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CONSTITUTIONAL STUDIES

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MISSION

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

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IN MEMORIAM

It is with profound sadness that we announce the passing of Professor Rainer Arnold on January 9, 2025. Professor Arnold was a dedicated member of the editorial board of the Bulgarian Constitutional Court's journal. His unwavering commitment to the Rule of Law and human dignity has inspired countless jurists around the globe. Prof. Rainer's wisdom and support have profoundly influenced our editorial board and will continue to inspire all who believe in the transformative power of law.

We have lost a great voice in the fight for the rule of law.

May he rest in peace.

Authors in Volume VII

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CONTENT

LE ROLE DE LA COUR CONSTITUTIONNELLE EN TANT QUE JUGE EUROPÉEN – LE POINT DE VUE BELGE

Pierre Nihoul

L'essentiel de mon propos[1] sera de formuler, au départ de la pratique de la Cour constitutionnelle belge en relation avec le droit de l'Union, quatre pistes de réflexion. Auparavant, il s'impose d'exposer à grands traits la place qu'occupe le droit conventionnel et, singulièrement, le droit européen, dans le contrôle de constitutionnalité en Belgique (I) et de rappeler rapidement comment la Cour a entamé et poursuivi un dialogue soutenu avec la Cour de justice (II).

I. Place du droit européen

Les juges nationaux se trouvent face à une profusion de textes garantissant les droits humains : la Constitution interne, la Convention européenne des droits de l'homme, la Charte des droits fondamentaux de l'Union, les Pactes onuziens pour faire bref. Tout ceci est évidemment extrêmement riche, mais cela nécessite aussi un peu d'ordre et de méthode, afin d'éviter la cacophonie.

Pour ce qui concerne la Belgique, il faut rappeler que l'essentiel des relations entre le droit belge et le droit européen s'est construit de manière prétorienne. La Constitution belge ne contient pas une disposition générale et expresse relative à l'articulation entre la Constitution, la loi et le droit de l'Union européenne, l'article 34 ayant seulement trait au transfert de compétences déterminées. Devant ce vide constitutionnel, la Cour de cassation a dans un premier temps, par un arrêt du 27 mai 1971 (Franco-Suisse Le Ski), reconnu la primauté sur la loi d'une norme de droit international conventionnel qui a des effets directs dans l'ordre juridique interne. Cet arrêt fonde la compétence de chaque juge ordinaire ou administratif d'écarter l'application des dispositions législatives contraires à cette norme de droit

[1] Cet exposé est un résumé de la contribution de Pierre NIHOUL et Bernadette RENAULD intitulée « Les fonctions du renvoi préjudiciel : la pratique de la Cour constitutionnelle belge », exposée lors de la journée d'études tenue à Paris le 27 septembre 2024 sur le thème « L'usage du renvoi préjudiciel par les Cours constitutionnelles » et publiée dans la Revue du Droit public, 2025/2, p. 170-178.

international. La conséquence de cette jurisprudence est un contrôle diffus du contrôle de conventionnalité de la loi.

Dans un second temps, à la faveur du processus de fédéralisation de la Belgique entamé à partir de 1980, le Constituant crée, en dehors du pouvoir judiciaire, une Cour qui va devenir constitutionnelle. Cette nouvelle Cour est exclusivement compétente pour juger la conformité des normes législatives au regard des droits fondamentaux constitutionnels.

Le résultat de cette évolution en deux temps est que le contrôle de constitutionnalité et de conventionnalité des lois ne coïncide pas au niveau organique alors que la matière des droits fondamentaux s'interpénètre entre le droit constitutionnel national et le droit conventionnel. Des conflits sont inévitables. Comment coordonner ces deux contrôles ?

La Cour constitutionnelle a développé deux techniques qui lui permettent d'inclure, parmi ses normes de référence (son bloc de constitutionnalité), les normes de droit conventionnel, y compris, tout le droit de l'Union :

– La technique combinatoire via le principe d'égalité et de non discrimination : la Cour s'est déclarée compétente pour contrôler le respect par tout législateur de n'importe quel droit fondamental constitutionnel ou conventionnel, dès lors qu'il est présenté en combinaison avec la violation du principe d'égalité ;

– la technique de l'ensemble indissociable ou de l'unité normative, ce qui est le cas lorsque des droits constitutionnels sont également garantis, en des termes analogues, par une ou plusieurs dispositions de droit international conventionnel applicable en Belgique.

A cela s'ajoute une règle, cette fois établie par le législateur, de priorité imposée aux juridictions de fond : hormis quelques exceptions (de l'acte clair ou de l'acte éclairé), le juge ordinaire ou administratif est tenu de poser une question préjudicielle à la Cour constitutionnelle sur la constitutionnalité de la norme législative. Ce n'est qu'après une réponse négative à cette question par la Cour que le juge est compétent pour contrôler la compatibilité de la loi avec la disposition conventionnelle analogue.

Le résultat, c'est que la Cour constitutionnelle en vient à aspirer le contrôle de conventionnalité dans le contrôle de constitutionnalité.

En ce qui concerne plus particulièrement le droit primaire de l'Union, la Cour prend ainsi en compte les droits et libertés analogues résultant de la Charte des droits fondamentaux ou des traités. Elle inclut ainsi les 4 libertés de circulation dans la liberté économique. Il en va de même avec le droit dérivé. Si celui-ci consacre un droit analogue à une disposition constitutionnelle, la Cour l'englobe dans son examen de la disposition constitutionnelle correspondante. Si non, elle le combine avec le principe d'égalité et de non-discrimination.

II. Dialogue avec le juge européen

Si la Cour retient les normes européennes comme normes de référence, elle tient également compte du droit vivant, c'est-à-dire de la jurisprudence de la Cour européenne des droits de l'homme et de la Cour de justice dont les arrêts sont abondamment mentionnés ou cités.

Les chiffres de la jurisprudence des sept dernières années l'illustrent. Entre 2018 et 2024, la Cour a rendu 1259 arrêts. Pour ce qui est des normes, dans 462 arrêts, la Cour a inclus des dispositions de la CEDH et de ses protocoles dans son examen, soit près de 37% des cas. La Charte de l'Union européenne a été mentionnée dans 151 arrêts, soit dans près de 12% des cas. La jurisprudence de la Cour européenne des droits de l'homme a été évoquée dans 339 arrêts (quasi 27% des affaires), tandis que la jurisprudence de la CJUE était présente dans 183 arrêts (plus de 14%).

Enfin, l'ouverture de la Cour constitutionnelle belge à l'égard du droit européen est particulièrement démontrée par le grand nombre de questions préjudicielles adressées à la Cour de justice de l'Union européenne. À ce jour, la Cour l'a fait dans 47 arrêts, représentant 185 questions distinctes, tant sur l'interprétation que sur la validité du droit de l'Union.

La plupart du temps, il s'agit de questions d'interprétation du droit dérivé de l'UE (règlement et directive) à propos de législations belges transposant ce droit dérivé. Soit que la législation belge n'apparaît pas conforme au droit dérivé, soit que le droit dérivé nécessite une explicitation, une interprétation.

La Cour constitutionnelle pose aussi des questions de validité du droit de l'UE. C'est principalement le cas lorsque la législation belge de transposition est contestée devant la Cour constitutionnelle et qu'il est soutenu que la législation secondaire de l'UE qui est transposée par cette loi viole de la même manière que la législation de transposition certains droits fondamentaux. Jusqu'à présent, la Cour a soumis 35 questions de validité du droit dérivé de l'UE pour conformité avec certaines dispositions de la Charte de l'UE, 14 questions de validité à la lumière du TFUE et 2 à la lumière du TUE.

Il ne faudrait toutefois pas donner l'impression que la Cour interroge systématiquement Luxembourg lorsqu'elle est confrontée à l'application du droit de l'Union. Dans la plupart des arrêts impliquant le droit de l'Union européenne, la Cour constitutionnelle ne soumet pas de questions préjudicielles à la Cour de justice. Elle ne viole pas pour autant l'obligation de renvoi qui pèse sur les juridictions de dernier ressort. En effet, dans ces affaires, la Cour adhère par une motivation détaillée aux exigences strictes de la jurisprudence *CILFIT* et – plus récemment – *Consorzio*, en ce qui concerne l'interprétation du droit de l'UE, ainsi que de la jurisprudence *Foto-Frost*, en ce qui concerne la validité du droit de l'UE.

Comme on le voit, la Cour constitutionnelle se présente ainsi aussi comme un juge du droit de l'Union.

III. Quatre pistes de réflexions

1. Premièrement, le renvoi préjudiciel assure un rôle d'évolution et d'harmonisation de l'interprétation des droits fondamentaux

Par cette double attitude inclusive, la Cour constitutionnelle a pu donner aux garanties constitutionnelles dont la plupart n'ont pas été modifiées depuis 1831, une interpretation évolutive et contemporaine, tenant compte notamment des nouveaux enjeux sociaux, culturels et environnementaux.

Cette attitude inclusive permet aussi à la Cour d'aligner les droits fondamentaux constitutionnels sur ceux plus récents de la Charte, des traités et du droit dérivé, mais sauvegarde également la primauté du droit de l'UE et le principe d'égalité devant ce droit.

Dans cette dynamique, le renvoi préjudiciel par la Cour constitutionnelle à Luxembourg est la cerise sur le gâteau, l'élément qui permet de parfaire l'harmonisation des jurisprudences là où il y a doute sur l'interprétation d'une norme de droit européen ou sur sa validité. En corollaire, il contribue à prévenir les conflits entre la jurisprudence constitutionnelle et la jurisprudence supranationale.

2. Deuxièmement, le dialogue préjudiciel contribue à assurer que la transposition en droit interne du droit de l'Union et, singulièrement, du droit dérivé, a été correctement effectuée, y compris dans son interprétation et application par les juridictions internes

En pratiquant le renvoi préjudiciel lorsqu'une contestation est soulevée devant elle à propos d'une disposition interne transposant le droit dérivé, la Cour constitutionnelle participe de la correcte application de ce droit, ce qui peut aller, le cas échéant, jusqu'à la sanction du droit interne pour contrariété avec le droit européen.

L'influence de la Cour constitutionnelle sur les juridictions internes belges joue ici aussi un rôle interéssant en termes d'harmonisation. En effet, l'attitude de la Cour constitutionnelle a pour effet que d'autres juges seront également enclins à être plus attentifs aux normes pertinentes du droit européen. Le contrôle indirect au regard des droits fondamentaux

auquel la Cour constitutionnelle procède n'a, d'un point de vue formel, aucune autorité de chose jugée pour le juge ordinaire ou administratif en ce que ce contrôle se fait dans ce cadre au regard des normes de droit européen, mais, en raison de la spécialisation de la Cour en cette matière, il en émanera une très grande autorité de fait. Lorsqu'elle prend en considération la jurisprudence européenne pertinente, la Cour constitutionnelle jouit d'ailleurs d'autant plus d'autorité, puisque cette jurisprudence est effectivement contraignante pour tout juge interne.

Cet effet se manifeste en particulier dans la procédure préjudicielle, dans le cadre de laquelle la Cour constitutionnelle associe souvent d'office des normes de droit européen à son contrôle, même si le juge *a quo* n'a formulé la question préjudicielle qu'en termes d'un contrôle au regard de dispositions constitutionnelles. Les juges dans d'autres affaires ne sont pas astreints à poser une question préjudicielle s'ils se plient à ce que la Cour constitutionnelle a déjà décidé. Sa jurisprudence a ainsi une influence harmonisante dans l'ordre juridique interne.

3. Troisièmement, le renvoi préjudiciel permet aux parties de contourner l'absence de saisine directe de la Cour de justice de l'Union européenne.

Le nombre considérable de renvois préjudiciels auxquels la Cour constitutionnelle procède est dû, d'un côté, à l'interdépendance en augmentation constante de l'ordre juridique national et de l'ordre juridique européen mais s'explique aussi, d'un autre côté, par le fait que les parties ont découvert en la Cour constitutionnelle un juge du droit de l'Union européenne. Elles optent parfois pour la Cour constitutionnelle belge pour tenter de faire contrôler, par la Cour de justice, une norme du droit dérivé de l'Union au regard du droit primaire de l'Union. La combinaison de la stricte obligation de renvoi pour les juridictions supérieures avec l'accès plus souple à la justice devant la Cour constitutionnelle belge, entre autres pour les groupements d'intérêts, est, en effet, un moyen habile de contourner le défaut d'accès direct à la Cour de justice.

Un bon exemple de cette « manœuvre » est donné par l'affaire « Test-Achat ». Une directive interdisant les discriminations entre hommes et femmes dans l'accès à des biens et services, contenait une exception pour les contrats d'assurance. Le législateur belge a utilisé cette possibilité en autorisant les compagnies d'assurance à demander aux hommes une prime plus élevée d'assurance-vie, au motif que les femmes ont, en moyenne, une espérance de vie légèrement supérieure. Le centre de protection des consommateurs Test-Achats a attaqué cette disposition légale devant la Cour constitutionnelle, mais le véritable but de l'action était de soumettre la disposition de la directive au contrôle de la CJUE.

4. Quatrièmement, le dialogue préjudiciel permet aux juridictions constitutionnelles nationales de faire entendre leur voix à Luxembourg, d'exprimer un éventuel désaccord ou encore de tenter d'influencer la Cour de justice

L'attitude de la Cour constitutionnelle contribue à instaurer le dialogue avec la Cour de justice puisqu'un dialogue juridictionnel se déroule plus aisément lorsque les juridictions parlent la « même langue ». Ce dialogue peut avoir pour effet qu'une des deux juridictions, ou même les deux, reviennent sur leur jurisprudence. Déceler si un revirement de la Cour de justice s'inspire de la jurisprudence d'une ou de plusieurs cours constitutionnelles ou d'autres juridictions supérieures n'est cependant pas évident.

A cet égard, l'affaire la plus spectaculaire concerne à nouveau le cas Test-Achats, dont je parlais il y a un instant. Spectaculaire car la Cour constitutionnelle belge a, de l'avis de certains observateurs, réussi à influencer la CJUE. Saisie par la Cour constitutionnelle, la Cour de justice a jugé que la possibilité prévue par la directive violait les articles 21 et 23 de la Charte, qui interdisent toute discrimination fondée sur le sexe et qui garantissent l'égalité entre les femmes et les hommes dans tous les domaines. A la suite de cet arrêt, la Cour constitutionnelle a annulé la loi de transposition.

