EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Seminar

"The articulation between the European Convention of Human Rights and the European Law: past, present and future"

A Judicial Network in Defense of the Rule of European constitutional Law

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Strasbourg, 14 June 2024

I am honored to participate in this ceremony celebrating President O'Leary's service at the European Court of Human Rights. This institution has proven to be pivotal in the protection of individual fundamental rights, democratic values and institutions and, indeed, the rule of law.

Its importance is growing ever greater, especially in these troubled times we face. Troubled times for all and a "*turbulent changing of an era for our common European values"*, to borrow President O'Leary's words from a recent speech.[1]

I am invited to speak here from the perspective of national constitutional courts. In this context, I want to highlight a crucial point. My first and foremost consideration is that in Europe, national constitutional courts are not isolated.

In the face of the insidious erosion of the role of the judiciary, which is undermining the powers and the independence of many courts worldwide, European national constitutional courts stand in a stronger position than elsewhere. They benefit from the support of a robust network of actors, all committed to the defense of the same European values.

A few years ago, at the beginning of 2018, I was invited to deliver a speech at this Court on the principles of judicial independence and the separation of powers.[2] My talk, like the others, was focused on hypothetical threats to the independence of courts and was highly speculative in nature. At that time, only six years ago, we were addressing the first signs of the "decline" in the rule of law after a long and glorious era – beginning after World War Two – that was rightly hailed as 'the age of rights' (Norberto Bobbio) and was at the same time characterized by 'the rise of the judiciary' (Mauro Cappelletti).

[1] S. O'Leary, *EUnited in Diversity II – The Rule of Law and Constitutional diversity – Perspective from the European Court of Human Rights*, The Hague, the Netherlands, 31st August – 1st September 2023.
[2] M. Cartabia, *Separation of Powers and Judicial Independence: Current Challenges,* Seminar on *The Authority of the Judiciary,* in the occasion of the Solemn Hearing of the Court, Strasbourg, 26 January 2018.

Rights and courts have been the cornerstones of the new constitutionalism, born from the ashes of totalitarianism, that has dominated the scene for over 50 years.

Today, we are living in a new different phase for constitutionalism.

Today, the role of courts, the protection of fundamental rights, and the rule of law are a matter of concern. Both in public discourse and in scholarship, they are often described as useless, burdensome and aristocratic limits to the will of the people. We see numerous concrete historical examples of attacks against the judiciary which raise alarms. Even in countries with a strong tradition of judicial independence, the atmosphere has changed and not for the better, and maybe judicial institutions as such are not openly attacked, but their decisions are disregarded.[3]

Yet, I see a huge difference between the position of the judiciary in European countries and in other parts of the world.

Consider the announced (and partly implemented) judicial reform in Israel, a case in point.

In response to a reform aimed at significantly curbing its powers, the Supreme Court issued a countermeasure on January 1st 2024. The Court first affirmed its power to review basic laws, endorsing the doctrine of unconstitutional constitutional amendments.[4] Second, it struck down the basic law through which the Knesset sought to limit the Supreme Court's powers to review government acts on the ground of reasonableness.[5]

The Israeli Supreme Court found itself in the uncomfortable position of being both the target and the defender of constitutional values.

In this specific case, the Court proved strong enough to successfully resist the attack. However, while the first part of the decision received endorsement by a large majority, the second part, focusing on the reasonableness control, garnered support by a narrower 8-7 majority.

The overall impact of this decision on the Court's power remains unclear. It is difficult to predict whether the Supreme Court has been reinforced or weakened by this necessary and courageous decision.

Consider now a hypothetical, unlikely, imaginary situation with similar events taking place in a European country.

Indeed, domestic remedies need to be activated in the first instance. National judicial review must take the initial step in addressing these unfortunate situations. National judges and constitutional courts serve as irreplaceable frontline safeguards. Even from a European perspective, they are expected to have the first say in line with the principle of subsidiarity which is a core tenet of the European system.

And yet, by now they know – and, most importantly, citizens know – that in Europe we can count on other additional supports and backups.

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[3] A striking example is the UK saga on Rwanda: With a decision issued on 15 November 2023 the Supreme Court found that sending asylum seekers to Rwanda was unlawful because the country is not safe and therefore asylum-seekers would be at risk of refoulement. In response, the Government planned a new treaty with Rwanda and in parallel introduced an emergency legislation designing Rwanda a safe country and thus overcame the prohibition decided by the Supreme Court. See Donald, Alice; Grogan, Joelle: *Defeat in the Supreme Court: Where Next for UK Asylum Policy?, VerfBlog,* 2023/11/17, https://verfassungsblog.de/defeat-in-the-supreme-court/.

[4] Y. Roznai, *Unconstitutional constitutional amendments, The limits of amendment power,* Oxford University Press, 2019.

[5] D. Kretzmer, *Judicial Review over Basic Laws. The Supreme Court of Israel's Decision on the «Unreasonableness Amendment»*, in Quaderni costituzionali, 1 (2024), pp. 193-202.

