



COURT OF JUSTICE
OF THE EUROPEAN UNION

HOGHE RAAD DER NEDERLANDEN



Constitutional Court
of Belgium



Grand-Duché de Luxembourg
Cour constitutionnelle

EUited in diversity The Rule of Law and Constitutional Diversity

International Conference - The Hague, the Netherlands
31 August - 1 September 2023

CONFERENCE PROCEEDINGS



**EUnited in Diversity II:
The Rule of Law and Constitutional Diversity**
International Conference

The Hague, the Netherlands
31 August and 1 September 2023

Conference proceedings



**UniE dans la diversité II :
État de droit et diversité constitutionnelle**
Conférence internationale

La Haye, Pays-Bas
31 août et 1 septembre 2023

Actes de la conférence



COURT OF JUSTICE
OF THE EUROPEAN UNION



Constitutional Court
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Grand-Duché de Luxembourg
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PROGRAMME

Thursday, 31 August

09:00 **Opening of the Conference**

09:05 Introductory remarks

Mr Didier Reynders, Commissioner for Justice, European Commission

Keynote speeches

09:20 • Mr Koen Lenaerts, President of the Court of Justice of the European Union

09:35 • Ms Síoífra O’Leary, President of the European Court of Human Rights

09:50 • Ms Dineke de Groot, President of the Supreme Court of the Netherlands

10:05 – 12:05 **Independence of the judiciary as a *conditio sine qua non* for protecting democracy, mutual trust and the rule of law**

1st panel Speakers

- Mr Pierre Nihoul, President of the Belgian Constitutional Court (French linguistic group)
- Ms Sacha Prechal, President of Chamber at the Court of Justice of the European Union
- Ms Katerina Šimáčková, Judge at the European Court of Human Rights
- Mr Stephan Harbarth, President of the the Federal Constitutional Court of Germany
- Moderator: Mr Christoph Grabenwarter, President of the Austrian Constitutional Court

Time for plenary discussion

12:30 Lunch

14:30 – 16:30 **Rule of law – Primacy of EU law and equality before the law of EU citizens**

2nd panel Speakers

- Mr Lars Bay Larsen, Vice-president of the Court of Justice of the European Union
- Mr Luc Lavrysen, President of the Belgian Constitutional Court (Dutch linguistic group)
- Mr Aldis Laviņš, President of the Latvian Constitutional Court
- Ms Elena-Simina Tănăsescu, Judge at the Romanian Constitutional Court
- Moderator: Mr Tamás Sulyok, President of the Hungarian Constitutional Court

Time for plenary discussion

18:30 Dinner

Friday, 1 September

10:00 – 12:00 **Diversity and uniformity in EU law**

3rd panel

Speakers

- Mr François Biltgen, Judge at the Court of Justice of the European Union
- Ms Pavlina Panova, President of the Bulgarian Constitutional Court
- Mr François Seners, Member of the French Constitutional Council
- Mr Francis Delaporte, Vice-President of the Constitutional Court of Luxembourg
- Moderator: Mr Anders Eka, President of the Swedish Supreme Court

Time for plenary discussion

12:15

Lunch

14:00 – 15:45 **Legal protection of current and future generations**

4th panel

Speakers

- Ms Juliane Kokott, Advocate General at the Court of Justice of the European Union
- Mr Frédéric Krenc, Judge at the European Court of Human Rights
- Ms Carla Sieburgh, Judge at the Dutch Supreme Court
- Mr Matej Accetto, President of the Slovenian Constitutional Court
- Moderator: Mr Kari Kuusiniemi, President of the Finnish Supreme Administrative Court

Time for plenary discussion

15:45

Closing of the conference

Concluding remarks

- Mr Koen Lenaerts, President of the Court of Justice of the European Union
- Ms Dineke de Groot, President of the Supreme Court of the Netherlands

16:30

Farewell cocktail





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Mr Didier Reynders

Commissioner for Justice, European Commission

Keynote Speech by Mr Didier Reynders, Commissioner for Justice, European Commission

Dear President de Groot, dear President Lenaerts, dear President O’Leary, dear Presidents and judges of the Constitutional jurisdictions, dear participants, Ladies and Gentlemen, I am honoured to be here with you in The Hague at this second edition of the ‘EUnited in Diversity’ Conference. I very much welcome the initiative of the Supreme Court of the Netherlands, the Constitutional Court of Belgium, the Constitutional Court of Luxembourg and of the Court of Justice of the European Union in uniting efforts to ensure a follow-up to the important reflections you started in 2021, in Riga, and to give continuity to the dialogue you initiated then.¹ I am also pleased that the Commission could be helpful in supporting this conference. During the next two days, you will have the opportunity to exchange on subjects ranging from the independence of the judiciary, the primacy of EU law, the diversity and uniformity in EU law, and the legal protection of current and future generations. I am sure that these discussions, in such eminent company, will further foster a common rule of law culture in the European Union. This is the best guarantee for the respect of our common values, of which you, as judges, are also the guarantors.

Ladies and Gentlemen, the topics you have chosen for your discussions during this conference are all the more important when we consider the developments in recent years, which remind us that the founding values of the Union are under strain. We have seen that respect for the rule of law cannot always be taken for granted anymore. We have also witnessed an accumulation of events and developments, which have underlined the importance of protecting the rule of law and, consequently, the essential role of Constitutional jurisdictions in this respect. In fact, when I started my mandate as Commissioner for Justice, less than four years ago, it seemed unthinkable that during this Commission’s term we would be faced with a pandemic which would lead many Member States to declare a state of emergency; or that subsequently we would have to witness the return of a war of aggression to the European continent. At the same time, we are starting to see the impact of climate change around us and the challenges this

1 | Conference proceedings, ‘EUnited in diversity: between common constitutional traditions and national identities’, *EUnited in Diversity*, Vol. 1, Court of Justice of the European Union – Publications and Electronic Media Unit, Luxembourg, 2021, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf.

is bringing for current and future generations. These crises have made clear the importance of a well-functioning system of institutional checks and balances, where the power exercised by one state power is subject to the scrutiny of others.

For example, in the context of the COVID-19 pandemic, constitutional jurisdictions were particularly instrumental in ensuring the functioning of the system of checks and balances. The scrutiny of the legality, proportionality, and necessity of emergency measures by the constitutional jurisdictions was an essential counterbalance to the exceptional powers granted to Governments. As regards the increasingly-recurring extreme climate conditions that have been affecting Europe lately, such as fires, floods, and heatwaves that have already claimed lives of Europeans this summer, these remind us of the need to tackle the challenges brought by climate change. Also in this area, constitutional jurisdictions will have an important role to play in ensuring the effective protection of fundamental rights in the context of environmental protection and governance. This will be instrumental in mitigating the challenges that climate change may pose to future generations.

Another serious crisis of our time is the Russian war of aggression against Ukraine. It underlines, daily, the importance of safeguarding democracy, human rights, and the rule of law. This war is a tragic reminder of the consequences that the absence of rule of law in a country can have, including for the international community as a whole. As we work together to help Ukraine defend its sovereignty and integrity, we can only be credible if we are also able to protect the rule of law within the European Union. As President von der Leyen recently said, ‘peace through the rule of law is also the story of a united Europe’.² Together with the rule of law, respect for human dignity, freedom, democracy, equality, and human rights are the values every Member State has agreed to uphold when joining the European Union. These values are, as President Lenaerts recently put it, the ‘moral compass that helps Europeans navigate uncharted waters’.³ Despite this commitment, we cannot ignore the dangers that threaten the rule of law within our Union, and that may threaten the very foundations of our democratic societies.

2 | Von der Leyen, U., *Speech by President von der Leyen at award ceremony for the ‘World Peace and Liberty Award’ to the European Commission*, 21 July 2023.

3 | Lenaerts, K., “On Values and Structures: The Rule of Law and the Court of Justice of the European Union” in Södersten, A. and Hercock, E., (eds.) *The Rule of Law in the EU: Crisis and Solutions*, Swedish Institute for European Policy Studies, Stockholm, June 2023.

Quoting President O’Leary, ‘rule of law backsliding, attacks on judicial independence, gender violence and inequality, the erosion of effective political democracy, pluralism and tolerance are not ills befalling other States’.⁴ Europe is not immune to them. We should therefore be attentive to the tell-tale signs of such attempts to erode the very foundations of our democracies.

It is therefore clear that, in times of crises, constant proactive action is needed to promote and safeguard our common values. I therefore welcome that the topics of this conference underscore the importance of reflecting about the rule of law in a forward-looking manner. The Commission consistently aims to facilitate and encourage discussions about our shared values, EU law, and Constitutional traditions, both at EU- and at national-level. Existing structures for these discussions have been created and have established a certain rhythm and a continuity to these discussions, and each of these structures fulfils a specific role. In the General Affairs Council, Ministers are conducting the Rule of Law Dialogue at regular intervals, centred around the Commission’s annual Rule of Law Report. This allows for an in-depth, structured exchange on the rule of law in the EU and its 27 Member States. In March this year, we reached an important milestone: the Council held the sixth country-specific exchange of views, closing the first full cycle of country-specific discussions on the rule of law situation in the 27 EU Member States. At the same time, ministers started a new cycle in the Council, thus ensuring the continuity of the dialogue. Important debates on the rule of law also regularly take place in the European Parliament. Moreover, the Presidents of the Supreme Courts and the Supreme Administrative Courts in the EU are holding regular discussions on rule of law related topics in their European networks. The Commission is readily supporting all these exchanges. I am aware that a dialogue is also taking place between constitutional jurisdictions, in different settings and formats.

4| O’Leary, S., *Speech at the Fourth Summit of the Heads of State and Government of the Council of Europe*, Reykjavik, 16-17 May 2023, available at https://www.echr.coe.int/documents/d/echr/Speech_20230517_Oleary_4_Summit_ENG.

With its second edition, today's conference is also becoming an established forum of dialogue. It can represent an important contribution to promoting constitutional justice as an essential element for the protection of democracy, fundamental rights and the rule of law. Of course, let me also highlight the importance of the more formal dialogues among courts, such as the preliminary ruling procedure, which is the mechanism for cooperation between national courts and tribunals and the Court of Justice of the European Union, as established by Article 267 TFEU, or the dialogue between the European Court of Human Rights and national courts. These fulfil key roles in the system of cooperation among courts in Europe.

Ladies and Gentlemen, promoting and supporting the establishment of structures for dialogue on the rule of law is a priority for me. As Commissioner for Justice, I am committed to further supporting the development of dialogue between the Constitutional Courts of the EU Member States, the Court of Justice of the European Union and the European Court of Human Rights. In order to continue the discussion on how constitutional jurisdictions can contribute to the protection of the rule of law within the EU, I will be hosting in Brussels, for the second time, a high-level conference bringing together Presidents, Vice-Presidents and Judges of the highest national courts exercising constitutional jurisdiction in November. The objective of the conference will be to discuss how constitutional jurisdictions can contribute to the protection of the rule of law, as enshrined in Article 2 TEU, and to further explore opportunities for dialogue among these key interlocutors.

Ladies and Gentlemen, as I reach the end of my intervention, I would like to recall the essential role your distinguished Courts play in making the European project a reality, true to its founding values, and firmly anchored in the rule of law. I am convinced that the discussions that will take place during this conference on judgments about values, EU law, and national constitutional law will be profound and inspiring, and I wish you a very fruitful discussion.

Thank you for your attention.





Mr Koen Lenaerts

President of the Court of Justice
of the European Union

Keynote Speech by Mr Koen Lenaerts, President of the Court of Justice of the European Union

On Common European Values

Two years ago, at the initiative of my colleague and friend, Ineta Ziemele, the first edition of the 'EUnited in Diversity' conference series took place in Riga.¹ The idea was to provide a forum for international discussion where national constitutional (or supreme) courts and the Court of Justice of the European Union would examine common challenges and reflect upon the best ways to address them. That conference was, by all means, a great success, since we learned a great deal about each other.

Today, I would like to thank Presidents de Groot, Nihoul, Lavrysen, Linden and Delaporte for co-organising the second edition of this series of conferences in The Hague, where we will once again examine questions that concern all of us, and benefit from the contribution of the European Court of Human Rights ('the ECtHR'). The four topics chosen by the organisers have, as a common theme, the importance of values in the European legal space, and the need to stress those values.

1 | Conference proceedings, 'EUnited in Diversity: between common constitutional traditions and national identities', *EUnited in Diversity*, Vol. 1, Luxembourg, Court of Justice of the European Union – Publications and Electronic Media Unit, 2021, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf.

Values have come to the forefront of the recent case-law of the Court of Justice of the European Union, and are becoming the driving force behind its legal discourse.² That does not mean, however, that liberal values were foreign to the initial stages of the European integration process. After suffering under totalitarian regimes and overcoming the atrocities of war, the founding fathers of the EU firmly believed that European democracies should come together and bring liberty and prosperity to their citizens, by setting common objectives and committing themselves to respecting mutually-agreed-upon rules and principles.

The very essence of the internal market is grounded in free movement, which requires the effective judicial protection of economic freedoms against protectionist measures.³ Since ‘free movers’ do not, in principle, enjoy political representation in the host Member State, upholding their rights may require access to a court of law that must be able to provide effective remedies. Where those rights enter into conflict with the views of the political majority of the day, respect for the rule of law commands that majority to comply with the judgments of the courts. National courts have thus contributed to the dismantling of protectionist laws, by enforcing either the Treaty provisions on free movement or secondary EU law giving concrete expression to those provisions. The same applies in other areas of law where the EU has conferred rights on individuals. EU anti-discrimination law and EU environmental law are key examples of national courts having contributed to delivering justice. Without the EU’s and the Member States’ ongoing commitment to respecting the rule of law, democracy, and fundamental rights, the internal market would never have been established.

What is more, the seminal judgment of the Court of Justice of the European Union in *Van Gend en Loos* already contained the seeds of individual liberty and respect for the rule of law, since its rationale rests on conferring rights on individuals that national courts must uphold.⁴ The EU’s *acquis* is imbued with those liberal values.

2| Koncewicz, T., “Values”, in Garben, S. and Gormley, L. (eds.), *Oxford Encyclopedia of EU Law*, Oxford University Press, Oxford, 2023.

3| Lenaerts, K., “New Horizons for the Rule of Law within the EU”, *German Law Journal*, Vol. 21, 2020, p. 29.

4| Judgment of 5 February 1963, *Van Gend en Loos*, C-26/62, [EU:C:1963:1](#).

So, what has changed now? Why is it that in the 21st century the Court of Justice of the European Union – which is now seventy years old – must ‘go back to basics’ and defend the very values on which it is founded? In my view, this is because the political climate in which we live has changed, and not for the best, I am afraid. Authoritarian movements are on the rise worldwide. In Europe a few years ago, undercutting the authority of national courts was seen as a red line that no democratic government of a Member State would dare to cross. As the case-law of the Court of Justice of the European Union and that of the ECtHR show, that is unfortunately no longer true. Respecting the independence of the judiciary, protecting minorities, granting international protection to those fleeing persecution and, above all, accepting that all men and women are created equal, are fiercely contested in some quarters.

Faced with those challenges, the EU – which is, first and foremost, a ‘Union of values’ – ‘must be able to defend those values, within the limits of its powers as laid down by the Treaties’.⁵ As the Court of Justice of the European Union held in the *Conditionality Judgments*, those values form part of the very identity of the EU as a common legal order.⁶ Questioning those values amounts to annihilating the European integration project as a whole.

Take the principle of judicial independence, for example. Without independent national courts, the preliminary reference mechanism would cease to operate, national judiciaries would no longer trust each other, and the judicial protection of EU rights would simply collapse.

5 | Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraph 127; and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, [EU:C:2022:98](#), paragraph 145.

6 | Ibid. See, in this regard, Lenaerts, K. and Gutiérrez-Fons, J.A., “Epilogue - High Hopes: Autonomy and the Identity of the EU”, *European Papers*, 2023, p. 1495.

Similarly, it is difficult to talk about the EU as a ‘*demoicracy*’ – a term defined as ‘a Union of peoples, understood both as States and as citizens, who govern together but not as one’⁷ – without upholding the rights to freedom of peaceful assembly, to freedom of association, and to freedom of expression, which are vital to ensure vibrant national democracies and to connect those democracies at the transnational and European levels.

Moreover, the values on which the EU is founded form a package. They are interdependent, given: that fundamental rights are little more than empty promises where there is no democracy and no rule of law; that it is impossible for a democracy to work properly without respect for the rule of law and fundamental rights; and that the rule of law is devoid of substance without democracy and fundamental rights. That is the reason why the Court of Justice of the European Union has stressed the principles of value alignment and of no regression in value protection.

By ‘value alignment’, I refer to the fact that a candidate State for EU membership must align its own constitution and national identity with the values on which the EU is founded. In the light of Article 49 TEU, which gives concrete expression to the Copenhagen criteria, compliance with those values is a *conditio sine qua non* for accession.⁸

The principle of no regression, as put forward by the Court of Justice of the European Union in the *Repubblika* case, applies once EU membership is acquired. After accession, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is ‘no turning back the clock’ when it comes to respecting the values contained in Article 2 TEU. Accession is the starting point in value protection – not the finish line. A Member State can always improve its own level of value protection. However, EU law precludes such a Member State from drifting towards authoritarianism or from falling into democratic backsliding. ‘Compliance with those values’, the Court of Justice of the European Union has held, ‘cannot be reduced to an obligation which

7 | Nicolaïdis, K., “The Idea of European Democracy” in Dickson, J. and Eleftheriadis, P. (eds.) *The Philosophical Foundations of European Union Law*, Oxford University Press, 2010, p. 247. See also Nicolaïdis, K., “The New Constitution as European ‘Demoi-cracy’?” *Critical Review of International Social and Political Philosophy*, Vol. 7, No 1, 2004, p. 76.

8 | Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraph 61. See also judgment of 5 June 2023, *Commission v Poland* (Independence and private life of judges), C-204/21, [EU:C:2023:442](#), paragraph 64, and case-law cited.

a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession'. The Member States must respect those values 'at all times'.⁹

The protection of those values does not, however, rule out national diversity.¹⁰ As interpreted by the Court of Justice of the European Union, that protection does not impose 'a particular constitutional model' on the Member States,¹¹ but limits itself to providing for a reference framework within which Member States and their citizens may make the constitutional choices that best fit their culture and tradition. As the judgment of the Court of Justice of the European Union in *Lin* shows,¹² that reference framework seeks therefore to guarantee the primacy, unity and effectiveness of EU law, whilst allowing room for national diversity in constitutional design and practice.¹³

At this stage, I would like to stress the fact that the Court of Justice of the European Union is not alone – and should not be alone – in upholding common European values. National courts and, in particular, national constitutional courts, as well as the ECtHR, play a vital role in giving content to those values. Those values are not the result of a top-down approach, but follow a bottom-up dynamic insofar as they draw from the constitutional traditions common to the Member States. The case-law of national constitutional courts, read in the light of comparative law, is of paramount importance for identifying the content of those values.

9| Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraphs 126 and 134; and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, [EU:C:2022:98](#), paragraphs 144 and 266.

10| Safjan, M., "Op-Ed: Unity, diversity and the language of EU law", *EU Law Live*, available at <https://eulawlive.com/op-ed-unity-diversity-and-the-language-of-eu-law-by-marek-safjan/>.

11| Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, [EU:C:2021:1034](#), paragraph 239, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, [EU:C:2022:99](#), paragraph 43.

12| Judgment of 24 July 2023, *Lin*, C-107/23 PPU, [EU:C:2023:606](#), paragraphs 110 and 123.

13| Lenaerts, K., "On Checks and Balances: the Rule of Law within the EU" *Columbia Journal of European Law*, Vol. 29, 2023, p. 33.

The same applies to the case-law of the ECtHR. Both the Court of Justice of the European Union and the ECtHR have built synergies that seek to reinforce the coherence and development of their respective case-law. It suffices to look at the judgments of both courts that relate to data protection,¹⁴ judicial independence,¹⁵ and the rights of minorities such as those of the LGBTQ+ community.¹⁶

The fact that the Court of Justice of the European Union draws on the constitutional traditions common to the Member States and on the case law of the ECtHR is a two-way street. Constitutional courts and the ECtHR can also benefit from the EU's defence of liberal values.

First, since the EU legal order has internalised those traditions and the case-law of the ECtHR, they may benefit from the normative force and the system of remedies of EU law. The twin principles of primacy and direct effect would operate in order to set aside national measures at odds with those traditions and that case-law.

Second, experience shows that democratic backsliding begins by capturing the constitutional and supreme courts. This appears to be the roadmap for undermining the rule of law, democracy, and fundamental rights, not only in Europe but worldwide. In that regard, the Court of Justice of the European Union has held that EU law protects the independence of national constitutional courts. In *Euro Box* and *RS*, it held – and I quote – that

'[EU law does] not preclude national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts, provided that national law guarantees the independence of that constitutional court from, in particular, the legislature and the executive, as is required by [that law]'.¹⁷

14| See, for example, judgment of 8 December 2022, *Google (De-referencing of allegedly false information)*, C-460/20, [EU:C:2022:962](#), paragraph 63 (referring to judgment of the European Court of Human Rights of 6 October 2022, *Khural and Zeynalov v Azerbaijan*, Application No. 55069/11 [CE:ECHR:2022:1006JUD005506911](#), paragraph 41 and the case-law cited).

15| See, for example, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 128 (referring to judgment of the European Court of Human Rights of 22 July 2021, *Reczkowicz v Poland*, Application No. 43447/19 [CE:ECHR:2021:0722JUD004344719](#)).

16| See, for example, judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, [EU:C:2021:1008](#), paragraph 61 (referring to judgment of the European Court of Human Rights of 12 July 2001, *K. and T. v Finland*, 'Finland, Application No. 55069/11, [CE:ECHR:2001:0712JUD002570294](#), paragraphs 150 and 151).

17| *Ibid.*

‘However’, the Court of Justice of the European Union added, ‘if national law does not guarantee such independence, [EU law precludes] such national rules or such a national practice, since such a constitutional court is not in a position to ensure the effective judicial protection [of EU rights]’.¹⁸ Coupled with the principle of no regression, this would mean that EU law opposes constitutional reforms that weaken the independence of national constitutional courts.

This shows that EU law, and in particular the principles of primacy and direct effect, provides a line of defence against threats to national constitutional courts. In order for that line of defence to operate properly and for constitutional courts to be protected by EU law, it seems to me that national constitutional courts must trust the Court of Justice of the European Union and abandon doctrines that entail a unilateral breakaway from EU law obligations. Those doctrines may open a window of opportunity for authoritarian tendencies and democratic backsliding that may, sooner or later, weaken the independence of the constitutional court concerned, or have a ripple effect across other Member States.

Dear Commissioner, dear Presidents, fellow colleagues: at a moment in time where war is at the EU’s borders and authoritarian tendencies are on the rise worldwide, we must stand together for the values for which the founding fathers of the EU fought so hard, so that future generations may benefit from the freedoms that we currently enjoy. Unity is therefore vital for the future of Europe. Paraphrasing the famous words of Abraham Lincoln,¹⁹ ‘a Europe divided against itself cannot stand’. That is why we must continue strengthening and fostering the bonds of friendship and mutual respect that bring us together today.

Thank you very much.

18| Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, [EU:C:2021:1034](#), paragraph 230, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, [EU:C:2022:99](#), paragraph 44.

19| A. Lincoln, “The ‘House Divided’ Speech”, Springfield, Illinois, June 16, 1858, in *Lincoln Speeches*, Penguin Civic Classics, 2012, p. 56.



Ms Síofra O'Leary

President of the European Court of Human Rights

Keynote Speech by Ms Síofra O’Leary, President of the European Court of Human Rights

The Rule of Law and Constitutional Diversity: Perspectives from the European Court of Human Rights

1. Introduction

In January 2022, the Strasbourg Grand Chamber delivered a decision on admissibility in the inter-State case of *Ukraine and the Netherlands v Russia*.¹ Hearings will follow in the coming months in this and other interstate cases relating to the invasion, dating back to 2014 all the way up to 2022.² I mention these cases at the outset because they remind us of the grave context in which the EUrined in Diversity II conference was held to discuss the need for unity and common purpose in defence of human rights, the rule of law and effective, pluralist, democracy as we have known it to date.

The events of the past year – which have led to the mass displacement of Ukraine’s people, reconfigured Europe’s legal and political borders, and altered dramatically its security architecture – have demonstrated that an EU-centric focus is insufficient to tackle the many and varied threats confronting the three pillars which underpin both European organisations and which have their roots in your national constitutions. Given the challenges facing the EU and Europe writ large, of which the Council of Europe remains an enduring and effective symbol, it strikes

1 | Judgment of the European Court of Human Rights (ECtHR) of 30 November 2022, *Ukraine and the Netherlands v Russia*, Application Nos. 8019/16, 43800/14 and 28525/20, [CE:ECHR:2022:1130DEC000801916](#). The case concerns events in Eastern Ukraine since 2014 and the downing of Malaysia airlines flight MH17 the same year with the loss of all 298 passengers aboard.

2 | See the applications cited above to which has been added *Ukraine v Russia (X)*, Application no. 11055/22, introduced after the invasion which commenced on 24 February 2022, in which 26 Member States, 23 of which are EU Member States, have been granted leave to intervene, and which will be heard early in 2024; and *Ukraine v Russia (re Crimea)*, Application nos. 20958/14 and 38334/18, which will be heard on 13th December 2023.

me as fitting to rewind to 1949 and remind ourselves of the Council's Statute. In it, the ten founding States, nine of which would become EU Member States, reaffirmed in the Preamble:

'their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.³

The Statute required Council of Europe members, then and now, to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, on pain, in cases of serious violations, of expulsion.⁴ One of the principal means for achieving greater unity and safeguarding the signatory States' common heritage was and is the European Convention on Human Rights and its innovative mechanism for the collective enforcement of individual rights.⁵

However farsighted the founding fathers of both the Council of Europe and the European Convention on Human Rights may have been, they are unlikely to have realised that they were setting down what was, in essence, a first reference in a European Treaty to common constitutional traditions. They pooled Europe's common values as a basis for the development of extraordinary levels of political and economic integration on the one hand and the convergence of legally binding minimum standards in order to safeguard human rights, democracy and the rule of law on the other. Those common constitutional traditions would go on to influence the interpretation and development of the European Convention on Human Rights as a living instrument for over seven decades, fill important gaps at crucial points in time in the protection

3| See the third recital of the Statute of the Council of Europe, European Treaty Series – Nos 1/6/7/8/11, (5.05.1949, ETS 1), London (emphasis added).

4| See Articles 1 (the aim being to achieve a greater unity between members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress) and 3 of the Statute of the Council of Europe. See also Article 8 on suspension and cessation of rights and membership for serious violations of Article 3.

5| See the European Convention for the Protection of Human Rights in whose preamble reference is also made to Europe's 'common heritage of political traditions, ideals, freedom and the rule of law'.

of fundamental rights under the European Economic Community (EEC) Treaty,⁶ and infiltrate the formulation and spirit of different provisions of the TEU and the Charter of Fundamental Rights of the EU – not least Articles 2 and 6(3) of the former and Articles 52(3) and (4) and 53 of the latter.

Our multi-level system for the protection of human rights in Europe is a living and changing organism. However, the common values which lie at its core are and have always been a product of our common European heritage and not a top-down imposition from Strasbourg, Brussels, or Luxembourg.

This is perfectly illustrated in the inter-State decision in *Ukraine and the Netherlands v Russia*, in which the Grand Chamber emphasised that:

‘the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but [...] “to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law” [...]’.⁷

6 | Treaty establishing the European Economic Community, Rome (25.03.1957, 4300). See variously the gaps identified in Decision of the Italian Constitutional Court of 27 December 1973, 183/1973, [ECLI:IT:COST:1973:183](#), paragraph 255, and Judgment of the German Federal Constitutional Court of 29 May 1974, 2 BvL 52/71, paragraph 271 et seq.; and the responses of the Court of Justice of the then-EEC in Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, [EU:C:1970:114](#); Judgment of 14 May 1974, *Nold*, C-4/73, [EU:C:1974:51](#); Judgment of 28 October 1975, *Rutili*, C-36/75, [EU:C:1975:137](#); and Judgment of 13 December 1979, *Hauer*, C-44/79, [EU:C:1979:290](#).

7 | Judgment of the ECtHR of 30 November 2022, *Ukraine and the Netherlands v Russia*, Application Nos. 8019/16, 43800/14, and 28525/20, [CE:ECHR:2022:1130DEC000801916](#), paragraph 385, in which the Court went on to explain the essential nature of interstate cases such as those currently pending: ‘It follows that when a High Contracting Party or Parties refer an alleged breach of the Convention to the Court under Article 33 of the Convention, they are not to be regarded as exercising a right of action for the purpose of enforcing their own rights, but rather as bringing before the Court “an alleged violation of the public order of Europe” [...]’.

This article will touch on three themes: firstly, how the European Court of Human Rights ('the ECtHR') accommodates diversity, while achieving convergence, in a European legal space embracing 46 heterogeneous States. Secondly, I will revisit the kinetic mobile structure which the former President of the *Bundesverfassungsgericht* used almost ten years ago to characterise the interaction between the Strasbourg Court and its national constitutional counterparts, as well as the Court of Justice of the European Union.⁸ Lastly, I will point to some factors which I think merit further exploration given how they will or might influence our interaction in the coming years.

2. Accommodation of diversity

At the Fourth Summit of the Heads of State and Government of the Council of Europe earlier this year, the latter reaffirmed their:

'deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent, alongside our domestic democratic and judicial systems'.⁹

This political expression of the legal principle of shared responsibility, on which the European Convention on Human Rights system is based,¹⁰ goes some way to explaining why and how diversity between Council of Europe Member State systems is accommodated, while common minimum standards are established, developed and safeguarded. The protection of human rights by the Strasbourg Court and the uniformity it entails is balanced with respect to national (constitutional) identities and the diversity which the latter may entail by the principle of

8| See Voßkuhle, A. "Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts" in ECtHR, *Dialogue between Judges 2014*, "Implementation of the judgments of the European Court of Human Rights: A shared judicial responsibility?", Strasbourg, 2014, pp. 36-40.

9| See Reykjavik Declaration, *United around our Values*, (4th Summit of Heads of State and Government of the Council of Europe, 16-17 May 2023), available at <https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1>.

10| See judgment of the ECtHR of 7 December 1976, *Handyside v the United Kingdom*, Application No. 5493/72, [CE:ECHR:1976:1207JUD000549372](https://www.echr.coe.int/ViewDoc.aspx?i=001-10101-1976000549372), paragraph 48: 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights' and "the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines".

subsidiarity, in particular the requirement to exhaust effective domestic remedies, as well as by the doctrine of the margin of appreciation.¹¹

As regards exhaustion, when examining a complaint, the Court of Justice of the European Union should have the benefit of the examination by national courts, to the highest instance required under the domestic system, of the substance of the complaint later pleaded in Strasbourg. This is particularly important in cases in which a complex and delicate balance has to be struck between competing interests.¹² In the same vein, where the European Convention on Human Rights is demonstrated to be properly embedded in the domestic system and the obligations thereunder have been duly assessed in a given case by national judges, the Court's role is not to substitute the assessment of the latter, unless it has been shown that there are strong reasons for doing so.¹³ Subsidiarity, now incorporated in the preamble of the European Convention on Human Rights following the ratification of Protocol No. 15, 'does not provide for the primacy of national safeguards over European guarantees: on the contrary, it ensures their complementarity and interweaves them'.¹⁴

11| See the extensive examination of subsidiarity and the margin of appreciation at the ECtHR judicial seminar on the occasion of the opening of the 2015 judicial year – ECtHR, *Dialogue between Judges 2014*, "Subsidiarity: a two-sided coin?", Strasbourg, 2015.

12| See, for example, the judgment of the ECtHR of 13 September 2018, *Big Brother Watch and Others v the United Kingdom*, Application Nos. 58170/13, 62322/14 and 24960/15, [CE:ECHR:2018:0913JUD00581701](#), paragraph 245 and the authorities cited therein: '[...] it is particularly important that the domestic courts are first given the opportunity to strike the "complex and delicate" balance between the competing interests at stake. Those courts are in principle better placed than [the ECtHR] to make such an assessment and, as a consequence, their conclusions will be central to its own consideration of the issue'.

13| See, for example, in the immigration context and the right to family reunification derived from Article 8 of the Convention, judgment of the ECtHR of 14 September 2017, *Ndidi v the United Kingdom*, Application No. 41215/14, [CE:ECHR:2017:0914JUD004121514](#), paragraph 76: 'The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so.'

14| See further Sauvé, J. M. in ECtHR, *Dialogue between Judges 2014*, "Subsidiarity: a two-sided coin?", Strasbourg, 2015, p. 25.

As regards States' margin of appreciation, it contributes to striking a balance between common minimum standards on the one hand and the needs and specificities of different societies and legal systems on the other. The margin also reflects the fact that the European Convention on Human Rights does not impose uniform standards throughout Europe in relation to a multitude of issues: the protection of morals, democratic accountability or the organisation of justice systems, to name but a few. Regulation of these matters, which fall to be appreciated by national authorities, can however be subject to external European supervision with a view to assessing whether those authorities overstep their margin.

When it comes to verification of the existence of a European consensus, the ECtHR looks to whether or not there is common ground between the national laws and practices of Contracting States, as well as, where relevant, the situation at EU-level and in international law. The existence or absence of common standards is not dispositive, but it is relevant. A good recent example of both in operation can be found in *M. A. v Denmark*, concerning the extension of statutory waiting periods to be eligible for family reunification for persons benefitting from subsidiary or temporary protection.¹⁵ While Member States may be recognised as enjoying a margin of appreciation – wider or narrower depending on the interests at stake – the margin is not unlimited. Rights of the European Convention on Human Rights operate in accordance with the principle of effectiveness; a general principle of interpretation extending to all the provisions of the European Convention on Human Rights and the Protocols thereto.¹⁶

15| Judgment of the ECtHR of 9 July 2021, *M. A. v Denmark*, Application No. 6697/18, [CE:ECHR:2021:0709JUD000669718](#), paragraphs 151 to 163. For an example of where the existence of clear statutory consensus was not relied on to reduce the respondent State's margin of appreciation in view of the acute sensitivity of the moral and ethical issues at stake see judgment of the ECtHR of 16 December 2010, *A., B. and C. v Ireland*, Application No. 25579/05, [CE:ECHR:2010:1216JUD002557905](#).

16| See, for example, Judgment of the ECtHR of 9 July 2021, *M. A. v Denmark*, Application No. 6697/18, [CE:ECHR:2021:0709JUD000669718](#), paragraph 162.

The system of shared responsibility also attributes considerable importance to how and if the domestic legislative procedure has Strasbourg-proofed or assessed legislation which finds itself subsequently at the heart of an individual complaint. The point is well-illustrated in the seminal ruling in *Animal Defenders*, which concerned an Article 10 complaint regarding a statutory prohibition on paid political advertising, in which the ECtHR emphasised that:

‘there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision [...] By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State [...]. The [respondent] State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue in the present case.’¹⁷

The supervision exercised by the ECtHR is thus external, subsidiary, intervenes when a case has concluded at domestic level, except in relation to Protocol No. 16 requests, and is of a review type only. This is, of course, a major difference between the direct and indirect actions heard by the Court of Justice of the European Union. However, it is noticeable that as the latter’s case-law has developed in new and more sensitive areas, a margin of appreciation for EU Member States has also taken explicit root in the Court of Justice of the European Union’s legal reasoning.¹⁸

17| See judgment of the ECtHR of 22 April 2013, *Animal Defenders International v the United Kingdom*, Application No. 48876/08, [CE:ECHR:2013:0422JUD004887608](#), paragraph 111. See also judgment of the ECtHR of 9 March 2023, *L. B. v Hungary*, Application No. 36345/16, [CE:ECHR:2023:0309JUD003634516](#), a case with extensive references to EU data protection law; or judgment of the ECtHR of 27 June 2017, *Satakunnan Markkinapörssi Oy et Satamedia Oy v Finland*, Application No. 931/13, [CE:ECHR:2017:0627JUD000093113](#), a case in which a preliminary reference had first been made to the Court of Justice of the European Union in relation to derogations provided by the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31-50).

18| See, for example, joint judgments of 15 July 2021, *WABE and MH Müller Handel*, C-804/18, [EU:C:2021:594](#), paragraphs 87 to 88.

3. Judicial dialogue, convergence and exchange in the multi-level system for the protection of human rights in Europe

Speaking at the opening of the Strasbourg judicial year almost a decade ago, Andreas Voßkuhle depicted the interaction between the Strasbourg Court and national courts in relation to the protection of human rights, and necessarily the interaction of both with the Court of Justice of the European Union, as a kinetic structure. The latter is an ensemble of balanced parts which can move independently but which are also interconnected, such that movement in one part of the structure may necessarily trigger movement elsewhere.¹⁹ Is this still an apt description of our ongoing dialogue and interaction and are our judicial movements as fluid as they should be given the challenging changing of an era which our continent is experiencing? I would like to echo President Lenaerts's characterisation of the dialogue between the two European courts in recent years as being one of constructive, and in certain fields, highly effective, dialogue and complementarity.

Of course, one can never forget the key features that distinguish the two European courts: the legal systems of which they form a part and the different scope of their jurisdiction.²⁰ The mission of the Court of Justice of the European Union is broader than that of the ECtHR, in that it seeks to ensure the uniform interpretation of EU law generally. However, until now, its fundamental rights' jurisdiction has been limited by the scope of application of EU law and by the principle of conferral, with the exception of questions relating to judicial independence and related aspects of the rule of law – a point to which I will return in my conclusion.

19| Voßkuhle, A. "Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts" in ECtHR, *Dialogue between Judges 2014*, "Implementation of the judgments of the European Court of Human Rights: A shared judicial responsibility?", Strasbourg, 2014, pp. 36-40.

20| See O'Leary, S., "The EU Charter Ten Years On: A View from Strasbourg", in Bobek, M. and Prassl, J. (eds.) *The EU Charter of Fundamental Rights in the Member States*, Hart Publishing, Oxford, 2020, Chapter 2.

President Lenaerts has given several examples, from fields as diverse as data protection,²¹ judicial independence,²² or LGBTI rights,²³ where effective and necessary synergies are evident in our case-law. Let me supplement his references with others relating to asylum and immigration,²⁴ the operation of the European Arrest Warrant,²⁵ the right to a reasoned refusal

21| See, for a recent example, the references to EU law and Court of Justice of the European Union case-law in the judgment of the ECtHR of 9 March 2023, *L. B. v Hungary*, Application No. 36345/16, [CE:ECHR:2023:0309JUD003634516](#), on the disclosure of the names and home addresses of tax defaulters.

22| See variously judgments of the ECtHR of 1 December 2020, *Ástráðsson v Iceland*, Application No. 26374/18, [CE:ECHR:2020:1201JUD002637418](#); of 7 May 2021, *Xero Flor v Poland*, Application No. 4907/18, [CE:ECHR:2021:0507JUD000490718](#); of 22 July 2021, *Reczkowicz v Poland*, Application No. 43447/19, [CE:ECHR:2021:0722JUD004344719](#); of 8 November 2021, *Dolińska-Ficek and Ozimek v Poland*, Application Nos. 49868/19 and 57511/19, [CE:ECHR:2021:1108JUD004986819](#); of 3 February 2022, *Advance Pharma v Poland*, Application No. 1469/20, [CE:ECHR:2022:0203JUD000146920](#); of 15 March 2022, *Grzęda v Poland*, Application No. 43572/18, [CE:ECHR:2022:0315JUD004357218](#); of 16 June 2022, *Żurek v Poland*, Application No. 39650/18, [CE:ECHR:2022:0616JUD003965018](#); of 29 June 2021, *Broda and Bojara v Poland*, Application Nos. 26691/18 and 27367/18, [CE:ECHR:2021:0629JUD002669118](#); of 9 March 2021, *Bilgen v Turkey*, Application No. 1571/07, [CE:ECHR:2021:0309JUD000157107](#); of 6 November 2018, *Ramos Nunes de Carvalho e Sá v Portugal*, Application Nos. 55391/13, 57728/13 and 74041/13, [CE:ECHR:2018:1106JUD005539113](#); of 5 May 2020, *Kövesi v Romania*, Application No. 3594/19, [CE:ECHR:2020:0505JUD000359419](#); of 19 October 2021, *Miroslava Todorova v Bulgaria*, Application No. 40072/13, [CE:ECHR:2021:1019JUD004007213](#); of 9 February 2021, *Xhoxhaj v Albania*, Application No. 15227/19, [CE:ECHR:2021:0209JUD001522719](#); and of 12 January 2023, *Ovcharenko and Kolos v Ukraine*, Application Nos. 27276/15 and 33692/15, [CE:ECHR:2023:0112JUD002727615](#) on judicial and prosecutorial independence. The selection illustrates the range of issues and respondent States, both EU and several EU ‘accession’ States, in relation to which rule of law questions have arisen of late.

23| See, most recently, judgment of the ECtHR of 23 January 2023, *Macatė v Lithuania*, Application No. 61435/19, [CE:ECHR:2023:0123JUD006143519](#), a case on Article 10 of the European Convention on Human Rights sanctioning the labelling of books as harmful to children because of their positive depiction of same-sex couples; of possible relevance to pending judgment of *Commission v Hungary*, Case C-769/22; or of judgments of the ECtHR of 13 July 2021, *Fedotova v Russia*, Application Nos. 40792/10 and 2 Others, [CE:ECHR:2021:0713JUD004079210](#); of 23 May 2023, *Buhuceanu and others v Romania*, Application Nos. 20081/19 and 20 Others, [CE:ECHR:2023:0523JUD002008119](#); and of 1 June 2023, *Maymulakhin and Markiv v Ukraine*, Application No. 75135/14, [CE:ECHR:2023:0601JUD007513514](#), on the requirement under Article 8 and, in one case, under Articles 8 and 14, for some form of legal recognition of same sex couples.

24| See judgment of the ECtHR of 9 July 2021, *M. A. v. Denmark*, Application No. 6697/18, [CE:ECHR:2021:0709JUD000669718](#), on waiting periods and family reunification; judgment of the ECtHR of 7 December 2021, *Savran v Denmark*, Application No. 57467/15, [CE:ECHR:2021:1207JUD005746715](#), on the expulsion of a foreign national suffering from psychiatric illness; or of 2 July 2020, *N. H. and Others v France*, Application Nos. 28820/13 and 2 Others, [CE:ECHR:2020:0702JUD002882013](#), on the saturation of accommodation facilities for asylum-seekers.

25| See, for example, judgment of the ECtHR of 25 March 2020, *Bivolaru and Moldovan v France*, Application Nos. 40324/16 and 12623/17, [CE:ECHR:2021:0325JUD004032416](#).

of a request for a preliminary reference,²⁶ or justified restrictions of the right to freedom of expression in defence of media pluralism and common values.²⁷ Depending on the field of law or legal question, the traffic flows may be in both directions. Where new EU legislation codifies the fundamental rights contained in the European Convention on Human Rights, the flow is understandably more pronounced in one direction given the terms of Article 52(3) of the Charter on Fundamental Rights of the European Union. This is well illustrated, for example, in recent judgments of the Court of Justice of the European Union on the EU directives on criminal procedure in which clear use of European Convention on Human Rights benchmarks on rights guaranteed by Article 6 and the Court of Justice of the European Union's developed toolbox in such cases is evident.²⁸

It is important to stress that the Strasbourg Court does not have the authority to assess the validity or the correct interpretation of EU law. It seeks not to trespass into the exclusive domain of the Court of Justice of the European Union in this regard.²⁹ The ECtHR's role is confined to ascertaining whether the effects of adjudication by national courts and authorities

26| See, recently, judgment of the ECtHR of 13 February 2020, *Sanofi Pasteur v France*, Application No. 25137/16, [CE:ECHR:2020:0213JUD002513716](#); or of 14 March 2023, *Georgiou v Greece*, Application No. 57378/18, [CE:ECHR:2023:0314JUD005737818](#).

27| See judgment of the ECtHR of 5 April 2022, *NIT S. R. L. v the Republic of Moldova*, Application No. 28470/12, [CE:ECHR:2022:0405JUD002847012](#), and reliance on the general principles therein in Judgment of 27 July 2022, *R. T. France v Council*, T-125/22, [EU:T:2022:483](#). At the time of writing, it is understood that the appeal before the Court of Justice of the European Union in the latter case has been withdrawn.

28| See the recent judgments of the Court of Justice of the European Union in Judgment of 23 November 2021, *I. S. (Illégalité de l'ordonnance de renvoi)*, C-564/19, [EU:C:2021:949](#), paragraph 101; Judgment of 15 September 2022, *H. N., (Procès d'un accusé éloigné du territoire)*, C-420/20, [EU:C:2022:679](#), paragraph 55; Judgment of 15 September 2022, *DD (Réitération de l'audition d'un témoin)*, C-347/21, [EU:C:2022:692](#), paragraph 31; Judgment of 1 August 2022, *TL, C-242/22 PPU*, [EU:C:2022:611](#), paragraph 40; and Judgment of 8 December 2022, *H. Y. A. and Others (Impossibilité d'interroger les témoins à charge)*, C-348/21, [EU:C:2022:965](#). In the other direction of travel, see the use made by the Strasbourg Grand Chamber of the more developed language of the EU directive on the right of access to a lawyer in the judgment of the ECtHR of 16 December 2014, *Ibrahim and others v the United Kingdom*, Application Nos. 50541/08, 50571/08, 50573/08 and 40351/09, [CE:ECHR:2014:1216JUD005054108](#), paragraphs 210 and 259. See further Callewaert, J., "The Recent Luxembourg Case-law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg", *EU Law Live*, 4 May 2023.

29| See judgment of the ECtHR of 3 October 2014, *Jeunesse v the Netherlands*, Application No. 12738/10, [CE:ECHR:2014:1003JUD001273810](#), paragraph 110; or of 4 April 2017, *Thimothawes v Belgium*, Application No. 39061/11, [CE:ECHR:2017:0404JUD003906111](#), paragraph 71. See, however, judgment of the ECtHR of 6 December 2022, *Spasov v Romania*, Application No. 27122/14, [CE:ECHR:2022:1206JUD002712214](#), on the thin line which may exist in some exceptional cases.

in EU Member States in an individual case are compatible with the European Convention on Human Rights.³⁰ However, where the common values underpinning the European Convention on Human Rights and the EU Treaties are openly challenged – common values which derive from Europe’s common constitutional heritage – both European courts assist directly and indirectly in their defence, in defence of the other European system,³¹ and in defence of national constitutional and supreme courts which are, let us not forget, on the front line.³²

The ECtHR is also necessarily – in a system based on shared responsibility – in constant dialogue with national constitutional courts, where we speak through our judgments, sometimes separate opinions, and also the odd obiter dictum. I have referenced some key factors which condition our structured dialogue in the first part this address. That dialogue with

30| Good examples, in relation to the European Arrest Warrant (EAW), are provided in the judgment of the ECtHR of 9 July 2019, *Romeo Castaño v Belgium*, Application No. 8351/17, [CE:ECHR:2019:0709JUD000835117](#), and in the judgment of the ECtHR of 25 March 2020, *Bivolaru and Moldovan v France*, Application Nos. 40324/16 and 12623/17, [CE:ECHR:2021:0325JUD004032416](#).

31| See, for a striking example, the analysis of the Court of Justice of the European Union in Judgment of 22 February 2022, *X and Y v Openbaar Ministerie*, C-562/21 PPU and C-563/21, [EU:C:2022:100](#), paragraphs 79 to 80, regarding execution of an EAW issued by an EU Member State and the two-step assessment required under EU law: ‘In the context of that assessment, the executing judicial authority may also take account of the case-law of the European Court of Human Rights, in which a breach of the requirement for a tribunal established by law in respect of the procedure for the appointment of judges has been established [...]. For the sake of completeness, it should also be added that those relevant factors also include constitutional case-law of the issuing Member State, which challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments of the Court of Justice and of the European Court of Human Rights relating to compliance with EU law and with that convention of rules of that Member State governing the organisation of its judicial system, in particular the appointment of judges.’ See, for a corresponding defence of the need to respect EU law, judgment of the ECtHR of 6 July 2023, *Tuleya v Poland*, Application Nos. 21181/19 and 51751/20, [CE:ECHR:2023:0706JUD002118119](#).

32| See, for example, judgment of the ECtHR of 6 July 2023, *Tuleya v Poland*, Application Nos. 21181/19 and 51751/20, [CE:ECHR:2023:0706JUD002118119](#), paragraph 264, where, in response to the Polish government’s argument regarding loss of victim status due to a decision of the Chamber of Professional Liability in the applicant’s favour the ECtHR noted: ‘that the [national] judges dealing with the applicant’s case were guided by the Court’s case-law and, applying and interpreting for the first time section 9 of the 2022 Amending Act, they did so in the light of the requirements of a fair trial as established by the Convention. In putting together various strands of the Court’s and the CJEU’s rulings, they not only reached a decision consistent with the Convention and the rule-of-law standards but, at the same time, gave practical effect to the principle of subsidiarity underlying the Convention. The Court cannot over-emphasise the fundamental role played by the national courts as guarantors of justice in upholding that principle through their decisions whereby they give direct effect to the Convention rights and freedoms or remedy Convention violations that have already occurred [...]. Nor can the Court fail to see that the resolution in the applicant’s case is a step forward in terms of ensuring compliance with the Court’s judgments given in the context of the independence of the judiciary in Poland.’

national courts is particularly important where country-specific and complex assessments lie behind the European Convention on Human Rights complaint pending before us.³³ A good example is provided in a Dutch case on criminal procedure referenced by President De Groot.³⁴ But dialogue is also crucial in cases which raise cutting edge legal issues in relation to which no consensus has yet emerged. This is precisely because the common standards derived from the European Convention on Human Rights will apply across 46 States with different cultures, heritages, and rhythms of societal development. Good examples can be found in recent cases on Article 8 from Germany and France on, respectively, the legal impossibility for a transgender parent's current gender to be indicated on a birth certificate³⁵ or the recognition of a neutral gender for intersex persons.³⁶

4. So what challenges and opportunities lie ahead?

In its two conditionality judgments regarding Poland and Hungary handed down in 2022, the Court of Justice of the European Union held, in relation to Article 2 TEU values, that:

‘[they] have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties’.³⁷

33| See, for example, judgment of the ECtHR of 5 July 2022, *Association of Civil Servants and Union for Collective Bargaining and Others v Germany*, Application Nos. 815/18 and 4 Others, [CE:ECHR:2022:0705JUD000081518](#); or of 8 October 2020, *Ayoub v France*, Application Nos. 77400/14 and 2 Others, [CE:ECHR:2020:1008JUD007740014](#) (freedom of assembly); or of 20 May 1999, *Rekvényi v Hungary*, Application No. 25390/94, [CE:ECHR:1999:0520JUD002539094](#), paragraphs 44 to 50; or of 18 October 2018, *Annen v Germany (no. 6)*, Application No. 3779/11, [CE:ECHR:2018:1018JUD000377911](#), paragraph 79 (freedom of expression).

34| See the contribution of Dineke de Groot in this volume.

35| See judgments of the ECtHR of 4 April 2023, *O. H. and G. H. v Germany*, Application Nos. 53568/18 and 54741/18, [CE:ECHR:2023:0404JUD005356818](#); and of 4 April 2023, *A. H. and Others v Germany*, Application No. 7246/20, [CE:ECHR:2023:0404JUD000724620](#).

36| See judgment of the ECtHR of 31 January 2023, *Yv France*, Application No. 76888/17, [CE:ECHR:2023:0131JUD007688817](#).

37| Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraph 127; reflected also in Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, [EU:C:2022:98](#), paragraph 145.

These are landmark judgments, which come at a critical time, and which built on previous judgments, such as *Associação Sindical dos Juizes Portugueses*,³⁸ in which the Court of Justice of the European Union innovatively and to great effect combined Articles 2 and 19(1) TEU.³⁹

However, one of several questions which now arise in our multi-level system is what future role Article 2 TEU is set to play. Must it be invoked in combination with another ‘concretising’ provision of EU law, or can it serve as a self-standing basis for the defence of the rights which the values listed in that provision seek to protect?⁴⁰

Naturally, as I said, it falls to the Court of Justice of the European Union to interpret and apply the relevant provisions of the Treaties, the Charter of Fundamental Rights of the European Union, and secondary EU law. However, what interests me for the purposes of our discussions at the EUnited in Diversity II conference is the impact of the mobilisation of Article 2 in the autonomous manner now discussed in the literature on the kinetic mobile structure which has, overall, been functioning effectively to date.

38| Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, C-64/16, [EU:C:2018:117](#).

39| See Spieker, L.D., “Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis”, *German Law Journal*, Vol. 20, No 8, 2019, pp. 1182-1213, on the mutually-amplifying effect of this combination of TEU provisions with Article 19(1) TEU facilitating judicial enforcement of the value at stake due to its greater precision and Article 2 TEU providing an extension of scope beyond that of the EU Charter and EU law more generally.

40| See, for example, Rossi, L.S., “La valeur juridique des valeurs. L’article 2 TUE : relations avec d’autres dispositions de droit primaire de l’UE et remèdes juridictionnels”, *Revue trimestrielle de droit européen*, Vol. 56, No 3, 2020, pp. 639-657 ; or Spieker, L.D., “Breathing Life into the Union’s Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis”, *German Law Journal*, Vol. 20, No 8, 2019. See also Bonelli, M., “Infringement Action 2.0: How to Protect EU Values before the Court of Justice”, *European Constitutional Law Review*, Vol. 18, No 1, 2022, pp. 30-58.

The Treaty of Lisbon⁴¹ and the recognition of the equal legal value of the Charter of Fundamental Rights of the European Union were premised on the explicit inclusion of the principle of conferral and general provisions setting out the limits to the scope and functioning of EU law. Those provisions sought, in essence, to channel and even to control the potentially centripetal force of the Charter of Fundamental Rights of the European Union and EU law more generally.⁴² As previously evidenced in the case-law of the Court of Justice of the European Union, where a situation was not covered by EU law, it was to national remedies and, if they failed, to Strasbourg and the European Convention on Human Rights that litigants were directed.⁴³

For decades, the central core of fundamental rights and freedoms underpinning our democracies have been safeguarded by national constitutional courts, subject to the external supervision of the ECtHR.⁴⁴ The latter not only renders justice in a given case, but also elucidates, safeguards, and develops the rules instituted in the European Convention on Human Rights, thereby

41 | Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, p. 1-271).

42 | See Advocate General Saugmandsgaard Øe in Opinion of 29 November 2018, *Commission v Hungary* (Usufruct Over Agricultural Land), C-235/17, [EU:C:2018:971](#), paragraphs 68 to 69: 'It is important not to lose sight of the context in which that question [relating to when the Court of Justice of the European Union has jurisdiction to determine a failure to respect the rights guaranteed by the Charter on Fundamental Rights of the European Union] arises. In essence, the extent to which the Member States are bound, under EU law, by the requirements regarding the protection of fundamental rights is a constitutional issue, which is delicate and fundamental, concerning the division of powers in the EU. Requiring Member States, in their actions, to respect fundamental rights as provided for in EU law has the effect of limiting the regulatory and policy approaches available in those Member States, while the power of the EU to set the boundaries of what is possible increases correspondingly. [...] Moreover, institutionally, at issue is the extent to which the [Court of Justice of the European Union], as the highest court, has the jurisdiction to take the place of national constitutional courts and the European Court of Human Rights [...] in monitoring the legislation and actions of the Member States in the light of fundamental rights. Undoubtedly mindful of those issues, the drafters of the Charter took care expressly to limit the circumstances in which it applies to national legislation.' On the limits to Court of Justice of the European Union jurisdiction following the Treaty of Lisbon see Lenaerts, K., "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review*, Vol. 8, No 3, 2012, pp. 375-403.

43 | See, for example, Judgment of 15 November 2011, *Dereci and Others*, C-256/11, [EU:C:2011:734](#), paragraphs 70 to 73; or the Advocate General Saugmandsgaard Øe in Opinion of 29 November 2018, *Commission v Hungary* (Usufruct Over Agricultural Land), C-235/17, [EU:C:2018:971](#), paragraphs 108 to 109.

44 | See, for example, the extensive case-law referenced in the ECtHR Factsheet on the right to vote – available at: https://www.echr.coe.int/documents/d/echr/FS_Vote_ENG.

contributing to the observance by Contracting Parties, including EU Member States, of the European Convention on Human Rights engagements undertaken by them.⁴⁵

As the EU evolved into the integrated and comprehensive legal and political system that it is today, it was thus through the European Convention on Human Rights system that strength and concrete expression was given to the common European values now set out explicitly in Article 2 TEU.⁴⁶ Good illustrations of the importance of the European Convention on Human Rights system for the EU's value alignment and defence can be found in the Copenhagen accession criteria, in being a party to the European Convention on Human Rights as a *sine qua non* of EU membership or even post-membership,⁴⁷ in the terms of the TEU and the Charter of Fundamental Rights of the European Union itself, and in the importance accorded in the Commission's annual Rule of Law Reports to Member State execution of Strasbourg judgments. The latter are the expression of the ECtHR's specific mandate to penalise infringements of fundamental rights committed by the Member States, on condition that domestic remedies have been exhausted and that subsidiarity and applicable margins are respected.

As I said at the outset, our multi-level system for the protection of fundamental rights and the prevention of rule of law backsliding and democratic erosion has always been a living and changing organism.⁴⁸ This turbulent changing of an era may require further adaptations and, yes, also concessions, in defence of our common European values. The use to which Article 2

45| Judgment of the ECtHR of 30 March 2017, *Nagmetov v Russia*, Application No. 35589/08, [CE:ECHR:2017:0330JUD003558908](#), paragraph 64.

46| See, for example, judgments of the ECtHR of 28 September 2015, *Bouyid v Belgium*, Application No. 23380/09, [CE:ECHR:2015:0928JUD002338009](#), paragraph 89 (concerning the value of human dignity); of 15 July 2002, *Michael Matthews v the United Kingdom*, Application No. 40302/98, [CE:ECHR:2002:0715JUD004030298](#), paragraph 42 (concerning the concept of effective political democracy); of 4 February 2021, *Jurčić v Croatia*, Application No. 54711/15, [CE:ECHR:2021:0204JUD005471115](#), paragraph 83 (concerning gender equality and non-discrimination); of 1 December 2020, *Guðmundur Andri Ástráðsson v Iceland*, Application No. 26374/18, [CE:ECHR:2020:1201JUD002637418](#), paragraph 211 (concerning the value of the rule of law); of 18 June 2020, *Molla Sali v Greece*, Application No. 20452/14, [CE:ECHR:2020:0618JUD002045214](#) (concerning the rights of minorities); and of 1 July 2014, *S. A. S. v France*, Application No. 43835/11, [CE:ECHR:2014:0701JUD004383511](#), paragraph 128 (concerning pluralism, tolerance and broadmindedness are hallmarks of a democratic society).

47| See, for example, Judgment of 19 September 2018, *R O*, C-327/18, [EU:C:2018:733](#), paragraph 61.

48| See *XXV Congress of the International Federation of European Law (FIDE)*, introductory statement by J.M. Sauvé, given on 30 May 2012 in Tallinn (Estonia), emphasising the movements at work in Europe over the last decades in relation to fundamental rights, namely the expansion of rights, their increasing number of sources and their many interpretations.

TEU is put, expansion of EU competences, the accession of the EU to the European Convention on Human Rights provided for in Article 6(2) TEU, greater future alignment between EU and Council of Europe membership, given that eight members of the latter are in line to accede to the former, or the ongoing war on our European borders, to name but a few;⁴⁹ all these events may in time call for rebalancing and adjustments. But the delicacy, solidity and balance of the kinetic structure which has served us in Europe so well points to the need for sensitivity and care, at both national and European level, if, when and how we seek to realign component parts.