On peut sans doute y ajouter la matière de la conservation et de l'accès aux métadonnées dans laquelle la Cour constitutionnelle mais aussi d'autres juridictions nationales ont interrogé à plusieurs reprises la Cour de justice dont la jurisprudence s'est nuancée au cours des arrêts successifs. J'ajouterais l'affaire de l'abattage rituel avec étourdissement qui a permis à la Cour de justice de poser des jalons dans d'autres matières comme le port du voile.

Toutefois, ce dialogue ne doit pas être à sens unique. Je voudrais souligner deux éléments de tension à cet égard.

1. Le principe de la primauté du droit de l'Union sur celui des États membres, principe qui concerne également les normes constitutionnelles, ainsi que le principe de l'effectivité du droit de l'Union, sont susceptibles de provoquer quelques tensions entre hautes juridictions. Je cite deux esemples :

– la Cour de justice a déduit de ces principes qu'à condition que les mesures d'harmonisation européennes respectent les standards de droits fondamentaux garantis, notamment, par la Charte des droits fondamentaux de l'Union, les États membres ne sont pas autorisés à imposer un niveau de protection plus élevé que celui qui découle du droit dérivé (CJUE, 26 février 2013, *Melloni*, C-399/11) ;

– la Cour de justice a aussi déduit de ces principes la possibilité de remettre en cause l'autorité de la chose jugée attachée à une décision d'une Cour constitutionnelle (CJUE, 22 février 2022, *R. S.*, C-430-21).

2. La construction de l'Union européenne et l'intégration toujours plus poussée des législations des différents Etats membres entraîne un phénomène d'universalisation - à l'échelle de l'Union européenne - des standards du contrôle des droits fondamentaux et un risque de nivellement par le bas. Face à ce phénomène, plusieurs juridictions constitutionnelles en Europe mobilisent, pour se prémunir contre une atteinte jugée trop importante à la souveraineté nationale et aux valeurs que celle-ci entend protéger, le concept d' « identité nationale ».

La Cour constitutionnelle belge a fait référence à la notion d'identité dans l'arrêt n°62/2016, confirmé par l'arrêt n° 127/2021 du 30 septembre 2021. Elle a jugé en se référant aux articles 33 et 34 de la Constitution que lorsque le législateur belge donne assentiment à un traité qui confie certaines compétences aux institutions de l'Union européenne, il doit respecter l'article 34 de la Constitution :

« *L'article 34 de la Constitution n'autorise en aucun cas qu'il soit porté une atteinte discriminatoire à l'identité nationale inhérente aux structures fondamentales, politiques et constitutionnelles ou aux valeurs fondamentales de la protection que la Constitution confère aux sujets de droit* ».

Cette incise n'a cependant pas été suivie d'effet concret. Et rien ne permet d'affirmer à l'heure actuelle que la Cour s'engagera dans cette voie.

En reprenant mot pour mot la formule prévue par l'article 4 du TFUE, la Cour constitutionnelle belge inscrit cette exception dans le cadre du droit de l'Union européenne. En d'autres termes, la Cour constitutionnelle est ouverte au droit de l'UE, mais demande en même temps que ce droit reste dans certaines limites constitutionnelles, qui sont reconnues par le traité fondamental de l'UE.

Enfin, elle n'a pas précisé si et dans quelle mesure cette jurisprudence entraverait effectivement la pleine efficacité du droit de l'UE dans l'ordre juridique belge, ni ce qu'impliquent exactement « l'identité nationale belge » ou « les valeurs fondamentales » de la Constitution. Sur ces points, la Cour constitutionnelle laisse une marge au développement jurisprudentiel, sans doute dans un dialogue continu avec la Cour de Justice, qui est liée par l'article 4, paragraphe 2, du TUE. C'est ainsi que la Cour a pris note de l'arrêt *Indépendance et vie privée des juges* dans lequel la Cour de justice a jugé que «il ne saurait être valablement soutenu que les exigences découlant (…) du respect de valeurs et de principes, tels que l'Etat de droit, la protection juridictionnelle effective et l'indépendance de la justice (…) soient susceptibles d'affecter l'identité nationale d'un Etat membre, au sens de l'article 4, § 2, TUE. Dès lors, cette dernière disposi-

tion, qui doit être lue en tenant compte des dispositions, de même rang qu'elle, consacrées par ces articles 2 et 19, paragraphe 1, second alinéa, ne saurait dispenser les États membres du respect des exigences découlant de celles-ci » (5 juin 2023, Commission c. Pologne, C-204/21, point 72). Une nouvelle affaire à cet égard permettrait à la Cour de poser dans ce cadre une question préjudicielle à la Cour de justice, ce qui ouvrirait un dialogue entre juges. Il s'agirait dans ce cas de poser une question préjudicielle en validité de la norme de droit européen considérée comme soulevant une telle question.

Conclusion

Il me semble pouvoir conclure de tout ceci qu'il y a nombre d'avantages à pratiquer le dialogue préjudiciel avec la Cour de justice au niveau des juridictions constitutionnelles européennes, notamment le fait de permettre que l'interpénétration des ordres juridiques se fasse harmonieusement et au bénéfice du justiciable. Bien sûr, je ne prétends pas qu'il n'y ait que des avantages. Il ne faudrait pas que le renvoi préjudiciel devienne une manœuvre dilatoire facile pour les parties (un renvoi préjudiciel à Luxembourg rallonge quand même la procédure devant la Cour constitutionnelle de près de deux ans en moyenne). Ni que le dialogue soit à sens unique.

CONSTITUTIONAL COMPLAINT IN LATVIA: PROCEDURAL REQUIREMENTS AND THEIR APPLICATION

Anita Rodiņa

Introduction

The protection of fundamental rights is one of the most important duties of a democratic state governed by the rule of law.[1] It is generally accepted by national States and the international community that everyone has the right to an effective remedy by competent national court if fundamental rights are violated.[2] Therefore in modern democracies protection of human rights has become a priority for judges.[3]

In Latvia the right of a person to apply to the court is protected by Article 92 of the Constitution of the Republic of Latvia (called also *Satversme*) which guarantees the right to fair trial.[4] One of the legal mechanisms where a person may defend their fundamental rights is the Constitutional Court of the Republic of Latvia (hereinafter Constitutional Court or Court). As it is common in countries where the European model of constitutional control exists, a person may submit to the Constitutional Court a specific application – constitutional complaint. Also, in Latvia if a legal norm violates the fundamental rights included in the Constitution, a person may defend those rights at the Constitutional Court.

The right to stand before the Constitutional Court was not granted to a person immediately after the establishment of the Constitutional Court in 1996. The constitutional complaint procedure in Latvia was introduced on 1 July 2001. There were two main reasons for such a delay. First, it took some time to understand the role and functions of the Constitutional Court, then to develop the mechanism of a constitutional complaint. The

[1] Judgement of the Constitutional Court on 20 April 2012 in case No. 2011-16-01, para 9.

[2] **Schabas W. A.,** *The customary International Law of Human Rights,* Oxford University Press, Oxford, 2012, p. 276.

[3] **Barak A,** *On Judging. In book: Judges as Guardians of Constitutionalism and Human Rights,* Eds. Scheinin M., Krunke H., Aksenova M. Cheltenham, Edward Elgar, 2016, p. 32.

[4] The Constitution of the Republic of Latvia of 15 February 1922, http://saeima.lv/en/legislation/constitution/

Constitutional Court was a completely new constitutional institution. Its functioning after delivering of the first judgement caused extensive debates, raising the question about its competence and necessity.[5] Second, after restoration of the statehood in 1990 Latvia did not draft a new constitution, but restored the old one – *Satversme* – which had been passed in 15 February 1922. The particularity of the *Satversme* was the lack of a full catalogue of fundamental rights. Initially, when the *Satversme* was drafted in 1920–1922, it was planned that it would consist of two parts: the first part would include constitutional regulation of constitutional institutions, but the second part – fundamental rights.[6] In the final voting the second part of the *Satversme* did not gain the necessary votes.[7] Therefore the *Satversme* initially did not include a full catalogue of fundamental rights.[8]

On 15 October 1998, the *Saeima* (Parliament of the Republic of Latvia) included in the *Satversme* Chapter VIII "Fundamental Human Rights" (Articles 89 – 116).[9] As the constitutional complaint is a tool to defend fundamental rights – those which are guaranteed by the Constitution, after those amendments in the constitution, idea of constitutional complaint became realistic and soon the Constitutional Court Law was amended.

Constitutional Court Law (Section 19, 2) explains that constitutional complaint (application) may be submitted to the Constitutional Court by any person who considers that their fundamental rights as defined in the Constitution are infringed upon by legal norms that do not comply with the norms of a higher legal force.[10]

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[5] **Lase I.,** *Aivars Endziņš neredz iemeslus likvidēt Satversmes tiesu [Aivars Endziņš sees no reason to liquidate the Constitutional Court],* Diena, 10.08.1999, p. 3.

[6] **Kučs A.,** *Pamattiesības [Fundamental rights]* – in: *Latvijas valsts Tiesību avoti. Valsts dibināšana – neatkarības atjaunošana. Dokumenti un komentāri*, Rīga, TNA, 2015, p. 120-123.

[7] **Pleps J.,** *Pamattiesību konstitucionālā regulējuma ģenēzes ietekme uz Satversmes 8. Nodaļas normu interpretāciju [The influence of the genesis of the constitutional regulation of fundamental rights on the interpretation of the norms of Chapter 8 of the Satversme]* – in: *Aktuālas cilvēktiesību aizsardzības problēmas. Konstitucionālā sūdzība,* Rīga, TNA, 2010, p. 22.

[8] In the meantime, in the first part or the so-called institutional part of *Satversme* there were some fundamental rights defined *expresses verbis*, like, art. 8 (active voting rights), art. 9 (passive voting rights), art. 80 (the rights to participate in national referendums), art. 37 (the right to be elected as a President of the State), art. 82 (principle of equality).

[9] Grozījumi Latvijas Republikas Satversmē [Amendments in the Satversme], Latvijas Vēstnesis, № 308/312 23.10.1998.

[10] **Constitutional Court Law of** 5 June 1996**.** http://www.satv.tiesa.gov.lv/?lang=2&mid=9

Comparative law studies show, that a constitutional complaint has some typical features: to apply to the Constitutional Court, a person must prove infringement of their fundamental rights, the Constitutional Court shall serve as the last national legal remedy, and the constitutional complaint must be submitted within a set term. However, each mechanism of a constitutional complaint is unique. Also, the application of these criteria exemplifies the uniqueness of this legal remedy. But most importantly – a constitutional complaint can achieve its aim if it is a real and an effective legal remedy, namely, a remedy that can help to eliminate a violation. As the case-law of the Constitutional Court demonstrates, the constitutional complaint can be considered both as a real and an effective legal remedy.

1. The subject of the constitutional complaint

As the constitutional complaint serves to protect fundamental rights, the subject of a constitutional complaint may be any person who is the subject of the fundamental rights. In Latvian constitutional law doctrine, any natural person is a subject of fundamental rights. It means that any person who considers that their rights are violated, may turn to the Constitutional Court.

The Constitutional Court has demonstrated a very open approach, as for example, it has recognized the right to submit a constitutional complaint by a legally incapacitated natural person. The Constitutional Court has noted that the criterion for submitting a constitutional complaint should be the capacity of a person to be the subject of fundamental rights rather than the procedural legal capacity of a person.[11] As in this case the constitutional complaint was submitted regarding legal norms that were directly related to the status of a legally incapacitated person, if the Constitutional Court had refused to accept and review the constitutional complaint, the applicant would have been denied protection of their fundamental rights. This concept very much differs from the case law of other Latvian courts belonging to the court system (general jurisdicions, administrative courts), which are not accepting applications from natural persons with restricted legal capacity.

Fundamental rights, considering the nature and content of the specific fundamental right, may be also applicable to legal persons of private law.[12] It means that to defend violated fundamental rights legal persons may apply to the Constitutional Court. However, a legal person can submit

[11] Judgment of the Constitutional Court on 27 December 2010 in case No. 2010-38-01, para 6.

[12] Judgement of the Constitutional Court on 17 January 2008 in case No. 2002-09-01, para 12.2.

a constitutional complaint only to protect its violated fundamental rights, not the rights and interests of shareholders or owners of the company.[13] As the case law proves usually legal persons apply to the Court to defend their property rights, the rights to fair trial and legal equality.

The State and state institutions – or legal persons of public law – cannot file a complaint as the state and its institutions, oversee the fulfillment and protection of fundamental rights. For example, the Constitutional Court refused to initiate a case based on the application of Moscow City State Unitary Enterprise "Moscow International Cooperation Centre" and Moscow City Property Department who challenged norms which regulate the use of the proceeds from the sale of the so-called "Moscow House". The Court explained, that the said legal persons have not provided arguments in the application that they in this particular situation should be regarded as legal persons of private law, not state or municipal institutions.[14]

Any natural person can submit a constitutional complaint by themselves. The relevant legal regulations do not demand to have a legal advisor or a sworn advocate to apply to the Constitutional Court. The Constitutional Court Law gives the right to use an authorized representative which can be a sworn advocate, but it is not an obligation. Besides, persons with low income or who are otherwise restricted in protecting their rights (due to natural disasters, force majeure or other circumstances beyond the person's control, or is wholly dependent on the state or local authority), can obtain legal aid, paid for by the State, to prepare and submit a constitutional complaint.[15] Although this legal aid mechanism has its disadvantages,[16] the State funded legal aid provided in the Constitutional Court proceedings should be considered as a significant benefit.

2. The object or range of legal norms which can be challenged at the Constitutional Court by a person

The doctrine distinguishes between two types of constitutional complaints, taking into consideration the object or legal acts (legal norms), which can be challenged before the Constitutional Court. The first model

[13] **Rodiņa, A.,** *Konstitucionālās sūdzības teorija un prakse Latvijā [Theory and Practice of the Constitutional Complaint in Latvia],* Rīga, 2009, p. 83.

[14] Decision of the 1st panel of the Constitutional Court on 11 December 2024 to refuse to initiate a case (application No 130/2024), para 5.

[15] Law on state-funded legal aid. Article 3 and 9.1, 9.2. Latvijas Vēstnesis, 52, 01.04.2005.

[16] To receive state-funded legal aid, a person must first apply to the Constitutional Court himself or herself, and be refused to initiate a case either because the application lacks legal reasoning or because it is insufficient to satisfy the claim.

allows challenging a broad scope of legal acts – general acts and individual acts or acts of application of law. This model exists in Germany.[17] Another model allows challenging a narrow scope of legal acts – individual acts or general (normative) acts. In Latvia the object of the constitutional complaint may be only a general (normative) act. In a study this form of constitutional complaint has been characterized as "normative constitutional complaint".[18] It means that the norm, not the result of application thereof can be challenged at the Constitutional Court.

