

I N T E R N A T I O N A L C O N F E R E N C E

**THE POSITION OF CONSTITUTIONAL  
COURTS FOLLOWING INTEGRATION INTO  
THE EUROPEAN UNION**

Bled, Slovenia

30 SEPTEMBER – 2 OCTOBER 2004

**PROCEEDINGS**

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**Z B O R N I K**

M E D N A R O D N A K O N F E R E N C A

**POLOŽAJ USTAVNIH SODIŠČ  
PO VKLJUČITVI V EVROPSKO UNIJO**

Bled, Slovenija

30. SEPTEMBER – 2. OKTOBER 2004



## C O N T E N T S

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INTRODUCTION	5
THE ADDRESS OF THE PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA	6
CONTRIBUTIONS	10
Venice Commission <i>Prof. Dr. Didier Maus</i>	10
European Court of Human Rights <i>Prof. Dr. Luzius Wildhaber</i>	27
Court of Justice of the European Communities <i>Prof. Dr. Vassilios Skouris</i>	37
European Ombudsman <i>Prof. Dr. Nikiforos Diamandouros</i>	48
Constitutional Court of the Republic of Austria <i>Prof. Dr. Heinz Schäffer</i>	57
Constitutional Court of the Republic of Italy <i>Prof. Dr. Valerio Onida</i>	98
Federal Constitutional Court of Germany <i>Prof. Dr. Winfried Hassemer</i>	106
Constitutional Court of the Republic of Slovenia <i>Prof. Dr. Ciril Ribičič</i>	119
Constitutional Court of the Republic of Slovenia <i>Prof. Dr. Mirjam Škrk</i>	137
Supreme Court of Cyprus <i>Dr. Christos Artemides</i>	159
Constitutional Court of the Czech Republic <i>Dr. Jiří Mucha</i>	163

Supreme Court of the Republic of Estonia <i>Prof. Dr. Eerik Kergandberg</i>	171
Constitutional Court of the Republic of Lithuania <i>Prof. Dr. Egidijus Kūris</i>	179
Constitutional Court of the Republic of Latvia <i>Prof. Dr. Aivars Endziņš</i>	208
Constitutional Court of the Republic of Hungary <i>Prof. Dr. Attila Harmathy</i>	219
Polish Constitutional Tribunal <i>Prof. Dr. Marian Grzybowski</i>	227
Constitutional Court of the Slovak Republic <i>Prof. Dr. Ján Mazák</i>	236
DECLARATION	245

## **INTRODUCTION**

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The international conference on “The Position of Constitutional Courts Following Integration into the European Union”, which the Constitutional Court of the Republic of Slovenia organised in cooperation with the Commission for Democracy through Law (the Venice Commission) of the Council of Europe, was held in Bled from 30 September to 2 October 2004. The official languages of the conference were Slovene, English, French, and German.

The conference was dedicated to an exchange of the experiences of the presidents and judges of the constitutional courts of the accession countries (the Czech Republic, Cyprus, Latvia, Lithuania, Estonia, Hungary, Poland, Slovakia, and Slovenia), some member states of the European Union (Austria, Italy, Germany), the Court of Justice of the European Communities, the European Court of Human Rights, the European Ombudsman, and the Venice Commission. Representatives of the Constitutional Courts of Bulgaria, Croatia, and Romania also attended the conference as observers.

The main subject of the conference was the impact of EU integration on the position of the constitutional courts, and how these constitutional courts are prepared to meet the new challenges that lie ahead. The conference papers gathered in these Proceedings present national constitutional amendments connected with European Union accession, the previous experiences of some constitutional courts concerning the legal order of the European Union, and open issues raised in connection with the application of the legal order of the European Union. The contributions of the participants in the official languages of the conference are published in the texts that they submitted for publication, whereas the Slovenian and certain English abstracts of the papers were prepared by the editors of the Proceedings.

The participants judged the conference to be a great success, and concluded the event with a declaration which is included in these Proceedings.

I would like to thank the following colleagues for their contributions to a successful completion of the Proceedings: Dean DeVos, Tina Florijančič, Petra Mahnič, LL.M., Lidija Novak, Dr. Marko Novak, Nataša Skubic, Urška Umek, and Lea Zore.

*Dr. Arne Marjan Mavčič*  
Editor of the Proceedings

## **The Address of the President of the Constitutional Court of the Republic of Slovenia to the Participants of the International Conference on the Position of Constitutional Courts Following Integration into the European Union**

Dear Guests, Ladies and Gentlemen,

In his article on constitutional democracy Prof. Hassemer, Vice-President of the German Federal Constitutional Court, emphasized that the development of the constitutional judiciary in the first half of the 20<sup>th</sup> century is a result of the recognition that the decisions of the majority are not correct merely because they are reached by the majority. Today we cannot even imagine a democratic state without a constitutional court or highest court exercising constitutional review. In the system of the separation of powers, which is the basis of every democratic system, it is the constitutional court which checks and balances the other branches of power.

The constitutional court, as the supreme guardian of the constitution, has the final word in the review of the conformity of the acts of all state authorities with the constitution.

Following accession to the European Union and the assumption of the European legal order, the constitutional courts found themselves in a completely new situation – that of facing a system of legal norms which, in relation to their domestic regulations, have a unique position. By the transfer of the implementation of part of their sovereign rights to the European Union the member states recognized the supremacy of the European legal order over the domestic legal order. The norms of European law cannot be placed in the hierarchy of legal norms; they have a supra-state position and, in some sense, also a supra-constitutional significance.

Neither the accession treaty nor any other legal source of the European Community contain provisions that refer to the position and jurisdiction of the constitutional courts of member states. However, the question is raised what their role is in relation to the legal acts of the Community, and which criteria should be applied in the review of domestic regulations which entail the implementation of European law.

While constitutional courts have for some time been aware of the fact that, in the area of human rights protection, they do not have the “final word,” and have accepted the standards which the European Court of Human Rights, in Strasbourg, has set in this area, their position in relation to the Court of Justice of the European Communities, in Luxemburg, is much more complicated. The effective operation of all three legal systems – national legal systems, European Community law, and the system of human rights protection in the framework of the European Convention for the Protection of Human Rights – can be ensured only by means of cooperation between the constitutional courts of the member states and both European courts.

It is a great honour to announce that the presidents of the two highest European judicial institutions also accepted the invitation to attend the Conference. Professor Luzius Wildhaber, President of the European Court of Human Rights, and Professor Vassilios Skouris, President of the Court of Justice of the European Communities, will present their views concerning the mutual relation between the two courts, and the relation of these courts to the constitutional courts of the member states.

We are aware of the fact that there are no uniform and final answers to the questions which constitutional courts face upon integration into the European Union. We are convinced, however, that the experiences of the constitutional courts of the present member states will greatly assist us in this effort.

Therefore, it is a pleasure to welcome the representatives of the three most respected European constitutional courts:

- the President of the Constitutional Court of the Republic of Italy, Professor Valerio Onida,
- the Vice-President of the German Federal Constitutional Court, Professor Winfried Hassemer,
- and the Substitute Judge of the Constitutional Court of the Republic of Austria, Professor Heiz Schäffer.

Please allow me, once again, to welcome you and wish you a pleasant stay in Slovenia. I would also like to thank you for your willingness to actively participate in the Conference. I am delighted to mention that the presidents or representatives of the constitutional courts of all the new EU member states are participating in the Conference (with the exception of Malta, which was forced to cancel due to unforeseen circumstances). Furthermore, the presidents of the constitutional courts of a number of candidate states have also accepted our invitation.

I am convinced that a mutual exchange of opinions and experiences will contribute to a better understanding and easier resolution of the issues connected with integration into the European Union.

## **Nagovor predsednice Ustavnega sodišča Republike Slovenije udeležencem Mednarodne konference o položaju ustavnih sodišč po vključitvi v Evropsko unijo**

Spoštovani gostje, gospe in gospodje!

Prof. Hassemer, podpredsednik nemškega Zveznega ustavnega sodišča, je v prispevku o ustavni demokraciji zapisal, da je razvoj ustavnega sodstva v drugi polovici 20. stoletja rezultat spoznanja, da odločitve večine niso pravilne že zgolj zato, ker so odločitve večine. Danes si skoraj ne moremo zamisliti demokratične države, ki ne bi imela ustavnega sodišča oziroma najvišjega sodišča z ustavnosodno jurisdikcijo. V sistemu delitve oblasti, ki je temelj vsake demokratične ureditve, je prav ustavno sodišče tisto, ki postavlja zavore in vzpostavlja ravnovesja med posameznimi vejami oblasti.