After all, the point of all our endeavours is not the mechanism itself, but the peace, security, unity, mutual trust and treasured diversity that our multi-level system seeks to foster and protect.

49| Turkey, North Macedonia, Montenegro, Serbia, Albania, Moldova, Ukraine and Bosnia Herzegovina have all been recognised as candidates for EU membership.





Ms Dineke de Groot

President of the Supreme Court of the Netherlands

Keynote Speech by Ms Dineke de Groot, President of the Supreme Court of the Netherlands

Being United in Diversity is about the Upholding of EU Law with Respect for EU and National Treasures

1. Introduction

Dear participants of EUnited in Diversity II, dear guests attending the opening ceremony. I would like to warmly welcome all of you in the courtroom of the Supreme Court of the Netherlands, in Dutch: Hoge Raad der Nederlanden. Together with the other organisers of this conference, the Constitutional Court of Belgium, the Constitutional Court of Luxembourg, and the Court of Justice of the European Union, I am looking forward to our discussions today and tomorrow, both in the panels and during our other social activities.

I would like to thank Mr Reynders, European Commissioner for Justice, working on the rule of law and consumer protection, for his introductory speech. I would like to express my gratitude to him for his understanding of the importance of this judicial dialogue of national and international courts with constitutional tasks within the European Union ('EU'), and for his willingness to let the European Commission support this conference while fully respecting the independence of the courts.

I would also like to thank Mr Lenaerts, President of the Court of Justice of the European Union, and Ms O'Leary, President of the European Court of Human Rights ('the ECtHR'), for their keynote speeches. They feel as a profound and open-minded warm-up for our four panels today and tomorrow.

Dear fellow judges, it is wonderful that you are all able to participate in our judicial dialogue during this conference, whether as a speaker, moderator or intervener.

It is an honour and a pleasure that I may now, as the president of the hosting court, give the final keynote speech, on the first day of the EUnited in Diversity II conference. We will speak today and tomorrow about the independence of the judiciary, the rule of law, diversity, and uniformity in EU law, and the legal protection of current and future generations. We will also have opportunities to connect in person. Perhaps you will even find a moment around the conference to see something of The Hague, the international city of peace and justice.

2. European and Benelux-spirit

Some of the participants of this conference in The Hague were able to attend the 'EUnited in Diversity' conference in Riga, two years ago. After the pandemic, this was one of the first possibilities to meet in person again. The surroundings were beautiful and well-equipped. To my memory, the first day of that conference was mainly about sharing information. There was a lot of polite listening, as well as prudence in interventions. In the evening, our Latvian colleagues organised delicious food, wonderful music and coffee by the fireplace. I dare not make a causal link, but the next day we had vibrant and open-minded discussions, from the need to understand each other's judgments and positions better. We could agree as well as disagree on substantive grounds based on principles, rules and values. A lot of case-law of our courts was used. The conference proceedings of EUnited in Diversity I have been published in a book and online.¹

At the end of the Riga conference, Court of Justice of the European Union Judge Ms Ziemele, one of the initiators, who is present at this conference again, voiced the hope that this should not be a one-off event, since national constitutional judges and members of the Court Justice of the European Union are united in diversity in cases they deal with and decide.

My neighbours during the Riga conference were the colleagues of Luxembourg and Belgium. We enjoyed not only the European spirit during this conference, but also the Benelux spirit. During the farewell drinks, we suggested to President Lenaerts to explore together the possibility of organising an EUnited in Diversity II conference. From the logos displayed,

1 | The conference proceedings are published on the website of the Court of Justice of the European Union: "EUnited in diversity; between common constitutional traditions and national identities", *International Conference* (Riga, Latvia, 2-3 September 2021) available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf.

you will have seen that this conference is indeed organised by the Constitutional Courts of Belgium and Luxembourg, the Supreme Court of the Netherlands, and the Court of Justice of the European Union.

Over the past two years, every now and then, I asked myself what I meant in Riga with the expression 'Benelux spirit'. Was it invoked by the idea of being united in diversity? Could a Benelux spirit be something apart from a European spirit? I will leave the philosophical part aside. The Benelux Union was founded on 5 September 1944, so almost 79 years ago, as a customs union. This was almost four years after Lodewijk Ernst Visser, after whom this courtroom is named, was suspended by the Nazis. At that time, he was the president of the Supreme Court of the Netherlands, where he had been a judge since 1915. According to Nazi ideas, his Jewish origins meant not only that he could no longer be a judge, but also – in contemporary language – that he was not entitled to human rights and effective legal protection. His fellow judges let him go and did not protest. What happened to President Lodewijk Ernst Visser is and will always be a sad and painful remembrance for the Supreme Court of the Netherlands. His portrait looking at me in my office is an incentive to try to contribute as the current president of my court to freedom, justice and well-being of the people. It is an honour to have our conference about human rights and effective legal protection in a courtroom which is, through his name, connected to these topics.

Being founded in 1944, the Benelux Union is an even longer-standing union than the European Union. The governments of the three respective countries – Belgium, Luxembourg and the Netherlands – signed the first Benelux agreement while they were in exile in London during World War II. It followed the Belgium-Luxembourg Economic Union and the Benelux Monetary Agreement.² The main aims of the Benelux Union were, and still are, to promote cooperation and solidarity between the three countries, and stand stronger together. In 1958, a treaty was signed to broaden and deepen this cooperation to an economic union. The Benelux Union then aimed to allow for the free movement of people, goods, capital and services between the three countries, and for coordination of their policy in economic, financial and social

2 | CVCE/EU by UNI.LU, *Benelux CVC/EU*, last updated 7 July 2016, available at <http://www.cvce.eu/obj/benelux-en-3bc2b8e0-cb9a-4640-91a6-d2cafb9c0cdc.html>; Britannica, The Editors of Encyclopaedia, "Low Countries", *Encyclopaedia Britannica*, 29 September 2023, available at <https://www.britannica.com/place/Low-Countries>.

fields.³ Also in 1958, the three Benelux countries were among the six founding members of the European Economic Community, which is nowadays integrated in the European Union. Thus, the Benelux Union may be perceived as an early step towards the European integration of today. The Benelux Court of Justice was established by treaty in 1965,⁴ which was important for the strengthening of legal unity and legal certainty. The Benelux Court is one of the oldest international courts, following the International Court of Justice, the ECtHR and the Court of Justice of the European Union. In an EU context, the Benelux Court is regarded a court 'common to several Member States'.⁵

Following these first steps, the values of solidarity and cooperation, and the importance of legal unity and legal certainty still characterise the Benelux-spirit. It is possible that the Dutch Supreme Court has to refer a preliminary question to the Benelux Court and afterwards to the Court of Justice of the European Union. Although this would not be immediately positive for the duration of a case pending in a national court, it demonstrates the loyalty of the Benelux countries in contributing to cooperation, legal unity and legal certainty within the Benelux countries as well as the European Union.⁶ In that way, the Benelux spirit might not be separate from the European spirit, but is indeed part of it.

The broader European spirit within the European Union aspires to commitment to a fair chance for the people in the Member States to live in peace, prosperity and justice, which is something to cherish. The past and current situation in the world shows that it is not self-evident to live one's life in Europe in peace and prosperity. A war is going on nearby, as a result of which the ECtHR lost its Russian member. Many individuals and organisations are faced with life events and social, economic and financial difficulties. Our judicial dialogue in this conference is, in essence, about justice. Although justice is a broad concept, life on earth ultimately needs

3 | Europa-Nu.nl, *Europa-Nu.nl stopt per maandag 3 juli noodgedwongen*, 3 July 2023, available at https://www.europa-nu.nl/id/vm4di0pm1kso/europa_nu_nl_stopt_per_maandag_3_juli.

4 | Overheid.nl, "Verdrag betreffende de instelling en het statuut van een Benelux-Gerechtshof, Brussel, 31-03-1965", *Wettenbank*, last updated 27 October 2023, available at <https://wetten.overheid.nl/BWBV0004117/1986-12-01>.

5 | Regulation (EU) 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice (OJ L 163, 29.5.2014, p. 1-4).

6 | Government of the Netherlands, *Joint Declaration of Benelux Summit, Diplomatic Statement*, 7 October 2020, available at <https://www.government.nl/documents/diplomatic-statements/2020/10/07/joint-declaration-benelux-summit>.

justice based on logical, truthful, fair and rebuttable considerations, which often relate to the protection of fundamental rights and the pursuit of common values, enshrined in both European and international treaties. Such a value-based approach is inherent in the European Union. It is underlying in the European Convention on Human Rights, and it is leading for the courts of the Member States while interpreting and applying the law and providing effective legal protection in the cases they decide.

3. EUnited in Diversity

According to Article 2 TEU, the European Union is founded ‘on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. National constitutional law may include both similar and varying values. While safeguarding democracy, the rule of law, and fundamental rights, our courts may need to balance the unity- and diversity-dimensions of EU and national constitutional law. When should a court, while dealing with an aspect of national diversity, give way to European unity in the 27 Member States? And conversely, how should a court – in the interpretation and application of EU law – deal with national diversity? How should the interpretation and application of the European Convention on Human Rights consider EU law? How should the ECtHR balance the field of law that is covered by the 46 Member States of the Council of Europe? I expect such questions to pass by here today and tomorrow by means of discussing concrete case-law.

Maybe such questions would be less diffuse if our national constitutional courts and our supreme courts with constitutional tasks would show some more similarity in their jurisdiction. But for valuable historical reasons, which still have significance for the perceptions of national identity in our countries, European diversity is a treasure. Being united in diversity under EU law is not about challenging this treasure. It is about the upholding of EU law with respect for EU and national treasures. Bridging differences in national jurisdictions is not required for upholding EU law; rather, as long as such differences are not contrary to EU law, they are fully respected by EU law. Article 267 TFEU integrates the interpretation of EU law by the Court of Justice of the European Union into the national judicial systems of the Member States, no matter the way in which national jurisdiction is designed. The national courts are the ones who have to provide effective legal protection to the people in the Member States, while taking EU law into account. Judicial independence, loyal cooperation, and mutual trust are indispensable for our courts. Here, I would like to provide a Dutch example within the constitutional concept of a fair hearing.

In its judgment in the case of *Keskin* against the Netherlands, the ECtHR upheld a complaint against a denial of a request by the defence to call a witness.⁷ This ECtHR judgment had implications for the assessment by the Dutch criminal courts of requests to summon and examine witnesses. Prior to the ECtHR's decision in the *Keskin* case, Dutch criminal courts required the defence to substantiate such requests. This was based on Dutch criminal law and a long-standing practice of case-law of the Dutch Supreme Court, which included the constitutional concept of a fair hearing as enshrined in the ECHR. For the functioning of daily practice in criminal law, it is essential to have legal unity and legal certainty over the issue of how to deal with requests by the defence to call a witness.

About three months after the *Keskin* judgment, the Dutch Supreme Court rendered a judgment constituting its first response to the ECtHR judgment in the case of *Keskin*.⁸ In this response, the Dutch Supreme Court started by pointing out that in the Dutch system, unlike in the systems of many other Member States of the ECtHR, the hearing focuses on the assessment of the findings from the preliminary investigation, including the witness testimony provided at that stage. This set-up of criminal proceedings is aimed at contributing not only to an efficient and well-structured handling of criminal cases within a reasonable period of time, but also to ascertaining the truth. Decisions by the fact-finding court on summoning and examining a witness and on the assessment of facts must be rendered in a way that – in the words of the ECtHR – safeguards the 'overall fairness of the trial'. After its response to the *Keskin* judgment of the ECtHR, the criminal chamber of the Dutch Supreme Court continued by adapting national standards dealing with requests of the defence to call a witness, while taking into account both the Dutch system and the judgment of the ECtHR in the case of *Keskin*.

7 | Judgment of the European Court of Human Rights of 19 January 2021, *Keskin v the Netherlands*, Application No. 2205/16 [CE:ECHR:2021:0119JUD000220516](https://www.echr.coe.int/ViewDoc.aspx?id=1925333).

8 | Judgment of 20 April 2021 of the Supreme Court of the Netherlands, 19/02973, [NL:HR:2021:576](https://www.rechtspraak.nl/HR/HR-2021-576). See also the Supreme Court of the Netherlands, *Annual Report 2021*, p. 24, available at <https://2021.jaarverslaghogeraad.nl/wp-content/uploads-hogeraad/sites/6/2022/04/Annual-Report-2021-Supreme-Court-of-the-Netherlands.pdf>.

This example shows that being united in diversity may mean that a common national court practice of major importance for the functioning of the rule of law might have to be suddenly reconsidered. It also shows professional loyalty and trust, as the Dutch Supreme Court has taken the opportunity to have a dialogue with the ECtHR by providing a response, and subsequently to give guidance to the Dutch criminal courts how to deal with requests to summon and examine witnesses after the ECtHR judgment.

Following this example on balancing the unity and diversity dimensions of national and international constitutional law by an international and a national court, it is a small step to mention that all constitutional courts and supreme courts with constitutional tasks within the European Union have a different function in their legal system and their societies. Even the constitutional tasks of the three organising national courts cannot be easily compared, because we have different functions and diverse origins. The Netherlands does not have a separate constitutional court, but its Supreme Court has several constitutional tasks. The *Cour constitutionnelle*, *Grondwettelijk Hof*, or *Verfassungsgerichtshof* of Belgium 'owes its existence to the development of the Belgian unitary state into a federal state'.⁹ It was initially founded as a court of arbitration, but was later extended to include the supervision of the observance of several fundamental rights.¹⁰ The *Cour constitutionnelle* of Luxembourg rules on the constitutionality of laws, with regard to both ordinary courts of law and administrative jurisdictions.¹¹ Notwithstanding the different function in their legal system and societies, these three courts need, just as other constitutional courts and supreme courts with constitutional tasks within the European Union, to provide judgments in which democracy, the rule of law and fundamental rights are safeguarded, either on the basis of national legislation, or as enshrined in European and international treaties. The preliminary proceeding of Article 267 TFEU enables national courts and the Court of Justice of the European Union to bridge differences in order to safeguard the uniform interpretation and application of EU law.

9| Constitutional Court of Belgium, *Jurisprudence*, available at <https://www.const-court.be/en>.

10| The Constitutional Court of Belgium, *2014 Publication*, available at [brbr-2014-001e.pdf \(const-court.be\)](https://www.const-court.be/en/publications/2014-publication).

11| Justice.public.lu, *Cour Constitutionnelle*, available at <https://justice.public.lu/fr/organisation-justice/cour-constitutionnelle.html>; Luxembourg.public.lu, *Justice*, available at <https://luxembourg.public.lu/en/society-and-culture/political-system/justice.html>.



In this context, just like the representatives of Belgium, Luxembourg and the Netherlands who initiated the Benelux Union in 1944 in exile, the national, European and international courts of today share a tangible role in uniting different opinions and opposites, between different nations and within countries. After all, the courts need to foster the rule of law and the effective protection of human rights for the benefit of individuals and society, within the relevant legal cultures and constitutional traditions. Being united in diversity is a key aspect of our loyal cooperation as well as of the judicial dialogue. I look forward to continuing our profound and rich dialogue during this conference through the contributions of members of national courts, the Court of Justice of the European Union and the ECtHR.



Ms Dineke de Groot, President of the Supreme Court of the Netherlands





1st panel

**Independence of the
judiciary as a conditio
sine qua non for protecting
democracy, mutual trust
and the rule of law**



M. Pierre Nihoul

Président (FR) de la Cour constitutionnelle
de Belgique

Intervention de M. Pierre Nihoul

Président (FR) de la Cour constitutionnelle de Belgique

Réflexions introductives sur l'indépendance des juges

1. Introduction

L'indépendance du juge peut être entendue comme le pouvoir, voire le devoir du juge de décider librement. Quelle liberté ? Celle d'apprécier sans contrainte les faits qui lui sont soumis et d'interpréter sans entraves la norme qu'il est tenu d'appliquer en l'espèce. Elle entend rendre le juge inaccessible à toute ingérence ou pression interne ou externe.

En synthèse, l'indépendance se manifeste par l'absence de lien et par l'absence de subordination (hiérarchie, tutelle et autre mode de contrôle) de la part d'un autre pouvoir de droit (législatif ou exécutif), de la part d'un pouvoir de fait (groupes de pression, médias, opinion publique) et de la part de ses collègues et du corps dont le juge fait partie. Au-delà de ces trois formes d'ingérence, l'indépendance nous paraît alors se confondre avec l'impartialité, notamment en ce qu'elle a trait aux relations avec les parties ou au for intérieur du juge, sujet que nous n'aborderons pas.

À la lecture de la doctrine et de la jurisprudence, les superlatifs ne manquent pas pour qualifier les garanties d'indépendance et d'impartialité dans le chef du juge : elles sont le « gage de la démocratie » ¹, « le fondement même de tout État démocratique » ², « l'une des conquêtes les plus importantes de la justice démocratique » ³ ou encore « des exigences qui tiennent aux valeurs fondamentales de la démocratie » ⁴. À juste titre !

1 | Frison-Roche, M.-A., *L'impartialité du juge*, Dalloz, Paris, 1999, p. 53.

2 | Arrêt de la Cour de cassation belge du 14 octobre 1996, *Pas.*, I, n° 349.

3 | Martens P., « La tyrannie de l'apparence », *Revue trimestrielle des droits de l'homme*, n° 28, Anthemis, Bruxelles, 1996, pp. 640 et suiv.

4 | Arrêts de la Cour constitutionnelle belge du 21 octobre 1998, n° 107/1998, B.4.4 et du 16 janvier 2020, n° 7/2020, B.11.

Un pouvoir juridictionnel efficace, impartial et indépendant est en effet la pierre angulaire de l'État de droit. Il fait partie intégrante du système de contre-pouvoirs démocratiques. Par ailleurs, le respect par les États des exigences de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (ci-après « CEDH ») en matière d'« indépendance », ainsi que d'« impartialité » et de « tribunal établi par la loi », est indispensable pour garantir le droit à un procès équitable consacré par l'article 6, paragraphe 1, de ladite Convention. Au-delà de cette garantie spécifique, un pouvoir juridictionnel indépendant est tout aussi important pour la protection effective de tous les droits et libertés énoncés dans la Convention. Il serait en effet illusoire de croire que les juges peuvent faire respecter l'état de droit et donner effet à la Convention s'ils sont privés par le droit interne des garanties touchant directement à leur indépendance et à leur impartialité ⁵.

Il en va de même pour le droit de l'Union. Ainsi, l'article 19 TUE concrétise la valeur de l'État de droit affirmée à l'article 2 TUE. En vertu de l'article 19, paragraphe 1, second alinéa, TUE, « il appartient aux États membres de prévoir un système de voies de recours et de procédures assurant aux justiciables le respect de leur droit à une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union ». Le principe de protection juridictionnelle effective « constitue un principe général du droit de l'Union qui découle des traditions constitutionnelles communes aux États membres, qui a été consacré par les articles 6 et 13 de la CEDH et qui est à présent affirmé à l'article 47 de la Charte [des droits fondamentaux de l'Union européenne] ». Or, pour garantir une telle protection juridictionnelle effective, la préservation de l'indépendance des instances juridictionnelles est primordiale. Par ailleurs, « les garanties d'accès à un tribunal indépendant, impartial et établi préalablement par la loi, et notamment celles qui déterminent la notion tout comme la composition de celui-ci, représentent la pierre angulaire du droit à un procès équitable » ⁶.

L'ancrage de l'indépendance dans le corpus juridique constitutionnel national et européen fait l'objet des trois exposés suivants dans le même panel.

5| Arrêts de la Cour européenne des droits de l'homme (ci-après « Cour EDH ») du 9 mars 2021, Bilgen c. Turquie, Requête n° 1571/07, § 79, [CE:ECHR:2021:0309JUD000157107](#) ; du 29 juin 2021, Broda et Bojara c. Pologne, Requêtes n°s 26691/18 et 27367/18, § 120, [CE:ECHR:2021:0629JUD002669118](#).

6| Arrêt du 5 juin 2023, Commission/Pologne (Indépendance et vie privée des juges), C-204/21, [EU:C:2023:442](#) points 68 à 71 et jurisprudence citée.

Notre propos s'attache quant à lui à relever les remèdes destinés à garantir l'indépendance et l'impartialité des juges.

Il y va principalement de remèdes préventifs. Ceux-ci sont soit individuels soit structurels.

2. Les remèdes individuels

Les remèdes individuels concernent donc le juge en personne. Il ressort de la jurisprudence des cours européennes, rejointe en cela par les juridictions belges ⁷, que l'indépendance d'un juge est de nature fonctionnelle en ce sens qu'elle est déterminée par son mode de nomination ou de désignation, par la durée de son mandat, par l'existence d'une protection contre les pressions extérieures et par l'apparence ou non d'indépendance. On y trouve les germes d'une série de garanties individuelles qui doivent être complétées par d'autres mécanismes.

De manière générale, le statut des magistrats doit assurer leur indépendance et leur impartialité, ce qui requiert à tout le moins les éléments exposés ci-après.

2.1 La nomination des magistrats

Pour ce qui est de leur nomination ou de leur désignation, les conditions d'accès et de sélection ainsi que les procédures y afférentes doivent être empreintes d'une objectivité certaine et d'une vérification des aptitudes et qualités professionnelles. Il en va de même pour la suite de la carrière des magistrats : leur évaluation, leur progression via des affectations ou des promotions, et leur fin de carrière. Dans son rapport général des 12 et 13 mars 2010, la Commission de Venise, qui est une émanation du Conseil de l'Europe, recommande à cet égard, comme norme européenne relative à l'indépendance des juges, « le principe selon lequel toutes les décisions concernant la nomination et la carrière professionnelle des juges devraient être fondées sur le mérite, évalué au moyen de critères objectifs dans le cadre de

7 | Arrêts de la Cour constitutionnelle belge du 3 mars 1999 octobre 1996, n° 29/99, B.5.5. ; du 18 octobre 2006, n° 151/2006, B.17.1. ; du 3 décembre 2009, n° 195/2009, B.11. ; du 31 mai 2018, n° 62/2018, B.42.
Arrêt de la Cour de cassation belge du 27 avril 2010, P.10.0119.N.

la loi » ⁸. Pour sa part, la Cour européenne des droits de l'homme a, dans un arrêt de principe récent, défini une « démarche en trois étapes » permettant de déterminer si des irrégularités commises dans telle ou telle procédure de nomination d'un juge sont « d'une gravité telle qu'elles emportent violation du droit à un tribunal établi par la loi et si les autorités compétentes de l'État ont ménagé entre les différents principes en jeu un équilibre juste et proportionné dans les circonstances particulières de l'affaire » ⁹.

2.2 Un statut pécuniaire stable

L'indépendance des magistrats suppose aussi un statut pécuniaire stable (exclusion de primes variables), préétabli selon des règles générales et abstraites, transparent et fixé à un niveau suffisant qui ne soit en tout cas pas inférieur à celui des organes contrôlés. La Recommandation n° R(2010)12 du 17 novembre 2010 prévoit à cet égard que les « principales règles du régime de rémunération des juges professionnels devraient être fixées par la loi » (point 53) et être « à la mesure de leur rôle et de leurs responsabilités, et être de niveau suffisant pour les mettre à l'abri de toute pression visant à influencer sur leurs décisions » (point 54) ¹⁰. La Commission de Venise y a ajouté en 2010 que « les primes et les avantages en nature, dont l'attribution comporte un élément d'appréciation, devraient être supprimés progressivement » ¹¹.

8| Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, partie I, § 27, p. 7, disponible sur le site <https://rm.coe.int/1680700e13>.

9| Arrêt de la Cour EDH du 1er décembre 2020, Guðmundur Andri Ástráðsson c. Islande, Requête n° 26374/18, [CE:ECHR:2020:1201JUD002637418](#), §§ 243-252 pour la présentation des étapes et §§ 254-290 pour leur application ; voir aussi l'arrêt de la Cour EDH Xero Flor w Polsce sp. z o.o. c. Pologne du 7 mai 2021, Requête n° 4907/18, [CE:ECHR:2021:0507JUD000490718](#) portant sur une Cour constitutionnelle, et notamment les §§ 285-289.

10| Recommandation n° CM/Rec(2010)12 du 17 novembre 2010 du Comité des Ministres aux Etats membres sur les juges : indépendance, efficacité et responsabilités disponible sur le site <https://www.coe.int/fr/web/cdcj/recommendations-resolutions-guidelines>. Cette recommandation remplace la Recommandation n° R(94)12 du 13 octobre 1994 du Comité des Ministres sur l'indépendance, l'efficacité et le rôle des juges.

11| Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite, « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, disponible sur le site <https://rm.coe.int/1680700e13>, partie I, § 51, p. 11.

2.3 La durée de la nomination

La nomination des juges à vie jusqu'à l'âge obligatoire de la retraite est assurément l'approche la plus fiable du point de vue de l'indépendance et est vivement recommandée par la Commission de Venise comme une des normes européennes à promouvoir en la matière ¹². La nomination pour une période déterminée d'un juge, en-dehors des magistrats non professionnels comme les juges-échevins ou les jurés, ne peut être admise que si l'instance responsable et si la procédure relative à la nomination et la reconduction à une fonction de juge présentent des caractéristiques suffisantes d'objectivité et de transparence et que si durant cette période, le juge concerné bénéficie de garanties comme l'inamovibilité et l'absence de pouvoir hiérarchique. Les clauses et les périodes d'essai sont de ce point de vue à proscrire, ce qui n'exclut pas le stage judiciaire préalable à une nomination, lequel ne peut toutefois comprendre l'exercice même de la fonction juridictionnelle ¹³.

2.4 L'inamovibilité et les mandats

Les mutations tant fonctionnelles que géographiques d'un juge, en ce compris sa promotion ou son avancement, ne peuvent en principe se faire sans son consentement ¹⁴, à l'exception d'une sanction disciplinaire de ce type ou sauf certaines circonstances particulières telles qu'une réorganisation législative de l'appareil juridictionnel dans son ensemble ou de la juridiction concernée ou une affectation temporaire d'appoint à un autre tribunal en vue de

12| Ibid., partie I, § 38, p. 9.

13| Voir notamment le cas des juges assesseurs en Pologne tranché par la Cour EDH, arrêt du 30 novembre 2010, Henryk Urban et Ryszard Urban c. Pologne, Requête n° 23614/08, [CE:ECHR:2010:1130JUD002361408](#) (à propos de juges stagiaires pouvant être révoqués par le ministre de la Justice à tout moment pendant la durée de leur mandat).

14| L'article 152, alinéa 3, de la Constitution belge dispose à cet effet que « [l]e déplacement d'un juge ne peut avoir lieu que par une nomination nouvelle et de son consentement ».
Arrêt de la Cour constitutionnelle belge du 12 octobre 2017, n° 113/2017, B.13. : « Cette disposition constitutionnelle ne peut toutefois être considérée (...) comme empêchant le législateur de procéder à des réformes qui visent à assurer une meilleure administration de la justice : la loi attaquée se donne en effet pour objectifs, selon ses travaux préparatoires précités, d'assurer une meilleure gestion et une plus grande efficacité de l'appareil judiciaire, d'éliminer l'arriéré et de rendre la justice plus rapidement et, enfin, de promouvoir une jurisprudence de qualité et de meilleurs services, tout en maintenant une proximité suffisante du citoyen; parmi les mesures visant à atteindre ces objectifs figure notamment une plus grande mobilité des magistrats ».

résorber l'arriéré ou de traiter certaines affaires volumineuses ¹⁵. Le système des mandats temporaires prévu pour certaines fonctions, comme principalement, celles de chef de corps, n'est pas incompatible avec la garantie de l'inamovibilité pour autant que soient prévues les mêmes garanties que celles indiquées à propos des nominations temporaires.

2.5 Les incompatibilités

Il s'agit par de telles règles d'éviter que le juge soit placé dans une situation de nature à mettre en doute son indépendance et son impartialité. Ces règles doivent certainement prohiber l'exercice cumulé d'un mandat politique, électif ou non, exécutif ou législatif ; en effet, l'exercice d'un mandat politique implique que son titulaire s'engage publiquement en faveur de ses opinions politiques et cherche à s'attacher la confiance des électeurs ¹⁶. Ces règles doivent également interdire le cumul avec d'autres activités rémunérées par les pouvoirs publics ou par des entreprises privées qui risquent d'être parties à la cause devant le magistrat concerné ¹⁷. À cet égard, il nous semble intéressant de prévoir, à l'instar de ce qui a été prévu pour les mandataires politiques et publics, l'obligation pour les magistrats de déclarer annuellement leur cumul d'activités et d'en assurer la publication de manière adéquate. La transparence régulière des cumuls d'activité contribuerait certainement à réduire les risques de partialité.

15] Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, disponible sur le site <https://rm.coe.int/1680700e13>, partie I, § 43. Voir l'article 86 bis du Code judiciaire belge à propos des juges de complément nommés par ressort de cour d'appel ou du travail et les articles 98 et 113 du Code judiciaire belge à propos d'un système de délégations.

16] Arrêt de la Cour constitutionnelle belge du 21 octobre 1998, n° 107/1998, B.4.4.

17] Selon l'article 155 de la Constitution belge, « [a]ucun juge ne peut accepter d'un gouvernement des fonctions salariées, à moins qu'il ne les exerce gratuitement et sauf les cas d'incompatibilité déterminés par la loi ». La loi en question est constituée des articles 292 et suivants du Code judiciaire, des articles 107 à 109 des lois coordonnées sur le Conseil d'État et des articles 44 à 46 de la loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle.

2.6 L'immunité

Si les magistrats ne doivent pas bénéficier d'une immunité générale, ils doivent toutefois être protégés contre toute pression extérieure induite. Pour cette raison, il convient de leur reconnaître une immunité fonctionnelle. Soit sur le plan pénal, une immunité limitée aux actes accomplis dans l'exercice de leurs fonctions, à l'exception des infractions intentionnelles telles que la fraude, la corruption, etc. Sur le plan civil, la reconnaissance d'une telle immunité conduit à instaurer un régime de responsabilité à la charge exclusive de l'État, donc sans action récursoire à l'encontre du magistrat, sous réserve d'une éventuelle sanction disciplinaire dans le chef du magistrat ¹⁸ et d'une responsabilité civile limitée aux actes intentionnels ¹⁹.

18| Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, disponible sur le site <https://rm.coe.int/1680700e13>, partie I, §§ 56 à 61.

Voir aussi les principes fondamentaux relatifs à l'indépendance de la magistrature issus du Haut-Commissariat des Nations unies aux droits de l'homme et confirmés par l'Assemblée générale des Nations unies dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, principe n° 16.

19| Voir aussi en Belgique la procédure de la prise à partie d'un magistrat devant la Cour de cassation qui peut déboucher sur la condamnation du magistrat à la réparation du préjudice souffert ou à l'annulation du jugement et le renvoi de la cause devant d'autres juges (articles 1140 à 1147 du Code judiciaire belge).

En Belgique, la jurisprudence de la Cour de cassation est en ce sens que « [l]orsque l'État peut, sur la base des articles 1382 et 1383 du Code civil, être rendu responsable du dommage résultant d'une faute commise par un juge ou un officier du ministère public, l'indépendance du pouvoir judiciaire et des magistrats qui le composent apparaît assurée à suffisance par l'impossibilité légale de mettre en cause la responsabilité personnelle des magistrats en dehors des cas où ceux-ci ont été condamnés pénalement et des cas pouvant donner ouverture à la prise à partie » (arrêts de la Cour de cassation belge du 19 décembre 1991, Pas., 1992, p. 316, n° 8970 ; du 8 décembre 1994, Pas., 1994, I, n° 541 ; du 5 juin 2008, Pas., 2008, n° 347 ; du 27 juin 2008, Pas., 2008, n° 411 ; du 25 mars 2010, Pas., 2010, n° 219).

Voir aussi les arrêts de la Cour constitutionnelle belge du 30 juin 2014, n° 99/2014, et du 23 février 2017, n° 29/2017.

2.7 Le privilège de juridiction

Ce privilège consiste en le droit à être jugé par une juridiction supérieure, ce qui implique de ne pas bénéficier d'un double degré de juridiction, et à ne pouvoir être poursuivi que par l'office du Parquet, à l'exclusion donc des parties civiles. Un tel système n'est pas recommandé par la Commission de Venise et est d'ailleurs mal perçu par ses « bénéficiaires ». Saisies par des magistrats en mal de double degré de juridiction, la Cour européenne des droits de l'homme, à l'instar de la Cour constitutionnelle belge ²⁰, n'a toutefois pas remis en cause ce privilège ²¹.

2.8 La discipline

La discipline ne peut relever de l'organe qui a investi le magistrat de sa fonction. Dans ce cadre, il est recommandé par la Commission de Venise que les procédures disciplinaires « relèvent de la compétence de conseils de la magistrature ou de juridictions disciplinaires » et qu'en outre, « il devrait être possible de faire appel des décisions des instances disciplinaires » ²². Dans un rapport du 3 novembre 2017 sur l'indépendance et l'impartialité judiciaire, le conseil consultatif des juges européens (CCJE) insiste sur un point fondamental : « seul un Conseil indépendant peut garantir l'indépendance des juges, en rendant des décisions qui remplissent les critères " d'un tribunal indépendant et impartial " conformément à l'article 6 de la Convention » (§ 19) ²³.

20 | Arrêts de la Cour constitutionnelle belge du 14 juillet 1994, n° 66/94 ; du 7 novembre 1996, n° 60/96 ; du 11 février 1998, n° 13/98 (à propos de justiciables poursuivis en même temps que les magistrats) ; du 4 novembre 1998, n° 112/ 98 ; du 18 novembre 1998, n° 117/1998 ; du 11 mars 2009, n° 44/2009 ; du 1er février 2018, n° 9/2018 ; du 22 mars 2018, n° 35/2018 ; du 24 septembre 2020, n° 124/2020.

21 | Arrêt de la Cour EDH du 15 juillet 2003, Ernst et autres c. Belgique, Requête n° 33400/96, [CE:ECHR:2003:0715JUD003340096](#), §§ 50 à 57 ; Décision d'irrecevabilité de la Cour EDH du 9 décembre 2004, Stevens c. Belgique, Requête n° 56936/00.

22 | Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite, « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, disponible sur le site <https://rm.coe.int/1680700e13>, partie I, § 43.

Voir aussi les principes fondamentaux relatifs à l'indépendance de la magistrature issus du Haut-Commissariat des Nations Unies aux droits de l'homme et confirmés par l'Assemblée générale des Nations Unies dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, principe n° 20.

23 | Bureau du conseil consultatif de juges européens (CCJE), Rapport sur l'indépendance et l'impartialité du pouvoir judiciaire dans les États membres du Conseil de l'Europe en 2017, disponible sur <https://rm.coe.int/2017-rapport-situation-juges-etats-membres/1680786ae2>.

En principe, l'article 6, paragraphe 1, de la CEDH ne s'applique pas au contentieux disciplinaire des magistrats pour le motif que ces fonctions impliquent une participation directe ou indirecte à l'exercice de la puissance publique et ne portent pas sur des droits civils ²⁴. L'absence d'application de l'article 6 de la CEDH a toutefois pour effet qu'en l'absence de standards européens en la matière, les garanties dans le contentieux disciplinaire des magistrats sont susceptibles de varier d'un pays à l'autre.

Deux nuances sont à apporter à ce constat.

- La non-application de l'article 6 de la CEDH à ce contentieux doit toutefois être nuancée depuis l'arrêt *Bilgen c. Turquie* du 9 mars 2021 ²⁵ et n'empêche pas en tout état de cause que plusieurs des garanties prévues par cette disposition s'appliquent néanmoins, en tant que principe général, au régime disciplinaire des magistrats, comme le principe général de l'impartialité ²⁶.
- L'entrée en vigueur de la charte des droits fondamentaux de l'Union européenne a pour effet que les mêmes garanties prévues par l'article 47 ne sont pas limitées aux contestations portant sur des droits civils tout en n'étant applicables que dans le cadre de la mise en œuvre du droit de l'Union. La Cour de justice a toutefois interprété largement cette restriction dans sa jurisprudence récente ²⁷.

24| La Cour EDH a appliqué les critères énoncés dans la jurisprudence issue de l'arrêt du 19 avril 2007, *Vilho Eskelinen et autres c. Finlande*, Requête n° 63235/00, [CE:ECHR:2007:0419JUD006323500](#), à tous les types de litiges concernant des juges.

La Cour EDH a en effet considéré que, s'ils ne font pas partie de l'administration au sens strict, les magistrats n'en font pas moins partie de la fonction publique au sens large (Cour EDH, 15 mars 2022, *Grzęda c. Pologne*, Requête n° 43572/18, [CE:ECHR:2022:0315JUD004357218](#), §§ 262 et 263). Pour une critique de cette jurisprudence, voir notamment Michalauskas M., « Brèves réflexions sur l'applicabilité de l'article 6, § 1, de la Convention européenne des droits de l'Homme au contentieux relatif au statut des magistrats », *Revue trimestrielle des droits de l'Homme*, n° 59, Anthemis, Bruxelles, 2004, pp. 645 à 652.

25| Voir le rapport de Madame la Juge Šimáčková dans le même panel.

26| Arrêts de la Cour constitutionnelle belge du 31 mai 2001, n° 74/2001, B.9.3. ; du 23 février 2017, n° 29/2017, B.12. ; du 8 novembre 2018, n° 150/2018, B.13.

Voir aussi la jurisprudence de la Cour EDH, notamment les arrêts du 9 janvier 2013, *Oleksandr Volkov c. Ukraine*, Requête n° 21722/11, [CE:ECHR:2013:0109JUD002172211](#), §§ 112 et 113 ; du 30 avril 2015, *Mitrinovski c. « l'ex-République yougoslave de Macédoine »*, Requête n° 6899/12, [CE:ECHR:2015:0430JUD000689912](#), § 45 ; du 7 janvier 2016, *Gerovska Popčevska c. l'ex-République yougoslave de Macédoine*, Requête n° 48783/07, [CE:ECHR:2016:0107JUD004878307](#) ; du 23 juin 2016, *Baka c. Hongrie*, Requête n° 20261/12, [CE:ECHR:2016:0623JUD002026112](#), § 121.

27| Voir aussi la note de bas de page 6 et le rapport de M^{me} la Présidente de chambre Sacha Prechal dans le même panel.

2.9 L'absence de subordination interne

Les juges ne sont soumis qu'à la loi. L'indépendance individuelle de chaque juge « est incompatible avec une relation de subordination des juges dans l'exercice de leur activité juridictionnelle » ²⁸.

3. Les remèdes structurels

Les remèdes préventifs sont aussi de nature structurelle en ce qu'ils concernent les juridictions sous l'angle de leur organisation et de leur fonctionnement.

3.1 Les principes d'indépendance et d'impartialité

La première garantie dans ce domaine est le niveau normatif d'affirmation des principes d'indépendance et d'impartialité. Il est requis à cet égard que les principes fondamentaux garantissant l'indépendance des juges soient inscrits dans la Constitution ou dans un texte équivalent, ce qui implique, pour assurer leur effectivité, l'existence d'un contrôle constitutionnel des normes législatives qui porte sur ces principes.

3.2 L'organisation juridictionnelle, la procédure et le statut des magistrats

La deuxième garantie concerne les normes relatives à l'organisation juridictionnelle (leur nombre, les juridictions, leur ressort, leurs compétences etc.), à la procédure et au statut des magistrats. Il ressort de la condition de légalité inscrite dans l'article 6 de la CEDH que ces normes doivent relever pour l'essentiel du pouvoir législatif plutôt que du pouvoir exécutif ²⁹.

Il est par ailleurs indiqué que le principe de légalité en ces matières soit inscrit dans la Constitution et censurable ainsi via le contrôle de constitutionnalité des lois.

28| Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite, « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, disponible sur le site <https://rm.coe.int/1680700e13>, partie I, § 72.

29| Voir notamment Cour EDH, 22 juin 2000, Coëme et autres c. Belgique, Requêtes nos 32492/96, 32457/96, 32548/96, 33209/96 et 33210/96, [CE:ECHR:2000:0622JUD003249296](#), § 98 ; et Cour EDH, 1er décembre 2020, Guðmundur Andri Ástráðsson c. Islande, Requête no 26374/18, [CE:ECHR:2020:1201JUD002637418](#), §§ 223 à 230. Voir aussi les principes fondamentaux relatifs à l'indépendance de la magistrature issus du Haut-Commissariat des Nations unies aux droits de l'homme et confirmés par l'Assemblée générale des Nations unies dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, principe n° 11.

3.3 L'autorité garante de l'indépendance et de l'impartialité de la justice

La troisième garantie structurelle a trait à l'autorité qui est désignée, par le texte constitutionnel si possible, comme étant garante de l'indépendance et de l'impartialité de la justice. Il est requis que cette autorité ne relève ni du pouvoir exécutif ni du pouvoir législatif, mais qu'elle consiste en une autorité indépendante de ces deux pouvoirs, créée par la Constitution et dotée de garanties substantielles pour ce qui est de sa composition, de ses pouvoirs et de son autonomie organique et financière. Elle doit pouvoir jouer un rôle déterminant dans les décisions relatives à la nomination, la carrière et la discipline des juges. Ainsi, la possibilité pour le pouvoir exécutif de démettre les membres d'une juridiction de leurs fonctions pour négligence grave ou inconduite notoire n'est pas compatible avec le principe de l'inamovibilité du juge qui constitue une garantie de l'indépendance du « pouvoir judiciaire » – sensu lato – par rapport au pouvoir exécutif ³⁰. Il est recommandé par la Commission de Venise de créer un tel organe et de le composer de telle façon qu'il ait un caractère pluraliste, les juges représentant une partie importante, sinon la majorité, de ses membres et devant être élus ou désignés par leurs pairs ³¹.

30 | Conseil d'État belge, avis L. 42.324//3 du 13 mars 2007 sur un avant-projet de décret « tot aanvulling van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid met een titel XVI Toezicht, handhaving en veiligheidsmaatregelen », Gedr. St., VI. Parl., 2006-2007, nr. 1249/1.

31 | En Belgique, un tel organe a vu le jour avec la révision constitutionnelle du 20 novembre 1998 sous la dénomination de Conseil supérieur de la Justice (article 151 de la Constitution).

3.4 Le financement de la justice

Une quatrième garantie structurelle réside dans le financement de la justice qui doit être d'un niveau suffisant ³² et qui ne doit pas être tributaire des fluctuations politiques. Un certain niveau doit donc lui être garanti. Par ailleurs, il est indispensable d'associer le pouvoir juridictionnel au processus d'élaboration du budget de la Justice. Enfin, une plus grande autonomie de la Justice passe par la reconnaissance de sa capacité à s'autogérer sur le plan financier, ce que permet de réaliser un financement par dotation dont l'utilisation est soumise à des contrôles tant internes qu'externes.

3.5 Le prononcé de la décision de justice

Une cinquième garantie provient d'une série de mécanismes qui gravitent autour du prononcé de la décision de justice : la collégialité des formations de jugement, la publicité des audiences, le secret du délibéré, la motivation de la décision, le prononcé en audience publique et le caractère définitif de la décision de justice en-dehors des procédures de recours prévues par la loi.

4. Conclusion

Ces remèdes, ces garanties ne sont pas des vœux pieux. Ils, elles sont indispensables à la démocratie, à la confiance mutuelle des justiciables et entre États et à la promotion de l'État de droit. En tant que juridiction constitutionnelle, il nous revient de les rendre effectives.

32| Rapport du Conseil de l'Europe, Commission européenne pour la démocratie par le droit dite « Commission de Venise » des 12 et 13 mars 2010 sur l'indépendance du système judiciaire, disponible sur le site <https://rm.coe.int/1680700e13>, partie I, § 55.

Voir aussi les principes fondamentaux relatifs à l'indépendance de la magistrature issus du Haut-Commissariat des Nations unies aux droits de l'homme et confirmés par l'Assemblée générale des Nations unies dans ses résolutions 40/32 du 29 novembre 1985 et 40/146 du 13 décembre 1985, principe n° 7.



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Contribution by Ms Sacha Prechal, Judge at the Court of Justice of the European Union

Independence of the Judiciary before the Court of Justice of the European Union

1. Introduction

The organisation of the judiciary and judicial proceedings is a matter of competence of the Member States. Nevertheless, the exercise of this competence has to comply with the Member States' obligations under EU law. In this respect, EU law sets minimum requirements and the Court of Justice of the European Union performs a certain review of the organisation of the judiciary, in particular in relation to the independence of the latter.

The inherent and inextricable link between the right to effective judicial protection and the rule of law has characterised the EU judicial system at least since 1986.¹ The judgment in the *Portuguese Judges* case² marked the beginning of a new development in the case-law, in particular by making clear that Article 19(1), second paragraph, TEU may serve as a *self-standing ground*³ for the assessment of whether certain measures are compatible with the requirement of judicial independence. In the same judgment, the Court of Justice of the European Union first pointed out that Article 19 TEU gives concrete expression to the value to the rule of law stated in Article 2 TEU⁴ and confirmed the relationship between the very existence of effective judicial protection and the rule of law by declaring effective judicial protection to be of the

1 | Judgment of 23 April 1986, *Les Verts v European Parliament*, C-294/83, [EU:C:1986:166](#).

2 | Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, [EU:C:2018:117](#).

3 | Until then, Article 19(1), second paragraph, TEU was usually referred to as an aid to interpretation.

4 | Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, [EU:C:2018:117](#), paragraph 32.

essence of the latter principle.⁵ Building upon pre-existing case-law,⁶ the Court of Justice of the European Union continued by stating that judicial independence is a crucial element of that judicial protection and is inherent in the task of adjudication.⁷

In the present contribution, I will not contemplate the – in my view manifest – importance of judicial independence for democracy and the rule of law; neither will I dwell upon the independence of the judiciary as a cornerstone of the right to a fair trial. Instead, I will focus on four EU law-specific issues. First, I will briefly discuss the normative foundations of the case law concerning judicial independence. Next follows a brief discussion of the concrete content of that independence. In the third place, I will address the type of assessment the Court of Justice of the European Union performs when facing a problem of independence. Finally, a brief reflection on the question of ‘why judicial independence matters in the EU law context’ will round off the contribution.

2. The foundations of the ‘independence case-law’

Two provisions of primary EU law are the foundations of the Court of Justice of the European Union case law on the independence of the judiciary: Article 47 Charter of Fundamental Rights of the European Union (‘the Charter’) and Article 19(1), second paragraph, TEU.

Both provisions reaffirm a pre-existing general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 European Convention on Human Rights, namely the principle of effective judicial protection.⁸ The core of that principle is the protection of the rights that legal subjects derive

5 | Ibid, paragraph 36; referring to Judgment of 28 March 2017, *Rosneft*, C-72/15, [EU:C:2017:236](#), paragraph 3.

6 | Reference is made to Judgments of 19 September 2006, *Wilson*, C-506/04, [EU:C:2006:587](#), paragraph 49; Judgment of 14 June 2017, *Online Games and Others*, C-685/15, [EU:C:2017:452](#), paragraph 60; and Judgment of 13 December 2017, *El Hassani*, C-403/16, [EU:C:2017:960](#), paragraph 40.

7 | Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, [EU:C:2018:117](#), paragraphs 41 and 42.

8 | Starting with Judgment of 15 May 1986, *Johnston*, C-222/84, [EU:C:1986:206](#).

from EU law and, often at the same time, the control of the exercise of the powers by public authorities, both at the EU- and Member State-level.⁹

As far as *the content* is concerned, Article 19(1), second paragraph, TEU corresponds with the right to effective judicial protection laid down in Article 47 of the Charter.¹⁰ The text of the latter Article explicitly mentions access to an independent and impartial tribunal previously established by law as a component of effective judicial protection. Moreover, not only is the content of Article 19(1), second paragraph, TEU and Article 47 of the Charter the same; they both have direct effect as well.¹¹ Note that the content corresponds closely to Article 6(1) of the European Convention on Human Rights. Unsurprisingly, the case-law of the European Court of Human Rights ('the ECtHR') relating to this Article is regularly referred to by the Court of Justice of the European Union.¹²

The difference between the two articles lies in the *material scope of application*. Article 47 of the Charter applies, within the Member States, 'only when they are implementing' EU law. The notion of 'implementation' is to be understood broadly. In the judgment in *Åkerberg Fransson*, confirming its previous case law, the Court held that no systematic distinction should be made between the notions 'implement' and 'act within the scope of application of EU law'.¹³ The scope of application of Article 47 of the Charter is limited in two respects. First, the applicability of the Charter presupposes that the case at hand involves the application or interpretation of a rule of Union law other than a provision of the Charter itself. Second, the

9| For a brief history of, in particular, Article 19 TEU see Prechal, S., "Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?" in Bonelli, M., Eliantonio, M., and Gentile, G., (eds.) *Article 47 of the EU Charter and Effective Judicial Protection, Volume I*, Hart Publishing, Oxford, 2022, pp. 11-25.

10| Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in Joined Cases C-585/18, C-624/18 and C-625/18, [EU:C:2019:982](#), paragraph 169. While the English version of Article 19 TEU requires the Member States to provide remedies sufficient to ensure effective legal protection, the French version refers to 'protection juridictionnelle effective'. In any case, effective legal protection comprises also the notion of 'effective judicial protection'.

11| Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraphs 142 to 145.

12| Smulders, B., "Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in their Recent Case Law on Judicial independence: the Case of Irregular Judicial Appointments", *Common Market Law Review, Special Issue*, 2022, pp. 105-128.

13| Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, [EU:C:2013:105](#), paragraphs 21 and 22.

applicability of Article 47 of the Charter presupposes at least an alleged violation of rights and freedoms guaranteed by EU law.¹⁴ In concrete terms, there must be a real dispute about the interpretation or application of EU law rules in which an individual claims that the judicial protection of his or her legal position, as provided for by EU law, is not sufficient.

In contrast, for the purposes of Article 19(1), second paragraph, TEU, it is sufficient that the national court concerned *may act in the fields covered by EU law*. Indeed, a debate is possible about the question whether ‘fields covered by EU law’ has another or broader meaning than ‘the scope of EU law’. In any case, however, the very fact that the said court may act in the field of EU law triggers the application of Article 19(1), second paragraph, TEU. This implies that it is not always necessary that, in the concrete case at hand, some other rule of EU law applies. The mere fact that the court concerned has competence *to potentially decide* on the interpretation or application of EU law is sufficient to come within the material scope of Article 19(1), second paragraph, TEU.¹⁵

It is submitted that the difference in the scope of application of the two provisions is due to their different nature. Effective judicial protection, as laid down in Article 47 of the Charter, is a fundamental right which aims at the protection of individuals in the first place. The role of effective judicial protection in the context of Article 19(1), second paragraph, TEU is, to an extent, different. Article 19 TEU is an institutional provision, which features in *Title III, Provisions on the Institutions*, TEU. It concerns the structure and mission of the judicial power in the EU. In the *Portuguese Judges* judgment, the Court of Justice of the European Union explicitly confirmed what has been present in EU law ever since *Van Gend en Loos*,¹⁶ namely that both the Court of Justice of the European Union and the national courts have the responsibility for ensuring judicial protection in the EU legal order. In other words, national courts share with the Court of Justice of the European Union the task of ensuring that, in the interpretation and

14| See, for instance, Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraphs 87 and 88.

15| Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, [EU:C:2018:117](#), paragraph 40; confirmed for instance in Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraph 51, and, recently, in Judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’ and Others*, in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#), paragraph 194.

16| Judgment of 5 February 1963, *Van Gend en Loos*, 26/62, [EU:C:1963:1](#).

application of the Treaties, the law is observed.¹⁷ Since, from this institutional perspective, the national courts form a part of the EU judicial system, they must meet the requirements of effective judicial protection and therefore also the guarantee of judicial independence.¹⁸ In this respect, the courts must be independent at all times – not only because they may be called upon to interpret and apply EU law, but because judicial independence is a structural requirement.¹⁹ The indivisible nature of the independence of the judiciary explains the broad application of Article 19(1), second paragraph, TEU.²⁰

3. The principle of judicial independence specified

At a very general level, the Court of Justice of the European Union has identified two aspects of the requirement that courts be independent. The first is an external one, meaning that the body is protected against external intervention or pressure liable to impair the independent judgment of its members in the proceedings before them. Not only should any direct influence be avoided, but also types of influence that are more indirect and that are liable to have an effect on the decisions of the judges concerned.²¹ In accordance with the principle of the

17| Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, [EU:C:2018:117](#), paragraphs 32 and 33.

18| Judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraph 68; Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#), paragraph 111.

19| As Advocate General Bobek put it: ‘...(In)dependence is about control, pressure, and leverage. It is structural. It must be guaranteed transversally. Certainly, a person influencing or even controlling a judge or a court might decide not to exercise his or her influence in an individual case. However, that would hardly mean that that judge is in general ‘independent’. For that reason, there is simply no ‘judicial independence within the scope of EU law’ as opposed to ‘judicial independence in purely national cases’. There is no ‘part-time’ judicial independence’. Opinion of AG Bobek of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, in Joined Cases C-748/19 to C-754/19, [EU:C:2021:403](#), point 136.

20| This in contrast to other requirements that may follow from the principle of effective judicial protection, like standing rules, for instance. It is very well conceivable that for actions with an EU law-dimension these rules differ when compared to purely national actions.

21| Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in joined Cases C-585/18, C-624/18 and C-625/18, [EU:C:2019:982](#), paragraph 125.

separation of powers, the independence of the judiciary must, in particular, be ensured in relation to the legislature and the executive.²²

The second aspect is *internal* and is very closely linked to impartiality. It seeks to ensure an equal distance of the body (and its individual members) from the parties to the proceedings and their respective interests.²³

Subsequently, these rather abstract requirements have been translated into more concrete standards, which should be safeguarded through specific rules, and which were given a more precise substance in a line of cases decided by the Court of Justice of the European Union.²⁴

In relation to the *nomination* of judges, the involved bodies may enjoy some discretion, and final nomination by a political body remains possible. However, in the selection procedure and decision-making processes, there must exist detailed procedural rules and substantive – merit-based – conditions. Objective and verifiable criteria should be provided, as well as the obligation to state reasons, in particular by referring to those criteria.²⁵ Involvement of a body such as the Polish Council for the Judiciary may contribute to the objectivity of the procedures. However, the proviso is that the body itself is independent of the legislative and executive authorities; and, insofar as the body advises another authority or makes appointment (or other) proposals, it should also be independent of the authority which it assists.²⁶ The possibility to

22| Ibid., paragraph 124.

23| See, for instance, Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, [EU:C:2018:586](#), paragraph 65. A new dimension of the internal independence requirement, namely the control within the judiciary, is currently pending before the Court of Justice of the European Union in Joined Cases *Hann-Invest et al.*, C-554/21, C-622/21 and C-727/21. The cases concern, inter alia, the phenomenon of a ‘Registration Service’, which implies that the registrations judge examines the decision taken by a formation of a court, of which he or she is not a part. He or she may approve the decision or refer it back, together with written or oral comments, in order for a new decision to be taken.

24| Unsurprisingly, these standards overlap greatly with those discussed by Pierre Nihoul in his contribution to the present volume.

25| Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraphs 122 and 123; Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraph 56.

26| Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraph 116; Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in Joined Cases C-585/18, C-624/18 and C-625/18 [EU:C:2019:982](#), paragraph 138; Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraph 66.

challenge the decisions at issue in court proceedings – which should at the very least include an examination of whether there was no *ultra vires* or improper exercise of authority, error of law, or manifest error of assessment – can be equally important.²⁷ This is, in particular, the case where there exist doubts about the guarantees in the process of selection and the bodies involved in it.²⁸

The possibility of the *secondment* of judges to an adjudicating panel must be such as to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions. This implies, inter alia, that the criteria for secondment must be made public, and that the person responsible for the secondment must state reasons, in order to avoid both arbitrariness and the risk of manipulation.²⁹

Another important guarantee is the *principle of irremovability*.³⁰ This means that judges must be allowed to remain in post, provided that they have not reached the obligatory retirement age or that their mandate has not expired. Exceptions to this principle do exist; however, these must be determined by express legislative provisions, which go beyond normal administrative or employment law.³¹ The only reason for removal should be an incapacity to carry out their duties or a serious breach of their obligations by the judges concerned.³² While lowering the retirement age of judges as such is not necessarily problematic, if – in the specific circumstance of a case – such a lowering can be perceived as a disguised removal from office of a pre-determined

27| Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraph 114; Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in Joined Cases C-585/18, C-624/18 and C-625/18 [EU:C:2019:982](#), paragraph 145.

28| Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraphs 129 and 130. As to promotion of judges, where comparable requirements apply see the recent Judgment of 7 September 2023, *Asociația ‘Forumul Judecătorilor din România’ & YN*, C-216/21, [EU:C:2023:628](#).

29| Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, in Joined cases C-748/19 to C-754/19, [EU:C:2021:931](#), paragraphs 78 and 79.

30| Judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraph 76.

31| Judgment of 21 January 2020, *Banco de Santander*, C-274/14, [EU:C:2020:17](#), paragraph 60.

32| Judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraph 76.

group of judges of a Supreme Court, this does indeed raise serious concerns as regards compliance with the principle of the irremovability of judges.³³

Similarly, *transfer* without the consent of the judge concerned is potentially capable of undermining irremovability and judicial independence, in particular when it is used as a means of controlling the content of judicial decisions. Moreover, it may have effects similar to disciplinary sanctions. Therefore, guarantees are needed to prevent direct or indirect external intervention. Transfer should be allowed only if there are legitimate grounds relating, for instance, to the distribution of available resources, and they should be open to challenge in a court, while fully safeguarding the rights of the defence.³⁴

The latter subject leads to another set of specific guarantees, namely those relating to disciplinary procedures. These guarantees must prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. There must be a clear definition of conduct amounting to disciplinary offences and the penalties applicable. The rules must provide for the involvement of an independent body in accordance with a procedure that fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence and the possibility of bringing legal proceedings in which the disciplinary bodies' decisions can be challenged.³⁵ This implies a guarantee that one will not be exposed to disciplinary measures for making a reference for a preliminary ruling to the Court of Justice of the European Union.³⁶

33| Judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraphs 82 to 86.

34| Judgment of 6 October 2021, *W. Ż. (Chamber of Extraordinary Control and Public Affairs – appointment)*, C-487/19, [EU:C:2021:798](#), paragraphs 114 to 118.

35| Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, [EU:C:2018:586](#), paragraph 67; Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' et al.*, in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#), paragraphs 198 to 200; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraphs 80 to 82, 134 to 140, 187 to 191 and 203 to 207. Cf. also the recent Judgment of 11 May 2023, *Inspecția Judiciară*, C-817/21, [EU:C:2023:391](#). Comparable considerations as in disciplinary proceedings apply to cases of the personal liability of judges for the damage resulting from a judicial error. See Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#), paragraphs 229 to 237.

36| Order of 12 February 2019, *RH*, C-8/19 PPU, [EU:C:2019:110](#), paragraph 47; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraphs 227 and 228.

