. Resheniya i opredeleniya na KS* [Constitutional Court of the Republic of Bulgaria. Yearbook 2020. Constitutional Court decisions and procedural orders], Dissenting Opinion of G. Iliev and T. Raykovska, which contains legal arguments that incidental laws do not boil down to the so-called laws in the formal sense (p. 58) and that these laws, just as the rest, are invalidated as from the entry into force of the Constitutional Court's decision and not as from their adoption (p. 60, 62).

the impact of the understanding of an *ab initio* invalidity of these acts on the legal order?

1.2. Discrepancies regarding the competence/the right to referral to the Constitutional Court.

This question arose over an interpretation of the power of a supreme court or of the Ombudsman to approach the Constitutional Court.

The initial jurisprudence limited the institutional capacity to approach the Constitutional Court to the Supreme Court (Procedural Order No. 6 of 30 June 1992 in Constitutional Case No. 12 of 1992). Several years later, after the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC) had already been institutionalised, it was held that the Constitutional Court's power under the procedure of Article 150 (2) of the Constitution could be triggered by individual SCC and SAC panels examining the specific dispute referred to the court (Procedural Order No. 1 of 1 July 1997 in Constitutional Case No. 5 of 1997). The Constitutional Court called this change in its operation "streamlining", even though the correct term is "rectification". I consider the rectification made to be justified because it is the individual supreme courts' panels that apply the law which might prove to be in conflict with the Constitution. It is these panels alone that suspend the examination of a case pending a Constitutional Court ruling. In its reasoning, the Constitutional Court found that "the constitutional legislator had in mind … the respective Supreme Court as a body administering justice in a specific dispute referred to it, i.e. in the exercise of its justice-administering competence which is implemented by its panels". The Constitutional Court's reasonings do not enjoy the force of *res judicata*; still, when they are so categorical, they create legitimate expectations that the Constitutional Court itself would adhere to the understanding already stated. But not so with the Procedural Order of 9 May 2019 in Constitutional Case No. 5 of 2019. That Procedural Order set a precedent by admitting to examination on the merits a motion from a SCC panel that did not seek a declaration of unconstitutionality but an interpretation of the Constitution in connection with a property dispute case

(again concerning "the royal estates"). In these circumstances, however, it is difficult to find a *raison d'être* for differentiation of the situations under Article 150 (1) and (2), in which the supreme courts are the referring authorities.

The Ombudsman (under a provision supplementing the Constitution in 2006) and the Supreme Bar Council (under a provision supplementing the Constitution in 2015) were empowered to approach the Constitutional Court with a motion to establish the unconstitutionality of a law that violates citizens' rights and freedoms. *Per argumentum a contrario*, these institutions may not approach the Court with any such motion about violations of the rights of legal persons. Assessing the admissibility of a motion, the Constitutional Court must ascertain whether the law challenged violates rights of natural persons in addition to rights of legal persons. In a number of cases the challenged law adversely affects various types of rights both in relation to the economic operation of legal persons and rights of citizens. A review of the motions submitted to the Constitutional Court by the Ombudsman and by the Supreme Bar Council shows hesitant jurisprudence on the admission of such referrals.

1.3. Discrepancies regarding the subject-matter and timing of a constitutional review of international treaties.

Such a question arose in connection with an assessment of international treaties concluded by the Republic of Bulgaria in the course of their ratification. Invoking Item 4 of Article 149 (1) of the Constitution, the Constitutional Court concluded that a review as to compliance of international treaties with the Constitution is only possible prior to their ratification and entry into force. On this basis, the Court set aside as inadmissible a motion to establish unconstitutionality of an Agreement between the Government of the Republic of Bulgaria and the Government of the Russian Federation and admitted to examine on the merits the challenge of the ratification instrument adopted by the National Assembly (Procedural Order No. 2 of 27 July 1995 in Constitutional Case No. 16 of 1995). Several years later, the Constitutional Court ignored this distinction in connection with the ratification of another international treaty (an Agreement on Cooperation

between the Governments of the Republic of Bulgaria and the Republic of Turkey in the Field of Energy and Infrastructure). The Constitutional Court stated that, just as all laws in the country, so the ratified international treaties, too, should be subject to review as to constitutionality according to Item 2 of Article 149 (1) of the Constitution. Undeniably, a review as to compliance with the Constitution must apply to the content of an international treaty. The point is that, unlike the review of laws, the review of ratifications is bound by a time limit. The Constitutional Court claimed otherwise, acknowledging its "departure from its previous understanding". In its opinion, "the ratifying (approving) law incorporates the ratified international treaty and these two instruments should be regarded as a single whole which may be challenged as unconstitutional in all its parts." (Decision No. 9 of 16 June 1999 in Constitutional Case No. 8 of 1999). This view is prone to two objections. One is a formal objection: what is the point of the time-limiting provision of Item 4 of Article 149 (1) of the Constitution if a challenge of an international treaty is admissible even after the ratification?! The other objection relates to the certainty of the legal framework and the predictability of international relations. It appears that the internal aspect of the sovereignty of the state overrides the external aspect – the equal standing of states. The state thus becomes an unreliable international partner which, without resorting to the procedure for denunciation of an international treaty, may relinquish its binding force. This contravenes the first sentence of Article 27 of the Vienna Convention on the Law of Treaties, according to which a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

2. Discrepancies in deciding similar matters, where the motion to declare unconstitutionality was granted in some cases and denied in other cases.

2.1. Assessment of defects of a law vis-à-vis incompatibility with the principle of the rule of law.

Most questions arise about the compliance of legislation with the principle of the rule of law. This is understandable because

this principle comprises several important aspects. Sometimes it is the last and only rampart that protects the constitutional order and the rights of citizens. The Constitutional Court's case-law regarding the application of the principle of the rule of law is more or less consistent. Its permanence is difficult to maintain because of variations in the assessment of the quality of laws on a wide-ranging scale.

"…The imperfection of the law and the discrepancies between its rules violate the principle of Article 4 (1) of the Constitution… This constitutional principle could be respected only if the provisions contained in the statutory instruments are clear, precise and consistent." (Decision No. 9 of 30 September 1994 in Constitutional Case No. 11 of 1994, to the same effect Decision No. 5 of 29 June 2000 in Constitutional Case No. 4 of 2000). Shortly after that, however, this rigour of the reasoning was diluted: "… [the] internal inconsistencies in the legislative framework as adopted and the ambiguities in its interpretation do not suffice to declare the provisions concerned unconstitutional… Setting a requirement for the legislative framework to be internally coherent is relevant to the principle of the rule of law, but only provided that, in its nature and extent, the inconsistency is constitutionally intolerable." (Decision No. 14 of 23 November 2000 in Constitutional Case No. 12 of 2000).

The Constitutional Court members are more demanding when a newly passed law comes into conflict with a law or laws that are already in force. This is undoubtedly a deficiency of legislation that impedes its application. However, each discrepancy between laws should hardly be classed as a violation of the principle of legality (of governance in accordance with the law). Some Constitutional Court members believe that "the Court's case-law on this matter is evolving, albeit at an uneven pace, from denial to admission, more or less clearly, of review as to compliance of the acts of the National Assembly not only with the Constitution but with the laws in force."[15] In my opinion, however, such a deficiency of the law *per se*

[15] *Konstitutsionen sad na Republika Bulgaria. Godishnik 2020. Resheniya i opredeleniya na KS* [Constitutional Court of the Republic of Bulgaria. Yearbook 2020. Constitutional Court decisions and procedural orders], Dissenting Opinion to Decision No. 1 of 4 February 2020 in Constitutional Case No. 17 of 2018, p. 8.

does not suffice to declare the law unconstitutional, first, because the Constitutional Court is entrusted with verifying the compliance of the laws with the Constitution rather than the synchronisation of legislation, and second, because there are legal techniques to address such discrepancies. The Constitutional Court would make a more useful and, moreover, a more decisive step if it blocks attempts to introduce amendments through transitional and final provisions that circumvent the procedural rule, established by the Constitution, for the adoption of laws on two readings. More generally, the Constitutional Court confirms that this expectation is justified. "Conflict with the Constitution may consist in a conflict of provisions of a law with the Constitution…, but it may be a violation of a procedural rule, established by the Constitution, upon the passage of laws." (Procedural Order of 16 March 1995 in Constitutional Case No. 4 of 1995).

Variations are evident in the Constitutional Court's approach to matters concerning the retroactive effect of the law in the context of the problem of the rule of law. By its Decision No. 18 of 14 November 1997 in Constitutional Case No. 12 of 1997, the Constitutional Court correctly found that "…in principle, the Constitution does not deny the National Assembly a right to pass retroactive rules. Such an exception is explicitly provided for in Article 5 (3) of the Constitution, but a blanket prohibition obviously does not apply to other cases". Just a few months earlier, the Constitutional Court held a different position on such a matter. "The rule on non-retroactive tax legislation manifests the principles of rule of law and legality, proclaimed by the Constitution, in the field of tax law. The Constitutional Court subscribes to the view that the tax law operates *ex nunc*, as from its entry into force onwards." (Decision No. 9 of 20 June 1996 in Constitutional Case No. 9 of 1996). It is still an open question whether such an unconditional statement is within the prerogatives of the constitutional jurisdiction.

Decision No. 15 of 6 November 2018 in Constitutional Case No. 10 of 2018, which denied a motion to establish unconstitutionality of proposition three of Article 280 (2) of the Code of Civil Procedure (CCP) in the part "as well as where the said judg-

ment is manifestly incorrect", brings up the question of compatibility with case-specific interpretations of Article 4 (1) of the Constitution. In formal terms, the rule of law requires a clear and unambiguous wording of legal rules. The implementation of this principle presupposes legal certainty and predictability of legal regulation, including the administration of justice. I share the dissenting opinion that the motion to declare unconstitutionality which the Constitutional Court denied does not tally with Decision No. 4 of 11 March 2014 in Constitutional Case No. 12 of 2013.[16] In that decision the Constitutional Court emphasised that "...the procedural rules on validity and admissibility of the decision are particularly essential, which is why the Court is bound to monitor *proprio motu* their observance at each stage of the proceedings. The justification of the cassation appeal will be verified only after the cassation appellate review is admitted." Therefore, the criterion applied – incorrectness of the judgment – is a criterion on the merits rather than on the admissibility. It appears that the SCC alone is vested with a power to monitor the justification of the motion in advance, before the case has been proceeded with and before it has been examined on the merits. The requirement for manifest incorrectness entails that cases with incorrect decisions that, however, are not manifest, are excluded from cassation appellate review but, on the other hand, cases with lesser defects that, however, are manifest, would be admitted to examination on the merits. The legal uncertainty of the legal framework and the Constitutional Court's inconsistency raise doubts about the correctness of its decision on the matter under discussion.

The Constitutional Court negates the arbitrary withdrawal of acquired civil rights and considers this to be incompatible with the principle of the rule of law as proclaimed in Article 4 (1) of the Constitution (Decision No. 3 of 27 April 2000 in Constitutional Case No. 3 of 2000). This line of reasoning is correct in principle as it corresponds to justice as a characteristic sum-

[16] *Konstitutsionen sad na Republika Bulgaria. Godishnik 2018. Resheniya i opredeleniya na KS* [Constitutional Court of the Republic of Bulgaria. Yearbook 2018. Constitutional Court decisions and procedural orders], p. 289.

marising the substantive state committed to the rule of law. The Constitutional Court, however, is not always as categorical when ruling on the compatibility of legal provisions with the principle of the rule of law.