As provided by the *Satversme* (Article 85) and the Constitutional Court Law (Para 1 of Section 16), the object of the constitutional complaint can be a law – act adopted by the Parliament in accordance with the procedure set out in the *Satversme* and the Parliament Rules of Procedure.[19] A person may challenge any law, including a norm of the State Budget Law, tax legislation, as long as the requirements for a constitutional complaint are fulfilled. Case law shows that most of the major reforms undertaken by the legislator end up before the Constitutional Court. For example, the reforms on the transfer of school and kindergarten education to the official state language (Latvian, as opposed to Russian) have been examined by the Constitutional Court several times following constitutional complaints. Similarly, the numerous attempts by the Parliament to regulate the relationship (land use fee) between land owners and the owners of buildings built on their land (during the Soviet era) have been assessed five times by the Constitutional Court.

A person may also contest a norm of an international treaty in both *a priori* and *a posteriori*. But a *priori* constitutional review of international treaties can be considered as theoretical, as it would be almost impossible to prove infringement in a situation when the contested legal norm (act) has not yet been adopted. Constitutional complaints where persons challenge norms of international agreements are rare and there has never been a case initiated regarding the conformity of a norm of international treaty following a constitutional complaint.

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[17] **Kommers, D. P.,** *The constitutional jurisprudence of the Federal Republic of Germany,* Durham, N. C. London, Duke University Press, 1997, p. 15.; see also about other countries in: **Chakim M. Lutfi,** *A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions,* Constitutional Law Review, Vol. 5, No. 1, 2019, p. 96-133.

[18] *Study on Individual Access to Constitutional Justice,* p. 22. http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e

[19] Judgement of the Constitutional Court on 2 March 2016 in case No. 2015-11-03, para 20.

In Latvia fundamental rights may be restricted not only with the law, but also with other generally binding (external) normative acts.[20] Pursuant to Section 31 of the Law on the Structure of the Cabinet of Ministers, the Cabinet may issue external regulatory enactments – regulations inter alia if the Cabinet has been authorized by the law.[21] Also a local government, pursuant to the law "On Local Governments" (Section 44 and 45) – has the right to issue an external regulatory enactment – binding regulations.[22] Both, the Cabinet Regulations and the binding regulations of local governments and the legal norms included therein may be contested before the Constitutional Court. The Constitutional Court has developed in its case law *ultra vires* doctrine, recognizing as being incompatible with the *Satversme* such regulatory enactments, which have been issued by exceeding the competence or not abiding by the limits of authorization. If the authorization to issue external regulatory enactments has been exceeded, then the institution has acted *ultra vires,* and the norm has not been established based on law and is incompatible with the *Satversme*.[23]

As it is typical for a European model Constitutional Court, The Latvian Constitutional Court reviews constitutionality of legal norms *a posteriori*. However, it does not mean that the Court may review only legal norms that are in force. By considering the goal of the applicant and the principle of subsidiarity, a person may challenge a norm that has lost its legal force. For example, a legal person who has lost state aid, used all general legal means and challenged the legal norm (that which was applied to cancel the state aid) at the Constitutional Court. When the case was initiated, the legislator had changed this legal norm. Despite that, the Court initiated a case and delivered a judgement.[24] The Constitutional Court may also initiate a case if a legal norm has not yet entered into force. For example, a legal person challenged the constitutionality of a provision of the Animal Protection Act prohibiting the farming of animals if the sole or main purpose of the farming is the production of fur. The transitional provisions of the Law stipulated that this ban should enter into force on 1 January 2028. The case was initiated already on 2 March 2023.[25] Or – the Consti-

[20] Judgement of the Constitutional Court on 21 November 2005 in case No. 2005-03-0306, para 8.

[21] Law of the Structure of the Cabinet of Ministers. Latvijas Vēstnesis, No. 82 (3866), 28.05.2008.

[22] On Local Governments. Latvijas Vēstnesis, No. 215, 04.11.2022.

[23] Judgement of the Constitutional Court on 12 December 2014 in case No. 2013-21-03, para 12.

[24] Judgement of the Constitutional Court on 10 October 2024 in case No. 2023-35-03.

[25] Decision of the 3rd Panel of the Constitutional Court on March 23 2023 to initiate a case (application No 34/2023)

tutional Court initiated a case regarding the constitutionality of norms which prohibit the sales of electronic smoking liquids and tobacco substitutes containing flavours, other than flavours which produce the smell or taste of tobacco on 1 July 2024. The prohibition (legal norms) entered into force on 1 January 2025.[26]

3. Infringement of fundamental rights

Infringement of fundamental rights is the „backbone" of a constitutional complaint. It distinguishes a constitutional complaint from *actio popularis*.[27]

In the case-law of the Constitutional Court, it has been recognized that an infringement of a fundamental right must be established by following logical and interconnected steps. First, it must be understood whether the Constitution guarantees the fundamental right in question.[28] This means that a person cannot expect and demand protection of something that the Constitution does not even provide for. For example, the Constitutional Court has explained that the right to property does not entail the right to start or open a pharmacy, but it protects the right to continue an existing business. Further, it must be established that the contested norm directly infringes the fundamental right or causes negative consequences to an applicant.[29] The interference of the challenged norm to the applicant must always be concrete and direct.[30]

The main role of constitutional review is to settle disputes that exist. In most cases initiated and reviewed by the Constitutional Court, the infringement of a fundamental right already exists or fundamental rights

[26] Decision of the 4th Panel of the Constitutional Court on July 1 2024 to initiate a case (application No. 67/2024)

[27] **Kokott, J., Kaspar, M.,** *Ensuring Constitutional Efficacy* – in: **Rosenfeld, M., Sajo, A. (eds),** *Comparative Constitutional Law,* Oxford, Oxford University Press, 2012, pp. 811-813.

[28] Judgement of the Constitutional Court on 9 February 2023 in case No. 2020-33-01, para 27; Judgement of the Constitutional Court on 23 February 2023 in case No. 2022-03-01, para 8.

[29] Judgement of the Constitutional Court on November 26, 2022 in case No. 2021-31-0103, para 23; Decision of the Constitutional Court of 23 November 2016 to terminate a case No 2016-02-01, para 15.1.5.

[30] Decision of the Constitutional Court of 11 November 2002 to terminate a case No. 2001-07-01, para 3; Judgement of the Constitutional Court on 18 February 2010 in case No. 2009-74-01, para 12; Judgement of the Constitutional Court on 23 May 2022 in case No.2021-18-01, para 22.9.; Judgement of the Constitutional Court on 27 October 2022 in case No. 2021-31-0103, para 25. p.

were infringed at the very moment the application was submitted.[31] Usually, an existing infringement is caused if the challenged norm has been applied to a person. For example, last year the Constitutional Court initiated several cases regarding provisions of law on confiscation of illegal assets, the legal norms had been applied and thus caused infringement of property rights.[32]

Infringement may also be caused by a legal norm *per se*.[33] As the Court has explained there may be situations where negative consequences can be established without the application of the contested norm.[34] For example, in 2024 the Constitutional Court initiated cases in which private persons challenged the constitutionality of provisions of law concerning the reimbursement (payment) for land use in cases where land and built structures had different owners.[35] The infringement occurred on the day the contested norms entered into force, since the statutory reimbursement had to be calculated from that date. Infringement can also be caused if a norm prohibits to enjoy a fundamental right. For example, the Court has reviewed the constitutionality of a legal norm which prohibited to apply for the office of a judge if there had been criminal proceedings against the person that were terminated on non-conviction grounds.[36] If a person contests a law on expropriation of their immoveable property or they contest regulations on spatial planning of a local municipality, then it is presumed by law **(**Section 19.3 of the Constitutional Court Law) that the infringement occurs upon the day these legal acts enter into force.

The Constitutional Court has revealed other forms of infringement in case law, namely, an infringement to be expected in the future and even a potential infringement. These forms are exceptional and can be applied

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[31] Judgment of the Constitutional Court on March 1 2013 in case No. 2012-07-01, para 12.

[32] Decision of the 3rd Panel of the Constitutional Court on 7 December 2023 to initiate a case (application No. 183/2023); Decision of the 2nd Panel of the Constitutional Court on 27 December 2023 to initiate a case (application No. 148/2023).

[33] Judgement of the Constitutional Court on 21 December 2015 in case No. 2015-03–01, para 18.; Judgment of the Constitutional Court on 10 May 2013 in case No. 2012-16-01, para 22; Judgment of the Constitutional Court on 5 April 2013 in case No. 2012-20–03, para 6.

[34] Decision of the Constitutional Court of 30 May 2023 to terminate a case No. 2022-19-01, para 13.1.; Judgement of the Constitutional Court on 3 July 2024 in case No. 2022-44–01, para 15.1.

[35] Decision of the 1st Panel of the Constitutional Court on 24 July 2024 to initiate a case (application No. 83/2024); Decision of the 2nd Panel of the Constitutional Court on 19 August 2024 to initiate a case (application No. 89/2024).

[36] Judgement of the Constitutional Court on 15 December 2022 in case No. 2021-41-01

only in exceptional situations. At the same time, for example, in 2023 from 46 cases initiated in total in 15 infringement was not existing, but expected in the future.

In those exceptional cases a person must always substantiate why the issue or case must be examined immediately, instead of waiting the moment, when the contested norm creates an actual, existing infringement. This means that a person must be able to prove that the norm, with respect to the applicant, will definitely [in the nearest future] be applied [to put it simply, one can say that it is obvious that the legal norm with 100% certainty or "validly and credibly"[37] will affect the applicant or will be applied to the applicant], and that as the result of application therefore adverse consequences will be created for the person.[38] In opposite potential infringement means that it is not clear [obvious], whether the legal norm will ever be applied to the applicant. However, the consequences that might arise as the result of application of the legal norm should be irreversible or the harm should be significant.[39] For example, at the end of 2022 and the beginning of 2023, several Russian citizens challenged before the Constitutional Court the regulation which provided that the previously issued permanent residence permits will be invalid as of 1 September 2023.[40] To obtain a new permanent residence permit, individuals had to fulfill certain requirements, including a language test. Considering that the significant negative consequences for the persons would occur in the future, infringement was recognized as expected in the future.

Cases where the infringement has been potential are very rare as the criteria are quite complicated and the Court shall focus on deciding disputes in existing cases. In the last 20 years only in two cases infringement

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[37] Judgement of the Constitutional Court on 21 December 2015, in case No. 2015-03–01, para 18.

Judgment of the Constitutional Court on 18 February 2010 in case No. 2009-74-01, para 12.1; Judgment of the Constitutional Court on 21 December 2015 in case No. 2015-03-01, para 18.

[38] Judgment of the Constitutional Court on 5 April 2013 in case No. 2012-20-03, para 6; Judgment of the Constitutional Court on 20 June 2018 in case No. 2017-25-01, para 15; Judgment of the Constitutional Court on February 18, 2010 in case No. 2009-74-01, para 12.1.

[39] Judgment of the Constitutional Court on 10 May 2013 in case No. 2012-16-01, para 23.2.

[40] Decision of the Constitutional Court Assignments meeting on 28 February 2023 to initiate a case (Application No. 231/2022; See also Decision of the 4th Panel of the Constitutional Court on 1 March 2023 to initiate a case (application No. 15/2023; Decision of the 4th Panel of the Constitutional Court on 6 March 2023 to initiate a case (application No. 3/2023; Decision of the 2nd Panel of the Constitutional Court on 8 March 2023 to initiate a case (application No. 5/2023.

has been recognized as being potential. In one of the cases the Court had to assess compliance of Section 86 (3) of the law "On Judicial Power" with Article 102 of the *Satversme*, which prohibited a judge from being a member of a political party.[41]

4. Obligation to exhaust other legal remedies before the Constitutional Court

Constitutional Court Law (Section 19^2, para 2) provides that a person has the right to apply to the Court only if all other remedies have been used or if such remedies do not exist. Namely, constitutional complaint is the last national legal remedy; therefore, in accordance with the subsidiarity requirement, before Constitutional Court other options to protect fundamental rights shall be used.[42]

The obligation to exhaust all possibilities to defend fundamental rights by other remedies applies if fundamental rights are infringed by an individual act (f. ex. an administrative act).[43] In such a situation the person must first challenge the decision before the courts until a final ruling enters into force. For example, in already mentioned example, the person who had lost state aid based on the decision of the authorised institution because it did not follow the requirements included in the Cabinet Regulations, applied to the court and after the non-appealable decision of the cassation court (Senate) came into force, it applied to the Constitutional Court.[44]

At the same time in specific situations the Constitutional Court can be the only remedy. Namely, the principle of subsidiarity must be complied with only if other legal remedies are avaliable to resolve the dispute in an effective way.[45] The remedy is real and effective, if real possibility exists to achieve an outcome, which eliminates the violation. "If an imperative norm is defined clearly, if the applicant is in a situation typical for the scope of this norm and no doubts exist regarding the application of this

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[41] Judgment of the Constitutional Court on 10 May 2013 in case No. 2012-16–01

[42] Decision of the Constitutional Court of 7 October 2019 to terminate a case No. 2018-19-03, para 15.1.

[43] Judgement of the Constitutional Court on 26 April 2007 in case No. 2006-38-03, para 8.1.

[44] Decision of the 2nd Panel of the Constitutional Court on 22 August 2023 to initiate a case (application No. 138/2023), para 6.

[45] Judgement of the Constitutional Court on 24 October 2013 in case No. 2012-23-01, para 14. Compare with Judgement of the Europan Court of Human Rights in case Rotary v. Romania (No. 28341/95) on 4 May 2000, para 67; Judgement of the Europan Court of Human Rights in case Vučković and Others v. Serbia (No. 17153/11 and 29 other) on 25 March 2014, paras. 69-77.

norm in the particular case, the Constitutional Court Law does not require exhaustion of such formally existing possibilities to appeal against an administrative act, the use of which, obviously, would not lead to a decision favourable for the person."[46] For example, as it was mentioned before, the Court initiated a case about conformity of law which regulates the amount of reimbursement in the so called divided property (land belongs to one owner and the building to another). The Court found that the challenged norm is imperative, and the Applicant is in a situation typical for the application of this norm. Consequently, there were no other legal remedies.[47] In case where a person challenged provisions which from 1 January 2025 prohibited to sell tobacco substitute products containing flavourings, the Court found that the appeal against an administrative act adopted by the authority, which would specify the prohibition with respect of the applicant, would be formal, since it would not affect the prohibition laid down by the contested provision. [48] Therefore, also in this case the applicant was unable to defend their fundamental rights by other legal means. There are no other legal remedies, except the Constitutional Court, if property is expropriated for public needs and the person considers that this law is incompatible with the *Satversme*.