Unsurprisingly, decisions authorising the initiation of *criminal proceedings* against judges, their arrest and detention, and the reduction of their remuneration must also be adopted or reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence. The same holds true for *decisions relating to essential aspects of the employment*, social security, or retirement law schemes applicable to judges.³⁷

Finally, as to salary reductions at stake in the *Portuguese Judges* case, the Court of Justice of the European Union held that the level of remuneration of judges must be commensurate with the importance of the function they carry out.³⁸

4. Assessment of independence issues

The Court of Justice of the European Union may be called upon to assess a problem of independence of the judiciary directly. This will be the case in infringement proceedings under Article 258 TFEU. In proceedings under Article 267 TFEU, it is ultimately for the referring court to make the relevant findings. However, while interpreting the relevant provisions of EU law, the Court of Justice of the European Union may provide that court with detailed guidance, focusing on the concrete problems of the case. Where relevant, national courts are under the obligation to take fully into account the findings made by the Court of Justice of the European Union in an infringement proceeding.³⁹ Moreover, they are required, under the principle of sincere cooperation laid down in Article 4(3) TEU, to nullify the unlawful consequences of an infringement of EU law.⁴⁰

The assessment made by the Court of Justice of the European Union is a global one. First, the measures at stake are not considered in isolation, but placed in their broader context. It might be that, when considered separately, the measure may not seem objectionable *per se*. However, when combined with other measures, the cumulative effect may point to a lack of independence. Second, the assessment does not entail close scrutiny only of the measure

37| Judgment of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21, [EU:C:2023:442](#), paragraphs 96 to 98.

38| Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, [EU:C:2018:117](#), paragraph 5.

39| Judgment of 13 July 2023, *YP and Others*, in Joined Cases C-615/20 and C-671/20, [EU:C:2023:562](#), paragraphs 55 to 58.

40| *Ibid.*, paragraph 64.

concerned; the specific national legal and factual context has to be taken into account. This implies that the way the measures are applied and how this application works out also matter, as does the intention behind the measures. This intention is indeed not always easy to discern but, again, given the context, in certain cases it could have been identified and played a role in the assessment. For instance, in case *Commission v Poland*, there were clear indications that the reform of the retirement age of serving judges of the Polish Supreme Court was made with the aim of side-lining a certain group of judges. The arguments brought forward by the Polish government did not dispel these doubts.⁴¹

The intentions were similarly important in cases concerning national legislation aiming to render it impossible to verify the nomination of a judge and the process leading to that nomination.⁴² In that respect, the so called ‘Muzzle Law’ of 20 December 2019 prohibited national courts from taking actions or omissions that may prevent or significantly impede the functioning of a judicial body and actions that question the existence of a judge’s official relationship, the effectiveness of a judge’s appointment, or the legitimacy of a constitutional organ of the Republic of Poland. The law classified these actions as disciplinary offences. The Court of Justice of the European Union considered, inter alia, that the relevant provisions of the ‘Muzzle Law’ reflected a series of questions submitted by several Polish courts to the Court of Justice of the European Union regarding the compatibility with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of various recent legislative amendments affecting the organisation of justice in Poland. After a detailed analysis, the Court of Justice of the European Union came to the conclusion that the new law implied a risk that the provisions may be used to prevent the national courts concerned from making certain findings or assessments required of them by EU law and to influence the judicial decisions expected from those courts, thus undermining the independence of the judges of which those courts are composed.⁴³ Similarly, the Court

41| Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, [EU:C:2019:531](#), paragraphs 80 to 96. Cf. also Judgment of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, [EU:C:2019:924](#), paragraphs 126 to 131.

42| According to case-law of the Court of Justice of the European Union, in certain circumstances, national courts may be obliged to review compliance with the requirements arising from the fundamental right to effective judicial protection, such as those relating to access to an independent and impartial tribunal previously established by law. This may imply a verification of the procedure of nomination. See Judgment of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21, [EU:C:2023:442](#), paragraphs 130 and 131.

43| Judgment of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21, [EU:C:2023:442](#), paragraphs 139 to 152.

of Justice of the European Union found that the provisions prevented national courts from making further reference for preliminary questions, and therefore the provisions infringed on Article 267 TFEU.⁴⁴

A comparable intention of precluding national courts from making the necessary findings and from submitting preliminary question to the Court of Justice of the European Union was already at issue in *A.B. and Others*. In this case, after an initial referral by the Polish Supreme Administrative Court, the Law on the KRS (the Polish National Council for the Judiciary) was amended. Pursuant to that reform, it became impossible to lodge appeals against decisions of the KRS concerning the proposal or non-proposal of candidates for appointment to judicial positions at the Supreme Court. Moreover, that reform declared such still-pending appeals to be discontinued *ex lege*. Consequently, the referring court was de facto deprived of its jurisdiction to rule on that type of appeal. In addition, the possibility of a national court repeating similar questions for preliminary rulings in the future was blocked.⁴⁵ While the final findings were left to the referring court, the Court of Justice of the European Union clearly indicated that such legislation would be incompatible with Article 267 TFEU, Article 19(1) TEU and 4(3) TEU.

Naturally, assessments of this type are sensitive and delicate. An issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context.⁴⁶ There should certainly not be ‘one-size-fits-all’ solutions. Differences between Member States should be respected, and no blueprints should be imposed.⁴⁷ Likewise, the standard applied

44| Ibid., paragraphs 153 to 161.

45| Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraphs 90 to 107.

46| Bell, J., “Judicial Cultures and Judicial Independence”, *Cambridge Yearbook of European Legal Studies*, Vol. 4, 2001, pp. 47-60; Krajewski, M., “The EU Right to an Independent Judge: How much Consensus Across the EU?” in Bonelli, M., Eliantonio, M., and Gentile, G., (eds.) *Article 47 of the EU Charter and Effective Judicial Protection, Volume I*, Hart Publishing, Oxford, 2022, pp. 61-80.

47| The case law of the European Court of Human Rights follows a similar approach. No particular constitutional models are imposed, but what matters is whether, in a given case, the requirements of the European Convention on Human Rights have been met (see, inter alia, Judgment of the European Court of Human Rights of 6 May 2003, *Kleyn and Others v the Netherlands*, Application Nos. 39343/98, 39651/98, 43147/98 and 46664/99, [ECLI:CE:ECHR:2003:0506JUD00393439](#), paragraph 193’ [CE:ECHR:2003:0506JUD003934398](#) and the case-law cited; Judgment of the European Court of Human Rights of 9 November 2006, *Sacilor Lormines v France*, Application No. 65411/01, [ECLI:CE:ECHR:2006:1109JUD006541101](#), paragraph 59’ Judgment of the European Court of Human Rights of 18 October 2018, *Thiam v France*, Application No. 80018/12, [ECLI:CE:ECHR:2018:1018JUD008001812](#), paragraph 62’and the case-law cited) cited in Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in Joined Cases C-585/18, C-624/18 and C-625/18, [EU:C:2019:982](#), paragraph 130.

should not disturb other legal systems when there is not a (serious) problem of judicial independence. This is why context and intention are important elements to be taken on board.

In my opinion, the ultimate test of the Court of Justice of the European Union allows for all of this to be considered. At the end of the day, the Court requires that the rules and their application must be such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the body concerned to external factors and its neutrality with respect to the interests before it. Briefly put: a test of ‘appearance of independence’. This is a flexible and open test, leaving quite some space for considering a whole range of elements. Indeed, some rules that may not be problematic in one Member State may be problematic in another and vice versa, depending on the overall situation.⁴⁸

5. Judicial independence as a specific problem in the EU law context

Since the EU is a common legal order based on the rule of law, it should not come as a surprise that, as in any other system based on the rule of law, judicial independence is an essential prerequisite within that legal order. If the rule of law is part of the identity of the EU legal order, so is judicial independence.⁴⁹ However, there are some additional and specific reasons why judicial independence matters in the EU law context.

First, the independence of the judiciary is essential for another building block of that legal order, namely the principle of mutual trust. Most often cited in this respect is the cooperation in the Area of Freedom, Security and Justice (AFSJ). Upholding effective judicial protection in the Member States, and thus also the independence of the judiciary, is a vital condition for mutual trust. In turn, mutual trust is crucial for cooperation in civil and criminal matters, and in the field of immigration and asylum policy. While the best-known are cases concerning the

48| Cf. cases in which the Court of Justice of the European Union indicated, after a careful analysis, that there were no elements present, which would sufficiently substantiate the claims of lack of judicial independence: Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#); Judgment of 9 July 2020, *Land Hessen*, C-272/19, [EU:C:2020:535](#); Judgment of 7 September 2023, *Asociația ‘Forumul Judecătorilor din România’ & YN*, C-216/21, [EU:C:2023:628](#).

49| Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraph 232.

execution of European Arrest Warrants,⁵⁰ mutual trust is equally important in the two other fields of the AFSJ; therefore, problems related to independence of the judiciary may emerge there as well.⁵¹

However, the rationale of mutual trust is much broader than that and goes beyond the AFSJ. Not only is the functioning of the internal market based on mutual trust,⁵² but the whole system of cooperation in the EU is permeated by that principle. Mutual trust means here, above all, that all Member States uphold EU law in comparable fashion.

The Court of Justice of the European Union expressed this idea clearly in the *Conditionality Judgment*,⁵³ in particular, in relation to sound financial management of the EU budget. The Court recalled that compliance of the Member States with the common values on which the EU is founded, such as the rule of law and solidarity, justifies the mutual trust between those States. That compliance is thus a condition for the enjoyment of all the rights deriving from the application of the Treaties to the Member States concerned. It continued by stating that the Union budget is one of the principal instruments for giving practical effect, in the European Union's policies and activities, to the fundamental principle of solidarity between Member States. The implementation of that principle, through the Union budget, is based on the Member States' mutual trust in the responsible use of the common resources included in that budget. The sound financial management of the Union budget and the financial interests of the Union may be seriously compromised by breaches of the principles of the rule of law committed in a Member State.⁵⁴

50| For example, Judgment of 25 July 2018, *Minister for justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, [EU:C:2018:586](#); Judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, in Joined Cases C-354/20 PPU and C-412/20 PPU, [EU:C:2020:1033](#).

51| In the area of cooperation in civil matters see, for instance, Judgment of 13 July 2023, *TT (Déplacement illicite de l'enfant)*, C-87/22, [EU:C:2023:571](#); Judgment of 16 February 2023, *Lufthansa Technik AERO Alzey GmbH*, C-393/21, [EU:C:2023:104](#). As far as immigration and asylum policy is concerned, see, for instance, Judgment of 19 March 2019, *Ibrahim and Others*, C-297/17, C-318/17, C-319/17 et C-438/17, [EU:C:2019:219](#); Judgment of 19 March 2019, *Jawo*, C-163/17, [EU:C:2019:218](#).

52| Judgment of 11 May 1989, *Wurmser*, C-25/88, [EU:C:1989:187](#); Judgment of 16 June 2022, *Sosiaali- ja terveystalouden lupa- ja valvontavirasto*, C-577/20, [EU:C:2022:467](#); Judgment of 9 February 2022, *Sped Pro v Commission*, T-791/19, [EU:T:2022:67](#).

53| Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#).

54| *Ibid.*, paragraphs 125 to 132.

In brief, because mutual trust is vital for the functioning of the whole system, deficiencies in the functioning of the judiciary of a Member State, including its independence, are not internal questions of that State. They are also a problem for other Member States and for the EU legal order.

Second, it is submitted that lack of judicial independence is, at the end of the day, a threat to EU law itself and therefore also for the European integration. From the very beginning, Union law has been essential to the process of European integration. The idea of integration through law, instead of through processes where politics prevails, make the EU different from many other international organisation.⁵⁵ It is not without reason that the EU is characterised as a common legal order. There exists an intricate legal network of intertwined rules and jurisprudence. A judicial system has been put in place to ensure the coherent and uniform interpretation of Union law. Under that system, it is for the national courts and the Court of Justice of the European Union to ensure that Union law is fully applied in all Member States, and that the rights which individuals derive from that law enjoy effective judicial protection.⁵⁶ Such a system works well only in a context in which a minimum of common values is respected, including the rule of law principles and, in particular, a well-functioning independent judiciary.

In concrete and simplified terms: if citizens do not trust judges and so refrain from going to court, if judges do not take a critical look at what the national authorities are doing and do not dare to refer preliminary questions, then the outlook for EU law would be quite bleak. Both for those individuals and for Union law itself. This would put an end to the actual compliance and enforcement of EU law and, indeed, to its further development. One may wonder whether this risk is properly understood and considered in certain quarters.

55| Cf. Pescatore, P., *The Law of Integration*, Sijthoff, Leiden, 1974; Schwarze, J., "Das Recht als Integrationsinstrument", in Capotorti, F., et al. (eds.), *Du droit international au droit de l'intégration*, Nomos, Baden-Baden, 1987, pp. 637-650.

56| Cf. already here above and, for instance, Judgment of 5 June 2021, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21 [EU:C:2023:442](#), paragraph 128.



Mr Roger Linden, President, and Mr Francis Delaporte, Vice-President of the Constitutional Court of the Grand Duchy of Luxembourg



Ms Kateřina Šimáčková

Judge at the European Court of Human Rights

Contribution by Ms Kateřina Šimáčková, Judge at the European Court of Human Rights

Protection of the Rule of Law and Judicial Independence through the Protection of the Rights of Judges before the European Court of Human Rights

This text presents a new line of case-law of the European Court of Human Rights ('the ECtHR'), which is based on the principle of the rule of law, expressed as one of the three pillars of the European Convention on Human Rights alongside the protection of democracy and fundamental rights. This line of case-law allows judges to assert their rights before national courts and subsequently before the European Court of Human Rights. The new case-law concerns not only access to courts for affected judges, but also protects candidates for judicial office or members of judicial councils. This leads to the question of whether this special approach to judges is sufficiently legitimate. However, it is clear that the ECtHR is seeking to contribute to the protection of judicial independence, which is essential for the proper functioning of the rule of law and the protection of fundamental rights.

1. Earlier case-law common to all public servants

The rights of judges, like all other public servants – i.e. to fair judicial review when they are deprived of office or when their rights arising from their public service are affected – have been protected in the case-law of the ECtHR under the civil limb of Article 6 under the so-called '*Eskelinen* test', created by the Grand Chamber based on the case of *Vili Eskelinen and Others v Finland*.¹ Although the judiciary is not part of the ordinary civil service, it is considered 'part of typical public service'. Under this test, a civil servant must have access to the courts in respect of their employment disputes and is subject to the protection of the ECtHR in this respect because their dispute is of a civil nature, unless two cumulative conditions are met: i) national law expressly excludes access to the courts for the position or category of employees in question, *and* ii) this exclusion is justified by objective reasons in the national interest.

1 | Judgment of the European Court of Human Rights (ECtHR) of 19 April 2007, *Vilho Eskelinen and Others v Finland*, Application No. 63235/00, [CE:ECHR:2007:0419JUD006323500](https://www.echr.coe.int/tk/EN/63235_00.aspx?i=00&f=7).

The ECtHR has applied the criteria set out in *Vilho Eskelinen and Others* to all types of disputes concerning judges, including those relating to recruitment or appointment,² career/promotion,³ transfer,⁴ suspension,⁵ disciplinary proceedings,⁶ reduction in salary following conviction for a serious disciplinary offence⁷, removal from post (for example, President of the Supreme Court, President of the Court of Appeal or Vice-president of the Regional Court) while remaining a judge.⁸ It has also applied the *Eskelinen* criteria to a dispute regarding the premature termination of the term of office of a chief prosecutor.⁹

In all these cases, the standard *Eskelinen* test was applied without explicitly emphasising the peculiarities of the special position of judges and prosecutors in the rule of law system.

2 | Judgment of the ECtHR of 26 July 2011, *Juričić v Croatia*, Application No. 58222/09 [CE:ECHR:2011:0726JUD005822209](#).

3 | Decision of the ECtHR of 9 October 2012, *Dzhidzheva-Trendafilova v Bulgaria*, Application No. 12628/09, [CE:ECHR:2012:1009DEC001262809](#); judgment of the ECtHR of 15 September 2015, *Tsanova-Gecheva v Bulgaria*, Application No. 43800/12, [CE:ECHR:2015:0915JUD004380012](#), paragraphs 33 and 34.

4 | Decision of the ECtHR of 12 May 2009, *Tosti v Italy*, Application No. 27791/06, [CE:ECHR:2009:0512DEC002779106](#).

5 | Judgments of the ECtHR of 23 May 2017, *Paluda v Slovakia*, Application No. 33392/12, [CE:ECHR:2017:0523JUD003339212](#), paragraphs 33 and 34; and of 20 October 2020, *Camelia Bogdan v Romania*, Application No. 36889/18, [CE:ECHR:2020:1020JUD003688918](#), paragraph 70.

6 | Judgments of the ECtHR of 6 November 2018, *Ramos Nunes de Carvalho e Sá v Portugal*, Application Nos. 55391/13, 57728/13, 74041/13, [CE:ECHR:2018:1106JUD005539113](#), paragraph 120; of 9 July 2013, *Di Giovanni v Italy*, Application No. 51160/06, [CE:ECHR:2013:0709JUD005116006](#), paragraphs 36 and 37; and of 9 March 2021, *Eminağaoğlu v Turkey*, Application No. 76521/12, [CE:ECHR:2021:0309JUD007652112](#), paragraph 80; dismissal (see judgments of the ECtHR of 9 January 2013, *Oleksandr Volkov v Ukraine*, Application No. 21722/11, [CE:ECHR:2013:0109JUD002172211](#), paragraphs 91 and 96; of 19 January 2017, *Kulykov and Others v Ukraine*, Application No. 5114/09 and 17 others, [CE:ECHR:2017:0119JUD000511409](#), paragraphs 118 and 132; of 28 March 2017, *Sturua v Georgia*, Application No. 45729/05, [CE:ECHR:2017:0328JUD004572905](#), paragraph 27; of 31 October 2017, *Kamenos v Cyprus*, Application No. 147/07, [CE:ECHR:2017:1031JUD000014707](#), paragraphs 82 to 88; and of 5 February 2009, *Olujčić v Croatia*, Application No. 22330/05, [CE:ECHR:2009:0205JUD002233005](#), paragraphs 31 to 43).

7 | See Judgment of the ECtHR of 20 November 2012, *Harabin v Slovakia*, Application No. 58688/11, [CE:ECHR:2012:1120JUD005868811](#), paragraphs 118 to 123.

8 | See Judgments of the ECtHR of 23 June 2016, *Baka v Hungary*, Application No. 20621/12, [CE:ECHR:2016:0623JUD002062112](#), paragraphs 34 and 107 to 111, of 25 September 2018, *Denisov v Ukraine*, Application No. 76639/11, [CE:ECHR:2018:0925JUD007663911](#), paragraph 54; and of 29 June 2021, *Broda and Bojara v Poland*, Application Nos. 26691/18 and 27367/18, [CE:ECHR:2021:0629JUD002669118](#), paragraphs 121 to 123.

9 | See Judgment of the ECtHR of 5 May 2020, *Kövesi v Romania*, Application No. 3594/19, [CE:ECHR:2020:0505JUD000359419](#), paragraphs 124 and 125.

2. Change of approach

After 2020, however, the situation changed. The ECtHR developed a new reasoning in *Bilgen v Turkey*,¹⁰ relying on the fact that, by protecting the rights of judges, it also protects the rule of law. Therefore, in some cases, it must go further in protecting judges than it does in protecting other public servants. In effect, the ECtHR created a special standard of protection for the rights of judges as compared to other public servants by adding an additional aspect in their favour, for the Court to consider – namely, the protection of the independence of the judiciary and the rule of law.

In 2020, the Grand Chamber issued the key judgment of *Guðmundur Andri Ástráðsson v Iceland*,¹¹ in which the ECtHR emphasised the obligations imposed on states in relation to the right to be tried by a court established by law (established in accordance with the law) within the meaning of Article 6(1) of the European Convention on Human Rights. The Grand Chamber of the ECtHR unanimously found that the judge of the Court of Appeal, who had ruled in the applicant's case, had been appointed to her post by a procedure that did not respect the applicable law. And it found, therefore, the applicant's conviction could not be found compatible with the Convention. The ECtHR has thus become much more attentive to the way in which judges are appointed, including from the point of view of the protection of the parties to the proceedings. This approach was repeatedly applied in subsequent Polish cases – e.g. *Xero Flor* or *Reczkowicz*, with regard to the criticised changes in the Polish judiciary that were found to be contrary to the principles of the rule of law.

In 2021, the ECtHR found it unacceptable for judges to be prevented from exercising their judicial functions following a legislative reform in Ukraine.¹² In addition to recognising their right to have access to the courts in such a case, the ECtHR considered that the prevention of Supreme Court judges from exercising their functions significantly interfered with their

10| Judgment of the ECtHR of 9 March 2021, *Bilgen v Turkey*, Application No. 1571/07, [CE:ECHR:2021:0309JUD000157107](#), paragraph 79.

11| Judgment of the Grand Chamber of the ECtHR of 1 December 2020, *Guðmundur Andri Ástráðsson v Iceland*, Application No. 26374/18, [CE:ECHR:2020:1201JUD002637418](#); and of 22 July 2021, *Reczkowicz v Poland*, Application No. 43447/19, [CE:ECHR:2021:0722JUD004344719](#).

12| See Judgment of the ECtHR of 22 July 2021, *Gumenyuk and Others v Ukraine*, Application No. 11423/19, [CE:ECHR:2021:0722JUD001142319](#), paragraphs 61 and 65 to 67.

right to respect for their private life. The ECtHR also held that it went against the principle of irremovability of judges, which was fundamental for judicial independence and public trust in the judiciary.

Recent case-law has brought into focus judges, not as members of a court whose decision is impugned by an applicant, but as holders of Convention rights. Notably, the ECtHR has commented on systems of judicial discipline, employment disputes, privileges of judges as parties to proceedings, reputation issues, as well as on salary and retirement benefits. The ECtHR has been influenced by relevant international and European material in elaborating the Convention rights and protection specific to judges.

In particular, the ECtHR has emphasised the special role of the judiciary in society which, as the guarantor of justice – a fundamental value in a state governed by the rule of law – must enjoy public confidence if judges are to be successful in carrying out their duties.¹³ As the European Convention on Human Rights-system cannot function properly in the absence of independent judges, the Member States' task of ensuring judicial independence is of crucial importance. The ECtHR must be particularly attentive to the protection of the members of the judiciary against measures that can threaten their judicial independence and autonomy.¹⁴

Academics remind us that, in several recent judgments, the ECtHR 'has discussed the issue of the bond of trust and loyalty between judges and the state. In those cases, it held that the employment relationship of judges with the state must be understood in the light of the specific guarantees essential for judicial independence. Rather than loyalty to the holders of power, they are beholden only to democracy and the rule of law. In those other cases, those considerations sufficed for the ECtHR to conclude that the exclusion of judicial review of disputes about the career and status of judges had not been justified by objective reasons in the state's interests'.¹⁵

13| Judgment of the Grand Chamber of the ECtHR of 15 March 2022, *Grzęda v Poland*, Application No. 43572/18, [CE:ECHR:2022:0315JUD004357218](https://www.echr.coe.int/CE:ECHR:2022:0315JUD004357218), paragraph 302.

14| Key Theme – Article 6 (civil) Protection of the judiciary; ECHR-KS, *Registry of the European Court of Human Rights*, Strasbourg, 2023; available at www.echr.coe.int.

15| Leloup, M., Kosař, D., "Sometimes Even Easy Rule of Law Cases Make Bad Law, ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda v Poland*", *European Constitutional Law Review*, Vol. 18, No 4, Cambridge University Press, Cambridge, 2022, p. 12.

3. Grand Chamber *Grzęda* case

As expressed in the Grand Chamber *Grzęda* case:¹⁶ The right of access to a court under Article 6(1) of the European Convention on Human Rights must be interpreted in the light of the Preamble to the Convention – which, in its relevant part, declares the rule of law to be part of the common heritage of the Contracting States. The ECtHR has stated that judicial independence is a prerequisite to the rule of law in the case of *Ástráðsson v Iceland*. The Committee of Ministers has also taken the view that judicial independence constitutes a fundamental aspect of the rule of law.¹⁷

While the *Grzęda* case only concerns a complaint about the right of access to a court, the essential message of the Grand Chamber judgment is the need to protect the independence of the courts and judges and a criticism of Poland's judicial reforms. The judgment stressed the importance of judicial independence for the proper functioning of a European Convention on Human Rights-system based on subsidiarity.¹⁸ The understanding of the principle of judicial independence moved away from its traditional individual right of the parties to a judicial dispute towards a general duty of the state to safeguard the independence of the judiciary as a whole.¹⁹

This key theme focuses on the procedural protection of Article 6 of the European Convention on Human Rights but extends also to the ECtHR's examination of the rights of judges under other Convention articles, in particular the protection of private life or freedom of expression under Articles 8 and 10 of the Convention.

16| Judgment of the Grand Chamber of the ECtHR of 15 March 2022, *Grzęda v Poland*, Application No. 43572/18, [CE:ECHR:2022:0315JUD004357218](https://www.echr.coe.int/ViewDoc.aspx?id=16809f007d), paragraph 298.

17| See point 4 of the Appendix in the *Council of Europe, Judges: Independence, Efficiency and Responsibilities – Recommendation CM/Rec(2010)12 of the Council of Europe's Committee of Ministers to Member States*, adopted on 17 November 2010, available at <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d>.

18| Judgment of the Grand Chamber of the ECtHR of 15 March 2022, *Grzęda v Poland*, Application No. 43572/18, [CE:ECHR:2022:0315JUD004357218](https://www.echr.coe.int/ViewDoc.aspx?id=16809f007d), paragraphs 323 to 324.

19| Leloup, M. and Kosař, D., "Sometimes Even Easy Rule of Law Cases Make Bad Law, ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda v Poland*", *European Constitutional Law Review*, Vol. 18, No 4, Cambridge University Press, Cambridge, 2022, p. 27.

This approach has been used in the cases of other Polish judges (most recently, for example, Judge Tuleya)²⁰ and also in the case of the Georgian judicial candidate, Ms Gloveli.²¹ In Ms Gloveli's case, the ECtHR unanimously found in its Chamber decision that it was obliged to grant judicial protection even to an unsuccessful judicial candidate. In doing so, it relied on arguments arising from national law, as well as references to the *Grzęda* case, and the need to protect the independence of the judiciary. It referred here to the relevant international standards, which likewise state that any decision concerning the selection and the career of judges, or at least the procedure under which such a decision is made, should be amenable to judicial review.²²

4. Special protection of the rights of judges

In the above-mentioned cases on the protection of the right of judges, of the members of judicial councils, or of judicial candidates to have access to the courts and to have their private life or freedom of expression protected,²³ the ECtHR argued that the judiciary has a special role in society. As the guarantor of justice, a fundamental value in a state governed by the rule of law, the judiciary must enjoy public confidence if it is to be successful in carrying out its duties (see above). Pay particular attention to the prominent place that the judiciary occupies among state organs in a democratic society, and to the importance attached to the separation of powers and the necessity of safeguarding the independence of the judiciary. The ECtHR must be particularly attentive to the protection of the members of the judiciary

20| Judgment of the ECtHR of 6 July 2023, *Tuleya v Poland*, Application Nos. 21181/19, 51751/20, [CE:ECHR:2023:0706JUD002118119](https://www.echr.coe.int/ViewDoc.aspx?id=1881111).

21| Judgment of the ECtHR of 7 April 2022, *Gloveli v Georgia*, Application No. 18952/18, [CE:ECHR:2022:0407JUD001895218](https://www.echr.coe.int/ViewDoc.aspx?id=1881111).

22| *Council of Europe, Judges: Independence, Efficiency and Responsibilities – Recommendation CM/Rec(2010)12 of the Council of Europe's Committee of Ministers to Member States*, adopted on 17 November 2010, available at <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d>; *Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe on the draft law on amendments to the organic law on general courts of Georgia*, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014, CDL-AD(2014)031), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)031-e); *Urgent Opinion on the Selection and Appointment of Supreme Court Judges*, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019, CDL-AD(2019)009), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2019)002-e).

23| Judgment of the ECtHR of 16 June 2022, *Zurek v Poland*, Application No. 39650/18, [CE:ECHR:2022:0616JUD003965018](https://www.echr.coe.int/ViewDoc.aspx?id=1881111).

against measures affecting their status or career that can threaten their judicial independence and autonomy.²⁴ By doing so, the ECtHR actually tightened the usual test applied by the Court in public servants' protection cases in favour of the judges by limiting the State's discretion to exclude judicial protection for them.²⁵

In the *Tuleya* case, the ECtHR adds yet another layer to the argument that the rule of law requires protection – namely, the broader context of the situation of the Polish judiciary, which enters the Court's assessment in this case.

Recently, the ECtHR issued its Chamber judgment in *Lorenzo Bragado and Others v Spain*, imposing a duty of judicial review concerning the lawsuits of candidates affected by the Spanish Parliament's failure to complete appointments process to the General Council of the Judiciary (governing body of judiciary). The ECtHR based its reasoning on the need to protect the functioning of the judiciary, in addition to the need to protect the rights of the persons concerned to judicial protection.²⁶ Three judges have dissented²⁷ based in particular over the fact that the ECtHR's case-law has already gone quite far in recognising the existence of a 'right' under the civil part of Article 6, and that they do not agree with this type of solution in the case of any dysfunction related to the judiciary.

24| Judgment of the ECtHR of 7 April 2022, *Gloveli v Georgia*, Application No. 18952/18, [CE:ECHR:2022:0407JUD001895218](#), paragraph 49.

25| Not only in the Polish cases (see for example the dissenting opinion in the judgment of the ECtHR of 20 October 2020, *Camelia Bogdan v Romania*, Application No. 36889/18, [CE:ECHR:2020:1020JUD003688918](#), paragraph 70) has Polish Judge Wojtyczek expressed dissenting views against the sketched-out development of the case-law and makes the following argument: If – with the development of the case-law – judicial independence becomes more and more an individual right of a judge, then the exercise of judicial power and judicial discretion becomes protected by human rights. The fundamental distinction in modern law between the individual and state organs becomes blurred, and thus the whole concept of individual rights is called into question (as indicated in the dissenting opinion in *Grzęda* paragraph 7.1, last sentence). Judge Wojtyczek also points to a violation of the principle of equality (by providing a higher standard of protection to judges) in his dissenting opinion in *Zurek*.

26| Judgment of the ECtHR of 22 June 2023, *Lorenzo Bragado and others v Spain*, Application Nos. 54193/21 and 5 others, [CE:ECHR:2023:0622JUD005319321](#).

27| Judges Ranzoni, Guyomar, Gnatovskyy; the author of the text voted with the majority.

As the case-law develops, judicial independence has begun to be interpreted as – among other things – an individual right of the judge themselves, even though the ultimate goal is the impartiality of the judge and the protection of the rights of the parties. Ultimately, however, the bearer of these rights (or the beneficiary of this better status) is the judge, a representative of public authority insofar as they exercise, have exercised, or seek to exercise, judicial power.

5. Independence of judges as a condition for the protection of the fundamental rights of all

The issue of the independence of the judiciary and the rule of law is also addressed in the documents of the European Commission for Democracy through Law – the so-called Venice Commission.

The Venice Commission states in the Rule of Law Checklist:²⁸ the independence of the judiciary means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers.²⁹ All decisions concerning appointment and professional career of judges should be based on merit applying objective criteria within the framework of the law.

On the other hand, it is also important to stress that the Report on the Rule of Law³⁰ of the Venice Commission points out that one of the main factors of the rule of law is that no one has any privileges over anyone else. And doesn't the new approach of the ECtHR in the cases described above create precisely that - a certain privileged position of judges compared to other public servants?

28| Venice Commission, "Study No 711/2013" on the *Rule of Law Checklist* (March 2016, CDL-AD(2016)007), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

29| Hamilton, A., Madison, J., Jay, J., "Federalist No. 78" in *The Federalist Papers*, Palgrave MacMillan, New York, 2009: Alexander Hamilton, citing Montesquieu, redefined the judiciary as a separate branch of government coequal with the legislative and the executive branches.

30| Venice Commission, "Study No 512/2009" in the *Report on the Rule of Law* (March 2011, CDL AD(2011)003rev), available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e).

This case-law, which makes sense and is well reasoned, because one of the pillars of the European Convention on Human Rights is the protection of the rule of law, at the same time creates a special protected ‘caste’ of judges among public servants. I wonder whether this practice is fully legitimate in the eyes of the public, and whether and where it should have its limits. Indeed, whenever judges make decisions about judges and their claims, the legitimacy of those decisions in relation to the public must also be kept in mind.³¹

Other fundamental questions include whether the functioning of the judiciary can be effectively protected through the protection of the rights of judges before the ECtHR (in the similar way that the European Convention on Human Rights protects journalists³² as watchdogs of democracy), and whether the ECtHR has other options to protect the rule of law, which is merely illusory without a functioning independent national judiciary. The principle of subsidiarity within the Convention system is devoid of any meaningful content if the Member States do not secure in law and practice the existence of independent, impartial, and effective courts, so as to safeguard fundamental rights.³³ And protecting the independence of the judiciary also means protecting independent and strong judges.

31| Leloup, M., “Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR”, *European Constitutional Law Review*, Vol. 17, Issue 3, Cambridge University Press, Cambridge, 2021, p. 394 onwards; Ducoulombier, P., “Le droit subjectif du juge à la protection de son indépendance: chaînon manquant de la protection de l’État de droit en Europe?” in Branko, L. et al. (eds.), *Procès équitable: perspectives régionales et internationales*, Anthemis, Limal, 2020, p. 153 onwards.

32| See, for example, Judgment of the ECtHR of 8 November 2016, *Magyar Helsinki Bizottság v Hungary*, Application No. 18030/11, [CE:ECHR:2016:1108JUD001803011](#), paragraphs 166 to 168.

33| Krenc, F. and Tulkens, F., “L’indépendance du juge. Retour aux fondements d’une garantie essentielle d’une société démocratique” in Chenal, R. et al. (eds.), *Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi*, Wolf Legal Publishers, Oisterwijk, 2019, p. 397; Spano, R., “The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary”, *European Law Journal*, Vol. 27, John Wiley & Sons Ltd, Hoboken, New Jersey, 2021, p. 223.



Mr Stephan Harbarth

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Contribution by Mr Stephan Harbarth, President of the Federal Constitutional Court of the Federal Republic of Germany

EU Oversight of Judicial Independence in the Member States: its Foundations and Limits¹

1. Introduction

Before I begin, I would like to express my sincere thanks to my fellow speakers. By shedding light on numerous aspects of our topic, they have spared me the task of having to provide a long introduction and thus allow me to jump straight to an additional point; a point, moreover, which strikes me as being particularly important from the Member State-perspective, as it concerns the foundations – and indeed the limits – of the EU’s oversight of judicial independence in the Member States.

In EU law, the principle of judicial independence is derived from three sources.² Pursuant to Article 2, first sentence, of TEU, one of the founding values of the EU is the rule of law. This value is specified in, among other places, second subparagraph of Article 19(1) TEU, which codifies the EU requirement for effective legal protection. This, in turn, is supplemented and further defined by the guarantee set out in Article 47(2), first sentence, of the Charter of Fundamental Rights of the European Union (‘the Charter’), whereby every person is entitled to have their matter heard by an independent and impartial court. However, as the Court of Justice of the European Union and others have repeatedly pointed out,³ the organisation of justice falls within the competence of the Member States, meaning that they enjoy autonomy

1 | The spoken word prevails.

2 | Judgment of 9 July 2020, *Land Hessen*, C-272/19, [EU:C:2020:535](#), paragraph 45.

3 | See, by way of example, Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraph 48; and Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 88.

in terms of proceedings and procedures, which includes the organisation of the courts. The European treaty system, which is characterised by the principle of conferral (Article 5(1) and (2) TEU), does not provide the EU and its institutions with regulatory power in that regard.

In view of this situation, it might be tempting to agree with certain voices in legal scholarship who claim to have identified a ‘Copenhagen Dilemma’ – namely, the supposed inability of EU institutions to ensure sustained adherence to the values required for accession to the EU once a country becomes a Member State.⁴ However, in its case-law, issued largely in response to the situation in Poland, the Court of Justice of the European Union has succeeded in treading a course that avoids both the Scylla of powerlessness in dealing with rule-of-law backsliding in Member States, and the Charybdis of exceeding EU competences: in principle, the lack of regulatory power in the area of the organisation of justice does not rule out the exercise of judicial review by the EU over Member States when and insofar as EU law provides a standard in this area – which is the case in the primary law provisions on the principles of the rule of law and judicial independence.

Yet this course is not without certain risks. The more closely and intensively an EU institution (namely the Court of Justice of the European Union) exercises the power to review the rule of law and judicial independence, and the more specific the standards derived from the EU concept of the rule of law become, the smaller the margin of appreciation left to the Member States when enacting legislation. In the exercise of competences reserved exclusively to the Member States, the guarantees of primary law thus amount to a ‘negative allocation of competences’.⁵ If the power of the EU institutions (namely the Court of Justice of the European Union) to review the Member States’ judiciaries is too stifling, there is a risk that a regulatory power not provided for in the Treaties will be introduced through the back door.

4| See, for example Scholtes, J., “Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU”, *European Constitutional Law Review*, Vol. 19, No 1, 2023, p. 60; Mader, O., “Wege aus der Rechtsstaatsmisere. Der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung: Teil 2”, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 22, 2021, p. 975.

5| A critic of this characterisation is Kube, H., *Finanzgewalt in der Kompetenzordnung*, Jus Publicum, Heidelberg, 2004, p. 552 fn. 65, who prefers the nomenclature ‘limits on the exercise of powers’ (*Kompetenzausübungsschranke*).

2. Limits on the EU power of review

In spite of this, I am confident that the EU's powers of review can be limited as necessary, especially since the criteria for properly containing the EU's ability to review judicial independence are already established in the Court of Justice of the European Union's case-law and have already been applied on a case-by-case basis. Let me briefly outline these criteria. They can be grouped into four different structural categories: the standard of review; the subject matter of review; the depth of review; and the legal consequences of any breaches for the Member States.

2.1 Standard of review

It is necessary to develop a standard that reflects restraint.⁶ The EU standard should not go beyond fundamental minimum requirements which, according to the common constitutional tradition of the Member States, belong to the indispensable core of the principle of the rule of law and are essential to the functioning of the EU as a community based on the rule of law. The case-law of the Court of Justice of the European Union gives rise to two particular arguments in support of using a restrained standard.

2.1.1 Principle of the presumption of conformity at the time of accession to the EU

In several cases, the Court of Justice of the European Union has pointed out that respect for the values of Article 2 TEU is a pre-condition for accession to the EU and has thus implied that, at the time a Member State joined the EU, its judicial system was assumed to be in conformity with EU law.⁷ At least two conclusions can be drawn from this 'principle of the presumption of conformity'. First, it suggests that the status quo of the state of the rule of law in the Member State – and thus also the level of judicial independence – at the time of accession is the frame of reference and starting point for the Court of Justice of the European Union's subsequent

6 | In this respect, see 2.1.2 b) of this article.

7 | Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraph 59 et seq.; Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'*, C-83/19 et al., [EU:C:2021:393](#), paragraph 162; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraph 51; Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 160 et seq.; and – of particular importance here – Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 104.

review. In principle, this ‘preservative’ effect of the ‘status quo checked at accession’ also extends to processes that were completed prior to accession, as long as they are not still relevant to independence. On that basis, the Court of Justice of the European Union was able to rule that the appointment of a judge by an undemocratic regime prior to accession to the European Union may not be detrimental to judicial independence.⁸ At the same time, it can be inferred from the ‘presumption of conformity’ that if a Member State simply maintains the status quo in the decisive period, this is not in principle sufficient to cast doubt on the Member State’s adherence to the rule of law or on the independence of its judges, even if further developments may be possible and desirable from the EU’s point of view. Therefore, the Court of Justice of the European Union has in several decisions consistently placed great emphasis on the fact that Member States must ‘[prevent any] regression of their laws on the organisation of justice... by refraining from adopting rules which would undermine the independence of the judiciary’.⁹ The previous reference to the state of the rule of law and the level of independence that is applied at the time of accession already suggests that the point of reference for a ‘regression’ is not the *status quo ante*, that is to say the level of independence that applied before the regulatory entry into force and that prompted the examination by EU institutions, but the state of affairs at the time of accession.¹⁰

2.1.2 Significance of the expectations of persons seeking justice

The second recurring argument can be referred to as the ‘significance of the expectations of persons seeking justice’. In its most recent decisions, the Court of Justice of the European Union has repeatedly emphasised the need to dispel any serious and justified doubts in the

8| Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 104 et seq.

9| Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraphs 63–64; Judgment of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’*, C-83/19 et al., [EU:C:2021:393](#), paragraph 162; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraph 51; Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 162. For criticism of the ‘principle of non-regression’, see Scholtes, J., “Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU”, *European Constitutional Law Review*, Vol. 19, No 1, 2023, p. 69 et seq.

10| Scholtes, J., “Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU”, *European Constitutional Law Review*, Vol. 19, No 1, 2023, p. 63 et seq. For an opposing view, Mader, O., “Wege aus der Rechtsstaatsmisere. Der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung: Teil 2”, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 22, 2021, p. 974.

minds of such persons as to the independence of the judiciary due to actual possibilities for the executive or legislative branches to intervene.¹¹ However, the Court of Justice of the European Union has thus far not set out how the relevant group of persons seeking justice is to be determined. One possibility would be to base the decision on the expectations of persons seeking justice in the affected Member State, which could be quite different from those in other Member States. In principle, however, the decisive factor could also be the expectations of the EU population generally.¹² The first approach is the correct one – at least insofar as the Court of Justice of the European Union is assumed to derive an objective power of review from Article 2 first sentence and Article 19(1) subparagraph 2 TEU that is also exercised in cases where there is no specific reference to EU law.¹³

2.2 Subject matter of the review

With regard to the subject matter of the review, the case-law of the Court of Justice of the European Union clearly states that, firstly, it is not only the content of legal provisions that is important, but also their practical application; secondly, that the discernible objective of a measure – namely, the intention of the Member State – must also be taken into account; and, thirdly, that the Court of Justice of the European Union must not look at single aspects in isolation, but take all factors into account.

11| Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraph 117; Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraph 53; Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'*, C-83/19 et al., [EU:C:2021:393](#), paragraph 196; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraph 59; Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 225; and Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 105.

12| The wording used by the Court of Justice of the European Union, according to which the expectations 'in a democratic society' or 'in a state governed by the rule of law' are to be taken into account, could possibly be used for this purpose: Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., [EU:C:2019:982](#), paragraph 128; and Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 226.

13| Pursuant to the Court of Justice of the European Union's very broad interpretation of Article 19(1) subparagraph 2 TEU a court in a Member State acts in a 'field covered by Union law' not only when it actually interprets and applies EU law (or domestic law that is determined by EU law), but also when its jurisdiction potentially extends to the interpretation and application of EU law (See Judgment of 6 October 2021, *W. Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, [EU:C:2021:798](#), paragraphs 103–104; Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#) at paragraph 36 and Judgment of 29 May 2022, *Getin Noble Bank SA*, C-132/20, [EU:C:2022:235](#), at paragraph 90.

In a number of decisions, the Court of Justice of the European Union correctly refers not only to the content of Member State provisions, but also to their practical application.¹⁴ This is appropriate, because even though a Member State might have a legal provision, the wording of which appears to be a threat to independence, the Member State may have nonetheless developed certain conventions to deal with that provision, which meet or even surpass the EU standard of independence. Of course, the reverse is also true: a provision that is not problematic in itself can have an effect which endangers independence due to the way in which it is applied in practice. Finally, other conceivable cases are those in which the clear wording of a provision alone creates such a great risk of a threat to independence that the practical application of the provision or other fundamental principles no longer matter. This is what the Court of Justice of the European Union ruled in the case of the Polish disciplinary law.¹⁵

In its assessment, the Court of Justice of the European Union also considers the regulatory intention and objective discernible from the regulatory content and practical application of the provision in the Member State. Thus, essentially legitimate disciplinary provisions¹⁶ or provisions regarding the secondment¹⁷ or transfer¹⁸ of judges may not be used in order to politically control court decisions or to exert pressure on judges. In this respect, the Court of Justice of the European Union incorporates a final element in its assessment which – because the intentions of a Member State to exert political control over judges are rarely openly expressed – can only be established circumstantially.

14| Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#), paragraphs 68, 71; and Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraphs 207-08, 213.

15| Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraph 197 et seq., and particularly paragraph 200.

16| Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'*, C-83/19 et al., [EU:C:2021:393](#), paragraph 200; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraphs 61, 138; and Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 239.

17| Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, C-748/19 et al., [EU:C:2021:931](#), paragraph 73.

18| Judgment of 6 October 2021, *W. Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, [EU:C:2021:798](#), paragraph 118.

Moreover, the Court of Justice of the European Union does not consider individual measures in isolation, but looks to their interaction and combined effect.¹⁹ It is conceivable that a single measure may appear, in isolation, to be within the rule of law, yet has a combined effect with other measures that is no longer compatible with judicial independence.²⁰ According to the case-law of the Court of Justice of the European Union, a lack of judicial independence cannot be inferred from the mere fact that the composition of a panel of judges is based on rules that later prove to be unconstitutional under national law,²¹ or from the fact that judges are appointed by the legislature and the executive,²² or from the fact that judges may be seconded.²³ The situation may be different in the context of other measures, however, due to the possibility to compose a system of various individual components that on their own are unproblematic – or at least tolerable – in terms of the rule of law, but which impair judicial independence when viewed as a whole.²⁴

2.3 Depth of review

The standard of review – which is already subject to the applicable and necessary limitations outlined above – should also be applied with restraint by EU institutions. Statements to this effect in the case-law of the Court of Justice of the European Union are somewhat reserved,

19| Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, [EU:C:2021:153](#), paragraph 106, 129, 131 et seq.; Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, [EU:C:2021:596](#), paragraph 107, 110, 112, 146 et seq.; and Judgment of 6 October 2021, *W. Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, [EU:C:2021:798](#), paragraph 134 et seq. and paragraph 150. See also in comparison Mader, O., “Wege aus der Rechtsstaatsmisere. Der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung: Teil 2”, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 22, 2021, p. 974: contextual method.

20| Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., [EU:C:2019:982](#), paragraph 152.

21| Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 126, 127.

22| Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18 et al., [EU:C:2019:982](#), paragraph 133; and Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 233.

23| Judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim*, C-748/19 et al., [EU:C:2021:931](#), paragraph 72 et seq., 74.

24| Lübke-Wolff, V. G., “Das europäische Frankensteinproblem”, *Frankfurter Allgemeine Zeitung*, 13 January 2022, p. 14.

but they do exist. For instance, with regard to the application of the Conditionality Regulation,²⁵ the Court of Justice of the European Union has submitted that ‘the Commission and the Council must make their assessments taking due account of [...] the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law’.²⁶ The Court of Justice of the European Union has thus found that an irregular composition of panels breaches the first sentence of the second paragraph of Article 47 of the Charter:

‘when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process [...] which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system’.²⁷

Such criteria – namely the reference to the fundamental rules regarding the functioning of the judicial system, the requirement of a breach of a certain kind and gravity, as well as the existence of a real risk of undue influence – can also be effectively transferred to other cases.

2.4 Consequences of a breach

Once a breach of the EU principle of the rule of law has been established, attention turns to the legal consequences arising therefrom. The vast majority of the Court of Justice of the European Union’s decisions have been handed down in proceedings involving a request for a preliminary ruling under Article 267 TFEU. These decisions are, with regard to the interpretation and application of EU law, merely declaratory in nature; that is to say, the Court does not place Member States under obligation to remedy an identified breach in a specific way. More

25| Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I, 22.12.2020, p. 1-10).

26| Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraph 235; and Judgment of 16 February 2022, *Poland v Parliament and Council*, C-157/21, [EU:C:2022:98](#), paragraph 265.

27| Judgment of 26 March 2020, *Réexamen Simpson v Council*, C-542/18 RX-II et al., [EU:C:2020:232](#), paragraph 75; Judgment of 6 October 2021, *W. Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, [EU:C:2021:798](#), paragraph 130; Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19 et al., [EU:C:2021:1034](#), paragraph 206; and Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, [EU:C:2022:235](#), paragraph 122.

specific legal consequences can result from infringement proceedings or from conditions that the Commission and the Council apply to the release of budget and support funds when applying oversight mechanisms in the secondary law. Generally, Member States must therefore retain considerable discretion with regard to the elimination of a breach to ensure that the EU institutions' power to conduct a review does not conflict with the lack of regulatory power.

2.5 National constitutional courts as the primary guardians of the rule of law

The well-understood fact that the EU has limited power of review with regard to judicial independence in the Member States has a considerable permeating effect on the political and societal debate within the Member States. By their very nature, the constitutional courts of the Member States are more closely embedded in that debate than the Court of Justice of the European Union. The relevant cases usually appear before them at an earlier stage. From their own experience, they are familiar with the national particularities of the legal culture, they understand the expectations of those seeking justice, and they have a finely-tuned sense of the objectives behind the rules under review and the resulting practical implications. This is why the national constitutional courts – acting in conjunction with the ordinary courts, which are likewise bound by the law and the respective national constitution – are the primary guardians of the rule of law. Only when the finely calibrated judicial systems within the Member States are thrown off balance, and are no longer performing their paramount task of safeguarding the rule of law, is the Court of Justice of the European Union called upon to intervene.

3. Conclusion

There are certainly many more aspects to this discussion which could be mentioned. But in conclusion, just as with the protection of fundamental rights in the European multi-level system, the Member State courts and the Court of Justice of the European Union should engage in a dialogue. In the Member State-EU relationship, the standards and powers of review in respect of judicial independence can and must be developed and refined as part of a mutual exchange between the relevant institutions.²⁸

28| Lenaerts, K., "70 Jahre im Dienst der Europäischen Einigung", *Europäische Zeitschrift für Wirtschaftsrecht*, 2022, p. 1130 points to the cooperation between the Court of Justice of the European Union and the Member States' courts with regard to the dialogue on the rule of law.

2nd panel

**Rule of law –
Primacy of EU law
and equality before
the law of EU citizens**



M. Lars Bay Larsen

Vice-président de la Cour de justice
de l'Union européenne

Intervention de M. Lars Bay Larsen, Vice-président de la Cour de justice de l'Union européenne ¹

Libres réflexions sur l'équilibre entre égalité des citoyens et diversité constitutionnelle dans la jurisprudence de la Cour relative au principe de primauté

Il y a maintenant plus de dix ans, la Cour de justice de l'Union européenne organisait une journée de réflexion stimulante pour célébrer le cinquantième anniversaire de l'arrêt *Van Gend en Loos* ². L'année prochaine, soixante ans se seront écoulés depuis l'arrêt *Costa* ³, arrêt dans lequel, comme chacun sait, a été consacré pour la première fois le principe de primauté du droit communautaire sur le droit national. Il est dès lors pour le moins remarquable qu'après presque six décennies, tant les fondements que la portée de ce principe demeurent l'objet de débats au sein de l'Union, et ce, non seulement dans la sphère universitaire, mais également dans les mondes politique et judiciaire.

Si ce débat comporte divers aspects, aussi bien théoriques que pratiques, nous sommes plus précisément invités, à l'occasion du présent atelier, à réfléchir aux rapports qu'entretiennent la primauté du droit de l'Union, l'égalité entre les citoyens de l'Union et le respect de la diversité constitutionnelle. Il va sans dire qu'une telle réflexion implique de confronter des objectifs potentiellement en tension, l'accentuation de l'égalité étant de nature à réduire la diversité et réciproquement. Face à cette tension, divers équilibres pourraient, en principe, être envisagés. N'ayant certainement pas l'ambition d'élaborer une synthèse « idéale » assurant le dépassement des contraires, ma contribution visera essentiellement à exposer certains enseignements qui

1 | Les opinions exprimées dans cette intervention sont celles de leur auteur et ne reflètent pas nécessairement celles de la Cour de justice de l'Union européenne ou celles d'autres membres de cette Cour.

2 | Arrêt du 5 février 1963, *van Gend en Loos*, 26/62, [EU:C:1963:1](#).

3 | Arrêt du 15 juillet 1964, *Costa*, 6/64, [EU:C:1964:66](#).

peuvent, à mon sens, être tirés à cet égard de la jurisprudence de la Cour de justice de l'Union européenne. Mon approche se place donc sciemment du point de vue de la Cour de justice de l'Union européenne, sans bien évidemment nier l'existence de points de vue distincts, voire sensiblement différents, au niveau national. En vue d'exposer ces enseignements, je rappellerai, dans un premier temps, de quelle manière la Cour de justice de l'Union européenne s'est appuyée sur le principe de primauté pour assurer l'égalité des citoyens de l'Union devant les normes de l'Union d'effet direct (1), avant d'examiner dans quelle mesure le respect de la diversité constitutionnelle peut tempérer le principe de primauté (2).

1. La primauté comme vecteur d'égalité des citoyens de l'Union devant les normes de droit de l'Union d'effet direct

Les effets du principe de primauté sont, si l'on se base uniquement sur la jurisprudence de la Cour de justice de l'Union européenne, désormais bien établis. Ces dernières années, ces effets ont pu être synthétisés et réaffirmés par la Cour de justice de l'Union européenne dans plusieurs arrêts, rendus à propos des défaillances observées dans certains États membres en matière d'État de droit ⁴.

En substance, la Cour de justice de l'Union européenne juge de manière constante qu'un État membre ne saurait, en invoquant des dispositions de droit national, porter atteinte à l'unité et à l'efficacité du droit l'Union. Les normes de ce droit s'imposent ainsi à l'ensemble des organes d'un État membre, sans que des dispositions internes ne puissent y faire obstacle. Dans cette perspective, il incombe aux juges nationaux d'appliquer les dispositions du droit de l'Union et, le cas échéant, de laisser inappliquée de leur propre autorité toute réglementation ou pratique nationale, même postérieure, incompatible avec ces dispositions ou qui aurait pour effet de diminuer l'efficacité desdites dispositions.

4 | Voir, en particulier, les arrêts du 21 décembre 2021, Euro Box Promotion e.a., C-357/19, C-379/19, C-547/19, C-811/19 et C-840/19, [EU:C:2021:1034](#), du 22 février 2022, RS (Effet des arrêts d'une cour constitutionnelle), C-430/21, [EU:C:2022:99](#), ainsi que du 5 juin 2023, Commission/Pologne (Indépendance et vie privée des juges), C-204/21, [EU:C:2023:442](#).

Les fondements de cette solution ont été établis dès l'arrêt *Costa*, dans des termes qui ont été réitérés à plusieurs reprises par la Cour de justice de l'Union européenne ces dernières années ⁵. L'égalité entre les citoyens de l'Union n'est pas au cœur du raisonnement retenu à cet égard, lequel met davantage l'accent sur la « nature spécifique originale » du droit communautaire et sur le choix des États membres de limiter définitivement leurs droits souverains. La Cour de justice de l'Union européenne a d'ailleurs souvent davantage mis l'accent sur l'égalité entre les États membres devant les traités, laquelle exclurait toute possibilité pour l'un d'entre eux de faire prévaloir une mesure unilatérale contre l'ordre juridique de l'Union ⁶. Pour autant, dès l'origine, les liens structurels entre, d'une part, la primauté du droit communautaire et, d'autre part, l'égalité entre les ressortissants des États membres ne sont pas négligés. Ainsi, la Cour de justice de l'Union européenne s'est non seulement référée à la création par le droit primaire d'un « corps de droit » applicable à ces ressortissants, mais également au fait qu'admettre que la « force exécutive » du droit communautaire puisse varier d'un État membre à un autre provoquerait une discrimination fondée sur la nationalité. Ce dernier argument est au cœur de notre problématique : garantir que les mêmes règles issues du droit de l'Union s'appliquent effectivement dans l'ensemble des États membres assure, par définition, le même traitement aux citoyens de l'Union, indépendamment de l'État membre dans lequel ils se trouvent.

Cela étant, cette recherche d'égalité, ou plus largement les spécificités de la construction communautaire, ne sont pas considérées par la Cour de justice de l'Union européenne comme justifiant, en toute hypothèse, une application préférentielle des normes de l'Union en lieu et place des normes nationales. En effet, la primauté du droit de l'Union ne produit, en pratique, l'ensemble de ses effets que dans les situations où la norme de l'Union invoquée est revêtue de l'effet direct. S'il s'agit, là encore, d'un principe établi de longue date, il semble utile de souligner l'articulation précise entre primauté et effet direct, dans la mesure où cette articulation a parfois pu être mal interprétée.

5| Voir, notamment, l'avis 2/13 (Adhésion de l'Union à la CEDH), du 18 décembre 2014, [EU:C:2014:2454](#), point 157, ainsi que l'arrêt du 21 décembre 2021, *Euro Box Promotion e.a.*, C-357/19, C-379/19, C-547/19, C-811/19 et C-840/19, [EU:C:2021:1034](#), point 245.

6| Voir, notamment, l'arrêt du 21 décembre 2021, *Euro Box Promotion e.a.*, C-357/19, C-379/19, C-547/19, C-811/19 et C-840/19, [EU:C:2021:1034](#), point 249.

Ainsi que la Cour de justice de l'Union européenne l'a rappelé de manière détaillée dans l'arrêt *Popławski II* ⁷, le principe de primauté ne saurait aboutir à remettre en cause la distinction essentielle entre les dispositions du droit de l'Union dotées d'un effet direct et celles qui en sont dépourvues ni, partant, à instaurer un régime unique d'application de l'ensemble des dispositions du droit de l'Union par les juridictions nationales. Dès lors, une disposition du droit de l'Union qui est dépourvue de l'effet direct ne saurait être invoquée en vue d'obtenir, sur le seul fondement du droit de l'Union, que l'application d'une disposition nationale soit écartée par une juridiction d'un État membre. Certes, une telle juridiction demeure, en tout état de cause, tenue d'interpréter dans la mesure du possible le droit national en conformité avec le droit de l'Union et, lorsque certaines conditions sont remplies, d'assurer la réparation des dommages causés par la violation du droit de l'Union. Pour autant, il lui demeure loisible, au regard du droit de l'Union, d'appliquer une norme nationale au détriment d'une norme de l'Union contraire lorsque cette dernière est dépourvue d'effet direct.

Dans un tel cas, la diversité est, en quelque sorte, préférée à l'égalité entre les citoyens de l'Union. Ainsi, une solution nationale pourra alors concrètement être appliquée, au détriment du droit de l'Union, même si une telle application conduit à ne pas assurer l'uniformité des solutions retenues dans un domaine régi pour partie par le droit de l'Union. La persistance de cette diversité n'est d'ailleurs pas le fruit du hasard, mais bien des choix opérés par les auteurs des traités ou par le législateur de l'Union quant à l'instrument dans lequel est énoncée une norme de l'Union ou quant au degré de précision de cette norme. En effet, l'absence d'effet direct résultera le plus souvent soit de l'adoption d'une disposition dépourvue d'un caractère clair, précis et inconditionnel lui permettant d'être dotée de l'effet direct, soit du choix d'énoncer la norme de l'Union dans un instrument dépourvu d'un effet direct complet ⁸. Une bonne illustration de cette dernière hypothèse est fournie par l'adoption d'une directive ou d'un acte qui peut certes produire un effet direct dans les « rapports verticaux ascendants », autrement dit lorsqu'un particulier s'en prévaut contre des autorités publiques, mais qui ne produit pas d'effet direct « horizontal », au sens où il ne peut être invoqué en tant que tel pour écarter une législation nationale dans un litige entre deux ou plusieurs particuliers ⁹.

7 | Arrêt du 24 juin 2019, *Popławski*, C-573/17, [EU:C:2019:530](#).

8 | Voir, en ce sens, l'arrêt du 24 juin 2019, *Popławski*, C-573/17, [EU:C:2019:530](#), points 67 à 71.

9 | Voir, en ce sens, l'arrêt du 5 octobre 2004, *Pfeiffer e.a.*, C-397/01 à C-403/01, [EU:C:2004:584](#), points 103 à 118.