2.2. Discrepancies in the application of the principle of non-discrimination.

This issue was raised back in the early years after the political changes in 1989 and has been repeatedly debated upon the adoption of various laws. Its focus is on the issue of affiliation of certain individuals with the state security authorities and with the apparatus of the Communist Party. The Constitutional Court has a decisive role to play in the prevention of discrimination based on political affiliation and social status. The Court has found discriminatory the provisions of laws that impose restrictions on holding certain positions and thus restrict the free choice of occupation (Decision No. 8 of 27 July 1992 in Constitutional Case No. 7 of 1992 and Decision No. 2 of 21 January 1999 in Constitutional Case No. 33 of 1998). The only significant departure from this jurisprudence concerned individuals belonging to research organisations who were barred from occupying positions for a certain period of time by the Act to Introduce on a Provisional Basis Certain Additional Qualifications for Members of the Leaderships of Research Organisations and the Higher Certifying Commission (Decision No. 1 of 11 February 1993 in Constitutional Case No. 32 of 1992). The application of lustration and essentially discriminatory measures was thus, at least officially, extremely limited.

A number of other laws provide for the disclosure of affiliation of full-time staff and part-time associates with the security services of the former People's Republic of Bulgaria. Some of the Constitutional Court members inevitably found themselves to be judges in their own cause when they had to rule on unconstitutionality of the Act on Access to the Records of the Former State Security and of the Former Intelligence Agency of the General Staff (Decision No. 10 of 22 September 1997 in Constitutional Case No. 14 of 1997). In this case, they ensured for themselves a higher level of protection which, even if it is

assumed to be justified, is not available to other categories of persons affected by the operation of the same law.

2.3. Discrepancies regarding the assessment as to unconstitutionality of political parties and of citizens' associations.

This is a sensitive political issue, especially as concerns parties with significant public influence and a role in government. This matter was raised in connection with the application of Article 11 (4) and Article 44 (2) of the Constitution. While the motions submitted to the Constitutional Court were to declare unconstitutionality, the reasoning of the Court contains a number of reflections that lend an interpretative meaning to its acts. The answer to this question presupposes an assessment of the basic documents of the organisation such as the statutes and, possibly, its programme. Over time, the actual (non)compliance of the organisation with constitutional requirements has been given more weight in the assessment. A party must be judged above all on the basis of its activities, since the statutes can only be a front used to obtain court registration. The Constitutional Court abandoned its understanding that the effect of the prohibition under Article 44 (2) is not comprehended by the dispute as to constitutionality within the meaning of Item 5 of Article 149 (1) of the Constitution (this is evident from a comparison between Decision No. 1 of 29 February 2000 in Constitutional Case No. 3 of 1999 and Decision No. 4 of 21 April 1992 in Constitutional Case No. 1 of 1991, Procedural Order No. 9 of 1996 in Constitutional Case No. 30 of 1996).

2.4. Discrepancies between decisions concerning fundamental rights.

Initially, the Constitutional Court interpreted broadly the right to own property under Article 17 of the Constitution. It subsumed under that right receivables and even assets in general (*inter alia*, Decision No. 17 of 16 December 1999 in Constitutional Case No. 14 of 1999 and Decision No. 7 of 10 April 2001 in Constitutional Case No. 1 of 2001). Examining a motion to establish unconstitutionality of provisions of the Act to Settle the Rights of Long-Standing Home-Purchase Savings Depositors, however, the Court narrowed the previous interpretation of the

concept of ownership from "assets" or "property in the board sense" to right *in rem* and thus limited the scope of the protection sought (Decision No. 10 of 3 December 2009 in Constitutional Case No. 12 of 2009).

The Constitutional Court has dealt with the legal framework of the right of defence on several occasions. The Court referred to a decision it had adopted declaring unconstitutional Item 3 of Article 269 (2) of the repealed Criminal Procedure Code (CPC) so as not to desist from a stated understanding, i.e. from its jurisprudence. Two decisions concern a defence counsel, but in one case it was about the appearance of the defence counsel in a court hearing, and in the other case it concerned a dispositive hearing under Article 247c of the CPC. This begs the question of whether the overlapping of the two cases is sufficient to invite an identical conclusion (Decision No. 14 of 9 October 2018 in Constitutional Case No. 12 of 2017 and Decision No. 9 of 14 April 1998 in Constitutional Case No. 6 of 1998).

Another problem arises, concerning the right to work. It is a composite right whose ensuring presupposes actions both on the part of the government and employers for the fulfilment of counter obligations to workers. The obligation imposed on the state by Article 16 and Article 48 (1) of the Constitution to create conditions for the exercise of the right to work necessarily includes its obligation to create conditions for employers to fulfil their obligation to pay labour remuneration for the work performed (Decision No. 14 of 23 November 2000 in Constitutional Case No. 12 of 2000). Having consistently protected the constitutional right to labour remuneration by the cited decision, 18 years later the Constitutional Court failed to stand up for the supremacy of the right to work[17]. Decision No. 1 of 16 January 2018 in Constitutional Case No. 3 of 2017 did not garner the majority required to declare the provision of Article 245 (1) of the Labour Code unconstitutional on account of it admitting a reduction of the remuneration for work performed by the worker by up 60%

[17] **Vasil MRACHKOV**, *Konstitutsionalizirane na trudovoto pravo* [Constitutionalising labour law], in: *Constitutional Studies,* Vol. 1., Constitutional Court of the Republic of Bulgaria, St. Kliment Ohridski University Press, Sofia, 2019, p. 133.

of the amount agreed or to the national minimum wage. The Constitutional Court ignored altogether the key constitutional provision of Article 48 (5) of the Constitution and the protective spirit to which the Court adhered in Decision No. 14 of 2000[18]. Therefore, Decision No. 1 of 16 January 2018 comes into conflict with a previous decision and leads to a reversal of the achieved standard in the protection of the right to work by calling into question its status as a fundamental right.

2.5. Discrepancies regarding the constitutional procedure for the adoption of acts of the National Assembly.

The constitutional framework of the National Assembly is detailed in its Rules of Organisation and Procedure. Understandably, the Constitutional Court can obtain information about the presence of a quorum at the National Assembly's sittings and about the acts adopted by the legislature from an official source only such as verbatim reports. Most of the Constitutional Court's case-law on that matter was established while the original version of Article 81 (1) of the Constitution was in force, which required a quorum to be present for the National Assembly to sit. After an amendment of 2007, this requirement was limited to the opening of the sittings and to the adoption of the acts of the National Assembly. In political practice, the "quorum game" remains one of the most commonly used stratagems to thwart the adoption of resolutions disputed by a part of the parliamentary groups and National Representatives. The number of National Representatives present on record is the basis on which the number required for a resolution to pass is calculated. In reality, though, "the number of those who voted ... is determined not as the National Representatives present in the debating chamber but as those of them who have exercised their right to vote". (Decision No. 25 of 29 September 1998 in Constitutional Case No. 22 of 1998; also Decision No. 28 of 28 October 1998 in Constitutional Case No. 26 of 1998). Therefore, in this case we are facing a *prima facie* discrepancy in the reasoning and not a real discrepancy in the Constitutional Court's jurisprudence. Staying away from a vote is defined by

[18] **Ibid.**, p. 135.

the Court as inadmissible conduct which entails non-fulfilment of a constitutional obligation. It can be argued whether voting is rather above all a right of National Representatives, unlike their obligation to attend the sittings of Parliament and its working bodies, and whether the non-exercise of the right to vote in certain circumstances is rather a demonstration of a political stance which differs from an "abstention" vote. This, however, is another matter that falls outside the subject of this analysis.

According to the first sentence of Article 88 (1) of the Constitution, laws are debated and passed by two votes. In practice, though, this constitutional requirement is circumvented in many cases, and provisions that have nothing to do with the bill as passed on first reading are moved before it has come up for a second reading. I expect the dissenting opinions of judges who find this approach inadmissible to reach a critical point that will change the Constitutional Court's jurisprudence in line with the Constitution. This would prevent or at least severely limit a disgraceful practice in the law-making process.

2.6. Discrepancies regarding the legal status of local self-government bodies.

In only a few cases the Constitutional Court has dealt with matters of local self-government. Some of these cases concern the requirement that tax obligations must have a sound legal basis and the right of municipal councils to set the specific amount of local taxes and fees. Another matter concerns the legal status of local government. It was addressed in the Court's reasoning that justifies its decisions. I attribute to misunderstanding the debasement of the role of local self-government and its autonomy *vis-à-vis* central government. "The fact that local self-government and local administration are treated in a separate Chapter Seven of the Constitution does not exclude them from the executive branch of government within the meaning of Article 8 of the Constitution." (Decision No. 2 of 21 January 1999 in Constitutional Case No. 33 of 1998). If this statement is true in respect of the local administration, it is wrong with regard to the municipal councils as bodies of local self-government. The cited opinion does not distinguish between the functional

and structural division of state power. It is essentially rectified by other decisions that recognise the relative autonomy of local government bodies within the state. "The Constitution defines the population of a municipality as a self-governing entity and the municipal council as a body of this entity." (Decision No. 12 of 24 August 1999 in Constitutional Case No. 12 of 1999). "The legislator has the right and the obligation to design a legal framework that will ensure a balance between national and local interests. There is no constitutional rule against that." (Decision No. 2 of 14 January 2001 in Constitutional Case No. 10 of 2000).

2.7. Discrepancies regarding the legal status of the judiciary.

The changes in the legislative framework of the judiciary have generated a substantial caseload for the Constitutional Court. There are numerous constitutional cases on challenges of provisions amending and supplementing the Judicial System Act, especially in the part on the Supreme Judicial Council, and the State Budget Act concerning the independence of the judiciary. The criteria of the Constitutional Court regarding the grounds for early termination of the credentials of the Supreme Judicial Council (SJC) are debatable, to say the least (Decision No. 1 of 14 January 1999 in Constitutional Case No. 34 of 1998 compared to Decision No. 3 of 3 April 1992 in Constitutional Case No. 30 of 1991 and Decision No. 8 of 15 September 1994 in Constitutional Case No. 9 of 1994). The standard applied in these cases was hardly uniform[19]. Notably, this happened after a change of the majority in Parliament. The abundant dissenting opinions are indicative of the existence of discrepancies in a number of decisions pertaining to the judiciary. Discrepancies can be detected, *inter alia*, between parts of Decision No. 4 of 7 October 2004 in Constitutional Case No. 4 of 2004 and Decision No. 13 of 16 December 2002 in Constitutional Case No. 17 of 2002, and between Decision No. 16 of 12 June 2001 in Constitutional

[19] Regarding some issues of constitutionality, the unbiased reader will be left with the impression that the standard is a work in progress. This subtle assessment of the part of the Constitutional Court's case-law under discussion has been made by Prof. Nacehva: **Snezhana NACHEVA**, *Razdel VI. Sadebna vlast* [[Section VI. Judiciary] in: *Konstitutsionen sad. Yurisprudentsiya (1997-2006)* [Constitutional Court. Jurisprudence (1997-2006)], op cit., p. 525.

Case No. 6 of 2001 and Decision No. 17 of 3 October 1995 in Constitutional Case No. 13 of 1995.

The several amendments to the Constitution in this part of the basic law do not reduce the legal and political disputes that arise. Intentions are now stated again to amend the Constitution and laws in the field of the judiciary. The discussion, though, is too fragmented, and most proposals target mainly structural changes in the judiciary. The problems need to be thoroughly and impartially discussed, lest yet another possible change fails to improve tangibly the performance of that branch of government.

3. Discrepancies between interpretative decisions on similar matters.

A debate is under way among legal theorists in Bulgaria on whether the interpretative decisions of the constitutional court possess the force of *res judicata*, as do the rest of its decisions. The opposing stands taken on this issue, however, do not lead to significant differences in the conclusion that interpretative decisions are binding. The Constitutional Court does not admit a reinterpretation of a matter on which it has already ruled. Nor can discrepancies between interpretative decisions be attributed to the possibility of interpreting one and the same constitutional text several times if the issues that it raises are different.