Usually, a person is interested to bring a case to the constitutional Court as soon as possible. It is because the proceedings at the Constitutional Court take approximately just one year. However, the slow legal proceedings in the courts of the court system *per se*, cannot be an argument to prove that these other remedies are not effective. It has been explained by the Constitutional Court that "[t]he time required for carrying out legal proceedings *per se* cannot be the basis for declaring legal proceedings ineffective. Otherwise, any person could turn to the Constitutional Court, providing the argument that the administrative proceedings in court are ineffective."[49]

Still, there are legal possibilities to reach the Constitutional Court faster even if legal remedies exist. It can be possible by applying exceptions provided by the Section 19^2 para 3 of the Constitutional Court Law. If the examination of the constitutional complaint is of general importance or if the protection of fundamental rights by the general legal remedies cannot

[46] Judgment of the Constitutional Court on 24 October 2013 in case No. 2012-23-01, para 14.

[47] Decision of the 2nd Panel of the Constitutional Court on 10 December 2024 to initiate a case (application No. 128/2024), para 8.

[48] Decision of the 2nd Panel of the Constitutional Court on 26 August 2024 to initiate a case (application No. 99/2024), para 6.

[49] Decision of the 1st Panel of the Constitutional Court on 21 August 2012 to refuse to initiate a case (application No. 125/2012, para 5.2.

prevent significant harm to the person, then the person can apply to the Court without exhausting other legal remedies. In particular, the content of a constitutional complaint of general importance has not been yet revealed in a judgement of the Constitutional Court. An opinion has been expressed in theory that three interconnected criteria may form general importance.[50] Reflection of those three criteria – negative consequences have been caused not only to the submitter, but also other persons, the question concerned is very important and the dispute should be solved immediately - can be found in a decision of the Panel.[51] To prove significant harm, the consequences of the application of norm shall be adverse and irreversible.[52] Also this criterion has been applied only in two cases which were initiated quite a long time ago. In one of these cases a person who was released from the servant's office turned to the court of general jurisdiction. But in the mean time he also applied to the Constitutional Court as the hearing of the case had been scheduled at a date more than a year ahead. The Court agreed with the applicant, that in this specific situation protection of rights by general legal remedies cannot prevent significant harm for the applicant – within the period lasting more than a year he will lose his professional qualification, moreover, during this period he must provide livelihood.[53] In the last years this criterion has not been applied.

If the Constitutional Court is the last national legal remedy, then one may raise logical question: what happens with the final court's ruling (judgement or decision) if a person (latter) turns to the Constitutional Court. Section 19^2 para 5 of the Constitutional Court Law provides that submission of a constitutional complaint (application) shall not suspend the implementation of the court ruling except for the cases when the Constitutional Court has decided otherwise. The law implies a general presumption – until the Constitutional Court has not decided otherwise the ruling shall be implemented. It means that this right – to suspend implementation of the ruling as an extraordinary element of the Constitu-

[50] See **Rodiņa, A.,** *Konstitucionālās sūdzības teorija un prakse Latvijā [Theory and practice of the constitutional complaint in Latvia]*, Rīga, Latvijas Vēstnesis, 2009, p. 193-194.

[51] Decision of the 4th Panel of the Constitutional Court on 12 January 2023 to refuse to initiate a case (application No. 202/2022), para 8.

[52] Decision of the 1st Panel of the Constitutional Court on 1 February 2011 to refuse to initiate a case (application No.2/2011), para 7.

[53] Decision by the 2nd Panel of the Constitutional Court on 3 November 2006 to initiate a case (application No. 98/2006), para 3.

tional Court procedure[54] may be applied to reach important aims [55] and it cannot be used as the instrument to delay enforcement of the ruling if the person is dissatisfied with it.[56] The Court has explained that it can suspend implementation: 1) if enforcement of the ruling before the ruling by the Constitutional Court entered into force would make enforcement of the Constitutional Court's judgement impossible, or 2) could cause significant harm to the applicant himself.[57] So called interim measures have been applied just in a few situations. For example, a person who was prosecuted and sentenced to community service and later challenged the provision of the Criminal Law at the Constitutional Court, asked to suspend fulfilment of the judgement in his criminal case. The Constitutional Court held that the execution of the court judgement before the Constitutional Court ruling could cause serious harm to the person as criminal liability is the most serious form of legal liability, and its consequences may significantly affect the life of a person after serving a criminal sentence. Therefore, the Court decided to suspend the implementation of this decision.[58]

The Constitutional Court cannot apply other interim measures, for example, it cannot suspend application of the legal norm (law). Already in 2015 the Court explained that: "[t] he legislator has not envisaged another interim measure if constitutional complaint has been submitted."[59]

5. Term

The term to submit a constitutional complaint is a typical requirement for this type of application. Failure to comply with the term requirement denies access to the Constitutional Court.

The term is justified by several considerations, which have been pointed out by the Constitutional Court. First, it is necessary to ensure legal

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[54] Decision of the Assignment Meeting of the Constitutional Court on 27 March 2012 in case No. 2012-07-01.

[55] Decision of the 1st Panel of the Constitutional Court on 20 June 2008 to initiate a case (application No. 56/2008), para 6.2.

[56] **Endziņš, A.,** *Par grozījumiem Satversmes tiesas likumā [Относно измененията на Закона за Конституционния съд],* Jurista Vārds, No. 15, 13. 4. 2000; Decision of the Assignment Meeting of the Constitutional Court on 20 May 2008 in case No. 2008-04-01, para 4.

[57] Decision of the Assignment Meeting of the Constitutional Court on 5 March 2010 in case No. 2010-08-01, para 4.; Decision of the Assignment Meeting of the Constitutional Court on 21 November 2019 in case No. 2019-22-01, para 4.

[58] Decision by the 3rd Panel of the Constitutional Court on 16 August 2021 to initiate a case (application No. 134/2021), para 11

[59] Decision of the Assignment Meeting of the Constitutional Court on 4 February 2015 in case No. 2015-03-01.

stability and to regulate legal relations within a reasonable time. Second, a term avoids the various problems of enforcing judgments of a court of general jurisdiction and restoring a person's legal position if a constitutional court finds that fundamental rights have been violated.[60] Third, a term is necessary also to enable a prompt and reasonable response to violations.[61] Finally, under the concept of an active fundamental rights defender, it is expected that a person will react quickly to an infringement. This is in line with the Constitutional Court's consideration – that the longer a person tolerates an infringement, the less interested he or she is in protecting his or her constitutional rights.[62]

The term to submit constitutional complaint is six months. It is long enough to prepare an appropriate application. Moreover, it is long enough to be able to apply to the court twice if the application was not successful the first time. It shall be explained that the Constitutional Court Law gives authority to decide on the admissibility of application to the Panel consisting of three judges. Decision of the Panel is not appealable. But law is not prohibiting to improve previous application and to submit it *de novo*.

The calculation of the term depends on whether the person can exhaust general remedies or not.

If there are legal remedies, the six-month term begins when the decision of the last institution enters into force.[63] For example, if the Senate refuses to initiate cassation proceedings, the 6-month term begins from the date on which the ruling of the Senate's deliberative meeting comes into force.[64] Or the term can be calculated from the entry into force of a (non-appealable) appeal court ruling.[65]

If there is no remedy, the six-month term starts at the moment of the infringement. The law does not specify whether the moment of infringement is its beginning or its end. The Constitutional Court, referring to the protection of legal stability and the legitimate expectations of other persons, has explained that, for these reasons, the 6-month term must be

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[60] Judgement of the Constitutional Court on 26 November 2002 in case No. 2002-09-01, para 1.

[61] Decision of the Constitutional Court on 28 May 2021 to terminate a case No. 2020-52-01, para 16.1.

[62] Judgement of the Constitutional Court on 10 May 2013 in case No. 2012-16-01, para 22.3.; Decision of the Constitutional Court on 18 April 2019 to terminate a case No. 2018-13-03, para 12.3.

[63] Judgement of the Constitutional Court on 2 December 2022 in case No. 2021-42-01, para 11.

[64] Decision of the 2nd Panel of the Constitutional Court on 13 November 2024 to initiate a case (application No. 115/2024).

[65] Decision of the 3rd Panel of the Constitutional Court on 7 December 2023 to initiate a case (application No. 183/2023).

calculated from the moment when the infringement began and not from the moment when the infringement ceased to exist.[66]

There are two regulated situations at the Constitutional Court Law which explain the moment of infringement and also the time limit for submitting an application. If a person challenges the compulsory expropriation of immovable property for public purposes, the application must be submitted within six months of the date of entry into force of the law in question. If, the regulations on spatial planning of a local municipality are challenged, the application may be submitted within six months of the date of entry into force of the relevant binding regulation.

Upon expiry of the term established by the Law, the right to submit a constitutional complaint to the Constitutional Court ceases to exist. If a case has been initiated and the Constitutional Court finds during the examination of the case that the term requirement had not been complied with, the proceedings in the case shall be terminated.[67] The Constitutional Court has never reinstated a term for lodging a constitutional complaint which has been missed. For example, in a case where the application was sent by electronic mail, the court concluded that the 6-month time limit had been complied with if it was sent within the time limit. It does not matter when the court received it at its e-mail address.[68] However, the Court found that the application was sent out less than 20 minutes after the deadline. Although the Applicants' authorized representative informed the Constitutional Court that the application was sent to the Constitutional Court by electronic mail immediately after it was signed, but due to its large volume it remained in the mail box, the Court held that in this case the time limit had been missed.[69] In other words, the obligation to verify that the message has left the applicant's server lies with the applicant.

6. Constitutional complaint as a real and an effective legal remedy

A legal norm can be declared as being incompatible with the *Satversme* by a judgement of the Constitutional Court. A Judgement has *erga omnes* effect: the judgement and the interpretation of a legal provision

[66] Judgement of the Constitutional Court on 27 June 2013 in case No. 2012-22-0103, para 12.2.

[67] Decision of the Constitutional Court on 30 May 2023 to terminate a case No. 2022-19-01, para 14.

[68] Decision of the Constitutional Court on 28 May 2021 to terminate a case No. 2020-52-01, para 16.2.

[69] Decision of the Constitutional Court on 28 May 2021 to terminate a case No. 2020-52-01, para 16.3.

included in it is mandatory to all persons. It is final and comes into force on the date of promulgation.

The competence to declare laws and other enactments and parts thereof invalid is included in the second sentence of Article 85 of the *Satversme.*[70] *But the Satversme* does not regulate the moment when the norm, which is declared unconstitutional, loses its legal force. In accordance with Section 32 (3) of the Constitutional Court Law, a legal provision, which has been declared by the Constitutional Court as non-compliant with a norm of a higher legal force, must be regarded as being not in effect from the day of publication of the Constitutional Court's judgment (*ex nunc*). This is the so-called general presumption and it helps to reach a fair balance between two values: legal certainty and legality.

In the meantime, the Constitutional Court Law has granted to the Court a broad discretion to decide on the date of which an unconstitutional legal norm becomes invalid. The Constitutional Court, by substantiating its opinion, can rule that the norm becomes invalid from the day it was adopted (*ex tunc*) or on another day in the past (*ex tunc*), or the date may be set in the future (*pro futuro*). To decide on the moment when the legal norm loses its legal force, the Constitutional Court considers several principles: the principle of justice, the principle of legality, the principle of separation of powers, legal expectations, and legal certainty.[71] It is because the law not only authorizes the Constitutional Court, but also places responsibility upon it, so that its judgments in the social reality would ensure legal stability, clarity, and peace.[72]

Case law studies show that the contested legal norm is declared invalid *ex tunc* – from the moment of adoption, if it had been adopted *ultra vires* or if significant procedural violations have been committed.[73] At the same time, the Constitutional Court has recognized that it could deviate from this presumption, if significant circumstances were established that would substantiate the need to deviate from the existing practice.[74]

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[70] Article 85 of the Constitution says "The Constitutional Court is entitled to declare laws or other enactments or parts thereof invalid."

[71] Judgment of the Constitutional Court on March 11 1998 in case No. 04 – 05(97), para 5; Judgment of the Constitutional Court on 18 May 2017 in case No. 2016-12-01, para 15.

[72] Judgment of the Constitutional Court on 11 Mach 1998 in case No. 04-05 (97), para 5.

[73] Judgment of the Constitutional Court on 20 February 2020 in case No. 2019-09-03, para 25.

[74] Judgement of the Constitutional Court on 29 June 2017 in case No. 2016-23-03, para 18.

Undoubtedly, retroactive (*ex tunc*) decisions should be regarded as an exception in order to preserve legal certainty.[75] Retroactive invalidation of a legal norm may affect third parties and public interests. Therefore, retroactive effect is applied and should be applied in exceptional cases. However, the retroactive decisions are of special importance in cases, which have been initiated based on constitutional complaints. This is because the decision *ex tunc* might be the only possibility to safeguard a person's fundamental rights. For example, in a case initiated based on a constitutional complaint of a Member of the Parliament, the Court held that the restriction of a MP to perform duties in the absence of a vaccination certificate (Covid-19) was contrary to the right to perform public service guaranteed by the Satversme.[76] The Court concluded that the declaration of the contested norm null and void from the moment of the infringement is the only possibility to protect her fundamental rights, since the person could not participate in the work of the Parliament and receive remuneration. Therefore, the contested norm was declared null and void *ex tunc* with respect of the applicant – from the moment when she was deprived of the right to participate fully in the work of the Parliament.

The Court in some cases has applied temporal effect *pro futuro,* which means that the norm declared as inconsistent with the *Satversme* continues to be applied for a certain period as an immediate revoking of the norm would be even more incompatible with the *Satversme*. Effect *pro futuro* usually is applied if it is necessary to give time to the legislator to regulate the situation or to amend unconstitutional legal norm, to avoid legal vacuum. For example, in case where the Court recognized as inconsistent with the Constitution regulation which prohibited to become a candidate to the judge post for a person against whom criminal proceedings had been terminated based on non-conviction grounds, the Court ruled that the requirements for judicial office is an important and fundamental issue.[77] It would be unacceptable that the unconstitutional legal norm would lose its legal force from the day of publication of the judgment and there would not be any regulation. It was therefore necessary and permissible that the unconstitutional provision remains in force for a certain period to give the legislator the opportunity to adopt a new legal framework by taking into consideration findings of the Constitutional Court.

