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MISSION

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VISIT OF THE DELEGATION OF THE ITALIAN CONSTITUTIONAL COURT TO THE CONSTITUTIONAL COURT OF BULGARIA

Giovanni Amoroso

A bilateral meeting between the delegation of the Italian Constitutional Court and the Constitutional Court of Bulgaria, chaired by President Pavlina Panova, took place in Sofia between June 16 and 18.

The meeting was divided into three sessions.

The first session focused on citizens' access to constitutional justice.

The first session addressed the institutional dialogue between the Constitutional Court, the Court of Justice of the European Union, and the European Court of Human Rights.

The third session concerned freedom of expression and political pluralism in the case law of the Constitutional Court.

Judges from the Bulgarian Constitutional Court discussed these issues with judges from the Italian delegation: on the first issue, judges Stefano Petitti and Yanaki Stoilov; on the second, judges Filippo Patroni Griffi and Atanas Semov; and on the third, judges Massimo Luciani and Nevin Feti.

On the sidelines of the frank and intense debate on these issues, the similarities between the two constitutional justice systems emerged.

First of all, it should be noted that the Bulgarian and Italian legal systems share two important features of European constitutionalism: a) the superordinate nature of the Constitution, which takes precedence over ordinary law and is at the same time rigid, in the sense that a special legislative procedure is required for its amendment or reform; b) the establishment of an *ad hoc* court with the specific task of exercising constitutional review, i.e., verifying the compliance of ordinary law with the Constitution.

Chapter IX of the Bulgarian Constitution provides for a special procedure for introducing amendments to the Constitution and requires a larger than relative or absolute majority (three-quarters or at least two-thirds of the votes of the members of the National Assembly). Without going into detail, it can be noted that the Bulgarian Constitution is more rigid than the Italian Constitution, with two fundamental differences: a) the Bulgarian Constitution distinguishes between amendments and a new Constitution, the latter being entrusted to a special Constituent As-

sembly; this distinction is not present in the Italian Constitution; b) the Italian Constitution provides, under certain conditions, for a referendum to confirm or reject amendments approved by Parliament; this is not provided for in the Bulgarian Constitution.

Chapter VIII of the Bulgarian Constitution provides for the Constitutional Court, as does Section I of Title VI of Part II of the Italian Constitution.

The Bulgarian Court has fewer judges than the Italian one (twelve compared to fifteen), but they come from the same sources: one third are appointed by the President of the Republic, one third are elected by the National Assembly, and one third are elected by the High Courts (Court of Cassation and Supreme Administrative Court). Technical expertise in law is also required.

The term of office is also the same (nine years) with no possibility of renewal.

Furthermore, as in Italy, the President of the Court is elected by the judges themselves and not appointed from outside.

The Bulgarian Constitutional Court, like the Italian one, is responsible for interpreting the Constitution.

However, constitutional review is broader in the Bulgarian Constitution because it covers any act of the National Assembly and the President of the Republic; conflicts of jurisdiction also have a broader scope; in addition, the Bulgarian Constitutional Court has special jurisdiction in electoral matters.

Another parallel can be found in the form of constitutional review, which can be principal, with the possibility of initiative by various authorities (including a number of parliamentarians and the high courts), or incidental, with a referral order by a common judge during a trial.

This opening to incidental review is recent, as it was the subject of an amendment to the Bulgarian Constitution in 2023.

There is also a parallel with regard to the placement of supranational legislation, as the Bulgarian Constitution requires national legislation to comply with generally recognized rules of international law and international treaties to which Bulgaria is a party.

Participation in the European Union is also expressly provided for (Article 4, paragraph 3 of the Bulgarian Constitution as amended in 2005 on the eve of Bulgaria's accession to the EU in 2007).

However, dialogue with the Court of Justice is perhaps less intense when one considers that, compared to the ten preliminary rulings on interpretation that the Italian Constitutional Court has made to date, there has not yet been a single call by the Bulgarian Court for preliminary ruling on interpretation.

Furthermore, I would like to point out that an important change was introduced in Bulgaria by the recent constitutional reform which extended the access to constitutional justice. Following this reform, any court, at the request of a party to the case or on its own initiative, may seize the Constitutional Court with a request to determine any inconsistency between the law applicable to their specific case and the Constitution. This is a welcome and a decisive development that brings the Bulgarian constitutional justice system closer to that of other European countries.

The 2024 Rule of Law Report of the European Commission have assessed that rules for constitutional review in Bulgaria have been improved.

Thereafter last year the Bulgaria's Constitutional Court ruled on July 26 to declare unconstitutional a significant part of constitutional amendments enacted in December 2023.

Some changes made to the country's Constitution, particularly those affecting the judiciary, were invalid. Specifically, the ruling stroke down the provisions affecting the powers of the prosecutor-general.

The Constitutional Court of Bulgaria therefore exercised constitutional review over provisions that had amended the Constitution.

The Italian Constitutional Court has also recently admitted this possibility, but only when the supreme principles of the legal system are violated; however, this has never happened so far.

Finally, I would like to emphasise that the bilateral meeting was very interesting and enriching and helped our courts to get to know each other much better in a spirit of mutual cooperation within the constitutional space of the European Union.

OFFICIAL VISIT OF A DELEGATION OF THE CONSTITUTIONAL COURT OF THE ITALIAN REPUBLIC TO SOFIA FOR A BILATERAL MEETING WITH THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA

Pavlina Panova

In June 2025, a bilateral meeting was held in Sofia between the Constitutional Court of the Republic of Bulgaria and a delegation of the Constitutional Court of the Republic of Italy.

I consider such meetings to be highly beneficial, as they allow judges to directly and freely discuss issues of common interest. The dialogue between us provides an opportunity for debate, for the direct exchange of ideas, and for the identification of shared characteristics within our respective legal systems, as well as for explaining our differences.

The three working sessions organised within the framework of the bilateral meeting, dedicated respectively to citizens' access to constitutional justice, the institutional dialogue between the Constitutional Court, the Court of Justice of the European Union, and the European Court of Human Rights, as well as freedom of expression and political pluralism in the case-law of the Constitutional Court, provided an opportunity for us to get to know each other better. Within an open and in-depth judicial dialogue, a number of similarities between the constitutional systems of the two countries emerged, including in the case-law of the constitutional jurisdictions. Indicative of these similarities and of the usefulness of the exchange of experience is the expansion of access to the Constitutional Court in the Republic of Bulgaria, whereby, following the most recent constitutional amendments, every court has been granted the possibility to refer matters to the constitutional jurisdiction - a possibility which Italian courts have had for decades and which constitutes a significant part of the work of the Constitutional Court of the Republic of Italy.

Constitutional justice is, by its very nature, a collegial activity. The internal institutional collegiality on which every democratic system of constitutional review is founded is complemented by a broader form of collegiality, consisting of meetings such as the one between our courts held from 16 to 18 June in Sofia, within the framework of which the European legal community is being built.

PART I

ACCESS OF CITIZENS TO CONSTITUTIONAL JUSTICE

ACCESS TO CONSTITUTIONAL JUSTICE BY INDIVIDUALS IN THE ITALIAN SYSTEM

Stefano Petitti

1. In order to determine what 'access to constitutional justice' means, one must first be aware of the many factors that contribute to defining the forms, features, and conditions for initiating constitutional review proceedings.

Let me start by saying that what follows will focus solely on incidental review proceedings within the Italian constitutional justice system. This is so because incidental proceedings are the only mechanism – which takes the forms that I will outline later – available to individuals who wish to bring alleged violations of fundamental rights before the Constitutional Court.

Indeed, the Italian legal system also provides for a number of forms of direct access to the Constitutional Court, but these are reserved for entities other than individuals. I will now briefly review these types of proceedings.

The first direct form of access is proceedings by direct application (*giudizio in via principale* or *giudizio di azione*), which however concern the distribution of competences between the State and the Regions and raise no particular issues as regards access to constitutional justice. Following the 2001 constitutional reform, the State and the Regions are now substantially on equal footing as regards initiating such proceedings. The State no longer has the power to challenge regional laws as a preventive measure before they come into force. It can only raise the question of constitutionality of a regional law after its publication, as was already permitted to the Regions for State laws. Differences remain between the State and the Regions regarding the constitutional violations they can raise, but it is not relevant to examine them in detail here.

Secondly, proceedings concerning jurisdictional disputes between branches of state must be considered. The Constitutional Court held that this mechanism is accessible neither to individuals (Orders Nos 164/2018 and 277/2017) nor to political parties (Order No 120/2009), but only – according to a more recent interpretation – to individual Members of Parliament who allege a manifest violation of a right directly conferred upon them by the Constitution (Order No 17/2019).

Against this background, I will concentrate on incidental review proceedings as a mechanism – in the Italian system – alternative to direct

access by individuals, seeking to show that this distinction should not be excessively emphasised.

I would like to recall a 2021 report by the Venice Commission, which highlighted that access to constitutional justice is not influenced only by the possibility for an individual to address the Constitutional Court either directly or through a judicial intermediary.

Alongside this distinction between proceedings by direct application and incidental proceedings, other aspects must be considered in order to understand how constitutional justice can be concretely accessed.

The first such aspect is the delicate balance – in systems where an *ad hoc* Court or Tribunal is vested with the task of assessing the constitutionality of legislation – between centralised constitutional review and diffuse control by the judiciary. Another issue worth mentioning concerns the range of judicial bodies entitled to raise constitutional questions in incidental proceedings: is this power conferred upon all courts or upon higher courts only? Thirdly, the existence – in individual systems – of access mechanisms reserved for certain institutional actors (such as parliamentary minorities) must be considered. Finally, it should not be overlooked that, in systems where individuals have direct access to constitutional justice, preliminary admissibility criteria apply which may be quite stringent, allowing a very limited proportion of cases to reach the merits stage (in Germany, around 3-4% each year).

This paper is not meant to provide a comparative legal analysis, but I believe that it is essential to highlight – at the very outset – that, when exploring access to constitutional justice, hasty classifications should be avoided, while the intrinsic logic underpinning the operation of each system should be appreciated.

Certainly, there are systems – such as the German, the Austrian and the Spanish one – which provide individuals with direct access to constitutional justice, albeit in different forms, in order to protect their fundamental rights. However, there are also systems – such as the Italian and the French one – which do not provide for such access, since individuals may only address the Constitutional Court on the initiative of a judicial body in the course of proceedings.

Nevertheless, it should be noted that in some systems where only indirect access applies, this mechanism has progressively expanded its operational scope to encompass elements typically associated with direct access.

From this perspective, the Italian model seems emblematic of that trend, especially considering that, after nearly seventy years of operation, it stands as a reference point in the constitutional justice landscape.

2. The first aspect to consider concerns the origins of the Italian model of indirect access to the Constitutional Court.

During the debates of the Constituent Assembly, there was no clear awareness of the defining features of the emerging constitutional review system, as evidenced by the fact that the means of access to the Constitutional Court were set forth only after the Constitution had entered into force with Constitutional Law No 1/1948. The precise meaning of Article 1 of that law – by which direct access was excluded in favour of incidental proceedings – was refined by subsequent legislative measures, notably Constitutional Law No 1/1953 and, above all, Law No 87 of the same year.

This is crucial to understanding how the Italian model of indirect access has evolved over time and, even after codification, how it continues to embody diverse guiding rationales.

Incidental proceedings require ordinary courts to perform a twofold assessment: first, they must assess relevance, that is, whether a given statutory provision must be applied to decide the case; and second, they must assess non-manifest groundlessness, that is whether the doubt as to the provision's conformity with specific constitutional principles is sufficiently reasoned.

As regards the second assessment, I limit myself to pointing out the evolution of Italian case law: the initial approach – where merely formulating a doubt as to the constitutionality of a provision was sufficient – gave way to the requirement that ordinary courts first attempt a constitutionally compliant interpretation of the provision, with failure to do so rendering the referral order inadmissible.[1] About a decade ago, however, the Court adopted a more flexible approach, requiring that the referring court only show it has non-implausibly attempted such an interpretation; the correctness of the court's interpretation thus became a substantive rather than an admissibility matter.[2]

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[1] Judgment No 356/1996: "As a general principle, statutes are not declared to be unconstitutional because unconstitutional interpretations of them are possible, but rather because constitutional interpretations of them are impossible." Where the challenged provisions are susceptible to different interpretations, which nevertheless converge toward the same outcome that is deemed consistent with the Constitution, while their divergence concerns only the means to be adopted (one requiring a prior declaration of unconstitutionality, the other one involving mere interpretative operations on legislative norms), the constitutional question must be declared inadmissible. This is so because the question generally amounts to an improper attempt to obtain an endorsement of one interpretation over another from the Constitutional Court, even though no difference arises in terms of protection of constitutional principles and rules, which is the very mission of constitutional adjudication.

[2] Judgment No 221/2015: "Whilst a complete assessment of these arguments is not capable of precluding potential disparate solutions, it appears to be indicative of an actual attempt by the lower court to use the interpretative instruments available

It is on the other requisite of the issue of constitutionality that I would like to dwell upon now. The relevance requirement is indeed the cornerstone of incidental proceedings, which are initiated when a court has doubts as to the compliance with the Constitution of a provision it must apply, the interpretation of which determines the decision of the case. It is therefore clear that the relationship between the ordinary court's assessment of the relevance requirement and the Constitutional Court's verification of that assessment is crucial in shaping access to constitutional justice.

The relevance of the constitutional question highlights the centrality of ordinary courts as the "gatekeepers" of constitutional proceedings in the Italian system, given that the issues that the Constitutional Court is called upon to address must arise from concrete circumstances and concern genuine problems of application.

The very fact that incidental proceedings – alongside the necessary involvement of a court – are characterised by the emergence of a concrete and genuine problem of application contributes to explaining the first development axis of the Italian system, namely the proliferation of constitutionally compliant interpretation as a means of resolving disputes "parallel" to the Constitutional Court's review. Once the idea (albeit still debated by distinguished scholars) gained acceptance that an ordinary court may derive multiple interpretations from a single statutory provision and must apply the one most consistent with the Constitution, this opened the way for the centralised constitutional review mechanism to coexist with the diffused power of ordinary courts to align statutory meanings with constitutional principles.