The Constitutional Court gives both a rule-setting and abstract interpretation to the constitutional provisions and an accompanying interpretation which it uses in the exercise of the rest of its powers. The existence of two separate powers of the Constitutional Court: to interpret independently, by setting rules, and not only responding to a motion to declare an act unconstitutional on a case-specific basis, may result in discrepancies between its decisions. A rule-setting interpretation has a greater force than a case-specific interpretation because the former is contained in the operative part of the decision whereas the latter is part of the reasoning behind the judicial act. Case-specific interpretation is a kind of *soft law*, whereas rule-setting interpretation is binding in all cases. Still, the weight of some of the reasons in some decisions declaring unconstitutionality

is so great that it transcends the particular case and should not be overlooked in the future jurisprudence of the Court. In case-specific interpretation, albeit on very rare occasions and where exceptional circumstances apply, the Constitutional Court may change its jurisprudence, i.e. give again a different interpretation to a constitutional provision; where a rule-setting interpretation is made, this seems impossible[20]. In practice, though, both the motioners for interpretation and the Court in its answers have the opportunity to seek a conclusion that diverges from a previous decision.

According to one school of thought, a change of a rule-setting interpretation is possible subject to two conditions: that a sufficiently long period has elapsed since the initial interpretation, and that a significant change has intervened, affecting the objective circumstances in public life[21]. These prerequisites and the need of convincing reasons for a change in the interpretative jurisprudence are relevant, but they are advisory for the Constitutional Court rather than mandatory for its practice. The Constitutional Court insists that the motion for interpretation be reasoned *vis-à-vis* the specific circumstances that give rise to ambiguity regarding the content of the rule in its application in a certain field, aspect, etc. (Decision No. 14 of 10 November 1992 in Constitutional Case No. 14 of 1992). According to a view held both in the case-law of the Constitutional Court (Procedural Order No. 4 of 14 August 2007 in Constitutional Case No. 9 of 2007, Procedural Order No. 8 of 22 November 2016 in Constitutional Case No. 17 of 2016) and in the theory, the existence of *locus standi* to obtain the interpretation is a *conditio sine qua non* for its admissibility[22]. Using the interpretation to answer a question that exists in reality and is specifically reasoned at least slightly limits the strong prerogative of the Constitutional Court under Item 1 of Article 149 (1) of the Constitution.

A typical example of a discrepancy between two interpretations having the same subject is Decision No. 22 of 31 October 1995

[20] **Pencho PENEV, Yavor ZARTOV**, op. cit., p. 94.
[21] **Rosen TASHEV**, op. cit., p. 67.
[22] cf. **Pencho PENEV, Yavor ZARTOV**, op. cit., p. 104–110.

in Constitutional Case No. 25 of 1995 and Decision No. 3 of 28 April 2020 in Constitutional Case No. 5 of 2019. According to the former decision, "when the Constitutional Court declares unconstitutional a law which repeals or amends a law in force, the latter resumes its effect in the version preceding the repeal or amendment as soon as the Court's decision enters into force." The established case-law was reversed recently, when in a new interpretation on the same matter the Constitutional Court determined that its decisions do not have a re-enacting effect and the consequences of the act that has been declared unconstitutional must be settled according to Article 22 (4) of the Constitutional Court Act by the body which adopted the act concerned. The two decisions in question are about a quarter of a century apart, but this fact alone can hardly explain and justify the change. The two decisions on one and the same matter are not just different; they are opposite. The Constitutional Court, ignoring its own case-law, shows that it does not give a force of *res judicata* to the rule-setting interpretation, at least as inadmissibility of re-resolving the legal dispute. The Court's new understanding seems intended to avoid the inconvenience of the re-enactment of a law that either because of its obsolescence or for other reasons proves to be more irrelevant than even the law that was declared unconstitutional. An important result of the interpretative decision in question is that the Constitutional Court, even if only as a re-enactor of a previous legal framework, limits its role of a positive legislator. The independent power to interpret the Constitution abstractly, however, in practice transforms the Constitutional Court from a defender of the basic law into its editor and even co-drafter along with the holders of primary and secondary constituent power.

Similarly but perfidiously, the Constitutional Court handled the notorious interpretations of the form of the state in the part concerning the judiciary (Decision No. 3 of 10 April 2003 in Constitutional Case No. 22 of 2002 and Decision No. 8 of 1 September 2005 in Constitutional Case No. 7 of 2005 г.). The former decision, as its operative part shows, gives a broad interpretation to the form of state government. The options of

the National Assembly to make changes in any of the branches of government and specifically in the judiciary are thus seriously limited. This necessitated the first interpretation to be followed soon by a subsequent interpretation or rather a reinterpretation which raises other questions but still regarding the subject already discussed by the Constitutional Court. The latter decision essentially diluted the rigour of the previous one and "opened up" certain options for constitutional amendments without the need to convene a Grand National Assembly. The problem with these decisions is that they not only interpret constitutional provisions but also try to give advice and a recommendation to the political branch of government on how to handle the Constitution and, in particular, to what extent and how to amend it. That is why dissenting opinions dispute such questions and the answers given, which cast the Constitutional Court in the role of an oracle that grants political indulgences and of a positive legislator at the expense of the holders of political power[23].

III. Reconciling discrepancies in the jurisprudence of the constitutional court

The only way to reconcile discrepancies in the jurisdiction of the constitutional court, if we leave aside amending the constitution, is for the court itself to do so. However, as already explained, the court's own capabilities in this respect are limited. Still, a change in constitutional courts' jurisprudence is one of the ways in which the law changes as it operates. Provided that the constitutional court declares and reasons the change and further consistently adheres to it, the court has presumably updated its jurisprudence. Then the discrepancy already becomes just documented and stops being real. The new jurisprudence supersedes the previous one and makes the previous decision or decisions inapplicable. As a

[23] See the dissenting opinions of R. Yankov and P. Tomcheva to Decision No. 3 of 2003 in: *Konstitutsionen sad. Yurisprudentsiya (1997–2006)* [Constitutional Court. Jurisprudence (1997–2006)], op. cit., p. 700, and the dissenting opinion of R. Yankov to Decision No. 8 of 2005, ibid, p. 753–754.

result of consistent application, the new case-law becomes settled and in this sense ceases to be discrepant.

A problem arises, however, when the constitutional court keeps adopting discrepant decisions/procedural orders when interpreting/applying the same provisions in similar matters or when different bodies (parliament, courts, etc.) use the discrepancies in the constitutional court's case law and thus extend them to other legal acts. A new motion for an interpretation of the constitution would not always be admissible, and a possible declaration of the act as unconstitutional would erode the effectiveness of the decision due to intervening consequences in law and in fact.

Another way of reconciling discrepancies in the jurisprudence of the constitutional court is to devise an institutional mechanism through which such questions can receive an official answer.

A decision of the constitutional court may be incorrect without leading to discrepant jurisprudence. If jurisprudence is discrepant, however, it indicates that at least one of the decisions handed down is incorrect. The range of defective decisions of the constitutional court covers nullity, inadmissibility and incorrectness[24]. It is proposed that such defects be corrected either by interpretation by the Constitutional Court or, if this is not possible, by the plenums either of the SCC or of the SAC[25]. Constitutional justice is man-made and, even if administered in good faith, it may reach decisions that are fraught with grave defects. Discrepancies between acts of the constitutional court may be of this nature. Unlike the conventional courts' judgments that are binding on the parties, constitutional court decisions have an *erga omnes* effect. This all the more requires that they should be mutually synchronised.

A special procedure to identify and eliminate discrepancies in the Constitutional Court's jurisprudence may be established which, of course, cannot be done without amending the Constitution. It is a complicated task both in terms of the what and the how of the change in question. Trying to control the

[24] **Pencho PENEV, Yavor ZARTOV**, op. cit., p. 332.
[25] Ibid., p. 333, 337 and 339.

controllers is always difficult. Invariably, a dispute must come to an end at some level and at some point.

If a dispute arises over discrepant jurisprudence of the Constitutional Court, a legal possibility needs to be available to raise this issue. The right to seek a ruling on discrepant acts should be exercised by the entities that even now have the capacity to approach the Constitutional Court. It would be inappropriate, as a matter of principle and for practical reasons, to set up an appeal body for decisions of the constitutional court. What I consider appropriate is to establish *ad hoc* panels of judges vested with the power to consider such matters. These panels must be selected at random, from among the SCC and SAC judges, and a panel should have at least as many members as the number of the Constitutional Court members. Some may object that one of the constituted powers, be it composed of judges, is empowered to review acts of other judges that perform the function of protecting the basic law as an act of constituent power. This contradiction, however, is embedded in the very composition of the Constitutional Court because the three quotas of which it consists are from branches of the constituted powers. After all, the supreme judges are supposed to be sufficiently qualified and independent to be entrusted with verification of the acts of the constitutional jurisdiction as they assess the conditions for admissibility and the merits of the motion made. The discussion of sensitive and difficult issues involving discrepancies in the Constitutional Court's jurisprudence would thus remain in the domain of the judiciary with its inherent legal modalities. The proposed model could give rise to competition between the constitutional court and the supreme courts, but I do not think that this is contraindicated either for the maintenance of the legal order or for the checks and balances among the branches of government. The decisions of the panel of judges constituted at random should have a declaratory effect so as not to neglect the position of the Constitutional Court and the place of its acts in the hierarchy of the sources of law. The authoritative official ruling of the special panel of judges would serve as a factor correcting and restraining the power at the Constitutional Court's

disposal. Decisions on such controversial issues would clarify the application of the constitutional rules and would stabilise the Constitutional Court's case-law. All this would facilitate the unification of the Court's jurisprudence and an enhancement of its predictability.

The proposed constitutional innovation is in the spirit of the changes that have been taking place in legal systems in recent decades. In particular, without ignoring the hierarchy of legal acts, this innovation is intended to promote judicial dialogue. Such dialogue is necessary because of the intricate interactions between the national, international and supranational law, but also on account of the problems in the interpretation and application of the constitutions in the states' domestic legal order. The proposal made seeks to endorse and ensure the principles of the rule of law, the supremacy of the constitution, and the separation of powers.

THE PRINCIPLE OF RESPECT FOR NATIONAL CONSTITUTIONAL IDENTITY IN THE EUROPEAN UNION

Atanas Semov

Introduction

A not insignificant number of studies have already looked into the subject of national constitutional identity in the European Union[1]. This is understandable, given that EU membership

[1] See, e.g. (in alphabetical order):

Alejandro Saiz ARNAIZ and Carina ALCOBERRO LLIVINA (eds), *National Constitutional Identity and European Integration,* Intersentia, Cambridge-Antwerp-Portland, 2013;

Hermann-Josef BLANKE, **Stelio MANGIAMELI**, *Article 4 (The Relations Between the EU and the Member States)* – in: **Hermann-Josef BLANKE**, **STELIO MANGIAMELI (eds)**, *The Treaty on European Union (TEU): A Commentary*, Springer, Berlin, Heidelberg, 2013, p. 185–235;

Leonard F. M. BESSELINK, *National and Constitutional Identity before and after Lisbon, Utrecht Law Review,* Vol. 6, 2010, p. 36;

Laurence BURGORGUE-LARSEN (dir.), *L'identité constitutionnelle saisie par les juges en Europe*, Pedone, 2011;

C. CALLIESS and G. VAN DER SCHYFF (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, 2009;

Vlad CONSTANTINESCO, *La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales: convergence ou contradiction? Contrepoint ou hiérarchie?* – dans: *L'Union européenne: Union de droit, Union des droits. Mélanges en l'honneur de Philippe Manin*, Paris, Pedone, 2010, p. 79;

Elke CLOOTS, *National Identity in EU Law*, Oxford University Press, 2015;

Mireille DELMAS-MARTY, *Intégration européenne et identité nationale. Le rôle des juges*, *Forum des juges, 3–4 décembre 2012,* Intégration européenne et identité nationale. Le rôle des juges – Académie des Sciences Morales et Politiques (academiesciencesmoralesetpolitiques.fr);