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[75] Heringa A.W. Constitutions Compared. An Introduction to Comparative Constitutional Law. Cambridge: Intersentia, 2016, p. 223.

[76] Judgement of the Constitutional Court on 7 December 2023 in case No. 2022-20-01, para 25.

[77] Judgement of the Constitutional Court on 15 December 2022 in case No. 2021-41-01, para 19

It may also happen that during the examination of a case the legislator amends the contested norm or excludes the contested legal norm from the regulatory enactment. This means that, based on the Constitutional Court Law (Para 2 of Section 29) the Constitutional Court can terminate a case.[78] However, it has been recognized that the fact *per se* that the contested norm has become invalid not always is sufficient grounds for terminating a case.[79] To terminate a case in such a situation, the dispute must have been resolved. In cases, which are initiated based on a constitutional complaint, the Court always takes into consideration that a person submitted a constitutional complaint to defend his or her fundamental rights that had been violated. "Therefore, when considering the issue regarding termination of proceedings in a case, the Constitutional Court first of all shall take into account the necessity to protect the fundamental rights of persons established in the *Satversme*."[80] This is because judgment of the Constitutional Court can be the only legal way for an applicant to achieve protection of his or her rights.[81] For example, in case where the Court had to assess Covid-19 restriction (prohibition to open specific shops), legal norm had lost its legal force. To continue proceedings the Constitutional Court considered both the applicant's request to recognize the norm as unconstitutional *ex tunc* and the fact that the issue in the case was of public importance, on which the Constitutional Court needed to give its assessment.[82] Latter challenged legal norms in this case were declared unconstitutional and as null and void *ex tunc* with respect of applicants.

In all states governed by the rule of law, execution of a judgement is self-evident or can be presumed. There is no special legal regulation in Latvia that would provide for the enforcement of the Constitutional Court's judgements and mechanisms of control over it. In some judgements the Constitutional Court has included regulation on how the judgement shall be executed. For example, in the case in which the Constitutional Court declared unconstitutional the legal norms that gave the right to cut down younger trees, the Court explained that the Cabinet of Ministers should take necessary measures to ensure that the certificates for cutting down

[78] Section 29 (1). Provides, that the Court proceedings of a case may be terminated until proclamation of the judgment by the decision of the Constitutional Court: 2) if the contested legal norm (act) has lost its legal force.

[79] Judgement of the Constitutional Court on January 11 2011 in case No. 2010-40-03, para 6.

[80] Judgement of the Constitutional Court on February 12 2008 in case No. 2007-15-01, para 4.

[81] Judgement of the Constitutional Court on 12 February 2008 in case No. 2007-15-01, para 4.

[82] Judgement of the Constitutional Court on 10 March 2022 in case No. 2021-24-03, para 19.

trees issued on the basis of the contested norm would become invalid.[83] In particular, the Cabinet of Ministers was required to ensure that the court's judgment would achieve its objective of ensuring that trees which the contested regulation permitted to be cut were not cut down.

Conclusions

Importance of the constitutional complaint can be evaluated from different perspectives.

One may agree with A.S. Sweet who has said that persons activate constitutional review process.[84] Persons by submitting constitutional complaints delegate to the Constitutional court policy issues that could have been dealt with in other platforms. As statistics show constitutional complaints dominate. For example, in 2022 altogether the Constitutional Court received 231 applications which were referred to the Panels to decide on the admissibility of the applications. Form these 212 were constitutional complaints. In 2023 out of 199 applications 185 were constitutional complaints. But in 2024 the court received 145 applications and 127 of those were constitutional complaints. Based on constitutional complaints 33 cases were initiated in 2022, 40 in 2023, and 24 in 2024. The Constitutional Court receives a large number of poorly prepared applications as in average only around 18% of constitutional complaints are successful (meaning cases are initiated). To help the applicants to understand the requirements of a constitutional complaint, the Court has prepared a form and an explanatory material which can be used to prepare a constitutional complaint.[85]

Persons by activating the process of constitutional review promote the development of constitutional law. Based on constitutional complaints the Constitutional Court has contributed to not just the development of constitutional law, but to the whole legal system. Successful constitutional complaints have underlined the relevance of issues concerning state aid, the education system, state language, property rights, right to a fair trial. The Constitutional Court has developed the understanding of a person as a value in the state, also pointing that a person cannot be stigmatized for life for mistakes they have made in the past. The Constitutional Court

[83] Judgement of the Constitutional Court on 8 April 2024 in case No. 2023-01-03, para 26.2.

[84] **Sweet, A. S.,** *Governing with judges. Constitutional Politics in Europe,* Oxford, Oxford University Press, 2000, p. 140.

[85] Form and material are available on web page for free to everybody: https://www.satv.tiesa.gov.lv/ieteikumi-konstitucionalas-sudzibas-sagatavosanai/

has developed an understanding of the concept of family, explaining that every family needs to be protected by the state.

Behind each constitutional complaint there is a concreate interest for which the Constitutional Court is called upon to protect. Constitutional Court enjoys high public confidence. It means that people do believe that the Constitutional Court can be a real and an effective legal remedy that can solve individual violations of fundamental rights. But at the same time every case contributes to the state as every judgement further develops democracy and rule of law. To summarize: as prof. A. Endziņš – the first president of the Constitutional Court has said, the achievements of the Constitutional Court and the public's trust to the work of the Constitutional Court over the years show that the establishment of the Constitutional Court was a necessary decision to ensure the rule of law in a State.

ON THE FIRST SESSION OF THE NATIONAL ASSEMBLY

Hristo Ormandzhiev

The relevance of the issue concerning the first, also referred to as the "constitutive"[1] session of the National Assembly is beyond doubt. This is determined not so much by its ceremonial nature, associated with the commencement of its activities and the swearing-in of Members of Parliament, but primarily by the actions that must be undertaken during its proceedings and their legal consequences.

The special significance of the first session of the National Assembly is predicated on the particular attention given to it by the constitutional legislator when adopting the Fundamental Law in 1991. On the one hand, it marks the beginning of the newly elected legislature's activities, while on the other, its successful completion enables the normal functioning of Parliament.

The commencement of the activities of the current 51-st ordinary National Assembly was marked by the election results, which, despite indicating a winner, did not grant the latter sufficient mandates[2] to form an independent government, necessitating the pursuit of a coalition culture.

The distribution of mandates and the heterogeneous composition of the parliament also influenced the work of the 51-st National Assembly during its first session, particularly in the election of its President. Despite these challenges, the current parliamentary reality offer hope for the restoration of the normal rhythm of legislative activity.

1. The designation of the first session of the National Assembly as "constitutive" is associated with the commencement of its establishment through the election of a President and Vice-Presidents.[3] The convening

[1] For more information on the first session of the National Assembly, see: *Constitution of the Republic of Bulgaria, Commentary*, Authorial Collective, Ciela, Sofia, 1999, pp. 190-195 /Commentary on Articles 75 and 76 of the Constitution by Prof. Dr. Mariana Todorova Karagyozova-Finkova/.

[2] According to Decision No. 3972-NS of the Central Election Commission (CEC), the winner of the elections for the 51-st National Assembly, GERB-SDS, secured 69 mandates;

[3] Article 76, para 3 of the Constitution states: "At the same session of the National Assembly, the President and Vice-Presidents shall be elected."

of this session is particularly significant in light of the initiative required for its summoning. This initiative belongs to the President of the Republic, who, within one month after the elections, must convene the National Assembly for its first session – "The newly elected National Assembly shall be convened for its first session by the President of the Republic no later than one month after the election of the National Assembly" (Article 75 of the Constitution). The formalization of the President's act is carried out through the issuance of a decree. This decree not only states the legal basis for its issuance but also specifies the date, time, and place of the session. The issuance of this decree is a necessary condition for the initial summoning of the Members of Parliament and for the commencement of their activities as members of the collective body – the National Assembly.

The Fundamental Law also provides an alternative mechanism for convening the National Assembly for its first session in the event that the President fails to do so. It does not specify the reasons for which the President might refrain from convening the Assembly but stipulates that, in such a case, the session shall be convened by a designated portion of the Members of Parliament – one-fifth of them: "If the President does not convene the National Assembly within the specified period, it shall be convened by one-fifth of the Members of Parliament." (Article 75 of the Constitution, *in fine*). This alternative serves as a safeguard to ensure the functioning of Parliament and to prevent an initial deadlock in its activities. However, this raises the question of the legal and procedural framework through which such an initiative by the Members of Parliament should be exercised, particularly in the scenario where a permanently operating, standing National Assembly remains in place. Undoubtedly, the initiative must be undertaken by the portion of newly elected Members of Parliament as specified in the Constitution. Notably, no specific deadline is provided for this alternative means of convening the Assembly. [4] The interpretation of Article 75 of the Constitution suggests that, before exercising their right to convene the first session, Members of Parliament must wait for the expiration of the one-month period allocated for the President's initiative. Only after this period elapses may they act. The constitutional logic in this case indicates that both the convening of the first session by the President and its actual holding must occur within the one-month timeframe prescribed by the Fundamental Law. [5]

[4] Article 75 of the Constitution states: "The newly elected National Assembly shall be convened for its first session by the President of the Republic no later than one month after the election of the National Assembly. If the President does not convene the National Assembly within the specified period, it shall be convened by one-fifth of the Members of Parliament."

[5] There is no Constitutional Court ruling on this particular issue.

The more intriguing question concerns the manner in which the alternative request for convening the first (constitutive) session of Parliament by one-fifth of the Members of Parliament will be formalized. Undoubtedly, for such a convening to take place, it must be initiated by duly elected Members of Parliament who have been officially declared as such by a decision of the Central Election Commission (CEC). This initiative may be undertaken either by MPs from different parties and coalitions or by a single party or coalition, provided they reach the required threshold – one-fifth of the Members of Parliament, or 48 MPs. The fundamental issue, however, is how this initiative should be implemented and to whom it should be directed. Since the convening of the National Assembly for its first (constitutive) session is carried out through a specific act – a presidential decree – the key question in the case of an alternative convening (should the President fail to exercise this initiative) concerns the nature of the act that will formalize the MPs' will to summon Parliament. [6]

2. Unlike other parliamentary sessions, the first session is distinguished by a predefined, constitutionally mandated agenda focused on the leadership of the National Assembly[7], the swearing-in[8] of Members of Parliament, and the election of the President and Vice-Presidents. In this sense, not only is the agenda for the first session predetermined, but it is also exhaustively defined. No other matters may be addressed during this session beyond those prescribed by the Constitution and the Rules of Organization and Procedure of the National Assembly (ROPNA). However, since at the time of the first session there is no internal regulatory act governing the Assembly's proceedings, the constitutional provisions must be followed – starting with the opening of the session. According to Article 76, para 1 of the Constitution, the first session of the National Assembly is opened by the oldest Member of Parliament present. The logic behind this constitutional provision is clear: the framers of the 1991 Constitution intended to entrust this function to the oldest MP, assuming that they possess the greatest life experience among the deputies. This choice

[6] So far, there has been no instance of the National Assembly being convened alternatively by one-fifth of the Members of Parliament. Therefore, it would be necessary to bring this issue before the Constitutional Court to clarify the procedure for such a convening.

[7] According to Article 76, para 1 of the Constitution: "The first session of the National Assembly shall be opened by the oldest Member of Parliament present."

[8] According to Article 76, para 2 of the Constitution: "At the first session, the Members of Parliament shall take the following oath: 'I swear in the name of the Republic of Bulgaria to observe the Constitution and the laws of the country and in all my actions to be guided by the interests of the people. I have sworn.'"

also serves as a demonstration of respect for the experience and wisdom of the most senior Member of Parliament present.

3. The next significant moment in the constitution of the National Assembly, which takes place during the first plenary session, is the taking of the constitutional oath, the content of which is outlined in the Fundamental Law. Parliamentary practice involves the reading of the oath by the person presiding over the session, after which all Members of Parliament pronounce its content aloud. The Constitution does not regulate the technical details of how the oath is to be taken, nor does it address certain subsequent actions. These are governed by the Rules of Organization and Procedure of the National Assembly. For the current legislature, the procedure for the Members of Parliament to take the oath prescribed in Article 76, para 2 of the Constitution is outlined in the Rules of the 51-st National Assembly.[9] The oath is taken orally, and this is confirmed by the signing of the oath roll.

The legal significance of the constitutional oath taken by Members of Parliament is clarified by the interpretative case-law of the Constitutional Court.[10] According to this case-law, Members of Parliament who have not taken the oath as per Article 76, para 2 of the Constitution have not entered into the exercise of their powers. Given that the taking of the constitutional oath has been regulated in all Bulgarian constitutions[11], its legal significance was only fully clarified by the aforementioned decision of the Constitutional Court. The Court held that by taking the oath, Members of Parliament confirm their readiness to fulfill a constitutional obligation that applies to all citizens (to uphold the Constitution and the laws), while also assuming another obligation – to be guided by the interests of the people in their actions within Parliament (Article 76, para 2 of the Constitution). After the oral taking of the oath, Members of Parliament are required to sign an oath roll, thereby officially certifying the taking of the oath.

4. With the opening of the first session of the National Assembly, the oral taking of the oath and the signing of the oath roll mark the beginning of its constitution. The next action, which is constitutionally prescribed, is the election of the President of the National Assembly. For this election to take place there must be a legal basis. Through a special decision, procedural rules are adopted for the election of the President and Vice-Pres-

[9] Promulgated SG No. 60 of 16 July 2024, Article 3, para 2;

[10] Regarding the significance of the constitutional oath, the Constitutional Court ruled in Decision No. 1/16.01.1992, on Constitutional Case No. 18/1991.

[11] Article 131 of the Tarnovo Constitution, Article 21 of the 1947 Constitution and Article 74 of the 1971 Constitution.

idents of the National Assembly[12], which regulate the procedure for nominating and electing the President of Parliament. These rules are adopted at the first session and are part of the mandatory actions for every newly opened National Assembly. This decision, and accordingly the rules, does not follow the general procedure for reviewing draft decisions because the parliament has not yet been fully constituted. They enter into force immediately and are applied during the election of the President of Parliament. The legal basis for adopting them is Article 76, para 3 and Article 86, para 1 of the Constitution.