While this does not alter the structural features of incidental proceedings, it has the effect of anticipating the resolution of constitutional issues before ordinary courts, without necessarily awaiting the intervention of the Constitutional Court. In my view, this makes the protection of the rights enshrined in the Constitution more complete and effective and ensures a more pervasive penetration of constitutional principles into the fabric of the legal system, thus mitigating – at least partially – the absence

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to it in order to assess whether the contested provision can be read differently in a manner that may be compatible with the Constitution. This possibility is consciously excluded by the referring court, which considers that the literal wording of the provision precludes an interpretation that is compatible with the Constitution.

The possibility for a further alternative interpretation, which the lower court did not consider it appropriate to pursue, does not have any significance for the purposes of compliance with the rules governing proceedings before the Constitutional Court, as the control as to the existence and legitimacy of such an additional interpretation is a question that relates to the merits of the dispute, and not to its admissibility."

of a direct access mechanism. Through constitutionally compliant interpretation, ordinary courts include constitutional principles in the identification of the rules necessary to resolve cases; these principles eventually find application in proceedings at any stage and instance, enabling the Constitution to engage directly with the realities of life.

Among the numerous examples that I could recall here, I would like to mention Judgment No 221/2015,[3] in which the Constitutional Court held that it is for ordinary courts to assess whether surgical treatment is necessary for the legal rectification of sex, particularly when the right to health of a transgender person is at stake.

There are also further elements showing that the Italian model of indirect access to constitutional justice has acquired certain features that make the absence of a direct access mechanism less problematic.

The first such element is the possibility for individuals to apply to ordinary courts to seek assessment of an alleged violation of their fundamental rights directly caused by a statute.

Under such circumstances, the incidental nature of the proceedings is put to the test, since, at times, an individual brings a case before a court solely to challenge the constitutionality of a statute. This being the case, there is a risk of circumventing the prohibition against bringing cases directly before the Constitutional Court.

This issue – particularly relevant in electoral matters – has been addressed and resolved by establishing that such questions of constitutionality must not fully coincide with the subject matter of the case pending before ordinary courts, which must thus retain a residual sphere of decision-making beyond what is determined by the Constitutional Court (Judgments Nos 1/2014 and 35/2017).[4]

Although, in my view, the incidental nature of constitutional proceedings has thereby been fully preserved, it is equally evident that these are typical situations in which a remedy functionally equivalent to direct ac-

[3] See previous footnote.

[4] In the mentioned decisions, the relevance of the incidental questions raised in the course of proceedings concerning the procedure for recognising the right to vote in parliamentary elections was affirmed on the basis of four considerations: 1) the presence, in the referral order, of a non-implausible reasoning regarding the existence of the applicants' standing and legal interest in the principal action; 2) the positive verification of the prejudicial nature of the question, since there was no overlapping between the main proceedings and the incidental constitutional review, leaving the referring court a margin of autonomous decision-making even after a possible ruling of unconstitutionality by the Constitutional Court; 3) the fundamental nature of the right under examination; and 4) the need to avoid the creation of an area immune from constitutional scrutiny.

cess is at work, especially when the constitutionality of a statutory provision is challenged.

Another example of the somewhat "hybrid" nature of indirect access to constitutional justice in Italy are questions raised by courts during precautionary proceedings.

For a long time, there was debate over whether a court's raising of a constitutional question concerning a provision to be applied during precautionary proceedings was compatible with the core features of the incidental system (and, in particular, with the relevance requirement), even more so when a precautionary measure was granted. The concern was that, once the claimant's request was (even temporarily) satisfied, the court should no longer apply the challenged provision, which would instead fall to the trial court to address.

In such cases, the preservation of the incidental model has been ensured by requiring that the court granting a precautionary measure retain jurisdiction over the case, thus allowing the Constitutional Court to carry out its review with reference to a concrete and genuine issue of application.[5]

However, it is clear that this now well-established case law is driven by substantive needs, namely, that the precautionary stage is essential for the full exercise of the right to defence and that direct protection before a court must be able to coexist with the scope of constitutional review.

Many other elements could be mentioned, but I will briefly recall two.

A crucial aspect of indirect access, as I mentioned at the beginning of my speech, concerns the range of judicial authorities entitled to refer questions to constitutional courts. Sometimes this range is limited to the highest courts (such as in the French system after 2008) or to judicial authorities in the narrowest sense (as in the German system of so-called concrete review).

In Italy, by contrast, the Constitutional Court has always adopted an extremely broad interpretation of the notion of referring court (*giudice a quo*), which encompasses a heterogeneous array of entities, ranging from arbitral tribunals (in ordinary arbitration, starting with Judgment No 376/2001) to the Court of Auditors (*Corte dei conti*) in its various jurisdictions, and even the Constitutional Court itself when acting through "self-referral" (*autorimessione*) (most recently, Order No 35/2024).

Moreover, unlike in other systems where there is a principle of required and strict correspondence between the question raised by the referring court and the subject matter of constitutional review, the Italian Constitutional Court has often exercised a flexible power to identify the matter

[5] For more information on a recent case, see Judgment No 3/2023 (concerning the prohibition against the stay of enforcement orders).

subject to review, frequently reformulating the referring court's question in order to achieve an outcome more consistent with the Constitution.[6]

3. In conclusion, it can be said that, as shown by the evolution of the Italian system of constitutional review, the divide between models that provide for direct access and those in which access to constitutional adjudication must occur through the ordinary courts should not be overstated.

Indeed, the Italian system shows that by broadening the operational conditions of incidental proceedings and adopting a reasonable degree of flexibility in its use, this mechanism can serve as an instrument capable of protecting individuals' fundamental rights no less and no less effectively than direct access.

This does not mean, of course, that certain significant differences (certainly those of a quantitative nature, as well as those concerning the possible immediacy of the Constitutional Court's intervention in response to an alleged violation of a fundamental right) do not persist today. These differences acquire renewed significance within the shared framework in which our constitutional courts now operate, one that involves daily interaction with both the Court of Justice of the European Union and the European Court of Human Rights (ECtHR).

It is precisely within this context that questions concerning access to constitutional justice are becoming more pressing than in the past.

I will limit myself to pointing out two issues.

As regards the relationship with the Court of Justice, the dialogue between constitutional courts and that Court – especially concerning the protection of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union – is of utmost importance. Although the Italian experience has shown a profound and genuine attitude towards such dialogue, particularly through the preliminary reference

[6] Judgment No 12/2024 states that, "in incidental constitutional proceedings, the question put forward in the referral order serves to clarify the content and the direction of the challenges raised by the referring court". Accordingly, the Constitutional Court "remains free to identify the ruling most suitable to achieve the *reductio ad legitimitatem* of the contested provision, not being bound by the specific wording of the question in the referral order, provided that it complies with the constitutional parameters invoked".

Judgment No 83/2025 states that "it is for this Court, where it deems the questions well-founded, to identify the ruling most appropriate to achieve the *reductio ad legitimitatem* of the contested provision, given that the Court itself is not bound by the wording of the question in the referral order, which merely serves to indicate the content and the direction of the challenges raised (see also, most recently, Judgments Nos 53/2025, 128/2024, 90/2024 and 46/2024)".

procedure,[7] I wonder whether the absence of a mechanism for direct access might ultimately make these forms of interaction less structured and more occasional, given that issues concerning fundamental rights continue, in everyday practice, to be addressed and resolved primarily by ordinary courts, without the necessary and systematic involvement of the Constitutional Court, an involvement that would, by contrast, inevitably occur in a system providing for direct access.

As for the relationship with the European Court of Human Rights, the distinction between direct and indirect access arises particularly in connection with the requirement of exhaustion of domestic remedies under Article 35 of the European Convention on Human Rights. Most recently, in *Parrillo v. Italy*, the ECtHR confirmed that, unlike in systems providing for direct access, under the Italian system it is not necessary for the parties to demonstrate that they have requested the ordinary court to raise a question of constitutionality in order to bring a case before the ECtHR.

This approach certainly requires further reflection and once again illustrates the complexity of the relationship between the different forms of access to constitutional justice.

[7] For the latest references for preliminary rulings, see Orders Nos 21/2025, 161/2024 and 29/2024.

ACCESS OF CITIZENS TO CONSTITUTIONAL JUSTICE – ADMISSIBILITY CONDITIONS FOR REQUESTS FROM THE COURTS

Yanaki Stoilov

I. Possibilities for Access of Citizens to Constitutional Justice under the Bulgarian Constitution

The Constitution of the Republic of Bulgaria, adopted in 1991, does not provide a possibility for citizens to directly petition the Constitutional Court. Such competence is granted only to certain state authorities and to one-fifth of the Members of Parliament (Article 150, paragraph 1 of the Constitution). From the standpoint of the subject matter of referral, the powers of the constitutional jurisdiction include review of conformity with the Constitution of legal acts adopted by the Parliament (laws and decisions), by the President (decrees), and other acts, among which are the international treaties concluded by the Republic of Bulgaria.

The evolution of constitutional review in Bulgaria is reflected in the gradual expansion of the possibilities to refer matters to the Constitutional Court in cases where the constitutionality of a law is contested. This evolution does not include the institution of a direct constitutional complaint by citizens. However, the trend has been towards increasing the opportunities for referral to the constitutional jurisdiction, and accordingly, for access to constitutional justice. Several amendments and supplements to the Constitution have contributed to this development:

– in 2006, the Ombudsman was granted the right to petition the Constitutional Court for establishing the unconstitutionality of a law that violates citizens' rights and freedoms;

– in 2015, the same right was conferred upon the Supreme Bar Council;

– in 2023, a subsequent amendment was introduced, significantly expanding the possibilities for referral to the Constitutional Court.

According to this amendment, any court, upon request by a party to a case or on its own initiative, may refer a matter to the Constitutional Court, requesting a determination of inconsistency between a law applicable to the specific case and the Constitution (Article 150, paragraph 2 of the Constitution). These are judicial panels (single-judge or collective) of the general and specialized (administrative) courts. Prior to this amendment, the power to refer matters to the Constitutional Court - beyond the general

competence of the two supreme courts under Article 150, paragraph 1 of the Constitution - was exercised by panels of the Supreme Court of Cassation and the Supreme Administrative Court adjudicating the specific legal dispute (Ruling No. 1/1997 on Constitutional Case No. 5/1997).

There is no doubt that the incidental review of a law's conformity with the Constitution aims to influence the final judicial act. The court whose decision is final issues its ruling after the completion of the proceedings before the Constitutional Court. The decision of the constitutional jurisdiction affects not only the outcome of the particular case in which the request was made, but also the legal order as a whole. The decision of the Constitutional Court, although adopted on a specific occasion (a case pending before another court), has *erga omnes* effect.

The introduction of the possibility for courts to refer matters to the Constitutional Court is among the main reasons for the significant increase in the number of constitutional cases in 2024. Most of the requests have been dismissed, but the percentage of cases admitted by the Court for consideration on the merits is about 20-25% of those initiated under this procedure.

Unlike in most Member States of the European Union, the regulation governing the referral of cases to the Constitutional Court by the courts in Bulgaria is contained only in a single provision of the Constitution and in a few provisions of the Rules of Procedure of the Constitutional Court. The absence of corresponding statutory regulation requires the Constitutional Court, through its jurisprudence, to develop criteria for assessing the requests submitted by the referring courts.

II. Criteria Regarding Referrals under Article 150, Paragraph 2 of the Constitution, Established in the Practice of the Constitutional Court

1. Applicability of Existing Jurisprudence

When exercising its extended constitutional competence, the Court follows its previous practice concerning the admissibility of requests submitted by panels of the Supreme Court of Cassation or the Supreme Administrative Court (Ruling No. 2/2024 on Constitutional Case No. 8/2024 г.).

2. Requirements for the Admissibility of a Request by the Referring Court

2.1. First, the request must be made by a judicial panel that is hearing a specific case in connection with which the disputed issue has arisen.

The purpose of the request is *"to ensure effective cooperation between the referring court and the Constitutional Court with a view to resolving the pending case in accordance with the decision rendered by the constitutional jurisdiction"* (Ruling No. 7/2024 on Constitutional Case No. 20/2024).

More generally, and in procedural terms, *"the requirement for a valid referral to the constitutional jurisdiction is transferred from the notion of legal interest within a specific proceeding before a given court (panel) to legal interest within the judicial process as a whole... and acquires the meaning of a legal interest in constitutionally compliant adjudication"* (Admissibility Ruling of 5 November 2024 on Constitutional Case No. 29/2024).

From a practical standpoint, an interesting question arises as to whether the Bulgarian constitutional jurisdiction can be regarded as a *court* within the meaning of the relevant constitutional provision. There is no doubt that the Constitutional Court, like other courts, may submit preliminary references to the Court of Justice of the European Union pursuant to Article 267 TFEU. However, it is not part of the judicial system; it stands outside the three branches of government (Interpretative Decision No. 18/1993 on Constitutional Case No. 19/1993). For this reason, it could not initiate proceedings on its own in the course of another case pending before it.

2.2. Second, the referring court must substantiate that the question before it is relevant to the resolution of the specific case in connection with the law applicable to that case.

The question referred to the Constitutional Court must have a *prejudicial* character in relation to the issue that the referring court must resolve in the main proceedings. In Interpretative Decision No. 3/2020 on Constitutional Case No. 5/2019, the Constitutional Court noted that *"the question of the constitutionality of the law applicable to the pending case has a prejudicial character – there would be no reason to raise and resolve such a question if the answer to it were to have no effect on the resolution of the legal dispute that prompted the referral to the Constitutional Court."* Furthermore, *"the request must contain a clear and well-reasoned statement explaining why the legislative provision challenged before the Constitutional Court is applicable and decisive for the outcome of the case"* (Ruling No. 7/2024 on Constitutional Case No. 20/2024). It follows that without the Constitutional Court's response to the question raised, the referring court is unable to exercise its adjudicatory function in conformity with the Constitution. *It is the duty of the referring court to first substantiate that the question is relevant to the resolution of the specific case and to determine the applicable law. Referral to the Constitutional Court must not merely be a possibility, but a necessity arising from the particular case. The statutory provision found by the referring court to be inconsistent with the Constitution must be applicable to the case pending before it. This means that without the Constitutional Court's answer to the question raised, the referring court cannot perform its judicial function in a constitutionally compliant manner*. (Ruling No. 2/2024 on Constitutional Case No. 8/2024; Ruling No. 6/2024 on Constitutional Case No. 19/2024; see

also Ruling No. 5/2024 on Constitutional Case No. 12/2024 and Ruling No. 1/2025 on Constitutional Case No. 1/2025.)