Pietro FARAGUNA, *Constitutional Identity in the EU – A Shield or a Sword?* – in: German Law Journal, Special Issue Constitutional Identity in the Age of Global Migration, Vol. 18, No. 7, p. 1617;

Silvio GAMBINO, *Constitutionalismes nationaux et constitutionalisme européen: identités nationales, traditions constitutionnelles et droits sociaux (après Lisbonne)*, Rivista di diritto pubblico italiano, comparato, europeo, No 6, 21.3.2012, Federalismi.it;

and the application of Union law deeply affect the sovereignty of

Sébastien MARTIN, *"Identité nationale" et "identité constitutionnelle",* Revue française de droit constitutionnel, 2012/3, n° 91, p. 13–44;

François-Xavier MILLET, *National Constitutional Identity as a Safeguard of Federalism in Europe* – in: **Loic AZOULAI, Lena BOUCON, François-Xavier MILLET (eds)**, *Deconstructing EU Federalism through Competences*, EUI Working Papers, Law 2012/06, p. 58;

Jean-Denis MOUTON, *La défence de l'identité constitutionnelle, révélatrice de la nature de l'Union européenne* – in: Constitutional Studies, Constitutional Court of Republic of Bulgaria, Vol. I, 2019, p. 192–214;

Jean-Denis MOUTON, *Vers la reconnaissance de droits fondamentaux aux États dans le système communautaire?* – dans: *Les dynamiques du droit européen en début de siècle. Etudes en l'honneur de Jean-Claude Gautron*, Paris, Pedone, 2004, p. 463;

Jean-Denis MOUTON, *Vers la reconnaissance d'un droit au respect de l'identité nationale pour les États membres de l'Union* – dans: *La France, l'Europe et le monde. Mélanges en l'honneur de Jean Charpentier,* Paris, Pedone, 2009, p. 409;

Jean-Denis MOUTON, *Réflexions sur la prise en considération de l'identité constitutionnelle des États membres de l'Union européenne* – dans: *L'Union européenne: Union de droit, Union des droits. Mélanges en l'honneur de Philippe Manin*, Paris, Pedone, 2010, p. 145;

Jean-Denis MOUTON (dir.), *L'Union européenne en débat. Visions d'Europe centrale et orientale,* Presses universitaires de Nancy, coll. Cap Europe, Nancy, 2004;

Sebastien PLATON, *Le respect de l'identité nationale des États membres: frein ou recomposition de la gouvernance?*, Revue de l'Union européenne, n°556, mars 2012, p. 1;

Dominique RITLENG, *De l'utilité du principe de primauté du droit de l'Union,* Revue trimestriel de droit européen, 2009, p. 677;

Martin SÉBASTIEN, *L'identité de l'État dans l'Union européenne: entre "identité nationale" et "identité constitutionnelle", Revue française de droit constitutionnel, Vol.* 3/2012 (n° 91), p. 13–44, spec. p. 13;

Denys SIMON, *L'identité constitutionnelle dans la jurisprudence de l'Union européenne* – dans: **Laurence BURGORGUE-LARSEN (dir.)**, *L'identité constitutionnelle saisie par les juges en Europe*, Pedone, 2011, p. 27;

Anita SCHNETTGER, *Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System* – in: **C. CALLIESS and G. VAN DER SCHYFF (eds)**, *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, 2009, p. 9–38;

Armin Von BOGDANDY, Stephan SCHILL, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty,* Common Market Law Review, Vol. 48, 2011, p. 417–1454.

See also:

Baptiste BONNET, *Les rapports entre droit constitutionnel et droit de l'Union européenne. De l'art de l'accomodement raisonable*, Conseil constitutionnel, 2019/1, N° 2, p. 11–21;

Monica CLAES, *Negotiating Constitutional Identity or whose Identity Is it Anyway?* – in: **Monica CLAES, Maartje DE VISSER, Patricia POPELIER**

Member States – but also unambiguously guarantee it precisely

---

and Cathérine VAN DE HEYNING, *Constitutional Conversations in Europe*, Intersentia, 2012, p. 205;

Monica CLAES, Jan-Herman REESTMAN, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case,* German Law Journal, Special Section The CJEU's OMT Decision, Vol. 16, No. 04, p. 917–970;

Laurent DECHÂTRE, *L'identité constitutionnelle comme limite à l'ouverture au droit international et européen en Allemagne et en France* – dans: **Évelyne LAGRANGE, Andrea HAMANN et Jean-Marc SOREL (dir.)**, *Si proche, si loin: la pratique du droit international en France et en Allemagne*, Collection de l'UMR de droit comparé de Paris, Université de Paris 1, Vol. 29, p. 57–86;

Olivier DUBOS, *Inconciliable primauté. L'identité nationale:* sonderweg *et* self-restraint *au service du pouvoir des juges?* – dans: La conciliation entre les droits et libertés dans les ordres juridiques européens, *Dixièmes journées du pôle européen Jean Monnet,* Institut droit et économie des dynamiques en Europe, Université Paul Verlaine (Metz), 18 et 19 décembre 2009;

Marthe FATIN-ROUGE STÉFANINI, Anne LEVADE, Rostane MEHDI, Valérie MICHEL (dir.), *L'identité à la croisée des États et de l'Europe. Quel sens? Quelles fonctions?*, Bruyllant, 2005;

Gary Geffrey JACOBSOHN, *Constitutions and national identity*, Cambridge, MA, Harvard University Press, 2010;

Jan KOMÁREK, *National constitutional courts in the European constitutional democracy, International Journal of Constitutional Law*, Vol. 12, Issue 3, July 2014, p. 525–544;

Theodore KONSTADINIDES, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement, Cambridge Yearbook of European Legal Studies,* 13, 2010/1, p. 195, esp. p. 197;

Elisabetta LANZA, *Core of State Sovereignty and Boundaries of Union's Identity in Lisbon – Urteil,* German Law Journal, Vol. 11, No. 04, p. 399;

Anne LEVADE, *Identité constitutionnelle et exigence substantielle: comment concilier l'inconciliable* – dans: *L'Union européenne: Union de droit, Union des droits. Mélanges en l'honneur de Philippe Manin*, Paris, Pedone, 2010, p. 109;

Anne LEVADE, *Quelle identité constitutionnelle nationale préserver face à l'Union européenne?* Annuaire de droit européen, Vol. II, 2004, p. 173;

Béligh NABLI, *L'état intégré. Contribution à l'étude de l'État membre de l'Union européenne,* Pedone, Paris, 2019;

Marie-Claire PONTHOREAU, *Constitution européenne et identités constitutionnelles nationales*, VIIe Congrès mondial de l'AIDC, Athènes, 11–15 juin 2007;

Marie-Claire PONTHOREAU, *Constitutions nationales et droit(s) sans frontières. Jalons méthodologiques,* Constitutions, 2010, p. 61;

Marie-Claire PONTHOREAU, *Identité constitutionnelle et clause européenne d'identité nationale. l'Europe a l'épreuve des identités constitutionnelles nationales,* Diritto pubblico comparato ed europeo, 2007, p. 1576;

through the principle of respect for national constitutional identity in the EU.

I suggest that protection of Member States' national constitutional identity requires the adoption of **several premises:**

1. Respect for the national constitutional identity of Member States is one of the fundamental principles of the EU.

2. Protection of national constitutional identity is necessary precisely because of the peculiarities of the EU and its legal order.

3. This principle, enshrined in Article 4(2) TEU, should be viewed as a manifestation of respect for Member States' sovereignty, a delimitation of the powers transferred to the EU, and a counterbalance to the principles of conferral, sincere cooperation and primacy.

4. Protection of national constitutional identity is an element of the legal status of the integrated State.

5. There is a distinct boundary to the primacy of EU law and to the limitation of Member States' sovereignty: they may not infringe Member States' national constitutional identity. But then, there is also a boundary to Member States' right to protect their national constitutional identity: it may not affect the essence, the *raison d'être* and the fundamental principles of the Union legal order.

6. The concept of national constitutional identity is an autonomous Union concept, a comprehensive concept, and a concept

---

Dominique ROUSSEAU, *L'identité constitutionnelle, bouclier de l'identité nationale ou branche de l'étoile européenne?* – dans: **Laurence BOURGORGUE-LARSEN**, *L'identité constitutionnelle saisie par les juges en Europe*, Paris, 2011, p. 89;

Sven SIMON, *Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling*, German Law Journal, Vol. 16, No. 04, p. 1026;

Gerhard VAN DER SCHYFF, *Member States of the European Union, Constitutions and Identity* – in: **C. CALLIESS and G. VAN DER SCHYFF (eds)**, *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge University Press, 2009, p. 305–347;

Mattias WENDEL, *La jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel fédéral allemand sur l'évolution des traités européennes. Un conte d'aiguilleurs et de gardiens du droit* – dans: **Évelyne LAGRANGE, Andrea HAMANN et Jean-Marc SOREL (dir.)**, *Si proche, si loin: la pratique du droit international en France et en Allemagne*, Collection de l'UMR de droit comparé de Paris, Université de Paris 1, Vol. 29, p. 87–125.

reflecting only particular significant constitutional peculiarities of a particular Member State. Identity manifests itself in a formal aspect and in a value aspect.

7. Protection of national constitutional identity is a right of the Member State concerned and of every natural or legal person under its jurisdiction.

8. Protection of national constitutional identity can only materialise through its confirmation (recognition) by the Court of Justice of the European Union (CJEU). The Court can only be seised by following the procedures laid down in Articles 258, 259, 263 and 267 TFEU. The Court may not monitor *proprio motu*.

9. A ruling given by the national constitutional jurisdiction is necessary but not mandatory.

10. If the CJEU confirms (recognises) an element of a Member State's national constitutional identity, the consequences consist in the right of that Member State (and of every natural or legal person subject to its law) to deviate from the fulfilment of obligations arising from EU law (and, above all, from the principle of primacy).

11. Ultimately, protection of national constitutional identity presents a significant tangible opportunity for an incidental restriction of particular Union law rule. This opportunity, however, remains a limited exception to the general operation (and *raison d'être*) of EU law. Presumably, this is an exception that confirms the rule. And the rule undoubtedly remains that any Union law rule prevails over any domestic law rule of a Member State. Therefore, respect for national constitutional identity requires a European-law-friendly approach from the national jurisdictions and an identity-friendly or sovereignty respectful approach from the CJEU.

I will discuss these conceptions briefly in this and the next volume.[2]

---

[2] For a more detailed analysis, see **Atanas SEMOV**, *Zashtita na natsionalnata konstitutsionna identichnost v Evropeiskiya sayuz* [Protection of national constitutional identity in the European Union], Professor Marin Drinov Publishing House of the Bulgarian Academy of Sciences, Sofia, 2021, and **Atanas SEMOV**, *The Protection of the National Constitutional Identity under the EU Law (Understanding, Procedures and Legal Effects)*, forthcoming: College of Justice – European Policy Research Center, Warsaw, Poland, 2022.

I. Respect for national constitutional identity as a fundamental principle of the EU

1. Why do EU Member States need protection of their national constitutional identity?

A proper understanding of the essence and application of the principle of respect for Member States' national constitutional identity requires a rationalisation of the basic peculiarities of the EU and its legal order.

1.1. Essential peculiarities of the EU.

1.1.1. The EU is not an international organisation: it is intended to lay down legal rules by itself, and it is vested with *power* (*competences*). The EU is *neither a State* nor *a federation*[3]: it is vested with power but does not possess sovereignty (and is by no means an entity fit to be sovereign).