Au vu de ce qui précède, il apparaît que la dynamique des principes de primauté et d'effet direct constitue, en tant que telle, une forme de recherche d'équilibre entre égalité et diversité. La définition de cet équilibre est considérée par la Cour comme relevant de son office propre, puisqu'elle revendique sa compétence exclusive pour préciser la portée du principe de primauté, sans que cette portée ne puisse dépendre des décisions des juridictions nationales ¹⁰. Ces constats n'épuisent néanmoins pas le sujet, en tant notamment qu'ils laissent entière une question qui date des débuts de la construction communautaire, mais qui trouve une place croissante dans la jurisprudence de la Cour de justice de l'Union européenne : la diversité des normes constitutionnelles nationales peut-elle contribuer à limiter la portée du principe de primauté ?

2. La diversité constitutionnelle : une limite à la primauté du droit de l'Union ?

Assez rapidement après avoir consacré le principe de primauté du droit communautaire, la Cour de justice de l'Union européenne a été confrontée à la théorie selon laquelle les normes constitutionnelles nationales pourraient bénéficier d'un régime particulier, en n'étant pas soumises à ce principe de primauté. Cette théorie a cependant été fermement rejetée par la Cour de justice de l'Union européenne dans l'arrêt *Internationale Handelsgesellschaft* ¹¹. Dès lors que cette solution a été répétée de manière constante ¹², il ne fait guère de doute que, du point de vue du droit de l'Union, inscrire une règle ou un principe dans un texte constitutionnel ne saurait offrir aux États membres une sorte de « carte blanche » leur permettant d'opposer discrétionnairement cette règle ou ce principe au droit de l'Union.

Dans ce contexte, il aurait néanmoins pu être envisagé d'opérer, au regard du principe de primauté, une distinction entre le droit constitutionnel dans son ensemble et le « noyau » de ce droit. Les termes de l'arrêt *Internationale Handelsgesellschaft* paraissaient pourtant déjà

10| Voir, notamment, les arrêts du 22 février 2022, RS (Effet des arrêts d'une cour constitutionnelle), C-430/21, [EU:C:2022:99](#), point 52, et du 5 juin 2023, Commission/Pologne (Indépendance et vie privée des juges), C-204/21, [EU:C:2023:442](#), point 79.

11| Arrêt du 17 décembre 1970, *Internationale Handelsgesellschaft*, 11/70, [EU:C:1970:114](#).

12| Voir, par exemple, l'arrêt du 8 septembre 2010, *Winner Wetten*, C-409/06, [EU:C:2010:503](#), point 61.

condamner une telle approche, puisque cet arrêt affirme que l'invocation d'atteintes portées, soit aux droits fondamentaux tels qu'ils sont formulés par la constitution d'un État membre, soit aux principes d'une structure constitutionnelle nationale, ne saurait affecter l'effet d'un acte communautaire ¹³. Force est d'ailleurs de constater que, confrontée à la revendication par le *Bundesverfassungsgericht* (Cour constitutionnelle fédérale allemande) de son pouvoir d'écarter un acte de l'Union qui aurait été adopté *ultra vires* ou qui serait contraire au noyau de la loi fondamentale allemande, la Cour de justice de l'Union européenne a pris soin de mettre en avant le caractère obligatoire de son arrêt à intervenir en réponse aux questions posées par cette juridiction nationale ¹⁴.

Si l'état du droit de l'Union pouvait donc paraître clair depuis les années 1970, la Cour de justice de l'Union européenne a toutefois été appelée à plusieurs reprises à réexaminer cette question dans ses deux dimensions, à savoir le statut des droits fondamentaux garantis par les constitutions nationales et celui du « noyau » de ces constitutions. Ce réexamen a été opéré dans une nouvelle perspective, par référence à deux dispositions de droit primaire. Il ne s'agirait donc pas de constater une limite inhérente au principe de primauté, mais plutôt d'admettre éventuellement une forme d'« autolimitation » des auteurs des traités qui auraient décidé de restreindre eux-mêmes les effets du droit de l'Union lorsque sont en cause certains aspects spécifiques du droit constitutionnel national.

La première des dispositions ayant justifié un tel réexamen est l'article 53 de la charte des droits fondamentaux de l'Union européenne (ci-après la « Charte »). Cet article prévoit qu'aucune disposition de la Charte ne doit être interprétée comme limitant ou portant atteinte aux droits de l'homme et libertés fondamentales reconnus, notamment, par les constitutions des États membres. Il avait pu être soutenu que ledit article impliquait la possibilité d'opposer à l'application du droit de l'Union un standard constitutionnel national offrant aux personnes concernées un niveau de protection de leurs droits fondamentaux plus élevé que celui prévu par la Charte. Cette interprétation a été rejetée par la Cour de justice de l'Union européenne, dans l'arrêt *Melloni* ¹⁵, en tant notamment qu'elle porterait atteinte au principe de primauté du

13| Arrêt du 17 décembre 1970, *Internationale Handelsgesellschaft*, 11/70, [EU:C:1970:114](#), point 3.

14| Arrêts du 16 juin 2015, *Gauweiler e.a.*, C-62/14, [EU:C:2015:400](#), point 16, ainsi que du 11 décembre 2018, *Weiss e.a.*, C-493/17, [EU:C:2018:1000](#), point 19.

15| Arrêt du 26 février 2013, *Melloni*, C-399/11, [EU:C:2013:107](#), points 57 à 59.

droit de l'Union. L'exclusion de la possibilité, dans le champ d'application du droit de l'Union, d'opposer les droits fondamentaux consacrés dans une constitution nationale à l'application des normes de l'Union n'a donc pas été remise en cause par l'adoption de la Charte.

À cet égard, il convient tout de même de faire état d'une solution spécifique retenue dans l'arrêt *M.A.S. et M.B.* ¹⁶. Dans l'affaire ayant donné lieu à cet arrêt, la Cour de justice de l'Union européenne avait rendu un premier arrêt ¹⁷, impliquant que le droit de l'Union impose, en vue de préserver les intérêts financiers de l'Union, de remettre en cause l'application des règles de prescription prévue par le droit italien. Or, alors que le principe de légalité des délits et des peines tel que prévu dans la Charte ne fait pas obstacle à une telle remise en cause, il en va différemment s'agissant du droit constitutionnel italien. Confrontée à cette difficulté, la Cour de justice de l'Union européenne, tout en réaffirmant dans son principe la solution consacrée dans l'arrêt *Melloni*, envisage que la portée du principe de légalité des peines dans l'ordre juridique italien pourrait justifier que les règles de prescription prévues dans cet ordre juridique ne soient pas écartées, en vue d'éviter la survenance d'une situation d'incertitude méconnaissant le principe de précision de la loi applicable. L'articulation précise entre les standards nationaux et européens de protection des droits fondamentaux paraît donc présenter ici une complexité allant au-delà de l'application pure et simple du principe de primauté du droit de l'Union. Il importe encore de noter, à ce propos, que la Cour de justice de l'Union européenne a pu récemment réaffirmer la solution consacrée dans l'arrêt *M.A.S. et M.B.*, tout en précisant que cette solution arrêtée en ce qui concerne un standard national de protection relatif à la prévisibilité de la loi pénale ne saurait être étendue à un tel standard relatif au principe de l'application rétroactive de la loi pénale plus favorable (*lex mitior*) ¹⁸.

La seconde des dispositions ayant mené à un renouveau des débats sur le rapport entre la diversité constitutionnelle et le principe de primauté est l'article 4, paragraphe 2, TUE. Cette disposition stipule que l'Union respecte, notamment, l'identité nationale des États membres, inhérente à leurs structures fondamentales politiques et constitutionnelles, ainsi que les fonctions essentielles de l'État. Son interprétation pose manifestement des questions délicates. En particulier, l'identification des « structures fondamentales » ou des

16| Arrêt du 5 décembre 2017, *M.A.S. et M.B.*, C-42/17, [EU:C:2017:936](#).

17| Arrêt du 8 septembre 2015, *Taricco e.a.*, C-105/14, [EU:C:2015:555](#).

18| Arrêt du 24 juillet 2023, *Lin*, C-107/23 PPU, [EU:C:2023:606](#), points 120 à 124.

« fonctions essentielles », voire la désignation des organes auxquels il revient de procéder à cette identification, n'a rien d'évident. En outre, la portée du verbe employé (« respecte ») est à la fois incertaine et déterminante : implique-t-il simplement une obligation de prendre en considération les éléments listés à ladite disposition ou fait-il de ces éléments une sorte de « bloc » qui serait opposable à l'application du droit de l'Union et encadrerait ainsi le champ d'application du principe de primauté de ce droit ?

Bien que la Cour de justice de l'Union européenne ait été interrogée dans plusieurs affaires sur l'interprétation de l'article 4, paragraphe 2, TUE et qu'elle se soit spontanément appuyée sur cette disposition dans d'autres affaires encore, elle n'a pas, à ce jour, rendu d'arrêt tranchant de manière complète les questions délicates qui viennent d'être énumérées ¹⁹. En revanche, sa jurisprudence fournit une série d'indications partielles qui, combinées, dessinent une sorte de mosaïque quant aux effets qui pourraient être reconnus à ladite disposition.

En premier lieu, l'article 4, paragraphe 2, TUE a régulièrement été utilisé comme un paramètre d'interprétation d'autres dispositions du droit de l'Union.

D'une part, la Cour de justice de l'Union européenne a procédé à plusieurs reprises à une interprétation de dispositions de droit dérivé en lisant celles-ci, en quelque sorte, « en conformité » à l'article 4, paragraphe 2, TUE. Autrement dit, en vue de choisir entre différentes interprétations possibles de dispositions de droit dérivé, la Cour de justice de l'Union européenne a opté pour l'interprétation présentée comme étant la plus à même de préserver les structures fondamentales ou les fonctions essentielles des États membres. Ainsi, appelée à déterminer si un accord passé entre collectivités territoriales impliquant le transfert de certaines compétences doit être considéré comme constituant un marché public au sens de la législation de l'Union en la matière, la Cour de justice de l'Union européenne a opté pour une réponse en principe négative en se fondant notamment sur la protection conférée par l'article 4, paragraphe 2, TUE à la répartition des compétences au sein

19] Celles-ci ont été traitées de manière plus directe dans les conclusions prononcées par des avocats généraux (voir ainsi, à titre d'exemple, les conclusions de l'avocate générale Kokott dans l'affaire *Stolichna obshtina*, rayon « Pancharevo », C-490/20, [EU:C:2021:296](#)). Le fait que la Cour de justice de l'Union européenne ne se soit pas directement appropriée les propositions de ses avocats généraux mérite, dans ce contexte, d'être relevé.

des États membres ²⁰. De même, la Cour de justice de l'Union européenne a jugé, en se référant à cette disposition, que les règles relatives à l'aménagement du temps de travail devaient être interprétées de manière à ne pas empêcher les forces armées d'accomplir leurs missions, en vue d'éviter de porter atteinte aux fonctions essentielles de l'État ²¹. Dans les affaires qui viennent d'être citées, le rapport à la diversité constitutionnelle est assez indirect, au sens où la Cour de justice de l'Union européenne a cherché à préserver de manière abstraite les structures fondamentales ou les fonctions essentielles des États membres, sans se référer à des normes constitutionnelles précises qui auraient pu être « touchées » par l'application du droit de l'Union. Par ailleurs, l'on voit bien ici qu'il n'est pas réellement question de limiter l'effet du principe de primauté : seule l'interprétation des normes de l'Union concernées est en cause, sans que leur application uniforme, y compris à l'encontre de normes nationales, ne soit écartée.

D'autre part, l'article 4, paragraphe 2, TUE a pu être mobilisé dans des affaires relatives à l'application d'une liberté fondamentale en vue d'identifier une raison impérieuse d'intérêt général susceptible de justifier une dérogation à cette liberté. La Cour de justice de l'Union européenne s'est notamment référée à cette disposition à l'occasion de l'examen de réglementations nationales visant à préserver une langue officielle ²² ou limitant la possibilité de se référer à des titres de noblesse dans l'attribution d'un nom ²³. Il n'est pas indifférent de noter qu'il s'agit sans doute du premier domaine dans lequel le respect de l'identité nationale a pu être mentionné par la Cour de justice de l'Union européenne, et ce avant même que l'article 4, paragraphe 2, TUE ne soit intégré dans le droit primaire ²⁴. Quoi qu'il en soit, là

20| Arrêt du 21 décembre 2016, Remondis, C-51/15, [EU:C:2016:985](#), points 40, 41 et 47. Il convient de souligner qu'une logique voisine avait déjà été retenue, de manière incidente, à propos d'une réglementation relative à la régulation des jeux de hasard, qui était examinée au regard de la libre prestation de service (arrêt du 12 juin 2014, Digibet et Albers, C-156/13, [EU:C:2014:1756](#), point 34).

21| Arrêt du 15 juillet 2021, Ministrstvo za obrambo, C-742/19, [EU:C:2021:597](#), points 43 à 46.

22| Voir, en ce sens, les arrêts du 12 mai 2011, Runevič-Vardyn et Wardyn, C-391/09, [EU:C:2011:291](#), point 86 ; du 16 avril 2013, Las, C-202/11, [EU:C:2013:239](#), point 26, ainsi que du 7 septembre 2022, Cilevičs e.a., C-391/20, [EU:C:2022:638](#), point 68.

23| Arrêt du 2 juin 2016, Bogendorff von Wolffersdorff, C-438/14, [EU:C:2016:401](#).

24| Ce constat vaut tant en ce qui concerne la protection d'une langue officielle (arrêt du 2 juillet 1996, Commission/Luxembourg, C-473/93, [EU:C:1996:263](#), point 35) que la régulation des noms de famille (arrêt du 22 décembre 2010, Sayn-Wittgenstein, C-208/09, [EU:C:2010:806](#), point 83) ou encore la protection de la dignité humaine (arrêt du 14 octobre 2004, Omega, C-36/02, [EU:C:2004:614](#), point 40).

encore, le principe de primauté n'apparaît pas réellement limité par la référence à l'identité nationale. En effet, la Cour de justice de l'Union européenne n'utilise ici l'identité nationale que pour déterminer la portée d'un pouvoir de déroger aux libertés fondamentales qui découle du droit primaire et qui trouve également à s'appliquer dans de nombreuses situations où l'identité nationale n'est pas en jeu. L'existence d'un contrôle de proportionnalité des mesures adoptées vient d'ailleurs confirmer que l'invocation de l'identité nationale ne permet pas aux États membres d'écarter discrétionnairement l'application des libertés fondamentales. De surcroît, la référence parfois plus précise à des exigences nationales identifiées ne saurait surprendre, puisque les dérogations aux libertés fondamentales sont, par nature, définies par les États membres et encadrées par le droit de l'Union.

En deuxième lieu, la Cour de justice de l'Union européenne a pu, dans plusieurs arrêts, rejeter expressément l'argumentation présentée par un État membre tendant à faire obstacle à l'application, dans l'affaire en cause, du droit de l'Union en se prévalant de l'incompatibilité de ce droit avec les structures fondamentales ou les fonctions essentielles de cet État membre. L'on peut, à cet égard, citer le refus d'accepter d'écarter l'application des règles relatives à l'aménagement du temps de travail, ce refus ayant néanmoins été atténué, ainsi que cela a déjà été exposé, par l'interprétation de ces règles en tenant compte de la nécessité de préserver les fonctions essentielles des États membres ²⁵. La Cour de justice de l'Union européenne a également rejeté l'idée selon laquelle la reconnaissance, dans un État membre, aux seules fins de l'exercice d'une liberté fondamentale, d'une union entre personnes de même sexe ou d'une filiation entre un enfant et deux personnes de même sexe établies dans un autre État membre, pourrait constituer une atteinte à l'identité nationale de l'État membre contraint à opérer une telle reconnaissance, alors que son droit national ne prévoit pas ce type d'union ou de filiation ²⁶. Le même sort a été réservé à l'argumentation de certains États membres qui entendaient opposer leur modèle national aux normes de l'Union relatives à l'indépendance des juges. Tout en acceptant que les États membres disposent d'identités nationales distinctes et définissent eux-mêmes leur modèle constitutionnel, la Cour de justice de l'Union européenne a estimé qu'ils partagent une notion d'« État de droit » commune qu'ils se sont engagés à respecter et dont ils ne peuvent donc pas s'écarter en invoquant l'article 4,

25 | Arrêt du 15 juillet 2021, *Ministrstvo za obrambo*, C-742/19, [EU:C:2021:597](#), point 39.

26 | Arrêts du 5 juin 2018, *Coman e.a.*, C-673/16, [EU:C:2018:385](#), points 43 à 47, ainsi que du 14 décembre 2021, *Stolichna obshtina, rayon « Pancharevo »*, C-490/20, [EU:C:2021:1008](#), point 53 à 58.

paragraphe 2, TUE ²⁷. Ont également été écartés, sur la base d'un raisonnement plus concis, la possibilité d'opposer l'identité nationale à l'exercice de la profession d'avocat sous le titre professionnel obtenu dans l'État membre d'origine ²⁸, ou à l'application de règles relatives au transfert d'entreprises à des collectivités publiques ²⁹.

Il apparaît que, dans l'ensemble de cette deuxième catégorie d'affaires, la Cour de justice de l'Union européenne détermine elle-même, dans une certaine mesure, ce qui peut ou non constituer une atteinte aux structures fondamentales d'un État membre et participe ainsi à la définition de ces structures, sans toutefois que cette fonction ne soit explicitement revendiquée. Cette démarche, qui est cohérente avec l'approche générale retenue par la Cour de longue date, notamment en matière d'ordre public, mérite d'être soulignée, en tant qu'elle fait participer la Cour de justice de l'Union européenne à la détermination de l'identité nationale de l'État membre concerné. Quoi qu'il en soit, la circonstance que la Cour de justice de l'Union européenne ait finalement, dans l'ensemble de ces affaires, refusé d'admettre que l'utilisation de l'article 4, paragraphe 2, TUE puisse faire obstacle à l'application du droit de l'Union, complique la détermination de la portée des solutions ainsi retenues. Faut-il en déduire que cette disposition peut effectivement jouer une telle fonction, et limiter en conséquence la portée du principe de primauté, mais que les conditions de son application n'étaient pas remplies en l'occurrence ? À l'inverse, doit-on comprendre que cette question a été laissée ouverte et qu'il n'a pas été nécessaire de la trancher puisque, en tout état de cause, aucun problème concret d'identité nationale ne se posait en réalité ?

En troisième lieu, dans l'arrêt *RS (Effet des arrêts d'une cour constitutionnelle)* ³⁰, la Cour de justice de l'Union européenne a fourni quelques indications plus directes sur les rôles respectifs des juridictions de l'Union et nationales dans l'application de l'article 4, paragraphe 2, TUE, sans pour autant épuiser la matière. Plus précisément, elle a estimé, d'un côté, qu'elle pouvait, au titre de cette disposition, être appelée à vérifier qu'une obligation de droit de l'Union ne méconnaît pas l'identité nationale d'un État membre. D'un autre côté, elle a souligné que ladite disposition

27| Arrêt du 16 février 2022, Hongrie/Parlement et Conseil, C-156/21, [EU:C:2022:97](#), points 233 et 234, ainsi que du 5 juin 2023, Commission/Pologne (Indépendance et vie privée des juges), C-204/21, [EU:C:2023:442](#), point 74.

28| Arrêt du 17 juillet 2014, Torresi, C-58/13 et C-59/13, [EU:C:2014:2088](#), point 58.

29| Arrêt du 13 juin 2019, Correia Moreira, C-317/18, [EU:C:2019:499](#), points 61 et 62.

30| Arrêt du 22 février 2022, RS (Effet des arrêts d'une cour constitutionnelle), C-430/21, [EU:C:2022:99](#), points 69 à 71.

n'avait ni pour objet ni pour effet d'autoriser une cour constitutionnelle d'un État membre à écarter l'application d'une norme de droit de l'Union, au motif que cette norme méconnaîtrait l'identité nationale de l'État membre concerné telle que définie par la cour constitutionnelle nationale. Il apparaît donc que l'article 4, paragraphe 2, TUE suit le « régime ordinaire » des dispositions de droit de l'Union. Il ne s'agit pas d'une sorte de « bouclier » qui pourrait être brandi par les cours nationales de leur propre autorité, mais bien d'une disposition dont la Cour de justice de l'Union européenne doit déterminer la portée, même si un juge national estime que l'identité de son État membre est en jeu. Il est d'ailleurs souligné, dans l'arrêt *RS (Effet des arrêts d'une cour constitutionnelle)*, qu'un juge national estimant qu'une disposition de droit de l'Union méconnaît l'obligation de respecter l'identité nationale de son État membre doit former une demande préjudicielle visant à apprécier la validité de cette disposition au regard de l'article 4, paragraphe 2, TUE. Ce dernier est donc ici présenté non pas comme une borne limitant la portée du principe de primauté du droit de l'Union, mais plutôt comme un paramètre potentiel de validité des dispositions de ce droit. S'il apparaît ainsi comme un outil permettant de préserver la diversité constitutionnelle, ce résultat est atteint sans remettre en cause le principe de primauté du droit de l'Union ou le rôle respectif des juridictions appelées à appliquer ce droit. Il paraîtrait toutefois de prime abord exagéré de lire l'arrêt *RS (Effet des arrêts d'une cour constitutionnelle)* comme prétendant définir de manière exhaustive les effets de l'article 4, paragraphe 2, TUE, celui-ci y ayant été abordé en relation avec une décision nationale concrète qui avait opposé l'identité nationale d'un État membre à l'application du droit de l'Union. L'on ne saurait donc, à ce stade du développement de la jurisprudence de la Cour de justice de l'Union européenne, exclure complètement que celle-ci puisse envisager d'adopter d'autres mesures, au titre de cette disposition, que la seule déclaration d'invalidité d'un acte de l'Union, mesures qui pourraient éventuellement conduire à réexaminer l'équilibre entre égalité des citoyens de l'Union et diversité constitutionnelle dans le cadre de l'application du principe de primauté.



Mr Lars Bay Larsen, Vice-President, and Mr Koen Lenaerts, President of the Court of Justice of the European Union



Mr Luc Lavrysen

President (NL) of the Belgian Constitutional Court

Contribution by Mr Luc Lavrysen, President (NL) of the Belgian Constitutional Court ¹

The European Convention on Human Rights and European Union Law in the Jurisprudence of the Belgian Constitutional Court

1. Introduction: the Rule of Law

The rule of law is a cornerstone of liberal democracies. Through an independent judiciary (panel 1) and equal application of the laws (panel 2), it creates the bedrock for preserving diversity (panel 3) as well as the rights of current and future generations (panel 4).

In the preamble of the European Convention on Human Rights, the rule of law is considered part of the ‘cultural heritage’ of its Member States. Moreover, according to the European Court of Human Rights, the rule of law is ‘a concept inherent in all Articles of the Convention’.²

Likewise, the preamble of the TEU repeatedly refers to the rule of law – and in the case-law of the Court of Justice of the European Union that concept takes an even more prominent role. In its recent ruling *Commission v Poland*, the Grand Chamber reiterated that ‘the Member States adhere to a concept of “the rule of law” which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times’.³

1 | With the contribution of Mr Jan Theunis, referendaire at the Belgian Constitutional Court.

2 | Judgment of the European Court of Human Rights of 15 December 2016, *Khlaifia and Others v Italy*, Application No. 16483/12, [CE:ECHR:2016:1215JUD001648312](#), paragraph 91.

3 | Judgment of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21, [EU:C:2023:442](#), paragraph 73.

The Belgian Constitution does not explicitly refer to the rule of law.⁴ However, both the Court of Cassation⁵ and the Constitutional Court⁶ consider the concept to be a general principle of law, compelling all branches of State power (legislative, executive and judicial) to comply with the law.⁷ In particular, the Constitutional Court regards respect for the rule of law⁸ as an essential condition for the protection of all fundamental rights.⁹

2. Protection of Fundamental Rights

While the jurisdiction of the Belgian Constitutional Court was originally limited to the adjudication of conflicts of competence between the federal government and the federated entities (1985-1988), nowadays the protection of human rights accounts for about 90 percent of its case-law.

Fairly soon after the installation of the Court, its jurisdiction was extended to cover constitutional rights and freedoms, limited in the first stage (1989) to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and the rights and liberties in respect of education (Article 24 of the Constitution).¹⁰ Later on it was further extended (2003)

4| Constitution belge coordonnée [Belgium] of 17 February 1994.

5| Judgment of the Belgian Court of Cassation of 17 October 2006, ECLI:BE:CASS:2006:ARR.20061017.4.

6| Judgment of the Belgian Constitutional Court (plenary) of 5 July 2018, ECLI:BE:GHCC:2018:ARR.087, B.17.2.

7| Alen, A., and Haljan, D., *Constitutional Law in Belgium*, Kluwer, 2020, pp. 30-31.

8| For further reading on this subject, we refer to contributions of the former and current Presidents of the Constitutional Court, available on the Court's website: Alen, A. and Verrijdt, W., *The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges: 25th Anniversary of the Constitutional Court of Slovenia*, Bled, 2016; J. Spreutels, J., De Groot, E., Goedertier, G., and Peremans, E., "L'Etat de droit et la justice constitutionnelle dans le monde moderne", *Rapport de la Cour constitutionnelle de Belgique présenté au 4e Congrès de la Conférence mondiale sur la justice constitutionnelle*, Vilnius, 2017; Lavrysen, L., *The Belgian Constitutional Court and the separation of powers: 50th Anniversary of the Constitutional Judiciary in the Republic of Macedonia*, Skopje, 2014; Nihoul, P., "Les relations entre la Cour constitutionnelle belge et les autres pouvoirs. Indépendance et influence", *Colloque des cours constitutionnelles*, Chisinau, 2017.

9| Judgment of the Belgian Constitutional Court (plenary) of 10 October 2019, ECLI:BE:GHCC:2019:ARR.129 and ECLI:BE:GHCC:2019:ARR.131, B.10.3.

10| Because the competences concerning educational policy were at the same time transferred to the communities, see Theunis, J., "Constitutional Justice and Peace", *Report of the Belgian Constitutional Court for the 5th Congress of the WCJ*, available at <https://www.const-court.be/en>.

to all constitutional rights and freedoms (Title II 'The Belgians and their rights', including Articles 8-32), as well as Articles 170, 172 and 191 (guaranteeing the principles of legality and equality in tax matters, and the protection of foreigners).

Following those two extensions of jurisdiction, the Constitutional Court developed a two-pronged judicial doctrine. Firstly, when the scope of review was extended in 1989, the Constitutional Court took full advantage of the principle of equality and non-discrimination. It decided to read Articles 10 and 11 of the Constitution in combination with all rights and freedoms enshrined in the Constitution, in all treaty provisions binding Belgium, and in general principles of law. The rationale behind this doctrine is that a particular category of persons is being discriminated against if they are wrongfully deprived from guarantees that are given to everyone. In its first judgment annulling an Act of Parliament for violating the principle of equality and non-discrimination, the Constitutional Court found an infringement because the Act had limited the freedom of association to a disproportionate extent.¹¹ Articles 10 and 11 thus operate as a portal or interface, allowing the Constitutional Court to review primary legislation indirectly against rights and liberties set out in other constitutional provisions, unwritten principles of law, and international and European law (both European Convention on Human Rights and EU law).¹²

Secondly, soon after its scope of review was extended to all constitutional rights and freedoms in 2003, the Constitutional Court began to read the constitutional provisions relied upon by the parties in combination with treaty provisions binding Belgium and guaranteeing analogous rights and freedoms. The Constitutional Court considered that where a treaty provision is similar in scope to one or more provisions of the Constitution, the safeguards contained in those treaty provisions constitute an 'inseparable whole' or 'normative unity' with the safeguards contained in the constitutional provisions in question.¹³ Following the rationale behind that doctrine, the provisions under Title II of the Constitution cannot be interpreted otherwise than in conjunction with the provisions concerning similar fundamental rights in the international treaties. This applies, in particular, to the European Convention on Human Rights. For instance, if respect for privacy and family life is at stake, the Constitutional Court

11 | Judgment of the Belgian Constitutional Court (plenary) of 13 October 1989, ECLI:BE:GHCC:1989:ARR.023, B.29, B.2.11 and B.2.13. See Alen, A., Haljan, D., and others, *International Encyclopaedia of Constitutional Laws – Belgium*, Kluwer, 2013, p. 125.

12 | Alen, A., Haljan, D., and Verrijdt, W., *Constitutional Law in Belgium*, Kluwer, 2020, p. 134.

13 | Judgment of the Belgian Constitutional Court (plenary) of 22 July 2004, ECLI:BE:GHCC:2004:ARR.136, B.5.3-B.5.4.

interprets Article 22 of the Constitution in light of Article 8 of the European Convention on Human Rights, even if the latter provision was not explicitly invoked by the parties before the Constitutional Court. In this case, Article 22 of the Constitution operates as a portal or interface allowing the Constitutional Court to review primary legislation indirectly against the analogous fundamental right in the European Convention on Human Rights (or International Covenant on Civil and Political Rights,¹⁴ Charter of Fundamental Rights of the European Union ('the Charter'), etc.).

The Constitutional Court does not limit either doctrine to provisions of international or EU law that have direct effect. Other provisions, that are conditional and give the parties or the member states substantial discretion in its application, are also taken into consideration, because they are binding for Belgium. Of course, provisions that have no direct effect give the legislators more 'room for manoeuvre' and so are seldom violated.

It should be noted that the Court of Justice of the European Union takes a similar approach with respect to the European Convention on Human Rights. It holds, for example, that Article 50 of the Charter contains a right (*ne bis in idem*) which corresponds to that provided for in Article 4 of Protocol No 7 European Convention on Human Rights. Consequently, it is necessary to take account of Article 4 of Protocol No 7 for the purpose of interpreting Article 50 of the Charter.¹⁵

As a result, the Belgian Constitutional Court gradually shifted from a competence court, to an equality court and finally to a human rights court.¹⁶ In legal doctrine, the two-pronged technique of reading constitutional provisions in combination with international treaty provisions is considered to have certain advantages, such as the modernisation of the fundamental rights provisions in the Belgian Constitution, many of which date back to 1831, as well as the

14| International Convention on Civil and Political Rights (United Nations, Treaty Series, 19 December 1966, Vol. 999, p. 171).

15| Judgment of 22 March 2023, *bpost*, C-117/20, [EU:C:2022:202](#), paragraph 23.

16| Theunis, J., "Het Grondwettelijk Hof (1980-2020): van bevoegdheidshof over gelijkheidshof naar grondrechtenhof", in Leysen, R., Muylle, K., Theunis, J., and Verrijdt, W. (eds). *Semper perseverans. Liber amicorum André Alen*, Intersentia, Belgium, 2020, pp. 247-256.

incorporation of Strasbourg case-law in the judgments of the Belgian Constitutional Court.¹⁷ Consequently, the Strasbourg Court has considerable influence over the case-law of the Constitutional Court. For instance, the European Convention on Human Rights was mentioned in 30 per cent of the Constitutional Court judgments of 2022, alongside reference to Strasbourg case-law. In that sense, the Belgian Constitutional Court has even been perceived as a satellite of the European Court of Human Rights.¹⁸

3. Primacy of EU Law

The ‘inclusive’ judicial doctrines of the Constitutional Court also apply to EU law. In this way, they not only ensure the alignment of constitutional fundamental rights with those of the Charter (which are themselves aligned with those of the European Convention on Human Rights) but also safeguard the primacy of EU law and the principle of equality before that law. In the end, primacy of EU law is intended to ensure a level playing field for EU citizens in all Member States. Since *Costa v E.N.E.L.* (1964), the Court of Justice of the European Union has emphasised ‘that the executive force of Community law cannot vary from one Member State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the EEC Treaty or giving rise to discrimination on grounds of nationality prohibited by that treaty’.¹⁹ In the same line of reasoning, the Court of Justice of the European Union holds ‘that, by virtue of the principle of the primacy of EU law, a Member State’s reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law’.²⁰

17| See Alen A. and Verrijdt W., *The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges: 25th Anniversary of the Constitutional Court of Slovenia*, Bled, 2016. See also Lambrecht, S., “Practice of the Belgian Constitutional Court in the Implementation of the Judgments of the European Court of Human Rights: An Insider’s Perspective”, *Journal of Human Rights Practice*, Vol. 12, No 1, 2020, p. 2.

18| See Lavrysen L. and Theunis, J., “The Belgian Constitutional Court: a satellite of the ECtHR?” in Alen, A. and others (eds.) *Liberae Cogitationes: Liber amicorum Marc Bossuyt*, Intersentia, Cambridge, 2013, pp. 331-354.

19| Judgment of 15 July 1964, *Costa E.N.E.L.*, C-6/64, [EU:C:1964:66](#); recently confirmed in Judgment of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21, [EU:C:2023:442](#), paragraph 75.

20| Judgment of 5 June 2023, *Commission v Poland (Indépendance et vie privée des juges)*, C-204/21, [EU:C:2023:442](#), paragraph 77.

In a significant number of cases, the Belgian Constitutional Court has adhered to the primacy of EU law. Thirty years ago, the federal parliament introduced an environmental tax on beverage packaging, which led to the first case clearly involving European Union law – then European Community law. The applicant beverage companies alleged the violation of Articles 10 and 11 of the Constitution, read in conjunction with *inter alia* Article 95 of the EC Treaty (now Article 110 of the TFEU).²¹ They argued that the tax was discriminatory towards products from other Member States. The Constitutional Court ruled that the tax was not a measure to protect Belgian companies and that each company was free to use eco-friendly packaging not subject to the tax. The Constitutional Court rejected the request to refer a preliminary question to the Court of Justice.²²

Twenty years ago, the Belgian Constitutional Court ruled on an action for annulment of an Act of Parliament validating building permits for a shipping dock in the port of Antwerp. The applicants argued that the Act violated Articles 10 and 11 of the Belgian Constitution, read in conjunction with the Habitats Directive²³ and the Birds Directive²⁴ and Article 10 of the EC Treaty, since proceedings before the Constitutional Court would not offer the same judicial protection as proceedings before the Council of State. According to the applicants, ‘the Court does not even have jurisdiction to review the conformity of primary legislation with European Community law’. The Constitutional Court firmly rejected that argument and fully assumed its role as ‘European’ judge: all Belgian courts, acting within the jurisdiction conferred on them by the Constitution, must ensure the primacy of European Community law.

21| Article 110 TFEU states: ‘No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.’

22| Judgment of the Belgian Constitutional Court (plenary) of 2 February 1995, ECLI:BE:GHCC:1995:ARR.007, B.4.3-B.4.4. See also Judgment of the Belgian Constitutional Court (plenary) of 2 February 1995, ECLI:BE:GHCC:1995:ARR.008, B.13-B.17.

23| Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206 22.7.1992, p.7).

24| Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p.7-25).

Accordingly, it was found that the applicants were not discriminated against in their rights derived from European Community law.²⁵

A more recent example of the application of EU law can be found in a case concerning the organisation of horse-racing betting. The federal parliament implemented the requirement of the consent of racing associations, as well as the payment of a fee to those racing associations. Since betting on horse races constitutes an economic activity, the economic freedoms laid down in the TFEU apply. Referring in detail to the case-law of the Court of Justice of the European Union, the Constitutional Court considered the restrictions on the freedom of establishment and the freedom to provide services, guaranteed by Articles 49 and 56 TFEU respectively, relevant to the objectives of protecting players and combatting fraud. However, according to the Constitutional Court, these objectives do not require that racing associations be granted the right to refuse the organisation of horse-racing betting. As a result, this restriction is not proportionate to the objectives pursued, and is therefore contrary to the freedom of establishment and the freedom to provide services.²⁶

In another recent judgment, a ruling upon a preliminary reference by a first instance judge, the Constitutional Court confirmed the primacy of EU law in proceedings following a judgment of the Court of Cassation. According to Article 435 of the Code of Criminal Procedure,²⁷ the court to which the case is referred after the annulment of a judicial decision must comply with that judgment of the Court of Cassation. Referring to the *Elchinov* judgment of the Court of Justice of the European Union, the Constitutional Court held that the obligation to comply with the judgment of the Court of Cassation had disproportionate consequences insofar as it prevented the receiving from giving priority to EU law, when the case-law of the Court of Justice of the European Union had evolved in the meantime. The Constitutional Court found a violation of Articles 10, 11 and 13 of the Constitution, read in conjunction with Article 6

25| Judgment of the Belgian Constitutional Court (plenary) of 26 November 2003, ECLI:BE:GHCC:2003:ARR.151, B.22.4-B.22.7.

26| Judgment of the Belgian Constitutional Court (plenary) of 9 December 2021, ECLI:BE:GHCC:2021:ARR.177, B.13.1-B.14.

27| Belgian Code of Criminal Procedure of 19 November 1808.

of the European Convention on Human Rights, as litigants in such cases cannot properly rely on European Union law to defend their rights and interests.²⁸

The above-mentioned judgments represent only a sample of cases. Last year (2022) the Constitutional Court (indirectly) applied EU law in 21 judgments.²⁹ Hence, if we extrapolate that figure – even assuming there were fewer judgments in the early years – we find several hundred other examples. The Belgian Constitutional Court thus significantly contributes to the effective implementation of the law of the European Union in Belgium.

4. Judicial dialogue and other tools

The Constitutional Court's openness towards European law is particularly demonstrated by the large number of references for preliminary rulings to the Court of Justice of the European Union. Up to now, there are 40 referring judgments, accounting for 138 distinct questions, both on interpretation and validity of EU law.³⁰ More importantly, the Constitutional Court also complied with the judgments of the Court of Justice of the European Union. In one case the Constitutional Court criticised the Court of Justice of the European Union's answer, but nevertheless followed it. In another case it went further than the judgment of the Court of Justice of the European Union by applying a higher human rights standard.³¹ That judgment from 2008 dates from before the *Melloni* case-law of the Court of Justice of the European Union.³² The Court of Justice of the European Union has not examined whether the provision of the Directive at stake – Article 2a(5) of Council Directive 91/308/EEC of 10 June 1991 on prevention

28| Judgment of the Belgian Constitutional Court (plenary) of 1 December 2022, ECLI:BE:GHCC:2022:ARR.159, B.17.1-B.18.3; with reference to Judgment of 5 October 2010, *Elchinov*, C-173/09, [EU:C:2010:581](#), paragraphs 24 to 32.

29| Figures collected by Judge Willem Verrijdt for a presentation at the University of Leuven, 15 June 2023.

30| See <https://www.const-court.be/en>.

31| Verrijdt, W., "Belgium", in Griller, S., Papadopoulou, L., and Puff, R. (eds.) *National Constitutions and EU Integration*, Hart Publishing, Oxford, 2022, p. 29; referring to Judgment of the Belgian Constitutional Court (plenary) of 31 May 2011, ECLI:BE:GHCC:2011:ARR.089; and Judgment of the Belgian Constitutional Court (plenary) of 23 January 2008, ECLI:BE:GHCC:2008:ARR.010.

32| Theunis, J., "Het Grondwettelijk Hof (1980-2020): van bevoegdheidshof over gelijkheidshof naar grondrechtenhof", in Leysen, R., Muylle, K., Theunis, J., and Verrijdt, W., *Semper perseverans. Liber amicorum André Alen*, Intersentia, 2020, pp. 247-256.

of the use of the financial system for the purpose of money laundering,³³ as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001,³⁴ as far as it applies to lawyers – provides for minimum or full harmonisation.

It should be noted, however, that in most judgments involving EU law, the Constitutional Court does not refer preliminary questions to the Court of Justice. In those cases, the Court adheres to the strict requirements of *Cilfit* and – more recently – *Consortio*,³⁵ as regards the interpretation of EU law, as well as to *Foto-Frost*, as regards the validity of EU law.³⁶

Apart from judicial dialogue, the Constitutional Court employs other tools to ensure the primacy of EU law. In judgment no. 161/2012, it pointed out that, under the principle of sincere cooperation (Article 4(3) TEU), all authorities in the Member States, including the courts, are required to interpret, to the greatest extent possible, their national law in conformity with EU law.³⁷ This reasoning clearly emerges from the toolbox of the Court of Justice of the European Union. In *Marleasing* the Court of Justice of the European Union expressed that obligation in the following terms: ‘in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter’.³⁸ The Constitutional Court frequently applies the *Marleasing* tool

33| Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 77-82).

34| Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (OJ L 344, 28.12.2001, p. 76-82).

35| See, inter alia, Judgment of the Belgian Constitutional Court (plenary) of 27 October 2022, ECLI:BE:GHCC:2022:ARR.138, B.54 and B.60; referring to Judgment of 6 October 1982, *Cilfit*, C-283/81, [EU:C:1982:335](#), paragraph 21; and Judgment of 6 October 2021, *Consortio Italian Management and Catania Multiservizi*, C-561/19, [EU:C:2021:799](#), paragraph 33.

36| See, inter alia, Judgment of the Belgian Constitutional Court (plenary) of 9 March 2023, ECLI:BE:GHCC:2023:ARR.039, B.15.1-B.15.3; referring to Judgment of 22 October 1987, *Foto-Frost*, C-314/85, [EU:C:1987:452](#), paragraph 14 and Judgment of 3 July 2019, *Eurobolt*, C-644/17, [EU:C:2019:555](#), paragraph 28.

37| Judgment of the Belgian Constitutional Court of 20 December 2012, ECLI:BE:GHCC:2012:ARR.161, B.14.1; referring to Judgment of 27 October 2009, *ČEZ*, C-115/08, [EU:C:2009:660](#), paragraph 138.

38| Judgment of 13 November 1990, *Marleasing*, C-106/89, [EU:C:1990:395](#), paragraph 8.

in its own case-law.³⁹ That requirement to interpret national law in conformity with EU law entails, in particular, the obligation of national courts to overrule established case-law, where necessary.⁴⁰ However, the obligation to interpret national law consistently with EU law cannot serve as a basis for the interpretation of national law *contra legem*.⁴¹

In such cases, when interpretation in conformity with EU law is not possible, national courts must fully apply EU law, by refusing to apply any conflicting provision of national legislation, even if adopted subsequently.⁴² This is referred to as the *Simmenthal* tool, named after the famous judgment, in which the Court of Justice upheld that principle.⁴³ In judgment no. 167/2020 the Constitutional Court thus set aside a provision of the Special Act on the Constitutional Court itself,⁴⁴ more specifically Article 25, which required the Constitutional Court to deliver its judgment on the merits within three months after pronouncement of a judgment ordering the suspension of an Act of Parliament. In this same judgment, the Constitutional Court had in fact referred a preliminary question to the Court of Justice of the European Union on the validity of a directive. The principle of the effectiveness of EU law requires that the suspension ordered by the Constitutional Court should continue until that Court is able to deliver its judgment on the merits, which is not possible within the three-month period. Therefore, the Constitutional Court disapplied Article 25 of the Special Act and upheld the suspension after the period of three months.⁴⁵

The last tool to be mentioned arose in the case of *Factortame*. According to that judgment of the Court of Justice of the European Union, the national court seized of a dispute governed by EU law must be able to grant 'interim relief in order to ensure the full effectiveness of the

39| See, inter alia, Judgment of the Belgian Constitutional Court (plenary) of 5 July 2018, ECLI:BE:GHCC:2018:ARR.087, B.29.5 and Judgment of the Belgian Constitutional Court (plenary) of 26 November 2021, ECLI:BE:GHCC:2021:ARR.168, B.9.

40| Judgment of 26 June 2019, *Addiko Bank*, C-407/18, [EU:C:2019:537](#), paragraph 66.

41| Judgment of 4 July 2006, *Adeneler and Others*, C-212/04, [EU:C:2006:443](#), paragraph 110.

42| Judgment of the Belgian Constitutional Court of 20 December 2012, ECLI:BE:GHCC:2012:ARR.161, B.14.1; referring to Judgment of 22 March 2010, *Melki*, C-188/10 and C-189/10, [EU:C:2010:363](#), paragraph 43.

43| Judgment of 9 March 1978, *Simmenthal*, C-106/77, [EU:C:1978:49](#), paragraph 24.

44| Special Act of 6 January 1989 on the Constitutional Court.

45| Judgment of the Belgian Constitutional Court of 17 December 2020, ECLI:BE:GHCC:2020:ARR.167, B.17.4. See also Judgment of the Belgian Constitutional Court of 17 December 2020, ECLI:BE:GHCC:2020:ARR.168, B.4.1-B.4.6.

judgment to be given on the existence of the rights claimed under [EU] law'.⁴⁶ Although the Special Act does not provide a basis for interim measures by the Constitutional Court itself,⁴⁷ that Court does allow for such measures, referring to *Factortame* and subsequent case-law.⁴⁸

5. Constitutional Controversy

Openness towards European law, however accepted, does not come without controversy. With regard to judicial dialogue, we already revealed that the Constitutional Court in one case applied a higher human rights standard, not allowing EU law to undermine the essential elements of legal protection granted by Title II of the Constitution.⁴⁹ In a pending case, the question arises whether the Constitutional Court, when given an answer to a preliminary question by the Court of Justice of the European Union, should revisit a point that has been definitively settled in the referring judgment, which enjoys authority under *res judicata*. From the existing case-law of the Constitutional Court,⁵⁰ it is clear that it can under no circumstances renege on a final decision as 'one of the essential principles of the rule of law'.⁵¹ It seems to be incumbent on the legislature, in that case, to bring the Act at issue into conformity with EU law, or risk liability for breach of that law.

More generally, however, the Belgian Constitutional Court has given a warning sign alerting the Court of Justice of the European Union to respect the national identity and basic values of the Belgian Constitution. In its 2016 landmark decision, the Constitutional Court ruled on actions for the annulment of various Acts of the federal and the Flemish parliaments approving the

46| Judgment of 19 June 1990, *Factortame*, C-213/89, [EU:C:1990:257](#), paragraph 21.

47| Article 30 of the Special Act on the Constitutional Court allows for the referring courts to take the necessary provisional measures, even ex officio, to ensure protection of the rights that are granted by European Union law.

48| Judgment of the Belgian Constitutional Court (plenary) of 29 July 2010, ECLI:BE:GHCC:2010:ARR.96, B.29; Judgment of the Belgian Constitutional Court (plenary) of 19 December 2013, ECLI:BE:GHCC:2013:ARR.183, B.9.3; Judgment of the Belgian Constitutional Court of 17 December 2020, ECLI:BE:GHCC:2020:ARR.167, B.17.3, referring to Judgment of 19 June 1990, *Factortame*, C-213/89, [EU:C:1990:257](#), paragraph 21 and Judgment of 13 March 2007, *Unibet*, C-432/05, [EU:C:2007:163](#), paragraph 67.

49| Judgment of the Belgian Constitutional Court (plenary) of 13 October 1989 ECLI:BE:GHCC:1989:ARR.023, B.29, B.2.11 and B.2.13.

50| Judgment of the Belgian Constitutional Court of 17 December 2009, ECLI:BE:GHCC:2009:ARR.199, B.8.

51| Constitutional Court case N° 6713.

2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.⁵² This so-called *Fiscal Compact* is an intergovernmental agreement between 25 EU Member States to reinforce the budget discipline of euro area governments following the sovereign debt crisis of 2010. A number of citizens and non-profit organisations asserted that the strict budgetary objectives established in the Fiscal Compact would lead to the authorities no longer being able to fulfill their constitutional obligations in terms of fundamental social rights (Article 23 of the Constitution).⁵³ The Constitutional Court rejected the actions for annulment because the petitioners lacked standing. However, in its ruling, the Constitutional Court added an important restriction to the powers entrusted to the EU institutions.

According to Article 33 of the Constitution, ‘all powers emanate from the Nation’, and these powers ‘are exercised in the manner laid down by the Constitution’. However, Article 34 of the Constitution provides that ‘the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law’. This Article is the portal to the composite legal order, allowing for the incorporation of EU law into the Belgian constitutional structure. That portal, however, is conditional. It does not allow for the assignment of powers, but only the exercise of powers; similarly, it does not allow for the exercise of undefined powers, but only for the exercise of specific powers. In addition, the Constitutional Court included another important condition: ‘Article 34 of the Constitution cannot be interpreted as granting an unlimited licence to the legislature, when approving that treaty, or to the said institutions, when exercising their attributed powers’. The Constitutional Court held: ‘Under no circumstances does Article 34 of the Constitution permit the discriminatory undermining of the national identity embedded in the basic political and constitutional structures or of the core values of the protection afforded by the Constitution to the citizens’.⁵⁴ The Constitutional Court uses the same terminology as that is used in Article 4(2) TEU, that reads as follows: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. In conclusion: the Belgian Constitutional Court is generously open

52| Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012 (T/SCG).

53| See Cannoot, P., Goossens, J., Lavrysen, L., Meerschaert V. and Theunis, J., “Developments in Belgian Constitutional Law”, in Albert, R., Landau, D., Faraguna, P., and Drugda, S. (eds.) *2016 Global Review of Constitutional Law*, I-CONnect, Vol. 15, No 3, Clough Center, 2017, p. 24.

54| Judgment of the Belgian Constitutional Court (plenary) of 28 April 2016, ECLI:BE:GHCC:2016:ARR.062, B.8.7.

towards EU law, yet is gently reminding it to stick within certain constitutional boundaries that are recognised by the basic EU treaty.

According to legal doctrine,⁵⁵ the restrictions imposed by the Constitutional Court are considered to have been – at least partly – triggered by the *Melloni* judgment of the Court of Justice of the European Union.⁵⁶ In that judgment, Article 53 of the Charter was at stake, according to which nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law, and by international agreements to which the European Union or all the Member States are party, including the European Convention on Human Rights and by the Member States’ constitutions.

The interpretation envisaged by the Spanish Constitutional Court in its request for a preliminary ruling was that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. That interpretation was, however, firmly rejected by the Court of Justice of the European Union. That Court reiterated that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that Member State.⁵⁷

In its ruling on the *Fiscal Compact*, the Constitutional Court set a new review standard by preventing the European Union and its institutions from encroaching upon Belgian national identity or upon the basic values of constitutional rights protection. The Constitutional Court confirmed that standard in a later case.⁵⁸ It did not make clear, however, if and to what extent this judgment will actually hamper the full effect of EU law within the Belgian legal order; nor does it clarify exactly what ‘Belgian national identity’ or ‘the basic values’ of the Constitution actually constitutes. At these points, the Constitutional Court leaves room for further case-

55| See Gérard, P. and Verrijdt, W., “Belgian Constitutional Court Adopts National Identity Discourse: Belgian Constitutional Court No. 62/2016”, *European Constitutional Law Review*, Vol. 13, No 1, 2017, p. 192.

56| Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#).

57| Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#), paragraph 60.

58| Judgment of the Belgian Constitutional Court of 30 September 2021, ECLI:BE:GHCC:2021:ARR.127, B.12.

law, undoubtedly through further dialogue with the Court of Justice of the European Union, under Article 4(2) TEU. The matter may give rise to references for a preliminary ruling on the validity of the EU law provisions that are believed to raise such an issue.

That future judicial dialogue is undoubtedly fuelled by a recent opinion of Advocate General Čapeta⁵⁹ in an Austrian case concerning the European Public Prosecutor's Office (EPPO), recalling the *Melloni* ruling in a manner that is not particularly reassuring to the constitutional courts. The Advocate General admitted 'that in certain situations and from the perspective of some Member States [the EPPO regulation] may lead to a decrease of the previously protected level of individual rights'. Harmonisation, she continued, 'inevitably leads to a weakening of the protection of fundamental rights in Member States with a higher prior level of protection, unless the highest standard is adopted as a common rule'. Yet this, she concluded, 'is the price of building a future together'. Food for thought and further discussion.

59| Opinion of Advocate General Čapeta of 22 June 2023, *G. K. and Others (Parquet européen)*, C-281/22, [EU:C:2023:510](#), paragraphs 113 and 114; referring to Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#), paragraphs 62 to 64.



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Contribution by Mr Aldis Laviņš, President of the Constitutional Court of the Republic of Latvia ¹

Constitutional Identities in the European Union: from Emancipation towards Convergence

*Ou nous parvenons à forger une identité européenne, ou le vieux continent disparaît de la scène mondiale.*²

1. Introduction

The aim of this contribution is to reflect on the ‘common values’ as they are mentioned in preamble of the Charter of the Fundamental Rights of the European Union.³ The Constitutional court of Latvia is constantly applying an open approach to international and European law.⁴ Our previous case-law clearly shows that the Constitutional court gives a full application to the principles of primacy and direct effect of the European Union law.⁵ In our understanding,

1 | With the contribution of Mr Uldis Krastiņš, legal adviser of the Constitutional court and Mr Andrejs Stupins adviser of the President of the Constitutional court.

2 | Habermas, J., *Sur l'Europe*, Paris, Bayard, 2006.

3 | The first indent of the Charter of Fundamental Rights of the European Union's preamble reads as follows: 'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values'.

4 | Constitutional identity should not inevitably be associated with so-called “illiberal constitutionalism”, i.e., the construction of a particular constitutional identity, legally obstructing the implementation of EU obligations, see Drinóczi, T. and Faraguna, P., “The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States”, *European Yearbook of Constitutional Law*, 2022, available at: <https://ssrn.com/abstract=4287559>.

5 | So far, the Constitutional Court of Latvia has submitted preliminary questions and received the answer from the Court of Justice of the European Union in five unique cases.

it is the EU legal order itself that also recognises the weight of national constitutional identity.⁶ Moreover, the Court of Justice of the European Union has described the founding treaties as the 'basic constitutional charter';⁷ thus, national constitutional identity is also recognised in the 'constitutional charter' of the Union. Curiously, instead of developing a single European constitutional identity the Member state courts have continued to rely on autonomous national constitutional identities.⁸

The previous does not answer the question how exactly the *common values* appear or interact, and whether 'common' means absolute analogy, as in the case of the prohibition of torture or death penalty; or it could be that the notion of 'common' also covers values that we can all understand but does not attribute them an equal gravity. This is often the case in areas of national language, State religion, status of nobility etc. Indeed, for a Member State with a relatively small population, it may be crucial to defend its national language by granting it constitutional protection.⁹

Since the end of the Cold War, which also allowed the full return of the Latvian legal system to the values of rule of law and protection of the fundamental rights, we have been going through a historical sequence that is likely to last. This sequence is 'globalisation',¹⁰ and it has fulfilled the promises of free trade, free movement of persons, and mutual recognition of

6 | Article 4(2) TEU: 'The Union shall respect [...] [the] national identities [of Member States]'; and Article 6(3) of the Treaty on European Union: 'constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

7 | Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, [EU:C:1986:166](#), paragraph 23.

8 | It seems that the dynamics behind the goals of the European integration have always been blurred. See, for example, this confession by one of the founding fathers: 'Vers quel aboutissement nous conduit cette nécessité, vers quel type d'Europe, je ne saurais le dire, car il n'est pas possible d'imaginer aujourd'hui les décisions qui pourront être prises dans le contexte de demain. [...] Je n'ai jamais douté que ce processus nous mène un jour à des États-Unis d'Europe, mais je ne cherche pas à en imaginer aujourd'hui le cadre politique, si imprécis sont les mots à propos desquels on se dispute : confédération ou fédération. Ce que nous préparons, à travers l'action de la Communauté, n'a probablement pas de précédent.' – Monnet, J., *Mémoires*, Paris, Fayard, 1976, pp. 615-616.

9 | Constitution of the Republic of Latvia, 15 February 1922, Article 4, first sentence: 'The Latvian language is the official language in the Republic of Latvia'; and Article 104: 'Everyone has the right to address submissions to State or local government institutions and to receive a materially responsive reply. Everyone has the right to receive a reply in the Latvian language'.

10 | See, "The Role of Constitutional Courts in the Globalised World of the 21st Century", *Proceedings of the 2018 Conference of the Constitutional Court of the Republic of Latvia – Riga: Constitutional Court of the Republic of Latvia*, 2019, available at <https://www.satv.tiesa.gov.lv/other/2019-ST-Referati-2018-atverumos.pdf>

judgments, among other achievements. However, it has also brought sometimes excessive standardisation, with the risk of doing away with local cultural and historical particularities.¹¹ These circumstances, in our view, explain the gradual appearance of the constitutional identity as an independent legal notion. The logic of the European integration requires for national constitutional identities to converge. Therefore, recognising genuine¹² constitutional identities does not lead to a deference to populism and to the abandonment of the European project; on the contrary, it is a practical tool to safeguard the liberal values of free trade and free movement by balancing them with the local sensibilities, such as the use of national language.

First, we will address the notion of constitutional identity, as it has been recognised in the case-law of the Court of Justice of the European Union. Second, it will be shown how the national constitutional identity was applied in a case concerning the use of a Member State language. Finally, we will suggest a set of criteria which could help to identify valid cases of constitutional identity in the future.

2. Emancipation of the Constitutional identity

On the whole, the EU legal system and the national legal orders have been receptive to each other's constraints, where the specific features intrinsic to Member States are recognised and taken into consideration.¹³

In a recent preliminary procedure,¹⁴ the Latvian Constitutional court asked the Court of Justice of the European Union whether the protection of a Member State language – which, in Latvia, is understood as a manifestation of national identity – may justify the restriction on the freedom of establishment. The case concerned a very strict limitation upon the higher

11| Mounk, Y., *The People vs Democracy*, Harvard University Press, Harvard, 2019.

12| For distinction between national constitutional identities and national unconstitutional identities, see once again Drinóczi, T. and Faraguna, P., “The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States”, *European Yearbook of Constitutional Law*, 2022, available at: <https://ssrn.com/abstract=4287559>.

13| Martin, S., “L'identité de l'Etat dans l'Union européenne : entre 'identité nationale' et 'identité constitutionnelle'”, *Revue française de droit constitutionnel*, Vol. 91, 2012/3, pp. 13-44.

14| Judgment of 7 September 2022, *Boriss Cilevičs and Others*, C-391/20, [EU:C:2022:638](#). See also, Judgment of the Latvian Constitutional Court of 9 February 2023, 2020-33-01.

education institutions to offer courses of study in foreign languages. Needless to say, in Latvia, the question of the Latvian language is closely linked with the country's recent past in the Soviet Union, where the use of Latvian, although formally allowed, led in practice to a serious deterioration of the prospects for this language in the future.¹⁵ This case shows that it is possible to conciliate the national constitutional identity with the supranational requirements. The Italian Constitutional court in a seminal judgment described the relationship between the European and national legal orders as 'two coordinated and yet separate systems'¹⁶ – thus the principle of primacy of the Union law does not preclude coordination.

On the EU side, European law has shown itself to be conciliatory. In some of the landmark cases – such as the *Omega*¹⁷ judgment – the Court was already discussing the notion of Constitutional identity without naming it textually, since it accepted that a fundamental value of the human dignity recognised in the Member State's Constitution is a valid reason to restrict the EU rules on the freedom to provide services.

Some years later, the notion was explained in a greater detail, where Advocate General Maduro recalled that

'European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States'.¹⁸

Altogether, we can identify three categories of cases where the constitutional identity has been used as legal ground justifying the restrictions on EU law. First, it has been invoked in judgments related to State language. For example, Luxembourg invoked the preservation of national identity in a demographic situation as specific as that prevailing in the [Member state]

15| Kreindler, I.T., "Baltic area languages in the Soviet Union: a sociolinguistic perspective", *Journal of Baltic Studies*, Vol. 19, No 1 (Spring 1988), p. 5.

16| Judgment of the Italian Constitutional Court of 8 June 1984, 170/1984, [ECLI:IT:COST:1984:170](#). In this decision the Court defined the relationship between the national and the EU legal orders as follows: 'diritto comunitario e diritto interno: i due sistemi sono configurati come autonomi e distinti, ancorché coordinati, secondo la ripartizione di competenza stabilita e garantita dal Trattato'.