Kot vrhovni varuh ustave ima ustavno sodišče pri presoji skladnosti delovanja vseh državnih organov z ustavo zadnje besedo.

Z vključitvijo v Evropsko unijo in prevzemom evropskega pravnega reda pa so se ustavna sodišča znašla v povsem novi situaciji – soočena so s sistemom pravnih norm, ki imajo v razmerju do domačih predpisov poseben položaj. S prenosom izvrševanja dela svojih suverenih pravic na Evropsko unijo so države članice priznale supremacijo evropskega pravnega reda nad domačim. Norm evropskega prava ni mogoče uvrstiti v hierarhijo pravnih norm, imajo naddržavni in v nekem smislu celo nadustavni značaj.

Niti pristopna pogodba niti kakšen drug pravni vir Evropske skupnosti ne vsebuje določb, ki bi se nanašale na položaj in pristojnosti ustavnih sodišč držav članic. Zastavlja pa se vprašanje, kakšna je njihova vloga v razmerju do pravnih aktov skupnosti in po kakšnih kriterijih naj presojajo domače predpise, ki pomenijo implementacijo evropskega prava.

Medtem ko se ustavna sodišča že nekaj časa zavedajo, da na področju varstva človekovih pravic nimajo “zadnje besede”, in so sprejela standarde, ki jih na tem področju uveljavlja Evropsko sodišče za človekove pravice v Strasbourgu, pa je njihov položaj v razmerju do Evropskega sodišča v Luksemburgu dosti bolj zapleten.

Učinkovito delovanje vseh treh pravnih sistemov – nacionalnih, prava Evropske skupnosti in sistema varstva človekovih pravic v okviru Evropske konvencije o varstvu človekovih pravic – je mogoče zagotoviti samo s sodelovanjem med ustavnimi sodišči držav članic in obema evropskima sodiščema.

V posebno čast mi je, da sta se vabilu na konferenco odzvala predsednika obeh najvišjih evropskih sodnih institucij:



- profesor Luzius Wildhaber, predsednik ESČP,
- in profesor Vassilios Skouris, predsednik ES v Luksemburgu,

ki nam bosta predstavila svoje poglede na medsebojno razmerje med obema sodiščema in na razmerje do ustavnih sodišč držav članic.

Zavedamo se, da na vprašanja, s katerimi se srečujejo ustavna sodišča po vključitvi v Evropsko unijo, ni mogoče najti enotnih in dokončnih odgovorov. Prepričani pa smo, da so nam pri tem lahko v veliko pomoč izkušnje ustavnih sodišč dosedanjih držav članic.

Zato me posebej veseli, da lahko med nami pozdravim predstavnike treh najbolj uglednih evropskih ustavnih sodišč:

- predsednika Ustavnega sodišča Republike Italije, profesorja Valeria Onido,
- podpredsednika nemškega Zveznega ustavnega sodišča, profesorja Winfrieda Hassemerja,
- in nadomestnega sodnika Ustavnega sodišča Republike Avstrije, profesorja Heinza Schäfferja.

Dovolite mi, da vas še enkrat pristrčno pozdravim in vam zaželim prijetno bivanje v Sloveniji. Zahvaljujem se vam za pripravljenost, da aktivno sodelujete na konferenci. Veseli me, da se konference udeležujejo predsedniki oziroma predstavniki ustavnih sodišč vseh držav novih članic EU (razne Malte, ki je morala zaradi drugih nepredvidenih obveznosti svojo udeležbo odpovedati). Na naše povabilo pa so se odzvali tudi predsedniki ustavnih sodišč držav kandidatk.

Prepričana sem, da bo medsebojna izmenjava mnenj in izkušenj prispevala k boljšemu razumevanju in lažjemu razreševanju problemov, povezanih z vključitvijo v Evropsko unijo.

*Prof. Dr. Didier Maus*  
*Judge of the Constitutional Tribunal of Andorra*  
*On behalf of the Venice Commission*

## **OPINION ON THE IMPLICATIONS OF A LEGALLY-BINDING EU CHARTER OF FUNDAMENTAL RIGHTS ON HUMAN RIGHTS PROTECTION IN EUROPE**

### **Summary and Concluding Observations**

Fundamental rights have been the concern of the Community institutions, and increasingly remain so. In its dealings with human rights matters, the ECJ has drawn inspiration not only from the text of the ECHR, but also from the case-law of the Strasbourg Court. Certain divergences in case-law have nonetheless occurred.

On account of the gaps in the EU human rights protection mechanism, EU citizens have increasingly turned to the Strasbourg Court. The latter has progressively expanded its scope of competence and has accepted to review national acts of implementation of Community law. Should this trend continue, and should the Strasbourg Court decide to have jurisdiction over the implementation of primary and secondary Community law, its effect could be that a *de facto* EC/EU accession to the ECHR will take place. In the meantime, the EU has adopted a Charter of fundamental rights, which affords a scope of protection of fundamental rights which is not entirely equal to the one afforded by the ECHR.

The Charter is likely to become legally binding. When this happens, there will be an overlapping of legal instruments (the Charter and the ECHR) and of *fora* (the Strasbourg and the Luxembourg Courts). This overlapping would not constitute a threat to legal certainty, if the guarantees afforded by either system were exactly the same.

However, absolute consistency between the case-law of the Strasbourg and the Luxembourg Courts cannot be guaranteed. Differences in the interpretation of the ECHR by the two Courts have occurred, and different interpretations of the ECHR and the Charter would seem inevitable, in spite of the horizontal clauses of the Charter.

Such divergences risk putting the national authorities in a difficult dilemma when they have to implement diverging judgments.

States which are party to the ECHR, such as all EU member States, have accepted to subject all their acts and legislation to the supervision of the Strasbourg Court. If these

States were allowed, by means of transfers of powers to a supra-national or international organization, such as the EU, to exclude matters which are covered by the ECHR from the guarantees enshrined therein, including that of external supervision by the Strasbourg Court, the effectiveness of the system established by the ECHR might be endangered. Indeed, in the absence of such external control, there would be no remedy against a possible more restrictive interpretation of the Charter provisions by the Luxembourg Court than the interpretation of the equivalent ECHR provisions by the Strasbourg Court: should this happen, there would be a real risk of lowering the level of human rights protection in respect of acts of the Community institutions.

Accession of the European Community to the ECHR appears therefore to be the key to securing the necessary consistency in the interpretation and the application of similar provisions of the ECHR and the Charter and thus to securing the effectiveness of the Strasbourg system.

Accession would indeed seem a logical consequence of the circumstance that the Community and the European Union evolve into structures which are increasingly comparable to those of a federal State. In that respect, the Charter would play the same role as the catalogues of fundamental rights contained in the national constitutions and the ECJ would play a similar role to that of the highest national courts.

Accession would jeopardise neither the principle of autonomy of EC law nor the substance of the monopoly of its interpretation by the ECJ.

Aside from making a contribution towards legal certainty in human rights protection in the EU legal space and towards the strengthening of European common values and their effective enforcement, accession would allow for the full representation of the EU in the Strasbourg Court, the taking into consideration by the latter of the specific experiences of the EU and the satisfactory handling of the issues arising out of the due implementation of judgments in cases involving EC/EU issues.

Accession would maintain and even reinforce the ECHR mechanism, avoid the creation of new dividing lines within Europe and enhance the credibility of the EU's policies in the field of human rights.

In addition to accession, normative coherence between Luxembourg and Strasbourg would be furthered by the creation of the possibility for the Luxembourg Courts to seek preliminary rulings by the Strasbourg Court concerning the interpretation of the ECHR.

Regular contacts and exchanges of views between the two Courts would certainly be highly profitable.

Pending accession, it would be useful to introduce the possibility for the Luxembourg Court to seek advisory opinions by the Strasbourg Court.

It is the Venice Commission's opinion that legal and material preparatory measures for accession of the EC/EU to the ECHR should be continued in order to ensure adequate and timely preparation for a time when the political momentum for accession exists. The Venice Commission is at the disposal of the organs of the Council of Europe and of the EU involved, to assist in this endeavour if requested.