1.1.2. The EU is a structure of integration. A Union of law, vested with *power*, which it exercises (relatively) *independently* of the States only up to an *extent* and within a *scope* defined by Member States through the Founding Treaties and only for the attainment of the *objectives*[4] set by the Founding Treaties. **Member States are subordinated to a union which is subordinated to them**[5]. The principle of integration is particularised and framed by a number of principles of the EU: *conferral* (which, after the Treaty of Lisbon, has already been regulated explicitly in the first paragraph of Article 1 and elaborated in Article 4(1) and in Article 5(1) and (2) TEU and reaffirmed in Article 7 TFEU); *attainment of objectives* (Article 5(2), first sentence *in fine*, and

[3] I would rather prefer that we are not tempted to define the EU as a federation of whatever kind, and we should best avoid using at all the concept of 'federation' in reference to the EU: the EU is an entity that does not fit into any old terminological garb and does not feel comfortable in it. The concept of 'federation' is tired… It rather harms the Union itself and its correct conceptualisation and successful development. What the EU needs is speeding up rather than spelling out!

[4] I have proposed a detailed analysis of the essential peculiarities of the EU in my studies on the most important problems of EU law.

[5] Member States are 'linked' by "…a structured network of principles, rules and mutually interdependent legal relations" – **CJEU**, 18.12.2014, *Opinion 2/13 (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms),* p. 167.

Article 7 TEU); *proportionality* (Article 5(4) TEU); *subsidiarity* (Article 5(3) TEU), etc.

1.2. Essential peculiarities of EU law[6]**.** EU law is not international law but differs fundamentally from it, and its effect in a Member State by no means depends on its will (direct applicability).[7] EU law is an *autonomous legal order*,[8] *a fundamentally "new kind of legal order"*[9]. It is a *"body of law which binds both their nationals and themselves [the Member States]"*[10]. It *"stems from an independent source of law" with its own "constitutional framework"*[11]. This autonomous legal order applies in a Member State solely on the basis of *its own principles of application*: primacy over domestic law; direct applicability, direct effect and indirect effect (impact) in almost all areas of legal regulation[12] (even in matters that do not fall within the formal scope of competences conferred on the EU[13]). All natural or legal persons subject to the law of all Member States are bound by EU law in all situations falling within its scope.

These peculiarities of the EU and its legal order make it crucial to understand the legal status of an EU Member State.

---

[6] Even in 2014 the CJEU referred to "the constitutional framework" of the EU – **CJEU,** 18.12.2014, *Opinion 2/13*, p. 177.

[7] That is why in Bulgaria Article 5(4) of the Constitution, which regulates the effect of international law, is inapplicable *vis-à-vis* EU law (see Constitutional Court Decision No. 7 of 19.4.2017 in Constitutional Case No. 7/2017) and, accordingly, the Constitutional Court may not review laws as to their compatibility with EU law (Constitutional Court Decision No. 8 of 30.6.2020 in Constitutional Case No. 14/2019).

[8] In p. 170 of **CJCE**, 18. 12. 1014, *Opinion 2/13,* the CJEU emphasises "the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law"!

[9] *Opinion 2/13*, p. 158.

[10] **CJEC**, 15.7.1964, *Costa* v *E.N.E.L.,* 6/64.

[11] P. 163, where the CJEC also recalls the judgment where this was first formulated: *Les Verts* v *Parliament*, 294/83, p. 23. See also **CJEC**, *Opinion 1/91, European Economic Area.*

[12] "It is becoming increasingly difficult to find areas where Union law is totally absent" – **Allan ROSAS**, *When is the EU Charter of Fundamental Rights Applicable at National Level?*, Mykolas Romeris University, Jurisprudence, 2012, 19 (4), p. 1269–1288, esp. p. 1281.

[13] **CJEU**, 2.3.2010, *Rottmann,* C-135/08, p. 41.

2. Legal status of an integrated State and right to protection of national constitutional identity as an element of that status.

"The legal status of an integrated State"[14] is the legal position of Member States in the EU. I already assumed that Member States are undoubtedly sovereign States. Just as undoubtedly, however, *their sovereignty is functionally limited:* they are "integrated States."

2.1. An integrated State is:

– a *sovereign State* (and the EU respects its sovereignty, Article 4(2) and Article 50 TEU);

– a *constituent unit of the EU* (first and second paragraphs of Article 1 TEU);

– a *founder and 'dominus' of the EU* (first paragraph of Article 1; Article 4(1) and Article 5 TEU);

– a *subordinate State* (obliged to comply with all EU law rules: Article 4(3) and Article 19 TEU, including by not applying its own domestic rules that are contrary to EU law);

– a *loyal EU member* (Article 4(3);

– *with guaranteed national constitutional identity* (Article 4(2): in certain cases a Member State may deviate from the obligation to observe EU law by not applying/not complying with Union law rules that are contrary to constitutional rules expressing its national constitutional identity).

2.2. The integrated State has Union fundamental rights and Union obligations.

2.2.1. Union obligations: an obligation *to assist the EU* (in carrying out tasks for the attainment of its objectives – Article 4(3) TEU,

---

[14] I am borrowing the concept of 'status of an integrated State' from my inspired and inspiring tutor, Prof. Jean-Denis Mouton of the Centre européen universitaire in Nancy, France. See mainly in **Jean-Denis MOUTON**, *La défence de l'identité constitutionnelle, révélatrice de la nature de l'Union européenne,* Constitutional Studies, Constitutional Court of Republic of Bulgaria, Vol. I, 2019, p. 192–214, and **Jean-Denis MOUTON**, *Vers la reconnaissance de droits fondamentaux aux États dans le système communautaire?* – dans: *Les dynamiques du droit européen en début de siècle. Etudes en l'honneur de Jean-Claude Gautron*, Paris, Pedone, 2004, p. 463. I regard the assertion of this concept – and its understanding – as crucial for the successful development of the EU. See also **Béligh NABLI**, *L'état intégré. Contribution à l'étude de l'État membre de l'Union européenne*, Pedone, Paris, 2019, and **Laurence POTVIN-SOLIS (dir.)**, *Le statut d'état membre de l'Union euorpéenne*, Quatorzièmmes journées Jean Monnet, Bruylant, 2018.

principle of sincere cooperation); an obligation *to obey* (to apply Union law rules by taking all general or particular measures – Article 4(3), second paragraph, and Article 19(1), second paragraph TEU, principle of effectiveness of EU law), and an obligation *to disobey* (or to refrain from applying any legal rules, whether national or international, that are contrary to Union rules, principle of primacy).

2.2.2. Union fundamental rights: *positive sovereign rights*: a right to be a member of EU as a sovereign State (in the light of Article 4(2) and Article 50 TEU), a right of a founder (determines the objectives, powers and legal *modi operandi* of the EU – first and third paragraphs of Article 1 and Article 4(1) TEU), and a right to equal treatment in the EU (Article 4(2); *negative sovereign rights*: *a right to control over the exercise of the conferred competences* (not to comply with any Union law rule constituting an act *ultra vires* – Article 5(1) and (2) TEU), and *a right to protection of identity* (not to comply with any Union law rule that is contrary to its national constitutional identity – Article 4(2) of TEU).

2.3. The right to protection of national constitutional identity as an element of the status of an integrated State.

2.3.1. Respect for a Member State's national constitutional identity manifests respect for its sovereignty, **frames** the competence conferred on the EU and the primacy of EU law[15] and **counterbalances** the principles of conferral, sincere cooperation[16] and primacy (in connection with the principles of direct applicability and direct effect). Owing to their reserved sovereignty, Member States may incidentally deviate from a Union obligation. Because they are loyal EU members, Member States can only do so with the

[15] See **Armin Von BOGDANDY, Stephan SCHILL,** *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty,* Common Market Law Review 2011, Vol. 48, p. 1417–1454, or **Stefano MANGIAMELI**, *The European Union and the Identity of Member States*, *L'Europe en formation* 2013, n°369/3, p. 151–168.

[16] For the interconnection with the principle of sincere cooperation and with the principle of conferral in the EU, see particularly topical in the **Opinion of Advocate-General Kokott**, op. cit., p. 83–85. She clearly points out that "a reading of that provision in the context of Article 4 and the other provisions under Title I of the Treaty on European Union reveals that that concept also has a vertical dimension, that it to say the Treaties confer on it a role in the delimitation of competences between the European Union and the Member States" (p. 83).

assistance (approval?) of the CJEU. And because the EU respects national constitutional identity, the CJEU endeavours to confirm respect for national constitutional identity – except where the unity and effectiveness of EU law are directly jeopardised.

2.3.2. On the face of it, this is a closed circle which depends solely on the well-intentioned dialogue between the national jurisdictions and the Union jurisdiction. A dialogue requiring a *European-law-friendly* approach (*europarechtsfreundlichkeit*[17]) from the national courts and an *identity-friendly* or *sovereignty-respectful* approach from the CJEU. This means that the national courts should invoke national constitutional identity only when they really find that this is substantially justified, and that the CJEU should always respect national constitutional identity whenever the foundations of the Union legal order are not substantially jeopardised.

Which ultimately means that the protection of national constitutional identity is a *tangible opportunity* (lest Member States' sovereignty be undermined) which is implemented *only as an exception* (lest the Union legal order be undermined).

2.3.3. *Sincere cooperation is a natural necessity for the EU.* A reading of the CJEU's case-law clearly shows that **the power of the EU does not impede Member States' sovereignty and Member States' sovereignty does not impede the power of the EU.**

2.3.4. *Primacy is an existential necessity of EU law*[18]. But it is unfeasible unless it is *limited functionally* (it applies only when a domestic law comes into conflict with it) and *limited in terms of subject-matter* (it does not apply in case of an act *ultra vires* or an infringed national constitutional identity[19]).

---

[17] To use the term of the German Constitutional Court itself in Bundesverfassungsgericht, 30.6.2009, 2 BvE 2/08, *Lissabon-Urteil*. See, e.g., Elisabetta LANZA, *Core of State Sovereignty and Boundaries of Union's Identity in* Lissabon-Urteil, German Law Journal 2010, Vol. 11 (4), p. 399–418.

[18] '[T]the fundamental principle that the Community legal system is supreme' (**CJEC**, 10.10.1973, *Variola,* 34/73) and 'existential necessity for supremacy' (**Pierre PESCATORE**, *L'ordre juridique des Communautés européennes*, Presses universitaires de Liège, 1975, p. 209, spec. p. 227).

[19] I think it should be beyond dispute that every constitutional court is competent: to interpret (and to ask the CJEU to interpret) the Founding Treaties in accordance with the principle of respect for national constitutional identity and to review any Union legal act as to compliance with the limits of the competence conferred on the EU (review as to *ultra vires*) and as to respect for

2.3.5. *Invoking national constitutional identity makes sense only as a limitation of the obligation of sincere cooperation for the purpose of deviating from primacy*: refusing to apply a Union law rule that is incompatible with national constitutional identity!

2.3.6. But then, however, the only way to protect national constitutional identity is to obtain a ruling from the CJEU (see in the next volume).

3. Regulatory framework.

3.1. The concept of 'national identity' was introduced by the Maastricht Treaty. Paragraph 1 of its Article F explicitly stated that that "the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy."

3.2. The Treaty of Lisbon re-regulated respect for Member States' national constitutional identity[20] as a ***fundamental principle of the EU*** **and** ***a fundamental right of the integrated State***[21]. It significantly modified the provision (including by moving it further up, to Article 4(2) TEU) and linked it directly to the constitutional concept of sovereignty[22] and thus established a formal (and, therefore, more certain) legal basis for respect for

national constitutional identity (and, by a reference for a preliminary ruling, to ask the CJEU to declare invalidity). See, to this effect, the case-law of certain constitutional jurisdictions: **Conseil constitutionnel de France**, *Décision no. 2004–505 DC*, 19.11.2004, § 10, 12–13; *Décision no. 2006–540 DC*, 27.7.2006, § 19; *Décision no. 2006–543 DC*, 30.11.2006, § 6; **Bundesverfassungsgericht,** 30. 6. 2009, 2 BvE 2/08, *Lissabon-Urteil*, § 234, 240, 332, 339; *2 BvR 2735/14*, 15.12.2015, § 44; **Tribunal Constitucional de España**, *Declaración 1/2004*, 13.12.2004, § 35, 37–45, 58; *Sentencia 26/2014*, 13.12.2014, § II.3.