The Constitutional Court is not obliged to rule on requests that contain questions related to the inherent adjudicatory activity of the courts (Ruling No. 9/2024 on Constitutional Case No. 21/2024).

The referring court is also required to clarify the scope of application of European Union law and the consequences of its application in the subject matter of the case (Article 18, paragraph 3 of the Rules of Procedure of the Constitutional Court).

"Clarification of the applicable domestic law in the context of European Union law is always necessary when the applicable domestic legal norm falls within the scope of EU law ... and is therefore required ipso jure from every legal subject applying it, and in particular from every court within the judicial system" (Decision No. 5 of 14 June 2022 on Constitutional Case No. 13/2021).

A similar issue arises with regard to the legal framework established by the Convention for the Protection of Human Rights and Fundamental Freedoms. The question remains open for discussion as to the extent to which the Constitutional Court is bound by the judgments of the European Court of Human Rights and by the reasoning of its decisions, especially those that do not directly concern Bulgaria.

2.3. Third, the referring court must substantiate that the applicable law is unconstitutional.

The referring court should base its request on its own reasoned conviction, expressed through arguments derived from a thorough analysis of the applicable domestic legal provision or the relevant provision of Union law. Here, I would raise the question of whether, instead of a firm conviction - that is, categorical certainty of the conclusion - it would not be sufficient for the referring court to express a well-reasoned opinion as to the unconstitutionality of the applicable law, since only the Constitutional Court, by virtue of its institutional position and professional authority, can provide a final answer to the question raised.

The Constitutional Court has also indicated that it is not sufficient for a legal norm to be challenged solely in view of a specific factual situation or based on a particular interpretation of that norm. In rejecting a request submitted to it, the Court reasoned that *"the request does not seek the establishment of the unconstitutionality of a statutory provision, but rather of the alleged unconstitutionality of a certain interpretation thereof in the course of its application"* (Ruling No. 10/2024 on Constitutional Case No. 22/2024). Furthermore, *"[t]he supreme courts - when identifying inconsistent or incorrect case-law - possess the competence to provide an abstract interpretation of the law ... The Constitutional Court reviews the conformity of the law with the Constitution, whereas its correct interpretation and application by the courts are ensured through the system of appellate*

judicial control and the interpretative acts of the supreme courts" (Ruling No. 11/2024 on Constitutional Case No. 25/2024).

2.4. Fourth and final, the question arises as to whether the Constitutional Court may assess the admissibility of the main case in connection with which it has been seized.

This issue has been raised in the practice of several constitutional jurisdictions within the European Union, including the Italian Constitutional Court and the Court of Justice of the European Union. At least for the time being, the Bulgarian Constitutional Court refuses to examine, even to a limited extent, the admissibility of the case pending before the referring court. However, according to some of the judges, when there is an identity between the subject matter of the main and the constitutional proceedings, and the sole purpose is to initiate a judicial process in order to circumvent the constitutionally established procedure for raising the issue of unconstitutionality, such a practice should not be allowed. The opposite would mean that the Constitutional Court would encourage the initiation of *fictio litis* cases (Separate Opinion of Judges Yanaki Stoilov, Sonya Yankulova, and Atanas Semov in the Admissibility Ruling on Constitutional Case No. 5/2025). In my view, this question should remain open for further development of the Constitutional Court's case law on the admissibility of cases. This is all the more important given the emergence of an opposite problem: in order to avoid the constitutional review of certain acts - and, accordingly, the control over the exercise of competence by the respective authorities – acts are sometimes used that fall outside the scope of that review (see the Opinion of Judges Yanaki Stoilov and Atanas Semov in the Admissibility Ruling on Constitutional Case No. 8/2025).

Conclusion. The authority of the courts to challenge statutory provisions before the constitutional jurisdiction significantly expands the possibilities for the parties in a judicial proceeding, including citizens, to request a review of the conformity of the law applicable to their case with the Constitution. In this way, the Constitutional Court contributes to the protection of citizens' fundamental rights and *"significantly enhances the potential of constitutional justice to uphold the supremacy of the Constitution… Thus, courts are encouraged to cooperate with the constitutional jurisdiction in constitutional justice"* (Admissibility Ruling of 5 June 2024 on Constitutional Case No. 29/2024).

The expansion of indirect access of citizens to constitutional justice through successive constitutional revisions, the latest of which concerns all courts, marks the evolution of the Bulgarian constitutional framework and practice regarding the referral to the constitutional jurisdiction. In this way, the Republic of Bulgaria finds its place among the states that employ a balanced approach in broadening access to constitutional justice – opening constitutional jurisdiction to the courts, without allowing an "inflation" of constitutional claims.

PART II

THE INSTITUTIONAL DIALOGUE BETWEEN THE CONSTITUTIONAL COURT, THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS – ITS SIGNIFICANCE AND IMPACT ON THE PRACTICE OF THE NATIONAL CONSTITUTIONAL COURT

THE INSTITUTIONAL DIALOGUE BETWEEN CONSTITUTIONAL COURTS, THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE EUROPEAN COURT OF HUMAN RIGHTS: ITS MEANING AND IMPACT ON THE CASE LAW AND PRACTICE OF THE ITALIAN CONSTITUTIONAL COURT

Filippo Patroni Griffi

1. Introduction

I would like to begin with a question aimed at understanding the meaning of the term "institutional dialogue" or, more precisely, of the interaction between national constitutional courts and the European courts. The question goes like this: "Can courts play a substantial role in the European integration process?" And, therefore, "can the union of safeguards foster the achievement of the union of peoples?"

The contribution of courts to the process of European integration might seem minor in times when Europe is affected by forces trying to undermine its unity. However, it is precisely in this moment of difficulty for European representative institutions and their regulatory mechanisms that courts assume a central role in the system of safeguards and, consequently, stay close to the citizens who benefit or will benefit from those safeguards. In so doing, courts become crucial in the European integration process.

National courts, working on the level of rights, ultimately create a set of values and principles that, when shared, serve as a unifying factor among institutions and between these institutions and the peoples of Europe. The goal is to create a European people, safeguarded by a homogeneous level of protection and supported by a concrete European citizenship. After all, many[1] have emphasised the importance not only of legislative assemblies but also of lawyers – particularly academics and judges, to which I would add legal practitioners – in the construction of

[1] Van Caenagem, *European Law in the Past and the Future*, Cambridge University Press, Cambridge, 2002.

what will be European law in the 21st century and, therefore, in the process of European legal integration.

The most significant "constitutional contribution" of courts to the process of European integration lies in the weaving of a *ius commune*, achieved by means of a dense network of general principles that do not overlap with national rights but rather complement them, through integration and assimilation, flowing into the matter of fundamental rights.

I believe we can state that general principles and fundamental rights form the foundation of the ongoing European integration process.

Thus, a two-way relationship is created between the European courts on one side and national courts on the other, which constitutes, or – better said – builds a relationship between legal systems. But also – as will be seen – among national courts themselves.

2. What are the mechanisms that promote this dialogue – though I would rather call it interaction – between the European courts and national, in particular, constitutional courts? My perspective is clearly that of the Italian constitutional system and of the case law of the Italian Constitutional Court.

The relationship between the Italian Constitutional Court and the European courts (but also the relationships between the latter and the "ordinary" courts, especially high courts) is taking on a complex structure within the Italian legal system. Understandably, this structure cannot be said to be immune from tensions, since all these courts operate within partially overlapping territories and populations and the European courts are characterised by constitutional traditions that may differ greatly.

The constitutional provisions relevant here are Article 11, under which Italy "agrees, on conditions of equality with other States, to the limitations of sovereignty necessary to a system that ensures peace and justice among nations"; and Article 117(1),[2] under which the legislature is required to comply not only with the Constitution but also with "the constraints deriving from European Union law and international obligations".[3]

I will examine the relationship of the national legal system first with the European Convention on Human Rights and then with the legal system of the European Union.

3. As for the European Convention, the Italian Constitutional Court, in Judgments Nos 348 and 349 of 2007, provided a clear framework – one that has remained essentially unchanged over time – for the relationship between the Convention's legal system and the domestic constitutional

[2] Introduced by constitutional reform in 2001.

[3] See also Article 10 of the Constitution.

order. After excluding the possibility of disapplying national laws that conflict with the Convention, the Court, on the basis of Article 117(1), classified the provisions of the Convention (as interpreted by the European Court of Human Rights) as "interposed norms" (*norme interposte*), i.e. norms that serve as a benchmark for constitutional review of domestic laws. In other words, national laws that violate the Convention may be declared unconstitutional due to a breach of the international obligations referred to in Article 117 of the Constitution.

Two clarifications are in order here. First, Convention norms are to be read in light of the longstanding interpretation provided by the ECtHR (Judgment No 49/2015). Second, the Constitutional Court reserves the right to assess the compatibility of the Convention not only with fundamental principles and rights but also with constitutional provisions (Judgment No 348/2007).

The abovementioned case law appears to offer a well-balanced compromise between the safeguarding of the prerogatives of the ECtHR and the Convention, on the one hand, and the centralised system of constitutional review, on the other. Indeed, the national court may consider the incorporation of Convention provisions into the domestic legal order. The relations between the courts will function most effectively insofar as the European Court acknowledges the margin of appreciation of national States, particularly in areas where no well-established common traditions exist, while ensuring the minimum core of fundamental rights. Conversely, national courts will be able to align themselves with the shared constitutional traditions that have developed within national systems and are recognised by the European Court.

4. The relationship between the national legal system and the EU legal order is more complex. I will limit myself to recalling the most relevant milestones.

In Judgment No 170/1984 the Court established that, when both a question of constitutionality and a question as to the compatibility of a national provision with EU law arose, priority was unequivocally to be given to the latter, possibly after a reference for a preliminary ruling, leading to the disapplication of domestic laws conflicting with EU law. Within this framework, it was for ordinary courts, in direct dialogue with the Court of Justice of the European Union (CJEU) and with no involvement of the Constitutional Court, to assess the compatibility of domestic provisions with EU law. This approach applied to EU law with direct effect, while greater room was left for centralised constitutional review (through Article 11 of the Constitution) in cases where national law conflicted with EU

provisions that were not directly applicable. This framework remained substantially unchanged for over thirty years.

However, the Constitutional Court's case law has gradually evolved. Let us examine how.

– First, from the standpoint of establishing a dialogue with the EU legal system and the CJEU, the Constitutional Court, moving beyond its early approach, has held that it can itself make a preliminary reference to the CJEU.[4] For instance, in recent Order No 21/2025 concerning the solidarity contribution on windfall profits imposed on energy companies, it considered it appropriate to ask the CJEU whether the national provision was compatible with an EU regulation.

– The year 2017 marked a turning point. In Judgment No 269, the Constitutional Court affirmed that, when a national norm conflicts with both the Constitution and the Charter of Fundamental Rights of the European Union (CFREU), it is for the Court itself to intervene in order to annul the unconstitutional provision with *erga omnes* effect. This without prejudice to the power of ordinary courts not to apply provisions that are found to be unconstitutional. The Court's intent, it seems to me, is not to compete with the European Court but rather to foster dialogue between the two supreme courts, instead of between the CJEU and national ordinary courts only.

In Judgment No 20/2019, while expressly continuing along the path chartered by Judgment No 269/2017, the Constitutional Court expanded its reasoning by extending constitutional review to violations not only of the CFREU but also of the principles of the EU directive in question, which it recognised as having an equivalent "constitutional rank". Moreover, it softened the emphasis on courts' mere power of disapplication, reaffirming – also by Order No 117/2019 – the continuing duty of ordinary courts to disapply national norms incompatible with EU law.[5]

In Judgment No 20/2019,[6] the Court highlighted that the protection offered by the two courts create a "concurrence of remedies" aimed at enhancing the effectiveness of both EU law and the national Constitution. And that ordinary courts are free to choose which path to follow to ensure the effectiveness of EU law.

This concept was definitively restated in Judgment No 15/2024, in which the Court seems to have taken further steps toward affirming the concurrence of domestic and European remedies. With reference to ear-

[4] The Court decided to refer to the CJEU for preliminary rulings first in constitutional review proceedings by direct application (Order No 103/2008) and, eventually, in incidental proceedings (Order No 207/2013). Since then, the Court referred to the CJEU eight times, seven of which in the course of incidental proceedings.

[5] The same approach was adopted in Judgments Nos 11 and 44 of 2020.

[6] As well as in Judgments Nos 63 and 117 of the same year.

lier openings – i.e. the (optional but advisable) route of bringing constitutional challenges for alleged violations of EU law – the following has been confirmed:

a) this avenue concerns not only violations of the Treaties and the CFREU, but also of secondary EU law, in particular self-executing directives;

b) there must be a violation of a constitutional provision in addition to the violation of EU norms (CFREU and directives); indeed, in that event, the declaration of unconstitutionality concerns both Article 3 of the Constitution and the relevant EU law;

c) nonetheless, this is without prejudice to the power – or rather duty – not to apply national law incompatible with EU law.[7,8]

In Judgment No 181/2024, the Constitutional Court reaffirmed that in cases of so-called double preliminary questions (*doppia pregiudizialità*), i.e. where a domestic provision conflicts both with domestic constitutional law and EU law, courts may either disapply the provision (possibly after referring to the CJEU) or raise a question before the Constitutional Court. However, the latter option requires that the issue has a "constitutional dimension" (*tono costituzionale*), meaning that it must be linked to interests or principles of constitutional rank. This link is often found in the principles of equality and of non-discrimination.