### ***Povzetek in sklepne ugotovitve***

*Temeljne pravice so bile in ostajajo skrb ustanov Skupnosti. Pri obravnavanju zadev s področja človekovih pravic se Sodišče Evropskih skupnosti (SES) ni zgedovalo le po besedilu Konvencije o varstvu človekovih pravic in temeljnih svoboščin (EKČP), temveč tudi po sodni praksi strasbourškega sodišča. Kljub temu je prišlo do določenih odstopanj v sodni praksi.*

*Zaradi nepopolnega mehanizma varstva človekovih pravic v EU so državljani EU vedno pogosteje iskali zaščito pred strasbourškim sodiščem. To je postopoma razširilo obseg svoje pristojnosti in sprejelo v presojo nacionalne akte, ki izvršujejo pravo Skupnosti. Če se bo ta trend nadaljeval in če bo strasbourško sodišče odločilo, da je pristojno za izvrševanje primarnega in sekundarnega prava Skupnosti, bo to učinkovalo kot de facto pristop ES/EU k EKČP.*

*Medtem je EU sprejela Listino o temeljnih pravicah, ki zagotavlja obseg varovanja temeljnih pravic, ki ni popolnoma enak obsegu varovanja iz EKČP.*

*Listina bo verjetno postala pravno zavezujoča. Ko se bo to zgodilo, bo prišlo do prekrivanja pravnih instrumentov (Listine in EKČP) in forumov (strasbourškega in luksemburškega sodišča). Takšno prekrivanje ne bi ogrozilo pravne varnosti, če bi bila jamstva v obeh dokumentih enaka.*

*Toda absolutne skladnosti sodne prakse strasbourškega in luksemburškega sodišča vendarle ni moč zagotoviti. Že v preteklosti sta sodišči različno razlagali EKČP in zdi se, da so različne razlage EKČP in Listine pravzaprav nujnost ne glede na obstoj t. i. horizontalnih določb v Listini. Takšne razlike lahko postavijo organe držav članic pred težko dilemo, ko morajo izvrševati različne sodbe.*

*Države, ki so podpisnice EKČP, kot so vse države članice EU, so pristale na pristojnost strasbourškega sodišča glede nadzora njihovih aktov in zakonodaje. Če bi s prenosom pristojnosti na supranacionalno ali mednarodno organizacijo, kot je EU, tem državam*

*dovolili, da izključijo zadeve, ki jih pokriva EKČP, iz jamstev, ki jih ta zagotavlja, vključno z zunanjim nadzorom strasbourškega sodišča, bi bila učinkovitost sistema, ustanovljenega z EKČP, lahko ogrožena. Če takšnega zunanjega nadzora ne bi bilo, ne bi bilo drugega sredstva v primerih, v katerih bi luksemburško sodišče lahko bolj ozko razlagalo določbe Listine, kot strasburško sodišče razlaga EKČP. Če bi do tega prišlo, bi obstajala resna nevarnost, da se zmanjša raven varstva človekovih pravic glede aktov ustanov Skupnosti.*

*Pristop Evropske skupnosti k EKČP se zato zdi ključ za zagotovitev nujne skladnosti pri razlagi in uporabi podobnih določb EKČP in Listine ter do zagotovitve učinkovitosti strasbourškega sistema.*

*Pristop bi bila logična posledica okoliščine, da se Skupnost in Evropska unija razvijata v strukture, ki so vse bolj primerljive s federalno državo. Pri tem bi Listina igrala enako vlogo kot katalogi temeljnih pravic v ustavah držav članic, SES pa podobno vlogo, kot jo imajo najvišja nacionalna sodišča. Takšen pristop ne bi ogrozil niti načela avtonomnosti prava ES niti monopola njegove razlage, ki ga uživa SES.*

*Poleg prispevka k pravni varnosti glede varstva človekovih pravic v pravnem prostoru EU in h krepitvi evropskih skupnih vrednot ter njihovega učinkovitega uveljavljanja bi pristop omogočil polno zastopstvo EU pred strasbourškim sodiščem, ki bi upoštevalo specifične izkušnje EU ter zadovoljivo obravnavalo zadeve v zvezi s potrebnim izvrševanjem sodb v primerih, ki se nanašajo na ES/EU.*

*Pristop bi vzdrževal in celo okreпил mehanizem EKČP, prispeval k preprečevanju oblikovanja novih delitev znotraj Evrope in povečal verodostojnost politik EU na področju človekovih pravic.*

*Poleg pristopa bi normativno skladnost med Luksemburgom in Strasbourgom okrepili z oblikovanjem možnosti, da luksemburški sodišči na strasbourško naslovita zahteve za predhodno odločanje glede razlage EKČP.*

*Redni stiki in izmenjave stališč med obema sodiščema bi bili gotovo zelo koristni. Zelo bi bilo koristno, če bi do pristopa uvedli možnost, da luksemburško sodišče od strasbourškega zahteva svetovalna mnenja.*

*Beneška komisija meni, da je treba nadaljevati s pravnimi in materialnimi pripravljalnimi ukrepi za pristop ES/EU k EKČP, da se zagotovi primerna in pravočasna pripravljenost za trenutek, ko bo nastopila politična priložnost za pristop. Tako je Beneška komisija organom Sveta Evrope in organom EU, ki bodo v to vključeni, na voljo za kakršnokoli pomoč.*

## **LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE ET LA PROTECTION DES DROITS DE L'HOMME EN EUROPE**

Mesdames, Messieurs,

C'est un grand honneur pour moi de prendre la parole à l'ouverture de cette conférence et de m'exprimer devant tant de représentants des cours constitutionnelles de pays membres de l'Union européenne, que ceux-ci le soient depuis l'origine, depuis déjà quelque temps, ou depuis le 1<sup>er</sup> mai dernier seulement.

Je suis convaincu que le thème qui est au centre de nos débats, celui des relations entre l'ordre juridique national, l'ordre juridique communautaire et l'ordre juridique issu de la Convention européenne des droits de l'homme, nous fournira, non seulement, l'occasion d'avoir des exposés et des débats particulièrement enrichissants. Il s'agit, du point de vue aussi bien de la théorie que du droit positif, du thème le plus important pour les dix ou quinze ans qui viennent. Il s'agit en effet de savoir, dans les vingt-cinq pays de l'Union européenne d'aujourd'hui, et les trente de demain, comment les différents systèmes juridiques vont s'articuler et, compte tenu du thème de notre réunion, comment la protection juridictionnelle des droits de l'homme, et donc leur effectivité, seront assurées. Lorsque, par exemple, dans un des pays de l'Union européenne, un citoyen estimera que son droit à un procès équitable n'est pas parfaitement assuré, le juge définitif de cette question sera-t-il la cour constitutionnelle nationale, la Cour de justice des Communautés européennes, ou la Cour européenne des droits de l'homme?

J'espère qu'à l'issue de nos débats, et grâce au concours des uns et des autres, tant des représentants des cours constitutionnelles des pays de l'Union européenne que de la participation des présidents de la Cour de justice des Communautés européennes et la Cour européenne des droits de l'homme, ainsi que de plusieurs de leurs collègues, nos idées seront plus claires.

Il me revient, en ouverture de nos débats, d'excuser le président La Pergola, président de la Commission de Venise, et de vous présenter le contenu de l'avis adopté par la Commission de Venise en décembre 2003 sur « Les implications d'une Charte des droits fondamentaux de l'Union européenne juridiquement contraignante sur la protection des droits de l'homme en Europe ».

Après avoir évoqué le contenu de ce document, je profiterai de l'occasion qui m'est donnée pour prolonger la réflexion.

## I - L'avis des 12-13 décembre 2003

Le point de départ de la réflexion se situe au moment du Sommet européen de Nice, le 7 décembre 2000, lorsque les présidents du Parlement européen, du Conseil européen et de la Commission européenne ont signé et proclamé la Charte des droits fondamentaux de l'Union européenne. A cette occasion, il est bien précisé que cette charte n'a pas de valeur contraignante, ni à l'égard des institutions européennes ou des institutions nationales agissant dans le cadre de compétences de l'Union européenne, et qu'il ne s'agit pas non plus d'un catalogue des droits fondamentaux dont les citoyens des pays de l'Union européenne et d'autres personnes pourraient revendiquer l'application devant les tribunaux. Même si cette charte est rédigée comme si elle devait devenir un acte normatif contraignant, elle se présente, à ce moment là, et encore aujourd'hui dans l'attente de l'éventuelle entrée en vigueur du « Traité établissant une constitution pour l'Europe », comme un code de bonne conduite, une déclaration de principe ou un idéal à atteindre. Il n'en demeure pas moins que, dès ce moment là, la Commission de Venise, comme d'autres juristes, pose la question de la superposition des catalogues en matière de droits de l'homme (les catalogues nationaux, le catalogue de la CEDH et le catalogue de la Charte) et les relations qui devront, le cas échéant, exister entre les juridictions compétentes.