See also **Jan KOMÁREK,** *National constitutional courts in the European constitutional democracy*, *International Journal of Constitutional Law 2014*, Volume 12(3), p. 525–544, and **Laurent DECHATRE**, *Karlsruhe et le contrôle ultra vires: une "source de miel" pour adoucir la très acidulée décision Lisbonne*, Revue des affaires européennes 2009–2010, no. 4, p. 861–873.

[20] Until Lisbon neither the Member States had invoked the "clause" nor had the Court of Justice found an occasion to apply it.

[21] **Jean-Denis MOUTON**, *Vers la reconnaissance d'un droit au respect de l'identité nationale pour les États membres de l'Union* – dans: *La France, l'Europe et le monde. Mélanges en l'honneur de Jean Charpentier*, Paris, Pedone, 2009, p. 409.

[22] See **Jean-Marc SAUVÉ**, *L'ordre juridique national en prise avec le droit européen et international: questions de souveraineté?,* Conseil d'État Ouverture, 10 avril 2015.

national constitutional identity, apparently as a **counterbalance to the principles of integration, of sincere cooperation and of primacy**. The Treaty of Lisbon thus provided an unconditional explicit guarantee that the integration construct would not affect the principal national democratic structures[23].

The Treaty of Lisbon performed a dual constitutional function. On the one hand, it *reinforced the federal dimension* of the Union construct and, on the other, it *categorically reaffirmed the sovereignty* of Member States and *clearly guaranteed that the EU is not turning into a federation* (be it a 'quasi' federation, a 'federation of States and citizens'[24] or a 'federation of nation- states'[25]).

---

[23] Even before the Treaty of Lisbon a number of Advocates-General, urging in their opinions the Court to give full scope to the clause on respect for national identity, tied the concept to constitutional identity: Advocate-General Maduro, for example, stated that constitutional jurisdictions "are best placed to define the constitutional identity of the Member States which the European Union has undertaken to respect" – *Opinion of Advocate-General Maduro,* **CJEC**, 7.9.2006, *Marrosu*, C-53/04, p. 40.

[24] 'Fédération d'*É*tats et citoyens', as formulated by one of the most profound scholars of the identity issue, Prof. Jean-Denis Mouton, in: *Konstitutsionno pravo na Evropeyskiya sayuz* [Constitutional law of the European Union] – in: **Florence BENOIT-ROHMER, Jean-Paul JACQUÈ, Jean-Claude GAUTRON, Joël RIDEAU, Etienne CRIQUI, Jean-Denis MOUTON**, *Zapiski po Pravo na ES. Tom I. Institutsionno pravo* [Notes on EU Law. Volume I. Institutional law], St Kliment Ohridski University of Sofia, Faculty of Law, Sofia, 2009, p. 187*; Darzhavata-chlenka mezhdu suvereniteta i zachitaneto na neynata identichnost: kakav Evropeyski sayuz?* [A Member State between sovereignty and respect for its identity: what European Union?] – in: **Marie-France CHRISTOPHE-TCHAKALOFF, Florence BENOIT-ROHMER, Jean-Paul JACQUÈ, Joël RIDEAU, Etienne CRIQUI, Jean-Denis MOUTON, Atanas SEMOV**, *Lektsii na Mezhdunarodnata magistarska programa Pravo na ES. Tom II. Aktualni problemi na ES* [Lectures of the International Master's Degree Programme in European Union Law. Volume II. Topical issues of the EU], St Kliment Ohridski University Press, Sofia, 2013, p. 223; and *Preotsenka na saotnoshenieto na Konstitutsionnoto pravo na ES i Konstitutsionnoto pravo na DCh? (Novo razvitie v kontseptsiyata za sayuznoto grazhdanstvo v praktikata na Sada na ES)* [Reassessment of the ratio between EU constitutional law and Member States' constitutional law? (New development in the Union citizenship concept in the case-law of the Court of Justice of the EU)] – in: **Koen LENAERTS, George ARESTIS, Jean-Paul JACQUÈ, Florence BENOIT-ROHMER, Joël RIDEAU, Jean-Denis MOUTON, Laurence POTVIN-SOLIS, Atanas SEMOV**, *Cours du Master international Droit de l'Union européenne. Volume III. Droits fondamentaux et non-discrimination,* St Kliment Ohridski University Press, Sofia, 2014.

[25] **Jean-Louis QUERMONE**, *La "Fédération d'États-nations": concept ou contradiction?,* Revue française de droit constitutionnel, 2010/4, No 84, p. 677–692.

Apart from the new wordings of Articles 1, 2 and 3 TEU, the Treaty of Lisbon enshrined a new Article 4, which builds on the first paragraph of Article 1 (principle of integration) and along with it constitutes the **pivotal provision defining the nature of the EU in four key elements:** *the EU is vested with competence to exercise public authority* (in the light of Article 1(1) in conjunction with the first paragraph of Article 1 TEU); the EU is *only vested with conferred competence* (in the light of Article 1(1) in conjunction with the first paragraph of Article 1 and of Article 5(2) TEU): according to Article 4(1), the EU may not do anything for which it is not explicitly empowered (or 'implicitly', Article 352 TFEU), and the matters in which the EU is not vested with any conferred competence are *areas in which the States reserve their competences* (or *'purely internal situations'*[26]); the EU has been established by, and consists of, *sovereign* States (in the light of Article 4(2) and Article 50 TEU); even though they remain sovereign, the Member States establish the EU in order to subordinate themselves to it (albeit only "in specified areas" – in the light of Article 19 TEU) and explicitly commit to a broad ranging obligation of *sincere cooperation* (paragraph 3).

Article 4 should be **rationalised within the context of the inherently democratic nature of the EU**, which is explicitly reaffirmed by the Fundamental Treaties[27]. According to the updated conception, the integration union is a structure based on mutual trust between the (democratic) Member States, on the one hand, and, on the other, among them all (jointly and individually) and the (democratic) Union[28].

3.3. The entire conception of the EU's obligation to respect the identity of its Member States is corroborated by the **explicit proclamation of the "constitutional traditions common to**

[26] The CJEC, however, takes a strongly limitative approach to this conception – e.g. in the matter of EU citizenship, see **CJEC**, 20.9.2001, *Grzelczyk,* C-184/99, p. 31,

[27] See **Eric Elander DUQUE**, *United In Diversity or Through Diversity? – National Identity As a Flexibility Clause – Granting Member States a Margin of Appreciation*, Lund University, JURM02 Graduate Thesis, Spring 2013.

[28] See **Eric Elander DUQUE**, *United In Diversity or Through Diversity? – National Identity As a Flexibility Clause – Granting Member States a Margin of Appreciation*, Lund University, JURM02 Graduate Thesis, Spring 2013.

the Member States"[29] **as "fundamental principles" – precisely of the EU itself**. The new wording of Article 4(2) TEU, however, is narrower: while the Maastricht Treaty stipulated that "the Union shall respect the national identities of its Member States," the new wording limits the scope of national identity to the fundamental, political, and constitutional structures of Member States[30] (see further in II).

3.4. Thanks to the Court of Justice of the EU, this provision has become a viable legal rule (with regard to all sources of EU law, this principle operates as a vector of interpretation, and with regard to the secondary sources, it also serves as a benchmark of validity) and the conception of a link between national constitutional identity (in its politico-institutional dimension) and national cultural identity has taken hold[31] (further in II).

4. Why respect for national constitutional identity is a *principle of the EU.*

The EU is a unique construct founded on two apparently incompatible elements: Member States transfer power yet stay sovereign. The **conferral of power**[32] (first paragraph of Article 1

[29] Article 6(3) TEU and more categorically in the fifth recital of the Preamble to the Charter of Fundamental Rights of the European Union.

[30] According to Advocate-General Kokott, "the objective of national identity of preserving, as far as fundamental political and constitutional structures (…)," and "only that function of the clause safeguarding national identity can explain why Article 4(2) TEU has been limited in comparison with the previous provision contained in the Maastricht Treaty" – **Opinion of Advocate-General Kokott**, 15.4.2021, *V.M.A.* v *Stolichna Obshtina, Rayon 'Pancharevo'*, C-490/20, p. 87–88.

[31] See also **Jean-Denis MOUTON**, *Vers la reconnaissance de droits fondamentaux aux États dans le système communautaire* – dans: *Les dynamiques du droit européen en début de siècle. Études en honneur de Jean-Claude Gautron,* Paris, Pedone, 2004, p. 467. See also **Martin SÉBASTIEN**, *L'identité de l'État dans l'Union européenne: entre "identité nationale" et "identité constitutionnelle"*, *Revue française de droit constitutionnel, Vol.* 3/2012 (n° 91), p. 13–44, spec. p. 13.

[32] Article 1 TEU outlines the EU as a union among States on which they confer competences in particular areas to attain objectives they have in common.

I object to the expression "transfer of sovereignty"… State sovereignty is, in its nature and rationale, unitary, indivisible and non-transferable. The EU Member States do restrict the (essentially independent) exercise of their sovereignty (i.e. their prerogatives as public authority), but they reserve the sovereignty itself – its core (the competence for competences and the right to self-determination), which is why they are solely competent not only

TEU) undoubtedly **limits sovereignty to a degree that it needs to be guaranteed at Union level**. The Founding Treaties explicitly provide at least four guarantees: a *principle of conferral* (first paragraph of Article 1, Article 4(1) and Article 5(2) TEU); a *principle of Member States' equality* and a *principle of reserved sovereignty* (Article 4(2) and in the light of Article 50 TEU – Brexit clearly proved it), and a *principle of respect for national constitutional identity* (Article 4(2) TEU). I therefore assume that Article 4(2) TEU should be viewed as **simultaneously enshrining two principles[33]: a principle of Member States' reserved sovereignty**[34] (a confirmation that EU membership may not affect Statehood itself, the EU is a union of States) and a **principle of respect for Member States' national constitutional identity** (the sovereign State is impossible without protected constitutional identity, and the Union is only possible when sovereignty and identity are respected).

4.1. Protection of national constitutional identity is a **principle**: it regulates a fundamental element of the nature of the EU, and it is of indispensable and even defining significance for the capability of the EU to be a structure of power.

4.2. Respect for national constitutional identity is **a principle inherent of the EU itself** (reflecting its essential peculiarities[35]) and not merely and not simply a principle of EU law, and even less so a principle of application of EU law.

---

to determine whether the EU exists and what it can do but also their own subordinate status, and they can leave the EU practically without restraint (as we saw) and, respectively, free themselves from Union's authority.

[33] See **Jean-Denis MOUTON**, *La défence de l'identité constitutionnelle, révélatrice de la nature de l'Union européenne* – in: Constitutional Studies, Constitutional Court of Republic of Bulgaria, Vol. I, 2019, p. 192–214.

[34] "[I]nherent in their [the Member States'] fundamental structures, political and constitutional". I wonder why the Member States, which otherwise formulated several guarantees of that, did not simply write down in the Founding Treaties that the EU consists of sovereign States or that Member States retain their sovereignty…

[35] "The national identity (…) is not only one legitimate objective among others which may be taken into account when examining a possible justification for a restriction on the right to freedom of movement" – **Opinion of Advocate-General Kokott**, 15.4.2021, *V.M.A.* v *Stolichna Obshtina, Rayon 'Pancharevo'*, C-490/20, p. 82.

4.3. Respect for national constitutional identity as a **fundamental principle** of the EU, inherently linked to the nature of the EU and inseparable from its other fundamental principles. It therefore operates transversally, with regard to all EU competences and activities and, accordingly, with regard to all its legal (and other!) acts. The EU may not adopt legal acts and any other measures whatsoever that infringe the principle of respect for the national constitutional identity of a Member State. I would venture to argue that a breach of the principle of respect for national constitutional identity should be regarded as grounds for invalidity of any EU legal act (see in the next volume).