17| Judgment of 14 October 2004, *Omega*, C-36/02, [EU:C:2004:614](#), paragraph 33 et seq.

18| Opinion of Advocate General Póiaras Maduro, 8 October 2008, *Michaniki*, C-213/07, [EU:C:2008:544](#), paragraphs 31 to 33.

already in the mid-nineties.¹⁹ The Court of Justice of the European Union acknowledged the constitutional concerns related to national language also in the *Runevic-Wardyn*²⁰ judgment and recently in the already-mentioned *Cilēvičs e.a.* judgment. In the same line of judgments, the Court of Justice of the European Union examined cases on the constitutional status abolishing the nobility such as *Sayn-Wittgenstein*;²¹ the constitutional identity was also invoked in relation to difference of treatment on grounds of religion or belief.²²

Thus, from the perspective of the Court of Justice of the European Union, the Constitutional identity may be summarised as a legitimate concern which may justify restrictions on the fundamental freedoms. In practical terms, this shows that the Court of Justice of the European Union has been willing to reconcile market principles and freedoms with the constitutional identity.

3. Constitutional identity open to international and European law - approach of the Constitutional Court of Latvia

So far, the absolute majority of cases regarding the constitutional identity were not demanding unreasonable exceptions that would put the EU legal order at peril. Indeed, the Latvian legal system is guided by the principle of ‘open statehood’, characterised by the willingness to engage in international cooperation and to adopt supranational and international law. In Latvia, this principle is enshrined under Article 68 of the Constitution, which states the following: ‘with the purpose of strengthening democracy, [Latvia] may delegate a part of its State institution competencies to international institutions’.

19| Judgment of 2 July 1996, *Commission v Luxembourg*, C-473/93, [EU:C:1996:263](#), paragraph 35.

20| Judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, [EU:C:2011:291](#).

21| Judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, [EU:C:2010:806](#).

22| Judgment of 17 April 2018, *Egenberger*, C-414/16, [EU:C:2018:257](#).

The Constitutional Court of Latvia interprets the principle of openness in the following way:

'[the legislator] when adopting and applying national legal norms, is reminded of the supremacy of European Union law. There's an obligation to ensure the application of European Union law in such a way as to strengthen Latvia as a democratic, law-abiding country based on the inherent dignity and freedom of every human being'.²³

Thus, in principle, the Latvian Constitutional Court recognises the precedence of the application of European Union law over domestic law, even over national constitutional law that is contrary to EU law.

It is true that openness is not without boundaries. The precedence of EU law over any national law only applies to the extent that the Constitution transfers sovereign powers to the European Union and, to the extent that they were allowed to transfer them.²⁴ The Constitutional Court of Latvia invoked this limit to openness and EU law precedence in our *Lisbon* case²⁵ – the Constitutional court indicated that openness may not conflict with democratic decision-making and democratic responsibility. This approach is followed by numerous Constitutional courts, as remarked in a decision of the German *Bundesverfassungsgericht* in a decision on the European arrest warrant, where it indicated that 'provisions for the protection of the constitutional identity and the limits of the transfer of sovereignty rights to the European Union can [...] be found in the constitutional law of numerous Member States of the European Union'.²⁶

As mentioned before, protection of the Latvian language as a constitutional identity is one of the core elements of the Latvian legal order. After legislators passed a law that restricted the use of foreign languages in the higher education institutions, the Constitutional Court received an application submitted by twenty members of the Parliament. In the application it

23| Judgment of the Latvian Constitutional Court of 17 January 2008, 2007-11-03, paragraph 24.2; Judgment of the Latvian Constitutional Court of 13 November 2018, 2018-18-01; paragraph 15.2.

24| König, D., "The role of the German Federal Constitutional Court in dealing with cases of a supra or international nature", "The Role of Constitutional Courts in the Globalised World of the 21st Century", *Proceedings of the 2018 Conference of the Constitutional Court of the Republic of Latvia – Riga: Constitutional Court of the Republic of Latvia*, 2019, p. 164, available at <https://www.satv.tiesa.gov.lv/other/2019-ST-Referati-2018-atverumos.pdf>.

25| Judgment of the Latvian Constitutional Court of 7 April 2009, 2008-35-01.

26| Judgment of the German Federal Constitutional Court of 15 December 2015, 2 BvR 2735/14, [ECLI:DE:BVerfG:2015:rs20151215.2bvr273514](https://www.bverfgericht.de/DE/verfges/2015/20151215_2bvr273514.html).

was argued that the contested provisions restrict the fundamental rights to private property – as they entail restrictions on the freedom of establishment of citizens and companies originating from Member States of the European Union. They also alleged that the restriction is disproportionate, since the legitimate aim – i.e. promotion of use of the official language and preservation of national identity – can be achieved by less-restrictive means, which would allow for wider use of foreign languages. Before reaching the final decision, the Constitutional court decided to stay the proceedings and to refer two questions to the Court of Justice of the European Union for a preliminary ruling.

Regarding the nature of the restriction of fundamental rights, Advocate General Emiliou in his Opinion indicated that the contested provisions make it more difficult for certain *undertakings* established abroad to relocate to Latvia or to open some other places of business in Latvia. As the applicants in the main proceedings correctly point out, in so far as educational courses have to be provided (almost exclusively) in Latvian, many foreign higher education institutions will be unable to use a (probably significant) part of their administrative and teaching staff in Latvia. In addition, foreign higher education institutions are precluded from offering a more diversified and competitive range of services, such as courses taught in other languages, despite the significant demand for these.²⁷ The Court of Justice of the European Union added that the restriction exists also in respect of nationals of other Member States who exercised that freedom, before the adoption of the law on higher education institutions.²⁸ This precision was important since fundamental rights to property, in the sense of the Constitution of Latvia, do not protect businesses which have not yet obtained a licence to carry out their activities, which is necessary in the area of higher education.²⁹

The Court of Justice of the European Union further acknowledged that policy of protecting the official language constitutes a manifestation of national identity for the purposes of Article 4(2) TEU. The Court confirmed, however, the broad discretion to adopt a policy of protecting the official language cannot justify a serious undermining of the rights which

27| Opinion of Advocate General Emiliou of 8 March 2022, *Cilevičs e.a.*, C-391/20, [EU:C:2022:166](#), point 75.

28| Judgment of 7 September 2022, *Cilevičs e.a.*, C-391/20, [EU:C:2022:638](#).

29| On this distinction see: Judgment of the Latvian Constitutional Court of 9 February 2023, 2020-33-01, paragraph 27.

individuals derive from the provisions of the Treaties enshrining their fundamental freedoms.³⁰ It also hinted at what *would* be found disproportionate – legislation of a Member State which would require, with no exceptions, that higher education courses of study provided in the official language of that Member State exceed what is necessary and proportionate for attaining the objective pursued by that legislation, namely the defence and promotion of that language.³¹

After receiving the judgment of the Court of Justice of the European Union, the Constitutional court adopted the final judgment in the case. First of all, the Constitutional court interpreted the rights to property, as provided in the Constitution, together with the freedom of establishment as it is enshrined in the TFEU. Thus, the Constitutional court remained faithful to the principle of openness even in cases regarding constitutional identity.

In the judgment, the Constitutional court made a distinction between the use of European Union languages and other foreign languages in the institutions of higher education. It acknowledged that, regarding the European Union languages, it is important to strengthen the knowledge of those languages to reaffirm the integration of Latvia into Europe. Thus, the Constitutional court observed that the legislator should have taken into account that there existed a less restrictive measure, which would be more consistent with economic freedoms and the right to property.³² As a consequence, this judgment shows that national and supranational courts may review a legal disposition that can be concretely applied to national constitutional identity. This is why, in the remaining text, we wish to suggest some criteria on how to evaluate and distinguish a genuine constitutional identity from rules which are a formal part of the national constitution, rather than related to the core values in the society. In any case, a valid norm of constitutional identity may not contradict the main principles of the European Union law.

30| Judgment of 7 September 2022, *Cilevičs e.a.*, C-391/20, [EU:C:2022:638](#), paragraph 83; and Judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, [EU:C:2011:291](#), paragraph 78.

31| Judgment of 7 September 2022, *Cilevičs e.a.*, C-391/20, [EU:C:2022:638](#), paragraph 84.

32| Judgment of the Latvian Constitutional Court of 9 February 2023, 2020-33-01, paragraph 33.

4. Convergence of the constitutional identities – Establishing common criteria

As Constitutional identity need not be a factious notion, it seems that there is a reasonable consensus over the existence and gradual expansion of the principle. In the remaining part, we address the convergence of constitutional identities – not in the sense of conflating them, but by establishing a clear and foreseeable set of criteria. In our opinion, there are three such criteria. First, the Constitutional identity has to be established in the Constitution of a State; second, it must also reflect important values at stake in the Member state; and finally, third, it should be open to the scrutiny of the national and supranational courts – for example, there should be a remedy such as the preliminary ruling procedure.

First, if we take the notion of Constitutional identity seriously, it may not simply overlap with the public order considerations. Therefore, the national constitutional identity must derive from a legal source of a constitutional rank. It should be provided in the national constitution, or derive from the constitutional practice of the Member State. Also, it is usually complicated to change the Constitution, which will normally preclude an increase of cases of constitutional identity.

Second, constitutional identity must also reflect important values at stake in the Member State and not reflect the political expediency of the moment. The originality of the European project derives from the fact that each Member State is entitled not only to safeguard but also to develop its constitutional identity. For instance, in the last decade, there have been extensive discussions in Latvia about the core of the Constitution. In doctrine, it is recognised that there are constitutional values, firstly, existing in the consciousness of the people and, secondly, values that unite the nation.³³ Thus, it is recognised in Latvia that there are general constitutional values, such as the rule of law, protection of the national language, protection of the fundamental rights etc. These values allow the Republic of Latvia to exist as a nation.

33| Opinion of Constitutional Law Commission convened by the President of Latvia, *On the Constitutional Foundations and Inviolable Core of the State of Latvia*, 2012, available at http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf.

Thus, not everything provided under the Constitution would automatically or instantly become the national constitutional identity.

The third criteria requires that there exists a remedy in courts – national and supranational – to review the legality and the proportionality of the concrete measures implementing the constitutionally-recognised values. After all, the Court of Justice of the European Union has been very flexible towards recognising the concerns of constitutional identity in cases concerning economic freedoms. The Court of Justice of the European Union, examining the proportionality in *Omega* case, stated that ‘the provisions adopted are not excluded merely because one Member state has chosen a system of protection different from that adopted by another State’.³⁴ Although it was not stated in identical terms, it is undeniable that the Court of Justice of the European Union in principle accepted that the protection of the national language in the *Cilēvičs e.a.* judgment may be based on a system of protection which is different from that adopted by other Member States.³⁵

This approach requires, however, that to some extent, the values protected by the national constitutional identity may be recognised as common values. In the *Coman*³⁶ judgment, the Court of Justice of the European Union recalled that the alleged constitutional identity ‘may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter [of Fundamental Rights of the European Union]’.³⁷ Moreover, the intensity of the scrutiny may be tighter in cases concerning equal treatment – such as difference of treatment on grounds of religion or belief.³⁸

34| Judgment of 14 October 2004, *Omega*, C-36/02, [EU:C:2004:614](#), paragraph 38.

35| Judgment of 7 September 2022, *Boriss Cilevičs and Others*, C-391/20, [EU:C:2022:638](#), paragraph 82.

36| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#).

37| *Ibid.*, paragraph 47. The Latvian Government made a statement in this case that on the assumption that a refusal to recognise marriages between persons of the same sex concluded in another Member state constitutes a restriction of Article 21 TFEU, such a restriction is justified on grounds of national identity, as referred to in Article 4(2) TEU. For the purposes of this article, the *Coman* case illustrates an example whereby the alleged constitutional identity did not meet the necessary criteria and thus was correctly dismissed.

38| Judgment of 17 April 2018, *Egenberger*, C-414/16, [EU:C:2018:257](#).

These criteria present several advantages. First of all, they allow each Member State to engage in a democratic debate and to choose the adequate level of protection for the most important values in a given society. Second, they also allow a degree of flexibility in the courts. The case-law of the Court of Justice of the European Union seems to indicate that the judicial scrutiny will be more permissive regarding economic freedoms, especially if the exercise of economic freedom is encroaching upon other fundamental rights. The control becomes tighter if the constitutional identity is at odds with the principle of equality; and finally, an alleged constitutional identity that is inconsistent with the fundamental rights may not be recognised. Last but not least, this approach allows the maintenance and development of the cooperation and the dialogue between the national and supranational courts.



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Contribution by Ms Simina Tănăsescu, Judge at the Constitutional Court of Romania

Primacy of EU Law and the Romanian Constitutional Court

The subject matter of this panel is broad and substantial. I have tackled elsewhere the concept of the rule of law in the EU¹ and its relationship with the primacy of EU law.² Therefore, in the short time available, please allow me to focus mainly on the topic of primacy of EU law, not necessarily from the classical perspective of its various approaches by the Constitutional Courts of Member States of the EU, but rather to analyse its meaning and impact on the fundamental rights of EU citizens. In this respect, I would like to submit three main ideas, not necessarily unrelated, namely that (i) primacy of EU law is not a synonym of supremacy of EU law over national law, and (ii) primacy of EU law may enjoy constitutional ranking in some Member States, and (iii) primacy of EU law may be a synonym of *lex mitior* regarding the protection of fundamental rights. In this last respect, the recent case-law of the Romanian Constitutional Court may be edifying.

1 | Tănăsescu, E.S., “The Independence of Justice as Proxy for the Rule of Law in the EU - Case Study: Romania”, *Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società* (NAD) No 1, 2021, pp. 102-122, available at <https://riviste.unimi.it/index.php/NAD/article/view/15826/670>.

2 | Selejan-Guțan, B., Tănăsescu, E.S., “A Tale of Primacy. The ECJ Ruling on Judicial Independence in Romania”, *VerfBlog*, 2 June 2021, available at <https://verfassungsblog.de/a-tale-of-primacy/>.

1. Primacy of EU law is not supremacy of EU law over national legal systems

The concept of primacy of EU law has been officially³ entrenched in the Final Act of the 2007 Intergovernmental Conference that adopted the Treaty of Lisbon.⁴ It had previously been dealt with as a creation of the case-law of the Court of Justice of the European Union, although an attempt at codification existed in Article 6 of the Treaty establishing a Constitution for Europe (2004).⁵

The primacy of EU law is a principle of law which particularises the more general principle *pacta sunt servanda* and which means that an EU Member State cannot invoke its internal law in order to avoid the obligation to apply the EU treaties it has ratified. In the specific case of the EU, the principle of primacy refers to the entire EU law, including secondary law and case-law of the Court of Justice of the European Union, and it concerns the entire national law of Member States, irrespective of its constitutional or legal rank. Primacy of EU law is a tool for solving what French lawyers call *conflits de système*, namely a situation where two legal norms from two different legal systems are potentially applicable to the same facts and their normative substance is conflicting. Because the two legal norms belong to two different legal systems, there are no pre-set rules of precedence and either one could, hypothetically, be applicable; but because their substance is conflicting, the outcome would be totally different if one or the other could effectively apply. Primacy of EU law entrenches a rule for this type of conflict of legal norms, establishing that any legal norm belonging to the EU legal system shall take precedence over any legal norm of any national legal system of Member States.

Supremacy is a characteristic of a constitution whereby the constitution holds ultimate authority in a legal system and, therefore, it takes precedence over all the other legal norms of that legal system. But the supremacy of the constitution is not only a rule for solving a potential conflict between legal norms belonging to the same legal system by acknowledging the ranking of those norms within the respective system and allowing for a hierarchical

3| See Declaration No 17 appended to the Treaty of Lisbon. Declarations adopted by intergovernmental conferences revising the EU treaties are not legally binding but they have legal effects.

4| Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, p. 1-271).

5| Draft Treaty establishing a Constitution for Europe (OJ C 169, 18.07.2003, p. 1-105).

primacy of that constitution. The concept of the supremacy of the constitution concerns the institutional structure of a state, and it means that all state organs, including the legislator, are bound by it and must act within the limits laid down in that constitution.⁶ The supremacy of the constitution fulfils an overarching function of unity and cohesion for the respective legal system; this explains why the supremacy of the constitution is the only reference for the validity of legal norms internal to that legal system.

The same unifying and ranking functions are fulfilled within the EU legal system by the EU treaties (and a limited number of other legal sources), which is why we all agree that, basically, the EU treaties are constitutional in function. But the supremacy these legal sources enjoy within the EU legal system does not extend to the legal systems of the Member States. These last ones remain characterised by the supremacy of their own constitutions.

Thus, primacy of EU law is not synonymous with supremacy, from two different perspectives:

- first, primacy of EU law over national legal systems of Member States is not a synonym of supremacy of EU Treaties within the EU legal system, i.e. with the supremacy of the primary sources over the secondary sources of EU law, and
- second, primacy of EU law over the legal systems of Member States is not to be mistaken for the supremacy of EU law over those legal systems.

If the first perspective seems rather obvious, the second one may still stir controversy.

6 | Limbach, J., "The Concept of the Supremacy of the Constitution", *Modern Law Review*, Vol. 64, No 1, 2001, pp. 1-10.

Primacy of EU law is *not* a criterion for the establishment of a potential hierarchy between legal norms that belong to the EU and the national legal systems respectively, or between those two legal systems themselves. Primacy of EU law merely emphasises that

‘EU law is not intrinsically superior to the Constitutions of Member States. Primacy simply means that, in the event of a difference in content on a particular issue between the law of a member state and EU law, it is EU law that must be applied to solve that specific issue, pending amendment or repeal of either the domestic law or EU law rules to solve the contradiction’.⁷

Although both the EU and the national legal systems enjoy their respective internal hierarchy of rules, based on the supremacy of their respective constitutional provisions, there is no hierarchy between them.

The conceptual difference between primacy and supremacy can also be observed from the more pragmatic point of view of their legal consequences, particularly with regard to the legal norms which are *not* applied to a specific situation. If a legal norm is found contrary to a Member State constitution, it is declared invalid and it can no longer be applied *erga omnes*, this being the legal consequence of an infringement of the supremacy of the constitution. On the other hand, if a legal norm is contrary to another legal norm from a different legal system, it may or may not be applicable in the case at hand, depending on the rules of precedence regulating their interaction. However, the validity of that legal norm still depends on the rules pertaining to the creation of legal norms within the respective legal system⁸. Thus, if a legal norm from a national legal system is found contrary to a legal norm from another legal system this will not invalidate the former; rather, that legal norm remains applicable in other situations, where it will no longer be found to conflict with that other legal system. The legal consequence of an infringement of the principle of primacy is not the invalidity of legal norms, but their mere inapplicability in a specific case at hand.

7| Ziller, J., “The Primacy of European Union Law”, *Study requested by the JURI Committee of the European Parliament*, PE 732.474 – July 2022, p. 24.

8| Kelsen, H., *Théorie pure du droit*, 2e éd., 1960, rééd. LGDJ, 1999, p. 304

Conflicts between legal norms stemming from different legal systems may be resolved through the primacy rule (of one or the other of the two legal systems), but may also be sorted out through other tools intended to eliminate that divergence. If the conflict is temporary and immediate, meaning that it has to be sorted out prior to a case being solved by a court, the principle of primacy is probably best suited. But if the conflict allows for deeper reflection, other solutions may be better suited, such as revisions of one of the conflicting norms or even withdrawal from the international treaty that makes primacy compulsory. However, until other adaptations are made, the principle of primacy seems preferable due to its main qualities: efficiency and expediency.

In the particular case of EU law, the principle of primacy enjoys two original features:

- it gives systematic preference to the EU legal system to the detriment of national legal systems of Member States; and
- it has a wide range of means of enforcement (compulsory jurisdiction of the Court of Justice of the European Union, infringement procedure, preliminary ruling mechanism, Member States' liability for breaches of rights of EU citizens etc.).

This is because the primacy of EU law is an expression of the *effective* application of EU law which, in turn, is an expression of the fact that EU integration is a priority for Member States. If European integration is no longer the broad objective of states united under the umbrella of the EU, primacy of EU law may no longer be a tool of predilection, and EU law could be set aside whenever in conflict with national law of Member States. This, in turn, would lead to a lack of unity in and effectiveness of the EU, thus affecting the equal protection of fundamental rights of EU citizens. The Court of Justice of the European Union has already explained this as early as *Costa v E.N.E.L.*⁹

9 | Judgment of 15 July 1964, *Costa v E.N.E.L.*, C-6/64, [EU:C:1964:646](#).

2. Primacy of EU law enjoys constitutional ranking in Romania

Romania joined the European Union on 1 January 2007 after more than ten years of preparation under the Association Agreement signed in 1993.¹⁰ The Accession Treaty signed in 2005 between Bulgaria and Romania, on one hand, and all the other Member States of the EU, on the other hand, contained a provision declaring that Bulgaria and Romania were to become 'Parties to the Treaty establishing a Constitution for Europe' (Article 1(2)) and only in the event that the Treaty establishing a Constitution for Europe was not be in force on 1 January 2007 would the new Member States become 'Parties to the Treaties on which the Union is founded, as amended or supplemented' (Article 4(1)).¹¹ Thus, from the very beginning, Romania has accepted the primacy of EU law as enshrined in Article 6 of the Treaty establishing a Constitution for Europe.

The revision in 2003 of the Romanian Constitution¹² prepared the country's accession to the EU and granted constitutional standing to the principle of primacy of EU law in a European clause appended to the text of the Fundamental Law (Article 148).¹³

Legal scholarship was polemical on the meaning of the primacy clause in the Romanian Constitution. One line of argument supported the idea of the supremacy of EU law over national law based on the intrinsically-original nature of EU law and the well-known case

10| Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part (1 February 1993) (OJ L 357, 31.12.1994).

11| Treaty of Accession of the Republic of Bulgaria and Romania (OJ L 157, 21.6.2005).

12| Constitution of Romania, 8 December 1991, revised in 2003.

13| Article 148 [Integration into the European Union] provides: '(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of national laws, in compliance with the provisions of the accession treaty. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.'

law of the Court of Justice of the European Union with regard to the constitutional nature of the founding treaties of EU.¹⁴ According to another approach, the constitution grants EU law primacy over the national legal system.¹⁵ Since Article 148(2) of the Romanian Constitution allows for ‘mandatory community regulations’ to ‘take precedence over the opposite provisions of national law’, it means that the Romanian constituent power decided that contradictions between EU law and Romanian law are not allowed, but if they occur they must be solved by giving systematic precedence to the EU legal system.

This last line of argument can be found in a landmark decision of the Romanian Constitutional Court (148/2003) which dealt with the 2003 revision of the Constitution, where the constitutional judges did not want to advance more in the ‘minefield’ of interaction between EU and national law, but they did want to underline the fact that the revised Constitution dealt with the issue of the interaction between EU and national law. Implicitly, they acknowledged that, in Romania, the primacy of EU law enjoys constitutional ranking.

However, the Romanian constitutional judges have not clarified the meaning of the concept ‘precedence’ referred to in Article 148, i.e., whether it refers to the *priority of application* or to the *supremacy* of EU law over national law. They need not clarify this issue because the Romanian Constitution makes it obvious. Indeed, the Romanian Constitution uses the word *supremacy* only in an auto-referential manner, while, with regard to other legal systems, it uses the concept of *precedence*.

14| Manolache, O., *Tratat de drept comunitar*, C.H. Beck, București, 2006, p. 11; Gornig, G. and Rusu, I.E., *Dreptul Uniunii Europene*, C.H.Beck, București, 2007, p. 25.

15| Vrabie, G., “Le constitutionnalisme européen – phénomène complexe et intégrateur” in Vrabie, G. (eds.) *L’évolution des concepts de la doctrine classique de droit constitutionnel*, Institutul European, Iași, 2007, p. 202; Tănăsescu, E.S., “Comentariu la art.148”, in Muraru, I. and Tănăsescu, E.S., (eds.) *Constituția României – Comentariu pe articole*, C.H. Beck, București, 2022, pp. 1349-1355.

Thus, Article 11 of the Romanian Constitution¹⁶ deals with the relationship between national and international law and provides for a dualistic approach with regard to the international legal system, while Article 20 of the Constitution¹⁷ enshrines the principle of *lex mitior* with regard to the protection of fundamental rights, giving precedence to the national or international provisions that better protect fundamental rights. Article 148 provides for the precedence of EU law over national law. On the other hand, supremacy is mentioned only with regard to the Constitution¹⁸ and to the mission of the Constitutional Court.¹⁹ The rule of precedence mentioned both in Article 20 and Article 148 of the Romanian Constitution expresses a possible solution to a conflict of legal norms and clearly covers the realm of the principle of primacy.

Therefore, in the Romanian legal system, the primacy of EU law is based not only on its intrinsic nature, but also on the express provisions of the national Constitution,²⁰ which does not refer to a hierarchy but to a systematic and compulsory precedence of EU law over Romanian legislation. Only a comparison between the normative substance of each EU legal norm, which finds itself in opposition with a national one, allows the observer to draw a conclusion with regard to their applicability in a given situation. This comparison may be performed by any public authority – ordinary courts and Constitutional Court included.

In this context, it is worth mentioning that while Article 20 of the Romanian Constitution provides for *lex mitior* with regard to human rights, Article 148 of the Romanian Constitution affords EU law a constant precedence over Romanian national law. It should also be noted

16| Article 11 [International law and national law] provides: ‘(1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by Parliament, according to the law, are part of national law. (3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.’

17| Article 20 [International treaties on human rights] provides: ‘(1) Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.’

18| Article 1(5) [The Romanian State] provides: ‘In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.’

19| Article 142 paragraph 1 provides: ‘The Constitutional Court shall be the guarantor for the supremacy of the Constitution.’

20| Muraru, I. and Tănăsescu, E.S., *Drept constituțional, Vol. I, Edition XII*, C.H.Beck, București, 2005, pp. 12-14.

that Article 148 gives precedence only to EU law which is 'contrary' to national law, whereas Article 20 provides for the precedence of international treaties on human rights that are 'inconsistent' with domestic law. This may be interpreted as a narrowing-down of the scope of the primacy of EU law: unlike human rights, where mere discrepancies are relevant, a clear contradiction is necessary for EU law to take precedence over the national one. In practice, the primacy of supranational or international law is not modulated according to its nature: it simply allows the setting-aside of domestic law that does not comply with the referential, whether this referential is EU law or international treaties on human rights.

Nevertheless, complicated situations may arise with regard to EU legal norms providing for fundamental rights. The case-law of the Italian, German and other constitutional courts with regard to the protection of the fundamental rights of their respective citizens is well known.²¹ Although EU law – including the Charter of Fundamental Rights of the European Union²² – does not prevent Member States from providing a higher level of protection, there have been instances whereby the Court of Justice of the European Union has given priority to the objective of complete harmonisation²³ in a specific legal area, to the detriment of the highest possible protection of fundamental rights.²⁴ It has to be mentioned that, as of late, when EU law makes inroads into sensitive areas, the Court of Justice of the European Union takes care to leave

21 | For a recent overview see, among others, Bobic, A., *The Jurisprudence of Constitutional Conflict*, OUP, Oxford, 2021.

22 | See, notably, Article 53 of the EU Charter of Fundamental Rights of the European Union which provides : 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

23 | See the conclusions of Advocate General Ćapeta in Opinion of 22 June 2023, *G. K. and Others (Parquet européen)*, C-281/22, [EU:C:2023:510](#), who wrote that European harmonisation 'inevitably leads to a weakening of the protection of fundamental rights in the Member States with a higher level of protection, unless the highest standard is adopted as a common rule' (paragraph 113).

24 | See judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#), where the Court of Justice of the European Union confirmed that the Framework Decision 2002/584 provided for an exhaustive list of possible reasons for refusing a European arrest warrant, and that the Spanish court(s) would therefore have to set aside a constitutional provision aiming at giving persons, who had received a sentence in absentia in another Member State, a better protection against surrender (extradition) than what followed from Framework Decision 2002/584.

some room for national choices.²⁵ However, the numerous instances of ‘judicial dialogue’²⁶ – as this type of interaction between constitutional courts of Member States and the Court of Justice of the European Union is generally labelled – should not set back or breach the primacy of EU law over the national legal systems of Member States, otherwise the unity, cohesion, and effectiveness of the EU legal system would be in danger. The Court of Justice of the European Union has explained this in *Costa v E.N.E.L.* and *Internationale*²⁷ and, more recently, in *RS*.²⁸

Irrespective of all these, the Romanian Constitution provides for *lex mitior*, that is an alternative precedence, of national or international standards, with respect to fundamental rights (Article 20), while, at the same time, it requires the systematic and compulsory primacy of EU law (Article 148). What if EU law represents a lower level of protection than the Romanian Constitution? In Romania, this is an endogenous antinomy of the Constitution, which involves the principle of primacy and requires the intervention of the Constitutional Court.

3. Primacy of EU law may be synonym to *lex mitior* regarding the protection of fundamental rights

The case-law of the Romanian Constitutional Court with regard to the primacy of EU law has been constantly evolving.

In a nutshell, immediately after Romania’s accession to the EU, the Romanian Constitutional Court proceeded to the direct application of EU law in order to identify and invalidate conflicting national provisions, declaring that non-compliance with EU law was equivalent to non-compliance

25| See judgment of 8 September 2022, *Boriss Cilevičs e.a.* C-391/20, [EU:C:2022:638](#).

26| On the topic of judicial dialogue, among others, see Nollkaemper, A., “Conversations Among Courts: Domestic and International Adjudicators” in Romano, C., Alter, K. and Shany, Y. (eds.) *The Oxford Handbook of International Adjudication*, Oxford, 2013; Tridimas, T., *The ECJ and the National Courts: Dialogue, Cooperation, and Instability*, Oxford, 2015; Ferrer Mac-Gregor, E., “What Do We Mean When We Talk About Judicial Dialogue?: Reflections Of A Judge Of The Inter-American Court Of Human Rights”, *Harvard Human Rights Journal*, Vol. 30, 2017, pp. 89-127.

27| Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, [EU:C:1970:114](#).

28| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, [EU:C:2022:99](#).

with Article 148 of the Romanian Constitution [Decision (59/2007)].²⁹ Soon after, it changed positions and refused to verify whether national law complied with EU law on the grounds that, according to Article 148(4) of the Romanian Constitution, this was an exclusive competence of the ordinary courts (Decision (1596/2010)).³⁰

Starting with Decision (668/2011),³¹ the Romanian Constitutional Court decided that it would no longer simply accept the primacy of EU law, but it will add two additional requirements before it could consider EU law applicable in the constitutionality review it carried out. Firstly, the EU norm must be sufficiently precise and clear, or its normative content must have been clearly established by the Court of Justice of the European Union. Secondly, the EU norm must be substantially relevant for the constitutionality review, i.e. its normative substance must support and justify a violation of the Romanian Constitution.

‘This reasoning is questionable in itself, in that it gives precedence to a material perspective over a formal perspective, in defiance of the text and, above all, at the cost of the illusion that constitutional law is in essence material. It is all the more so if we consider its consequences. In effect, it leads the Court to exercise a kind of *Solange* or *Arcelor* control in reverse, enabling it to set aside the standard of Union law in the name of the challenged law’s conformity with the Constitution’.³²

29| Decision of the Romanian Constitutional Court of 17 January 2007, Nr. 59, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/79350>.

30| Decision of the Romanian Constitutional Court of 9 December 2010, Nr. 1596, <https://legislatie.just.ro/Public/DetaliiDocument/125334>.

31| Decision of the Romanian Constitutional Court of 18 May 2011, Nr. 668, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/129963>.

32| Corre-Basset, A., *Cour constitutionnelle de Roumanie, décision 390/2021 du 8 juin 2021 (supériorité du droit constitutionnel interne sur le droit de l'Union)*, available at <https://www.conseil-constitutionnel.fr/publications/titre-vii/chronique-de-droit-constitutionnel-compare-janvier-a-juin-2021>.

Nevertheless, it is this second, subjective condition that has enabled the Romanian Constitutional Court to refuse to interpose EU law in the constitutionality review it has carried out on numerous subsequent occasions [Decisions (750/2015),³³ (64/2018),³⁴ (104/2018)].³⁵

On the rare occasions when the Romanian Constitutional Court has recognised EU law as a standard for the constitutionality review it performs and used it to invalidate national laws, it has insisted that the mere finding of legislative inconsistencies between national and EU rules cannot provide a solution for the constitutionality review; in order to declare a law unconstitutional, the Romanian Constitutional Court must find an infringement of Article 148 of the Romanian Constitution, as the Basic Law is the sole reference standard for the review carried out by the Romanian Constitutional Court [Decision (64/2015)].³⁶ That said, the Romanian Constitutional Court has not explained the difference between a violation of Article 148 of the Romanian Constitution and a violation of the principle of primacy of EU law, since Article 148 of the Constitution codifies in Romanian constitutional law precisely the primacy of EU law as developed in the case law of the Court of Justice of the European Union, making EU law binding and enforceable by all public authorities of Romania, including the Romanian Constitutional Court. Some commentators have noted that Article 148 of the Romanian Constitution ‘was not drafted to allow an elective but an imperative priority of EU law’.³⁷

33| Decision of the Romanian Constitutional Court of 4 November 2015, Nr. 750, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/174756>.

34| Decision of the Romanian Constitutional Court of 14 February 2018, Nr. 64, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/200204>.

35| Decision of the Romanian Constitutional Court of 6 March 2018, Nr. 104, <https://legislatie.just.ro/Public/DetaliiDocument/201029>.

36| Decision of the Romanian Constitutional Court of 24 February 2015, Nr. 64, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/167490>.

37| Moraru, M. and Bercea, R., “The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România’*, and their follow-up at the national level”, *European Constitutional Law Review*, Vol. 18, No 1, 2022, p. 85.

The missed judicial dialogue between³⁸ of the Romanian Constitutional Court in Decision (390/2021)³⁹ and the Court of Justice of the European Union in judgments *EuroBox Promotion* and *RS* is now, unfortunately, well known. The Romanian Constitutional Court denied the primacy of EU law over the Romanian Constitution⁴⁰ based on a vague concept of constitutional identity,⁴¹ attempted to prevent ordinary courts from applying the primacy of EU law and the rulings of the Court of Justice of the European Union despite the explicit provisions of Article 280 TFEU,⁴² and refused to perform a combined reading of national and supranational standards applicable in the case at hand.⁴³ Two of the nine judges of the Romanian Constitutional Court signed a separate opinion to Decision (390/2021), where they noted that such conclusions contradict not only binding EU law and established Court of Justice of the European Union case-law,

38| Tănăsescu, E.S., "A missed dialogue: the European Court of Justice and the Romanian Constitutional Court", in Miroslaw, G. (ed.) *Constitutionality of Law without a Constitutional Court: A View from Europe*, Routledge, 2023, pp. 133-156; Tănăsescu, E.S., "The European Court of Justice and the Constitutional Court of Romania: an implicit and indirect judicial dialogue?" *EuR-Europarrecht No 1*, 2023, pp. 71-83.

39| Decision of the Romanian Constitutional Court of 8 June 2021, Nr 390, <https://legislatie.just.ro/Public/DetaliiDocumentAfis/243370> has been a sort of replica to the joined judgment of the Court of Justice of the European Union of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#).

40| In Decision 390/2021 the Romanian Constitutional Court found – inter alia – that the primacy of EU law applies only to ordinary national legislation and not to the Constitution, because the primacy of EU law cannot be conceived or perceived as 'removing or ignoring the national constitutional identity, enshrined in article 11, paragraph 3, in conjunction with Article 152 of the Fundamental Law' (Recital 81 of Decision 390/2021).

41| Citing the German Constitutional Tribunal, most often the Romanian Constitutional Court equates the 'eternity clause' with the concept of constitutional identity. Interestingly, upon the constitutional revision of 2003, the 'eternity clause' remained untouched, while a primacy clause has been appended to the Constitution. On that occasion, the Constitutional Court noted that EU accession is a decision taken by the Romanian state in complete independence and 'not imposed on Romania by an external entity' and therefore the constitutional revision consisting in the addition of Article 148 to the text of the Basic Law 'does not infringe the limits of constitutional revision' (Decision 148/2003).

42| According to Article 280 TFEU, 'the judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299'. Article 299 TFEU contains procedural clarifications that do not concern the principle of primacy.

43| The Constitutional Court explained that the principle of the rule of law expounded in EU law cannot become a standard for the constitutionality review it performs because that EU law 'does not fill a gap in the Basic Law and does not establish a higher level of protection than the constitutional norms in force' (Recital 49 of Decision 390/2021). Consequently, the Constitutional Court declared it will perform a constitutionality review only 'with regard to the principle of the rule of law as expressly protected by domestic law, in Article 1(3) of the Romanian Constitution' (ibidem) and it came to conclusions rather different than those reached by the Court of Justice of the European Union in the judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, [EU:C:2021:1034](#).

but also Article 148 of the Romanian Constitution, which provides for the systematic and compulsory primacy of EU law over national law. On the other hand, the Court of Justice of the European Union reiterated that EU law takes precedence over the entire national law of Member States, including their constitutions.⁴⁴ Nevertheless, the primacy and unity of EU law seemed in danger, at least on Romanian soil.

4. 'All's well that ends well'⁴⁵

The recent case-law of the Romanian Constitutional Court displays a more nuanced approach to the primacy of EU law. Attempting to go beyond the interpretation of national law in conformity with EU law, and short of engaging in a judicial dialogue through the mechanism of the preliminary ruling, the Romanian Constitutional Court at least endeavours to provide for a combined reading of EU and national legal norms in order to reach the conclusion that the standard of protection of fundamental rights is equivalent in EU law and in the national Constitution.

Thus, in an earlier Decision (23/2018),⁴⁶ without resorting to the preliminary question mechanism, the Romanian Constitutional Court declared that the anti-rabies vaccination of dogs in Romania should be performed *prior* to the identification of dogs (pets) and not vice-versa, as required by the relevant EU regulation.⁴⁷ Citing the constitutional protection of health of Romanian citizens (Article 34),⁴⁸ the Romanian Constitutional Court ruled that anti-rabies vaccination

44| See judgments in joined cases of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19, C-840/19, [EU:C:2021:1034](#), and in judgment of 22 February, *RS (Effect of the decisions of a constitutional court)*, C-430/21, [EU:C:2022:99](#).

45| *All's Well That Ends Well* is a play written by William Shakespeare and published in 1623.

46| Decision of the Romanian Constitutional Court of 23 January 2018, Nr. 23, <https://legislatie.just.ro/Public/DetaliiDocument/198510>.

47| Regulation (EU) 576/2013 of the European Parliament and of the Council of 12 June 2013 on the non-commercial movement of pet animals and repealing Regulation (EC) 998/2003 (OJ L 178, 28.6.2013, p.1-26) required that anti-rabies vaccine of dogs compulsorily takes place upon the prior identification of pets through a microchip.

48| Article 34 [Right to protection of health] provides: '(1) The right to the protection of health is guaranteed. (2) The State shall be bound to take measures to ensure public hygiene and health. (3) The organization of the medical care and social security system in case of sickness, accidents, maternity and recovery, the control over the exercise of medical professions and paramedical activities, as well as other measures to protect physical and mental health of a person shall be established according to the law.'

records for pets may continue to be kept on paper and not in microchips, as imposed by the EU regulation, explaining that the cost of microchipping was not assumed by the state as a preventative measure against the transmission of diseases, but was instead placed on the pet owner, thus infringing on the right to the protection of health. Implicit in the reasoning of the Romanian Constitutional Court was the argument that anti-rabies vaccination of all pets, irrespective of their identification through a microchip or otherwise, provides a higher standard of protection for the health of Romanian citizens than the EU regulation because it makes possible the wider prevention against rabies. It must be noted that the Romanian Constitutional Court limited the scope of its decision only to pets (dogs) that did not cross the Romanian border; all others remained subject to EU regulations and, therefore, were vaccinated against rabies only after their identification through a microchip. In other words, the Romanian Constitutional Court proceeded to set aside EU law with regard to pets that were not crossing the Romanian border, although it fully accepted the direct application of EU law for pets subject to the free movement inside the EU. Again, the primacy and effectiveness of EU law was challenged, with an obvious consequence for the equal of treatment of EU citizens.

Following this decision of the Romanian Constitutional Court, an erratic anti-rabies vaccination led to a wider spread of rabies on the Romanian territory, thus resulting in a breach of equality between EU citizens with regard to their right to the protection of health.⁴⁹ This paradoxical outcome was to be expected; it highlighted not only a flawed reading of EU regulations as providing only for pets that crossed the borders within the EU, but also an erroneous interpretation between the articulations of the protection of health at national and at EU level. On one hand, the vaccination of all pets, even of those not identified through a microchip, proved defective, as some dogs were vaccinated iteratively, while others simply missed the immunisation, which allowed the disease to spread even more. On the other hand, both the Romanian Constitution and the EU regulation provided for preventive measures as minimal guarantees for an effective protection of the right to health – anti-rabies vaccination being one of them – so there was no possibility for contradiction between national and European law on this matter. It is not merely the vaccination that prevents the spread and the transmissibility of diseases; the traceability of the vaccine is of equal – if not overriding – importance for reaching

49| Article 35 [Health care] of the EU Charter of Fundamental Rights of the European Union provides: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.'

the objective of rabies eradication, and this can be attained with greater efficiency through microchipping than through paper records.

Upon the reshuffle of the relevant EU regulation,⁵⁰ the Romanian legislator simply transposed the new EU legal framework: it enabled veterinary authorities to vaccinate only dogs identified with microchips. The Romanian Constitutional Court was asked whether this reversal of operations (first identification and then vaccination) only of dogs confined to the Romanian territory is not infringing upon – among others – the principle of *lex mitior* provided by Article 20 of the Romanian Constitution since Decision (23/2018) of the Romanian Constitutional Court granted a higher protection of health to Romanian citizens than EU regulations. It is interesting that the claimant explicitly invoked the constitutional provisions of Article 20 (*lex mitior* for the protection of fundamental rights) and not those of Article 148 (primacy of EU law) in order to set aside EU law on the Romanian soil.

The Romanian Constitutional Court declared [in Decision (6/2023)]⁵¹ that the EU standard of protection of the fundamental right to health is equivalent to the one provided by the national Constitution, and therefore that Article 20 has no scope of application (Recital 62 of Decision (6/2023)). Noting that in the previous Decision (23/2018) it was rather the burden of the financial cost of the microchipping that made it establish a different order of operations with regard to identification and vaccination of a limited number of pets, the Romanian Constitutional Court also observed that the new EU Regulation makes possible the identification through a microchip and the vaccination at the same moment in time and not successively, thus making inoperative this argument of unconstitutionality. In addition, rabies being a grave infectious disease that concerns both humans and animals, it is of the utmost importance for the protection of the entire environment to secure a high efficiency of vaccination, which is enhanced by the traceability of the vaccine, guaranteed through microchipping

50| Through Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') (OJ L 84, 31.3.2016, p. 1-208) and Commission Delegated Regulation (EU) 2020/689 of 17 December 2019 supplementing Regulation (EU) 2016/429 of the European Parliament and of the Council as regards rules for surveillance, eradication programmes, and disease-free status for certain listed and emerging diseases (OJ L 174, 3.6.2020, pp. 211-340).

51| Decision of the Romanian Constitutional Court of 31 January 2023, Nr. 6, <https://legislatie.just.ro/Public/DetaliuDocument/272218>.

(Recitals 55-56).⁵² Therefore, this EU Regulation is applicable in Romania with regard to all types of pets (both those remaining only on national soil and those that cross borders within the EU), and the standard of protection of fundamental rights is equivalent in the EU and in the national legislation.

This recent case-law is an illustration of the new tactic adopted by the Romanian Constitutional Court with regard to EU law. Although still shy to resort to preliminary rulings, the Court has nevertheless resorted to an approach that only two years ago had been emphatically refused, and discovered that a combined reading of EU and national law leads both to a better protection of fundamental rights and to the full respect of the equality of EU citizens before EU law.

52| Decision of the Romanian Constitutional Court of 23 January 2018, Nr. 23, <https://legislatie.just.ro/Public/DetaliiDocument/198510>.

3rd panel

Diversity and uniformity in EU law



M. François Biltgen

Juge à la Cour de justice de l'Union européenne

Intervention de M. François Biltgen, Juge à la Cour de justice de l'Union européenne ¹

1. Introduction : primauté ne signifie pas suprématie

Il me tient à cœur de remercier les responsables de la conférence de l'excellente organisation et de l'atmosphère chaleureuse qui en résulte. Je suis très heureux de pouvoir participer à cette conférence « Riga II », n'ayant pas pris part à « Riga I ». Pour faire le lien avec Riga I, et pour m'éviter de longs développements au sujet de la primauté du droit de l'Union, je me contenterai simplement de rappeler les propos tenus par Koen Lenaerts il y a deux ans : « primacy is, in fact, a rule of uniformity of application, which is absolutely necessary. This is not because the Union is endowed with supremacy over the Member States. That is not the case. On the contrary, the Member States are die *Herren der Verträge*, the Masters of the Treaties. However, when there is a conflict between a national rule and an EU rule, then there is a pragmatic need to ensure uniform application of EU law ² ».

Dans son tout récent arrêt *Y. P. e.a.*, concernant l'indépendance des juges en Pologne, la Cour a rappelé que le respect de l'obligation d'assurer le plein effet des exigences du droit de l'Union est nécessaire, notamment pour assurer l'égalité des États membres devant les traités et constitue une expression du principe de coopération loyale énoncé à l'article 4, paragraphe 3, TUE ³.

Primauté du droit de l'Union ne signifie pas noyer la diversité dans l'unité, bien au contraire. L'article 5, paragraphe 1, TUE soumet l'Union aux principes d'attribution, de subsidiarité et de proportionnalité. Dans sa jurisprudence relative à la primauté du droit de l'Union, la Cour prend également en compte l'identité nationale, voire constitutionnelle des États membres (2) et respecte les compétences et les marges d'appréciation des États membres, notamment dans la mise en œuvre du droit secondaire (3).

1 | La présente contribution n'engage que son auteur.

2 | Voir « EUnited in diversity: between common constitutional traditions and national identities », International Conference Riga, Latvia – 2-3 September 2021, [conference proceedings](#), EUnited in diversity Volume 1, 2021, Court of Justice of the European Union, Luxembourg, 2022, p. 232.

3 | Arrêt du 13 juillet 2023, Y.P. e. a. (Levée d'immunité et suspension d'un juge), C-615/20 et C-671/20, [EU:C:2023:562](#), points 61 et 62 ainsi que jurisprudence citée.

2. La prise en compte de l'identité constitutionnelle nationale des États membres dans la jurisprudence de la Cour

Selon l'article 4, paragraphe 2, TUE, l'Union européenne respecte l'identité nationale des États membres, inhérente à leurs structures fondamentales politiques et constitutionnelles ⁴. Les cours constitutionnelles nationales sont compétentes pour définir une telle identité. Mais il appartient à la Cour de justice d'en tirer les conséquences éventuelles sur le droit de l'Union. Ainsi, la Cour a notamment relevé dans l'arrêt *RS* que si une cour constitutionnelle d'un État membre estime qu'une disposition du droit dérivé de l'Union, telle qu'interprétée par la Cour, méconnaîtrait l'obligation de respecter l'identité nationale de cet État membre, cette cour constitutionnelle doit surseoir à statuer et saisir la Cour d'une demande de décision préjudicielle, en vue d'apprécier la validité de cette disposition à la lumière de l'article 4, paragraphe 2, TUE, la Cour étant seule compétente pour constater l'invalidité d'un acte de l'Union ⁵.

De plus, l'Union européenne dispose également de sa propre identité constitutionnelle, fondée sur l'article 2 TUE ⁶, comme l'a clairement affirmé la Cour de justice dans ses arrêts *Hongrie et Pologne contre Parlement européen et Conseil* ⁷ concernant le régime général de conditionnalité pour la protection du budget de l'Union européenne. Les valeurs que contient l'article 2 TUE ont été identifiées et sont partagées par les États membres. Elles définissent l'identité même

4| L'Union respecte l'égalité des États membres devant les traités ainsi que leur identité nationale, inhérente à leurs structures politiques et constitutionnelles fondamentales, y compris en ce qui concerne l'autonomie locale et régionale. Elle respecte les fonctions essentielles de l'État, notamment celles qui ont pour objet d'assurer son intégrité territoriale, de maintenir l'ordre public et de sauvegarder la sécurité nationale. En particulier, la sécurité nationale reste de la seule responsabilité de chaque État membre.

5| Arrêt du 22 février 2022, *RS* (Effet des arrêts d'une cour constitutionnelle), C-430/21, [EU:C:2022:99](#), points 70 à 72.

6| L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités. Ces valeurs sont communes aux États membres dans une société caractérisée par le pluralisme, la non-discrimination, la tolérance, la justice, la solidarité et l'égalité entre les femmes et les hommes.

7| Arrêts du 16 février 2022, *Hongrie/Parlement et Conseil*, C-156/21, [EU:C:2022:97](#), et du 16 février 2022, *Pologne/Parlement et Conseil*, C-157/21, [EU:C:2022:98](#).

de l'Union en tant qu'ordre juridique commun. Ainsi, l'Union doit être en mesure, dans les limites de ses attributions prévues par les traités, de défendre lesdites valeurs ⁸.

J'analyserai d'abord certains cas dans lesquels la Cour a appliqué la primauté du droit de l'Union à l'égard d'une identité constitutionnelle nationale (2.1), puis ceux dans lesquels l'identité constitutionnelle nationale justifie une restriction à une liberté fondamentale (2.2) ou dans lesquels la Cour a confirmé une liberté fondamentale sans remettre en cause l'essence de l'identité constitutionnelle nationale (2.3).

2.1 La primauté de l'identité constitutionnelle de l'Union européenne par rapport à l'identité constitutionnelle nationale

Conformément à la jurisprudence précitée, lorsqu'un État candidat devient un État membre, il adhère à une construction juridique qui repose sur le principe fondamental selon lequel chaque État membre partage avec tous les autres États membres, et reconnaît que ceux-ci partagent avec lui les valeurs communes inscrites à l'article 2 TUE, sur lesquelles l'Union est fondée ⁹. Il s'ensuit que le respect par un État membre de ces valeurs constitue une condition pour la jouissance de tous les droits découlant de l'application des traités à cet État membre ¹⁰.

Cette identité constitutionnelle de l'Union doit donc pouvoir primer sur une éventuelle identité constitutionnelle nationale. En effet, comme vient de le rappeler Anders Eka, en vertu du principe de primauté du droit de l'Union, le fait pour un État membre d'invoquer des dispositions de droit national, fussent-elles de nature constitutionnelle, ne saurait porter atteinte à l'unité et à l'efficacité du droit de l'Union, ainsi que la Cour l'a rappelé à maintes reprises, par exemple

8 | Arrêt du 16 février 2022, Hongrie/Parlement et Conseil, C-156/21, [EU:C:2022:97](#), point 127.

9 | Ibid., point 125.

10 | Ibid., point 126.

dans les arrêts *Asociația « Forumul Judecătorilor Din România » e.a.*¹¹, et *Euro Box*¹² ou encore dans l'ordonnance *Commission/Pologne*¹³.

2.2 L'identité constitutionnelle nationale justifiant une restriction d'une liberté fondamentale

En revanche, l'identité constitutionnelle peut également justifier une restriction d'une liberté fondamentale en tant que raison impérieuse d'intérêt général, pour autant que la restriction soit notamment conforme au principe de proportionnalité.

Par son arrêt *Omega*, la Cour a confirmé cette thèse dans le cas de l'interdiction imposée par le maire de Bonn en Allemagne d'exploiter commercialement des jeux de divertissement impliquant la simulation d'actes de violence contre des personnes, en particulier la représentation d'actes de mise à mort d'êtres humains¹⁴. La Cour a expressément affirmé que cette interdiction répond au niveau de protection de la dignité humaine que la constitution nationale a entendu assurer sur le territoire de la République fédérale d'Allemagne¹⁵. Il est à noter que cet arrêt a été rendu avant l'insertion de l'article 4, paragraphe 2 dans le TUE.

Je voudrais également mentionner l'arrêt *Sayn-Wittgenstein* concernant le recours introduit par une ressortissante autrichienne résidant en Allemagne contre une décision du Landeshauptmann von Wien (chef du gouvernement du Land de Vienne) au sujet de la décision de ce dernier visant à rectifier l'inscription au registre de l'état civil du nom de famille « Fürstin von Sayn-Wittgenstein », acquis en Allemagne à la suite d'une adoption par un ressortissant allemand, pour le remplacer

11 | Arrêt du 18 mai 2021, *Asociația « Forumul Judecătorilor din România » e.a.*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 et C-397/19, [EU:C:2021:393](#), point 245 ainsi que jurisprudence citée, et points 251 et 252.

12 | Arrêt du 21 décembre 2021, *Euro Box Promotion e. a.*, C-357/19, [EU:C:2021:103](#), point 230.

13 | Ordonnance du 6 octobre 2021, *Commission/Pologne* (Indépendance et vie privée des juges), C-204/21 R-RAP, [EU:C:2021:834](#), point 23 : « Le fait qu'une cour constitutionnelle nationale déclare que de telles mesures provisoires sont contraires à l'ordre constitutionnel de l'État membre concerné ne modifie en rien l'appréciation figurant au point précédent » ; voir aussi arrêt du 13 juillet 2023, *Y.P. e. a.* (Levée d'immunité et suspension d'un juge), C-615/20 et 671/20, [EU:C:2023:562](#), points 91 et 92.

14 | Arrêt du 14 octobre 2004, *Omega*, C-36/02, [EU:C:2004:614](#).

15 | *Ibid.*, points 37 et 39.

par le nom « Sayn-Wittgenstein ». En l'espèce, un titre de noblesse n'est pas admis en Autriche en vertu de son droit constitutionnel et la Cour a accepté cette entrave à une liberté fondamentale ¹⁶.

Enfin, dans son arrêt *Cilevičs*, sur renvoi de la Cour constitutionnelle lettone, la Cour a conclu que la liberté fondamentale d'établissement ne s'oppose pas à une loi lettone exigeant que l'enseignement dans les établissements d'enseignement supérieur soit en principe dispensé uniquement dans la langue officielle de l'État. L'Union respecte non seulement la richesse de sa diversité culturelle et linguistique ¹⁷ mais aussi, conformément à l'article 4, paragraphe 2, TUE, l'identité nationale de ses États membres, ce qui inclut également la protection de la langue officielle de l'État membre concerné.

Dans ces trois arrêts, la Cour a par ailleurs précisé qu'il n'est pas indispensable que la mesure restrictive édictée par les autorités d'un État membre corresponde à une conception partagée par l'ensemble des États membres en ce qui concerne les modalités de protection du droit fondamental ou l'intérêt légitime concerné ¹⁸.

2.3 L'application de la primauté du droit de l'Union sans remettre en cause l'essence de l'identité constitutionnelle nationale

La question de l'identité nationale, voire constitutionnelle, s'est posée en matière d'état civil, et plus particulièrement le fait que certains États membres ne reconnaissent pas le mariage homosexuel ou la parentalité de couples homosexuels, en considérant que leur position fait partie de l'identité constitutionnelle nationale.

Dans l'arrêt *Coman*, sur saisine de la Cour constitutionnelle de Roumanie, la Cour a jugé que l'obligation pour un État membre de reconnaître un mariage entre personnes de même sexe conclu dans un autre État membre conformément à la législation de celui-ci, aux seules fins de l'octroi d'un droit de séjour dérivé à un ressortissant d'un État tiers, n'implique pas, pour ledit État membre, de prévoir dans son droit national l'institution du mariage entre personnes

16| Arrêt du 22 décembre 2010, Sayn-Wittgenstein, C-208/09, [EU:C:2010:806](#), point 95.

17| Arrêts du 12 mai 2011, Runevič-Vardyn et Wardyn, C-391/09, [EU:C:2011:291](#), point 86, ainsi que du 16 avril 2013, Las, C-202/11, [EU:C:2013:239](#), point 26.

18| Arrêt du 7 septembre 2022, Boriss Cilevičs e. a., C-391/20, [EU:C:2022:638](#), points 68, 82, 85 et 86.

de même sexe et, partant, ne méconnaît pas l'identité nationale ni ne menace l'ordre public de l'État membre concerné ¹⁹.

L'arrêt *Pancharevo* concernait le refus d'établir un acte de naissance mentionnant comme parents d'un enfant deux personnes de sexe féminin, alors que la Constitution bulgare et le droit de la famille bulgare ne prévoient pas la parentalité de deux personnes de même sexe. Or, selon la Cour, l'obligation pour un État membre de délivrer à un tel enfant une carte d'identité ou un passeport n'impose pas à l'État membre, dont l'enfant concerné est ressortissant, de prévoir dans son droit national la parentalité entre personnes de même sexe ²⁰. En outre, il serait contraire aux droits fondamentaux que les articles 7 et 24 de la charte des droits fondamentaux de l'Union européenne (ci-après la « Charte ») garantissent à l'enfant de le priver d'une relation avec l'un de ses parents dans le cadre de l'exercice de son droit de circuler et de séjourner librement sur le territoire des États membres ou de lui rendre l'exercice de ce droit de facto impossible ou excessivement difficile au motif que ses parents sont du même sexe.

3. Le respect des compétences et des marges d'appréciation des États membres

La Cour respecte les compétences des États membres, notamment en matière de mise en œuvre du droit secondaire. À cet égard, il y a lieu de faire la différence entre les domaines dans lesquels l'Union n'a pas (encore) procédé à une harmonisation, par exemple la fiscalité directe (3.1), ceux dans lesquels une harmonisation complète a eu lieu, comme le mandat d'arrêt européen (3.2), et ceux dans lesquels il existe une harmonisation partielle ou une marge d'appréciation laissée aux États membres, comme en matière de respect de la liberté de religion (3.3) ou encore de droit du travail (3.4).

19| Arrêt du 5 juin 2018, *Coman e.a.*, C-673/13, [EU:C:2018:385](#) points 45 à 50.

20| Arrêt du 14 décembre 2021, *Stolichna obshtina, rayon « Pancharevo »*, C-490/20, [EU:C:2021:1008](#), points 54 à 69.

3.1 Les domaines non harmonisés, à l'instar de la fiscalité directe

Si la fiscalité directe demeure une compétence intrinsèque des États membres, dans l'attente d'une harmonisation en droit de l'Union, les interventions de ces derniers ne sont pas exclues du champ d'application des dispositions du TFUE relatives au contrôle des aides d'État. Les États membres doivent ainsi s'abstenir d'adopter toute mesure fiscale susceptible de constituer une aide d'État incompatible avec le marché intérieur. La Cour se montre cependant toujours soucieuse du respect des compétences nationales. Dans un certain nombre d'arrêts récents, *Commission/Pologne* et *Commission/Hongrie*, la Cour a ainsi débouté la Commission dès lors que celle-ci n'a pas su établir les quatre conditions cumulatives au sens de l'article 107, paragraphe 1, TFUE.²¹ Dans l'arrêt *Fiat Chrysler Finance Europe/Commission*, la Cour a reproché à la Commission de ne pas avoir examiné la question de savoir, dans le cas d'un État membre ayant fait le choix d'appliquer le principe de pleine concurrence pour établir les prix de transfert des sociétés intégrées, si les paramètres prévus par le droit national en la matière sont manifestement incohérents avec l'objectif d'imposition non-discriminatoire de toutes les sociétés résidentes poursuivi par le système fiscal national²².