De l'avis de la Commission de Venise, il s'agit d'un sujet essentiel qui sera au cœur de l'espace juridique européen. Ceci justifie que trois membres de la commission, MM. Giorgio Malinverni (Suisse), Peter Vandjik (Pays-Bas) et Hans-Heinrich Vogel (Suède) préparent un rapport qui servira de support aux débats et aux conclusions adoptées lors de la 57<sup>e</sup> session plénière de la Commission de Venise<sup>1</sup>.

Ce document, qui contient de très nombreuses et précises références juridiques, présente d'abord un rapide historique de la question, puis évoque la protection des droits de l'homme dans l'ordre juridique communautaire, analyse l'extension du contrôle de la Cour européenne des droits de l'homme au champ du droit communautaire, synthétise le contenu de la Charte des droits fondamentaux de l'Union européenne et pose ensuite la question de la coexistence de deux instruments obligatoires en matière de protection des droits de l'homme dans les États membres de l'Union européenne, avant de s'interroger sur l'adhésion de la Communauté européenne (Union européenne) à la Convention européenne des droits de l'homme. L'avis préconise enfin des mesures provisoires destinées, pendant la période précédant l'adhésion de l'Union européenne à la CEDH, à atténuer les divergences de jurisprudence entre les cours de Strasbourg et de Luxembourg. Il contient également un résumé et des observations finales.

Il convient aujourd'hui de présenter le constat de la Commission de Venise et de souligner ses propositions de solution.

<sup>1</sup> Commission de Venise, avis n° 256/2003.

## A) Le constat

Toute la première partie de l'avis est consacrée à une présentation, à la fois historique et synthétique, de la situation qui prévaut aujourd'hui.

La première observation concerne les points de départ. Il est souligné, à juste titre, que la Convention européenne des droits de l'homme a, depuis 1950, pour vocation de renforcer la définition et la protection des droits de l'homme dans les pays signataires. Son caractère subsidiaire par rapport aux systèmes de protection nationaux<sup>2</sup>, l'existence d'organes spécifiques, désormais une Cour européenne des droits de l'homme permanente et une jurisprudence abondante ont permis à l'ordre juridique de la Convention européenne de devenir un véritable point de référence, non seulement en Europe, mais dans le monde, en matière de droits de l'homme.

L'évolution des Communautés européennes et, depuis le Traité de Maastricht, de l'Union européenne, se situe dans un contexte différent. La préoccupation initiale était d'ordre économique. Les traités ont donné naissance à un ordre juridique spécifique qui se superpose aux ordres juridiques nationaux et au profit duquel les autorités nationales ont consenti à d'importants transferts de compétence<sup>3</sup>, mais les droits fondamentaux en tant que tels n'ont pas fait partie des éléments essentiels de l'évolution des Communautés européennes et de l'Union européenne. Le rapport souligne que c'est à travers ses décisions, depuis l'arrêt Nold<sup>4</sup> de 1974, que la Cour de justice des Communautés européennes a développé une jurisprudence relative aux instruments internationaux concernant la protection des droits de l'homme et que, progressivement, tant la jurisprudence que les traités, ont pris en compte la préoccupation des droits fondamentaux et ont fait, implicitement puis explicitement, référence à la fois aux traditions constitutionnelles nationales et à la Convention européenne des droits de l'homme, convention dont tous les pays membres de l'Union européenne sont signataires<sup>5</sup>.

Dans ces conditions, il n'y a pas lieu de s'étonner que la jurisprudence de la Cour européenne des droits de l'homme soit, par définition, tout entière consacrée à ceux-ci alors que la jurisprudence de la Cour de justice des Communautés européennes a eu pour fonction essentielle de veiller à l'unité du droit communautaire et n'a introduit que progressivement les droits fondamentaux parmi ses normes de référence.

L'avis analyse ensuite, de manière extrêmement circonstanciée, les contacts qui ont existé, et qui existent encore, entre les deux juridictions, celle de Strasbourg et celle de Luxembourg. Dans les paragraphes 6 à 15, le document retrace toute l'évolution de la jurisprudence

<sup>2</sup> CEDH, 7 décembre 1976, *Handyside c/Royaume-Uni*, (Cour plénière), série A, n° 24.

<sup>3</sup> V. les arrêts, bien connus, de la CJCE : *Van Gend et Loos* (aff. 26/62) et *Costa c/Enel* (aff. 6/64).

<sup>4</sup> *Nold KG c/Commission* (aff. 4/73).

<sup>5</sup> V. l'article 6 du Traité de l'Union européenne (1992).



de la Cour de Luxembourg et souligne que cette dernière s'est très largement inspirée des décisions rendues par la Cour de Strasbourg. C'est ainsi qu'au paragraphe 13, il est indiqué que la CJCE « a considéré en fait la Cour de Strasbourg comme une source de principes juridiques généralement admis en matière de droits de l'homme à l'aune desquels (il convient) d'interpréter le droit communautaire ». Même si quelques légères différences sont relevées, pour l'essentiel la primauté du système de la convention européenne est reconnue.

Dans ses paragraphes 16 à 23, le rapport analyse de manière extrêmement fine la manière dont la Cour de Strasbourg a accepté, dans le respect des compétences des différents droits, de s'intéresser au champ du droit communautaire. L'arrêt *Matthews* de 1999<sup>6</sup>, un des très grands arrêts eu égard à notre problématique, a établi la compétence de la Cour de Strasbourg en matière de contrôle du droit communautaire primaire, c'est-à-dire le droit des traités. Il est souligné qu'une des justifications de cette compétence est le fait que la Cour de justice de Luxembourg ne l'est pas dans la mesure où elle est chargée d'appliquer le droit issu des traités mais non la légalité des traités eux-mêmes. Chacun sait que dans cet arrêt la Cour européenne des droits de l'homme a considéré que le Royaume-Uni était responsable d'une violation de l'article 3 du protocole n° 1 relatif aux droits des élections libres pour avoir exclu Gibraltar, territoire qui relève de la Couronne britannique, mais non du Royaume-Uni, du champ d'application de l'acte du 20 septembre 1976 portant élection des représentants au Parlement européen au suffrage universel direct. De manière significative, cette partie de l'avis de la Commission de Venise se termine par une référence à une « adhésion *de facto*, indirecte ou forcée, des Communautés européennes à la Convention européenne des droits de l'homme ».

Le troisième élément du constat porte sur la Charte européenne des droits fondamentaux. Dans les paragraphes 24 à 37, la Commission de Venise s'interroge sur la valeur de cette charte dans le système juridique d'aujourd'hui et encore plus dans le système juridique de demain.

La conclusion ne fait aucun doute puisqu'au paragraphe 37 il est écrit : « Le changement de nature de la Charte démultipliera sans nul doute ses effets sur le schéma de protection des droits de l'homme en Europe ». Il est en effet rappelé que la Charte des droits fondamentaux de l'Union européenne s'impose, à l'évidence, de la Convention européenne des droits de l'homme, mais qu'il existe des différences substantielles entre les deux instruments, qu'il s'agisse de la formulation des droits ou de la portée des droits garantis. Au regard de la formulation des droits, la Charte comprend l'ensemble des droits énoncés dans la Convention européenne, mais contient, par exemple dans le domaine des droits sociaux ou dans le domaine des droits dits de « la troisième génération », des droits qui ne figurent ni dans la Convention de 1950 ni dans ses protocoles additionnels, tels que le droit à l'environnement ou à une bonne administration.

<sup>6</sup> 18 février 1999, *Matthews c/Royaume-Uni*, (Grande chambre), *Recueil*, 1999, I, 305.

Lorsque la Charte prend soin, à la fois dans son texte même et dans les explications du *praesidium*, de souligner la parenté entre son contenu et la Convention européenne, cette proximité trouve sa limite dans les stipulations de la Charte qui ne s'appuient sur aucune disposition spécifique de la Convention européenne, même s'il peut être fait référence à d'autres accords européens (par exemple la Charte sociale européenne), à la différence près que ceux-ci ne relèvent pas du système de protection assuré par la Cour européenne des droits de l'homme.