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[7] In Judgment No 15, reaching these conclusions – and developing a corresponding doctrinal framework – was made possible by the structure of the anti-discrimination proceedings underlying the two cases examined in the decision, which allowed for both the non-application of the national legislation conflicting with EU law in the case at stake and, with essentially prospective intent, the referral of the matter to the Constitutional Court in order to annul said legislation with *erga omnes* effect.

[8] Obviously, such an approach would require a reconsideration – perhaps not even necessary in relation to precautionary matters – of constitutional case law on the matter of relevance, in a more flexible sense. On this point, see S. Barbareschi, *«L'ordinato funzionamento delle fonti interne» e il "concorso" degli strumenti di tutela dei diritti. Considerazioni sulla sentenza n. 15 del 2024,* in *Nomos. Le attualità del diritto,* No 2, 2024, especially p. 11 ff. In particular, Barbareschi (p. 13) argues: "From our perspective, therefore, the extension of the joint use of disapplication and constitutional review, in cases other than anti-discrimination proceedings, could primarily be pursued judicially, by identifying a new 'corollary' of the substantive approach, launched in 2017, which could lead to entirely disregarding the concrete applicability of the challenged legislative provisions". For further commentary on the judgment, see also L. Tomasi, *Diretta applicazione del diritto UE e incidente di costituzionalità nel giudizio antidiscriminatorio: la sentenza n. 15 del 2024 della Corte costituzionale*, in *Lavoro Diritti Europa,* No 2, 2024.

The immediate and explicit application of the "constitutional dimension" requirement is also found in Judgments Nos 1 and 7 of 2025.

In Judgment No 1, which concerned the constitutionality of a domestic provision conditioning access to public housing benefits on at least ten years of residence in Italy with reference to Directive 2003/109/EC, the "constitutional dimension" was identified in the principle of equality enshrined in Article 3 of the Constitution, which was also invoked by the referring court.

In Judgment No 7, which addressed a case involving the confiscation by equivalent of assets used to commit criminal offences, the "constitutional dimension" was found in the violation of constitutional provisions setting forth the principle of proportionality as well as in Articles 49(3) and 17 of the EU Charter of Fundamental Rights, the latter being effective in the domestic legal system by virtue of Articles 11 and 117(1) of the Constitution. The Constitutional Court upheld the claim of unconstitutionality on both grounds.

A special case is represented by Judgment No 31/2025, which concerns the constitutionality of the basic income scheme (*reddito di cittadinanza*) – a financial benefit, now repealed, which under national law was granted only to persons residing in Italy for at least ten years. The CJEU had already ruled on the incompatibility of the residence requirement with EU law, upon a preliminary reference made by the Naples Ordinary Court based on the assumption that the basic income constituted a social benefit. This classification, however, had been rejected on several occasions – even before the CJEU ruled on it – by the Constitutional Court. In Judgment No 31, the Constitutional Court held that the legal classification of the basic income falls to the national courts, specifically the Constitutional Court and the Court of Cassation. It concluded that the basic income was not merely a subsistence measure provided to individuals in need, but rather an active labour market policy instrument forming part of a "social inclusion plan". The Court thus found the ten-year residence requirement to be disproportionate, but held that some territorial connection was still necessary, and identified a five-year residence threshold as appropriate, applicable equally to Italian citizens, EU citizens and long-term residents.

5. Conclusions: the dialogue among national constitutional courts and the dialogue between national courts and European courts

Starting with Judgment No 269/2017, the Constitutional Court appears, on the one hand, to assert its role in assessing the constitutional compatibility of domestic provisions that are also in conflict with EU law, and, on the other hand, to engage directly in dialogue with the Court of Justice, with the aim of ensuring the uniform application of EU law within the national legal system.

What is gradually taking shape is a combined system of remedies, capable of guaranteeing the primacy of EU law – both through the non-application of conflicting national provisions by ordinary courts and through declarations of unconstitutionality concerning domestic laws that violate European law as well as constitutional principles and provisions.

Whether and to what extent the Italian Court's most recent case law will be further developed remain to be seen. For example, the model adopted in Judgment No 15/2024 – which combines non-application and the raising of a constitutional issue within the same proceedings, originally developed in the context of anti-discrimination cases – might be applied to other scenarios. For example, during interim proceedings, a court may not apply national law at the precautionary stage and raise a constitutional question in view of the proceedings on the merits of the case.

At present, we may conclude that a question may be referred to the Constitutional Court:

a) when national legislation is incompatible both with the Constitution and with the EU Charter of Fundamental Rights or other EU legislation, even when directly applicable;

b) provided that the question has a "constitutional dimension", that is, it involves principles and rights of constitutional rank.

A final observation is necessary. The dialogue between national supreme courts, and in particular constitutional courts, and the European courts is essential for the creation, maintenance and development of a European legal space that can serve as fertile ground for fostering the European integration process.

Alongside this "vertical" dialogue – supported by its own institutional tools enabling such interaction – I am firmly convinced of the need for a "horizontal" dialogue among national constitutional courts, which can only be cultivated through knowledge of each other's case law and could lead the way to shared traditions – traditions which the Court of Justice and the European Court of Human Rights may then recognise as common constitutional traditions. Constitutional courts will thus be able to contribute to the European integration process, promoting a coexistence of domestic, supranational and international remedies in the protection of fundamental rights – rights that are guaranteed by converging legal systems.

THE CONSTITUTIONAL JURISDICTION AND THE EXCESSIVE EXPANSION BY THE CJEU OF THE SCOPE AND IMPACT OF EU LAW

Atanas Semov

Let me start with a personal observation that does not commit anyone else: to the extent that it exists, the dialogue between the Court of Justice of the European Union (CJEU) and national constitutional jurisdictions is insufficient, with elements of disregard for certain views on either side. Below, I venture to share my reflections regarding the lack of dialogue between the CJEU and national constitutional jurisdictions, focusing on such sensitive topic as the scope of application of EU law.

The field of application of EU law is undoubtedly a matter of essence above all for court jurisdictions. The same matter, however, is raised ever more evidently with constitutional jurisdictions and entails the question as to whether they need and can oppose what already looks like a limitless expansion by the Court of Justice of the European Union (CJEU) of the scope of EU law and its impact on the Member States' legal systems.

Dialogue between the CJEU and the national courts, including dialogue with the national constitutional jurisdictions, is a well-known formula. I dare to think, however, that especially with regard to questions concerning the scope of EU law, such dialogue is simply non-existent…

We already have dozens of examples of the understanding imposed by the CJEU that **the limits of the competence conferred upon EU do not limit the effect** – *and* ***the impact*** – of EU law! The CJEU imposes legal consequences in apparently internal for a Member State situations: from Union law rules which regulate certain aspects of a subject-matter: it derives legal consequences applicable by extension to unregulated aspects of the same subject-matter or even to other subject-matters!...

And yet, in her Opinion in the Bulgarian case *Pancharevo* Advocate General Juliane Kokott explicitly mentions *"limits of the control"* by the Court of justice[1].

[1] **CJEU**, 15. 4. 2021, *Pancharevo*, C-490/20, Conclusions de l'Avocat général Kokott, p. 21.

The CJEU, for its part, consistently imposes the understanding that **EU law may impact even subject-matters in which the EU lacks competence:** *"the fact that a matter falls **within the competence of the Member States** does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter"*[2].

I define such situations as *apparently internal situations*.

I. The CJEU finds an indirect link to EU law even in situations without a cross-border element (movement) owing to the consequences of EU citizenship

During the last decade, the Court has achieved a **substantial narrowing of the understanding of purely internal situations.**

According to the Court, **in certain cases Member States act "within the scope of EU law" even where** ***"no cross-border element is present in the particular case"*** *(more specifically, effected movement) – i.e. even in situations that, to all intents and purposes, are purely internal! "... [T]here are **very specific situations** in which, despite the fact that the secondary law on the right of residence of third-country nationals does not apply and **the Union citizen concerned has not made use of his freedom of movement, EU law gives rise to definite legal consequences"***[3]**.**

The apparently internal situations *"...have the common feature that, **although they are governed by legislation which falls, a priori, within the competence of the Member States,** namely legislation on the right of entry and residence of third-country nationals **outside the scope of provisions of secondary legislation** which provide for the grant of such a right under certain conditions, **they nonetheless have an intrinsic connection** with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom"*[4].

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[2] **CJUE,** 2. 3. 2010, *Rottmann,* C-135/08, p. 41.

[3] **CJUE,** 13. 9. 2016, *CS*, C-304/14, т. 29.

See, by analogy, **CJUE,** 8. 3. 2011, *Ruiz Zambrano*, C-34/09, p. 43 and 44; **CJUE,** 15. 11. 2011, *Dereci*, C-256/11, p. 66 and 67; **CJUE,** 8. 11. 2012, *Iida*, C-40/11, p. 71; **CJUE,** 8. 5. 2013, *Ymeraga*, C-87/12, p. 36; **CJUE,** 10. 10. 2013, *Alokpa et Moudoulou*, C-86/12, p. 32.

[4] **CJUE,** 13. 9. 2016, *Rendón Marín*, C-165/14, p. 74-81 and 85 and **CJUE,** *CS*, C-304/14, p. 29-33, 36 and 48.

In the above mentioned Bulgarian case *Pancharevo* the CJEU "recalls" that a Union citizen, **even such who has never made use of their right to freedom of movement,** may rely on the rights pertaining to this capacity, ***"including – where appropriate – against his or her Member State of origin"***[5].

II. Limitless finding of a link to EU law on another ground

According to the CJEU, **in a purely internal situation of which *all elements are within the territory of a single Member State*,** a link to EU law will exist (and, accordingly, a request for a preliminary ruling would be admissible) if nationals established in other Member State "**have been or are interested"** (!) in the application of that national measure[6].

1. Even where no cross-border element whatsoever is present in the particular situation, the potential possibility of subjects of law from another Member State finding themselves in the same situation (respectively, coming under the same domestic law rules) places that situation within the scope of EU law. For example: *"...**although direct taxation falls within the competence of the Member States,** they must none the less exercise that competence consistently with EU law"*[7].

2. The Court finds a link to EU Law **also in a particular situation in which all facts are internal to the Member State *if only due to the (eventual, one day...) applicability* of the domestic law rule concerned by extension to relations with a cross-border element[8].**

3. On other occasions, the CJEU finds a link to EU law **for the sole reason that the applicable domestic law rules refer to EU law or cite it:** *"EU law had been rendered applicable by domestic law due to a renvoi made by that law to the content of those provisions"*[9].

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[5] **CJUE,** 14. 12. 2021, *Pancharevo*, C-490/20, p. 42.

[6] **CJUE,** 5. 12. 2013, *Venturini*, C-159-161/12, p. 25. See also **CJUE,** 1. 6. 2010, *Blanco Pérez et Chao Gómez,* C-570/07 and C-571/07, p. 40.

[7] **CJUE,** 22. 10. 2014, *Blanco et Fabretti*, C-344/13 and C-367/13, p. 24.

[8] See, e.g. **CJUE,** 15. 11. 2016, *Ullens de Schooten*, C-268/15.

[9] **CJUE,** 21. 12. 2011, *Cicala,* C-482/10, p. 17. See also: **CJCE,** 5. 12. 2000, *Guimont,* C-448/98; **CJCE,** 17. 7. 1997, *Leur-Bloem*, C-28/95, p. 25; **CJCE,** 11. 1. 2001, *Kofisa Italia,* C-1/99, p. 30-32.

A specific case in point is the Bulgarian case *Aurubis Balgaria,* where the CJEU holds that *"those EU customs rules are applicable to this dispute only by virtue of Bulgarian law..."*[10].

In the Hungarian case *Allianz Hungária Biztosító and Others "...the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning European Union law* ***in situations where the facts of the cases being considered by the national courts were outside the direct scope of European Union law*** *but where those provisions had been rendered applicable by domestic law, which adopted, for internal situations, the same approach as that provided for under European Union law. In those circumstances, it is clearly* ***in the interest of the European Union*** *that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly,* ***irrespective of the circumstances in which they are to apply***"[11] – i.e. regardless of whether a purely internal situation is involved or not.

4. In a Bulgarian case of 2022 *LB v Smetna palata na Republika Bulgaria* the CJEU held that the preliminary request was admissible even though it concerned a situation that was obviously outside the explicitly defined limits of the scope of the Union legal act in question: *"that contract does not fall within the scope of that directive"*[12]! **So what is the point of the scope of a Union legal act being explicitly defined (in the provisions of that same act) if that scope can be expanded without limitation[13]?**

5. Other examples of a link to EU law in subject-matters in which Member States retain competence:

5.1. Even respecting the subject-matter of direct taxation. *"Although ...direct taxation does not as such fall within the purview of the*

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[10] **CJUE,** 31. 3. 2011, *Aurubis Balgaria AD,* C-546/09, p. 23. See also **CJCE,** 11. 1. 2001, *Kofisa Italia,* C-1/99, p. 30-32.

[11] **CJEU,** 14. 3. 2013, *Allianz Hungária Biztosító et a.*, C-32/11, p. 20.

See also **CJEC,** 11.12.2007, *Eti and Others*, C-280/06, p. 22; **CJEC,** 17.7.1997, *Leur-Bloem*, C-28/95, p. 32 and **CJEC,** 14.12.2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, p. 19.

See prior **CJEC,** 26.9.1985, *Thomasdünger*, 166/84; **CJEC,** 17.7.1997, *Leur-Bloem*, C-28/95, p. 25; **CJEC,** 17.12.1998, *IP*, C-2/97, p. 59; **CJEC,** 14.12.2006, *Confederación Española de Empresarios de Estaciones de Servicio,* C-217/05, p.19.

And analogy in: **CJEC,** 18.10.1990, *Dzodzî,* C-297/88 and C-197/89, p. 36, 37 and 41.

[12] **CJUE,** 31. 3. 2022, *LB v Smetna palata na Republika Bulgaria,* C-195/21, p. 42.

[13] See also the Bulgarian cases **CJUE,** 10. 11. 2022, *DELTA STROY 2003,* C-203/21, p. 28 и **CJUE,** 27. 10. 2022, *'S.V.' OOD,* C-485/21, p. 18.

Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law"[14].

5.2. Even regarding matters with such direct bearing on the issue of sovereignty (and not *only* within a competence retained by the Member States) as the regime of **acquisition and loss of electoral rights**, the CJEU imposes Union consequences owing to their link – albeit in certain situations only – to relations regulated by EU law[15]. In a Bulgarian case, **the CJEU imposed applicability of the EU law rules regarding personal data even in respect of national parliamentary elections**[16].

5.3. And furthermore regarding: matrimonial rules[17]; acquisition or loss or national citizenship[18]; social security[19]; public health[20]; education[21] etc.

5.4. In a significant French case[22], he Court of Justice of the EU provided **an especially glaring example of the excessively broad scope of EU law, extending it not simply outside any competences of the EU** but even to a subject-matter that is particularly sensitive and, therefore, is the **only one explicitly *proclaimed by the Founding Treaties as a reserved (exclusive) competence of Member States: national security (Article 4(2) TEU):*** *"...according to the Court's settled case-law, although it is for the Member States to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law."*[23].

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[14] **CJEC,** 14.2.1995, *Schumacker,* C-279/93, p. 21. See also **CJEC,** 12.7.2005, *Schempp*, C-403/03, p. 19 and **CJEC,** 12.12.2002, *De Groot*, C-385/00, p. 75.

[15] **CJEC,** 12.9.2006, *Spain v United Kingdom*, C-145/04, p. 78 and **CJEU,** 5.10.2010, *McB.,* C-400/10 PPU.

[16] **CJEU,** 20.12.2022, *Koalitsia „Demokratichna Bulgaria – Obedinenie",* C-306/21.

[17] **CJEC,** 7.1.2004, *K.B.,* C-117/01, p. 30-34, and especially landmark in **CJEU,** 5.6.2018, *Coman and Others,* C-673/16, p. 31.

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

[19] **CJEC,** 28.4.1998, *Kohll*, C-158/96, p. 17 and 19.

[20] **CJEC,** 16.5.2006, *Watts*, C-372/04, p. 92.

[21] **CJEC,** 11.9.2007, *Schwarz*, C-76/05, p. 70; **CJEC,** 23.10 2007, *Morgan*, C-11/06, p. 24; **CJEC,** 11.9.2008, *Commission v Germany*, C-141/07, p. 23 and 25, and a number of other cases

[22] **CJEU,** 6.10.2020, Joined Cases *La Quadrature du Net and Others v Premier ministre and Others,* C-511/18 and *French Data Network,* C-512/18 and C-520/18, p. 99.

[23] See also **CJEU,** 21.12.2011, *N. S.,* C-411/10 and 493/10, and prior **CJEU,** 4.6.2013, *ZZ*, C-300/11, p. 38; **CJEU,** 20.3.2018, *Commission v Austria (State print-*

5.5. The CJEU made a landmark ruling (and, in effect, left a landmark void in the reasons) in the Hungarian case[24]: *"...[T]he referring court asks, in essence,* ***to what extent the fact that national legislation*** *such as that at issue in the main proceedings* ***concerns an area falling within the competence of the Member States*** *affects the answers to..."* other questions.

This, in essence, is THE CORE ISSUE that my presentation addresses.

And the answer that the CJEU gives is, apparently, to no extent at all: ***"...the fact that national legislation*** *such as that at issue in the main proceedings* ***concerns an area falling within the competence of the Member States does not affect the answers to the questions raised by the referring court."***[25]!

"...[T]he ***Member States must exercise their competences consistently with EU law*** *and, in particular, the fundamental freedoms guaranteed in the Treaty, which apply to situations such as those at issue in the main proceedings, which fall within the scope of EU law."*[26]

Is this, however, enough?... *Is it not necessary for the Court at least to state clear and exhaustive reasons as to what necessitates overstepping the limits of the competence conferred upon the EU and the impact (and, not infrequently, also direct legal consequences) of Union law rules in situations/subject-matters that fall within the reserved competence of Member States?*

Do not the Founding Treaties proclaim that "[u]nder the principle of conferral, ***the Union shall act only within the limits of the competences*** *conferred upon it by the Member States in the Treaties" (Article 5(2) TEU)?! What is the point of Article 4(1) TEU proclaiming that "competences not conferred upon the Union in the Treaties remain with the Member States"?*

And has not the CJEU itself repeatedly ruled that "EU law must be interpreted within the limits of the competences conferred upon the Union"?

5. Finally:

*"**Although,** generally speaking, criminal legislation and the rules of criminal procedure [...] are matters* ***for which the Member States are***

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ing office), C-187/16, p. 75-76, and **CJEU,** 2.4.2020, *Commission v Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17, C-719/17, p. 143 and 170.

[24] **CJEU,** 11.6.2015, *Berlington Hungary and Others*, C-98/14, p. 111.

[25] Ibid., p. 115 of the motivation and p. 7 of the operative part.

[26] Ibid., p. 112.

responsible, *the Court has consistently held that* ***Community law sets certain limits to their power in that respect"***[27]**.**

We are furthermore well aware that the CJEU has extended the scope and impact of EU law also to the national laws on the organisation of justice (a subject-matter within reserved national competence). The Court has held that "…**although the organisation of justice in the Member States falls within the competence of those Member States,** they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law. The same applies to the disciplinary liability of judges for failure to comply with the decisions of the national constitutional court"[28].

Also, we are all well familiar with the case *Commission v Poland (Independence of the Supreme Court)*[29] in which Hungary intervened in support of Poland, which is why I will not consider it in detail.

One question, though, seems to me already inevitable: **"Are there any limits at all to the scope of EU law,** and, respectively, to the competence of the CJEU?"

Conclusion

In my humble opinion, these examples alone – just a few of many! – suffice to make us wonder whether the CJEU has gone far. May be too far…

Ultimately, **the big question facing national constitutional jurisdictions** is *whether it is necessary and possible for them* to resist this already apparently limitless expansion of the scope of EU law and its impact on Member States' legal systems.

In my opinion, one possible means to do so is to assert the protection of national constitutional identity proclaimed in Article 4(2) TEU as **one of the fundamental principles of the Union** and to enshrine in the Statute of the CJEU a *requirement that, whenever a question about national constitutional identity is brought before it, the Court must seek observations from the constitutional jurisdiction of the State concerned.*

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[27] **CJEC,** 24.11.1998, *Bickel and Franz*, C-274/96, p. 17.

[28] **CJUE,** 21. 12. 2021, *SC Euro Box Promotion SRL,* C-357/19 et a, p. 133 and **CJUE,** 18. 5. 2021, *Asociația 'Forumul Judecătorilor din România' et a.,* C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, т. 111 and the jurisprudence cited.

[29] **CJEU,** 24.6.2019, *Commission v Poland (Independence of the Supreme Court),* C-619/18.

PART III

FREEDOM OF EXPRESSION AND POLITICAL PLURALISM IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

FREEDOM OF EXPRESSION AND POLITICAL PLURALISM IN THE CASE LAW OF THE ITALIAN CONSTITUTIONAL COURT

Massimo Luciani

1. Introduction

Prior to the examination of the Italian Constitutional Court's case law, the two phrases ("freedom of expression" and "political pluralism") that form the first part of the title of this paper must be clarified.

The Italian Constitution does not explicitly mention "freedom of expression": it rather refers to "freedom to manifest one's thoughts" (Article 21(1) of the Constitution provides that "*Everyone has the right to freely express their thoughts in speech, writing, or any other form of communication*"). The two phrases may be considered equivalent and do not coincide with "freedom of conscience". While the latter refers to a static element – *a condition of the spirit* – the former refer to a dynamic element, to an *activity* consisting in the expression of thought. This distinction is significant: freedom of conscience was particularly valued in pre-modern tradition, which focused on the "inner forum", whereas freedom of expression is cherished by modern secularized thought, which has renounced controlling the "inner forum" (left to religious authorities) and is solely concerned with the "outer forum". This distinction, moreover, is not devoid of practical consequences: while the guarantees relating to freedom of conscience are of an essentially negative nature (consider, for instance, the right to invoke freedom of conscience when a specific behaviour is required by public authorities), those pertaining to freedom of expression are also positive (such as the duty of public authorities to make its exercise materially possible). The Bulgarian Constitution appears to take a different approach (Article 37(1), first sentence, provides that "*Freedom of conscience, freedom of thought, and the choice of religion and of religious or atheistic views shall be inviolable*"), but the provisions – among others – of Articles 40 (concerning freedom of the press) and 41 (recognising the right to obtain and disseminate information) must also be considered.

As to political pluralism, it must first be noted that a "pluralist society" is not simply a "plural society". The latter syntagma was originally used to describe the condition of certain colonial systems, in which foreign exploitation was accompanied by a policy of non-interference with local

customs and traditions.[1] It later came to refer more generally to all societies characterised by the "plurality of needs emerging from the social structure".[2] Any even minimally complex society in which differing beliefs and aspirations exist is therefore "plural". On the contrary, a society is "pluralist" only when it: a) recognises a multiplicity of groups entrusted with mediating between individuals and society; b) shows the features of what Robert Dahl called a "polyarchy", in which "citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in the government";[3] c) acknowledges, as already pointed out by Kelsen,[4] ethical relativism – not in the sense of preventing individuals from privately holding ethically absolutist convictions (otherwise freedom of conscience would be infringed), but in the sense that such absolutism cannot influence public conduct to the extent of refusing to engage with differing viewpoints; d) is not satisfied with mere tolerance, as it does not merely *respect* diversity, but it rather *appreciates* it.[5]

Therefore, when Article 11(1) of the Bulgarian Constitution states that "*Political life in the Republic of Bulgaria shall be based on the principle of political pluralism*", it makes a far-reaching statement that aligns precisely with this conception of diversity.

2. The relationship between freedom of expression and political pluralism

Given the foregoing, it is evident that, within the context of a democratic system, freedom of expression and political pluralism are mutually intertwined: with no pluralism there is no democracy, and with no freedom of expression there is no pluralism. This interdependence has long been recognised in the case law of the Italian Constitutional Court: its numerous decisions concerning freedom of information have consistently been grounded in the idea that between freedom of expression, freedom of information, pluralism and democracy there is a one-to-one correspondence. As Thomas I. Emerson affirmed decades ago, "the right of all members of society to form their own beliefs and communicate them freely

[1] F. Gross, *Toleration and Pluralism*, in: *Il Politico*, 1985, 188 ff.; Id., *Limits and Limitations of Pluralism*, in: *Il Politico*, 1986, 220.

[2] F. Rimoli, *Pluralismo e valori costituzionali. I paradossi dell'integrazione democratica*, Turin, Giappichelli, 1999, 2; Id., *Pluralismo*, in: *Enc. giur.*, vol. VI, Rome, Istituto della Enciclopedia Italiana, 1997, 2.

[3] R. Dahl, *Democracy and its Critics*, New Haven, Yale Univ. Press, 1989, 220.

[4] See H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen, Mohr, 1929.

[5] G. Sartori, *Pluralismo, multiculturalismo e estranei. Saggio sulla società multietnica*, Milan, Rizzoli, 2000, 19.

to others must be regarded as an essential principle of a democratically organized society".[6]

The Italian Constitution does not draw the picture of a merely tolerant democracy; rather, it outlines a pluralist democracy – one that views the variety of opinions, values and lifestyles as a form of cultural wealth. The Constitution also places mediation and its actors at the heart of pluralism. In other words, pluralism is conceived as a social structure and practice in which various organised groups mediate between the individual's appetitive and volitional sphere and that of society. It is for this reason that the Constitution refuses to concentrate sovereignty in a single power and prefers to distribute it through "a balance among the constituted powers, [...] all of equal strength".[7] The latter topic – namely, the equilibrium among powers – goes far beyond the scope of this paper. Let us thus limit our discussion to the constitutional case law dealing with the former aspect, i.e. with the relationship between freedom of expression and pluralism.

3. General statements on freedom of expression in the case law of the Italian Constitutional Court

As early as in Judgment No 9/1965, the Constitutional Court included freedom of expression among the inviolable rights and linked it to the democratic system: "*freedom to express one's thoughts is, among the fundamental liberties proclaimed and protected by our Constitution, one of those [...] that best characterise the regime in force in the State, as it is a condition for the existence and development of the life of the country in all its cultural, political and social dimensions*". Subsequent case law has aligned with this view: Judgment No 84/1969 defined freedom of expression as "*the cornerstone of democratic order*"; Judgment No 172/1972 stated that the free expression of thought is "*foundation of democracy*"; Judgment No 199/1972 notably observed that "*a democratic State* [...] *not only permits criticism of existing institutions, but indeed draws sustenance from it, in order to ensure, through a free exchange of ideas, its adaptation to changes in social consciousness*". In Judgment No 106/1975, freedom of expression is described as "*a pillar of the democratic regime guaranteed by the Constitution*" (see also Judgment No 126/1985). Judgment No 112/1993 affirms that Article 21 of the Constitution "*places this freedom among the primary values*" and adds that the "*founding principles of the form of State outlined by the Constitution* [...] *want our democracy to be based on free*

[6] T. I. Emerson, *Toward a General Theory of the First Amendment*, New York, Faculty Scholarship Series, 1963, 883.

[7] M. Fioravanti, *Stato costituzionale in trasformazione*, Modena, Mucchi, 2021, 19.

public opinion and be capable of developing through the equal contribution of all to the shaping of the general will" (in the same spirit, see Judgments Nos 155/2002 and 206/2019). Judgment No 29/1996 asserted that information represents "*not so much a subject matter as a 'preliminary condition' for the implementation of the principles inherent in a democratic State*" (similarly, Judgments Nos 348/1990, 312/2003 and 206/2019). In Judgment No 155/2002, the Court underlined the need to achieve "*'the constitutional imperative' that 'the right to be informed', as protected under Article 21 of the Constitution, must be defined and characterised by a pluralism of sources from which knowledge and news can be drawn – thus enabling citizens to make informed assessments while being exposed to different political and cultural viewpoints –, by the objectivity and impartiality of the information provided, as well as by the completeness, accuracy and continuity of the information activity delivered*". This view has been endorsed by a consistent set of judgments, culminating in Judgment No 138/1985, which contains the particularly challenging description of freedom of expression as "*perhaps the highest*" of constitutional rights.