The procedural rules for the election of the President and Vice-Presidents of the National Assembly specify who may nominate a candidate for President of Parliament.[13] Nominations for President can be made by political parties and coalitions registered with the Central Election Commission (CEC) for participation in the elections on October 27, 2024, as well as by individual Members of Parliament. This initiative can be carried out together or separately, with the intended result being the election of the President of Parliament. It is noteworthy that the President must be elected from the current legislature, i.e., from among the elected Members of Parliament. Without his/her election, the legislative, control, and constitutive activities of Parliament cannot begin. A well-established parliamentary practice is that the political party or coalition that wins the elections nominates a candidate for President of Parliament, and this nomination is put to a vote. However, this practice is not always strictly followed in Bulgaria. The election of the President of Parliament also depends on the distribution of mandates, the presence or absence of a majority, and the achievement of agreement among political forces.

Voting is conducted openly through the available computerized voting system unless the National Assembly decides otherwise, and it follows the alphabetical order of the proposed candidacies[14]. A secret ballot may be held if the National Assembly adopts a specific decision determining the voting method.

When counting the results, a candidate is considered elected if they receive more than half of the votes of the present Members of Parliament, provided there is a quorum – meaning the presence of more than half of all Members of Parliament, as required by Article 81, para 2 of the Constitution. If no candidate secures the necessary majority in the first vote, a

[12] The 51-st National Assembly, by its decision of November 11, 2024, adopted Procedural Rules for the Election of the President, promulgated SG No. 104/2024.

[13] Item 1 of the Decision on the Adoption of Procedural Rules for the Election of a President of the 51-st National Assembly.

[14] Article 2 of the Decision on the Adoption of Procedural Rules for the Election of a President of the 51-st National Assembly.

second round is held between the two candidates who received the highest number of votes. The candidate who obtains more than half of the votes of the present Members of Parliament is elected.[15]

If no candidate is elected in the first vote, a runoff is conducted, which differs from a traditional second-round election. In standard runoff procedures, the candidate with the most votes wins. However, when electing the President of the Parliament, securing a simple majority is insufficient. Instead, the elected candidate must again receive more than half of the votes of the present Members of Parliament, as the decision is made under the conditions set forth in Article 81, para 2 of the Constitution.

The question of how long the first session of the National Assembly can last is also of interest. Clearly, it will continue for as long as necessary to complete all actions required for its constitution. In the case of a highly fragmented parliament or a lack of agreement among the represented political parties and coalitions, the session could, in practice, be prolonged significantly. The election of the President of the 51-st National Assembly was also influenced by constitutional amendments introduced by the Law Amending and Supplementing the Constitution of the Republic of Bulgaria, promulgated SG No. 106 of 22 December 2023. The new wording of Article 99, para 5 of the Constitution stipulates that if no agreement is reached on forming a government, the President, following consultations with parliamentary groups and on the proposal of the candidate for caretaker Prime Minister, appoints a caretaker government and schedules new elections within two months. The caretaker Prime Minister is appointed from among the President of the National Assembly, the Governor or Deputy Governor of the Bulgarian National Bank, the Chairman or Deputy Chairman of the Audit Chamber and the Ombudsman or his/her deputy. Under this provision, the President of the National Assembly becomes the primary potential candidate for caretaker Prime Minister if a regular government cannot be formed. With such a constitutional framework and a fragmented parliament, reaching an agreement on the election of the President of the National Assembly becomes hostage to "considerations" regarding the possible future administration under a caretaker government and the selection of the caretaker Prime Minister.

The solution adopted in Article 99, para 5 of the Law Amending and Supplementing the Constitution leads to parliamentary deadlock, preventing the legislature from carrying out any activities from its very first session. In most cases, the election of the President of the National Assembly is politically charged, which does not correspond to the role of the caretaker government. The latter emerges as a consequence of the

[15] Article 3 of the Decision on the Adoption of Procedural Rules for the Election of a President of the 51-st National Assembly.

parliament's failure to form a functioning cabinet after "spinning the parliamentary roulette". From the perspective of constitutional and institutional reasoning, the framers of the 1991 Constitution designed the system so that, in the event of an inability to form a government, responsibility for appointing and overseeing the caretaker government should rest with a figure distanced from parliamentary factions – namely, the President. However, even this arrangement does not provide an absolute guarantee of the caretaker government's complete impartiality from all branches of power.

5. The election of the President does not mark the conclusion of the constituent session of the National Assembly. Rather, it signifies the end of the presiding officer's role, who thereafter retains only the status of a Member of Parliament unless elected as President. The duties of the oldest attending MP, who chairs the first session, cease with the election of the President, who immediately assumes the powers set forth in Article 77, para 1 of the Constitution upon the adoption of the election decision by the National Assembly.

The first task of the newly elected President is to initiate the procedure for electing Vice-Presidents by adopting procedural rules for their election through a specific parliamentary decision.[16] Parliamentary practice suggests that each new legislature elects as many Vice-Presidents as there are parties and coalitions represented in the National Assembly, ensuring equal participation in its leadership. However, this is not a mandatory requirement. Each political party and coalition in the parliament is granted the opportunity to nominate a candidate for Vice-President, with voting conducted en bloc, meaning that individual nominations are not subject to separate consideration and voting.[17] This principle situation in the election of Vice-Presidents of the National Assembly does not preclude alternative approaches, such as a political party or coalition declining to nominate a Vice-President. Such a decision does not violate the principle of equal participation of political forces in the governance of the National Assembly, as it results from the voluntary choice of the respective party or coalition. The election of Vice-Presidents requires the

[16] Decision on the Adoption of Procedural Rules for the Election of Vice-Presidents of the 51-st National Assembly of December 6, 2024, promulgated SG No. 104/2024.

[17] Article 3 of the Decision on the Adoption of Procedural Rules for the Election of Vice-Presidents of the 51-st National Assembly – "The voting shall be open and conducted through the computerized voting system unless the National Assembly decides otherwise. The vote shall be cast en bloc for all candidates, except in cases where an objection has been raised against a specific candidate."

adoption of a formal decision by a simple majority – i.e., more than half of the MPs present. Once elected, the Vice-Presidents may assist the President by performing the activities assigned by him/her in accordance with Article 77, para 2 of the Constitution.

6. An important issue in the sequence of actions undertaken during the first session of the National Assembly concerns the legal framework governing these proceedings. This framework is found in the Constitution and the Rules of Organization and Procedure of the National Assembly (ROPNA). Since the application of the rules is not automatic, the newly elected National Assembly must adopt a specific decision to apply the rules of the previous parliament.[18] Established parliamentary practice dictates that a special commission is formed with the sole task of adopting a new set of Rules of Organization and Procedure or amending those of the preceding National Assembly.

7. The formation of parliamentary groups is of great importance for ensuring the functioning of the National Assembly, as they play a key role in initiating the procedure under Article 99 of the Constitution. These groups serve as the organizational structure through which political parties or coalitions in parliament carry out their activities. The details regarding their formation are set out in the Rules of Organization and Procedure of the National Assembly (ROPNA), which also specify the deadline for their establishment – by the end of the first parliamentary session. Given that the Constitution determines the agenda of the first session, the formation of parliamentary groups must take place during this session, but only after the election of the President of Parliament. This conclusion follows from the fact that the decision to establish a parliamentary group must be submitted to the President of the National Assembly. Since, until the President is elected, the session is chaired by the oldest present Member of Parliament, the formalization of parliamentary groups should occur only after the President has been chosen. Once formed, parliamentary groups are announced by the President and registered in a special parliamentary registry.

The constitutive session of the National Assembly reflects both tradition and innovation. It serves as a key indicator of the willingness of the represented political forces to reach a consensus within the national legislative body and of the subsequent political developments related to the formation of a government.

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[18] Decision on the Application of the Rules of Organization and Procedure of the National Assembly of December 6, 2024, promulgated SG No. 104/2024.

PRIDE AND PRECEDENT: ON JUDICIAL INTERPRETATION AND DIALOGUE IN EUROPEAN LAW

Matej Accetto

1. Introduction: The Various Guises of Judicial Dialogue

Judges communicate in different ways, both nationally and internationally.

They can do so directly, extra-judicially, within the framework of judges' associations or particular events that bring them together to exchange their views and best practices.[1] These types of dialogue and cooperation are important, not only for the quality of their institutions' judicial work when tackling new judicial challenges, but also for the opportunity and an enhanced sense of obligation to speak up – to each other as well as on each other's behalf – so as to help safeguard judicial integrity and independence in the face of internal or extraneous pressures.[2]

In this paper, however, I wish to focus on the dialogue conducted from the bench, in the courts' written opinions. There, too, judicial dialogue comes in various guises. At various constitutional and other high courts, such a dialogue may already take place at between the majority and the minority in any given case, or even within the majority itself, expressed in the form of dissenting and concurring separate opinions that engage with the court's dispositive decision. There is a dialogue taking place between the courts and political branches of government (for examples at the EU level, consider the interpretation by the Court of Justice of the requirements of individual and direct concern for direct access of individuals to the Court and the amendment to what is now Article 263(4) TFEU in the Treaty of Lisbon, or the decision in the *Barber* case leading to a special

[1] Such as the occasion of the celebration of the 25th anniversary of the Constitutional Court of the Republic of Albania, which also encouraged me to undertake the research that resulted in this article.

[2] See, e.g., the cautiously hopeful thoughts of the UN special rapporteur on the independence of judges and lawyers in 2006 in **L. O. Despouy,** *Perspectives on Judicial Dialogue and Cooperation: Keynote Address*, Harvard International Law Journal Online, Vol. 48 (2007), pp. 48-53, but also the current somewhat less optimistic situation in several European and other states.

protocol in the Treaty of Maastricht).[3] There is also an ongoing dialogue, the uneven power dynamic notwithstanding, between the apex and inferior courts within national legal systems. And, finally but most pertinently, there is the transnational judicial dialogue between courts from different states, or between national and international courts, a dialogue which is perhaps particularly well suited to constitutional courts and international courts dealing with the protection of human rights.[4]

Even then, one further introductory refinement is needed. Transnational constitutional dialogue, even when conducted by means of judicial opinions, may occur in different ways. Generally, courts may look beyond their borders for inspiration or comparative experiences of other jurisdictions in solving the challenges they face. This is *judicial dialogue as inspiration*, as the drawing of inspiration from each other's jurisprudence and constitutional traditions. In the European context, more specifically, national courts may – now (in the case of the Court of Justice of the European Union) or soon (in the case of the European Court of Human Rights) – request the European courts to offer their guidance on interpretation of their respective legal frameworks. This is *judicial dialogue as instruction*, as direct conversations intended to obtain authoritative guidance on the interpretation of the law to employ in a given case. Finally, again focusing on the European context, national and European courts may have different positions on how particular cases or more general issues should be addressed in light of EU law or the ECHR framework, and their differences may be expressed in their judicial opinions, addressed to their European counterparts as much as their domestic audiences. This is *judicial dialogue as disagreement*, as the confrontation of arguments designed to advance one's own interpretation of the law in the face of the counterparts' divergent positions. In this paper, I briefly sketch and analyse these three modalities of judicial dialogue.

2. Judicial Dialogue as Inspiration

The global constitutional dialogue in the shape of voluntarily drawing inspiration from "precedents" in other legal systems has been a staple diet for constitutional courts around the world for some time, albeit not always to the same extent. A well-known example is the 1995 judgment

[3] Cf. **A. Arnull,** *Judicial Dialogue in the European Union* – in: **J. Dickson and P. Eleftheriadis (eds.),** *Philosophical Foundations of European Union Law,* Oxford University Press, Oxford 2012, pp. 109-133, at 114-117.

[4] See the point made in connection with the role of the Inter-American Court of Human Rights in **P. G. Carozza and P. González,** *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights: A Reply to Jorge Contesse*, International Journal of Constitutional Law, Vol. 15(2), pp. 436-442, at p. 436.

of the South African Constitutional Court in the *Makwanyane* case,[5] examining the constitutionality of the death penalty at the time provided for by the Criminal Procedure Act. In that case, the court discussed at length the decisions by the Hungarian Constitutional Court,[6] the US Supreme Court,[7] the German Federal Constitutional Court,[8] the Canadian Supreme Court,[9] the Indian Supreme Court[10] and the Tanzanian Court of Appeal,[11] and made citation references to further jurisdictions such as Zimbabwe and Hong Kong,[12] and also dealt with the decisions by international tribunals and other bodies dealing with comparable instruments, notably the United Nations Committee on Human Rights[13] and the European Court of Human Rights.[14] The South African Constitutional Court has certainly been at the vanguard of the recent transnational constitutional dialogue as inspiration, with personal testimonials underlining its significance.[15] Similar examples can be found elsewhere. In the European context, for instance, even the more reluctant German Federal Constitutional Court has, as highlighted by Mayer,[16] on occasion conducted a thorough comparative review, in the *Iranian Embassy* case[17] referring to the practices in Belgium, Italy, Switzerland, Austria, France, Greece, Egypt, Jordan, the Netherlands, Sweden, Latin America, England, the US, the Philippines, Japan, Russia, Rumania, Poland, Bulgaria, Czechoslovakia, and Croatia.

There are no uniform rules, nor is practice homogeneous around the globe. Some jurisdictions are more reluctant to draw on the experience of others. When, around the turn of millennium, a few opinions at the US Supreme Court made relatively modest references to non-US legal contexts and sources, they gave rise to a fierce debate labelled an episode of

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[5] *S v Makwanyane and Another*, (CCT3/94) [1995] ZACC 3.

[6] *Ibid*., para. 38 and *passim*.

[7] *Ibid*., paras 40–58 and *passim*.

[8] *Ibid*., para. 59 and *passim*.

[9] *Ibid*., paras 60–62 and *passim*.

[10] *Ibid*., paras 70–78 and *passim*.

[11] *Ibid*., paras 114–115.

[12] *Ibid*., footnotes 3 and 127, with Zimbabwean Supreme Court also discussed in the opinion of Judge Didcott, para. 177.

[13] *Ibid*., paras 63–67 and *passim*.

[14] *Ibid*., paras 68–69 and *passim*.

[15] See e.g. **A. Sachs,** *The Strange Alchemy of Life and Law,* Oxford University Press, Oxford, 2011, pp. 113-124, on his personal and judicial interactions with judges in other jurisdictions.

[16] **F. C. Mayer,** *Constitutional Comparativism in Action – The Example of General Principles of EU Law and How They Are Made – A German Perspective,* International Journal of Constitutional Law, Vol. 11 (2013), pp. 1003–1020, at 1011-1012.