Tout en relevant que la Charte n'a pas de valeur contraignante, mais qu'elle a déjà été utilisée comme norme d'inspiration, soit par des avocats généraux de la Cour de Luxembourg, soit par le tribunal de première instance<sup>7</sup>, l'avis de la Commission de Venise considère, de manière quasi explicite, qu'il n'est pas possible de laisser de côté la valeur normative de cette Charte et que, par conséquent, il convient de réfléchir à des solutions susceptibles d'éviter des conflits de jurisprudence entre la Cour de Strasbourg et la Cour de Luxembourg et d'assurer, en tout état de cause, un niveau de protection important dans l'Union européenne.

## **B) Propositions de solution**

La réflexion de la Commission de Venise s'articule autour de deux périodes différentes. Elle s'interroge d'abord sur la situation actuelle, c'est-à-dire l'existence d'une Charte des droits fondamentaux de l'Union européenne, proclamée mais non obligatoire, puis évoque la situation qui résulterait de l'entrée en vigueur du Traité constitutionnel européen, donc de la valeur normative de la Charte.

### **1°) La situation actuelle**

Compte tenu des dispositions existantes, tant celles de la Convention européenne des droits de l'homme que celles résultant du Traité sur l'Union européenne dans sa version en vigueur après le traité de Nice, il n'existe guère de solutions procédurales.

L'avis de décembre 2003 préconise des contacts réguliers entre la Cour de Luxembourg et la Cour de Strasbourg, ce qui existe déjà. Ces contacts, formels ou informels, seraient destinés, en particulier pour la Cour de Luxembourg, à mieux connaître la jurisprudence de la Cour européenne des droits de l'homme et à s'inspirer, autant que faire se peut, des méthodes d'interprétation et des solutions sur le fond retenues par la Cour de Strasbourg. A l'inverse, il peut être utile, pour les membres de la Cour européenne des droits de l'homme, même pour les juges désignés sur proposition d'États non membres de l'Union

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<sup>7</sup> Tribunal de première instance, 3 mai 2002, Jégo-Quéré c/Commission, aff. T-177/01.

européenne, de mieux comprendre les préoccupations de la Cour de justice des Communautés européennes, en particulier lorsqu'il s'agit de combiner les droits fondamentaux de la personne et la libre circulation des biens, des marchandises et des services.

L'avis de la Commission de Venise préconise également une légère adaptation des traités de l'Union européenne destinée à permettre à la Cour de justice de saisir, à titre préjudiciel, la Cour européenne des droits de l'homme comme peut le faire le Comité des ministres en application de l'article 47 de la Convention.

Cette procédure, qui ne serait évidemment applicable que dans l'espace commun aux préoccupations des deux juridictions, aurait l'avantage d'éviter que la Cour de Luxembourg développe, de façon même involontaire, une jurisprudence trop éloignée de celle de Strasbourg. Elle nécessiterait tout à la fois une modification du traité sur l'Union européenne et de la Convention européenne des droits de l'homme et doterait la Cour de justice des Communautés européennes d'un statut particulier, différent de celui des juridictions suprêmes nationales. Ces dernières, qu'elles soient des juridictions suprêmes, judiciaires, administratives ou constitutionnelles, n'ont en effet pas la possibilité d'interroger la Cour de Strasbourg, à titre préjudiciel, comme elles peuvent le faire, depuis 1957, à l'égard de la Cour de justice des Communautés européennes.

La question de savoir si la CJCE peut disposer d'un statut particulier différent de celui des cours suprêmes nationales, est ainsi posée.

## **2°) Dans l'avenir**

Sans être évidemment en mesure, à l'époque où elle rend son avis, de savoir si le «*Traité constitutionnel européen*» sera d'abord signé et, ensuite, entrera en vigueur, la Commission de Venise se situe néanmoins en aval et considère ces deux étapes comme réalisées. Elle examine alors les solutions qui permettraient d'éviter d'inévitables conflits de jurisprudence entre les deux cours concernées.

Dans son paragraphe 72, l'avis préconise l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme : «*Il est clair que l'adhésion de l'Union européenne à la CEDH représente la meilleure solution face aux menaces qui pèsent sur la cohérence et la sécurité juridiques...*». Cette adhésion nécessite une disposition spécifique dans le *Traité constitutionnel européen* et une modification de la *Convention européenne des droits de l'homme*. En décembre 2003, la Commission de Venise ne pouvait être certaine, ni de l'inscription dans le *Traité*, mis au point le 18 juin 2004 et signé le 29 octobre 2004, de l'article I-9, § 2, selon lequel : «*L'Union adhère à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*», ni de ce que le protocole n° 14 à la *Convention* serait ouvert à la signature, le 13 mai 2004, et qu'il comporterait un

article 17 introduisant, dans l'article 59 de la Convention, un paragraphe 2 aux termes duquel : « L'Union européenne peut adhérer à la présente convention ». C'est néanmoins dans cette perspective que la Commission de Venise se plaçait.

Développant la suggestion relative à la période précédente, elle propose une formalisation des mécanismes de renvoi entre la Cour de Luxembourg et la Cour de Strasbourg et une éventuelle adaptation du mode de fonctionnement de la Cour de Strasbourg pour donner une priorité à la Cour de Luxembourg au motif qu'il s'agit d'une cour internationale et non d'une cour nationale. De ce fait, la Cour européenne des droits de l'homme deviendrait, pour ce qui concerne les droits fondamentaux communs à la Convention européenne et à l'Union européenne, la juridiction suprême.

Dans son paragraphe 84, l'avis de la Commission de Venise prend néanmoins une précaution importante. Elle souligne que : « L'adhésion (de l'Union européenne à la CEDH) ne mettrait en péril ni le principe de l'autonomie du droit communautaire, ni le monopole de son interprétation qui appartient à la Cour de justice des Communautés européennes ». Cet état de la réflexion, à fin 2003, mérite d'être prolongé, voire quelque peu élargi.

## **II- Les prolongements**

Depuis l'adoption de l'avis de la Commission de Venise des 12 et 13 décembre 2003, la situation a évolué, ce qui justifie quelques observations complémentaires. Il convient néanmoins de souligner l'incertitude du calendrier<sup>8</sup>. Si le « Traité établissant une constitution pour l'Europe » a été signé à Rome le 29 octobre, dans un texte identique à celui dont chacun disposait dès le 30 septembre, une incertitude demeure sur les vingt-cinq procédures de ratification et donc sur l'éventuelle date d'entrée en vigueur du traité. Au cas où celui-ci resterait à l'état d'instrument non ratifié, la problématique évoquée dans la première partie demeurerait présente. Dans le cas où, à partir de 2006 ou 2007, le traité deviendrait le texte fondateur de l'Union européenne, de nouvelles perspectives seraient ouvertes.

### **A) Le traité constitutionnel**

De manière très explicite, le texte signé le 29 octobre 2004 contient des dispositions relatives aux droits fondamentaux. A plusieurs reprises, il est fait référence à la volonté des vingt-cinq pays de se doter d'un véritable catalogue et de procédures en matière de droits fondamentaux. Ceci résulte aussi bien de certaines dispositions de la partie I du

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<sup>8</sup> Le présent rapport a été revu fin novembre 2004.

Traité constitutionnel<sup>9</sup> que de l'inclusion dans la partie II de la Charte, voire de certaines stipulations de la partie III relatives aux politiques et au fonctionnement de l'Union<sup>10</sup>.

Dès l'article I-2, consacré aux valeurs de l'Union, il est affirmé : « L'Union (européenne) est fondée sur les valeurs de respect de la dignité, 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 ».

Indépendamment de toute autre disposition plus précise, ces valeurs considérées comme « communes aux États membres » seraient susceptibles de constituer des normes de référence pour une juridiction suprême. Les stipulations de l'article I-3 sur les objectifs de l'Union, font également référence aux droits de l'homme puisque, par exemple, son paragraphe 3, alinéa 2, indique que l'Union combat « l'exclusion sociale et les discriminations et promeut la justice et la protection sociale et l'égalité entre les hommes et les femmes... ». De même, dans le paragraphe 4, il est indiqué que l'Union contribue « à la protection des droits de l'homme, en particulier ceux de l'enfant... ». L'article I-9, intitulé « Droits fondamentaux » constitue le pivot des stipulations générales relatives au sujet. Ses trois paragraphes sont consacrés :

- à la reconnaissance par l'Union des libertés et des principes énoncés dans la Charte des droits fondamentaux (qui constituent la partie II du « Traité constitutionnel ») ;
- à l'obligation pour l'Union d'adhérer à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, tout en précisant que cette adhésion « ne modifie pas les compétences de l'Union telles qu'elles sont définies dans la Constitution » ;
- au fait que les droits fondamentaux font partie du droit de l'Union en tant que principes généraux, et que ces droits fondamentaux sont, d'une part, ceux garantis par la Convention européenne et, d'autre part, ceux qui résultent des traditions constitutionnelles communes aux États membres.