3.2 Les domaines complètement harmonisés, à l'instar la décision-cadre 2009/299 sur le mandat d'arrêt européen

Ceci me ramène à l'arrêt *Melloni*, déjà largement abordé auparavant, rendu sur renvoi de la Cour constitutionnelle espagnole. Je me bornerai dès lors à rappeler que la décision-cadre 2009/299²³ sur le mandat d'arrêt européen a procédé à une harmonisation complète des conditions d'exécution d'un mandat d'arrêt européen en cas de condamnation par défaut. Une décision contraire fondée sur l'article 53 de la Charte aboutirait dès lors, en remettant en cause l'uniformité du standard de protection des droits fondamentaux défini par cette

21| Arrêts du 16 mars 2021, *Commission/Pologne*, C-562/19 P, [EU:C:2021:201](#) et *Commission/Hongrie*, C-596/19 P [EU:C:2021:202](#).

22| Arrêt du 8 novembre 2022, *Fiat Chrysler Finance Europe/Commission*, C-885/19 P, [EU:C:2022:859](#) points 122 et 123.

23| Décision-cadre 2009/299/JAI du Conseil, du 26 février 2009, portant modification des décisions-cadres 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès (JO L 81 du 27.03.2009, p. 24).

décision-cadre, à porter atteinte aux principes de confiance et de reconnaissance mutuelles que celle-ci tend à conforter et, partant, à compromettre l'effectivité de ladite décision-cadre ²⁴.

3.3 La prise en compte de la liberté de religion dans l'application du droit secondaire

Toutefois, dans de nombreux autres domaines, la Cour a consacré une large marge d'appréciation dans le chef des États membres. Ceci vaut tout particulièrement en matière de religion. L'arrêt *Centraal Israëlitisch Consistorie van België e.a.*, sur renvoi de la cour constitutionnelle de Belgique, concerne l'interprétation du règlement no 1099/2009 sur la protection des animaux au moment de leur mise à mort ²⁵, et notamment les méthodes particulières d'abattage prescrites par des rites religieux, pour lesquels il existe des exceptions. La Cour a rappelé à cet égard la jurisprudence de la Cour européenne des droits de l'homme, selon laquelle, lorsque des questions de politique générale sont en jeu, telles que la détermination des rapports entre l'État et les religions, sur lesquelles de profondes divergences peuvent raisonnablement exister dans un État démocratique, il y a lieu d'accorder une importance particulière au rôle du décideur national. La marge d'appréciation ainsi conférée aux États membres en l'absence de consensus au niveau de l'Union doit toutefois aller de pair avec un contrôle européen consistant notamment à rechercher si les mesures prises au niveau national se justifient dans leur principe et si elles sont proportionnées. La Cour a répondu par l'affirmative en l'espèce quant à la réglementation flamande ²⁶.

La Cour adopte une même approche générale concernant le respect de la marge d'appréciation quant au critère de discrimination en raison de la religion ou des convictions inscrit dans la directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail ²⁷. Quant au port du foulard islamique au lieu de travail, la Cour a d'abord été confrontée à des demandes de décision préjudicielle émanant de la France, État

24| Arrêt du 26 février 2013, Melloni, C-399/11, [EU:C:2013:107](#), points 62 et 63.

25| Règlement (CE) N° 1099/2009 du Conseil, du 24 septembre 2009, sur la protection des animaux au moment de leur mise à mort (JO L 303 du 18.11.2009, p. 1).

26| Arrêt du 17 décembre 2020, *Centraal Israëlitisch Consistorie van België e. a.*, C-336/19, [EU:C:2020:1031](#), points 67 à 69 et 79.

27| Directive 2000/78/CE du Conseil, du 27 novembre 2000, portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (JO L 303 du 2.12.2000, p. 16).

membre fondé sur la laïcité ²⁸ et de Belgique, qui reconnaît le principe de neutralité de l'État ²⁹. Dans son arrêt *WABE et MH Müller Handel*, sur renvois préjudiciels venant d'Allemagne, pour laquelle la liberté religieuse est un principe constitutionnel, elle a jugé que dans la mesure où dans la directive, le législateur de l'Union n'a pas procédé lui-même à la conciliation nécessaire entre la liberté de pensée, de conviction et de religion et les objectifs légitimes pouvant être invoqués à titre de justification d'une inégalité indirecte de traitement, mais en laissant le soin de procéder à cette conciliation aux États membres et à leurs juridictions, ladite directive permet de tenir compte du contexte propre à chaque État membre et de reconnaître à chacun d'eux une marge d'appréciation dans le cadre de la conciliation nécessaire des différents droits et intérêts en cause, aux fins d'assurer un juste équilibre entre ces derniers ³⁰. La Cour a ainsi rejoint l'essence de la jurisprudence de la Cour de Strasbourg.

3.4 Le droit du travail : une harmonisation minimale

En matière de droit du travail, l'Union européenne ne fixe des règles minimales et sectorielles que par voie de directives. Quant à la directive 2003/88 concernant certains aspects de l'aménagement du temps de travail ³¹, la Cour a jugé dans son arrêt *TSN et AKT* que l'article 31, paragraphe 2, de la Charte, lu en combinaison avec l'article 51, paragraphe 1, de celle-ci, n'a pas vocation à s'appliquer en présence de réglementations nationales et de conventions collectives qui prévoient l'octroi de jours de congé annuel payé excédant la période minimale de quatre semaines prévue à l'article 7, paragraphe 1, de la directive 2003/88, tout en excluant le report pour cause de maladie des jours de congé excédents. La jurisprudence de la Cour à l'égard de ce report n'est donc pas applicable au-delà de la période de quatre semaines ³².

28 | Arrêt du 14 mars 2017, Bougnaoui et ADDH, C-188/15, [EU:C:2017:204](#).

29 | Arrêt du 14 mars 2017, G4S Secure Solutions, C-157/15, [EU:C:2017:203](#) ; Arrêt du 13 octobre 2022, S.C.R.L. (Vêtement à connotation religieuse), C-344/20, [EU:C:2022:774](#) ; un troisième renvoi venant de Belgique, Commune d'Ans, C-148/22 est en phase de délibéré.

30 | Arrêt du 15 juillet 2021, WABE et MH Müller Handel, C-804/18 et C-341/19, [EU:C:2021:594](#), points 85 à 89.

31 | Directive 2003/88/CE du Parlement européen et du Conseil, du 4 novembre 2003, concernant certains aspects de l'aménagement du temps de travail (JO L 299 du 18.11.2003, p. 9).

32 | Arrêt du 19 novembre 2019, TSN et AKT, C-609/17 et C-610/17, [EU:C:2019:981](#), points 53 et 54.

Dans l'arrêt *Ministrstvo za obrambo*, la Cour a constaté que l'article 4, paragraphe 2, TUE, qui prévoit que la sécurité nationale reste de la seule responsabilité de chaque État membre, n'a pas pour effet d'exclure l'aménagement du temps de travail de l'ensemble des militaires du champ d'application du droit de l'Union. En effet, la directive 2003/88 s'applique à « tous les secteurs d'activités, privés ou publics », sauf lorsque des particularités inhérentes à certaines activités spécifiques dans la fonction publique, notamment dans les forces armées, s'y opposent de manière contraignante ³³. Bien que cet arrêt soit fondamentalement critiqué dans certains États membres, il ne faut pas perdre de vue qu'il se base sur un texte clair du droit dérivé. Or, la validité de ce droit dérivé par rapport au droit primaire n'a pas été mise en cause à ce jour, et il ne me semble pas non plus que la directive soit sur le point d'être révisée.

4. Conclusion : dialogue des jurisprudences et dialogue des juges

Le débat n'est certes pas clos. Et il ne peut l'être. C'est la raison d'être de notre rencontre. À ce stade, je ne me prononcerai donc pas sur les nombreuses questions relatives à la conservation et à l'accès aux données de connexion, dont nous parlera François Seners, ceci d'autant plus que l'Assemblée plénière de la Cour est actuellement saisie de l'affaire *La Quadrature du Net e.a. (Données personnelles et lutte contre la contrefaçon)* sur renvoi du Conseil d'État de France ³⁴.

Dans la mise en balance des différents intérêts, une importance fondamentale revient au dialogue des juges sur la base du renvoi préjudiciel.

Or, ce dialogue de juges à juges fonctionne. Le droit de l'Union a nettement progressé sous l'impulsion de renvois préjudiciels émanant de cours constitutionnelles, comme le démontrent, notamment, les arrêts *Jeremy F.* sur renvoi du Conseil constitutionnel français ³⁵, *Test-Achats* ³⁶ ou plus récemment *Orde van Vlaamse Balies e.a.* ³⁷, sur renvoi de la Cour constitutionnelle de

33| Arrêt du 15 juillet 2021, *Ministrstvo za obrambo*, C-742/19, [EU:C:2021:597](#), points 34 à 36.

34| Affaire pendante, *La Quadrature du Net e.a. (Données personnelles et lutte contre la contrefaçon)*, C-470/21.

35| Arrêt du 30 mai 2013, *F.*, C-168/13 PPU, [EU:C:2013:358](#).

36| Arrêt du 1er mars 2011, *Association belge des Consommateurs Test-Achats e.a.*, C-236/09, [EU:C:2011:100](#).

37| Arrêt du 8 décembre 2022, *Orde van Vlaamse Balies e.a.*, C-494/20, [EU:C:2022:963](#).

Belgique, l'arrêt *Digital Rights Ireland et Seitlinger e. a.* sur renvoi de la High Court d'Irlande et de la Cour constitutionnelle d'Autriche ³⁸ ou *Latvijas Republikas Saeima (Points de pénalité)* ³⁹ sur renvoi de la Cour constitutionnelle lettone. Les arrêts *CJ (Décision de remise différée en raison de poursuites pénales)* ⁴⁰ et *O. G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)* ⁴¹, sur renvoi de la Cour constitutionnelle italienne, viennent d'apporter des précisions importantes quant au mandat d'arrêt européen. Et c'est cette même Cour constitutionnelle italienne qui a conduit la Cour à adopter son arrêt *M.A.S et M. B.*, encore appelé *Taricco II*, qu'abordera plus en détail Pavlina Pavlova ⁴². Le tout récent arrêt *Lin* ⁴³ s'appuie sur cette dernière jurisprudence. Par rapport à ce que j'ai dit sur l'arrêt *Melloni*, je dois préciser que dans les deux cas, à la date des faits au principal, le régime de la prescription applicable aux infractions pénales portant atteinte aux intérêts financiers de l'Union n'avait pas fait l'objet d'une harmonisation par le législateur de l'Union, laquelle n'est intervenue qu'ultérieurement, de manière partielle, par l'adoption de la directive PIF ⁴⁴.

38| Arrêt du 8 avril 2014, *Digital Rights Ireland et Seitlinger e. a.*, C-293/12 et C-594/12, [EU:C:2014:238](#).

39| Arrêt du 22 juin 202, *Latvijas Republikas Saeima (Points de pénalité)*, C-439/19, [EU:C:2021:504](#).

40| Arrêts du 8 décembre 2022, *CJ (Décision de remise différée en raison de poursuites pénales)*, C-482/22 PPU, [EU:C:2022:964](#).

41| Arrêt du 6 juin 2023, *O. G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, C-700/21, [EU:C:2023:444](#).

42| Arrêt du 5 décembre 2017, *M.A.S et M.B.*, C-42/17, [EU:C:2017:936](#).

43| Arrêt du 24 juillet 2024, *Lin*, C-107/23 PPU, [EU:C:2023:606](#).

44| Directive (UE) 2017/1371 du Parlement européen et du Conseil, du 5 juillet 2017, relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal (JO L 198 du 28.07.2017, p. 29).

À l'avenir, il appartiendra également aux cours constitutionnelles nationales d'enrichir l'évolution de la jurisprudence de la Cour dans le sens du respect de la diversité dans l'unité. Je sais que, d'un point de vue procédural, cela n'est pas toujours facile en pratique, notamment dans les États membres dans lesquels une cour constitutionnelle est saisie également d'une question préalable de constitutionnalité, comme ce fut le cas pour l'arrêt *ArcelorMittal Rodange et Schifflange*, dont parlera Francis Delaporte ⁴⁵.

Mais au-delà de ce « dialogue des juges », en fait un « dialogue des jurisprudences », il faut aussi promouvoir le « dialogue des juges face à face », comme nous le faisons depuis deux ans dans ce que nous appelons le « dialogue RIGA », qui permet de mieux nous connaître et de mieux comprendre les soucis fondamentaux des uns et des autres, et de contribuer à la réalisation de la diversité dans l'unité. Vive RIGA III.

45 | Arrêt du 8 mars 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, [EU:C:2017:179](#).



Ms Ineta Ziemele and Mr François Biltgen, Judges at the Court of Justice of the European Union



Ms Pavlina Panova

President of the Constitutional Court of Bulgaria

Contribution by Ms Pavlina Panova, President of the Constitutional Court of Bulgaria

The Protection of National Constitutional Identity and Uniformity of EU Law

Today the debate over the constitutional identity centres on the European Union–EU Member States axis, with primary EU law serving as its prime reference. Article 4(2) TEU provides that '[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional'.

Article 4(2) TEU employs the term 'national identity' as a comprehensive notion, verging on each EU Member State's fundamental political and constitutional structures, inclusive of national and local self-government, that aim to ensure their territorial integrity, maintain law and order, and safeguard national security. Effectively, this provision points clearly to *where* to look for this identity and to *why* we need it, but fails to give a clear answer as to *what* it is. It is the case-law of the Court of Justice of the European Union and Member States' national courts, as well as legal theory, that shed light on the substance of the notion of national identity. However, these, at least to date, do not offer a uniform understanding of this notion neither in content nor in terminology.

Since the founding treaties serve as the Union's 'constitutional charter', at issue is the process of constitutionalisation of the Member States' national identities at the primary EU law-level. Therefore, we are talking about identity not as a feeling of national and cultural belonging but rather as the identity that is encoded in the fundamental constitutional structure of the individual Member States.

Thus, by bridging national constitutional law with EU law, Article 4(2) TEU serves as a girder in the compound constitutional structure of the Union. Hence this provision may be considered the portal that lets EU law into national law.

The use of Article 4(2) TEU by constitutional courts to pronounce certain Union legislation incompatible with the national legal order may – rather negatively – affect both the unity and integrity of the EU legal order, and legal certainty altogether. In particular, the exclusive

competence of the Court of Justice of the European Union to interpret the treaties (including Article 4(2) TEU) would be at stake. The situation would only be further complicated by the different understandings of various constitutional courts as to what constitutes 'national identity'.

It is widely accepted that the national identity protection clause laid down in Article 4(2) TEU has the necessary normative potential to shed light on the heated controversy about the nature and limits of the primacy of EU law. However, constitutional identity goes on to affect life beyond the EU-Member State playing-field. The ultimate objective is to preserve those fundamental values and principles that comprise each national constitutional order.

The principle enshrined in Article 4(2) TEU may be applied in practice only through cooperation between the Court of Justice of the European Union and the Member States' constitutional courts. These national courts shall define the national identity they insist on preserving; meanwhile, the Court of Justice of the European Union shall interpret the (secondary) EU law which according to the national constitutional court violates the constitutional identity, and establish how, when, and to what extent a Member States' claim for respect of its identity takes precedence over the other principles of EU law.

The Court of Justice of the European Union, for example, rules in this vein – though not expressly – in *Melloni*¹ and *Taricco*.² Here, it demonstrates in which cases the national jurisdictions may decide to disapply EU law if it runs contrary to fundamental principles of their national legal systems, and in particular to their constitutions.

From the perspective of the Court of Justice of the European Union, respect for constitutional identity should not challenge the primacy of EU law. The judgment in *Melloni* is particularly interesting in this regard. Although the Spanish Constitutional Court puts forward arguments to defend the constitutional identity as set forth in the Constitution – relying on the rule that surrender of a person convicted in absentia in another Member State is admissible only insofar as this Member State guarantees that the conviction will be open for review in that person's presence – the Court of Justice of the European Union categorically states that surrender

1 | Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#).

2 | Judgment of 8 September 2015, *Taricco and Others*, C-105/14, [EU:C:2015:555](#).

may be refused solely on grounds set forth in the EAW Framework Decision.³ The ground declared by the national court is not one of these. The referring court, in essence, seeks to establish whether it may grant to the convicted person, on the basis of Article 53 of the Charter of Fundamental Rights of the European Union ('the Charter'), more extensive rights than those granted by EU law. The Court of Justice of the European Union is crystal clear: such an interpretation of Article 53 of the Charter would infringe upon the principle of primacy of EU law and would undermine the effectiveness of EU law on the territory of that State. To claim otherwise would mean that Spain may not surrender persons convicted in absentia to the issuing State if the latter did not guarantee review of the conviction. This is not the essence and purpose of the EAW Framework Decision, which aims to facilitate the mutual surrender of accused and convicted persons across EU Member States on the basis of mutual trust and recognition. In cases when the EU legislature harmonises exhaustively fundamental rights in a given area, Member States may not require a higher standard of procedural guarantees even if this is provided for in their national constitutions. It is for the Court of Justice of the European Union to decide, in such cases, which level of protection is the most adequate in striking a balance between those rights, on the one hand, and the effectiveness of EU law and mutual cooperation, on the other.

A different interpretation of Article 53 of the Charter would undermine the principle of primacy of EU law, thus allowing a Member State to disapply EU law provisions that are in full compliance with the Charter on grounds that the fundamental rights guaranteed by its constitution would be infringed. Pursuant to the principle of primacy of EU law, national legal provisions that are also constitutional ones may not undermine the effectiveness of EU law on the territory of that Member State. Member States are free to provide for higher national standards of protection, provided that 'the primacy, unity and effectiveness of EU law are not thereby compromised'.⁴

3| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ L 190, 18.07.2002, p. 1-20).

4| Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#), paragraph 60.

Thus, the Court of Justice of the European Union recognises that Member States are free to apply higher national standards of protection of fundamental rights that exceed what is required by EU law. However, this is admissible only in cases whereby the standard of protection does not concern a subject matter that is exclusively regulated by EU law, reflecting the consensus reached by all Member States.

This view of the Court of Justice of the European Union is brilliantly illustrated in two of its judgments. In the first one – *Taricco* – the Luxembourg Court reiterates the direct effect of Article 325 TFEU insofar as it obligates Member States to counter illegal activities – i.e., those that affect the financial interests of the Union through deterrent and effective measures that Member States use to counter fraud damaging their own financial interests. In this case, the judicial authorities in Italy must disapply any provision of national law, including in relation to limitation periods as set forth in the Italian Penal Code.

This judgment has led to the Italian Constitutional Court asking the Court of Justice of the European Union whether the *Taricco* judgment should be applied if this would run contrary to a fundamental principle of the Italian legal system, namely the principle that offences and penalties must be defined by law. The Italian Constitutional Court claims that the Court of Justice of the European Union must allow national authorities to continue applying national provisions - albeit ones that are incompatible with EU law - if disapplying them would run contrary to a primary principle of the national constitutional order and thus jeopardize the constitutional identity of the said Member State. In its judgment in the case of *M.A.S. and M.B.*, known as *Taricco II*,⁵ the Court of Justice of the European Union observes that the principle that offences and penalties must be defined by law is part of the common constitutional traditions of the Member States. Under this principle, national provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty. Thus, when deciding to disapply the provision of the Criminal Code at issue, concerning the termination of statute-barred criminal proceedings, the Italian authorities 'are required to ensure that the fundamental rights of persons accused of committing criminal offences are observed'. The Court held that national authorities shall not be obliged to disapply national provisions that are incompatible with EU law 'unless that disapplication entails a breach of the principle that offences and penalties must

5 | Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#).

be defined by law. This applies even when as a result of this a national situation incompatible with EU law occurs’.

At first sight, it would appear that the Court of Justice of the European Union abandons the former case-law of *Melloni*, holding that higher national standards of fundamental rights protection have primacy over the rule and effectiveness of EU law. Although in its judgment in *Taricco II* the Court of Justice of the European Union does not expressly proclaim a common principle regulating the balance between higher national standards for fundamental rights protection as guaranteed by national constitutions and intrinsic to their national identity, and the European standards of fundamental rights protection, it implicitly accepts that the balance must continue to be struck in accordance with the *Melloni* doctrine. The different outcome from the two judgments – *Melloni* and *Taricco II* – is the result only of the different factual situations in each of the cases. The common rule, however, remains the same. *Melloni* centred on a specific harmonising legal framework at EU-level, namely Framework Decision 2002/584/JHA amended by Framework Decision 2009/299/JHA.⁶ In *Taricco II* no such legal framework regarding the limitation period existed. The Court of Justice of the European Union holds that national authorities must assess, on a case-by-case basis, whether the principle of legality applies to the rules set forth in the Italian system and therefore whether disapplication of the provisions in question would entail infringement of that principle. At the same time, the Court confirms that national authorities must guarantee that the primacy, unity, and effectiveness of EU law are not at risk. Thus, there is no discrepancy in interpreting the meaning of the principle of legality at either EU or national level. In subsequent cases, the Court does not rely on Article 53 of the Charter, since it has not established a new rule different to the one set forth in *Melloni*.

Another important question raised in *Taricco II*, to which the Court of Justice of the European Union gives an implicit answer, is the delicate issue of the ultimate judge who may rule on whether the identity clause laid down in Article 4(2) TEU has been infringed. Although it does not discuss this issue expressly, but rather refers to the national court to judge whether the principle of legality has been violated or not in the case at hand, the Court of Justice of the European Union points out that it must provide national authorities with the possibility to disapply EU law if the latter runs contrary to a fundamental right as interpreted in the national

6 | Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decision 2002/584/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.03.2009, p. 24-36).

legal order. This conclusion is obvious if a comparison is made between this judgment and the *Melloni* judgment, where the Court of Justice of the European Union expressly denies national authorities the possibility to disapply EU law even if it runs contrary to fundamental principles as interpreted in the national legal system. Therefore, it is ultimately for the Court of Justice of the European Union to decide when national authorities may disapply EU law if it runs contrary to primary principles of their national legal systems. This position is further developed in *RS*.⁷

The European constitutional courts find themselves in a peculiar situation – their review of constitutionality does not stop to the grounds for validity and applicability of a law on national level when the national law falls within the scope of EU law. Even if a constitutional court has held that a law is compatible with their constitution, the question of its validity involves checking its conformity with EU law, which falls within the competence of the Court of Justice of the European Union. Thus, the constitutional courts, though they themselves do not make references for preliminary rulings, necessarily turn into allies to the Court of Justice of the European Union in a joint mission. In essence, this involves establishing valid national laws and unifying EU law, to ultimately strengthen the rule of law at both national- and European-level.

In the recent case *RS*, in which a judgment was delivered on 22 February 2022, Romania referred the following question to the Court of Justice of the European Union for a preliminary ruling: must the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter, be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law?

In its judgment, the Court of Justice of the European Union holds that the second subparagraph of Article 19(1) TEU does not preclude national rules or a national practice under which the ordinary courts of a Member State, under national constitutional law, are bound by a decision of that Member State's constitutional court which finds that national legislation is consistent with that Member State's constitution. The same cannot be said for cases where the application of such national rules or a national practice prevents those ordinary courts from assessing the compatibility of national legislation with EU law when the constitutional courts of that

7 | Judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, [EU:C:2022:99](#), paragraph 70.

Member State has found to be consistent with a national constitutional provision providing for the primacy of EU law. Furthermore, the Court of Justice of the European Union points out in its judgment that

‘by virtue of the principle of the primacy of EU law, a Member State’s reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, *inter alia*, provisions of domestic law, including constitutional provisions, being able to prevent that’.⁸

In the light of these considerations, the Court of Justice of the European Union answers the question referred for a preliminary as follows:

‘the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law’.⁹

The Constitutional Court of the Republic of Bulgaria has been consistent in its case-law, that clarifying which is the applicable domestic law, in the context of EU law, is required in each case when the applicable national rule falls within the scope of application of EU law, and particularly when it transposes a EU directive. Thus, it is required *ipso jure* by every legal entity that applies it – and, in particular, by every court in the judiciary.

Therefore, determining the applicable law in every case requires courts to not only individualize the relevant national legal provision, but also to determine how it relates to EU law if it falls within its scope of application. It is this process of determination that allows judicial panels to rule on whether a national provision runs contrary to EU law – and if so – to disapply it,

8 | Judgment of 22 February 2022, *RS (Effet des arrêts d’une cour constitutionnelle)*, C-430/21, [EU:C:2022:99](#), paragraph 51.

9 | Judgment of 22 February 2022, *RS (Effet des arrêts d’une cour constitutionnelle)*, C-430/21, [EU:C:2022:99](#), paragraph 78.

directly applying the EU law provision instead. In such cases, the national legal provision will not be the applicable law, and the question of its unconstitutionality will be unnecessary, referring the question to the Constitutional Court respectively. Nevertheless, if the competent court believes that the national provision falls within the scope of application of EU law, and therefore requires interpretation of primary law or interpretation and ruling on the validity of secondary EU law as to its applicability, this national court will have to exercise its powers under Article 267(3) TFEU. In such cases, the issue of the applicable law will have to be resolved as a preliminary one, prior to referring the question to the Constitutional Court. The Bulgarian Constitutional Court has held that

‘... failure of the competent national court to act ipso jure in case of non-conformity of the relevant national legal provision to EU law puts at risk compliance with the principle of uniform and effective application of EU law, and in particular the effective protection of fundamental rights, which the Union legal order guarantees in comparable terms to the constitutional standards of EU Member States’.¹⁰

Thus, the Constitutional Court has demonstrated that it prefers to refrain from delivering a ruling so as to comply with the powers of the Court of Justice of the European Union to guarantee the unity of EU law by extending to national courts the possibility to initiate with priority the procedure under Article 267 TFEU where necessary.

This time-advantage in referring a question to the Court of Justice of the European Union for a preliminary ruling does not preclude the subsequent raising of an issue of unconstitutionality before the Constitutional Court, in cases where the Court of Justice of the European Union has established that the national provision is compatible with EU law, since the two jurisdictions are competent in different areas. Once the Court of Justice of the European Union has ruled that a national law does conform with EU law, then it is simply out of the question whether the relevant rule is applicable in the case at hand. Therefore, there is no obstacle to the judicial body’s ability to raise a question of a rule’s unconstitutionality, nor to the Constitutional Court’s ability to make an ultimate judgment on this rule.

10| Judgment of the Bulgarian Constitutional Court No 2 of 24 February 2022, constitutional case No15/21.

I view the developed case-law of the Bulgarian Constitutional Court – which is becoming more and more well-defined – as a manifestation of cooperation, albeit indirect cooperation, between the Constitutional Court and Court of Justice of the European Union. The position of the constitutional jurisdiction to refrain from ruling on the issue of unconstitutionality when a certain provision may fall within the scope of application of EU law demonstrates its willingness and duty to enhance the dialogue between Bulgarian national courts and the Court of Justice of the European Union, and to contribute to strengthening the primacy, unity and effectiveness of EU law.

Article 4(2) TEU is thought of as the linchpin of EU law and the constitutional law of Member States. It is for the Court of Justice to establish the notion of ‘national identity’, but not in isolation – through dynamic cooperation with Member States’ constitutional courts, while maintaining respect for the constitutional understanding of identity. Perhaps the most correct way to conceptualise this would be to consider the Court of Justice of the European Union and Member States’ constitutional courts as the peaks of the legal systems of the EU and the respective Member State. The question is not which one will prevail over the other in terms of height, but rather whether they are facing the same direction – more often than not, facing each other.

The effective interaction of the European and constitutional legal orders is impossible in case of subordination between the Court of Justice of the European Union and the constitutional courts. Dialogue and cooperation between the different legal systems are the only means that may ensure their due accord and balance.



M. François Sénors

Membre du Conseil constitutionnel
de la République française

Intervention de M. François Sénors, Membre du Conseil constitutionnel de la République française

Contrôle de constitutionnalité et droit de l'Union : l'approche française

Avant toute chose, deux remarques liminaires me semblent devoir être faites dans ce panel.

- La première est que l'articulation entre la primauté du droit de l'Union et la souveraineté revendiquée, en certains domaines, par de nombreux États de l'Union est un sujet qui demeure source potentielle de conflits. Si tel n'était pas le cas, nous ne serions certainement pas réunis dans cette conférence pour en débattre. Il est donc nécessaire d'appréhender les causes de ces conflits potentiels avec lucidité, pour nous efforcer de les surmonter.
- La seconde remarque liminaire est que c'est en abordant ces sujets entre nous, représentants de la Cour de justice de l'Union européenne, de la Cour européenne des droits de l'homme et des cours constitutionnelles nationales, de façon franche et constructive, que nous ouvrons la voie aux apaisements nécessaires et aux recherches de conciliation. Le principe de primauté du droit de l'Union est d'origine jurisprudentielle et l'on se souvient bien sûr que le traité établissant une Constitution pour l'Europe, qui l'intégrait, n'a pas pu entrer en vigueur en raison d'oppositions politiques qu'il a soulevées, pour plusieurs motifs qui étaient en lien avec les enjeux de la souveraineté des États. Je fais ce rappel sur le fondement juridique de la primauté pour souligner combien c'est à nous, juges, qu'il incombe de traiter cette épineuse problématique.

Pour prolonger les interventions précédentes, je me propose de vous présenter l'état du débat en France et la façon dont le Conseil constitutionnel l'a intégré jusqu'à présent dans sa

jurisprudence. Je précise cependant que je m'exprime aujourd'hui à titre personnel et que mes propos n'engagent que moi.

Force est de constater que le débat sur la souveraineté juridique nationale, qui est resté pendant plusieurs années l'apanage de sensibilités politiques minoritaires, est aujourd'hui alimenté par des personnalités ou des familles de pensée qui se situent au centre de l'échiquier politique. Deux exemples récents :

- le rapport d'information du Sénat français – où les sensibilités extrêmes ne sont pas représentées – publié en mars 2022 sur le thème de la judiciarisation de la vie publique¹ qui s'inquiétait, tout en les relativisant, de tensions entre la Cour de justice de l'Union européenne et la France, et qui se focalisait en particulier sur deux arrêts, celui sur le temps de travail des militaires et celui sur la conservation des données de connexion, deux domaines dans lesquels la sécurité nationale est susceptible d'être en cause ;
- la tribune publiée en juin 2023² par Édouard Balladur, ancien Premier ministre, qui a toujours été un Européen convaincu, et qui comporte un chapitre intitulé « Il faut assurer la supériorité de la Constitution française sur toute autre règle de droit, nationale ou internationale ».

Cette tendance se manifeste, de différentes façons, dans un grand nombre de pays de l'Union et pas seulement dans ceux dont l'adhésion est la plus récente.

Il faut admettre que nous traversons, sur ce sujet qui est à la fois politique et juridique, des temps troublés où la thématique pourtant ancienne de la primauté du droit de l'Union revient sur le devant de la scène, bien au-delà du cercle des juristes. Le constat est évident : la pression que nous subissons s'est plutôt renforcée qu'elle ne s'est affaiblie.

1 | Rapport d'information du Sénat français n° 592 (2021-2022), « Judiciarisation de la vie publique : le dialogue plutôt que le duel », déposé le 29 mars 2022, disponible sur ce site web : <https://www.senat.fr/rap/r21-592/r21-5921.pdf>.

2 | Balladur E., « L'Europe et notre souveraineté », Fondation pour l'innovation politique, 2023, point 8, p. 14, disponible sur ce site web : <https://www.fondapol.org/app/uploads/2023/06/224-balladur-fr-2023-06-20-w.pdf>.

J'en viens à la façon dont nous concilions, en France, notre Constitution, référence ultime des juges nationaux, avec le principe de primauté du droit de l'Union, et avec le rôle de la Cour de justice de l'Union européenne, garante de l'interprétation uniforme de ce droit et de sa conformité aux traités constitutifs. J'en tracerai brièvement le cadre général, mais aussi les évolutions jurisprudentielles récentes qui témoignent, pour ces dernières, du caractère vivant, parfois vif, mais toujours fécond, du dialogue des juges.

L'articulation de l'ordre juridique propre à l'Union et de l'ordre juridique interne propre à la France s'appuie sur les articles 54 et 88-1 de la Constitution de 1958 et sur les dispositions des traités constitutifs de l'Union auxquels l'article 88-1 renvoie.

L'article 54, qui date de l'entrée en vigueur de la Constitution de 1958, positionne la Constitution comme norme ultime de référence : « Si le Conseil constitutionnel, saisi par le Président de la République, par le Premier ministre, par le président de l'une ou l'autre assemblée ou par soixante députés ou soixante sénateurs, a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de ratifier ou d'approuver l'engagement international en cause ne peut intervenir qu'après révision de la Constitution ».

L'article 88-1 résulte quant à lui d'une révision constitutionnelle de 1992, dont l'un des objets était de permettre la ratification du traité de Maastricht. Le Conseil constitutionnel avait en effet jugé en amont sur le fondement de l'article 54, que la ratification de ce traité ne pouvait intervenir qu'après révision de la Constitution. L'article 88-1 marque ainsi ce qui a pu être décrit comme *l'eupéanisation* de la Constitution française.

Il est ainsi rédigé : « La République participe à l'Union européenne constituée d'États qui ont choisi librement d'exercer en commun certaines de leurs compétences en vertu du traité sur l'Union européenne et du traité sur le fonctionnement de l'Union européenne, tels qu'ils résultent du traité signé à Lisbonne le 13 décembre 2007 ».

Comment avons-nous mis en œuvre ces dispositions constitutionnelles ?

L'article 54 ne distingue pas entre les traités qu'ils soient bilatéraux, multilatéraux ou fondateurs de l'Union européenne. Mais c'est en matière de traités *constitutifs* de l'Union qu'il en a été fait usage à quatre reprises :

- en 1992 pour le traité de Maastricht ;
- en 1997 pour le traité d'Amsterdam ;
- en 2004 pour le traité établissant une Constitution pour l'Europe ;
- en 2007, enfin, pour le traité de Lisbonne.

À chaque fois, à la suite d'une décision du Conseil constitutionnel et conformément à l'article 54, la Constitution a été révisée.

Il est intéressant, à propos de ce contrôle des traités d'origine européenne, de voir comment le Conseil a jugé ³ de la conformité à la Constitution de l'accord économique global entre le Canada d'une part et l'Union européenne et ses États membres (ci-après « l'accord CETA »). C'est un accord mixte qui comporte des stipulations relevant tantôt de la compétence exclusive de l'Union, tantôt d'une compétence partagée entre l'Union et ses États, tantôt d'une compétence exclusive des États.

C'est aussi un traité qui, au regard du droit de l'Union, relève du domaine du droit dérivé.

Nous avons donc différencié notre contrôle. S'agissant des stipulations de compétence partagée ou de compétence exclusive des États, nous avons appliqué pleinement le contrôle de constitutionnalité prévu par l'article 54 de la Constitution. En revanche, s'agissant des clauses de l'accord CETA relevant de la compétence exclusive de l'Union (compétence en matière d'accord de commerce essentiellement), nous avons appliqué les principes spécifiques de contrôle que nous avons élaboré à partir de l'article 88-1 de la Constitution.

J'en arrive à ce mode particulier de contrôle.

3 | Décision du Conseil constitutionnel français du 31 juillet 2017, n° 2017-749 DC, [ECLI:FR:CC:2017:2017.749.DC](https://www.conseil-constitutionnel.fr/decision/2017/2017_749_DC/).

Nous avons construit, à partir des dispositions de l'article 88-1, qui présente un caractère général d'apparence anodine, une méthode spécifique de contrôle des lois mettant en œuvre le droit dérivé de l'Union.

Ce mode de contrôle particulier, qui a été élaboré à l'origine par notre jurisprudence relative aux lois de transposition de directives ⁴, est fondé sur le principe de la « coopération loyale », proclamé par l'article 4, paragraphe 3, TUE, mais aussi sur celui de *l'équivalence des protections*.

Notre jurisprudence constitutionnelle met en place, pour ce faire, un double test.

La loi doit transposer loyalement les directives de l'Union européenne et respecter les règlements de l'Union lorsqu'elle a pour objet d'y adapter le droit interne. Il en résulte que lorsqu'une loi transpose ou adapte une norme de droit dérivé de l'Union, nous censurerions les dispositions qui seraient manifestement incompatibles avec celles du droit de l'Union qu'elles sont censées traduire en droit interne français ⁵, lorsque nous en sommes saisis dans le cadre d'une saisine *a priori* ⁶. Il s'agit là d'une remarquable exception à la jurisprudence constante du Conseil constitutionnel français selon laquelle il ne se considère pas compétent pour exercer un contrôle de conventionnalité.

Il faut noter que, compte tenu du délai d'un mois (voire 8 jours en cas d'urgence) imparti au Conseil constitutionnel pour statuer sur les saisines *a priori*, une éventuelle censure de la loi pour « incompatibilité manifeste » avec le droit de l'Union devra être prononcée sans qu'il soit possible de poser une question préjudicielle à la Cour de justice de l'Union européenne.

Lorsque la loi se borne à tirer les conséquences nécessaires de **dispositions inconditionnelles et précises** d'une directive (ou d'un règlement qui laisse des marges d'appréciation aux autorités nationales), elle bénéficie d'une sorte d'immunité de contrôle de constitutionnalité reposant sur l'idée qu'en principe, l'ordre juridique de l'Union assure, par rapport à notre ordre constitutionnel national, une « équivalence de protection ». Le Conseil se déclare alors

4 | Décision du Conseil constitutionnel français du 10 juin 2004, n° 2004-496 DC, Loi pour la confiance dans l'économie numérique, [ECLI:FR:CC:2004:2004.496.DC](#).

5 | Décision du Conseil constitutionnel français du 27 juillet 2006, n° 2006-540 DC, Loi relative aux droits d'auteur et aux droits voisins dans la société de l'information, [ECLI:FR:CC:2006:2006.540.DC](#).

6 | Cette exigence ne relevant pas des droits et libertés ne peut être invoquée dans le cadre d'une question prioritaire de constitutionnalité.

incompétent pour contrôler la conformité à la Constitution de ce type de dispositions législatives qui ne sont que la « transcription mécanique » du droit de l'Union. Admettre notre compétence à l'égard de telles normes consisterait à se substituer à la Cour de justice de l'Union européenne, seule compétente en vertu des traités, et pour des raisons évidentes tenant à l'uniformité de l'application du droit de l'Union, pour interpréter et contrôler la légalité de ce droit au regard des traités constitutifs et de la charte des droits fondamentaux de l'Union européenne.

Ceci nous oblige à un exercice qui n'est pas toujours aisé : distinguer ce qui, dans une loi de transposition, n'est que le miroir fidèle d'une disposition inconditionnelle et précise du texte européen, de ce qui ne l'est pas.

Notre orientation d'ensemble dans ce type de débat est donc de ne pas renoncer à notre compétence lorsque la transcription laisse une marge de manœuvre quelconque à l'État et à l'inverse, à nous effacer lorsque la transcription est mécanique.

Pour que cette sorte d'immunité de contrôle de constitutionnalité joue, il faut néanmoins que l'équivalence des protections puisse être considérée comme garantie.

Pour le Conseil constitutionnel, eu égard notamment aux délais stricts qui lui sont impartis pour statuer et compte tenu également du contrôle exercé par la Cour de justice de l'Union européenne sur le droit dérivé, *a fortiori* depuis la charte des droits fondamentaux de l'Union européenne, cette *équivalence des protections* bénéficie d'une sorte de présomption d'effectivité.

Mais, et c'est là que la primauté de notre ordre constitutionnel interne réapparaît, cette *présomption d'équivalence des protections* ne peut plus jouer si, du fait d'une transcription du droit de l'Union contrainte par les traités, la loi va à l'encontre d'une règle ou d'un principe « **inhérent à l'identité constitutionnelle de la France**, sauf à ce que le constituant y ait consenti » ⁷. C'est la formule retenue par le Conseil constitutionnel depuis 2006. Cette année 2006 ne marque aucune rupture dans la ligne jurisprudentielle : la position du Conseil constitutionnel avait commencé à être définie dès la première décision qu'il avait rendue sur une question touchant au droit de l'Union en 1970 ⁸, et dans laquelle il avait veillé à ce qu'il n'y ait pas d'atteinte

7 | Décision du Conseil constitutionnel français du 27 juillet 2006, n° 2006-540 DC, Loi relative aux droits d'auteur et aux droits voisins dans la société de l'information, [ECLI:FR:CC:2006:2006.540.DC](#), considérant 19.

8 | Décision du Conseil constitutionnel français du 19 juin 1970, n° 70-39 DC, relative au traité signé à Luxembourg sur les ressources propres des Communautés, [ECLI:FR:CC:1970:70.39.DC](#), considérant 9.

aux « conditions essentielles d'exercice de la souveraineté nationale ». Conceptuellement et substantiellement, la notion de souveraineté nationale rejoint, en la matière, la protection des *intérêts fondamentaux de la Nation*, expression que l'on trouve assez fréquemment dans la jurisprudence du Conseil constitutionnel.

Il reste évidemment à savoir ce que recouvre cette réserve de l'identité constitutionnelle, à la fois très solennelle, mais d'un contenu et d'une portée assez incertains en droit constitutionnel français, qui, rappelons-le, n'admet pas de hiérarchie entre les divers principes garantis par notre loi fondamentale.

Beaucoup de commentateurs y ont vu l'expression, au-delà des différentes techniques juridiques mises en œuvre, d'une approche commune aux principales cours constitutionnelles européennes. De fait, cette approche, qui a été initiée à Karlsruhe par la Cour constitutionnelle fédérale allemande dans les décisions *Solange I* et *Solange II* ⁹ est présente notamment dans les jurisprudences de la Cour constitutionnelle italienne ¹⁰ et du Tribunal constitutionnel espagnol (décision du 13 décembre 2004 et du 3 juin 2005). Elle consiste, malgré l'intégration de plus en plus poussée au sein du droit de l'Union des principes constitutionnels communs aux États membres, à conserver la prééminence de la norme constitutionnelle nationale sous la forme d'une sorte *d'exit clause* ou de *nolle prosequi* **lorsque l'équivalence des protections n'est pas garantie, voire ignorée par le droit de l'Union et la jurisprudence de la Cour de justice de l'Union européenne** ¹¹. Force est de constater que les cours constitutionnelles et les cours suprêmes nationales sont unanimes pour juger que la constitution a, dans l'ordre juridique interne, la qualité de norme suprême ; j'ai conscience, en rappelant ce fait, de jeter

9 | Arrêts de la Cour constitutionnelle fédérale allemande du 29 mai 1974, 2 BvL 52/71 - BVerfGE 37, 271 - *Solange I* ; du 22 octobre 1986, 2 BvR 197/83 - BVerfGE 73, 339 - *Solange II*.

10 | Arrêt de la Cour constitutionnelle italienne du 13 avril 1989, SpA FRAGD/Amministrazione delle Finanze dello Stato, sentence n° 232/89.

11 | Une thèse a été consacrée en 2013 à « L'Union européenne et l'identité constitutionnelle des États membres » par François-Xavier Millet, Paris, LGDJ 2013.

une pierre dans le jardin très brillamment décrit par le juge François Biltgen... Et l'on sait qu'en Europe, rares sont les pays ¹² qui n'ont pas de contrôle de constitutionnalité.

En théorie, il y a deux façons d'interpréter cette réserve de *l'identité constitutionnelle de la France* :

- prise au pied de la lettre, elle évoque une espèce de noyau dur de règles ou de principes de la Constitution auxquels il ne pourrait pas être porté atteinte par le droit de l'Union, sauf réforme constitutionnelle ;
- de façon moins dogmatique et plus souple, elle repose sur une approche comparative, au cas par cas, entre les deux ordres de garanties offerts, d'une part, au niveau de l'Union et, d'autre part, dans la Constitution nationale. Est alors *inhérent* à l'identité nationale le principe ou la règle, de niveau constitutionnel, qui n'est pas ou qui est mal garanti par le droit de l'Union.

Le Conseil constitutionnel combine les deux approches. Dans sa décision du 26 juillet 2018 ¹³ sur la loi relative à la protection du secret des affaires, il a jugé que la liberté d'expression et de communication, la liberté d'entreprendre et le principe d'égalité devant la loi n'ont pas le caractère de principes « inhérents à l'identité constitutionnelle de la France ». Non pas, bien sûr, parce qu'il s'agirait de normes de second rang, mais parce que leur protection est suffisamment assurée au niveau européen. Cette orientation pragmatique a été confirmée par la décision du 15 octobre 2021 ¹⁴ qui a suscité beaucoup de commentaires et qui affirme, à l'inverse du cas précédent, que l'interdiction de déléguer l'exercice de la force publique à des personnes privées est un « principe inhérent à l'identité constitutionnelle de la France ».

Certains commentateurs regrettent l'absence d'explicitation d'une théorie générale de l'identité constitutionnelle, mais cette approche au cas par cas présente le mérite d'être évolutive et de tenir compte du dynamisme et des progrès du droit de l'Union en matière de protection des droits et libertés. Plus l'ordre juridique européen sera protecteur de ces droits et libertés, plus les cours constitutionnelles nationales pourront, tout en restant vigilantes, accepter

12| Danemark, Pays-Bas, Norvège, Suisse.

13| Décision du Conseil constitutionnel français du 26 juillet 2018, n° 2018-768 DC, [ECLI:FR:CC:2018:2018.768.DC](#), considérants 6 et 7.

14| Décision du Conseil constitutionnel français du 15 octobre 2021, n° 2021-940 QPC, [ECLI:FR:CC:2021:2021.940.QPC](#).

qu'il assure une équivalence des protections. Cette approche est, me semble-t-il, au cœur de l'approche de la cour constitutionnelle allemande.

L'exercice n'est pas pour autant aisé. Tout d'abord, l'ordre juridique de l'Union n'est pas complet. Beaucoup des exigences constitutionnelles propres aux États ne concernent pas le domaine des compétences déléguées à l'Union. Et pourtant, certaines réglementations européennes, prises dans le cadre de ces compétences déléguées, ont un impact direct sur les missions qui restent de la compétence exclusive des États. Il peut en résulter, structurellement, des décalages dans les niveaux de protection. La santé publique, mais plus encore la sécurité publique et l'ordre public, qui sont des exigences constitutionnelles en France, sont, par définition, mal prises en compte par la législation de l'Union qui poursuit d'autres objectifs (notamment la libre circulation des personnes et des capitaux, l'unicité du marché intérieur, le développement de l'économie numérique etc.).

L'exemple le plus frappant, du côté français, est l'affaire de la conservation des données de connexion, où la position prise par la Cour de justice de l'Union européenne dans son arrêt du 6 octobre 2020 ¹⁵ sur renvoi préjudiciel des Conseils d'État belge et français en interprétation de la directive n° 2002/58/CE du 12 juillet 2002 ¹⁶, s'est révélée bien embarrassante pour les États membres chargés de la sécurité publique, et en particulier de la lutte contre la criminalité et le terrorisme. Dans sa décision d'assemblée du 21 avril 2021 (French data network et autres) ¹⁷, le Conseil d'État français a réussi, au terme d'une décision d'une longueur très inhabituelle pour ses standards, à maintenir sa jurisprudence fondatrice Société Arcelor Atlantique et Lorraine du 8 février 2007 sur *l'équivalence des protections* ¹⁸, tout en sauvegardant une grande part de la législation française exigeant une conservation des données par les opérateurs de réseaux pour des motifs de sécurité publique. Il y est parvenu, non sans mal, en se glissant dans les

15| Arrêt du 6 octobre 2020, La Quadrature du Net e.a., C-511/18, [EU:C:2020:791](#).

16| Directive 2002/58/CE du Parlement européen et du Conseil, du 12 juillet 2002, concernant le traitement des données à caractère personnel et la protection de la vie privée dans le secteur des communications électroniques (directive vie privée et communications électroniques) (JO L 201 du 31.07.2002, p. 37), telle que modifiée par la directive 2009/136/CE du Parlement européen et du Conseil, du 25 novembre 2009 (JO L 337 du 18.12.2009, p. 11).

17| Décision du Conseil d'État français du 21 avril 2021, n° 393099, [ECLI:FR:CEASS:2021:393099.20210421](#).

18| Décision du Conseil d'Etat français du 8 février 2007, Société Arcelor Atlantique et Lorraine e.a., n° 287110, [ECLI:FR:CEASS:2007:287110.20070208](#).

petites ouvertures ménagées par la Cour de justice de l'Union européenne dans son arrêt *La Quadrature du Net e.a.* du 6 octobre 2020.

La Cour constitutionnelle belge, quant à elle, a totalement censuré les textes nationaux équivalents en application de la même jurisprudence de la Cour de justice de l'Union européenne.

De son côté, le Conseil constitutionnel français, pour lequel la Constitution est la norme de référence explicite a, sur ce sujet très évolutif de la collecte, de la conservation et de l'utilisation des données de connexion, adopté une approche fondée sur les mêmes principes de fond que ceux que retient la Cour de justice de l'Union européenne, relatifs à la protection de la vie privée, mais en s'éloignant toutefois de la lettre de la jurisprudence de la Cour de justice de l'Union européenne.

Le Conseil constitutionnel français a en effet refusé de s'aligner purement et simplement sur l'arrêt *Prokuratuur* du 2 mars 2021 ¹⁹ qui déclare contraire au droit de l'Union l'autorisation du procureur estonien de donner accès à des données de connexion, sauf dans les cas les plus graves.

Depuis un certain temps déjà, notre jurisprudence a renforcé progressivement le contrôle exercé sur l'utilisation de ces données de connexion ²⁰ dont nous savons qu'elle peut être particulièrement intrusive pour la vie privée. Nous nous sommes en cela inscrits dans un mouvement jurisprudentiel plus large, notamment au niveau européen avec l'arrêt *Tele2 Sverige AB* rendu par la Cour de justice de l'Union européenne le 21 décembre 2016 ²¹. En matière pénale, nous avons tout à la fois renforcé et adapté notre contrôle, pour le rendre aussi serré que possible par rapport aux caractéristiques propres à chaque phase des investigations ²²,

19| Arrêt du 2 mars 2021, *Prokuratuur* (Conditions d'accès aux données relatives aux communications électroniques), C-746/18, [EU:C:2021:152](#).

20| Voir, par exemple, la décision du Conseil constitutionnel français du 14 juin 2019, n° 2019-789 QPC, [ECLI:FR:CC:2019:2019.789.QPC](#).

21| Arrêt du 21 décembre 2016, *Tele2 Sverige*, C-203/15, [EU:C:2016:970](#).

22| Voir, par exemple, la décision du Conseil constitutionnel français du 3 décembre 2021, n° 2021-952 QPC, [ECLI:FR:CC:2021:2021.952.QPC](#).

mais tout en conservant son rôle au procureur, qui pour nous est un magistrat indépendant et pas seulement une autorité de poursuite²³.

Selon la formulation actuelle de notre jurisprudence, il y a contrariété entre la Constitution et le droit de l'Union dans trois hypothèses :

- celle d'une norme contraire à la Constitution ;
- celle d'une remise en cause des droits et libertés constitutionnellement garantis, faute de protection équivalente ;
- celle, enfin, d'une atteinte aux conditions essentielles d'exercice de la souveraineté nationale. Une telle atteinte pourrait notamment résulter d'un acte de l'Union *ultra vires*, circonstance qui n'a pas de précédent, mais qui pourrait conduire le Conseil constitutionnel à veiller au respect des compétences étatiques, selon le schéma défini en Allemagne par la cour constitutionnelle fédérale de Karlsruhe.

Il est manifeste que ces trois hypothèses ne peuvent être rencontrées que très rarement et c'est une bonne chose. Il n'empêche qu'elles font peser une espèce d'épée de Damoclès au-dessus de nos têtes. C'est elle qui impose à nos juridictions de prêter une attention toute particulière à la recherche des conciliations souhaitables. Cet enjeu avait été parfaitement souligné par l'ancien président de la Cour de justice des Communautés européennes, Gil Carlos Rodríguez Iglesias, dans un article publié en 2005 dans lequel il soulignait que « le conflit radical entre les exigences de l'ordre communautaire et celle de la Constitution d'un État membre n'est pas susceptible de solution logiquement satisfaisante, puisque tant le droit communautaire que le droit constitutionnel affirment leur prétention à la primauté »²⁴. Mais il ajoutait immédiatement

23| Voir, par exemple, la décision du Conseil constitutionnel français du 20 mai 2022, n° 2022-933 QPC, [ECLI:FR:CC:2022:2022.993.QPC](https://www.conseil-constitutionnel.fr/decision/2022/2022.933.QPC/).

24| Rodríguez Iglesias G.C., « No existe contradicción entre la constitución española y la constitución europea: la declaración del Tribunal constitucional », Revista de Derecho Comunitario Europeo, n°20, 2005, p. 11, disponible sur ce site web : <https://www.cepc.gob.es/sites/default/files/2021-12/25948nota-editorial.pdf>, traduction libre.

« qu'un tel conflit est en réalité purement hypothétique et tant les tribunaux constitutionnels que la CJCE peuvent et doivent éviter qu'un tel conflit se produise » ²⁵.

Ce « dialogue des juges », selon l'expression consacrée, est indispensable, plus qu'en tout autre domaine, sur cette question de la *primauté*. Il peut arriver qu'il soit un peu rugueux, non pas pour des raisons d'humeur, mais du fait de la différence des missions qui incombent aux juges de l'Union, d'une part, et aux juges constitutionnels des États membres, d'autre part, s'agissant de la prise en compte des identités constitutionnelles nationales. En effet, en dépit de l'évolution très explicite des traités, et tout particulièrement des stipulations de l'article 4 du traité sur l'Union européenne dont le paragraphe 2 impose le respect de l'identité nationale inhérente aux structures fondamentales politiques et constitutionnelles des États membres, les exigences qui pèsent sur la Cour de justice de l'Union européenne, d'une part, et les cours constitutionnelles, d'autre part, ne coïncident pas exactement. Comme l'a souligné le juge François Biltgen dans son intervention, la Cour de Luxembourg doit « respecter » les identités nationales, ce qui peut être interprété, *a minima*, comme une simple exigence de prise en considération, tandis que les cours constitutionnelles doivent « protéger » ces mêmes identités. Sans philosopher longuement sur la distinction entre respect et protection, il est patent que la différence de responsabilité recèle des risques de frictions.

L'expérience française de ces dernières années atteste que ces risques peuvent être conjurés dans un esprit constructif partagé.

La logique de recherche de conciliation a en effet très bien fonctionné pour combiner les exigences de la nouvelle procédure de question prioritaire de constitutionnalité (ci-après la « QPC »), créée lors de la réforme de la Constitution adoptée en 2008, avec les exigences du droit de l'Union. L'objectif de la QPC était de donner une priorité absolue, lors d'un procès, à la purge d'une contestation de la constitutionnalité d'une norme législative en cause, ce qui impliquait notamment une priorité de la question de constitutionnalité sur une éventuelle question de conventionnalité. En mai 2010, les juridictions administratives et judiciaires suprêmes, Conseil d'État et Cour de cassation, ont néanmoins jugé l'une et l'autre que la QPC ne faisait pas obstacle à ce que les juges français écartent immédiatement des dispositions de droit interne incompatibles avec le droit de l'Union et qu'ils posent à tout moment, si nécessaire, une question préjudicielle à la Cour de justice de l'Union européenne. Cette interprétation

25| Ibid., traduction libre.

conciliante a permis à la Cour de justice de l'Union européenne de juger que la procédure de la QPC respecte le droit de l'Union. Et, il faut le noter, cette procédure interne de la QPC a permis au Conseil constitutionnel, pour la première fois, de poser à la Cour de justice de l'Union européenne une question préjudicielle en avril 2013 ²⁶.

Le chemin à suivre, pour nos juridictions respectives, est donc bien tracé, selon les orientations fixées par les paragraphes 1, 2 et 3 de l'article 4 du TUE : respect des compétences et des identités nationales des États, d'un côté, et coopération loyale des autorités nationales dans la construction de l'Union, de l'autre.

Comme je le soulignais au début de mon propos, notre dialogue entre juges trouve aujourd'hui un écho assez puissant dans la sphère politique. Il n'est bien sûr jamais mauvais que le débat public se saisisse d'un sujet aussi structurant. Je crois néanmoins très important – et c'est un avis que nous partageons certainement – que les juges européens et ceux des cours constitutionnelles nationales puissent rester aux avant-postes de ce débat, en l'éclairant par leur compétence et leur clairvoyance, comme nous le faisons dans cette enceinte.

26| Voir l'arrêt du 30 mai 2013, Jeremy F./Premier ministre, C-168/13 PPU, [EU:C:2013:358](#) et la décision du Conseil constitutionnel français du 14 juin 2013, n° 314 QPC, [ECLI:FR:CC:2013:2013.314.QPC](#), dans l'affaire Jeremy F., sur le mandat d'arrêt européen.



Mr Francis Delaporte

President of the Luxembourg Supreme Administrative Court,
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Contribution by Mr Francis Delaporte, President of the Luxembourg Supreme Administrative Court, Vice-President of the Luxembourg Constitutional Court

Crossed Perspectives from the Point of View of the Case-law of the Constitutional Court of the Grand Duchy of Luxembourg

The Constitutional Court of the Grand Duchy of Luxembourg has exclusive jurisdiction to rule on the conformity of a law with the Constitution. A court may only refer a matter to it for a preliminary ruling if it needs the answer to the question of the conformity of a law with the Constitution in order to settle the dispute on which it has been asked to decide.¹ The number of preliminary rulings to the Constitutional Court are not very numerous at approximately ten a year. Yet despite the small number of decisions ruled by the Constitutional Court, some of them do contain landmark decisions that are relevant to the issue of the tension between diversity and uniformity as seen from the perspective of EU law.

Two specific elements should be emphasised with regards to this legal tension: the first relates to the primacy of EU law, in the general context of the primacy of international law per se, and reflects the position of Luxembourg marked by the particular cultural identity of

1 | Loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, Consolidated version applicable as of 1st of July 2023. See, more particularly, Article 6 : « Lorsqu'une partie soulève une question relative à la conformité d'une loi à la Constitution devant une juridiction, celle-ci est tenue de saisir la Cour Constitutionnelle. Une juridiction est dispensée de saisir la Cour Constitutionnelle lorsqu'elle estime que: a) une décision sur la question soulevée n'est pas nécessaire pour rendre son jugement; b) la question de constitutionnalité est dénuée de tout fondement; c) la Cour Constitutionnelle a déjà statué sur une question ayant le même objet. Si une juridiction estime qu'une question de conformité d'une loi à la Constitution se pose et qu'une décision sur ce point est nécessaire pour rendre son jugement, elle doit la soulever d'office après avoir invité au préalable les parties à présenter leurs observations. »

a small country conscious of the fact that its existence, independence, and even neutrality are essentially guaranteed by the international treaties that enshrine them.

The second vector relates to the positioning of the principle of the rule of law, recognised by the Luxembourg Constitutional Court as a constitutional principle – despite not being formally enshrined in the written text of the Constitution² and its sub-principles. The rule of law is also viewed from the perspective of the European Convention on Human Rights and, provided the implementation of EU law is concerned, in relation to the Charter of Fundamental Rights of the European Union ('the Charter').

1. The example of the case-law on greenhouse gas emission

To date, the Constitutional Court of the Grand Duchy of Luxembourg has only once had the opportunity to introduce a preliminary ruling before the Court of Justice of the European Union.³ Normally, given the Constitutional Court's limited jurisdiction, such a step should not have been on the agenda at all. As it happened, however, in the particular context of a reference for a preliminary ruling submitted to it by the Luxembourg administrative tribunal (*tribunal administratif*) in the matter of greenhouse gas emission allowances governed by Directive 2003/87/EC,⁴ the Court was finally prompted to refer the matter to the Court of Justice of the European Union.

The context of this case is the following: a Luxembourg steel production company had declared that it was suspending its activities and had been allocated emission allowances for the relevant year, which had been validly registered.