The current situation makes even clearer the added value of belonging to a broader family that is united by bonds of common values, supported by a network of committed political and judicial actors, and yet allows room for individual personalities and is pluralistic in nature.

Today, we can only praise the richness and even the complexity of the European judicial system for protection of fundamental rights, democracy and the rule of law – our core and basic values across the continent.

If we look back at our history, the relations between national and supranational courts in Europe have not always been a honeymoon.

First, the development of common constitutional principles in Europe, particularly in the field of fundamental rights, along with the case law developed by the two European Courts challenged or, to put it better, were perceived as challenging the monopoly that national constitutional courts had as the guardians of rights. The core business of national constitutional courts, namely the protection of fundamental rights, has incrementally become a shared mission: on the one hand, with both the European Court of Human Rights and the Court of Justice of the European Union and, on the other hand, with the national judges who are indirectly empowered by the principles governing the European Convention and, even more so, by European Union law.

Second, as the European Courts gained greater importance, national constitutional courts have lost their position of final authority and this was a major change. In most countries, the decisions issued by a constitutional court are final within the domestic system and no appeals are allowed.

And yet, within the European context, the same decisions are not at all final. The same case can be brought before one of the two European Courts, especially the European Court of Human Rights, even after a national constitutional court has given its ruling. This is not a remote possibility. In fact, there have been many cases decided in Strasbourg where an individual complaint has challenged a previous decision by a national constitutional court. For instance, the Hannover case[6] (a landmark German case on the right to privacy) and the Lopez Ostra case[7] (a Spanish case on the right to environment) are famous examples where the ECtHR reversed the decisions taken by the respective national constitutional court. In other cases, the European Court confirms the decisions of national constitutional courts. For instance, in the case relating to the strike of the *Beamte* in Germany, Humpert v. Germany[8], if one reads the German decision, it seems clear that the BVG's reasoning was (also) addressing the Court of Strasbourg, as if bearing in mind the likely possibility that an unsatisfied German citizen could bring an individual complaint to the Court. As it turned out, sometime later the prediction came true.

All in all, the possibility of further review by supranational courts on the same case ultimately enhances the quality of domestic decisions. Conflict and disagreement between national and supranational courts arise, just like in any group of friends and family. Occasionally, they may hold divergent views on the same cases, follow different interpretations of the same rights, or provide different balances between competing principles.

And yet, the supranational context brought to light that national constitutional courts, while final in their domestic systems, are not infallible. As Justice Robert Jackson famously stated: "We are not final because we are infallible, but we are infallible only because we are final".[9]

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[6] ECtHR, Third Section, Judgment 24 June 2004, Hannover vs. Germany, application no. 59320/00

[7] ECtHR, Chamber, Judgement 9 December 1994, Lopez Ostra v. Spain, application no. 16798/90.

[8] ECtHR, Grand Chamber, 14 December 2023, Humpert at al. v. Germany, applications nos. 59433/18, 59477/18, 59481/18 and 59494/18.

[9] Robert Jackson concurring in Brown v. Allen, 344 U.S. 443 (1953): «Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is

Today, national constitutional courts in Europe are neither infallible nor final.

Not only have European Courts eroded the monopolistic position of the national constitutional courts, but they can also contradict them and challenge their final position in the system. It is no surprise and no scandal, therefore, that national constitutional courts initially perceived the European Courts as competitors in the same marketplace and that some of them have occasionally taken a defensive stance.[10]

Over time however, national courts, including constitutional courts, have come to realize that their role and power are not diminished by the presence of other human rights adjudicators, especially at the supranational level. On the contrary, they mutually support and strengthen each other.

The European system entrusts national authorities with the primary responsibility of enforcing fundamental rights, including those protected by the European Convention, the EU Treaty, and the Charter of Fundamental Rights. Among these national actors, national constitutional courts play a pivotal, not secondary role. They accomplish their mission to enforce fundamental rights, as protected in Europe, in two different ways. The first and most common way, is by means of *interpretation*. National constitutional courts, as well as any other national judge, interpret the domestic legislation and the rights enshrined in the national constitution according to the interpretation provided by the European Courts. Secondly, they consider the rights protected by the European Convention, as interpreted by the Strasbourg Court, to be part of their national constitutional law or – if you want – part of a common European *bloc de constitutionalité*. Therefore, national constitutional courts review national legislation not only against the national constitution, but also against the European Convention and the relevant case law.

Therefore, national constitutional courts play a dual role. First, they implement ECHR and EU Law, contributing to the dissemination of the European case law within the member states (in a way they act as European courts at the local level). Second, the European law on fundamental rights provides national constitutional courts with additional instruments, tools and arguments for reviewing national legislation.[11]

A quick glance at the case law of the Italian Constitutional Court shows how the European Court of Human Rights has significantly contributed to the evolution of the domestic constitutional system. For example, in the field of criminal law and punishment[12], on bioethical issues[13], and on the rules governing the family name[14]- to name just a few examples.