Il y a donc véritablement, dans cet article I-9, dont la rédaction a été renforcée par la Conférence intergouvernementale, un véritable élargissement par rapport aux dispositions actuellement en vigueur à l'article 6, § 2, du Traité sur l'Union européenne. Cet article constitue une véritable stipulation générale introduisant la partie II consacrée à la Charte des droits fondamentaux de l'Union européenne et précise que les droits fondamentaux

<sup>9</sup> A l'inverse des trois autres parties, la partie I du traité ne comporte pas d'intitulé. En réalité, il s'agit de l'énoncé des dispositions relatives aux caractéristiques fondamentales de l'Union, à son cadre institutionnel et à l'exercice de ses compétences. Les 60 articles de cette partie présentent un caractère quasi-constitutionnel.

<sup>10</sup> Par exemple les III-118 et III-124 sur l'interdiction des discriminations, ou l'article III-120 sur la protection des consommateurs.

de l'Union européenne peuvent également s'inspirer des traditions constitutionnelles communes aux États membres. La question se posera de savoir s'il existe des droits fondamentaux résultant des traditions constitutionnelles communes aux États membres qui ne seraient pas inclus dans la Charte des droits fondamentaux et auxquels la Cour de justice de l'Union européenne<sup>11</sup> pourrait éventuellement se référer au titre des principes généraux du droit communautaire.

La partie II du Traité constitutionnel intitulée explicitement « La Charte des droits fondamentaux de l'Union » constitue, dans les articles II-61 à II-114, un ensemble quelque peu compliqué. On trouve d'abord un préambule qui, au-delà de sa rédaction symbolique, précise les sources d'inspiration de la Charte. Il s'agit à la fois des traditions constitutionnelles et des obligations internationales communes aux États membres, de la Convention européenne des droits de l'homme, des chartes sociales adoptées par l'Union et par le Conseil de l'Europe, ainsi que de la jurisprudence de la Cour de justice de Luxembourg et de la Cour européenne des droits de l'homme. Il s'agit donc de sources variées. Certes, la Convention européenne des droits de l'homme constitue l'élément central, tant par l'importance de son contenu que par la qualité de la jurisprudence de la Cour de Strasbourg, mais elle ne représente pas la seule source d'inspiration de la Charte des droits fondamentaux de l'Union européenne.

Dans le même alinéa du préambule, il est précisé, dans une rédaction ajoutée par la Conférence intergouvernementale : « Dans ce contexte, la Charte sera interprétée par les juridictions de l'Union et des États membres en prenant dûment en considération les explications établies sous l'autorité du *praesidium* de la Convention qui a élaboré la Charte et mises à jour sous la responsabilité du *praesidium* de la Convention européenne ». Cette rédaction devrait, dans l'esprit de certains, notamment britanniques, encadrer les interprétations jurisprudentielles. En tout cas, elle marque la volonté des auteurs du « Traité constitutionnel », de tenir le plus grand compte des interprétations de la Cour de Strasbourg, lesquelles figurent explicitement, et de manière répétée, dans les explications du *praesidium* qui a élaboré la Charte des droits fondamentaux. Ces explications prennent la forme d'une déclaration, annexée au Traité constitutionnel, mais faisant juridiquement corps avec lui.

Les six parties de la Charte consacrées successivement à la dignité, aux libertés, à l'égalité, à la solidarité, à la citoyenneté et à la justice, sont complétées par un titre VII relatif à l'interprétation et à l'application de la Charte. Lorsque les champs se recouvrent, les explications du *praesidium* font explicitement référence à la Convention européenne des droits de l'homme et à la jurisprudence de la Cour de Strasbourg. Lorsqu'une telle référence n'existe pas, nous sommes face à un droit fondamental de l'Union européenne

<sup>11</sup> D'après l'article I-29 du « Traité constitutionnel », la Cour de justice de l'Union européenne comprend la Cour de justice (actuelle CJCE), le Tribunal (actuel Tribunal de première instance) et des tribunaux spécialisés.

qui ne correspond à aucune stipulation de la Convention européenne. A titre d'exemple, l'article II-78 sur le droit d'asile ne s'inspire pas d'une disposition de la Convention européenne, mais de l'ancien article 63 du Traité sur les Communautés européennes, devenu l'article III-266 dans le texte du 29 octobre 2004. Par contre, pour rester dans le même domaine, l'article II-79 précise que les dispositions relatives à la protection en cas d'éloignement, d'expulsion ou d'extradition, soit ont le même sens et la même portée que l'article 4 du protocole additionnel à la Convention européenne, soit incorporent la jurisprudence pertinente de la Cour européenne des droits de l'homme.

Lorsqu'à l'article II-80, la Charte énonce que « toutes les personnes sont égales en droit », cet article ne découle pas de la Convention européenne, mais d'un principe général inscrit dans toutes les constitutions européennes et que la Cour de Luxembourg a jugé comme étant un principe fondamental du droit communautaire.

Il est évident que les articles consacrés à la solidarité trouvent peu de correspondants dans le système de la Convention européenne dans la mesure où celle-ci ne concerne que très indirectement les droits sociaux. La Charte des droits fondamentaux de l'Union européenne s'inspire dans ce cas, soit de la Charte sociale européenne révisée, soit de textes propres au droit communautaire.

On peut considérer qu'aucun des droits inscrits dans la Convention européenne et ses protocoles additionnels n'est exclu de la Charte des droits fondamentaux de l'Union européenne, mais qu'à l'inverse, celle-ci déborde assez largement le champ de la Convention.

Les articles II-111 à II-114, considérés comme des articles horizontaux, ont pour fonction de définir le champ d'application de la Charte, de déterminer la portée des interprétations des droits et des principes, d'évoquer le niveau de protection et d'interdire l'abus de droit. En ce qui concerne les liaisons avec l'ordre juridique de la Convention européenne, l'article II-112 précise nettement, dans son paragraphe 3, que « dans la mesure où la présente Charte contient des droits correspondant à des droits garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, leur sens et leur portée sont les mêmes que ceux que leur confère ladite convention. Cette disposition ne fait pas obstacle à ce que le droit de l'Union accorde une protection plus étendue ».

Les explications du *praesidium* complètent cet énoncé prescriptif et visent « à assurer la cohérence nécessaire entre la Charte et la CEDH ». Il s'agit évidemment de dispositions essentielles pour éviter les conflits d'interprétation entre les cours de Strasbourg et de Luxembourg. Les explications contiennent même des listes très précises relatives aux articles de la Charte dont le sens et la portée sont les mêmes que les articles correspondants de la Convention européenne où les articles de la Charte dont le sens est le même que les articles correspondants de la Convention, mais dont la portée est plus étendue.

Au titre des directives d'interprétation, le paragraphe 4 de ce même article II-112, précise que « dans la mesure où la présente Charte reconnaît des droits fondamentaux tels qu'ils résultent des traditions constitutionnelles communes aux États membres, ces droits doivent être interprétés en harmonie avec lesdites traditions ». L'ensemble de ce dispositif particulièrement original, et à notre sens, exceptionnel, repose avant tout sur deux considérations : en premier lieu, éviter que les deux cours européennes aient tendance à interpréter de manière différente des dispositions identiques ou très proches ; en deuxième lieu, faire en sorte que le système de la Charte des droits fondamentaux de l'Union européenne constitue un standard minimum et que, le cas échéant, les dispositions nationales ou d'autres dispositions internationales puissent renforcer l'énoncé et la protection de ces droits.