[17] 16 BVerfGE 27 (April 30, 1963).

the "culture wars" over the nature of the US constitutional identity and (juridical) patriotism.[18] Conversely, and perhaps not entirely unrelatedly, the US constitutional cases have recently also been referenced less in foreign jurisdictions, with other courts taking up the mantle of key players.[19] Even when comparative analysis is taken up, citation practices of different courts may betray different sensibilities – Hirschl thus notes, for example, that the Israeli Supreme Court is more open to citing sources from the authoritative jurisdictions in the West (such as the US, Canada, the UK, German and other European sources) rather than from other jurisdictions, even though some of these share some of the same ethnic and religious challenges of defining their constitutional identity.[20] In any event, a more detailed analysis of the breadth and modalities of such a "judicial dialogue as inspiration" would go beyond the scope of this contribution.[21] For our purposes, it may suffice to say that the practice of referring to foreign jurisdictions is, at least in principle, embraced by many constitutional courts around the globe and in Europe.

In EU law, a comparative outlook is practically an indispensable feature of the system of judicial review and thus also relevant to the work of the European Court of Justice. Member states' legal systems are a necessary source of inspiration in the crafting of the European legal order,[22] but also no more than an inspiration when having to reconcile the national variations into common European concepts and norms. This "drawing of inspiration" from the national constitutional traditions, as well as sources of international law, was particularly pronounced in the development of human rights in EU law as enshrined in the "unwritten" general principles of EU law, which the European Court of Justice justified precisely by means of such a comparative exercise, drawing inspiration from constitutional traditions common to the Member States.[23]

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[18] See **M. Tushnet,** *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, University of Baltimore Law Review, Vol. 35 (2006), pp. 299-312,, identifying six such cases as a "comprehensive list" of cases giving rise to the controversy. Incidentally, two of those cases dealt with the death penalty, and a further one with the death row.

[19] Cf. **R. Hirschl,** *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford University Press, Oxford, 2014, p. 21.

[20] *Ibid*., p. 23.

[21] For a recent influential contribution, see *ibid.*, with Hirschl calling for a reconsideration of the comparative constitutional studies as not only judicial or legal but also political enquiries.

[22] Cf. **R. Dehousse,** *Comparing National and EC Law: The Problem of the Level of Analysis*, American Journal of Comparative Law, Vol. 42 (1994), pp. 761-781, at 771-772.

[23] Cf. **Mayer,** op. cit., at 1005–1010.

3. Judicial Dialogue as Instruction

Of course, once adorned at the European level as general principles of EU law, many such nationally-conditioned principles then return to their domestic shores as the "higher law of the land" to guide, shape and control the development and application of national law.[24] At times, that may have resulted in the national courts changing their own practice of their own volition – thus, for instance, the success of the general principles at the European level was said to have contributed to an increase in their use in the Swedish legal system.[25] In any event, however, it also affects the national legal orders with the many obligations incumbent on the national legal orders and national courts derived from the principle of loyal cooperation, including the right or – for apex courts – the duty to refer unresolved questions on the interpretation of EU law to the European Court of Justice for a preliminary ruling to provide an answer to them.

This is the second modality of judicial dialogue – the communication between the national courts and the European courts whereby the former ask for an authoritative guidance of the latter. The notion has long been present in EU law, with the preliminary ruling procedure established by the Treaty in what is now Article 267 TFEU. A similar arrangement may soon become relevant with regard to the European Court of Human Rights (ECtHR), with Protocol No. 16 to the ECHR introducing the possibility for the highest national courts to request the Court to issue advisory opinions, adding to the existing – but practically never used[26] – possibility under Articles 47–49 of the ECHR for the Committee of Ministers to request the Court to issue an advisory opinion on the interpretation of the Convention or its protocols.

Protocol No. 16 has not yet entered into force,[27] and even when it does, it will introduce a softer version of the arrangement – the advisory opinions will be optional and non-binding. However, it has already been of practical significance. In its opinion on the compatibility of the draft

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[24] Cf. **T. Koopmans,** *General Principles of Law in European and National Systems of Law: A Comparative View*" – in: **U. Bernitz, and J. Nergelius (eds),** *General Principles of European Community Law,* Kluwer Law International, The Hague 2000, pp. 26-34, at 25.

[25] **J. Nergelius,** *General Principles of Community Law in the Future*" – in: **U. Bernitz, and J. Nergelius (eds),** *General Principles of European Community Law,* Kluwer Law International, The Hague 2000, pp. 223-233, at 226.

[26] So far, the ECtHR has only issued two such advisory opinions, in 2008 and 2010, dealing with the election of its judges.

[27] The treaty was open for signature in 2013 and requires ten ratifications to enter into force, and at the time of writing eight states have ratified it, with a further ten having signed but not yet ratified it.

agreement on EU accession to the ECHR with the EU Treaties,[28] one of the many reasons the European Court of Justice found it to be incompatible was the possibility for the advisory opinion procedure envisaged by Protocol No. 16 to be used in order to circumvent the preliminary ruling procedure provided for in Article 267 TFEU.[29]

As for the preliminary ruling procedure of the ECJ itself, it has long been established as an important cornerstone of the system of judicial review of EU law and has led to the judicial elaboration of some of the key doctrines of EU law as a supranational legal order such as the doctrines of direct effect and supremacy, as well as having come to represent the bulk of the workload of the Court of Justice in numerical terms, greatly surpassing the number of direct actions.[30] In the last years, this has become particularly apparent. In 2007, out of 573 new cases 265 (46%) were preliminary references and 221 (39%) direct actions (the rest being appeals). In 2010, out of 624 new cases 385 (nearly 62%) were preliminary references and only 136 (22%) direct actions; from 2011 to 2014, the share of preliminary references grew from 62% to 70%, while there were but a little over 70 direct actions per year which constituted no more than 12% of all new cases. In 2015 and 2016, out of a total of 702 and 680 new cases, only 48 (7%) and 35 (5%) were direct actions, while there were 436 (62%) and 470 (69%) preliminary references.

More importantly, however, the preliminary ruling procedure has introduced a complex dynamic to the relationship between the European Court of Justice and the apex national courts, as well as to the comparative outlook of national courts in general. I will not focus here on the positions of various national constitutional courts on the issue of whether they are exempted from the duty to refer under Article 267(3),[31] but rather focus on the apex courts' duty to refer as first elaborated by the Court of Justice in its *CILFIT* judgment.[32]

As is familiar, *CILFIT* set out three exceptions to the duty to refer: irrelevancy, prior ruling (*acte éclairé*) and clarity (*acte clair*). In so doing, it

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[28] Opinion 2/13, ECLI:EU:C:2014:2454.

[29] *Ibid*., paras 196-199.

[30] For a more thorough discussion of the Union's judicial architecture, see **M. Accetto,** *The Past and Possible Futures of European Union Judicature*, Czech (& Central European) Yearbook or Arbitration, Vol. I: The Relationship between Constitutional Values, Human Rights and Arbitration, 2011, pp. 3-22.

[31] For my views on this, see **M. Accetto,** *Constitutional Courts and EU Law* – in: **M. L. Amaral and S. Pedroso Bettencourt (eds),** *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos, Vol. I, Direito constitucional, direito constitucional europeu e direito europeu,* Almedina, Coimbra, 2016, pp. 767-800, at 774-778.

[32] Case 283/81, *CILFIT*, EU:C:1982:335.

may be seen as softening the supposedly rigid wording of Art. 267(3) and expressing a vote of confidence in the national courts' ability to resolve the straightforward issues of EU law.[33] As for the first exception, the text of Art. 267(3) does not as such include the caveat contained in Art. 267(2) (namely that the preliminary ruling should be necessary to enable the national court's judgment) and could be read as an unconditional obligation to refer,[34] but it was soon accepted by the national courts[35] and the Court of Justice[36] that like other courts and tribunals, apex courts also have the discretion and duty to appreciate whether the question is relevant to the dispute. That much was also appreciated by AG Capotorti in *CILFIT*,[37] even while arguing against embracing the *acte clair* doctrine.[38]

The "prior ruling" exception built on *da Costa*,[39] decided nineteen years earlier. In *da Costa*, AG Lagrange actually advocated for an *acte clair* doctrine,[40] but the Court disagreed, instead focusing (primarily) on "material identity" with a question in a prior ruling, which rendered the "unreserved requirement" to refer devoid of its purpose and thus substance. In limiting the exception to the cases that only required application rather than interpretation, the Court safeguarded uniform interpretation, but it was concerned with authority rather than clarity – Rasmussen makes a convincing case that the Court tactically employed *da Costa* not to empower national courts but to bolster the *erga omnes* authority of its own prior rulings.[41]

In contrast, *CILFIT* could be seen to be concerned with application and (non-)compliance more than interpretation. It was certainly at least partly a reaction of the Court to the practice of the national courts following *da Costa* which, notwithstanding the more limited actual text of that

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[33] Such was also the thinking of the European Commission at the time, as evidenced from its observations in the *CILFIT* case, [1982] ECR 3415, pp. 3424–3426.

[34] Cf. **H. Rasmussen,** *The European Court's Acte Clair Strategy in CILFIT – Or: Acte Clair, of Course! But What does it Mean?*, European Law Review, Vol. 40(4), 2015, pp. 475-489, at 478 (first published in E.L. Rev. 9 (1984) 242).

[35] E.g. the House of Lords in its second reference in *Garland¸v. British Rail*, [1981] 2 C.M.L.R. 542 – see **I. R. Storey,** *References to the European Court Under Article 177*, Trent Law Journal, Vol. 8 (1984), pp. 91-103, at 92.

[36] E.g. Case 53/79, *Damiani*, EU:C:1980:44, para. 5.

[37] EU:C:1982:267, para. 8.

[38] *Ibid*., paras 9-10.

[39] Joined Cases 28–30/62, *Da Costa*, EU:C:1963:6.

[40] EU:C:1963:2. Cf. **D. Edward,** *CILFIT and Foto-Frost in their Historical and Procedural Context* – in: **M. Poiares Maduro and L. Azoulai (eds),** *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty,* Hart, Oxford and Portland, 2010, pp. 173-184, at 175.

[41] **Rasmussen,** op. cit in note 33 above, at 477-482.

decision, often embraced what they took to be its expression of the *acte clair* doctrine that allowed them to avoid making preliminary references.[42] In that regard, *CILFIT* can be seen as a Trojan horse, as tightening the reins while appearing to loosen them,[43] as a symbolic expression of a horizontal relationship between the European and national courts with a hierarchical agenda.[44] Yes, the Court may have introduced the *acte clair* doctrine,[45] but then burdened it (and arguably the *acte éclairé* as well) with conditions that were impossible to satisfy: the national court should consider the question on the basis of "characteristic features of [EU] law", including "a comparison of the different language versions", appreciation of the "peculiar" EU meaning of terminology employed and interpreting every provision "in the light of the provisions of [EU] law as a whole".[46] It is easy to see this as an impossible task, likening the fate of national courts to that of Sisyphus punished for challenging the authority of the (mythological or judicial) heavens, as AG Colomer did in *Gaston Schul*.[47]

And yet, there is another twist. If national courts were happy to understand *da Costa* as vesting them with *acte clair* discretion, what would stop them from doing the same with a bolstered invitation in *CILFIT*? In that vein, the *CILFIT* condition may be seen as a requirement to conduct a proper comparative analysis – to look beyond the confines of the national legal orders – but also as a justification for the national courts that wish to express themselves authoritatively on issues of European law. After all, at least some of the *CILFIT* conditions that are absurd for national courts are also, taken literally, absurd for the Court itself (or its five-judge chambers).[48] So what is to stop the national courts from taking *CILFIT* at face value and confidently use its *acte clair* doctrine as they see fit? Who will roll the rock back down into the ravine?

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[42] Examples are noted, particularly as regards the French Conseil d'État, by AG Capotorti in *CILFIT*, op. cit. 52, para. 4, and more generally by Rasmussen, note 33 above, at 483-484.

[43] Again, this point was forcefully made by Rasmussen, note 33 above, at 487-498.

[44] Cf. **D. Sarmiento,** *CILFIT and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe* – in: **M. Poiares Maduro and L. Azoulai (eds),** *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty,* Hart, Oxford and Portland, 2010, pp. 192–200, at 195.

[45] Edward, note 39 above, p. 179, claims that in *CILFIT* the Court was not establishing an *acte clair* doctrine but merely common sense caveats.

[46] *CILFIT*, note 31 above, paras 17–20.

[47] Opinion of AG Colomer in Case C-461/03, *Gaston Schul*, EU:C:2005:415, paras 2–4.

[48] Cf. **A. L. Kjær,** *Nonsense: The CILFIT Criteria Revisited* – in: **H. Koch et al. (eds),** *Europe: The New Legal Realism,* Djøf, Copnehagen, 2010, pp. 297-316, at 304-305 and 313-314.

For some observers, this may have been the intention of the Court of Justice in its 2015 *Ferreira da Silva* judgment,[49] finding for the first time that a supreme court violated its duty under Art. 267(3) to refer a question to the Court in a case, one of many, related to the interpretation of the "transfer of a business" within the meaning of the Acquired Rights Directive.[50] Even here, however, the issue was not entirely straightforward.

The duality (or even triplicity) of *CILFIT* outlined above has been reflected in its commentary and subsequent judicial practice. On the one hand, the ruling has been critiqued for its harsh conditions it imposed on the national courts. In *Wiener*, AG Jacobs called for an "evolutionary approach" to Art. 267(3) which would not require apex courts to refer all questions of minor importance,[51] even if he otherwise did not call for changes to the *CILFIT* conditions except for the need to examine all the different language versions of EU law.[52] His position was more or less echoed by Craig in the academic commentary.[53] In *Gaston Schul*, AG Colomer went further, calling the *CILFIT* test "preposterous".[54]

On the other hand, in practice the national courts continued with their reluctance to make preliminary references, often preferring to interpret EU law by themselves.[55] This national judicial practice has showed that the *CILFIT* test may have set harsh conditions but is a toothless tiger when it comes to enforcing them, all the more so when the Court has repeatedly confirmed that it is the "sole responsibility" of the national courts to determine whether the correct application of EU law is so obvious that no reference is required.[56]

Oddly, but perhaps meaningfully, this last point was repeated by the Court in another judgment handed down on the very same day, and by the same chamber,[57] as the *Ferreira da Silva* judgment. In the second of the

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[49] Case C-160/14, *Ferreira da Silva,* ECLI:EU:C:2015:565.

[50] Council Directive 2001/23/EC (the Acquired Rights Directive), OJ 2001 L 82, p. 16, codifying Council Directive 77/187/EC, OJ 1977 L 61, p. 26, as amended by Council Directive 98/50/EC, OJ 1998 L 201, p. 88.