The link between freedom of expression, pluralism and democracy is thus unequivocal. Two recent rulings on public subsidies for publishing and broadcasting further emphasise this connection.

Judgment No 206/2019 stated that public subsidies to the press are not constitutionally mandated, but the need for them may arise under "*Article 3(2) of the Constitution, which requires the removal of 'those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'*". The ruling found that, in the specific case pending before the Court, such subsidies were not to be granted, due to the fact that "*such a need does not exist because the legal safeguards protecting media pluralism and market functioning are sufficient to ensure that value, so that the guarantee of the fundamental right at stake does not require the State to intervene by providing financial benefits*". The Court thus clarified that pluralism, where necessary, must be not only recognised, but also concretely supported by public action.

Judgment No 44/2025, addressing the State subsidy system for local radio and television broadcasters, confirmed that "*this Court has tied media pluralism to Article 21 of the Constitution and to the democratic character of the Republic itself*". It reaffirmed the distinction between internal and external pluralism; stated that protecting external pluralism requires "*the creation of conditions for free market access, along with regulation designed to prevent ownership concentration*"; and observed that "*the current local information system is characterised* […] *not by a scarcity of television*

broadcasters, as in the past, but rather by their abundance, due not only to the relatively low cost of establishing such broadcasters (Judgments Nos 226/1974, 202/1976 and 826/1998), but especially to the multiple channels made possible by digital technologies". The Court also noted that "*the information 'ecosystem' has radically changed and is now characterised, at all levels (local, national and global), by the elimination of technical barriers to the proliferation of information producers and distributors as well as by the reduction of economic costs associated with such activities*". The Court further recognised that "*throughout the entire ecosystem, the availability of information and of diverse viewpoints has greatly increased thanks to the internet*", which "*has enabled the decentralisation of information production, allowing any user to publish and disseminate news*"; "*has facilitated the multiplication, especially at the local level, of news websites that operate without bearing the costs once associated with launching a TV or radio station or printing a newspaper*"; and "*has amplified the reach of traditional media contents, often readily accessible online as they are in the result lists provided by search engines to individual users and disseminated via social media (where they can be easily spread through the well-known mechanisms of tagging, sharing and liking*".

However, Judgment No 44/2025 goes beyond acknowledging the expansion of informational pluralism by stating that "*it is accompanied by a crisis in the quality of information*" (due in part to "*the spread of misinformation, hate speech, unverified claims and polarised opinions*"). As a result, "*the present challenge of information is not so much the further multiplication of the already numerous voices in the public sphere, but rather the safeguard of the quality of information itself*", especially from the perspective of the right to be informed, which must coexist with the right to inform. Hence, the quality of information "*can be ensured by enhancing the role of journalists operating within media enterprises having sufficient organisational and technological infrastructure to perform critical fact-checking, investigative reports and analyses*".

The value of pluralism is so high that the Constitutional Court has struck down several provisions that, in one way or the other, restricted it. It is here sufficient to cite two examples.

The first is Judgment No 87/1966, which declared void Article 272(2) of the Criminal Code, which prohibited anti-national propaganda. As reaffirmed by more recent Judgment No 243/2011, which endorsed its reasoning, the Court declared it unconstitutional "*considering that 'national sentiment' is merely a spiritual concept that arises and develops in the inner conscience of each individual, thus solely forming part of the realm of thought and ideals. Therefore, propaganda not aimed at inciting violent reactions, nor intended to insult the nation or undermine citizens' duties*

toward the homeland or threaten other constitutionally protected values, could not be prohibited without this constituting a violation of the freedom guaranteed under Article 21 of the Constitution".

The second is Judgment No 189/1987, which declared Articles 1 and 3 of Law No 1085 of 24 June 1929 void insofar as they prohibited the display of foreign flags without the authorisation of "*local political authorities*". This was a fascist-era provision, and the Court declared it unconstitutional given that "*since 1929, the meaning of symbols, emblems and flags has changed significantly*". Whereas previously such symbols depicted national sovereignty as embedding a single ideology, today flags "*symbolically represent a given country, the identity of a particular State, and, at most, the ideology accepted and proposed by the majority of its people on the international stage*". As the State is not meant to "*impose its own values*", "*flags serve only as identifying symbols of a given State and, if anything, of distinct, unmistakable ideals embraced by its people and thus by its sovereignty*". In this context, criminal punishment of the displaying of foreign flags no longer makes sense.[8]

It is clear that the Italian Constitutional Court – much like the European Court of Human Rights (see *Handyside v. United Kingdom*, judgment of 7 December 1976) – has adopted an intermediate position between, on the one hand, the generally individualistic US model (which emphasises the importance of competition of ideas, i.e. the *free market of ideas*) and, on the other, the more functionalist German model, which highlights the social role of the media and their relevance in building public opinion (*Bildung der öffentlichen Meinung*).

4. Pluralism in the broadcasting system

Before the advent of the digital society and the development of social media, the formation of public opinion depended primarily on radio and television broadcasting, which was crucial for the right to inform as well as for the right to be informed, both of which derive from freedom of expression, as consistently affirmed in constitutional case law.[9]

It is precisely on this sensitive sector that, understandably, the Constitutional Court's case law has focused, although it should be borne in mind that political consensus and lifestyles are shaped not only by television news, but also – and perhaps even more significantly – by entertainment programmes.

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[8] For more information on this case, see M. Luciani, *Articolo 12*, Rome, Carocci, 2018, 124 ff.

[9] Judgments Nos 105/1972, 202/1976, 148/1981, 826/1988 and 112/1993.

In Italy, Law No 395 of 30 June 1910 and Royal Decree No 1067 of 8 February 1923 reserved "*to the Government*" and subsequently "*to the State*" the so-called circular radio-auditory services ("*servizi radioauditivi circolari*"). However, shortly thereafter (by Royal Decree No 2191 of 14 December 1924), these services were granted under an exclusive concession to a public company, namely URI (Unione Radiofonica Italiana), which later changed its name first to EIAR (Ente Italiano Audizioni Radiofoniche), then to RAI Radio Audizioni Italia, and finally to RAI – Radiotelevisione Italiana.

At the very beginning, the state monopoly on broadcasting was considered compatible with the Constitution. In particular, Judgment No 59/1960 justified it on the basis of three arguments: a) "*the factual scarcity of available broadcasting 'channels'*", which implied the risk of private oligopolies; b) the nature of broadcasting as a service of "*overriding general interest*"; c) the State's greater capacity to ensure an "*objective*" and "*impartial*" service.

The truly decisive argument was the first one, and not by chance it was reiterated in subsequent case law (starting with Judgment No 49/1961): frequencies are a scarce resource, and as such they hold high value, meaning that only the wealthiest can afford their costs. Accordingly, the Court held at the time, their use must be reserved, directly or indirectly, to the State.

Precisely for this reason, however, the Court later declared the state monopoly on transmitting foreign broadcasts (Judgment No 225/1974) and on cable transmissions (Judgment No 226/1974) to be unconstitutional. The former do not use frequencies allocated to Italy by international agreements, and the latter do not use radio frequencies at all. Nevertheless, in the latter case the Court acknowledged that the cost of a nationwide cable broadcasting system would be very high, and therefore only declared the monopoly on local cable transmissions to be unconstitutional – again to maximize pluralism and prevent a scarce resource from becoming the exclusive domain of a few.

These rulings concerned "external pluralism", i.e. the presence of multiple market operators. However, the Constitutional Court soon also dealt with "internal pluralism", i.e. with the variety of viewpoints, ideas and voices within the public broadcasting service. From this point of view, in Judgment No 223/1974 (the content of which was later clarified in Judgment No 1/1976), the Court held that the state monopoly could only be justified if it ensured independence of the public broadcaster from the executive power, adequate parliamentary oversight, impartiality of public service journalists and the possibility for the widest possible range of opinions to enter the public broadcasting system.

Following these decisions, Parliament enacted Law No 103/1975 to regulate the matter, but the reform proved unsatisfactory. In Judgment No 202/1976, the Constitutional Court thus declared the state monopoly on local over-the-air broadcasting to be unconstitutional, while state monopoly at the national level remained in force (as reaffirmed in Judgment No 148/1981). Once again, the Court's main concern was the protection of both external and internal pluralism.

In the following years, local frequencies were de facto occupied by private operators, and later, with Decree-Law No 807 of 6 December 1984 (converted by Parliament into Law No 10 of 4 February 1985), the public-private broadcasting duopoly was legally recognised – a feature that continued to characterise the Italian broadcasting landscape for years. That regulation was intended to be temporary, pending the adoption of comprehensive legislation, which, however, never saw the light of day. Given the absence of satisfactory legislative regulation, the Constitutional Court could not do much. Nevertheless, after a number of less consequential decisions (Judgments Nos 231/1985, 35/1986, 153 and 194 of 1987), it reaffirmed in Judgment No 826/1988 the "*fundamental value of pluralism*" and issued a pressing call for Parliament to intervene with a general law.

Such a law was eventually adopted (Law No 223 of 6 August 1990, "Regulation of the public and private broadcasting system"), and it stabilised the duopoly. However, this solution was not deemed satisfactory by the Constitutional Court, which considered a structure merely consisting of a "*public versus private*" dualism (see Judgment No 155/2002) inadequate. Subsequently, Legislative Decree No 177 of 31 July 2005 ("Consolidated law on audiovisual and radio media services", still in force) was enacted. Nonetheless, the sector long remained marked by a clearly oligopolistic structure, which has only been partially mitigated by major technological innovations in recent years (such as satellite transmissions, digital terrestrial broadcasting and smart TVs capable of connecting to the internet).

5. The press

Another crucial sector is the press.

As early as in Judgment No 18/1966, the Constitutional Court emphasised the "*importance of the press in social life*", and subsequent constitutional case law has consistently reaffirmed the significance of this medium (which, however, in recent years has undergone a serious crisis due to the technological transformations already mentioned). Thus, Judgment No 122/1970 acknowledged "*the importance of the press's role in a democratic regime*"; Judgment No 105/1972 recognized the press as a "*traditional and still irreplaceable means for informing citizens and therefore for shaping an informed and aware public opinion*"; and, according to

Judgment No 172/1972, "*the press, considered an essential instrument of that freedom* [i.e. freedom of expression], *must be safeguarded against any threat or coercion, whether direct or indirect*".

Also in this sector, constitutional case law has consistently intervened to support political and ideological pluralism. For instance:

i) In order to broaden the scope of protection, an extensive interpretation of "press" was endorsed: wall newspapers (Judgment No 115/1957) and public posters (Judgment No 11/1974), including electoral propaganda posters (Judgment No 48/1964), were considered to fall under the notion of printed material.

ii) The Court considered compatible with the Constitution both the requirement of authorisation to practice the printing profession (Judgment No 38/1961) and the obligation for newspaper vendors to be listed in a specific public register (Judgments Nos 33/1957 and 163/1982), but only insofar as these measures concerned certain ancillary economic activities not directly affecting the dissemination of thought.

iii) The ban on Sunday work for journalists was instead declared to be unconstitutional as it was deemed to be a direct limitation of freedom of information (Judgment No 105/1972).

iv) Article 21(3) of the Constitution allows for the seizure of printed publications only in the cases expressly provided by the press law. The Court made it clear that "press law" must not be narrowly understood as a specific statute formally bearing this title, but as any legislative act governing matters concerning the press (Judgments Nos 4/1972 and 60/1976). The Court further specified that the seizure "*applies to the entire print run of each publication*" (Judgment No 199/1972).[10]

v) Article 21(2) of the Constitution provides that "*The press may not be subjected to any authorisation or censorship*",[11] and constitutional case law has defined censorship as "*a typical public law instrument, whereby State authorities – and only they – exercise authoritative prior control over the press, through a measure that involves a judgment on the expression of thought, entrusted to the public administration*".[12]

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[10] Thus, the mandatory delivery of certain copies of printed material to the administrative authority cannot be considered a form of seizure. Furthermore, seizure "does not apply to instrumental activities or to objects that are aimed at and serve the organisation, planning, preparation and production of material presumed to be intended for publication" (Judgment No 38/1973).

[11] "Authorisation" is equivalent to "censorship" (Judgment No 31/1957).

[12] Judgment No 159/1970, but see also Judgments Nos 31 and 115 of 1957, 44/1960, 93/1972, 92/1979 and 1063/1988.

6. The limits of freedom of expression

Despite its fundamental importance in a democratic system, even freedom of expression cannot be regarded as limitless. On the one hand, the very first ruling of the Constitutional Court stated that "*the concept of limitation is inherent in the concept of right, and within the legal system the various legal spheres must necessarily limit each other, in order to be able to coexist within an orderly civil society*". On the other hand, as stated in Judgment No 85/2013 (and more recently in Judgment No 33/2021), no constitutional right may "'*tyrannise' other legal interests recognised and protected under constitutional law*" (a formulation that unmistakably evokes Schmittian thinking).[13]

Accordingly, the Constitutional Court has acknowledged the constitutionality of certain limits on freedom of expression, even beyond the explicit provisions of Article 21(6) of the Constitution.[14] Indeed, in addition to the general limit of public decency (*buon costume*), freedom of expression is subject to at least the following constraints: public security (Judgments Nos 1/1956 and 65/1970); crime prevention (Judgments Nos 1/1956, 120 and 121 of 1957, 38/1961); public tranquillity (Judgments Nos 33, 120 and 121 of 1957) and public peace (Judgment No 38/1961); "*tranquillity, rest and dignity of persons; road safety; protection of monuments, urban aesthetics and landscape*" (Judgment No 138/1985); public order (Judgments Nos 120/1957, 19/1962, 25/1965, 87/1966, 199/1972, 15/1973, 210/1976, 138/1985 and 112/1993); prevention of the re-establishment of the fascist party (Judgments Nos 1/1957 and 74/1958); administration of justice (Judgments Nos 25/1965, 18/1966, 1 and 18 of 1981, 196/1987); State security (limited, by Judgment No 25/1965, to "*the protection of the existence, integrity, unity, independence, peace and both military and civil defence of the State*"); protection of minors (Judgments Nos 9 and 25 of 1965, 16/1981), dignity and reputation of individuals (most recently, Judgment No 104/2024), including that of defendants in criminal proceedings (Judgment No 18/1966); the democratic method (Judgment No 87/1966); economic order (Judgment No 87/1966) and public economy (Judgments Nos 123/1976 and 73/1983); right to one's image (Judgments Nos 122/1970, 38/1973 and 86/1974); road safety, protection of monuments, urban aesthetics and landscape (Judgments Nos 129/1970, 89/1979 and 138/1985); defence of the homeland (Judgments Nos 16/1973 and 31/1982); prestige of the judi-

[13] C. Schmitt, *Die Tyrannei der Werte. Überlegungen eines Juristen zur Wert-Philosophie*, 3rd ed., Berlin, Duncker & Humblot, 2011 (the first edition ever was privately printed in 1960, while the first publicly printed edition dates to 1967).