4.4. Article 4(2) TEU must therefore be read as a rule enshrining an **obligation of the EU** (to respect Member States' sovereignty and national constitutional identity) and a **right of Member States** (a right to protection of their national constitutional identity).

4.5. The peculiar nature of the EU and of its legal order, however, predetermines the **impossibility** of the principle of (the right to) respect for a Member State's national constitutional identity **to call into question the very foundation of the Union legal order** and make its existence meaningless. Advocate-General Kokott argues that "only a conception of national identity which is consistent with the fundamental values of the European Union as enshrined *inter alia* in Article 2 TEU may be protected under Article 4(2) TEU"[36] (an identity which is inconsistent with the fundamental values of the EU makes membership in the EU meaningless) and that "reliance on national identity **must be weighed up** against other interests, such as the fundamental rights of the Charter"[37].

In any case, the concept of 'identity' in EU law **must be viewed solely in a Union context**[38] (see further in II).

---

[36] She recalls the **Opinion of Advocate-General Villalón,** *Gauweiler and Others*, C-62/14, p. 61, and **CJEU,** 22.12.2010, *Sayn-Wittgenstein,* C-208/09, p. 89.

[37] **Opinion of Advocate-General Kokott**, op. cit., p. 73 and 80.

[38] "An autonomous concept of EU law", ibid., p. 70.

5. Intermediate conclusion. Respect for a Member State's national constitutional identity in its two aspects (politico-institutional and cultural-historical[39]) should be understood as a ***principle* that is inherent to the nature of the unique integration construct and a *Union fundamental right* of the integrated State.**

Thus, there is a distinct boundary to the limitation of sovereignty and to the effect with primacy of EU law: they may not infringe the Member States' national constitutional identity.[40] But then, there is also a boundary to Member States' right to protect their national constitutional identity: it may not affect the essence, the raison d'être and the fundamental principles of the Union legal order.

At the end of the day, respect for national constitutional identity presents a significant tangible opportunity for an incidental restriction of the effect of particular Union law rules. This protection, however, remains just a limited exception to the general effect (and *raison d'être*!) of Union law. Presumably, this is an exception that confirms the rule that is inherent to the nature of the EU, according to which *any Union law rule prevails over any Member State's domestic law rule in case of a conflict between these two rules.*

This protection can be implemented in practice *only if there is a conflict* (with an essential element of identity – further in II) and *only provided that it is confirmed (recognised) by the CJEU* (in the next volume). This is precisely what makes the dialogue between the national judge and the Union judge not only necessary but crucial.

---

[39] About e.g. linguistic identity, see further **CFI**, 20.11.2008, *Italian Republic* v *European Commission,* T–185/05; **CJEC**, 5.3.2009, *UTECA*, C–222/07 (Opinion of Advocate-General Kokott); **CJEU**, 12.5.2011, *M. Runevič-Wardyn*, C-391/09, but also **CJEU**, 16.4.2013, *A. Las*, C-202/11 (negative judgment!).

See also the landmark case **CJEU**, 8.3.2011, *Ruiz Zambrano,* C-34/09, in which the CJEU found against Belgium inferring arguments from … Belgian identity!

[40] **Laurent DECHÂTRE,** *L'identité constitutionnelle comme limite à l'ouverture au droit international et euorpéen en Allemagne et en France* – dans: **Évelyne LAGRANGE, Andrea HAMANN et Jean-Marc SOREL (dir.)**, *Si proche, si loin: la pratique du droit international en France et en Allemagne*, Collection de l'UMR de droit comparé de Paris, Université de Paris 1, Vol. 29, p. 57–86.

National constitutional identity "was conceived to limit the impact of EU law in areas considered essential for the Member States and not only as a value of the European Union which must be weighed against other interests of the same ranking." **Opinion of Advocate-General Kokott**, op. cit., p. 86.

II. Concept of national constitutional identity

The understanding, set forth here, of respect for national constitutional identity as a fundamental principle of the EU and a fundamental right, part of the legal status of a Member State, calls for **conceptualising** national constitutional identity in **its three dimensions**: as an *autonomous Union concept*, as a *comprehensive concept*, and as a concept reflecting *only specific significant constitutional peculiarities of a particular Member State*.

1. For the purposes and within the framework of EU law, national constitutional identity is solely and exclusively a Union concept[41]**.**

It is based on the TEU but is fleshed out in the CJEU case-law.

1.1. Identity may mean two different things in EU law and outside EU law, say, in national constitutional law. The meaning and understanding of identity outside EU law can only serve as a source of inspiration for its interpretation in a Union context (*vis-à-vis* EU law).

1.2. A national constitutional rule can be invoked in order to protect national constitutional identity **only if it falls within the scope of EU law.** The determining factor will be the understanding of the scope of EU law[42].

Thus, for example, the Bulgarian Grand National Assembly is a typical example of a national constitutional identity element that is irrelevant to EU law. Such an institute does not exist in any other European constitution – and undoubtedly exemplifies constitutional identity. But it is unrelated to EU law: a Grand National Assembly is competent to amend the basic provisions of the Constitution, but *per se* cannot fall within the scope of EU law and, respectively, cannot provide grounds for non-application of a Union rule in Bulgaria.

1.3. The right to protection of national constitutional identity can **only** be exercised **if a Union law rule is in conflict with a na-**

---

[41] "An autonomous concept of EU law" – **Opinion of Advocate-General Kokott**, op. cit., p. 70.

[42] See for details in **Atanas SEMOV**, *Prilozhnoto pole na Pravoto na EU* [The scope of European Union Law], St Kliment Ohridski University Press, Sofia, 2022.

tional constitutional identity. Therefore, even if they enshrine manifest elements of national constitutional identity, a number of provisions in the national constitutions, identifiable as they are as falling within the scope of EU law, cannot come into conflict, whether directly or even indirectly, with any Union law rule and, accordingly, such provisions remain irrelevant to EU law. One interesting example is Article 1 of the Constitution of the Republic of Bulgaria. It defines Bulgaria as "a republic with a parliamentary system of government" (a national specificity) and states that the entire power of the State derives from the people and is exercised by the people directly and through the bodies provided for in the Constitution (which, too, refers to certain historic peculiarities of the Bulgarian State) and that no part of the people, no political party nor any other organisation, state institution or individual may usurp the implementation of the people's sovereignty (which, too, is a clear reference to Bulgaria's historical and political past). Read broadly (including by the Constitutional Court[43]), these rules do not impede membership of the EU and the effect of EU law and cannot come into conflict with an EU law rule even though they fall within the scope of EU law.

A key tool for the avoidance of a conflict between a rule of the national constitution and an Union law rule can (and must!) be the mechanism of interpreting the national rules in conformity with EU law[44].

1.4. The precise content of the concept may vary by Member State and, owing to its very nature, cannot be defined without taking into account the Member States' conceptions of their national identities. "The obligation for the European Union to respect the national identities of the Member States may be understood as an obligation to respect the plurality of views and, therefore, the differences which characterise each Member State.

[43] See, e.g., Bulgarian Constitutional Court Decision No. 7 of 19.4.2018 in Constitutional Case No. 7/2017 (CETA).

[44] See for details in **Atanas SEMOV**, *Saobrazeno s Pravoto na EU talkuvane na vatreshnite pravni normi* [EU law-compliant interpretation of domestic law rules], St Kliment Ohridski University Press, Sofia, 2022.

For that reason, the concept of national identity cannot be interpreted in the abstract at European Union level"[45].

2. Identity is complex: "national identity" is constitutional, and "constitutional identity" is national.[46]

Even though the two concepts are used as interchangeable (synonymous)[47], I believe that a single concept is needed, combining both adjectives because of the major significance of each one of them.

2.1. In my opinion, the correct concept (and the institute of Union law) is precisely **"national constitutional identity"**. *Constitutional identity is nationally driven, and national identity is constitutionally expressed.* Constitution and nation are in a direct and close dialectical link. The State is a legal form of the nation[48]. The consti-

[45] **Opinion of Advocate-General Kokott**, op. cit., p. 70–72. See also **CJEU**, 22.12.2010, *Sayn-Wittgenstein,* C-208/09, p. 91 and 92, as well as **CJEU**, 2.06.2016*, Bogendorff von Wolffersdorff*, C-438/14, p. 73.

[46] For an original interpretation, see, e.g., **Sébastien MARTIN**, *L'identité de l'État dans l'Union européenne: entre "identité nationale" et "identité constitutionnelle"*, Presses Universitaires de France, *Revue française de droit constitutionnel, Vol.* 3/2012 (n° 91), p. 13–44.

[47] See **Denys SIMON**, *L'identité constitutionnelle dans la jurisprudence de l'Union européenne* – dans: **Laurence BURGORGUE-LARSEN (dir.)**, *L'identité constitutionnelle saisie par les juges en Europe*, Pedone, 2011, p. 27; **François-Xavier MILLET**, *National Constitutional Identity as a Safeguard of Federalism in Europe* – in: **Loic AZOULAI, Lena BOUCON, François-Xavier MILLET (eds)**, *Deconstructing EU Federalism through Competences*, EUI Working Papers, Law 2012/06, p. 58; **Theodore KONSTADINIDES,** *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement, Cambridge Yearbook of European Legal Studies 2010, Vol.* 131, p. 195, esp. p. 197; **Leonard F. M. BESSELINK**, *National and Constitutional Identity before and after Lisbon*, *Utrecht Law Review 2010,* Vol. 6, p. 36, 37 and 43–44; **Monica CLAES**, *Negotiating Constitutional Identity or whose Identity Is it Anyway?* – in: **Monica CLAES, Maartje DE VISSER, Patricia POPELIER and Cathérine VAN DE HEYNING**, *Constitutional Conversations in Europe*, Intersentia, 2012, p. 205–206, 218 and 221.

[48] Certainly, history knows examples of state entities that were not based on a distinct nation. The genesis of the German State is a typical example – but only in historic terms. At present, it is unthinkable to call into question the existence of a German nation. It is just as true that building a single statehood is sometimes a factor of shaping a single nation: the First Bulgarian Empire (established in AD 681) is a case in point – certainly, with the entire conventionality of any notion whatsoever of nation in the early Middle Ages. Other examples can also be seen in some newly established States in Europe,

tution is a basic act of the established national identity and a basic tool for its preservation. In turn, national identity is the core and, in value and historic terms, the *raison d'être* of the constitution.

2.2. Therefore, the **EU actually respects the historic and legal triunity of "nation-identity-State."** The expression "The Union shall respect (…) their [Member States'] national identities, inherent in their fundamental structures, political and constitutional" should be understood in no other way but as a principle of respect for Member States' national identity in its constitutional manifestation.

3. Identity, as referred to in Article 4(2) TEU, is an identity of the State *per se*, and not an identity of any individual State structures or of the nation itself.

4. Identity manifests itself:

➢ *in a formal aspect*: politico-institutional constitutional specificities (form of State government and political regime and form of State organisation including regional and local autonomy and/or self-government),

➢ and *in a value aspect*: history, culture (including linguistic diversity or a monolingual regime), traditions and, more generally, an internal idea of national identity.

Hence the Union concept of national constitutional identity is not based on a general or abstract conception of identity but is limited to the constitutionally expressed national identity elements. *Each element of constitutional identity is national, but not each element of national identity is constitutional.* **In the EU, pro-**

---

e.g. the Republic of North Macedonia: a State of composite national texture and newly formed national identity (incidentally, a telling example of the need of an instituted statehood acquiring a national identity, sometimes by borrowing or even misappropriating arguments and artefacts from history).