[51] Opinion of AG Jacobs in Case C-338/95, *Wiener*, EU:C:1997:352, paras 54–65.

[52] *Ibid*., para. 65.

[53] **P. Craig,** *The Classics of EU Law Revisited: CILFIT and Foto-Frost* – **M. Poiares Maduro and L. Azoulai (eds),** *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty,* Hart, Oxford and Portland, 2010, pp. 185.191, at 188-189.

[54] **Gaston Schul,** note 46 above, para. 52.

[55] See **Sarmiento,** op. cit. 43, at 196.

[56] Case C-340/99, *TNT Traco*, EU:C:2001:281, para. 35; Case C-495/03, *Intermodal Transports*, EU:C:2005:552, para. 37.

[57] In *Ferreira da Silva*, Judge Lenaerts acted as judge of the chamber instead of Judge Cruz Vilaça. In both cases, Judge Silva de Lapuerta was the reporting judge.

two cases, *X and van Dijk*,[58] the question posed was whether the fact that a lower national court referred a question of EU law to the Court of Justice precluded the apex court addressing the same question from finding that the *CILFIT acte clair* condition was met. The Court reiterated the power (and sole responsibility) of the apex courts to independently make that assessment and held that an opposing view of inferior courts does not by itself preclude it.[59]

So how does this restatement of the earlier deference square with the harsher stance ultimately adopted in *Ferreira da Silva*? Putting the two cases side by side, one possible explanation for the distinction is that the situation in *X and van Dijk* only concerned divergence on the issue between the apex court and its inferior courts, whereas *Ferreira da Silva* concerned a divergence among many national courts in different Member States, hence requiring more fidelity to the national courts' obligation to help ensure a coherent and uniform application of EU law.

But it is also possible to read the rulings as an intentional couplet, reflecting the attempt of the Court to walk the tightrope of *CILFIT*'s duality while driven by the same concerns that already underpinned both *da Costa* and *CILFIT* rulings before – the aim of ensuring the authority of its own case-law. Under this reading, the joint message of the two cases is the continued commitment to finding a reasonable jurisdictional balance between the Court of Justice and national courts in applying EU law, with *Ferreira da Silva* adding the recurring chorus: the determination of the Court of Justice to ensure compliance with its decisions.

4. Judicial Dialogue as Disagreement

Which brings us back to the question of how judicial dialogue should be understood in such a relationship. The demands that EU law imposes on national courts vis-à-vis their Luxembourg interlocutor threaten to shape their exchange in the spirit of a monologue, or some sort of a hapless inverted version of a Socratic dialogue, with the ECJ responding to earnest questions by the national courts with authoritative pronouncements that the national courts must follow. To critics, and presumably to a number of national courts, such a conception of judicial dialogue would belie the use of the term. After all, a dialogue implies (occasional) disagreement.

This concern is not limited to the European context. In the context of the doctrine of "conventionality control", developed by the Inter-American Court of Human Rights and requiring national authorities to set aside national law in contravention of (the Inter-American Court's interpreta-

[58] Joined cases C-72/14 and C-197/14, *X and van Dijk*, EU:C:2015:564.

[59] *Ibid*., paras 57–62.

tion of) the American Convention on Human Rights, Contesse notes the expressed commitment on the part of the Inter-American Court to respect the role of the national courts and take their views into consideration, but goes on to be critical of its actual practice as a one-way insistence on having the final word.[60]

And it is a concern which has been expressed, in one way or another, by various national courts. In the context of EU law, for instance, the overall story of the national "rebellions" against an unfettered application of the doctrine of supremacy of EU law, starring the German Federal Constitutional Court, is well known and need not be rehashed here.[61] But disagreement may also arise in connection with particular issues, and in those cases the dialogue may well be expressed in the interlocutors adopting differing views on the solution warranted by a specific type of dispute or interpretative question posed. Such a disagreement may be seen as an attempt at "strategic adjudication",[62] intended to persuade the European counterpart to change its own position (the power of the argument), or perhaps as a statement demarcating the national court's own lines of jurisdictional sovereignty (the argument of power). Either way, it challenges the image of the judicial dialogue as monologue, flowing only in the direction from the European court(s) to the national judiciary.

In recent years, EU law has seen a few strong, even if controversial and not always persuasive, expressions of such discontent. In 2012, in a case concerning the arrangement of the pension system with regard to the seat of the employer after the dissolution of Czechoslovakia, the Czech Constitutional Court declared the decision of the Court of Justice in *Landtová*[63] to be *ultra vires*.[64] That was a severe statement by a national court, never before seen in EU law – one of the commentators went as far as to compare it to a sudden sighting of a yeti[65] – and, as noted by the commentators, probably more an unfortunate consequence of a domestic tug-of-war between the Czech Constitutional Court and the Czech Supreme Administrative Court, the collateral damage of which was also the ECJ

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[60] **J. Contesse,** *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, International Journal of Constitutional Law, Vol. 15(2), 2017, pp. 414-435, at 425.

[61] See **Accetto,** note 30 above, at 778-788.

[62] To adapt the term „strategic litigation", used to denote the strategic use of the court system by those advocating for a change in the policy or interpretation of the law concerning a particular legal or societal phenomenon.

[63] Case C-399/09, *Landtová*, ECLI:EU:C:2011:415.

[64] Case Pl ÚS, 5/12, judgment of 31. 1. 2012.

[65] **R. Zbíral,** *A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires*, Common Market Law Review, Vol. 49 (2012), pp. 1475-1492, at 1475.

judgment.[66] The decision was not without its critics, with Komárek calling it an expression of unmeasured rebellion than of a desire to conduct judicial dialogue with the European Court of Justice.[67] On the other hand, while the European Court of Justice has presumably decided against any overt pronouncements on the issue, the domestic tug-of-war threatened to continue, with the Supreme Administrative Court making another preliminary reference to the Court of Justice,[68] including a (somewhat rhetorical, especially in light of the *Elchinov* case[69]) question whether it was bound by decisions of the Constitutional Court which were contrary to EU law as interpreted by the Court of Justice.[70]

More recently still, at the end of 2016 the Danish Supreme Court also expressed its own disagreement in a case involving a familiarly controversial issue of the recognition of non-discrimination on the basis of age as a general principle of EU law in employment law. Previously, in *Mangold*,[71] the Court of Justice recognized it as such, drawing inspiration from the constitutional traditions common to the Member States, in an application of this approach that critics decried as unwarranted judicial activism and led a former president of the German Federal Constitutional Court to call for the threat of national constitutional review from the second *Solange* decision to be triggered.[72] In *Dansk Industri*, the Court of Justice was asked by the Danish Supreme Court to rule on the application of that principle to disputes between private parties and the possibility for the national court to balance it against the principles of legal certainty and the protection of legitimate expectations. The ruling of the ECJ was that national courts were required to do whatever was needed to give effect to that principle; the Danish Supreme Court, however, refused to do so,

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[66] **J. Komárek,** *Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, European Constitutional Law Review, Vol. 8(2) (2012), pp. 323-337, at 323. Similarly **Zbíral,** note 64 above, at 1487-1488.

[67] *Ibid.*, pp. 334-337.

[68] Case C-253/12, *JS*.

[69] Case C-173/09, *Elchinov*, [2010] ECR I-8889, in which the Court held that inferior courts must disregard even binding decisions of superior courts if by doing so they consider they would violate EU law.

[70] The case was then removed from the record in 2013.

[71] C-144/04, *Mangold*, ECLI:EU:C:2005:709.

[72] For an English version of the article making the rounds in European journals, see **W. Herzog and L. Gerken,** *Stop the European Court of Justice*, EUobserver, 10. 9. 2008, online version available at https://euobserver.com/opinion/26714. Herzog and Gerken were critical of the claim of "common constitutional traditions", finding the principle in question expressed in only two of the (then) twenty-five Member States' constitutional orders.

holding that a consistent interpretation of Danish law was impossible and that there was no legal basis in Danish law or the Act of Accession allowing the national court to give precedence to the unwritten general principle of EU law.[73] The case was soon followed by critical commentary, one notable example describing it as a coupling of ECJ's inflexibility with the Danish Supreme Court's obstinacy resulting in their mutual disempowerment, if not the weakening of the courts' authority in general.[74]

In my view, it is too early to speculate on the lasting repercussions of such episodes on the nature of judicial dialogue in Europe, or indeed on the prevailing trends of the national courts in mounting a rebellion against the pronouncements of the European Court of Justice. After all, such an expression of discontent may also be seen as a willingness to participate in an earnest judicial dialogue and for the national apex courts to become actively involved in the European judicial multilogue, with their respective roles and voices still to be found and fine-tuned. That may also explain the recently bolstered interest of the constitutional courts in making preliminary references themselves – just by way of two further examples, one can be reminded of the first preliminary reference by the German Federal Constitutitonal Court on the Outright Monetary Transactions programme in the *Gauweiler* case[75] or by the Slovenian Constitutional Court in *Kotnik*[76] – as well as the (re)positioning of themselves vis-á-vis the Luxembourg interlocutor, such as the German follow-up decision[77] on the OMT programme.[78]

In any event, judicial dialogue, properly conducted, can perhaps never be considered a particularly short-term affair or a one-off transaction, but is already by definition always a rather lengthy, ponderous exchange. Consider the examples offered by the other European court and its national interlocutors. In the *Von Hannover* line of cases[79] spanning twenty years, the European Court of Human Rights and the German Federal Con-

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[73] Case No. 15/2014, *Dansk Industri*, judgment of 6 December 2016.

[74] **U. Šadl and S. Mair,** *Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case No. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v The Estate Left by A*, European Constitutional Law Review, Vol. 13 (2017), pp. 347-368, at 368.

[75] Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400.

[76] Case C-526/14, *Kotnik*, ECLI:EU:C:2016:570.

[77] 2 BvR 2728/13, judgment of 21 June 2016.

[78] For more on this see **M. Payandeh,** *The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture*, European Constitutional Law Review, Vol. 13 (2017), pp. 400-416.

[79] The two pertinent ECtHR decisions were handed down in *Von Hannover v. Germany (No. 1)*, Application no. 59320/00, judgment of 24 June 2004; *Von Hannover v. Germany (No. 2)*, Applications nos. 40660/08 and 60641/08, judgment

stitutional Court ultimately reconciled their positions on assessing the applicants' privacy rights in a case involving the unwanted publication of images. Another example is the dialogue between the ECtHR and the Latvian Constitutional Court on the lawfulness of different approaches to calculating old-age pensions for non-citizens of Latvia,[80] with the Latvian Constitutional Court finding such an arrangement to be constitutional in 2001,[81] the ECtHR "replying" in 2009 with a finding of a violation of the ECHR in the *Andrejeva* case,[82] the Latvian Court in turn replying in another decision two years later[83] and the ECtHR (only) now presumably preparing its new response in the *Soročinskis* case.[84]

It need not always take two decades, but such a judicial dialogue will necessarily involve several cases. The dialogue taking place between the ECtHR and the UK Supreme Court concerning reliance on hearsay evidence is an apt example. In *Al-Khawaja and Tahery*, in a unanimous chamber decision in January of 2009,[85] the ECtHR held that there was a violation of the applicants' right to a fair trial. At the end of the same year, in *Horncastle*,[86] the UK Supreme Court took exception to what it considered to be too inflexible position of the ECtHR in the earlier case, ignoring the particular features of English law. When the *Al-Khawaja and Tahery* case was reviewed by the Grand Chamber, the ECtHR, having also conducted a comparative analysis of its own, reversed its position and found that there was no violation of the applicants' Convention rights.[87] Finally, when ECtHR confirmed this position in its own judgment on the *Horncastle* case,[88] the Court's press release described it as the "[c]onclu-

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of 7 February 2012; cf. also *Von Hannover v. Germany (No. 3)*, Application no. 8772/10, judgment of 19 September 2013.

[80] See the paper on "The Significance of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Case-Law of the Constitutional Court of the Republic of Latvia" presented by the president of the Latvian Constitutional Court, Ineta Ziemele, during the visit of the court's delegation to the Slovenian Constitutional Court in October 2017, available via shortened URL at https://goo.gl/2QMMbU.

[81] No. 2001-02-0106, judgment of 26 June 2001.

[82] *Andrejeva v. Latvia*, Application no. 55707/00, judgment of 18 February 2009.

[83] No. 2010-20-0106, judgment of 17 February 2011.

[84] *Soročinskis v. Latvia*, Application no. 21698/08.

[85] *Al-Khawaja and Tahery v. UK*, Application nos. 26766/05 and 22228/06, judgment of 20 January 2009.

[86] *R. v. Horncastle and others*, [2009] UKSC 14.

[87] *Al-Khawaja and Tahery v. UK*, Application nos. 26766/05 and 22228/06, GC judgment of 15 December 2011.

[88] *Horncastle and others v. UK*, Application no. 4184/10, judgment of 16 December 2014.

sion of judicial dialogue between ECHR and UK courts on use of hearsay evidence".[89]

5. Conclusion

The paper attempted to identify the three modalities of the transnational judicial dialogue that encourage, compel or enable national courts to look beyond the confines of their jurisdiction in solving the cases and controversies before them: judicial dialogue as inspiration, judicial dialogue as instruction and judicial dialogue as disagreement. Some further questions remain, such as to what extent the transnational judicial dialogue of national courts is driven by their internal objectives or parochial interests, and to what extent by the more cosmopolitan desire to play a role in the common global or European judicial enterprise. The European context, (ever more) closely intertwining national orders in a common European framework, either in the area of fundamental rights under the European Convention on Human Rights or more broadly within the scope of application of European Union law, certainly fosters both dimensions and directions of this dialogue: national legal orders are inevitably conditioned and governed by the common legal framework, but in turn also help shape its development and application.

In this vein, the role of the constitutional courts cannot be overlooked, for they are ideally placed to help resolve the tensions between the national constitutional orders and the common transnational legal framework and standards, to find the appropriate balance between the national "bedrooms of the established habits of mind"[90] and the common living space. With both of these spaces undergoing constant transformation, the delicate balance between them must also be continually reviewed and refined. Transnational judicial dialogue is an indispensable feature of this endeavour.

[89] Press release ECHR 376 (2014) of 16. 12. 2014.

[90] To borrow a phrase from another discipline in **R. Kegan and L. Laskow Lahey,** *How the Way We Talk Can Change the Way We Work,* Josey-Bass, San Francisco, 2001, at 70.