[14] "*Publications, performances, and other exhibits offensive to public morality shall be prohibited.*"

ciary (Judgment No 100/1981); prestige of the Government, the judiciary and the armed forces (Judgment No 20/1974); and religious sentiment (Judgment No 188/1975).

It is evident that all these limits do not result from the Court's judicial "invention" or acceptance of repressive provisions discretionarily adopted by Parliament;[15] rather, they stem from a systematic interpretation of the Constitution that prohibits viewing freedom of expression in isolation from other constitutional rights and interests. In any event, the Court has remained mindful of the principle of democratic pluralism stating that the limit of respect for the "*shared moral sentiment*" refers "*not only to what is common among the different moralities of our time, but also to the variety of ethical conceptions that coexist in contemporary society*" (Judgment No 293/2000). The connection between freedom of expression and both political and ideological pluralism thus remains very strong. In Order No 132/2020 (followed by Judgment No 150/2021), concerning custodial sanctions imposed on journalists for violating individuals' rights to their reputations (deemed constitutional only under specific conditions), the Court succinctly observed that "*Freedom of expression constitutes – even more than a right proclaimed by the ECHR – a fundamental right recognised as 'co-essential to the freedom guaranteed by the Constitution' (Judgment No 11/1968), a 'keystone of the democratic order' (Judgment No 84/1969) and a 'cornerstone of democracy in the whole legal system' (Judgment No 126/1985 and, recently, Judgment No 206/2019)*".

The world has been profoundly affected by the technological revolution, and the Constitutional Court has acknowledged this change. For example, it has noted that mobile phones are now universally present "*in every area of professional, family and personal life*", such that it would be unrealistic to claim that "*freedom of communication, deprived of mobile telephony, could still be adequately ensured by alternative means such as landline telephones*" (Judgment No 2/2023). It has also recognised that the communication landscape has been deeply transformed by the emergence of technologically advanced tools (Judgment No 170/2023). Today's threats are greater than those of the past, and abuse of freedom of expression may seriously harm the reputation of individuals (Judgment No 104/2024) and hinder the proper formation of public opinion (Judgment No 194/2024).[16] Nonetheless, democracy cannot allow itself to fear a freedom that lies at its very foundation.

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[15] In the same vein, M. Manetti, *La libertà di manifestazione del pensiero*, in *I diritti costituzionali*, edited by R. Nania e P. Ridola, Turin, Giappichelli, 2006, vol. II, 2006, 796.

[16] Both this judgment and the previously mentioned one were issued in proceedings concerning the non-justiciability of opinions expressed by Members of Parliament, pursuant to Article 68 of the Constitution.

FREEDOM OF EXPRESSION AND POLITICAL PLURALISM IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA

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Freedom of expression and political pluralism are of fundamental importance to a democratic society. They are conditions for its progress and are inherently linked to the individual's ability to realize their potential within the social reality. Freedom of expression lies at the foundation of political pluralism and of the inadmissibility of monopolizing the political, ideological, or spiritual spheres as a whole. Without pluralism and tolerance, a society can be neither democratic nor free.

Freedom of expression may promote social development through artistic and academic expression, through the exposure of abuses, and through many other diverse forms. However, free expression also has a "dark side", which may be used to incite hatred, provoke violence, or infringe upon the rights and good name of others. Therefore, adherence to universal human values – such as equality, justice, and tolerance – may limit the state's regulatory powers in various areas of public life, without excluding them entirely.

1. Constitutional Regulation of Freedom of Expression and Political Pluralism

The Constitution proclaims political pluralism as a principle upon which the political life of the Republic of Bulgaria is founded (Article 11, paragraph 1). During the deliberations of this provision in the Grand National Assembly[1], proposals were made to replace the term "political pluralism" with "multiparty system". It is possible for a multiparty system to exist without the presence of diverse political values, just as it is possible for political views to exist that are not institutionalized within parties but are instead represented by non-partisan individuals possessing clear political convictions. Therefore, the Constitution adopted the term "pluralism" (from the Latin *pluralis* – in plural), which in the political sphere denotes a multiplicity of views, ideas, and conceptions regarding the exercise of state power, rather than emphasizing

[1] Stenographic Record of the 148th Session of the Seventh Grand National Assembly, 11 June 1991.

solely the parties as associations of citizens with electoral rights who contribute to the formation and expression of their political will.

Political pluralism constitutes the essence of the democratic state, in which decisions are taken by the majority, but under the guarantee of freedom of expression and due consideration of differing opinions. The public life in Bulgaria during the 1990s, and the transition from a totalitarian to a democratic and rule-of-law state, undoubtedly justified the approach of the constitutional legislator in elevating political pluralism to the level of a constitutional principle. It serves as a safeguard against the declaration or affirmation of any political party or ideology as state-sanctioned, as well as against monopolizing the understanding of the exercise of state power.

The Bulgarian Constitution enshrines freedom of expression as one of the fundamental rights of citizens. Article 39 provides that everyone shall have the right to express and disseminate their opinions. This right may not be exercised to the detriment of the rights and good name of others, nor for calls to violent alteration of the constitutionally established order, to the commission of crimes, or to the incitement of hatred or violence against individuals. In proclaiming this right, the constitutional legislator took into account the international instruments to which the Republic of Bulgaria was a party as of 1991, and in particular Article 19 of the International Covenant on Civil and Political Rights. The commitment to uphold high international standards concerning fundamental rights is further evident from the consideration given to the Convention for the Protection of Human Rights and Fundamental Freedoms, which had not yet been signed at that time, but to which Bulgaria acceded in 1992.

Freedom of expression and political pluralism are deeply interconnected. Freedom of expression, in its various manifestations, encompasses political speech as well, as highlighted in the case-law of the European Court of Human Rights concerning the application of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitutional Court has on numerous occasions affirmed the importance and interrelation between them – both in its interpretative jurisprudence and in the exercise of its competence to rule on the constitutionality of laws and other acts of the National Assembly. In this way, the constitutional jurisprudence has clarified the content and permissible limitations of freedom of expression, its functional relationship with other fundamental rights, its significance for the foundations of the democratic state, as well as the specific manifestations of this freedom in the activities of Parliament, in electoral legislation, in media regulation, and in the balancing measures aimed at safeguarding personal dignity and rights.

2. Examples from the Jurisprudence of the Constitutional Court

In the jurisprudence of the Constitutional Court, key dimensions of freedom of expression and political pluralism are delineated, as the Court has had occasion both to interpret freedom of expression as a fundamental right and, through the principle of political pluralism, to determine the conformity with the Constitution of laws and other acts of the National Assembly related to media regulation, access to information, and the balance with other fundamental rights.

2.1. Freedom of Expression and Political Pluralism in the Interpretative Jurisprudence

A central place in the topic of freedom of expression is occupied by Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996, by which a binding interpretation was given of the provisions establishing the right to freely express and disseminate opinions, the freedom of the press and other mass media, and the right to seek, receive, and disseminate information (Articles 39, 40, and 41 of the Constitution). These rights form the foundation of the democratic process and contribute to its functioning both with regard to the democratic method for forming the bodies envisaged by the Constitution and to the exercise of control over their activity. The very essence of the right to freely express and disseminate opinions presupposes the value of the competition of ideas and the confrontation of differing viewpoints. The functional relationship among these rights has been clarified, and it has been accepted that they constitute the so-called "communication rights". These rights require the state to refrain from interference in their exercise but do not have an absolute character. Their limitation is permissible for the protection of other constitutionally safeguarded rights and interests and may take place only on the grounds provided for in the Constitution. When imposing such limitations, the bodies of the legislative, executive, and judicial powers are obliged to take into account the high public significance of these rights. "Among these grounds, the possibility to interfere with the right to freely express an opinion when it is used to infringe upon the rights and good name of others is the greatest, since in this way the honor, dignity, and good name of the individual are protected in accordance with Article 4, paragraph 2, and Article 32, paragraph 1, sentence 2 of the Constitution. This constitutional limitation does not mean that public criticism cannot be exercised, especially of political figures, public officials, and state bodies. The restriction regarding statements constituting calls for incitement to hostility is based on the values enshrined in the Constitution, such as tolerance, mutual respect, as well as the prohibition on propagating hatred on racial, national, ethnic, or religious grounds. This restriction does not deny protection to the diversity of mutually opposing opinions. The very essence of

the right to freely express and disseminate opinions presupposes the value of the competition of ideas and the confrontation of differing viewpoints." (Decision No. 7 of 1996 on Constitutional Case No. 1 of 1996).

From the principle of political pluralism, the Constitutional Court has reasoned that national unity does not mean political unanimity. The President, who embodies the unity of the nation, may make statements and perform actions with differing political content (Decision No. 25 of 1995 on Constitutional Case No. 27 of 1995).

Political pluralism also finds expression as a specific criterion for maintaining the balance among the constitutionally established bodies in the performance of their functions and powers. "The framers of the Constitution sought to establish enduring democratic constitutional institutions which, through their activity, would affirm a state new in its essence and organization, guarantee the irreversibility of the democratic process, and ensure that it could not be violated. For this purpose, the fundamental constitutional institutions were established – the National Assembly, the President, the Vice President, the Council of Ministers, the Constitutional Court, and the bodies of the judiciary. /.../ Their structure, place within the state hierarchy, manner of formation, principal powers, and the balance among them, as determined by the Grand National Assembly, constitute a guarantee for the development of the democratic process through the implementation of the principles of popular sovereignty (Article 1, paragraph 2 of the Constitution), political pluralism (Article 11, paragraphs 1 and 2 of the Constitution), the separation of powers (Article 8 of the Constitution), the rule of law (Article 4 of the Constitution), and the independence of the judiciary (Article 117, paragraph 2 of the Constitution)." (Decision No. 3 of 2003 on Constitutional Case No. 22 of 2002).

The Constitutional Court relates political pluralism to the principle of limited mandate as a mechanism for the democratic constitution, structure, and functioning of state bodies through the conferral of specific powers for a defined period of time. "Political pluralism is connected with the exercise of state power in accordance with the freely expressed political will, and therefore it constitutes a fundamental category of the democratic state. Article 11 of the Constitution emphasizes its special place among the constitutional principles and expresses the link between the political and the state construction of public bodies and institutions. It represents the connection between 'the free formation of the will of the people and the organized statehood,' reflecting the political impact on state life and its organization, as well as the provision of alternative solutions and models." (Decision No. 13 of 2010 on Constitutional Case No. 12 of 2010).

In the context of guarantees against possible deviations from the rules of democratic governance, the Constitutional Court also highlights its own role. "As the fundamental law, the Constitution sets in legal form the parameters

upon which political life in our country is based and develops, which presupposes the introduction of internal guarantees against arbitrariness and abuse of power. Not only the principles upon which it rests – and which are *conditiones sine qua non* for its definition as a democratic constitution – among them the principle of separation of powers (Article 8 of the Constitution), the principle of the rule of law (Article 4, paragraph 1 of the Constitution), and the principle of political pluralism (Article 11 of the Constitution), but also, to no lesser extent, the system of specific norms, institutions, and mechanisms for the exercise of power, established in conformity with them – all these are conceived and function with a view to overcoming such a danger. The Constitutional Court itself also has significance in the context of guarantees for protection against possible deviations from the rules of democratic governance, by virtue of its place within the system of state power, the powers conferred upon it by the Constitution, and the procedure prescribed for it to follow." (Decision No. 14 of 2013 on Constitutional Case No. 17 of 2013).

2.2. Political Pluralism in the Activity of the National Assembly

In a number of its decisions, the Constitutional Court has had occasion to acknowledge the significance of political pluralism in the activity of the National Assembly as the general representative body of the state. Restricting the right of Members of Parliament to submit proposals on the content of draft laws between the two readings is incompatible with the essence of legislation in a democratic state and constitutes a departure from pluralism (Decision No. 8 of 2010 on Constitutional Case No. 2 of 2010; Decision No. 7 of 2024 on Constitutional Case No. 14 of 2023, and other decisions cited therein). Even when the National Assembly may, by way of exception, adopt a law at two readings within a single sitting (Article 88, paragraph 1, second sentence of the Constitution), the pluralism of opinions must be ensured.

The introduction of a provision in the Rules of Procedure of the National Assembly stipulating that a successful vote of confidence requested by the government precludes the possibility of proposing a vote of no confidence on the same grounds by one-fifth of the Members of Parliament within the following six months, may lead to a "dictatorship of the majority" and to the erosion of political pluralism. "The six-month period introduced by Article 89, paragraph 3 of the Constitution, which restrains the opposition, is an expression of rationalized parliamentarism and is intended to ensure reasonable parliamentary practice in the application of the vote of no confidence. At the same time, it functions as a protective mechanism with respect to the government and stabilizes state governance in cases where a proposal for a vote of no confidence in the Prime Minister or the Council of Ministers has already been rejected. It is constitutionally inadmissible, by means of such a period,

to block the possibility of initiating a new vote of no confidence through the government's request for a vote of confidence. The six-month protective period is part of the institution of the 'vote of no confidence' and is applicable solely to it." (Decision No. 6 of 2011 on Constitutional Case No. 3 of 2011).