The opposite example is France: an old nation state in which the adopted principle is that every person who is a citizen of the State is part of its (only) nation… The French State is an *État-nation* (nation State). See, e.g., **Mattias WENDEL**, *La jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel fédéral allemand sur l'évolution des traités européennes. Un conte d'aiguilleurs et de gardiens du droit* – in: **Évelyne LAGRANGE, Andrea HAMANN et Jean-Marc SOREL (dir.)**, *Si proche, si loin: la pratique du droit international en France et en Allemagne*, Collection de l'UMR de droit comparé de Paris, Université de Paris 1, Vol. 29, p. 87–125.

tection is only enjoyed by those national identity elements that are *enshrined/expressed* in the national constitution. *What is protected is not national identity in general* (with all possible conceptions and outlines) *but only the constitutionally objectified* national identity – in its settled case-law, the CJEU recognises only such national identity elements that are objectified in the national constitution.

A case in point in Bulgarian history and in Bulgarian national memory is the Orthodox Church, which played an enormous role in preserving national memory and in reviving and asserting statehood. *Chitalishtes* (local centres for self-education which emerged in the late Middle Ages) are of immense significance, and they have retained this significance to this very day as specific centres for the preservation of memory and traditions and, in general, the spirit of the nation. In the value system of the Bulgarian people, teachers enjoy a nearly saintly status. These indisputable elements of Bulgarian national identity lack an explicit constitutional expression but can be inferred only from the spirit of the Constitution, read broadly in the context of history and values. Clearly, such an approach is possible: the Court of Justice of the European Communities granted such historic reading of the way in which the protection of human dignity is expressed in the Basic Law of the Federal Republic of Germany[49].

5. Identity reflects only *particular significant peculiarities* of a *particular State.*

5.1. In all cases, 'identity' **solely and namely implies *'distinction'*,** specificity, peculiarity, own characteristic, an identifying trait. The dissimilar rather than the similar. Not in the sense of 'integrating factor' or 'common identity' but in the sense of 'differentiating' and even 'unique.'[50]

[49] **CJEC**, 14.10.2004, *Omega,* C–36/02.

[50] Whether the CJEU always recognises a national constitutional identity element of a Member State specifically in the sense of a unique distinguishing peculiarity is an entirely different matter. In *Omega*, for example, the national peculiarity of protecting human dignity is strongly overrated – this is undoubtedly a principle that is inherent to a sufficiently equal degree to all democratic constitutions…

5.2. The national identity of a Member State is **what essentially/substantially differentiates it from the other Member States**. This identity is a *set of peculiarities that are inherent precisely to that Member State*[51] on account of its historical, cultural, political or legal traditions and/or specificities, not necessarily cumulatively. There are two keywords here: 'essentially' (concerning the most important aspects) and 'differentiates' (in the sense of being inherent to a particular State, setting it apart from the rest)[52]…

5.3. The CJEU's settled case-law **lacks examples of a 'group identity' being recognised to several Member States.** Such an option, though, should not be ruled out. I think it should be beyond doubt that, say, *religion* can be a *specificity common to several Member States* which is expressed in national constitutional identity elements of each one of them. As we have already seen, features of a national constitutional identity element – for one or more Member States with a sensitive ethnic balance or a burden of particular cultural and historical problems – can be found, say, in the *treatment of migrants*, in connection with the ethnic as well as the religious or cultural characteristics of the migrating groups of people[53]. The *shared communist past* of twelve EU Member States, too, can be a factor in identifying national constitutional identity elements of several of these Member States: certainly, only in the context of the constitutional expression of these elements. Similarly, it seems beyond doubt that several Member States, which not too long ago were, to a varying degree, under *the rule of the Ottoman Empire,* exhibit common elements in their constitutional identity.

---

[51] I would use, as a point of reference, Article 36(1) of the Bulgarian Constitution, which defines the study and use of the Bulgarian language as "a right and an obligation of every Bulgarian citizen."

[52] "[t]he objective of national identity of preserving, as far as fundamental political and constitutional structures are concerned, the particular approaches specific to each Member State" – **Opinion of Advocate-General Kokott**, op. cit., p. 87.

[53] See, e.g., **Pietro FARAGUNA**, *Constitutional Identity in the EU – A Shield or a Sword?,* Special Issue, Constitutional Identity in the Age of Global Migration, German Law Journal 2017, Vol. 18, Issue 7, p. 1617.

5.4. It is precisely because of its nature of an inherent element of the Constitution that national constitutional identity enables the individual Member State – **incidentally and specifically that Member State!** – to deviate from Union law. Even a fundamental right, like the human dignity, which is otherwise protected by every democratic constitution – may have different national dimensions according to the CJEU. And, in some Member States, it may be a manifestation/element of their national constitutional identity (the CJEU already held that with regard to Germany and Austria in *Omega*[54] and *Wittgenstein*[55] – precisely because of their common historical legacy of the fascist regime, which affects their national conception of human dignity), whereas the same may not be the case that can be established (proved) with regard to other Member States…

5.5. National constitutional identity reflects **precisely what is specific** to the individual State,[56] whereas what is common is enshrined in the formula of "constitutional traditions common to the Member States."

5.6. National constitutional identity is always protected through a particular element (a particular manifestation). *There is no such thing as 'national constitutional identity in general'*, and nobody could formulate it *in abstracto*. National constitutional identity always has particular manifestations: an enhanced protection of human dignity[57]; an enhanced protection of the national language[58]; or, conversely, a multilingual regime[59]; constitutional protection of the family and the different sexes of the individuals who are marrying (and/or of the parents), which would be the case, say, with the Bulgarian Constitution (particularly topical, see further); the constitutional status of religion – or the complete lack of such status (in the secular State, as in France), etc. Therefore, national constitutional identity should *always* be invoked before the

---

[54] **CJEC**, 14.10.2004, *Omega,* C–36/02.

[55] **CJEU**, 22.12.2010, *Sayn-Wittgenstein,* C–208/09.

[56] "Within the scope of national identity within the meaning of Article 4(2) TEU, which means that EU law must respect differences in values and views" – **Opinion of Advocate-General Kokott**, op. cit., p. 98.

[57] **CJEC**, 14.10.2004, *Omega,* C-36/02, and **CJEU**, 22.12.2010, *Sayn-Wittgenstein,* C-208/09.

[58] **CJEU**, 12.05.2011, *M. Runevič-Wardyn*, C-391/09.

[59] **CJEC**, 5.3.2009, *UTECA*, C-222/07 (Opinion of AG Kokott).

CJEU by *arguing that a particular national constitutional identity element has been affected* and not national constitutional identity as a whole/in general.

5.7. Only an essential element of the national identity may be relied upon for the exercise of the right under Article 4(2) TEU. To qualify as essential, an element should be *explicitly enshrined in the national constitution or should be inferable from its spirit and reason* on the basis of historical, cultural and other factors, including traditions, national mentality and value system.

5.8. The content of national constitutional identity (even of an individual Member State) may not be determined in advance, in the abstract or in principle. It is determined on a case-by-case basis, proceeding from two cumulative assessments: a *national assessment* (ultimately by the national jurisdictions and in the first place by the constitutional jurisdiction) and an *assessment by the Court of Justice of the EU*. Invoking a national constitutional identity element, however, "cannot be subject to a review of proportionality (a step of which involves analysing the necessity of a measure in the light of the objective pursued)"[60].

5.9. The national jurisdictions' assessment is leading, whereas the CJEU's assessment is decisive. Hence – over and over again… – the dialogue between the national jurisdictions and the CJEU is inescapably important for the certainty and effectiveness of the Union legal order and for the successful balancing of the effect of EU law in Member States and the protection of their sovereignty and identity. It is precisely this conception that calls for a clear reading of the mechanisms for the exercise of the right to protection of national constitutional identity and their consequences (in the next volume).

---

[60] **Opinion of Advocate-General Kokott**, op. cit., p. 107. "If the obligation to respect national identities within the meaning of Article 4(2) TEU is therefore intended to preserve the fundamental political and constitutional structures specific to each Member State and thus demarcates the limits of the European Union's integrative action, it follows that the Court may carry out only a limited review of the measures adopted by a Member State for the purposes of safeguarding its national identity. By contrast, a review of the proportionality of those measures would reduce national identity to a mere legitimate objective." (p. 90).

6. The principle enshrined in Article 4(2) TEU is a **principle precisely of *respect* for Member States' national constitutional identity.** The expression "the Union shall respect" (*l'Union respecte*) denotes a state of compliance, of inviolability. **The principle finds expression in a right to protection of national constitutional identity** – a Union fundamental right of the Member States which is exercised before/through the CJEU (and, preceding that, by and/or before the national bodies – see in the next volume). When a Union legal act 'disregards' national constitutional identity, that act breaches the principle – and hence violates the right to protection of identity. To that extent, it is possible to speak of a *'principle of respect for national constitutional identity'*, as well as of a *'right to protection of national constitutional identity'* (as an implementation of the principle).

7. National constitutional identity is an objective fact, a status, a standard, a benchmark. Article 4(2) does not enshrine *a right to national constitutional identity* – this right is an inherent element of sovereignty itself, of statehood itself, what it enshrines is a *principle of respect*, which finds expression in a *right to protection of national constitutional identity* – precisely against an act/rule of EU law which affect national constitutional identity.

Conclusion

Respect for the national constitutional identity of an EU Member State *(in its two aspects: politico-institutional and cultural-historical) is one of the fundamental principles of the EU.* The EU itself and all its structures are obliged to respect this principle.

Protection of national constitutional identity *is a fundamental right of a EU Member State that is recognised at Union level, an element of the legal status of the integrated State*. This is a right of the State (and of every natural or legal person under its jurisdiction) to incidentally deviate from the fulfilment of a Union obligation without impairing the unity and effectiveness of EU law. This right can be exercised only if a particular Union law rule is in conflict with a particular identity element. It is implemented

entirely according to a Union procedure (only before the Court of Justice of the EU) and only as an exception – an exception that confirms the rule. And the rule remains effectiveness, unity and primacy of EU law.

The national constitutional identity *of an EU Member State is a set of fundamental distinctions which are explicitly formulated or implicitly embodied in the spirit and reason of its Constitution, expressing the politico-institutional, cultural-historical, ethnopsychological and value essence of the State.* National constitutional identity manifests itself and is protected through its particular identifiable elements. The concept of national constitutional identity is an autonomous Union concept.

Boundaries are thus set: a boundary to the effect (and primacy) of EU law (it may not affect an element of Member States' national constitutional identity) and a boundary to Member States' right to protection of their national constitutional identity (it may not affect the nature, the *raison d'être* and the fundamental principles of the Union legal order). Protection of national constitutional identity manifests and guarantees the Member State's sovereignty. It is only possible to the extent that it does not affect significantly the unity and effectiveness of EU law: protecting national constitutional identity without restriction would deprive the EU of its *raison d'être*. Reading the unity and effectiveness of EU law too narrowly would erode the Member State's identity and sovereignty.

Therefore, protection of national constitutional identity is an entirely tangible[61] but limited[62] opportunity. The CJEU has already proved on numerous occasions that it is tangible, but also that it should not be overrated. One more reason to regard the dialogue between the national (including constitutional) judge and the Union judge as not only necessary but crucial.

Hence, **the Court of Justice of the EU showing wisdom** is key to finding the necessary balance in each particular case.

---

[61] The Bulgarian Constitutional Court has already opened the door to it – see, e.g., Decision No. 7 of 19.4.2018 in Constitutional Case No. 7/2017 concerning the Comprehensive Economic and Trade Agreement (CETA).

[62] It may not discourage the national jurist to regard primacy as a primordial and essential feature of the Union legal order.

In case of an irreconcilable conflict between the identity of the State and the identity of the Union, respectively, between the CJEU and the State, the only solution is cessation of membership of the EU. Which brings us back to the wisdom of the CJEU…

Therefore, in the next volume I will analyse the mechanisms for the exercise of this right before the CJEU.