2 | Constitution du Grand-Duché de Luxembourg, 17 October 1868, consolidated on 17 January 2023.

3 | Judgment of the Luxembourg Constitutional Court of 19 June 2015, n° 119/15, Mémorial A, n° 121 of 2015, available at https://www.stradalex.lu/fr/slu_src_publ_jur_lux/document/cconslu_119_15, p. 2618.

4 | Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003).

Once the relevant national minister became aware of the suspension of activities by the operator in question, certain negotiations having remained fruitless, he took a decision to withdraw the allocated and registered emission allowances, specifying that this operation was carried out without any compensation.

On appeal by the operator before the administrative tribunal, the latter was faced with the dual question of whether, on the one hand, the Luxembourg law providing for the possibility of withdrawing registered and allocated allowances without compensation was compliant with the relevant directive and, on the other hand, whether said law was compliant with the Luxembourg Constitution concerning the protection of property rights.

The administrative tribunal reasoning could be informally summarised as such : I am not obliged to refer a question to the Court of Justice of the European Union for a preliminary ruling, but I am obliged to do so in relation to the question of the relevant law's conformity with the Constitution, for which I am obliged to refer the matter to the Constitutional Court.

The administrative tribunal therefore decided to refer the matter first to the Constitutional Court,⁵ before which it was obliged to submit a preliminary question, while leaving unanswered the question of the conformity of the national legislation with Union law, since a tribunal of first instance is not obliged to refer the matter to the Court of Justice of the European Union in such a case.

Without entering into a theoretical debate on the primacy of EU law and, where applicable, its limits, the Constitutional Court approached the subject in a straightforward manner, reflecting its position on the obvious primacy of EU law over national law, including the Luxembourg Constitution. In fact, it considered that it had to answer the question of the conformity of the provisions of the law with the Constitution. This conformity question conditioned the qualification of the requested restitution with regard to the concept of expropriation in the public interest, and the qualification of the issued and unused emission allowances. The latter qualification was essential to determining whether they could have been the subject,

5| Judgment of the Luxembourg Administrative Tribunal of 17 December 2014, no 33558, available at https://www.stradalex.lu/fr/slu_src_publ_jur_lux/document/t_adm_lu_33558.

as property, of an expropriation in the light of Article 16 of the Constitution referred to in the question for a preliminary ruling before the Constitutional Court.

Relying on the law, which provides that a referring court may only refer a question to the Constitutional Court for a preliminary ruling if it is necessary for its decision, the Constitutional Court emphasised the useful effect of such a question. This was particularly so in the context of a law transposing an EU directive into national law, noting that this useful effect was conditioned in particular upstream, by verification of the transposition law's conformity with EU law. This conformity aspect was particularly relevant in cases, such as this, where the referring court, in its referral judgment, had called into question elements of the transposition law in relation to the legal framework deriving from EU law, without ruling on this aspect of the dispute or submitting a related question to the Court of Justice of the European Union. Indeed, in this case, the Tribunal chose to first refer a question to the Constitutional Court for a preliminary ruling on the conformity of the law to the Constitution, thus dealing, at least in large part, with the same elements of the transposition law.

Noting that it had to give a ruling that could not be appealed against, and also in view of the need to ensure that the final decision on the merits would have a useful effect, the Constitutional Court stated that it would first have to refer to the Court of Justice of the European Union the question of whether the disputed law complied with the Directive, before it could usefully consider the other question referred to it – namely, whether said law complied with the Constitution.

This direct and unconditional preliminary ruling to the Court of Justice of the European Union can be explained by the fact that, historically, the Grand Duchy of Luxembourg is a monist state and has built its cultural identity on the value of the international treaties, which, since its creation, have successively conditioned its existence, independence and neutrality.

The Treaty of Vienna of 9 June 1815 created the Grand Duchy of Luxembourg as a state. The Treaty provided a complex structure for the Grand Duchy, which reverted to the personal ownership of King William I of the Netherlands following an exchange of land that belonged to him with the Kingdom of Prussia. The King of the Netherlands became Grand Duke of Luxembourg in personal union, but decided to subject the Grand Duchy to the Dutch *Grondwet* without granting it its own Constitution.

At the same time, the Grand Duchy became part of the German Confederation, and the fortress of Luxembourg became a Confederate fortress, with German Confederate regiments defending it. It was this complicated situation that meant that Luxembourg, despite having overwhelmingly joined the Belgian revolutionaries in 1830 who had taken part in the creation of the Kingdom of Belgium, would not form part of this new entity.

The Treaty of London of 19 April 1839 provided for the division of the former Grand Duchy of Luxembourg, with the western – essentially French-speaking – part remaining with the Kingdom of Belgium as the province of Luxembourg-Belgium, while the remainder, essentially the German-speaking eastern part, forming the current Grand Duchy of Luxembourg.

For this Grand Duchy, the Treaty of London of 1839 is seen as the one that finally secured its independence and drew the definitive borders with both Belgium and the Netherlands. It was here that the three countries of the future Benelux took on their respective consistencies.

Finally, following the crisis of 1866 after the dissolution of the German Confederation and Prussia's victory over Austria, and the aborted sale of the Grand Duchy by William III to Napoleon III, the international crisis known as the 'Luxembourg crisis' was averted by the Treaty of London of 11 May 1867, which established the Grand Duchy's perpetual neutrality and ordered the dismantling of the fortress, implying the departure of the Confederate troops, as Luxembourg was no longer part of a Germanic entity.

It was these three treaties that the Grand Duchy was to invoke constantly to defend itself against the hegemonic aspirations of its three neighbors, particularly during the conflicts of 1870-1871, 1914-1918, and 1940-1945, opposing its two great neighbors, France and Germany.

It is this assurance, derived from international treaties, that has forged Luxembourg's cultural identity, namely a strong belief in the value of international law as a guarantee of the country's existence, independence, and neutrality.

WIn its decision dated 8 March 2017,⁶ the Court of Justice of the European Union answered the preliminary question by ruling that :

‘Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009, must be interpreted as not precluding national legislation which allows the competent authority to require the surrender, without full or partial compensation, of unused allowances which have been improperly issued to an operator, as a result of the failure by the latter to comply with the obligation to inform the competent authority in due time of the cessation of the operation of an installation. The allowances issued after an operator has ceased the activities performed in the installation to which those allowances relate, without informing the competent authority beforehand, cannot be classified as emissions ‘allowances’ within the meaning of Article 3(a) of Directive 2003/87, as amended by Regulation No 219/2009’.⁷

In its decision, the Constitutional Court ruled on the preliminary question submitted to it on June 16, 2017.⁸ It is in this final judgment that the Court returned to its method deployed through its judgment on referral, considering that the context of the proceedings was specific in that the Constitutional Court, for reasons of useful effect, without returning to the referring national court, directly submitted the aforementioned preliminary question to the Court of Justice of the European Union.

Subsequently, the Constitutional Court took direct account of the Court of Justice of the European Union’s response in its aforementioned judgment of March 8, 2017. It adopted the reasoning deployed therein of unused allowances that had been wrongly issued to the operator as a consequence of the latter’s breach of the obligation to inform the relevant national authority

6| Judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange SA*, C-321/15, [EU:C:2017:179](#).

7| Regulation (EC) 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two (OJ L 87, 31.3.2009, p. 109-54).

8| Judgment of the Luxembourg Constitutional Court of 16 June 2017, n° 119, Mémorial A, n° 589, available at https://www.stradalex.lu/fr/slu_src_publ_jur_lux/document/cconslu_119_17, p. 1.

in good time of the cessation of operation of an installation. The Constitutional Court thus concluded that the relevant national law providing for the withdrawal of allowances without compensation was not contrary to Article 16 of the Constitution, concerning the protection of the right to property, which provides that no one may be expropriated except for reasons of public utility and in return of fair compensation.

Not only did the Constitutional Court's reference to the Court of Justice of the European Union for a preliminary ruling enable a procedural shortcut, but it also revealed the fundamental conception of Luxembourg's constitutional conception concerning the primacy of EU law over national law, and the cultural identity-element of a strong belief in the authority of international treaties as guarantee of the very existence and independence of the State.

2. The example of the case-law on exchange of information upon request

Secondly, the topic of exchange of information upon request, in tax matters, has given rise to a rich and diverse case-law before Luxembourg's administrative courts (tribunal and court), involving not only the Constitutional Court of Luxembourg, but also the Court of Justice of the European Union.

One of the aspects that brought the Court of Justice of the European Union, the Constitutional Court, and the Luxembourg Administrative Court together in a triangular dialogue was the case of taxpayers resident in Switzerland, to whom EU law does not apply, as this situation concerned the question of to what extent, if any, they could have an immediate right of appeal against the information order (*décision d'injonction*) issued by the Director of the Direct Tax Administration of Luxembourg to a Luxembourg bank where they were suspected to hold accounts.

It was in this context that the Luxembourg Constitutional Court was asked by the Administrative Court (*Cour administrative*) to give a preliminary ruling on whether the national law prohibiting an appeal against such an information order complied with the general principle of the rule of law, if recognised as a constitutional principle by the Constitutional Court, as well as with the principle of legality derived from Article 95 of the Luxembourg Constitution, which provides that the courts and tribunals apply regulations only insofar as they comply with the law.

This preliminary question enabled the Constitutional Court to issue its landmark decision of 28 May 2019 (no. 146 of the register – first ruling),⁹ in which it held that the fundamental principle of the rule of law was a general principle of constitutional value inherently contained in the democratic principle set out in Article 1 of the Constitution, which provides that the State of the Grand Duchy of Luxembourg is a democratic state, and in Article 51(1) of the Constitution, which recognises that the Grand Duchy is organised as a parliamentary democracy. The Constitutional Court also ruled that that this meta-principle gives rise to a series of other constitutional principles – such as, in the case of the reference for a preliminary ruling under analysis here, the principle of access to justice and the principle of effective remedy.

In parallel, two preliminary rulings were made to the Court of Justice of the European Union by the Administrative Court concerning the limits of an action brought against an information order by the taxpayer concerned by the exchange of information procedure. The Constitutional Court, while acknowledging that EU law did not apply as such to the case in the main proceedings, nevertheless foresaw the potential impact of the rulings of the Court of Justice of the European Union and stayed proceedings until the Court of Justice of the European Union had ruled in the two similar cases it was referred. This is another example of the importance of EU law and of the judicial dialogue with the Court of Justice of the European Union.

Once the Court of Justice of the European Union's rulings had been issued, the Constitutional Court rendered its final decision and resolved the preliminary question submitted to it in its ruling of 19 March 2021.¹⁰

9| Judgment of the Luxembourg Constitutional Court of 28 May 2019, n° 146/19, Mémorial A, n° 383, available at https://www.stradalex.lu/fr/slu_src_publ_leg_mema/document/cconslu_146_19.

10| Judgment of the Luxembourg Constitutional Court of 19 March 2021, n° 146/21 Mémorial A, n° 232, available at https://www.stradalex.lu/fr/slu_src_publ_leg_mema/document/cconslu_146_21.

It was in this latter ruling that the Constitutional Court forged the concept of a common foundation (*socle commun*) between the fundamental principle of the rule of law and its sub-principles at the national constitutional level, the corresponding principles contained in the European Convention on Human Rights and, in the case of an implementation of EU law, the corresponding principles contained in the Charter.

In relation to this *socle commun*, the Constitutional Court declared that its reasoning consisted of carrying out a global analysis, so as to compare the principles laid down by the three bodies of national and international rules, in order to achieve a coherent and corresponding interpretation of the applicable fundamental rights.

4th panel

Legal protection of current and future generations



Ms Juliane Kokott

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Contribution by Ms Juliane Kokott, Advocate General at the Court of Justice of the European Union

Legal Protection of Current and Future Generations in the Case-Law of the Court of Justice

1. Introduction

When I first read the title of our panel, ‘Legal protection of current and future generations’, I immediately thought of environmental protection: safeguarding the foundations of life on the planet and the notion of ‘intergenerational justice’ as highlighted by the German constitutional court.¹ Sometimes the Court of Justice of the European Union uses a similar term, ‘common heritage’,² to evoke the idea of passing something from current to future generations.

Against this background, I have to admit that the case-law presented by the organisers for our panel appeared incoherent at first sight. Of course, there were environmental cases, but the organisers also referred to case-law on gender rights, for example on the recognition of same-sex couples³ or gender reassignment.⁴

1| Judgment of the German Federal Constitutional Court of 24 March 2021, 1 BvR 2656/18 [DE:BVerfG:2021:rs20210324.1bvr265618](#).

2| Judgment of 4 March 2021, *Föreningen Skydda Skogen*, C-473/19 and C-474/19, [EU:C:2021:166](#), paragraph 39; Judgment of 2 March 2023, *Commission v Poland (Forest management and good practice)*, C-432/21, [EU:C:2023:139](#), paragraphs 73 and 108.

3| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#).

4| Judgment of 7 January 2004, *K. B.*, C-117/01, [EU:C:2004:7](#); Judgment of 27 April 2006, *Richards*, C-423/04, [EU:C:2006:256](#); and Judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, [EU:C:2018:492](#).

However, upon further reflection, I recognised that the two topics are part of the overarching theme of this conference and the Riga conference in 2021, 'United in Diversity'. They highlight where EU law requires a uniform approach – and whether this is justified – and where it takes a more hands-off approach that allows for legal diversity between Member States. From this point of view, environmental law and gender rights in EU law are at different ends of the spectrum, reflecting the general theme of the conference.

On one hand, EU environmental law provides for a very detailed, uniform, and high level of protection based on directives and regulations in secondary law. On the other hand, gender rights issues are often linked to more general fundamental rights considerations, in particular in respect of discrimination. At the same time, many of these questions, particularly the most controversial ones, fall largely outside the scope of EU law as it currently stands. In both areas, courts, and in particular the Court of Justice of the European Union, must determine the procedural framework for effective legal protection and, with regard to the substantial rules, the degree of uniformity required by EU law and the scope for diversity.

In addition, these two areas also mark opposing poles in another dimension that is important for access to justice. The protection of the environment is primarily a general societal interest, while gender rights mainly concern deeply personal individual interests – effectively the diversity between individuals.

2. Legal protection in the context of weak harmonisation – gender rights

The procedural framework for legal protection in the area of gender rights is rather straightforward: individuals invoke certain rights for themselves and courts have to assess whether these rights exist. This is the situation envisaged by the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

Currently, the focus is on same-sex relationships and transgender rights, summed up as LGBTQ+. ⁵ Nevertheless, we should remember that the debate on gender rights in EU law

5 | Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (or sometimes questioning).

began with women's rights in the 1970s. In this particular area, EU law and jurisprudence have been very progressive – one can recall the cases brought up by the flight attendant Gabrielle Defrenne. She asked the Court of Justice of the European Union to decide whether a woman is entitled to equal pay for equal work,⁶ whether she has the same right to a pension as a male co-worker,⁷ or whether her airline could terminate her employment at the age of 40 while her male colleagues could continue working.⁸ However, we should also bear in mind that Ms Defrenne lost two of these cases before the Court of Justice because the Treaty only prohibits wage discrimination. Only later was EU law extended to other forms of discrimination against women by the adoption of specific legislation.⁹

The more modern issues of gender rights often come under a directive that prohibits discrimination *inter alia* on grounds of sexual orientation with regard to employment and occupation.¹⁰ However, the Council of the European Union could only adopt this instrument by unanimous vote, and new Member States were aware that it was part of the *acquis communautaire* when they joined the EU.

Therefore, with regard to the limits of diversity between Member States case law on two other areas is of greater interest: gender reassignment and recognition of non-traditional couples, that is to say same-sex couples and couples in which one partner has undergone a gender reassignment. The fact that this case-law exists does not mean that the EU has harmonised these

6 | Judgment of 8 April 1976, *Defrenne*, C-43/75, [EU:C:1976:56](#).

7 | Judgment of 25 May 1971, *Defrenne*, C-80/70, [EU:C:1971:55](#).

8 | Judgment of 15 June 1978, *Defrenne*, C-149/77, [EU:C:1978:130](#).

9 | See in particular Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), now Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23), and Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

10 | Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). See for example Judgment of 25 April 2013, *Asociația Accept*, C-81/12, [EU:C:2013:275](#); and Judgment of 12 January 2023, *TP (Audiovisual editor for public television)*, C-356/21, [EU:C:2023:9](#).

issues. On the contrary, it is questionable whether the EU has any powers of harmonisation in this area.¹¹ This, in turn, leaves considerable scope for diversity between Member States.

Then what is the basis for the case-law of the Court of Justice of the European Union in this area? The Court of Justice relies on the idea that Member States must comply with EU law whenever they exercise *any* powers.¹² This fundamental rule of EU law also applies to powers relating to gender reassignment and non-traditional couples. Clearly, respect of the EU principle of non-discrimination will be of particular importance in this regard.¹³

This approach gives rise to two categories of cases.

The first line of jurisprudence concerns cases involving Member States that have already recognised gender reassignment or non-traditional couples in domestic law. As such, this case law does not affect the diversity between Member States. To ensure compliance with the principle of non-discrimination, the Court of Justice of the European Union mainly requires Member States to act coherently and to adhere to the fundamental decision that they themselves have already taken.¹⁴

The second line of jurisprudence is much more delicate, as it concerns the rights of same-sex couples in Member States that do not recognise such partnerships.

11| On gender reassignment see Judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, [EU:C:2018:492](#), paragraph 29; and on non-traditional couples see Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#), paragraph 37.

12| Judgment of 28 April 1998, *Decker*, C-120/95, [EU:C:1998:167](#), paragraph 23; Judgment of 13 November 2018, *Raugevicius*, C-247/17, [EU:C:2018:898](#), paragraph 45; and Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, [EU:C:2022:99](#), paragraph 38.

13| Judgment of 27 April 2006, *Richards*, C-423/04, [EU:C:2006:256](#), paragraphs 21-24; Judgment of 1 April 2008, *Maruko*, C-267/06, [EU:C:2008:179](#), paragraph 59; Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#), paragraphs 37-38; and Judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, [EU:C:2018:492](#), paragraph 29.

14| See, for example: Judgments of 30 April 1996, *P v S and Cornwall County Council*, C-13/94, [EU:C:1996:170](#); Judgment of 7 January 2004, *K. B.*, C-117/01, [EU:C:2004:7](#); Judgment of 27 April 2006, *Richards*, C-423/04, [EU:C:2006:256](#); Judgment of 1 April 2008, *Maruko*, C-267/06, [EU:C:2008:179](#); and Judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, [EU:C:2018:492](#).

These cases involve the right of free movement of one of the partners. In principle, EU citizens who have started a family in another Member State have the right to bring this family with them when they return to their home Member State. Consequently, members of their family not holding Union citizenship enjoy a derived right of residence because they belong to the family of an EU citizen.¹⁵ However, does this derived right of residence also apply to partners of same-sex couples and their children?

The *Coman* case first raised this question.¹⁶ Mr Coman is a Romanian citizen. In his home Member State, same-sex couples are not legally recognised. However, while Mr Coman was living and working in Brussels, he married Mr Hamilton, a US citizen. He and Mr Hamilton then requested Romania to grant Mr Hamilton a right of residence as Mr Coman's husband. After the Romanian authorities refused his right of residence, the case was brought before the Court of Justice of the European Union.

The *Coman* case should be read in conjunction with another case involving a Bulgarian woman who had married a UK woman in Gibraltar when the UK was still a Member State. Subsequently, the women had a daughter in Spain, and the Spanish authorities issued a birth certificate identifying both women as mothers. However, the Bulgarian authorities refused to issue a similar birth certificate because the Bulgarian constitution defines marriage as a union between a man and a woman.¹⁷

In both cases, the Court of Justice of the European Union considered that the host Member States to which the EU citizens had moved – Belgium in the *Coman* case, and the UK and Spain in the case of the two mothers – had certified the existence of family life.¹⁸ These Member States had recognised the same-sex marriages and, in the Bulgarian case, issued the birth certificate showing both women as mothers. Therefore, it was found that the partner of the respective EU citizen and, in the Bulgarian case, their child enjoy derived rights in the home Member State of the EU citizen.

15| Judgments of 7 July 1992, *Singh*, C-370/90, [EU:C:1992:296](#); and Judgment of 12 March 2014, *O.*, C-456/12, [EU:C:2014:135](#). On derived rights of unmarried heterosexual partners see Judgment of 12 July 2018, *Banger*, C-89/17, [EU:C:2018:570](#).

16| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#).

17| Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, [EU:C:2021:1008](#).

18| Judgments of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#), paragraphs 39 and 40; and Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, [EU:C:2021:1008](#), paragraph 48.

Does this finding mean that the Member State of origin has to change its laws and recognise same-sex marriages? Moreover, what about Article 4(2) TEU? According to this provision, the Union shall respect the national identities of Member States inherent in their fundamental political and constitutional structures.

The Court of Justice of the European Union resolves this tension by *distinguishing between* the recognition of marriages and parental relationships for the *sole purpose* of granting derived rights under EU law, on the one hand, and the *general* recognition of such relationships, on the other hand. To be perfectly clear: EU law does not require the latter. Conversely, the recognition of marriages and parental relationships for the *sole purpose* of granting derived rights under EU law should not be considered to undermine the national identity of the Member State concerned.¹⁹

And so we see that some judgments of the Court of Justice of the European Union on gender rights may appear far-reaching and innovative, but, on closer inspection, the Court of Justice does not interfere with the scope for diversity that EU law reserves for Member States.

3. Legal protection in an area of strong harmonisation – Environmental protection

In contrast to gender rights, environmental law is perhaps the clearest *legislative* expression of the protection of current and future generations. Article 191 TFEU sets ambitious objectives: to preserve, protect and improve the quality of the environment. For human health, the ambitions are a bit more restrained – it only needs to be protected. In any event, this policy shall aim for a high level of protection. Article 37 of the Charter confirms these ambitions.

These are, indeed, laudable goals, but why pursue them at a European level? When the Member States conferred these powers to the European Economic Community with the Single European Act,²⁰ the answer was obvious: the Single Market needs a level playing field.

19| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#), paragraphs 45 and 46; and Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, [EU:C:2021:1008](#), paragraphs 56 and 57.

20| Single European Act of 29 June 1987 (OJ L 160, p. 1-28).

If only Member States were responsible for environmental policy, there could be a race to the bottom. Therefore, Europe should at least provide for common minimum standards.

Member States, on the other hand, remain free to ensure stronger protection under Article 193 TFEU. In principle, this allows for diversity. However, competitive pressures within the Single Market and the global economy considerably weaken the incentives for stronger protection of the environment. Member States that nevertheless opt for stronger protection than EU law requires are often criticised with the disparaging term ‘gold plating’.²¹

As a result, EU environmental law not only provides for a minimum standard, but in many instances also defines the common level of protection.

But how can this common standard be enforced in court?

Article 47 of the Charter and Article 19 TEU lay out the general principles. Under Article 47 of the Charter, everyone whose rights and freedoms under EU law are violated has the right to an effective remedy before a court. Pursuant to Article 19 TEU, Member States are to ensure effective legal protection in the areas covered by Union law.

If we only consider these general principles, the core question is whether environmental law creates rights. Some legal systems in the Union take this question very seriously. For example, German procedural rules only allow actions to defend a *subjective right* that is to say a right directly granted to the plaintiff. According to traditional German jurisprudence, many environmental rules do not create such rights because they do not serve the individual interest of the party; rather, they serve the general interest.²² The protection of this general interest by way of enforcement of environmental law, however, is the responsibility of state authorities.

21| Hendrik, J., et al., “‘Gold plating’ of European Environmental Measures?” *Journal for European Environmental & Planning Law*, Vol. 6, No 4, 2009, pp. 417-435.

22| See for example, Judgment of the German Federal Administrative Court of 18 May 1982, BVerwG 7 C 42.80, DE:BVerwG:1982:180582U7C42.80, BVerwGE 65, 313 (320).

When the Court of Justice of the European Union addressed the same issue at EU-level, it accepted that the air quality rules in question²³ protect *public* health. At the same time, it stressed that at least persons *directly concerned* by possible breaches must be in a position to require compliance.²⁴ Therefore, such individuals must have access to courts to enforce EU environmental law that aims to protect *human health*. Later, the Court of Justice extended this approach beyond that of health to other legally-recognised interests of individuals.²⁵

Nevertheless, I should also mention that, more recently, the Court of Justice of the European Union found that the same rules on air quality do not create rights that could serve as a basis to demand compensation for damages.²⁶

Whether the jurisprudence on directly-concerned persons also allows environmental NGOs to enforce environmental law has not yet been tested. However, the Court of Justice of the European Union held that they can rely on the Aarhus Convention.²⁷

In contrast to the general rules of Article 19 TEU and Article 47 of the Charter, the Aarhus Convention specifically addresses environmental law. Article 9(3) provides that members of the public shall have access to administrative or judicial procedures to challenge acts, which contravene environmental law.

Initially, the Court of Justice of the European Union found that this provision was not directly applicable as part of EU law because state parties remain free to define criteria for this action.²⁸

23| See now Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ L 152, 11.6.2008, p. 1).

24| Judgment of 25 July 2008, *Janecek*, C-237/07, [EU:C:2008:447](#), paragraphs 37 to 39.

25| Judgment of 3 October 2019, *Wasserleitungsverband Nördliches Burgenland and Others*, C-197/18, [EU:C:2019:824](#), paragraphs 35 and the following.

26| Judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre* (Liability of the State for air pollution), C-61/21, [EU:C:2022:1015](#), paragraphs 55 and 56. However, such rights to damages must be distinguished from the rights that consumers derive from product standards aiming to protected air quality; see Judgment of 21 March 2023, *Mercedes-Benz Group* (Liability of manufacturers of vehicles fitted with defeat devices), C-100/21, [EU:C:2023:229](#).

27| Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus (Denmark) on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

28| Judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, [EU:C:2011:125](#), paragraphs 44 and 45.

Later, however, the Court of Justice considered – in light of Article 47 of the Charter – that the discretion that Member States enjoy in this regard is limited. In particular, they cannot set criteria that exclude recognised environmental NGOs from access to courts.²⁹

In practice, therefore, EU environmental law not only sets ambitious standards of protection, but also enables directly concerned individuals and recognised environmental NGOs to enforce these standards. Where EU environmental law exists and Member States are not willing to enact stronger protection, there is scope for diversity only within the framework of the relevant provisions; for example, derogations could provide such flexibility, or there could be rules that set certain objectives without specifying the means of achieving them.

4. Conclusion

This brief glance at EU law and the jurisprudence of the Court of Justice of the European Union on gender rights and environmental law has shown that, despite the tremendous differences between these areas, the Court of Justice applies the concept of effective legal protection to ensure the effectiveness of EU law. Where EU law provides for intensive harmonisation, as in the field of environmental protection, the Court of Justice ensures that individuals and specialised NGOs can enforce the harmonised rules. Conversely, in an area such as gender rights, where EU law, in principle, provides only very limited common rules, the Court of Justice guarantees the effective exercise of the limited rights granted by EU law, while respecting those areas where EU law leaves room for diversity between Member States.

However, the next challenge is an infringement procedure against Hungarian legislation on content and advertising that promotes or portrays gender identities that do not correspond to the sex assigned at birth, sex reassignment or homosexuality.³⁰ Such materials may not be made available to children, in particular by media, but also by certain professions. According to the European Commission, these rules infringe certain directives on the internal market and in particular Articles 1, 7, 11 and 21 of the Charter, as well as Article 2 TEU.

29| Judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C-664/15, [EU:C:2017:987](#), paragraphs 46 and 47; Judgment of 8 November 2022, *Deutsche Umwelthilfe (Approval of motor vehicles)*, C-873/19, [EU:C:2022:857](#), paragraphs 67 and 68.

30| Pending case, *Commission v Hungary*, C-769/22.



M. Frédéric Krenc

Juge à la Cour européenne des droits de l'homme

Contribution de M. Frédéric Krenc, Juge à la Cour européenne des droits de l'homme

La Convention européenne des droits de l'homme : un « instrument vivant » pour les générations présentes et futures

Dans le temps qui m'est imparti, je voudrais partager avec vous quelques réflexions, de toute évidence non exhaustives, sur la protection des générations actuelles et futures, et je le ferai au regard de la Convention européenne des droits de l'homme et de la jurisprudence de la Cour que j'ai l'honneur de servir.

1. Introduction

En prélude à mes réflexions, je voudrais souligner trois éléments qu'il me paraît essentiel de rappeler d'entrée.

Le premier tient à l'objet et au but de la Convention européenne des droits de l'homme. La Convention est – personne ne l'ignore – un traité international qui consacre des droits fondamentaux. Cependant, ce traité ne vise pas à l'uniformité au sein des États parties. Il garantit un socle minimal de droits que les États sont libres de compléter, d'affiner, conformément à leurs règles internes respectives et à leurs traditions constitutionnelles.

Le deuxième élément concerne le rôle de la Cour européenne des droits de l'homme (ci-après la « Cour EDH »). La Cour EDH est une juridiction qui opère dans le cadre d'un traité auquel elle doit donner tout son sens, mais dont elle ne peut s'affranchir. Autrement dit, la Cour EDH n'est pas un supra-législateur libre de décider sans contrainte et habilité à imposer de manière hégémonique sa propre vision du monde aux États et à leurs organes.

Troisièmement, la Cour EDH est une juridiction internationale dont l'office est subsidiaire. C'est-à-dire que la Cour EDH n'intervient qu'après les juridictions nationales. La subsidiarité place en effet les juridictions nationales au centre du système de la Convention. Ce sont elles qui assument, au plus près des individus, des faits et des réalités, la responsabilité première d'appliquer la Convention. Le contrôle de la Cour EDH est ultime et auxiliaire.

Dans ce contexte, le rôle de la Cour européenne des droits de l'homme n'est pas d'éradiquer la diversité qui caractérise et, en même temps, enrichit la Grande Europe, celle des 46 États. Le rôle de la Cour EDH est – comme l'intitulé de la présente rencontre le met fort justement en exergue – de garantir l'unité dans la diversité. Il s'agit de veiller au respect de droits fondamentaux qui sont le reflet de valeurs communes, tout en observant l'autonomie des autorités nationales pour le surplus¹.

Ces rappels me paraissent essentiels avant d'envisager la question relative à la protection des générations actuelles et futures au regard de la Convention.

2. Un « instrument vivant »

Pour répondre à cette question, il me faut commencer par rappeler que la Convention européenne des droits de l'homme constitue un « instrument vivant »². La Cour EDH l'a énoncé pour la première fois en 1978 dans son arrêt *Tyrer c. Royaume-Uni*³. Ainsi, la Convention n'est pas un texte inerte dont le sens est définitivement arrêté à l'état de la société de 1950. Elle « est un instrument vivant à interpréter à la lumière des conditions de vie actuelles et des conceptions prévalant de nos jours dans les États démocratiques »⁴.

1 | Voir Krenc, F., *Une Convention et une Cour pour les droits fondamentaux, la démocratie et l'État de droit en Europe*, 2023, Anthemis-LGDJ.

2 | « La Convention européenne des droits de l'homme : un instrument vivant de 70 ans », *Dialogue entre juges*, Cour européenne des droits de l'homme, Conseil de l'Europe, 2020, disponible sur https://www.echr.coe.int/documents/d/echr/Dialogue_2020_FRA#:~:text=En%202020%2C%20la%20Convention%20europ%C3%A9enne,l'%C3%A9volution%20de%20nos%20soci%C3%A9t%C3%A9s.

3 | Cour EDH, 25 avril 1978, *Tyrer c. Royaume-Uni*, Requête n° 5856/72, [CE:ECHR:1978:0425JUD000585672](#), § 31.

4 | Parmi de nombreux autres, Cour EDH, 7 juillet 2011, *Bayatyan c. Arménie*, Requête n° 23459/03, [CE:ECHR:2011:0707JUD002345903](#), § 102. Pour un constat similaire relatif la Charte des droits fondamentaux de l'Union européenne, arrêt du 17 décembre 2020, *Centraal Israëlitisch Consistorie van België e.a.*, C-336/19, [EU:C:2020:1031](#), point 77.

2.1 L'évolution des « conditions de vie »

La Cour EDH prend donc, tout d'abord, en considération l'évolution des conditions de vie. Elle a ainsi été amenée à tenir compte des évolutions induites par les nouvelles technologies et, en particulier, par l'essor du numérique.

C'est ainsi, pour ne prendre qu'un exemple, que la Cour EDH a été naturellement conduite à considérer que la « correspondance » protégée par l'article 8 de la Convention européenne des droits de l'homme inclut les courriers électroniques ⁵.

En vérité, le numérique confronte la Cour EDH à un grand nombre de questions nouvelles au regard de la Convention. Je me bornerai simplement à relever deux arrêts très récents rendus par la Grande Chambre : l'arrêt *Sanchez c. France* du 15 mai 2023 concernant la condamnation pénale d'un homme politique pour ne pas avoir promptement supprimé des commentaires illicites publiés par des tiers sur son compte Facebook et, plus récemment encore, l'arrêt *Hurbain c. Belgique* du 4 juillet 2023 dans lequel la Cour EDH, en dialogue avec la jurisprudence *Google Spain* de la Cour de justice ⁶, a précisé les conditions sous lesquelles un « droit à l'oubli » peut être invoqué.

Parallèlement, la Cour EDH a déjà connu de contentieux relatifs à la surveillance de masse ⁷. Et nul doute que, dans un proche avenir, elle sera confrontée aux questions suscitées par l'intelligence artificielle.

5| Cour EDH, 3 avril 2007, *Copland c. Royaume-Uni*, Requête n° 62617/00, [CE:ECHR:2007:0403JUD006261700](#), § 41. Voir également Cour EDH, 5 septembre 2017, *Bărbulescu c. Roumanie*, Requête n° 61496/08, [CE:ECHR:2017:0905JUD006149608](#).

6| Arrêt du 13 mai 2014, *Google Spain et Google*, C-131/12, [EU:C:2014:317](#).

7| Voir notamment les arrêts de la Cour EDH, 25 mai 2021, *Big Brother Watch et autres c. Royaume-Uni*, Requêtes n°s 58170/13, 62322/14 et 24960/15, [CE:ECHR:2021:0525JUD005817013](#); Cour EDH, 25 mai 2021, *Centrum för Rättvisa c. Suède*, Requête n° 35252/08, [CE:ECHR:2021:0525JUD003525208](#).

2.2 L'évolution des « conceptions prévalant dans les États démocratiques »

Outre les conditions de vie actuelles, la Cour EDH tient compte des « conceptions prévalant de nos jours dans les États démocratiques ». Comme l'a énoncé le célèbre arrêt *Marckx*, ce qui pouvait passer pour « licite et normal » au moment où la Convention européenne des droits de l'homme fut rédigée, peut s'avérer par la suite incompatible avec celle-ci ⁸.

À cet égard, l'arrêt *Al-Saadoon et Mufdhi c. Royaume-Uni* du 2 mars 2010 offre un exemple notable d'une telle interprétation évolutive. Il concerne la peine de mort. Celle-ci, au moment où la Convention fut rédigée, n'était pas prohibée par l'article 2. Une exception est et reste expressément prévue par l'article 2. Toutefois, dans l'arrêt *Al-Saadoon*, la Cour EDH a pris acte de l'évolution vers l'abolition de la peine de mort au sein des États membres du Conseil de l'Europe, pour énoncer solennellement ensuite que « l'article 2 de la Convention interdit aujourd'hui la peine de mort en toutes circonstances » ⁹.

3. La protection des personnes LGBTI

L'arrêt *Fedotova et autres c. Russie* constitue une autre illustration insigne et récente de l'interprétation évolutive ancrée sur les valeurs démocratiques qui sous-tendent la Convention européenne des droits de l'homme. Dans cet arrêt du 17 janvier dernier, la Cour EDH réunie en Grande Chambre a jugé que l'article 8 de la Convention impose aux États parties « d'offrir un cadre juridique permettant aux personnes de même sexe de bénéficier d'une reconnaissance et d'une protection adéquates de leurs relations de couple » ¹⁰.

Pour asseoir cette obligation positive, la Cour EDH a pris soin de retracer l'évolution de sa jurisprudence qui, avec l'arrêt *Dudgeon* de 1981 ¹¹, avait commencé par la protection des aspects

8 | Cour EDH, 13 juin 1979, *Marckx c. Belgique*, Requête n° 6833/74, [CE:ECHR:1979:0613JUD000683374](#), § 41.

9 | Cour EDH, 2 mars 2010, *Al-Saadoon et Mufdhi c. Royaume-Uni*, *Al-Saadoon et Mufdhi c. Royaume-Uni*, Requête n° 61498/08, [CE:ECHR:2010:0302JUD006149808](#), § 120.

10 | Cour EDH, 17 janvier 2023, *Fedotova et autres c. Russie*, Requêtes n°s 40792/10, 30538/14 et 43439/14, [CE:ECHR:2023:0117JUD004079210](#), § 178.

11 | Cour EDH, 22 octobre 1981, *Dudgeon c. Royaume-Uni*, Requête n° 7525/76, [CE:ECHR:1981:1022JUD000752576](#).

les plus intimes de la vie des personnes homosexuelles, avant de s'intéresser par la suite à la protection du couple ¹². L'arrêt Fedotova parachève en quelque sorte cette évolution.

En soutien de son interprétation, la Cour EDH a mobilisé les valeurs propres à la société démocratique promue par la Convention européenne des droits de l'homme qui se traduisent par « le pluralisme, la tolérance et l'esprit d'ouverture » ¹³. Elle a notamment récusé l'idée selon laquelle la protection de la famille traditionnelle ou l'opinion publique majoritaire pourraient valablement justifier l'exclusion des couples de même sexe d'une reconnaissance et d'une protection juridiques. Pour la Cour EDH, « il serait en effet incompatible avec les valeurs sous-jacentes à la Convention qu'un groupe minoritaire ne puisse exercer les droits qu'elle garantit qu'à la condition que cela soit accepté par la majorité » ¹⁴. La Cour EDH a expressément tenu à souligner que la société démocratique « a pour socle l'égale dignité des individus et [qu']elle se nourrit de la diversité qu'elle perçoit comme une richesse et non comme une menace » ¹⁵.

Par ailleurs, la Cour EDH a pu s'appuyer à titre confortatif sur une « tendance nette et continue » observable au sein des États membres du Conseil de l'Europe en faveur de la reconnaissance et de la protection des couples de même sexe ¹⁶.

12| Cour EDH, 17 janvier 2023, Fedotova et autres c. Russie, Requêtes n^{os} 40792/10, 30538/14 et 43439/14, [CE:ECHR:2023:0117JUD004079210](#), §§ 156 à 164 où la Cour EDH s'est référée notamment aux arrêts de la Cour EDH du 7 novembre 2013, Vallianatos et autres c. Grèce, Requêtes n^{os} 29381/09 et 32684/09, [CE:ECHR:2013:1107JUD002938109](#) ; du 21 juillet 2015, Oliari et autres c. Italie, Requêtes n^{os} [CE:ECHR:2015:0721JUD001876611](#) ; du 14 décembre 2017, Orlandi et autres c. Italie, Requêtes n^{os} 26431/12, 26742/12, 44057/12 et 60088/12, [CE:ECHR:2017:1214JUD002643112](#).

13| Cour EDH, 17 janvier 2023, Fedotova et autres c. Russie, Requêtes n^{os} 40792/10, 30538/14 et 43439/14, [CE:ECHR:2023:0117JUD004079210](#), § 179.

14| Ibidem, § 218.

15| Ibidem, § 180.

16| Ibidem, §§ 175 et 178.

Pour autant, si elle énonce une obligation positive de reconnaissance et de protection, la Cour EDH laisse, ici comme ailleurs, le « choix des moyens » aux autorités nationales. Celles-ci disposent d'une marge d'appréciation quant à la forme de cette reconnaissance et quant au contenu de cette protection, cette reconnaissance et cette protection ne devant pas prendre nécessairement la forme du mariage ¹⁷.

De mon point de vue, l'arrêt Fedotova met fort bien en lumière cette dialectique unité-diversité qui est au centre de nos discussions.

Unité requise par les valeurs démocratiques qui fondent la Convention européenne des droits de l'homme et sur lesquelles il n'est pas possible de transiger.

Diversité à travers la marge d'appréciation allouée aux États quant à la traduction concrète de ces mêmes valeurs par un régime juridique adéquat pour les couples de même sexe.

Une autre question dont le contentieux gagne en importance en Europe, concerne les personnes intersexuées. Nous savons que certaines juridictions constitutionnelles ont déjà connu de cette question.

Je songe à l'arrêt de la Cour constitutionnelle fédérale allemande du 10 octobre 2017 ¹⁸.

Je songe aussi à l'arrêt de la Cour constitutionnelle belge du 19 juin 2019 ¹⁹.

L'une comme l'autre ont considéré que l'impossibilité pour les personnes dont le genre est non binaire, d'obtenir une modification du sexe mentionné dans l'acte de naissance était contraire aux normes fondamentales dont ces juridictions assurent le respect. Se fondant tantôt sur le droit à la protection de la personnalité, tantôt sur le droit à l'autodétermination, ces deux juridictions constitutionnelles ont estimé que cette impossibilité était discriminatoire.

17| Ibidem, § 188.

18| Arrêt de la Cour constitutionnelle fédérale allemande du 10 octobre 2017, 1 BvR 2019/16, [ECLI:DE:BVerfG:2017:rs20171010.1bvr201916](https://www.bverfgericht.de/verfges/verf2017/20171010.1bvr201916).

19| Arrêt de la Cour constitutionnelle belge du 19 juin 2019, [n° 99/2019](https://www.courconst.be/jurisprudence/2019/06/19/20190619_001).

Pour sa part, la Cour EDH a rendu le 31 janvier dernier l'arrêt *Y c. France* dans lequel elle a considéré que le refus des autorités françaises d'inscrire la mention « neutre » ou « intersexe » sur l'acte de naissance d'une personne intersexuée à la place de « masculin » n'a pas violé l'article 8 de la Convention européenne des droits de l'homme. Elle s'est référée aux motifs invoqués par les autorités françaises qu'elle a jugé pertinents, ainsi qu'à l'absence de consensus européen en la matière, pour estimer que ces mêmes autorités n'avaient pas méconnu les obligations positives leur incombant au titre de la protection de la vie privée ²⁰.

La Cour européenne des droits de l'homme a toutefois laissé la porte ouverte à une évolution ultérieure de sa jurisprudence, rappelant que « la Convention est un instrument vivant » et qu'il y a lieu de tenir compte de « l'évolution de la société et de l'état des consciences » ²¹.

Cette question nous montre que les juridictions nationales, en l'occurrence les juridictions constitutionnelles, peuvent aller au-delà des exigences de la Convention, telles qu'interprétées actuellement par la Cour EDH. Telle est l'essence même de la subsidiarité. Le fait pour un État de ne pas suivre le mouvement à l'œuvre ne constitue pas une violation de la Convention, mais pourrait l'être à l'avenir.

D'aucuns ne manqueront pas d'établir ici un parallèle avec l'évolution de la jurisprudence intervenue en 2002 concernant les droits des personnes transsexuelles, où la Cour EDH, en rupture avec sa jurisprudence antérieure, finit par imposer par ses arrêts *Goodwin* ²² et *I.* ²³, l'obligation aux États parties de reconnaître les changements de sexe des personnes transsexuelles ayant subi une opération de conversion.

20| Cour EDH, 31 janvier 2023, *Y. c. France*, Requête n° 76888/17, [CE:ECHR:2023:0131JUD007688817](#).

21| *Ibidem*, § 91.

22| Cour EDH, 11 juillet 2002, *Goodwin c. Royaume-Uni*, Requête n° 28957/95, [CE:ECHR:2002:0711JUD002895795](#).

23| Cour EDH, 11 juillet 2002, *I. c. Royaume-Uni*, Requête n° 25680/94, [CE:ECHR:2002:0711JUD002568094](#).

4. L'urgence climatique

Outre les questions liées à la protection des personnes LGBTI, l'environnement et le climat sont au centre de toutes les préoccupations et au cœur de tous les discours. Je ne m'étendrai pas longuement sur le sujet car trois affaires sont actuellement pendantes devant la Grande Chambre de la Cour européenne des droits de l'homme ²⁴.

Je voudrais simplement dire ceci ²⁵.

On sait que, dans l'attente de l'adoption éventuelle d'un nouveau protocole additionnel, la Convention européenne des droits de l'homme ne garantit pas, en tant que tel, un droit à un environnement sain et durable. Ce n'est pas à dire cependant que les questions environnementales sont étrangères à la Convention ni qu'elles échappent à la compétence judiciaire de la Cour EDH.

La Cour EDH connaît de ces questions chaque fois que les droits garantis par la Convention européenne des droits de l'homme se trouvent en jeu. On parle, en ce sens, d'une « protection par ricochet » ²⁶. Concernant le droit à la vie consacré par l'article 2 de la Convention, on songe notamment à l'affaire Öneriyıldız c. Turquie ²⁷. S'agissant du droit au respect de la vie privée et du domicile garanti par l'article 8 de la Convention, on pense entre autres à l'affaire Cordella c. Italie ²⁸.

24| Affaires pendantes devant la Cour EDH : Verein Klimaseniorinnen Schweiz et autres c. Suisse (n°53600/20) ; Carême c. France (n°7189/21) ; Duarte Agostinho et autres c. Portugal et 32 États (n°39371/20).

25| Je me permets de renvoyer pour de plus amples développements à Krenc F., « La Cour européenne des droits de l'homme : prétoire pour les contentieux environnementaux et climatiques ? », Liber amicorum Robert Spano, Anthemis, 2022, pp. 377-392.

26| Sudre F., Milano L., Pastre-Belda B. et Schahmanèche A., Droit européen et international des droits de l'homme, 16ème éd., PUF, 2023, p. 763.

27| Cour EDH, 30 novembre 2004, Öneriyıldız c. Turquie, Requête n° 48939/99, [CE:ECHR:2004:1130JUD004893999](#).

28| Cour EDH, 24 janvier 2019, Cordella et autres c. Italie, Requêtes n°s 54414/13 et 54264/15, [CE:ECHR:2019:0124JUD005441413](#). Voir aussi plus récemment l'arrêt de la Cour EDH du 11 octobre 2022, Pavlov et autres c. Russie, Requête n° 31612/09, [CE:ECHR:2022:1011JUD003161209](#)

La Cour EDH est donc – une abondante jurisprudence en atteste – déjà un « juge de l'environnement ».

Mais peut-elle être le « juge du climat » ²⁹ ?

La Convention européenne des droits de l'homme repose sur une dimension individuelle : « Nul ne peut ... » ; « Toute personne a droit ... ». Seul l'individu concerné par des mesures imputables à un État et déployant ses effets sur un territoire national est a priori visé par la Convention. Aussi, la saisine individuelle de la Cour EDH est conditionnée par la démonstration de la qualité de « victime » (article 34 de la Convention), et l'engagement de la responsabilité de l'État devant la Cour est subordonné à l'exercice par celui-ci de sa « juridiction » au sens de l'article 1^{er} de la Convention. Pour d'aucuns, il s'agit là d'autant d'obstacles à l'appréhension par la Cour des questions climatiques dès lors qu'elles revêtent un caractère global en ce sens qu'elles dépassent des situations purement individuelles et ont des causes et/ou des effets transfrontières.

D'autres objectent que ces obstacles ne sont pas dirimants.

Il reviendra à la Cour EDH de se prononcer.

Quelle que soit la réponse qui sera donnée la Cour EDH, il me paraît évident que la Cour EDH ne pourra résoudre à elle seule la question climatique. Mais il me paraît tout aussi évident que nous, juges nationaux et européens, avons une responsabilité partagée en ce domaine.

À cet égard, il me plaît de relever le rôle pionnier des juridictions nationales. Assumant leur rôle de juges de droit commun de la Convention européenne des droits de l'homme, celles-ci n'hésitent pas à mobiliser la Convention à l'appui de leurs décisions. On sait que sur la question climatique, l'impulsion est venue ici même du Hoge Raad avec l'arrêt Urgenda du 20 décembre 2019 ³⁰. Un grand nombre de hautes juridictions nationales ont ensuite suivi le mouvement.

29| Sur cette question, voir les actes du colloque « Droits de l'homme pour la planète » organisé le 5 octobre 2020 à la Cour européenne des droits de l'homme, qui ont fait l'objet d'une [publication](#) par le Conseil de l'Europe.

30| Arrêt de la Cour suprême des Pays-Bas du 20 décembre 2019, 19/00135, [ECLI:NL:HR:2019:2007](#).

Ces décisions montrent, s'il en était besoin, que la Cour EDH n'a pas le monopole de la Convention et que celle-ci est appelée à être mobilisée prioritairement par le juge national.

5. La protection des « générations futures » et la « solidarité intergénérationnelle »

À mes yeux, la question environnementale et climatique appelle une réflexion plus large sur les droits des « générations futures » et la notion de « solidarité intergénérationnelle ».

Il est ainsi remarquable de relever que dans sa décision du 24 mars 2021 concernant la loi fédérale relative au changement climatique ³¹, la Cour constitutionnelle allemande s'est fondée sur la notion de « générations futures » inscrite dans la Loi fondamentale allemande à l'article 20 a).

Le Conseil constitutionnel français s'est référé à cette même notion dans une décision du 12 août 2022 ³².

Plus récemment encore, la Cour internationale de Justice a été invitée, par une résolution de l'Assemblée générale des Nations Unies du 29 mars dernier, à préciser dans un prochain avis consultatif les obligations incombant aux États dans le cadre de la lutte contre le réchauffement climatique « pour les générations présentes et futures » ³³.

31| Arrêt de la Cour constitutionnelle fédérale allemande du 24 mars 2021, 1 BvR 2656/18, [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618](https://www.bverfgericht.de/DE/VerfG/2021/rs20210324.1bvr265618.html).

32| Décision du Conseil constitutionnel français du 12 août 2022, n° 2022-843 DC, [ECLI:FR:CC:2022:2022.843.DC](https://www.conseil-constitutionnel.fr/document/2022-843-DC.pdf).

33| Assemblée générale des Nations unies, Demande d'avis consultatif de la Cour internationale de Justice sur les obligations des États à l'égard des changements climatiques du 29 mars 2023, disponible sur <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/063/83/PDF/N2306383.pdf?OpenElement>.

Si la notion de « solidarité intergénérationnelle » se voit essentiellement mobilisée dans le cadre climatique, elle concerne également l'état des dettes publiques, la sécurité sociale mais aussi la préservation de nos patrimoines culturels.

L'idée tient en ce que les choix opérés aujourd'hui ne peuvent compromettre la capacité des générations futures à satisfaire leurs propres besoins demain.

Il convient de relever que de son côté, la Cour a indiqué à plusieurs reprises que la Convention européenne des droits de l'homme ne consacre pas la souveraineté de l'individu au détriment de la collectivité. Elle a ainsi reçu des notions telles que le « vivre ensemble » ³⁴ ou la « solidarité sociale » ³⁵ aux fins de justifier des ingérences dans les droits fondamentaux consacrés par la Convention.

Ces concepts ont certes été mobilisés dans des contextes spécifiques et différents, et il faut bien sûr se garder de toute généralisation. Pour autant, ces concepts confirment au moins une évidence : la Convention européenne des droits de l'homme ne promeut pas la maximisation des désirs personnels sans se soucier d'autrui ni de la collectivité. La Convention est, au contraire, source d'obligations et de responsabilités, en ce compris pour les individus, afin de tendre vers une égale jouissance par chacun des droits qu'elle garantit.

34| Cour EDH, 1er juillet 2014, S.A.S. c. France, Requête n° 43835/11, [CE:ECHR:2014:0701JUD004383511](#).

35| Cour EDH, 8 avril 2021, Vavříčka et autres c. République tchèque, Requêtes nos 47621/13 et 5 autres, [CE:ECHR:2021:0408JUD004762113](#).

6. Conclusion

De toute évidence, la Cour européenne des droits de l'homme est investie d'une responsabilité immense envers les générations actuelles et futures. Il s'agit de faire en sorte que la Convention européenne des droits de l'homme soit un instrument vivant, adapté aux réalités d'aujourd'hui et capable de répondre aux défis de demain. La Convention n'a pas vocation à régir la société du siècle dernier. Elle vise à créer pour les années à venir les conditions d'une vie paisible, digne et durable en Europe ³⁶.

Dans l'exercice de sa mission, la Cour EDH n'est fort heureusement pas seule. Elle partage cette responsabilité avec l'ensemble des juridictions nationales et, en particulier, avec les juridictions constitutionnelles dont le rôle est majeur.

Elle est par ailleurs en dialogue continu avec la Cour de justice de l'Union européenne dont la jurisprudence entend préserver les mêmes valeurs que celles qui sont au cœur de la Convention européenne des droits de l'homme.

Quelle planète, quelle société allons-nous léguer à celles et ceux qui seront appelés à y vivre ? Notre mission est, et doit rester, strictement judiciaire, mais elle n'en est pas moins cruciale.

Je vous remercie de votre attention.

36 | Voir Krenc, F., *Une Convention et une Cour pour les droits fondamentaux, la démocratie et l'État de droit en Europe*, précité.



Ms Carla Sieburgh, Judge at the Dutch Supreme Court
and Mr Francis Delaporte, President of the Luxembourg Supreme Administrative Court,
Vice-President of the Luxembourg Constitutional Court



Ms Carla Sieburgh

Judge at the Dutch Supreme Court

Contribution by Ms Carla Sieburgh, Judge at the Dutch Supreme Court

Constitutional Adjudication in the Netherlands: Legal protection by the Ordinary (Civil) Judge and the General Clause of Tort Law as the Entries to Unity

In this paper some aspects of Constitutional adjudication in the Netherlands will be discussed; more specifically, the legal protection by the ordinary (civil) judge and the general clause of tort law as the entries to unity in diversity. Before elaborating upon the following three themes, i) current and future generations, ii) international and supranational law as an accelerator and iii) diversity and unity, I will briefly sketch the landscape of constitutional protection by the judiciary in the Netherlands.

1. Landscape of legal protection through constitutional adjudication in the Netherlands

While a Dutch landscape often is visualised as flat, the landscape of constitutional protection by the Dutch judiciary could be compared with the fascinating interplay we see if we look at a mountain chain. For the judiciary, this landscape is characterised by:¹

1. The absence of a separate constitutional court. Article 112 of the Dutch Constitution² stipulates that civil courts have jurisdiction over all claims so that they can always grant legal protection if no legal protection is offered by another court.

1 | Adviezen van 31 oktober 1991 en 11 november 1997 van de President van en de Procureur-Generaal bij de Hoge Raad naar aanleiding van het voorlopig kabinetsstandpunt over constitutionele toetsing door de rechter, available at <https://www.hogeraad.nl/over-ons/publicaties/wetgevingsadviezen-president-procureur-generaal/>; De Groot, G., "The potential of climate change cases for a sustained and resilient judiciary", *Conference for the Presidents of the Constitutional Courts of Europe on "Climate Change as a Challenge for Constitutional Law and Constitutional Courts"*, Berlin, 4-5 May 2023, available at <https://www.hogeraad.nl/over-ons/raad/toespraken-president/>.

2 | The Constitution of the Kingdom of the Netherlands 2018.

2. Each judge is (if necessary) a constitutional judge. The Dutch Constitution charges the Supreme Court with *cassation* of these judgments.
3. Constitutional law, including fundamental rights law, is part of review of all types of acts of the three state powers, being legislator (Parliament), government [executive (factual acts, implementing measures, orders)], and judiciary.
4. The three state powers – and therefore constitutional review by the judge – are founded on and revolve in an orbit around an invariable given: the rule of law-based democracy.
5. Whilst providing legal protection, the judge is aware of the limitations of courts in the political process. Evidently, he respects the margin of appreciation. Moreover, instead of giving an order to the state right away, he may choose to first give a signal to the legislator, to offer the legislator time to repair a part of the law that is unconstitutional. And if the judge provides for recovery, he tailors the remedies (see point 8). Particularly when legislation is challenged, the remedies courts may impose are limited. Courts should not intervene in the political decision-making process involved in the creation of legislation. Besides, an order by the court cannot bind parties other than the parties to the proceedings (the decision is only binding between the parties to the dispute [Article 236 Dutch Code of Civil Proceedings]).³ Therefore, the judge is not allowed to order the legislator to adopt or create legislation, or to adjust the substance of an existing law in a specified way.
6. Constitutional law, including fundamental rights law, may be of importance for decisions in cases between an individual/private party against the state, and between a private party against another private party (e.g. in the review of an applicable rule or as a viewpoint when filling in an open norm). Constitutional adjudication can be at stake in a so-called ‘collective or class action’ (Article 3:305a Dutch Civil Code), which enables interest organisations and groups to bring class action suits, representing interests of individuals or general interest issues (e.g. an obligation pursuant Articles 2 and 8 of the European Convention on

3 | Code of Civil Procedure of the Netherlands.

Human Rights) against the state or – on the basis of an open norm of private law – against another individual. Pooling the interests of residents promotes efficient and effective legal protection.

7. In the Netherlands, constitutional review by the judiciary has one very clear demarcation: the judge is not allowed to review Acts of Parliament and treaties (Article 120 Dutch Constitution) against the Dutch Constitution nor against unwritten general principles of national law. However, on the basis of both Article 94 Dutch Constitution and of positive treaty obligations, the judge is under an obligation to review acts of Parliament against provisions of international and supranational law, including fundamental rights instruments such as the European Convention on Human Rights, the general principles of EU law, and the Charter of Fundamental Rights of the European Union. As a consequence, the international and supranational constitutional sources have been, and continue to be, of paramount importance.
8. Regarding the practical aspects of the approach of courts: in the Netherlands the judge is, on a case-to-case basis, asked for constitutional review – for example of factual acts or of legislation (and ultimately of court decisions) – which means that the remedy is neatly tailored to the case at hand. Legal protection is being moulded organically from the bottom-up.
9. Given the type of cases I will deal with today – the climate case against the Netherlands (*Urgenda*)⁴ and the case on behalf of Dutch families of fighters of the Islamic State who were in Syria⁵ – I limit myself to constitutional review by the civil judge. This review is mainly situated in the law of torts and takes place on the basis of the general and open norm to determine whether an act is unlawful. An act is 'unlawful' if an act or omission violates a rule of unwritten law pertaining to proper social conduct (duty of care). This ground for a claim has been for

4 | Judgment of the Dutch Supreme Court of 20 December 2019, *Urgenda*, [ECLI:NL:HR:2019:2007](https://eclis.nl/hr/2019/2007).

5 | Judgment of the Dutch Supreme Court of 26 June 2020, [ECLI:NL:HR:2020:1148](https://eclis.nl/hr/2020/1148).

decades a well-established sensor for detecting new developments in society.⁶ For example, it brought to the surface the right to strike.⁷

10. If an act is found to be unlawful, the typical remedies are damages and orders (injunction or prohibition) (Article 3:296 Dutch Civil Code). These remedies enable the judge to provide for effective legal protection, in conformity with Article 13 European Convention of Human Rights and Article 47 Charter of Fundamental Rights of the European Union.

2. Legal protection by the ordinary (civil) judge

2.1 Current and future generations

Implying or targeting future generations in the review of factual acts and legislation is a topic that is relatively recently put on the 'agenda' and is highly debated.

I acknowledge that bringing future generations into the picture regarding court decisions is not an easy part of our work. At the same time, I would like to emphasise that it is also not a new part of our work. Future generations have been covered by the law and have been a part of legal thinking for ages, both as objects and as subjects. For example, family law deals explicitly with the legal status of children to be born in the future.⁸

As far as human rights law is concerned, it is crystal clear that these provisions not only cover those who exists in the here and now, but also who will be born tomorrow, next year, etc. The future is undeniably built in to these provisions; they have an aspirational element. They radiate the ambition to protect individuals in the here and now, but at least as important as this is the object to safeguard and protect individuals who will be born in the near and further future. Thus, behavior that threatens these rights and freedoms in the future can, at least in theory, be subject to judicial review.