The Constitutional Court has also had occasion to consider political pluralism in the context of amendments to the procedure for the election of the chairperson of a regulatory body. "When the law determining the eligibility requirements is amended, this must not lead to a restriction of the pluralism of opinions and of the opportunities within the National Assembly – each Member of Parliament and each parliamentary group must have an equal possibility to form and express their political will. The right of Members of Parliament and parliamentary groups to submit nominations for the head of a state body, such as the Energy and Water Regulatory Commission, may not be affected by procedural rules that impair constitutionally established fundamental principles governing the activity of the representative institution." (Decision No. 8 of 2022 on Constitutional Case No. 4 of 2022).

An interesting aspect arises from the examination of freedom of expression through the prism of holding the position of Chairperson or Deputy Chairperson of the National Assembly. The Constitutional Court has held that, regardless of whether the person makes a statement in a personal capacity, or whether or not they perform specific actions related to presiding over the work of Parliament, this does not alter their status within the internal organization of the National Assembly, nor the responsibility they bear for measured and reasonable conduct that contributes to upholding the authority of the national representative institution. (Decision No. 16 of 2018 on Constitutional Case No. 4 of 2018).

2.3. Political Pluralism and Its Manifestations in Electoral Legislation

It is hardly surprising that the Constitutional Court has repeatedly addressed the manifestations of political pluralism in cases challenging the constitutionality of provisions contained in electoral legislation. A prohibition on the publication of opinion poll results related to elections later than 14 days prior to election day – and, for local elections, later than 7 days prior to election day – was declared unconstitutional (Decision No. 4 of 1997 on Constitutional Case No. 29 of 1996). On the other hand, the cessation of campaigning by political parties and individuals 24 hours before election day constitutes an expression of a balanced regulation of the exercise of two fundamental rights – the right to free elections (the free will to choose) and the right to expression.

A statutory regulation providing that the expenses for the printing of ballot papers shall be borne by the parties, coalitions, and independent candidates

violates the Constitution, as the imposition of a general financial burden might not hinder some of them, but would deprive others of participation. "According to Article 11, paragraph 1 of the Constitution, political life in the Republic of Bulgaria is founded upon the principle of political pluralism. /.../ On the other hand, under Article 11, paragraph 3 of the Constitution, political parties assist in the formation and expression of the political will of the citizens. The forum for their realization is the ongoing political life and, primarily, the parliamentary elections. From this perspective, the property status of the parties should not constitute an obstacle to the expression of the citizens' will. One cannot speak of legal equality of party participation in elections through the introduction of a general financial burden which might not hinder some of them but would deprive others of participation in the electoral process." (Decision No. 8 of 2001 on Constitutional Case No. 10 of 2001).

The Constitutional Court has declared unconstitutional the introduction of a higher electoral threshold for coalitions (8 percent) than that for parties (4 percent). In addition to a violation of equality in the right to vote, the Court also found a contradiction with the principle of political pluralism, since such a restriction does not reflect an acceptable balance for the representation of citizens in the National Assembly. "Equality in the right to vote is clearly infringed. The legislator has created obstacles to coalition majorities, and consequently to coalition governance. In doing so, it has violated not only the requirement for equal suffrage under Article 10 of the Constitution, but also the principle established by Article 11, paragraph 1 thereof, according to which political life in the Republic of Bulgaria is founded upon political pluralism." (Decision No. 1 of 2009 on Constitutional Case No. 5 of 2009).

Although the Constitutional Court accepts the electoral deposit as a constitutionally permissible quantitative limitation of political pluralism – aimed at ensuring the seriousness of participation in elections and consolidating the party system against "splinter parties" – it considers that such a deposit must be kept within reasonable limits, which are defined by the conditions for its reimbursement (Decision No. 4 of 2011 on Constitutional Case No. 4 of 2011; Decision No. 8 of 2001 on Constitutional Case No. 10 of 2001).

The Constitutional Court has examined the significance, for political pluralism, of the representational norm within municipal councils as bodies of local self-government. The smaller the number of municipal councillors, the greater the likelihood that only local party leaders will be represented in the municipal council, leading to a de facto immutability of its composition. "[T]he reduction of the representative character of municipal councils in large municipalities, without being accompanied by the introduction of a new norm of representation, constitutes a violation of the constitutional principles of the democratic state and representative democracy (the Preamble, Article 1, paragraph 2, and Article 2, paragraph 1 of the Constitution) and of political

pluralism (Article 11 of the Constitution).” (Decision No. 4 of 2011 on Constitutional Case No. 4 of 2011).

In the light of the principle of political pluralism, the Constitutional Court has also reviewed the constitutionality of the rules governing the financing of political parties. It has held that public financing through state subsidies simultaneously ensures political pluralism and guarantees the political rights of the individual. “It is a constitutional duty of the state to create conditions for a democratic political life founded upon the principle of political pluralism. The property status of political parties cannot be allowed to become an obstacle to the expression of the citizens’ political will.” (Decision No. 5 of 2021 on Constitutional Case No. 13 of 2019).

The provision of the source code and documentation related to machine voting only to representatives of parties and coalitions that have received more than 4 per cent of the valid votes in the most recent parliamentary elections restricts access and the possibility of establishing independent oversight over all stages of the electoral process. It constitutes a disproportionate interference by the state, through the legislative body, with the freedom of political convictions and is contrary to the principle of political pluralism. “The transparency of the electoral process is a characteristic of essential importance for elections in a democratic society – only transparent and fair elections can ensure the necessary democratic legitimacy of governance. /…/ Publicity in the conduct of elections is founded upon the principle of political pluralism (Article 11, paragraph 1 of the Constitution), which requires the exercise of state power to conform to the freely expressed political will of the sovereign through the electorate, and therefore it is a fundamental category of the democratic state.” (Decision No. 9 of 2023 on Constitutional Case No. 4 of 2023).

The Constitutional Court also considers political pluralism through the prism of the possibility for citizens to exercise their right to vote not in a positive but in a negative manner – by not supporting any nominated candidate. Through such voting, the law acknowledges their negative attitude towards political parties, which constitutes a constitutionally permissible (though not obligatory) manifestation of the principle of political pluralism. “The possibility to vote in a manner demonstrating disagreement and rejection of the values and views upheld by political parties and their representatives fits within the constitutional framework guaranteeing the freedom of formation and expression of the political will of citizens.” (Decision No. 5 of 2025 on Constitutional Case No. 24 of 2024).

2.4. Political Pluralism, Freedom of Expression, and Media Regulation

The Constitutional Court has had occasion to examine various aspects of the relationship between freedom of expression, political pluralism, and the role of the mass media in the process of their free dissemination.

With regard to the statutory regulation of the independent specialized body responsible for regulating media services (then the National Council for Radio and Television, now the Council for Electronic Media), the Court held that political neutrality in its composition is an important constitutional guarantee for the proper functioning of democratic discourse based on political pluralism. "Political pluralism is impossible where there is no equality of opportunity for the expression and exchange of ideas, opinions, and information, and for participation in normal democratic discourse. An important constitutional guarantee for the proper realization of democratic discourse founded on political pluralism is the principle of political neutrality in the composition of independent bodies. This principle is intrinsically inherent to the functioning of political pluralism. It requires the exclusion of the possibility that one or more political forces institutionalize their advantage within the NCRT and, through it, in the management of the Bulgarian National Radio and the Bulgarian National Television." (Decision No. 21 of 1996 on Constitutional Case No. 19 of 1996).

A restriction imposed on private radio and television organizations "to engage in political propaganda on their own behalf" likewise finds no support in the Constitution. "From a legal standpoint, Article 39, paragraph 1 of the Constitution guarantees the right of 'everyone' to express an opinion, irrespective of whether that person is a natural or a legal entity (including radio and television organizations). Insofar as that opinion may concern political matters, it may be regarded as political propaganda, yet there is no constitutional prohibition against this. There is likewise no prohibition against the clarification and dissemination of certain political ideas and views through radio and television. The establishment of such a prohibition by law is absurd from the standpoint of the constitutional principles of political pluralism – Article 11 of the Constitution; the inviolability of freedom of conscience and thought – Article 37, paragraph 1 of the Constitution; the protection of individuals against persecution and restriction of their rights because of their convictions – Article 38 of the Constitution; as well as with regard to the freedoms and rights under Articles 39-41 of the Constitution. Therefore, for private radio and television organizations, the restriction under Article 26 of the Radio and Television Act is unconstitutional." (Decision No. 21 of 1996 on Constitutional Case No. 19 of 1996). For public-law organizations of national significance, such as the Bulgarian National Radio and the Bulgarian National Television, the legislative exclusion of the possibility for them to engage in political propaganda on their own behalf is in the public interest, ensuring the independent and politically impartial performance of their functions.

In its practice, the Constitutional Court declared unconstitutional a provision that guaranteed up to five minutes of broadcast time twice a month for statements by representatives of parliamentary parties and coalitions, as it violated the principle of equality of political forces before the Constitution, derived from political pluralism. "Thus, the well-known totalitarian result is achieved, whereby all Bulgarian citizens pay to be persuaded and indoctrinated solely by one (or several) parliamentary political forces." (Decision No. 21 of 1996 on Constitutional Case No. 19 of 1996).

On the other hand, it is not unconstitutional to regulate the right of the President of the Republic, the President of the National Assembly, the Prime Minister, the Prosecutor General, and the Presidents of the Constitutional Court, the Supreme Administrative Court, and the Supreme Court of Cassation to address the public via the Bulgarian National Radio and the Bulgarian National Television. The principal argument in the request was that there was no political pluralism, since the President of the Republic, the President of the National Assembly, and the Prime Minister all belonged to the same political force. While that was factually true at the time, the Constitutional Court held that this argument was circumstantial and could hardly substantiate unconstitutionality, as the privilege was based not on party affiliation or personal qualities, but on the fact that these individuals were legally entrusted with leading constitutionally established state institutions (Decision No. 10 of 1999 on Constitutional Case No. 36 of 1998).

In connection with a challenge to a decision of the National Assembly releasing the Director-General (then Chief Director) of the Bulgarian News Agency, the Constitutional Court held that the public-law act by which the appointment (election) and dismissal are carried out establishes a legal relationship in which the person concerned is a party in that capacity. In the exercise of state functions, the obligation of neutrality applies. With regard to freedom of opinion, the obligation of neutrality extends to the state as a whole when it acts through legislative, administrative, or judicial means, which means that differing criteria cannot be applied to competing ideas (Decision No. 15 of 1993 on Constitutional Case No. 17 of 1993).

2.5. Freedom of Expression, Access to Information, and the Protection of Personal Dignity and Rights

The Constitutional Court has also had the opportunity to consider the limitations arising from the non-absolute nature of the freedom of expression. In cases concerning the constitutionality of imprisonment as a penalty for the offences of insult and defamation, the Court held that liability – both criminal and civil – for insult and defamation, as a means of protecting honour, personal dignity, and good name, constitutes a restriction of the right to freedom of expression that is permissible under the Constitution. The Constitutional Court may assess proportionality in determining both the limits within which rights may be exercised

and the boundaries within which their restriction is constitutionally acceptable. Exercising such review, the Court found that criminal liability for insult and defamation does not contradict the constitutional requirement of proportionality (Decision No. 20/1998 in Constitutional Case No. 16/1998).

Regarding restrictions on the right to information – which are also related to freedom of expression – the Court held that, since there is no constitutionally protected right of citizens or legal entities to access classified information, there is likewise no constitutional right to access the register describing the materials and documents containing classified information (Decision No. 3/2002 in Constitutional Case No. 11/2002).

Freedom of expression and its balancing with the protection of personal data is also an aspect encompassed within the jurisprudence of the Constitutional Court. The subject of challenge was a provision of the Personal Data Protection Act establishing a non-exhaustive list of criteria for assessing this balance. According to the Court, the legislature pursues a legitimate aim; however, "the establishment, within a statutory rule, of criteria for balancing that have been developed in judicial practice conflicts with the very nature of balancing as a pragmatic approach to resolving conflicts between fundamental rights, seeking a rational rather than a formally lawful outcome. Moreover, these judicially derived criteria are not followed precisely by the contested provision, being combined with other requirements" (Decision No. 8 of 2019 on Constitutional Case No. 4 of 2019). The Constitutional Court has held in its case-law that it is not appropriate to impose *a priori* views, but rather to allow judicial practice itself to develop its own criteria. "The constitutionally permissible limit (the boundary of restriction) for legislative interference in this fundamental right lies in its essential content – which is not subject to political renegotiation through current legislation." (Decision No. 8 of 2019 on Constitutional Case No. 4 of 2019).

3. Instead of a Conclusion

The jurisprudence accumulated over the years by the Constitutional Court – which, in view of the powers it exercises, is connected with the interpretation of the constitutional framework and the regulatory possibilities of the legislative power – traces the path, including through the difficult process of balancing against other constitutional values and fundamental rights. As Giuseppe Branca[2] observes, "[w]e can destroy Hell, but we cannot build Paradise and Purgatory out of its ashes, for only Parliament can do that." The impartial defender of the values enshrined in the Basic Law may oppose unconstitu-

[2] President of the Constitutional Court of Italy in the period 1969-1971, cited in **Bliznashki, G. (Ed.),** *The Constitution of the Republic of Italy*, University Publishing House "St. Kliment Ohridski", 2024, p. XXXI.

tional attempts to retreat from them – but is that sufficient?! Here it is worth highlighting two diametrically opposed questions:

– on the one hand, whether the constitutional contours are reasonably drawn so as to encompass the new participants in the process (bloggers, vloggers, users of social networks) and the new technologies for disseminating ideas and information that fall within the scope of legal regulation;

– and on the other hand, whether the constitutional framework is sufficiently concrete to allow an adequate response to undemocratic tendencies that, under the guise of freedom of expression, serve to spread false information, relying on manipulative or deceptive techniques aimed at undermining the capacity for informed decision-making.

The free exchange of information and ideas is not merely the freedom to speak, but above all the duty to think – and to remain aware of the multilayered nature of this freedom.