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thereby better done. There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. *We are not final because we are infallible, but we are infallible only because we are final*» Emphasis added.

[10] D. Paris, *The Impact of EU Law and the ECHR on National Constitutional Adjudication in the European legal space*, in *The Max Planck Handbooks in European Public Law*, A. von Bogdandy, P. Huber and C. Grabenwarter eds, Oxford University Press, 2023, p. 477- 494.

[11] For a comprehensive overview of the role(s) of national courts in Europe, see M. Claes and B. De Witte, *The Roles of Constitutional Courts in the European Legal Space*, in *The Max Planck Handbooks in European Public Law*, A. Von Bogdandy, P. Huber, and C. Grabenwarter (eds), Oxford University Press, 2023, pp. 495-526.

[12] See, for example, the decision of the Italian Constitutional Court n. 32 of 2020 based on the ECtHR Third Section, Judgement 10 July 2012, Del Rio Prada vs Spain, application no 42750/09; or decision n. 253 of 2019, based on the ECthR Third Section, Judgement 5 October 2006, Viola vs. Italy Application no. 45106/04.

[13] Italian Constitutional Court Decision n. 96 of 2015 recalling ECthR Second section, Judgement 28 august 2012, Costa e Pavan vs. Italy, Application no. 54270/10.

[14] Italian Constitutional Court Decision n. 286 of 2016, recalling ECthR Second section, Judgement 7 January 2014, Cusan and Fazzo vs. Italy, Application no. 77/07.

In other cases, the "resistance" of the national constitutional court brought benefits to the jurisprudence of the European Court of Human Rights.[15]

National constitutional courts are empowered – rather than undermined – by the very presence of other counterparts in Europe rowing in the same direction. The same is true and can be repeated the other way around, that strong domestic courts are essential for the proper functioning of the European system.

It is a win-win situation.

Indeed, even in this collaborative environment, specific cases may still lead to disagreements and conflicts. Yet, in the long term and in a broad perspective, all judicial actors are partners in the same game rather than rivals.

To prevent major misunderstandings and disputes, which harm both citizens and the authority of the courts, I believe it is time to implement all available procedures that facilitate cooperation and coordination among all the courts in Europe.

For many members states, including Italy, Protocol 16 is only on paper and is waiting for signature and ratification. The reasons of this delay are difficult to understand, especially considering the beneficial experience of preliminary ruling within the EU.[16]

On a different note, the EU's accession to the ECHR is still pending. But I'll leave that for other speakers to address.

On top of these important steps to be taken, let me add my personal dream: imagine a future where, in our amazing European system, the European courts enabled by appropriate procedural rules can directly consult national constitutional courts when the case requires listening to their voices to resolve major interpretative doubts. Such a fantastic possibility would significantly strengthen the network of judicial peers[17] that has proven to be an essential asset to our European democracies.

In conclusion, I would like to once again highlight that over the past decade or so, the different judicial (along with non-judicial) institutions across Europe have showed an extraordinary ability to "close ranks" and work together for the common goal of protecting the *rule of* European constitutional *law*, made up of common constitutional principles and traditions, whereby any power is free to interpret their national identity but at the same time is bound to abide by a higher law.

The erosion of the rule of law in some countries has triggered a stricter legal cooperation in Europe among courts, along with other political and non-political supranational institutions. As President O'Leary recently emphasized – especially during the solemn hearing of the Opening of the Judicial Year 2024: "*Where the common values which derive from the common constitutional heritage are openly challenged, both European courts assist directly and indirectly in their defence, in the defence of other European system and in defence of independent and impartial national constitutional and supreme courts which are, let us not forget, in the front line*".

[15] Italian Constitutional Court Decision n. 49 of 2015 on the measure of confiscation, replying to a precedent case law of the ECthR and followed by ECtHR Grand Chamber, case of G.I.E.M. s.r.l. and others v. Italy, applications nos. 1828/06 and others.

[16] An interesting recent overview is provided by J. Alberti, G. De Cristofaro eds., *Il rinvio pregiudiziale come strumento di sviluppo degli ordinamenti,* 2023, Pisa, pp. 488-XVI.

[17] This idea is in line with the proposal of the Mixed Chamber at the EU level advanced by D. Sarmiento and JHH Weiler, *The Comeback of the Mixed Chamber*, https://verfassungsblog.de/the-comeback-of-the-mixed-chamber.

In these turbulent times, Europe has demonstrated its ability to create virtuous synergies for a common purpose, with the judiciaries actively engaging in this collaborative effort. They reference each other's work and row in the same direction, thereby enhancing the effectiveness of actions taken by any other institutions.

All in all, if we broaden our perspective and look at other countries, we can humbly say that, in this turbulent era, any citizen should feel safer and more secure within our European complex, multilayered, and sometimes bizarre and convoluted legal system than in single, isolated countries.