Pour bien souligner que la Charte des droits fondamentaux de l'Union européenne ne constitue ni un catalogue se superposant aux catalogues nationaux, ni un catalogue subsidiaire comme l'est la Convention européenne des droits de l'homme, l'article II-111 en précise le champ d'application. Cette Charte n'est applicable que dans le domaine des compétences de l'Union européenne, qu'il s'agisse des compétences définies par les traités ou de celles qui pourraient être ultérieurement ajoutées. De plus, elle ne s'applique qu'aux institutions européennes qui, par définition, n'agissent que dans le cadre des compétences de l'Union européenne et aux institutions nationales, lorsque celles-ci mettent en œuvre, à un titre ou à un autre, des compétences européennes et le droit de l'Union. Cette double limitation est destinée à rassurer les partisans du traditionnel nationalisme juridique. Elle sera néanmoins source de grandes difficultés, non pas tant pour définir les compétences de l'Union, non pas tant pour définir les institutions de l'Union, mais pour distinguer, dans l'exercice de l'action des autorités publiques nationales ce qui relève de l'Union européenne et ce qui relève de leur responsabilité propre.

En choisissant de doter l'Union européenne d'une Charte spécifique des droits fondamentaux, les États membres ont voulu répondre à certaines inquiétudes, en particulier celles du Tribunal constitutionnel fédéral allemand, relayé par les autorités de la République fédérale, qui s'inquiétaient du niveau de protection assuré aux citoyens des pays de l'Union dans le cadre des compétences de l'Union européenne. Ce choix, dont la dimension politique ne peut être sous-estimé, risque de donner naissance à quelques sérieuses difficultés de mise en œuvre.

## **B) Les relations avec les ordres constitutionnels nationaux**

A partir du moment où tous les pays de l'Union européenne appartiennent au système de la Convention européenne des droits de l'homme, et où dans chacun de ces pays existe, de façon écrite ou jurisprudentielle, un système d'énoncé et de protection des droits fondamentaux, il importe, tant du point de vue de la construction doctrinale que de l'intérêt des justiciables, de s'interroger sur la complémentarité, la concurrence ou les oppositions entre les trois systèmes applicables.



La situation peut être résumée de la manière suivante :

1 - Le système national s'applique par définition à toute personne se trouvant sur le territoire national et relève, tant pour la définition des droits que pour leur mise en œuvre, des organes nationaux, qu'il s'agisse du pouvoir constituant, du Parlement ou des juridictions. Peu importe à cet égard que l'ordre juridictionnel national soit unique ou composite, qu'il existe une juridiction constitutionnelle ou non. Il ne viendrait à personne l'idée de considérer qu'au motif que le Royaume-Uni dispose d'un système juridique très spécifique, les citoyens britanniques ne bénéficient ni de droits fondamentaux ni d'un système de garanties juridictionnelles. Même si le *Human Rights Act* de 1988 a inscrit dans le droit britannique l'essentiel de la Convention européenne des droits de l'homme, il s'incorpore dans les caractères originaux du système britannique.

2 - Le système de la Convention européenne des droits de l'homme est caractérisé par son aspect subsidiaire. Dans la mesure où les dispositions de fond de la Convention sont applicables, qu'il s'agisse de droits ou de procédures, il ne peut être fait appel à la Cour de Strasbourg qu'après épuisement des recours internes. L'instance devant la Cour de Strasbourg se caractérise d'ailleurs par un litige entre une personne et un État, celui-ci étant considéré comme la combinaison de sa fonction normative et de sa fonction judiciaire. Le système de la Convention européenne peut également être mis en œuvre par les juridictions nationales au titre du contrôle de conventionalité, lorsqu'elles sont amenées à écarter des dispositions du droit national pour non respect des dispositions de la Convention européenne telles qu'elles sont interprétées par la Cour. A notre connaissance, aucune juridiction nationale n'a considéré que dans son ordre interne, des dispositions de valeur constitutionnelle devaient être écartées au nom du contrôle de conventionalité<sup>12</sup>. Une telle hypothèse n'est néanmoins pas inconcevable, en particulier lorsque demeurent dans des constitutions nationales des dispositions qui ont été adoptées à une période non démocratique.

3 - Le système de l'Union européenne se caractérise par un domaine limité aux attributions de l'Union européenne et par une applicabilité limitée aux institutions intervenant dans le champ de ces compétences et par un système juridictionnel faisant intervenir à la fois les juridictions nationales et la Cour de Luxembourg, celles-ci pouvant, le cas échéant, être saisies au titre d'une question préjudicielle.

La superposition des trois catalogues et des trois systèmes de mise en œuvre est susceptible de déboucher sur des situations curieuses. Lorsque, par exemple, un citoyen considérera qu'un de ses droits sociaux non couvert par la Convention européenne et n'entrant pas dans le champ des compétences de l'Union européenne n'est pas correctement mis en

<sup>12</sup> Dans sa décision du 19 novembre 2004, n° 2004-505 DC, le Conseil constitutionnel français vient de confirmer, à propos du « Traité constitutionnel » que, dans l'ordre interne, la Constitution demeure la norme suprême.

œuvre, il ne pourra s'adresser qu'au juge national, sauf ensuite à considérer qu'il n'a pas bénéficié d'un procès équitable, ce qui pourrait le conduire vers Strasbourg.

Si, par contre, à l'occasion de la mise en œuvre d'une politique de l'Union européenne, par exemple à travers des subventions accordées à un agent économique, celui-ci considère que son droit de propriété n'a pas été totalement respecté, il pourra faire valoir devant la juridiction nationale, soit les dispositions de la Charte des droits fondamentaux de l'Union européenne et demander, le cas échéant, à ce que la Cour de Luxembourg soit saisie, soit faire valoir les stipulations de la Convention européenne des droits de l'homme et, après d'éventuels échecs devant la juridiction nationale, s'adresser à la juridiction de Strasbourg. Qu'il s'agisse des droits relatifs à la liberté de la personne ou à sa libre expression, des droits des étrangers, des droits sociaux ou de certains droits économiques, il faudra, chaque cas, bien examiner quel est le système des droits fondamentaux applicable. Si celui de la Convention européenne est désormais bien connu, celui de la Charte des droits fondamentaux de l'Union européenne devra faire l'objet d'une pédagogie importante. Il conviendra d'expliquer pourquoi il s'agit d'une charte des droits fondamentaux de l'Union européenne et non pas d'une Charte des droits fondamentaux des citoyens des pays de l'Union européenne ou des personnes se trouvant sur le territoire d'un des pays de l'Union européenne. Si par hasard, le droit national est moins développé que le droit de l'Union européenne, mais que ce dernier n'est pas applicable, le conflit de juridique deviendra rapidement politique.

En fin de compte, le problème étudié dans l'avis de la Commission de Venise de décembre 2003 résulte d'un double mouvement : celui du succès de la Convention européenne des droits de l'homme et celui du développement géographique et thématique de l'Union européenne. Très séparées dans les années 1950, ces deux constructions, profondément différentes, tant dans leur objet que dans leurs effets, ont néanmoins tendance à posséder un espace commun de plus en plus important. Ceci nécessite que le dialogue des juges et des juristes soit de plus en plus développé, qu'éventuellement, des procédures spécifiques nouvelles soient mises en place, que l'éducation dans les pays de l'Union européenne souligne de plus en plus le caractère exceptionnel de la protection des droits fondamentaux dans cet espace et peut-être qu'un code de bonne conduite, au moins coutumier, se développe entre le réseau des cours constitutionnelles nationales (ou des cours en tenant lieu) et les deux grandes juridictions européennes, celle de Strasbourg et celle de Luxembourg.

En même temps, il n'est pas interdit de craindre qu'un développement aussi raffiné des systèmes de garantie des droits fondamentaux ne conduise, d'une part, à allonger la durée des procédures et, d'autre part, à les rendre difficilement compréhensibles pour le justiciable.

Comme l'a souvent souligné la Cour européenne des droits de l'homme, il ne suffit pas que la justice soit équitable, il faut qu'elle soit vécue et ressentie comme telle.

*Prof. Dr. Luzius Wildhaber*  
*President of the European Court of Human Rights*

## OPENING SPEECH

### Summary

Due to the increasing number of states in which EU law has become part of their legal systems, EU enlargement also concerns the European Court of Human Rights (the ECtHR). The number of applications that might involve elements of EU law is increasing.

European constitutional courts have played a major role in ensuring the effective judicial protection of human rights in Europe. Let us not forget the “Solange” judgments of the German Constitutional Court, which resulted in the Court of Justice of the European Communities (the ECJ) developing case law which includes an impressive catalogue of human rights that are gradually being assumed by EU legislation, including the EU Charter of Fundamental Rights (the Charter) and the Treaty establishing a Constitution for Europe (the European Constitution).