6| Hartkamp, A., *European Law and National Private Law: Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, Intersentia, Cambridge, 2016.

7| Judgment of the Dutch Supreme Court of 30 May 1986, [ECLI:NL:HR:1986:AC9402](#).

8| Gaillard, É., *Génération futures et droit privé: Vers un droit des générations futures*, Thèse Paris II, LGDJ, Paris, 2011.

More difficult is to determine what is required to bring a case before the courts on behalf of future generations and to remedy an (actual or impending) breach with a justiciable right.

The Dutch climate case *Urgenda* may serve as an example.

A couple of the elements discussed under section 1 above are of relevance. I limit myself to the techniques used to address the future and future generations.

The Dutch Climate case *Urgenda* refers to the fact that Article 3 United Nations Framework Convention on Climate Change explicitly addresses future generations.⁹

Besides, Articles 2 and 8 European Convention on Human Rights address society as a whole. The foreseeable future is, like the past, part of the here and now – so to safeguard the future freedoms of the existing generations, a future reduction of greenhouse gas emissions is required and can be a basis for review of legislation or factual acts.¹⁰

In the German climate case, a comparable reasoning has been used.¹¹ Article 20a of the German Basic Act¹² protects natural foundations of life also for the future of the already existing generations. The legislator's decisions are unconstitutional as they create a disproportionate risk that the freedom protected by fundamental rights will be impaired in the future.

The crux in both the German and the Dutch case is the acknowledgement that, for fundamental rights to have substantive effect for the current generation, they have to reach out to the future of the current generation, which indirectly reaches out to future generations. The link between the current and future generations results in a justiciable right.

9| United Nations Framework Convention on Climate Change, 1992, FCCC/INFORMAL/84 GE.05-62220 (E) 200705.

10| See in more detail Schutgens, R., and Sillen, J., *Algemeenbelangacties bij de burgerlijke rechter, Preadvies Vereniging voor de vergelijkende studie van het recht van België en Nederland 2020/21*, Boomjuridisch Den Haag, Antwerpen, 2021, p. 155 e.v.; Cornelis, L., *Bescherming van klimaat, biodiversiteit en ecosystemen middels subjectieve rechten*, March 2022, available at <https://www.lawbackontrack.org/nl/publicaties/bescherming-van-klimaat-biodiversiteit-en-ecosystemen-middels-subjectieve-rechten>; Loth, M.A., *Stemmen door de tijd; over intergenerationele zorgplichten in het aansprakelijkheidsrecht*, Tilburg University, Tilburg, 2023.

11| Judgment of the German Federal Constitutional Court of 24 March 2021, *Klimaschutz*, 1 BvR 2656/18, [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618](https://www.bverfgericht.de/decisions/ECLI:DE:BVerfG:2021:rs20210324.1bvr265618).

12| Basic Law for the Federal Republic of Germany, classification number 100-1, as last amended by the Act of 19 December 2022 (*Federal Law Gazette I*, p. 2478).

However, until now, the Dutch court did not acknowledge a justiciable right with respect to a breach that will take place in the future and that will not limit the freedom of the existing generations but merely the freedom of future generations. One may wonder whether it would, in clearly defined cases, be desirable to recognise the interest of the future generation as a general interest that may be protected by the courts at present? How about the dumping of poisonous waste in sea, in barrels that are completely safe as of now, but that will corrode after 300 years and start to leak?¹³ As has been said before by one of the other contributors:¹⁴ as judges we have ever more the responsibility to pioneer.

2.2 International and supranational law as accelerator

The agility of the general clause ('duty of care') is probably even more visible in a case in which the international law was, in its very substance, not found to be applicable.

I have in mind the case of the families of fighters of the Islamic State. The question was whether the Dutch State had the duty to repatriate these families (mothers and children) from Syria. The judges held that the Dutch authorities did not have extraterritorial jurisdiction over human rights in Syria.¹⁵ Therefore, the fundamental rights laid down in, for example, the European Convention on Human Rights were not applicable, and there was not a jurisdictional link as laid down in the case-law of the European Court of Human Rights.¹⁶ As a consequence, the Dutch state did not, on the basis of these instruments, have the duty to repatriate the families.

But, even though the Dutch State had no jurisdiction and the international instruments as such were not applicable, the international fundamental rights of the children influence the substance of the genuine duty of care under national law. The Supreme Court held that each case has to be evaluated in its own right, through an individual and case-by-case assessment.

13| This example was already given in 1988 by Nieuwenhuis, J.H., "Zij die geboren worden groeten u. Aansprakelijkheid jegens toekomstige generaties", *RM Themis* 1988, p. 359 e.v.; Nieuwenhuis answered this question in the affirmative.

14| See the contribution of Judge Krenc in this volume, paragraph 11.

15| Judgment of the Dutch Supreme Court of 26 June 2020, [ECLI:NL:HR:2020:1148](#).

16| Special circumstances may create a jurisdictional link and, in that vein, a right to enter one's own country. See the judgment of the European Court of Human Rights of 14 September 2022, *H.F. v France*, Application Nos. 24384/19 and 44234/20, [ECLI:CE:ECHR:2022:0914JUD002438419](#).

The Dutch State is under the duty to assess whether, in the circumstances of the case, it can and must make an effort to end the violation and to deflect the impending violation.

The blending-in of the international fundamental right values in the duty of care shows the openness to adopt values that have to be balanced against straightforward national public policy, such as matters of security.¹⁷

2.3 Diversity and unity

From the above, it follows that the Dutch approach to constitutional adjudication, combined with international and supranational human rights law, is open to adopting diverse values and guarantees unity. The system is open to national and international developments. The bottom up approach combined with the general clause of tort law (duty of care) enable judges to react swiftly to developments in society that are at stake in a case brought to the court. The developments in question may relate to diverse and contradicting fundamental rights and constitutional values. This diversity can flow from both national and international sources.

In his constitutional capacity, the Dutch judge relies on the Dutch Constitution, on international and supranational instruments¹⁸ and, at least as important, on the mechanisms through which these instruments take effect (e.g. the positive obligation, the possibility and obligation to review against general principles of EU law and the Charter, and to set aside a provision that is in breach of EU law or the European Convention on Human Rights).

The approach is flexible and open for diversity, yet since constitutional review does not require a separate procedure and is an integral part of decision making by the ordinary judge and ultimately by the Dutch Supreme Court, it guarantees, with respect to national and international instruments, unity on the national level and therefore coherence - nationally, internationally, supranationally, and intergenerationally.

17| On international and supranational law as accelerators: Sieburgh, C.H., "General principles and the Charter in private law relationships: constructive and critical input from private law", Chapter 10 in Bernitz, U., Groussot, X. and Schulyok F., (eds.) *General Principles of EU Law and Private Law*, Kluwer Law International, The Hague, 2013, pp. 233-247; Sieburgh, C.H., "Waarom het Unierecht de invloed van grondrechten op het privaatrecht aanjaagt en versterkt", *RM Themis* 2015, p. 3-13.

18| As seen under section 1, 8), courts are not allowed to review Acts of Parliament and treaties (Article 120 Dutch Constitution) against the Dutch Constitution nor against unwritten general principles of national law.



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The Present-Day Implications of Future Generations for Judicial Review

This contribution explores the interplay of two relationships implied in the conception of the conference as well as this panel: above all the substantive link between the current and future generations, but also, somewhat more briefly, the jurisdictional link between the European and national courts. I start, however, by taking a step back and appraising the more fundamental challenges and characteristics shaping the judicial response to the claims invoking the rights of future generations.

1. Introduction: The meeting of current and future generations

Years ago, debates on environmental obligations owed to future generations encountered the so-called ‘Parfit paradox’ – or non-identity problem – concerning our obligations towards future generations, attributed to the British philosopher Derek Parfit: assuming that, as an anthropological version of the butterfly effect, any meaningful change in our behaviour will affect the circumstances of procreation, our actions taken to safeguard the rights of individual members of future generations may result in those very members not being born.¹ To the extent

1 | See the restatement of Parfit’s thesis in the context of environmental protection in D’Amato, A., “Do We Owe a Duty to Future Generations to Preserve the Global Environment?”, *American Journal of International Law*, Vol. 84, No 1, Cambridge University Press, Cambridge, 1990, pp. 190–198; and the response in Brown Weiss, E., “Our Rights and Obligations to Future Generations for the Environment”, *American Journal of International Law*, Vol. 84, No 1, Cambridge University Press, Cambridge, 1990, pp. 198–207. Also see, more recently, Chambers, K. L., “Wronging Future Children”, *Ergo*, Vol. 6, No 5, Michigan Publishing Services, Ann Arbor, 2019, pp. 119–141.

that each generation is defined by its actual members, a paradox of sorts is thus revealed: any action taken on behalf of hypothetical members of future generations may actually result in these members never coming into existence. How, then, can we hold ourselves to be bound by obligations owed to individuals whose very lives we prevent?

This paradox is also reflected in a number of specific challenges in conceptualising law's response to climate change – and, more generally, environmental protection – in the context of fundamental rights, some of which I list below. But I wish to start by considering the ways in which it may be overcome. One possibility is for the law to recognise the interests of the environment, or nature, as self-standing legally recognised interests that ought to be protected by the courts,² as long as a suitable representative or guardian of those interests is appointed.³

Another is to recognise that, even if we remain ensconced in the traditional conception of human rights protection, the rights of future generations require of us a reassessment of the relationship between the individual and the community, as well as between the current and future generations.

On the one hand, while we often conceptualise our present-day commitments and legal standards in the form of obligations owed to future generations, these also have direct implications for the value-based 'constitutional' identity of the current generation. Individuals' biological drive to reproduce and preserve their genetic traits is reflected in societies' care for their young.⁴ It can certainly be established as the collective will of the current generation – and an element shaping its value system – that humankind should survive.⁵ In addition, it has been argued

2| Which, again, has been advanced at least since the 1970s and has for a long while been considered controversial. See e.g. the recent account of the origins and the international landscape in Scartz, A. C., "Do You Need Legs to Stand? Wild Rice Stands in Trial and an Examination of the Use of Legal Personhood to Protect the Rights of Nature in Court", *Georgia Journal of International and Comparative Law*, Vol. 51, No. 1, University of Georgia School of Law, Athens, 2022, pp. 247–252.

3| See Skagen Ekeli, K., "The Principle of Liberty and Legal Representation of Posterity", *Res Publica*, Vol. 12, Springer, New York, 2006, pp. 385–409, identifying a number of concrete problems with the guardianship model but arguing that the principle of liberty offers a sufficient justification.

4| See Weiss, E. B., "The Planetary Trust: Conservation and Intergenerational Equity", *Ecology Law Quarterly*, Vol. 11, No 4, UC Berkeley School of Law, Berkeley, 1984, pp. 499–500.

5| Gündling, L., "Our Responsibility to Future Generations", *American Journal of International Law*, Vol. 84, No 1, Cambridge University Press, Cambridge, 1990, p. 209.

that correctly appraising the problems of future generations may help us understand and overcome present-day concerns.⁶

On the other hand, while the paradox holds true at the level of an(y) individual, it seems to me disingenuous to claim that we cannot relate the current generation – as a community comprising but transcending the mere sum of its individual members – to future generations, regardless of which concrete individuals will comprise them. There will be future generations, and they will need to confront the reality of the environment – as well as the social arrangements and constitutional orders – left to them by the current one.

2. Present-day implications of future rights: Defining the problems

Nevertheless, while far from a novel concept, the issue of the rights of future generations has long posed conceptual as well as practical problems, and continues to do so.

One of the open issues concerns defining the nature of the legally-protected interests of future generations. While (the members of) current generations presently have rights which may be infringed, and thus also protected by the courts, future generations have contingent future rights.⁷ Beyond the non-existence challenge (the challenge of granting rights to those who do not (yet) exist), the nature, scope and content of these rights are very hard to define.⁸ Can contingent future rights entail present-day obligations and, if so, are they justiciable obligations owed to the future generations, or virtue-based obligations owed to ourselves?⁹

6| See e.g. Weiss, E. B., "The Planetary Trust: Conservation and Intergenerational Equity", *Ecology Law Quarterly*, Vol. 11, No 4, UC Berkeley School of Law, Berkeley, 1984, pp. 500–501.

7| See e.g. Elliot, R., "The Rights of Future People", *Journal of Applied Philosophy*, Vol. 6, No 2, Wiley-Blackwell, Hoboken, 1989, pp. 160–162.

8| See Fikkers, S., "Legislating For Future Generations: Goal Regulation", *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, Vol. 102, No 1, Franz Steiner Verlag, Stuttgart, 2016, pp. 6–8.

9| See e.g. Gaba, J. M., "Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue", *Columbia Journal of Environmental Law*, Vol. 24, No 2, Columbia University School of Law, New York, 1999, pp. 283–287.

Another issue concerns the achievement or maintenance of the inter-generational equilibrium. How do we, in the pursuit of inter-generational fairness, reconcile the inevitable tensions between the desire to provide for a present-day protection of future generations and the need to respect their generational sovereignty?¹⁰ What, inter-generational overlap notwithstanding, are the delimiting lines of identifying the relevant future generations in terms of their proximity to the current one? In other words, when we talk of the relationship of the current to 'future' generations, are the latter intended to encompass the immediate next generations (involving the current generation's children, grandchildren and great-grandchildren), the relationship to which is particularly immediate and graspable, or rather the more distant future generations beyond them?¹¹

Furthermore, how do we recognise the relevant interests of these future generations in terms of scope (by way of example, should future generations be ascribed a right to coexist with a particular species that can be breached if this species becomes extinct) and availability (for instance, how many future generations should have a commensurate right to exploit the finite oil resources)?¹² How is the possible diversity of future interests to be evaluated and determined for the purposes of present-day adjudication, knowing that societal preferences change (and have dramatically changed in the past) and that, notwithstanding the fact that our present-day actions may affect them, there is a great level of uncertainty about future preferences?¹³

10| An issue all the more relevant in light of the preference for constitutional rigidity, as already contemplated by Jefferson – see Gosseries, A. P., "Constitutions and Future Generations", *The Good Society*, Vol. 17, No 2, Penn State University Press, Pennsylvania, 2008, pp. 32–33.

11| See Gaba, J. M., "Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue", *Columbia Journal of Environmental Law*, Vol. 24, No 2, Columbia University School of Law, New York, 1999, pp. 253–255.

12| See Elliot, R., "The Rights of Future People", *Journal of Applied Philosophy*, Vol. 6, No 2, Wiley-Blackwell, Hoboken, 1989, pp. 164–168, offering a rebuke to such objections. In some cases, the problem can be one of defining the proper content of the right or the objective concerned. For example, if the aim is defined as providing for a decent standard of living, then having access to oil reserves may properly be understood only as a means to an end rather than the end in itself; and, in the context of the resulting climate change, not at all an unproblematic one at that.

13| See Gaba, J. M., "Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue", *Columbia Journal of Environmental Law*, Vol. 24, No 2, Columbia University School of Law, New York, 1999, pp. 259–265.

Finally (although the list is far from exhausted), who should speak for these future generations? Should special representation be provided for?¹⁴ And should the safeguards be political (think of the Knesset Commission for Future Generations or the Finnish Parliamentary Committee for the Future) or judicial (consider the developing climate change litigation) in nature?

3. Present-day implications of future rights: The role of judicial review

The questions identified above are hardly reducible to simple answers. And yet, in contemplating ways to resolve them, it may be beneficial to consider the interplay between the two relationships highlighted at the outset, and to see their implications for the viability of addressing the concerns of future generations through judicial review.

The first point to note is that, at least to some extent, all human rights litigation – and in particular constitutional adjudication – has inter-generational implications, addressing specific cases brought by applicants possessing the requisite legal interest (i.e., meeting the standing requirements) but setting down precedential standards for all future cases. However, this may be even more pronounced when it comes to vulnerable minority groups. I do not consider it a coincidence that in the so-called Maastricht Principles on the Human Rights of Future Generations, a recently-attempted restatement of the existing international law on the issue,¹⁵ the core substantive principles of the rights of future generations centre on equality and non-discrimination (including the prohibition of inter-generational discrimination). Challenges of inequality and discrimination highlight the significance of the cross-generational implications of human rights, not only remedying the past and present injustice, but setting down important benchmarks to achieve inter-generational justice.¹⁶

14| Gosseries, A. P., "Constitutions and Future Generations", *The Good Society*, Vol. 17, No 2, Penn State University Press, Pennsylvania, 2008, pp. 34–36.

15| See Liebenberg, S. and others, *Maastricht Principles on the Human Rights of Future Generations, an academic (re) statement of the principles adopted on 3 February 2023*, text available at <https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>.

16| *Ibid.*, recital X in the preamble.

Two decisions that my court, the Constitutional Court of Slovenia, delivered on the same day on the cusp of summer in 2022 may serve as an apt illustration. The first recognised a constitutional right to same-sex marriage, finding the existing legislation to be a violation of the applicants' rights in the concrete case, but requiring the parliament to amend the legislation and thus resolving the issue for all future cases.¹⁷ The second, perhaps even more significantly, concerned a constitutional challenge brought against the judicial decisions of the ordinary courts and the legislation which excluded same-sex couples from the possibility of applying for the joint adoption of a child.¹⁸ This second case was, again, brought as a constitutional complaint by a specific same-sex couple that had been denied, by the administrative authorities and the ordinary courts deciding on the basis of the challenged legislation, the right to be placed on the list of candidates for adoption, with the applicants claiming that the decisions at issue infringed their own right (as prospective adoptive parents) to non-discrimination. However, in the review of the case by the Constitutional Court significant importance was given to the principle of the best interests of the child, in the context of the case necessarily implying the contingent interests of future children that will (or rather may at some uncertain time in the future) be considered for adoption. In some ways, indeed, intra-generational justice is also a prerequisite for inter-generational justice.¹⁹

Secondly, the challenges in determining the mechanisms and venues to achieve an appropriate representation of future generations also seem to reaffirm the important role of the courts in meeting these challenges. To the extent that the pertinent future interests are to be recognised as present-day rights, this is a task ultimately to be decided by the courts, notwithstanding the possibility of other types of special representation (or the 'political safeguards' of future generations) mentioned above. In determining 'what the law is',²⁰ it is also emphatically a

17| Judgment of the Slovenian Constitutional Court of 16 June 2022, U-I-486/20, Up-572/18 (Official Gazette RS, No. 94/2022), ECLI:SI:USRS:2022:U.I.486.20.

18| Judgment of the Slovenian Constitutional Court of 17 June 2022, U-I-91/21, Up-675/19 (Official Gazette RS, No. 94/2022), ECLI:SI:USRS:2022:U.I.91.21.

19| Let me also reiterate the following point: I refer to these two cases not because they are revolutionary in the global sense, since in a number of states similar cases had already been resolved several years earlier (even if for many other states the issue remains unresolved or controversial), but merely as a domestic illustration reaffirming the significance of the rights of vulnerable minority groups as a tool to promote intra- and inter-generational justice.

20| Echoing, of course, *Marbury v Madison*, 5 U.S. 137 (1803), at p. 177.

province of the courts to strike the appropriate balance between the competing interests of those involved in judicial disputes.

By way of a pertinent example, consider the litigation concerning climate change or, more generally, environmental protection. Cases are – and will continue to be – brought before the courts by affected individuals or, in some cases, environmental NGOs. An important element of the challenges posed for judicial review by climate change litigation has been and remains the issue of standing, both as concerns individuals claiming potential future interference with their rights²¹ and the possibility of environmental organisations to seize the court with environmental or nature conservation concerns. However, recognising the requisite legal interest of such actors, which allows them to bring an application before the court, does not mean that these same actors are suitably equipped to strike the appropriate balance between all the pertinent rights and legally-protected interests.²² That this is a task which will inevitably remain with the courts is not really put into question – in different debates among the highest European national courts, such as the one in this conference, the common refrain has been determining how to marshal and manage such cases, as well as develop and implement the required tools of constitutional review to conduct judicial review, rather than whether the issue might fall outside the role of the courts altogether.

21| See, e.g., the discussion of a notable recent decision of the German Constitutional Court in Theil, S. “Cautious Scrutiny: The Federal Climate Change Act Case in the German Constitutional Court”, *Modern Law Review*, Vol. 86, No 1, Wiley-Blackwell, Hoboken, 2022, pp. 266–267.

22| Cf. Gosseries, A. P., “Constitutions and Future Generations”, *The Good Society*, Vol. 17, No 2, Penn State University Press, Pennsylvania, 2008, p. 35. Also see Skagen Ekeli, K., “The Principle of Liberty and Legal Representation of Posterity”, *Res Publica*, Vol. 12, Springer, New York, 2006, pp. 393–395, addressing the problem that special representation or guardianship of future generations may not easily solve conflicts of interest between different future generations.

Let me use another decision by the Slovenian Constitutional Court to illustrate the nexus. In a case reviewing domestic legislation regulating the use of plant protection products in core water protection areas that was alleged to be in breach of the right to drinking water, now enshrined in Article 70a of the Slovenian Constitution,²³ the Court noted that adverse consequences for the rights of both present and future generations must be taken into account:

‘The duty to ensure a high level of environmental protection, as one of the fundamental and constitutionally protected values, is incumbent on the legislative, executive and judicial branches of government. The Constitution allows for different approaches to environmental protection that may be implemented at the legislative level. However, the requirement of a healthy living environment must be understood in the broader context of the state’s positive duty to preserve nature and protect the environment as such. It does not only concern the well-being of people. Of course, there is a close link between environmental protection and a healthy environment for people. The well-being of individuals, in the present as well as future generations, is inextricably linked to the protection of the environment. Interference with the environment, however, involves a constant clash between the interests of individuals, the authorities and the environment itself, except that the lattermost cannot represent its own interests. The requirement of the first sentence of Article 72(2) of the Constitution, which imposes on the State the duty to ensure a healthy living environment, is therefore of fundamental importance.’²⁴

The Court went on to add that

‘[t]o ensure long-term environmental protection, it is therefore necessary to follow the concept of sustainable development, through which future generations may also be ensured a healthy environment and preserved nature, i.e. a harmonious coexistence of humanity with the environment and nature’.²⁵

23| Constitution of the Republic of Slovenia, adopted 23 December 1991.

24| Judgment of the Slovenian Constitutional Court of 16 March 2023, U-I-416/19 (Official Gazette RS, No. 35/2023), ECLI:SI:USRS:2023:U.I.416.19, paragraph 17 (footnotes omitted).

25| Ibid., paragraph 18.

Thirdly, and finally, the role for judicial review in this area seems to be a task amenable to cross-border judicial interactions. While the need to address the present-day implications of the notion of the rights of future generations – notably in relation to the protection of the environment – can perhaps be said to have been largely accepted, the determination of the proper content and scope of those rights remains a challenge. Even when grounded in specific constitutional provisions concerning the rights to life and a healthy living environment, as it is in Slovenia, the process of judicial review is indispensable in determining the principles guiding their interpretation as well as the determination of appropriate remedies. In the elaboration of the substantive standards of – as well as the grounds and procedural preconditions for – judicial review, the courts will need to reassess the traditional tenets of constitutional adjudication, drawing on the underpinning fundamental values and general principles of their respective legal orders. The challenge is further pronounced by uncertainty as to the future implications of current actions (or inaction), as well as to the need to find a coherent present-day articulation of a diverse and varied set of possible future interests, a particular inter-generational quest for ‘unity in diversity’.²⁶ In the interwoven context of the European legal orders and human rights regimes, this very much becomes (also) a common judicial endeavour, in which courts will certainly be invited, and may sometimes even be required, to draw inspiration from each other.²⁷

26| I have focused on such challenges for judicial review as posed by climate change litigation in some more detail in Accetto, M., “Judicial Review and Climate Change”, to be published in *Human Rights Law Journal*, N. P. Engel Verlag, Kehl am Rhein (forthcoming).

27| Limitations of space preclude a more detailed discussion here, but see Accetto, M., “Judicial Independence and Interdependence in European Union Law”, in *Une justice proche du citoyen: Forum des magistrats et Audience solennelle*, Publications Office of the European Union, Luxembourg, 2023, pp. 76–81, for more thoughts on different guises of transnational judicial dialogue.

7. Conclusion

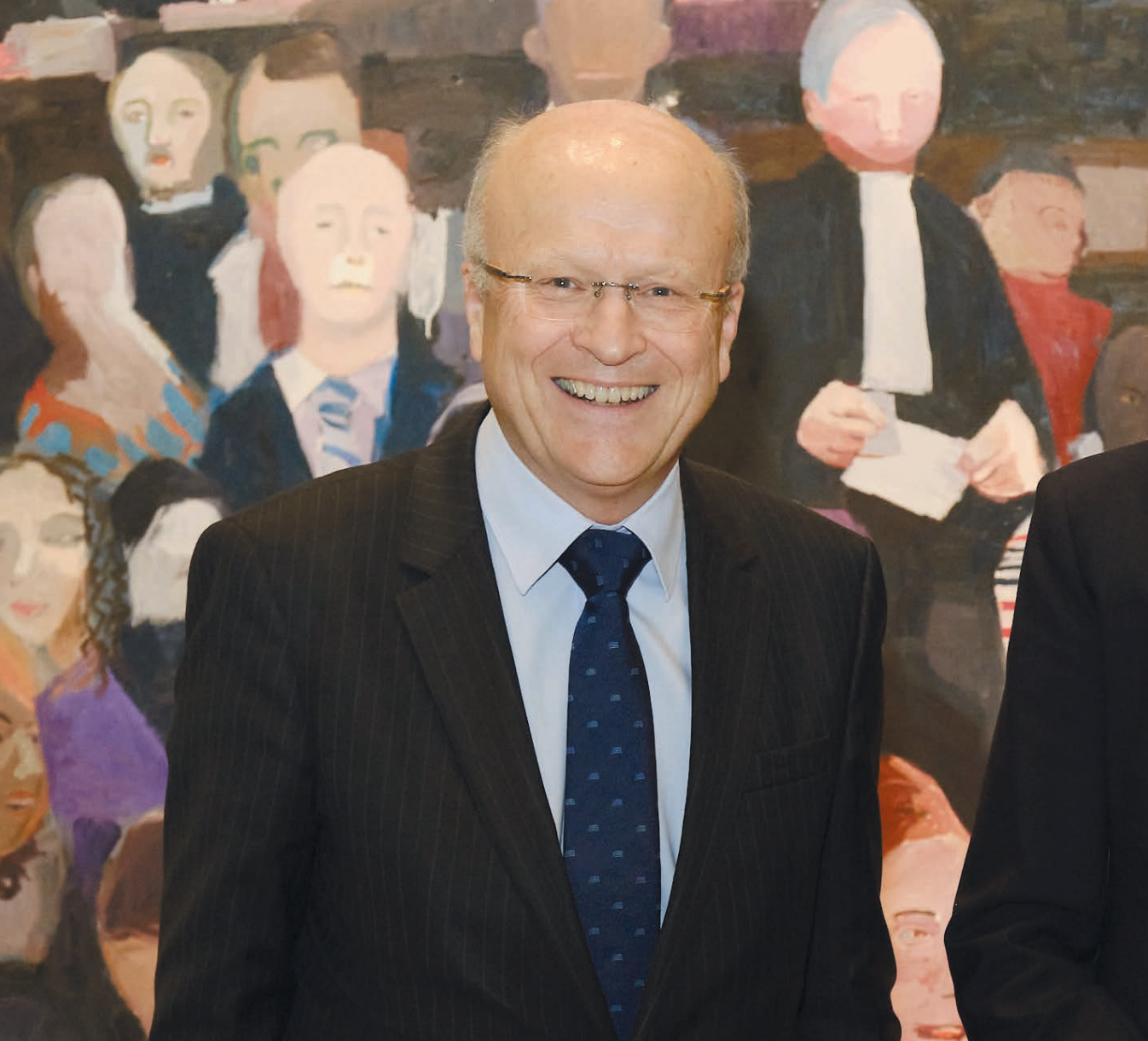
Determining the appropriate approach of the law to the protection of the rights of future generations is a complex endeavour, posing a number of concrete problems as well as conceptual challenges, some of which have been highlighted above. Theories abound, pitfalls are identified, and possible avenues to avoid or overcome them are explored. And yet the practical reality of the law cannot wait for a doctrinal consensus to emerge in theory – when applications are filed with the courts, the role of the latter is not to explore and expound grand theories, but ‘simply’ to decide cases.²⁸

When it comes to cases concerning climate change, more generally environmental protection and other possible instances in which the interests of future generations are invoked or must be taken into consideration, that fact is both a burden and blessing. On the one hand, the traditional tenets of judicial review may need to be reassessed in the context of such novel challenges, operating as a disruptive reality challenging the established habits and standards of the constitutional orders. On the other hand, however, it is precisely in the courts that these constitutional orders have vested the responsibility to protect them, to interpret and apply the tools of judicial review in a way that resolves disputes without doing damage to the fundamental values underpinning the constitutional identity of the polity. It is a familiar tension between the calls for a legal revolution and the propensity for a more incremental evolution in the lives of constitutions (or human rights regimes) as living instruments, and one which the courts are also inevitably called upon to address. The reflections in this contribution seem to allow for a cautiously optimistic conclusion: the courts alone will not suffice, but they are well equipped to play their role in incorporating the rights (or interests) of future generations into the fabric of the constitutional orders whose observance they are to ensure.

28| This point is also familiar to and often made in the context of the development of EU law, for instance in relation to the earlier appraisals of the doctrine of general principles of EU law as developed by the Court of Justice – see e.g. Sevón, L., “General Principles of Community Law – Concluding Remarks”, in Bernitz, U. and Nergelius, J. (eds.), *General Principles of European Community Law*, Kluwer Law International, The Hague, 2000, p. 220.



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Mr Koen Lenaerts

President of the Court of Justice
of the European Union

Concluding Remarks by Mr Koen Lenaerts, President of the Court of Justice of the European Union

I would like to thank all organisers of this successful conference. Although the Court of Justice of the European Union co-organised this conference, the credit for its perfect organisation goes entirely to the team from the three organising national constitutional and supreme courts, and in particular to the *Hoge Raad der Nederlanden* and its President Dineke de Groot.

I also thank expressly all the participants in this conference. Our fruitful and open discussions have once again demonstrated the merits of the formula used for this series of conferences entitled 'EUited in Diversity'. These conferences are focused on European Union law as a law that is common to all Member States, which nevertheless retain their own identity and their own diversity. Diversity is a building block for the EU as a common legal order, for its unity. Finding the correct balance between unity and diversity so that they remain in harmony lies at the core of the European Union, which is also expressed in its motto 'united in diversity'.

The key to finding this balance lies in the cooperation based on trust between the Court of Justice of the European Union and the courts and tribunals of the Member States through the preliminary ruling mechanism provided for in Article 267 TFEU.

The Member States, which concluded the Treaties, conferred on the Court of Justice of the European Union jurisdiction to be the ultimate interpreter of EU law, or – to use the words of the *Bundesverfassungsgericht* – the Court of Justice is the 'gesetzliche Richter des Unionsrechts'.¹ The interpretation of EU law by the Court of Justice has the same normative value as the norm interpreted ('res interpretata'). It is to apply everywhere, *ex tunc* and *erga omnes*. However, the Court of Justice does not fulfil its task in isolation, but rather through interaction with the courts and tribunals of the Member States. Thus, the preliminary ruling mechanism provides for an institutionalised dialogue in which the national courts and tribunals not only

1 | See, for example, orders of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 6 October 2017, 2 BvR 987/16, [ECLI:DE:BVerfG:2017:rk20171006.2bvr098716](#), paragraphs 3 to 9; and of 4 March 2021, 2 BvR 1161/19, [ECLI:DE:BVerfG:2021:rk20210304.2bvr116119](#), paragraphs 53 to 55 and cited case-law.

refer questions to the Court of Justice, but also suggest answers to it. They inform the Court of Justice on how they – as jurisdictions of equal standing – would interpret the provisions of EU law concerned, if it depended on them alone, in a particular national context. This dialogue opens a debate at a pan-European level in which all Member States may participate and put forward their standpoint from their own perspective. It is then for the Court of Justice to strike the right balance and to find an interpretation that can work in all 27 Member States. It does so through a deliberative process, taking into account the sensitivities of *all* Member States.

This is how unity is ensured by the Court of Justice of the European Union. It is the result of a ‘bottom-up’ exercise in judicial dialogue. The Member States, as Masters of the Treaties, have created a law common to them, even in highly sensitive areas of the law, and established an institutional structure in which the political institutions pass legislation and adopt administrative decisions in a broad range of policy areas, while the Court of Justice ensures the uniform interpretation and enforcement of EU law. The adoption of secondary EU law in those highly sensitive areas more often than not means that the Court of Justice is called upon to rule on very sensitive matters.

One recent example is a case in which a Slovenian court referred a preliminary question to the Court of Justice of the European Union in order to know whether the Working Time Directive² applied to military personnel.³ In the debate before the Court of Justice, the French and Spanish Governments submitted that this was not the case, since the applicability of that Directive in such a context would undermine the organisation of their armed forces and thus undermine national security.

The Court of Justice of the European Union, taking into account these concerns, ruled that Article 4(2) TEU requires that the application to military personnel of the provisions of the Directive must not hinder the proper performance of the essential functions of the military. This, however, does not mean that all members of the armed forces of the Member States are permanently excluded from the scope of the Directive. Members of the armed forces who perform administrative tasks which are not carried out in the context of a military operation may fall within the scope of the Directive, since the application of that Directive to

2 | Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9).

3 | See judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, [EU:C:2021:597](#).

those members does not interfere with the essential functions of the military. That is how the balance between unity and diversity is struck in practice. The Court of Justice has to make a uniform interpretation which allows room for national choices, whilst not calling into question the EU legislative measure at issue or the Treaties.

The more fundamental the rules of EU law at issue are, the more fundamentally important uniformity is. When it comes to the content of the values on which the EU is founded, uniformity comes to the very forefront.

It should be recalled in that regard that the EU is, first and foremost, a Union of values. Those values are not the result of a ‘top-down’ approach, by which the authors of the Treaties decided to impose certain values on the Member States. On the contrary, those values are the result of a ‘bottom-up’ dynamic, since they stem from the constitutional traditions common to the Member States.⁴ In the *Conditionality Judgments*, the Court of Justice of the European Union made this crystal clear. It held – and I quote – that ‘[t]he values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order’.⁵

One of the values listed in Article 2 TEU is the rule of law. Ever since its landmark judgment in *Les Verts*,⁶ the Court of Justice of the European Union has consistently held that the EU is a ‘Union based on the rule of law’. In its most basic conception, respect for the rule of law means that nobody is above the law and that courts should guarantee effective protection against breaches of the law. If this fundamental value is not respected, all of the other values listed in Article 2 TEU become empty promises. Only societies governed by the rule of law can properly protect democracy and fundamental rights. Respect for the rule of law is therefore, quite simply, the bedrock on which our democratic societies are built.

4 | In relation to the value of respect for the rule of law, see judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraph 237; and of *Poland v Parliament and Council*, C-157/21, [EU:C:2022:98](#), paragraph 291.

5 | Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, [EU:C:2022:97](#), paragraph 127; and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, [EU:C:2022:98](#), paragraph 145.

6 | Judgment of 23 April 1986, *Les Verts v Parliament*, C-294/83, [EU:C:1986:166](#), paragraph 23.

The independence of the judiciary is an essential prerequisite for a legal system that respects the rule of law. As such, it is crucial to the proper functioning – and indeed to the very survival – of democratic societies. *Without independent judges*, public authorities are free to exercise power in an arbitrary manner with impunity. *Without independent judges*, there is no effective judicial protection of the most fundamental rights and freedoms enjoyed by citizens. Ultimately, *without independent judges*, there is nothing to prevent an authoritarian drift in which the rule of law becomes no more than a distant utopia, replaced by the unfettered power of the political majority of the moment. In the worst-case scenario, the democratic process itself may be completely compromised, with the outcome of elections themselves being called into question.

Respect for the rule of law and for democratic principles therefore requires that judges be independent.⁷ In the EU legal order, respect for judicial independence is grounded in the constitutional traditions common to the Member States and is part of the democratic inheritance of all European Union citizens. Indeed, the constitutions of all Member States, without exception, provide for an independent judiciary.⁸

However, whilst the Court of Justice of the European Union will protect the independence of the judiciary of the Member States, it does not intend to shape national legal systems according to a pre-established ‘constitutional model’. As is clear from many decisions of the last decade,⁹ it respects the national identity of the Member States, which is inherent in their fundamental political and constitutional structures. It is up to the Member States to define the constitutional, political and societal model that best reflects the democratic choices of their own nationals, but the exercise of that competence must take account of the values and principles on which the Union is founded, as well as the rights and freedoms enjoyed by citizens under EU law.

7| See Spano, R., “The rule of law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary”, *European Law Journal*, Vol. 27, No 1-3, 2021, pp. 1-17. See also Spano, R., “The rule of law — the polar star of the European Convention on Human Rights”, *Quarterly Review of Human Rights*, Vol. 27, 2021, pp. 481-509.

8| See Lenaerts, K., “On Checks and Balances: The Rule of Law within the EU”, *Columbia Journal of European Law*, Vol. 29, 2023, p. 25.

9| Timmermans, C.W.A., “Mediating conflicts between national identities and EU law: The potential of Article 4(2) TEU”, *Common Market Law Review*, Vol. 59, 2022, pp. 75-86.

For example, according to the landmark judgments in *Åkerberg Fransson*¹⁰ and '*Taricco II*',¹¹ Member States can enforce their own standards of protection of fundamental rights going beyond the minimum protection offered by the Charter of Fundamental Rights of the European Union (the 'Charter'), provided that the 'primacy, unity and effectiveness' of EU law are respected. This means, in practice, that it is only in the absence of fully determined legislative choices at EU level that a Member State may apply its own standards of protection, insofar as it does not render ineffective the EU measures that it implements. That possibility does not exist if the EU legislation at issue prescribes rules based on such fully determined choices, as was the case in *Melloni*.¹²

The principle of procedural autonomy also reflects the idea that the EU does not promote a particular constitutional model. Provided that there are no EU rules on the matter, it is, in accordance with that principle, for the national legal system of each Member State to establish procedural rules providing for remedies that ensure the effective protection of EU rights. However, those procedural rules must comply with the principles of both equivalence and effectiveness. Subject to compliance with those twin principles, it is for each Member State to determine, *inter alia*, the relationship between civil and administrative courts of last instance. In *Randstad Italia*, for example, the Court of Justice of the European Union held that in circumstances where an effective legal remedy exists,

'it is ... entirely open – from the point of view of EU law – to the Member State concerned to confer jurisdiction on the highest court in its administrative order (*Consiglio di Stato*) to adjudicate on the dispute at last instance, in relation both to the facts and to points of law, and consequently to prevent the dispute from being open to further substantive examination in an appeal in cassation before the highest court in its judicial order (*Corte suprema di cassazione*)'.¹³

10| Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, [EU:C:2013:105](#).

11| Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#).

12| Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#). It is worth noting that the German Federal Constitutional Court (Bundesverfassungsgericht) has recognised and faithfully applied the *Åkerberg–Melloni* case-law in the context of two orders relating to the right to be forgotten. See, in this regard, orders of the German Federal Constitutional Court of 6 November 2019, *Recht auf Vergessen I*, 1 BvR 16/13, [ECLI:DE:BVerfG:2019:rs20191106.1bvr001613](#), and of *Recht auf Vergessen II*, 1 BvR 276/17, [ECLI:DE:BVerfG:2019:rs20191106.1bvr027617](#).

13| Judgment of 21 December 2021, *Randstad Italia*, C-497/20, [EU:C:2021:1037](#).

This was so even where the highest administrative court of the Member State concerned had disregarded EU law, insofar as interested persons had been allowed ‘to bring an action before an independent and impartial tribunal and to assert effectively that EU law... had been infringed’.¹⁴

In any event, parties adversely affected by a judgment that breaches EU law could bring an action in damages against that Member State itself, in accordance with the *Köbler* line of case-law.¹⁵

The case-law of the Court of Justice of the European Union also contains numerous examples in which the national identity of the Member State concerned was taken into account in the interpretation of EU law. Thus, in the *Centraal Israëlitisch Consistorie van België* judgment,¹⁶ concerning regional measures banning ritual slaughter without prior stunning, the reference to national identity was translated into the affirmation of an ‘area of diversity’ within the Union. The lack of consensus on that issue in the EU, reflected in the absence of a precise choice made by the EU legislature, means that a national or regional entity may, in the light of its ‘own social context’, arbitrate between respect for freedom of religion and safeguarding animal welfare.

A similar finding was made in the *headscarf* cases.¹⁷ The Court of Justice of the European Union accepted that, subject to some strict conditions, a secular approach prescribing a religiously-neutral dress code can be adopted, but at the same time that Member States are free to make the choice of affording greater protection to the expression of religious beliefs when that corresponds to their constitutional tradition.

In practice, as is apparent from the *Cilevičs* judgment,¹⁸ national identity is taken into account as follows in the case-law of the Court of Justice of the European Union: it is the referring court, or possibly also a national government intervening in a case, which submits to the Court of

14| Ibid., paragraph 78. The Court of Justice’s answer coincided with the Italian Constitutional Court (*Corte costituzionale*) case law on the matter construing the final appeal’s jurisdiction of the Corte suprema di cassazione in a restrictive manner, relating to issues of court jurisdiction only.

15| Ibid., paragraph 80 (referring to judgment of 30 September 2003, *Köbler*, C-224/01, [EU:C:2003:513](#)).

16| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, [EU:C:2020:1031](#).

17| See namely judgments of 14 March 2017, *G4S Secure Solutions*, C-157/15, [EU:C:2017:203](#); and of 15 July 2021, *WABE and MH Müller Handel*, C-804/18 and C-341/19, [EU:C:2021:594](#).

18| Judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, [EU:C:2022:638](#).

Justice that a particular approach is part of the national identity of the Member State concerned and explains why. However, a national court, including a national constitutional court, can never decide unilaterally not to apply EU law because it considers it to be contrary to national identity as it understands it.¹⁹ On the contrary, the national court concerned must, in such a situation, engage in a dialogue with the Court of Justice and refer the matter to that court. The Court of Justice will then have to interpret EU law in a way that respects Article 4(2) TEU.

The Court of Justice of the European Union will verify whether the concern submitted falls within the concept of ‘national identity’ as defined in Article 4(2) TEU. Therefore, it will see how that concern can be squared with the interpretation of substantive EU law. Thus, the Court of Justice has to assess how to carve out the freedom for all Member States to take a particular measure, which might, at first glance, be in conflict with EU law. Cases like *Omega*,²⁰ *Sayn-Wittgenstein*,²¹ *Cilevičs*,²² or *WABE*,²³ as well as many others, demonstrate that the Court of Justice is entirely committed to making this delicate interpretation process work.

National identity can never be opposed to primacy. Primacy of EU law is indeed the paramount instrument for ensuring that EU law is applied uniformly across the EU. The equality of citizens and the Member States before EU law thus requires that, in case of conflict between the common rules and national rules, the common rules prevail. Primacy is a conflict rule, not a supremacy rule as such. The German term *Anwendungsvorrang* expresses this idea perfectly: primacy of application without normative superiority.

It is therefore also obvious that national identity can never apply solely to one Member State. Thus, if the Court of Justice of the European Union interprets EU law in a way which respects the national identity of a Member State, that holds true for all the other Member States as well.

19| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, [EU:C:2022:99](#), paragraphs 70 and 71.

20| Judgment of 14 October 2004, *Omega*, C-36/02, [EU:C:2004:614](#).

21| Judgment of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, [EU:C:2010:806](#).

22| Judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, [EU:C:2022:638](#).

23| Judgment of 15 July 2021, *WABE and MH Müller Handel*, C-804/18 and C-341/19, [EU:C:2021:594](#).

Taking into account the rules and principles of EU law at stake, the Court of Justice will indicate to what extent the Member States can make their own choices, in accordance with EU law.

In that respect, it is important to point out that the Court of Justice of the European Union is institutionally in a very different position to the European Court of Human Rights ('the ECtHR'). Indeed, although both the Council of Europe and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way.

Firstly, the European Convention on Human Rights operates as an *external* check on the obligations imposed by that international agreement on the Contracting Parties, whereas the EU system of fundamental rights protection is an *internal* component of the rule of law within the EU. Indeed, the fundamental rights as protected by the Charter are fully embedded in the EU legal order's constitutional framework, which includes the principles of primacy and direct effect. Without equating the EU to a State,²⁴ the logic underpinning the EU system of fundamental rights protection is nevertheless closer to that of an EU Member State than to that provided for by the European Convention on Human Rights.

In that sense, the Court of Justice of the European Union, as guarantor of the rule of law within the EU, is, in effect, as to its role, closer to a constitutional and supreme court of a State. On the one hand, just like any *constitutional court* in a Member State, the Court of Justice ensures that the acts adopted by the EU institutions comply with primary EU law, notably the EU Treaties and the Charter. It is also called upon to rule on the allocation of powers between the EU and its Member States, as well as between the EU institutions. On the other hand, just like any *supreme court* in Europe, the Court of Justice ensures the uniform application of EU law throughout the territory of the EU Member States, from Helsinki to Lisbon and from Dublin to Nicosia, whilst relying on the loyal cooperation of all the courts of the Member States through the preliminary ruling mechanism.

24| Opinion 2/13 of the Court (Full Court) of 18 December 2014, Accession of the European Union to the European Court of Human Rights, of 18 December 2014, [EU:C:2014:2454](#), paragraph 156.

Secondly, in contrast to the system of protection set up by the European Convention on Human Rights, fundamental rights in the EU legal order are not self-standing.²⁵ Not all national measures may be examined in light of the Charter – only those that fall within the scope of EU law. I like to use the metaphor that the Charter is the ‘shadow’ of EU law, since the scope of EU law determines that of the Charter.²⁶ If a national measure falls outside the scope of EU law, it also falls outside of the scope of the Charter.²⁷ This does not mean, however, that the fundamental rights are left unprotected, since the national measure at stake may be examined through the prism of the national constitution and the European Convention on Human Rights.²⁸

Thirdly, an important difference also lies in the role of the EU legislator in the system of protection of fundamental rights. Whilst the European Convention on Human Rights is the starting point for the EU protection of fundamental rights, the Court of Justice of the European Union has on several occasions made clear that it only constitutes a minimum threshold of protection.²⁹ Furthermore, both the EU institutions and the Member States have to comply with the Charter should the latter provide for a higher standard of protection than that set by the European Convention on Human Rights, as is the case in relation to the *ne bis in idem* principle,³⁰ and the right to liberty in the Röske transit zone.³¹ Finally, according to the principle of representative

25| Regarding the scope of application of the Charter, see generally Ladenburger, C., “European Institutional Report”, in Laffranque, J. (ed.) *The Protection of Fundamental Rights Post – Lisbon, FIDE XXV Congress*, Vol. 1, Tartu University Press, Tartu, 2012; Lenaerts, K., “Exploring the Limits of the EU Charter of Fundamental Rights”, *European Constitutional Law Review*, Vol. 8, 2012, p. 375; Tizzano, A., “L’application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe 1”, *Il Diritto dell’Unione Europea*, Vol. 3, 2014, pp. 429-437; and Lenaerts, K., “La Charte dans l’ordre juridique de l’Union européenne”, *Cahiers de droit européen*, Vol. 57, No 1, 2021, pp. 29-54.

26| Lenaerts, K. and Gutiérrez-Fons, J.A., “The Place of the Charter in the European Legal Space”, in Peers, S., Hervey, T., Kenner, J., and Ward, A., (eds), *The EU Charter of Fundamental Rights: A Commentary*, 2nd Edition, Hart Publishing, 2021, p. 1711.

27| See, for example, judgment of 6 March 2014, Siragusa, C-206/13, [EU:C:2014:126](#), paragraphs 20 and 21.

28| Judgment of 15 November 2011, *Dereci and Others*, C-256/11, [EU:C:2011:734](#), paragraphs 72 and 73. See also judgments of 17 January 2013, *Zakaria*, C-23/12, [EU:C:2013:24](#), paragraph 41; and of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, [EU:C:2020:367](#).

29| Judgment of 22 June 2023, *K.B. and F.S. (Raising ex officio of an infringement in criminal proceedings)*, C-660/21, [EU:C:2023:498](#), paragraph 41.

30| Judgments of 20 March 2018, *Menci*, C-524/15, [EU:C:2018:197](#); and of 22 March 2022, *bpost*, C-117/20, [EU:C:2022:202](#).

31| Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU et C-925/19 PPU, [EU:C:2020:367](#).

democracy, it is for the EU legislator to decide whether an EU-wide level of protection should be established or if there is room for national diversity between the Member States. It follows from the foregoing that whilst the ECtHR can only take the European Convention on Human Rights into account in order to establish whether the Parties to it enjoy a certain degree of margin of appreciation, the Court of Justice also has to examine, alongside the European Convention on Human Rights and the Charter, the level of harmonisation adopted by the EU legislator.

Fourthly, as the Court of Justice of the European Union made clear in the ruling *XC and Others*,³² one additional difference lies in the fact that, according to Article 35(1) of the European Convention on Human Rights, the ECtHR may only deal with the matter after all domestic remedies have been exhausted, which implies the existence of a decision of a national court adjudicating at last instance and with the force of *res judicata*. In the EU legal order, however, the protection of fundamental rights is effectively guaranteed through the preliminary ruling mechanism before a final national decision is issued.

What is ultimately at stake in the preliminary ruling procedure is the harmonious coexistence of the common values of the Union and national identities. That involves a permanent search for the best point of balance. In this subtle exercise, the national constitutional and supreme courts and the Court of Justice of the European Union are not competitors, but allies. The Court of Justice provides support to those national courts in their function as guarantors of the rule of law in the various national legal systems, and guidance on the complex and ever-more voluminous body of EU law. Constitutional and supreme courts must ensure, for their part, that EU law is respected in the various Member States.

The interpretation of EU law is therefore not a matter just for the Court of Justice of the European Union. Whilst only the Court of Justice can give the definitive interpretation of EU law, the day-to-day enforcement of EU law is a matter for the national courts. They can enforce rights arising under EU law in ways that the Court of Justice cannot because of the principle of conferral. The Court of Justice must always remain within the strict limits of the jurisdiction conferred on it.

32| Judgment of 24 October 2018, *XC and Others*, C-234/17, [EU:C:2018:853](#).

This may be illustrated by reference to the *Ministre de la Transition écologique* case³³ in which the French *Conseil d'État* asked the Court of Justice of the European Union whether under EU law citizens can claim compensation from their Member State for health problems suffered on account of air pollution resulting from breaches of limits fixed by EU law. The Court of Justice ruled that, as a matter of EU law, there was no such right.³⁴ It indicated, however, that EU law does not preclude that the Member State might incur liability on the basis of national law, which could take into account for that purpose the failure of the State to fulfil obligations under EU law, i.e. the compliance with the applicable limits.

Thus, the cooperation between the Court of Justice of the European Union and the courts and tribunals of the Member States rests on the premise that every court plays its own role, and that national courts contribute significantly to the protection of common EU interests such as the protection of the environment. The seminal *Urgenda* judgment of the *Hoge Raad* demonstrates this.³⁵ We are all participants on an equal footing in this composite EU legal order, making it work; but, when it comes to the definitive interpretation of EU law, a solution is found by national courts entering into dialogue with their common Court, which is the Court of Justice.

Thank you.

33| Judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution)*, C-61/21, [EU:C:2022:1015](#).

34| Judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution)*, C-61/21, [EU:C:2022:1015](#), paragraphs 55 and 56.

35| Judgment of the Supreme Court of the Netherlands of 20 December 2019, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) and Stichting Urgenda*, n° 19/00135, [ECLI:NL:HR:2019:2007](#). See also, order of German Federal Constitutional Court (Bundesverfassungsgericht) of 24 March 2021, 1 BvR 2656/18, [ECLI:DE:BVerfG:2021:rs20210324.1bvr265618](#).



Ms Dineke de Groot

President of the Supreme Court of the Netherlands

Concluding Remarks by Ms Dineke de Groot, President of the Supreme Court of the Netherlands

Just before the beginning of the opening ceremony of this conference yesterday early morning, I introduced the very much appreciated presence of the interpreters while mentioning that this conference is, in essence, about understanding each other. It is my impression that the panel topics, the moderators, the panellists, and all other participants provided us over these two days with the necessary material to work towards understanding each other. From my observation, we had a profound and open-minded judicial dialogue with regard to the rule of law, judicial independence, democracy and fundamental rights within the law of the European Union. What we discussed in the panels yesterday and today indeed enabled us to identify concrete ways and examples to further unity in the interpretation and application of EU law. It brought to light points of view about how we can both respect diversity and encourage that diversity to unite rather than divides us.

What struck me in our discussions was that it naturally happened that more or less all relevant points of view with regard to a certain legal issue were put forward by all of us together, similar to deliberations in chambers in a case. I think this demonstrates not only our common knowledge of law and jurisprudence with regard to our topics related to the rule of law, democracy and fundamental rights. Our discussions also show that the courts provide judgments in which this common knowledge is fundamental on the way to unity in diversity. This self-evidence that national and international courts within Europe cooperate loyally in the interpretation and application of the law is something to cherish amidst the risks and dangers which rightly also came up in our discussions.

It is not my intention to repeat what has been said these days. I would like to share just a few observations here that made me reach for the pen while listening.

In what was called 'Panel Zero' already during lunch yesterday, the four keynote speeches at the opening ceremony sketched a broad perspective of the four panel topics as part of a complex world, in which new challenges are being posed, such as climate change, the war in Ukraine, matters regarding technology, and the recent global health crisis. Maybe, this already showed the importance and relevance of our judicial dialogue for the current and future chances of the people and societies for peace, justice and well-being.

In the first and the second panel, the exchange of information and views about both the independence of the judiciary and the rule of law combined the significance of trust, as the basis of the concept of mutual trust, with the necessity of legitimacy of court judgments in the eyes of people and societies, amongst whom also politicians and press representatives. Trust was discussed, as such, in a rich way. Different aspects of the meaning of trust for court judgments passed by, like the confidence the courts must inspire in the public; what would happen if citizens did not trust judges and refrained from going to court; the external and internal dimensions of independence; judicial independence as a vital condition for mutual trust; mutual trust as crucial for cooperation in court cases; and the necessity of courts being critical towards other national authorities about backsliding of the rule of law, without denying their difficulties as guardians of their own independent position.

The contributions of the judges from the European Court of Human Rights ('the ECtHR') certainly added value to this discussion about EU law, unity and diversity. President O'Leary spoke in her keynote speech about the way the ECtHR approaches diversity (subsidiarity, exhaustion, margin of appreciation – of which the latter is not unlimited), the kinetic mobile structure, how to engage in the judicial dialogue in the coming years. All these topics were further addressed and explored during the conference.

Several challenges facing us became clearly visible. For instance, we saw that a certain legal question in a case could invoke a court to be prudent, in order to further the confidence the courts must inspire in the public, whereas the same question could inspire a court to be firm with regard to the protection of the rule of law.

We discussed the judicial dialogue from the perspective of various courts, be it national or international courts. As an example, it was brought up that this judicial dialogue might include a judgment of a national court responding 'in a both friendly and critical way' to a judgment from the Court of Justice of the European Union or the ECtHR. Several participants from national courts acknowledged the importance of engaging in a judicial dialogue with judgments of the Court of Justice of the European Union and the ECtHR, without traveling solo on the road to unity in diversity.

I also noted the comment that there is no legal ground for Member State courts to violate EU law, and that the available rules to decide upon a possible conflict between EU law and

national law are clear and well-equipped. Shortly afterwards, though, this was followed by the observation, after a quote from the *Van Gend en Loos* judgment,¹ that ‘there is no such thing as a simple legal issue’.

During our third panel, about diversity and uniformity in EU law, we again spoke about the triangular dialogue between the Court of Justice of the European Union, national courts and the ECtHR. In the contributions of the participants, we could clearly see those of the Court of Justice of the European Union explaining its position towards the systematic interpretation of EU law. Within quite some contributions, the furthering of plasticity within that interpretation seems to be considered as helpful for the mission of other courts to cooperate loyally with the Court of Justice of the European Union, and fulfil all aspects of the role of national courts within the respective Member States.

The fourth panel only further underlined that we should continue our judicial dialogue. The legal protection of current and future generations is a topic that confronts the judiciary with new legal questions against individual, European and global backgrounds. These questions go far beyond the issue of climate change, as Advocate General Kokott explained.

I confess that I obtained some inspiration for probable next panel topics. I will provide some examples. Maybe during the conference on ‘EUUnited in Diversity III’ or somewhere else, we could have a judicial dialogue about the triangle in the context of legal reasoning and of law in context. For instance, we could elaborate on the perspective of legal systematic reasoning against the background of current and future European and global challenges. Or we could pay special attention to an approach in which coherence and consistency within the fundamental rights system are key. Another opportunity could be to involve aspects of human behaviour and law, as well as results of empirical legal studies in the judicial dialogue. Finally, we heard examples of judgments of national courts, which demonstrated that the impact of national sources of diversity for the unity of EU law might be further explored in upcoming opportunities for the judicial dialogue.

To conclude, the balance of the fragile mobile was respectfully challenged, discussed and upheld by all present in this courtroom of the Supreme Court of the Netherlands during these two days, on the basis of mutual trust, legality, and legitimacy with regard to the rule of law, democracy, and fundamental rights.

1 | Judgment of February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26-62, [EU:C:1963:1](#).





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Pierre Nihoul, President (FR)

Constitutional Court of the Grand Duchy of Luxembourg

Roger Linden, President

Francis Delaporte, Vice-President

Supreme Court of the Kingdom of the Netherlands

Dineke de Groot, President

Carla Sieburgh, Judge

Court of Justice of the European Union

Koen Lenaerts, President

Lars Bay Larsen, Vice-President

Sacha Prechal, President of Chamber

Juliane Kokott, Advocate General

François Biltgen, Judge

Ineta Ziemele, Judge

Participants (in protocole order)

Didier Reynders, European Commissioner for justice

Special guest during the opening ceremony

European Court of Human Rights

Síofra O'Leary, President

Kateřina řimářková, Judge

Frédéric Krenc, Judge

Constitutional Court of the Republic of Bulgaria

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COURT OF JUSTICE OF THE EUROPEAN UNION

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In recent years, Europe has faced numerous challenges, such as the return of a war to the European continent, the consequences of a global pandemic and the growing impact of climate change. These challenges underline the importance of the rule of law, the well-functioning of the Constitutional and Supreme Courts of the EU Member States and their smooth cooperation with the Court of Justice of the European Union.

In 2021, under the motto 'EUnited in diversity', the Court of Justice of the European Union launched a dialogue with representatives of the constitutional courts of the EU Member States with a view to guaranteeing a harmonious relationship between the EU legal order and those of its Member States.

This dialogue continued, in the second edition of the conference with the specific theme 'The Rule of Law and Constitutional Diversity'. The conference took place this time in the Hoge Raad in The Hague, the Netherlands, on 31 August and 1 September 2023, under the auspices of the Supreme Court of the Netherlands and the Constitutional Courts of Belgium and Luxembourg. In four panels, the participants at the conference discussed the role of their respective courts in upholding the rule of law, and in particular judicial independence, in the European legal space, in balancing uniformity and diversity in EU law and in providing legal protection to future generations.