Even without the legally binding Charter, there are three types of legal sources in the area of human rights in Europe: national sources, including constitutions, international sources, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and, finally, EU law sources, including the case law of the ECJ. Consequently there are three different jurisdictions. What is particularly difficult in this respect is the fact that the jurisdictions must combine various sources as these do not only co-exist, but also overlap. This complicated situation leads to two challenges for the future: i.e. the issue of effective human rights protection and the issue of the guarantee of legal certainty.

In connection with effectiveness, a recent case adjudicated by the ECtHR, *Koua Poirrez v. France* (30 September 2003), is of particular interest. In this case, the ECtHR decided after a thirteen-year long procedure, which also involved preliminary ruling proceedings before the ECJ. The Court established that EU law could not be applied in this case. It is surprising that, on its own initiative, the national court only “made reference” concerning the possible application of EU law without considering the ECHR, which prohibits discrimination based on nationality. The mentioned cases show that to speed up judicial proceedings it is necessary for national courts to consider all the mentioned sources and also apply the ECHR, on their own initiative if possible, so that applicants do not need to go to Strasbourg.

Concerning the issue of legal certainty, the paper establishes the fact that it can be reasonably difficult for individuals that the same basic rights can have different meanings in the mentioned three systems. Fortunately, conflicts between the Convention and constitutional norms are rare. Constitutional courts interpret constitutions in conformity with the Convention or even exceed the minimal standards determined therein.

In connection with the discussion regarding the relation between the Convention and national constitutions, from the view of the Charter and the European Constitution, the author agrees with the position that the Charter has an “added value” for the EU. Concerning such, the author is of the opinion that its acceptance is understandable with regard to the basic role of human rights for the legitimacy of the activities of any public authority and with respect to the extent of powers transferred to the EU. It is also clear that it contains more rights than the ECHR; notwithstanding the fact that some of them only codify the established case law of the Strasbourg Court, and some of them are not directly enforceable. All of this is not problematic concerning the possibility of member states ensuring higher standards. It will have to be ensured that the level of legal protection of convention rights assumed by the Charter is not jeopardized. Considering the general provisions of the Charter and Art. 52.2 thereof, the Charter somewhat paradoxically strengthens the role of the ECHR as the *ius commune* of European human rights. Irrespective of that, the author is of the opinion that this is not enough to ensure complete respect for the ECHR. There also appears a need for the EU to accede to the ECHR. The EU’s accession to the ECHR would give the EU the position of a party (*locus standi*) in proceedings before the ECtHR in cases which contain elements of EU law (hitherto only as *amicus curiae*). This would not only enable such cases to be properly argued by qualified representatives of the EU appearing before the ECtHR, but also that accountable states would not be left to themselves in the implementation of those parts of Strasbourg judgments which require amendments to EU legislation.

### **Povzetek**

*Zaradi vedno večjega števila držav pogodbenic, v katerih je pravo EU postalo del njihovih pravnih sistemov, širitev EU zadeva tudi Evropsko sodišče za človekove pravice (ESČP). Povečuje se namreč število pritožb, ki utegnejo vsebovati elemente prava EU.*

*Evropska ustavna sodišča so odigrala pomembno vlogo pri zagotavljanju učinkovitega pravnega varstva človekovih pravic v Evropi. Ne pozabimo na sodbe “Solange” nemškega Ustavnega sodišča, ki so povzročile, da je Sodišče Evropskih skupnosti (SES) razvilo sodno prakso z impresivnim katalogom pravic, ki jih postopoma prevzema zakonodaja EU, vključno z Listino temeljnih pravic EU (Listina) in Pogodbo o Ustavi za Evropo (Evropska Ustava).*

*Tudi brez pravno zavezujoče Listine imamo na področju človekovih pravic v Evropi tri vrste pravnih virov: nacionalne vire, vključno z ustavami, mednarodne vire, kakršen je EKČP, in končno vire prava EU, ki vključujejo sodno prakso SES. Posledično imamo tudi tri različne jurisdikcije. Posebej težavno je, da morajo jurisdikcije različne vire kombinirati, ker ti ne le soobstajajo, temveč se tudi prekrivajo. Ta zapletena situacija prinaša dva izziva za prihodnost, tj. vprašanje učinkovitosti varstva človekovih pravic in vprašanje zagotavljanja pravne varnosti.*

*V zvezi z učinkovitostjo je zgovoren nedavno obravnavan primer pred ESČP Koua Poirrez v. Francija (30. september 2003). O njem je ESČP odločilo po 13 let trajajočem postopku, ki je vključeval tudi postopek predhodnega odločanja pred SES. To sodišče je ugotovilo, da prava ES v tem primeru ni mogoče uporabiti. Presemetljivo je, da je nacionalno sodišče na lastno iniciativo "poizvedelo" le o možni uporabi prava ES, ni pa upoštevalo Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin (EKČP), ki prepoveduje diskriminacijo na podlagi nacionalnosti. Naveden primer kaže, da je za pospešitev sodnih postopkov odločilno, da nacionalna sodišča upoštevajo vse navedene vire in uporabijo EKČP, če je le mogoče na lastno iniciativo, tako da pritožnikom ni treba v Strasbourg.*

*Glede vprašanja pravne varnosti avtor ugotavlja, da je za posameznike upravičeno težko razumljivo, da imajo lahko iste temeljne pravice v omenjenih treh sistemih različno vsebino. Na srečo so v praksi konflikti med Konvencijo in ustavnimi normami redki. Ustavna sodišča namreč razlagajo ustave v skladu s Konvencijo oziroma celo presegajo minimalne konvencijske standarde.*

*V zvezi z razpravo o razmerju med Konvencijo in nacionalnimi ustavami z vidika Listine in Evropske Ustave avtor pritrjuje stališčem, da ima Listina "dodano vrednost" za EU. Pri tem meni, da je glede na temeljno vlogo človekovih pravic za legitimacijo delovanja vsake javne oblasti in glede na obseg prenesenih pristojnosti na EU njen sprejem razumljiv. Jasno je tudi, da vsebuje več pravic kot EKČP, ne glede na to, da nekatere od njih pomenijo le kodifikacijo ustaljene sodne prakse strasbourškega sodišča, nekatere pa niso neposredno iztožljive. Vse to pa ni problematično zaradi možnosti držav članic, da zagotavljajo višje standarde. Paziti pa je treba, da raven pravnega varstva konvencijskih pravic, ki jih prevzema Listina, ni ogrožena. Ob upoštevanju splošnih določb Listine in njenega tretjega odstavka 52. člena, Listina pravzaprav nekoliko paradoksalno krepi vlogo EKČP kot ius commune človekovih pravic Evrope. Kljub temu avtor meni, da to ne zadošča za zagotavljanje popolnega spoštovanja EKČP. Obstaja tudi potreba po pristopu EU k EKČP. Pristop EU k EKČP bi podelil EU položaj stranke (locus standi) v postopku pred ESČP v primerih, ki bi vsebovali elemente prava EU (doslej le kot amicus curiae). To bi ne le omogočilo, da bi kvalificirani predstavniki EU pred ESČP te primere ustrezno argumentirali, temveč tudi, da odgovorne države ne bi bile pre-*

*puščene same sebi pri uresničevanju tistih delov strasbourške sodbe, ki zahteva spremembo zakonodaje EU.*

Mr President-elect, dear colleagues and friends,

It is a great pleasure for me to be here today and to be given the opportunity to address what has indeed become a very topical issue these days: « The position of Constitutional Courts following integration into the European Union ».

Even though the European Court of Human Rights is maybe not a Constitutional Court in the proper sense of the term, it has indeed many things in common with the Constitutional Courts of the European continent, not least the fact that it is also affected by the enlargement of the European Union, if only because of the increasing number of State Parties to the Convention, where EU law has thus become part of the national legal system subject to review under the Convention, which results in an increased number of applications potentially involving EU law elements.

Over the years, the European Constitutional Courts have always demonstrated a particular commitment to the effective protection of fundamental rights in Europe, including in respect of Community law. We remember the important role played many years ago by some of those Courts in prompting the European Community to reinforce its own protection of fundamental rights. We have still in mind the reflection-process launched across the continent by the “Solange”-judgments of the German Constitutional Court. The concerns thus expressed were taken into account by the European Court of Justice, which has since built up through its case-law an impressive set of rights now gradually being endorsed by the EU legislature. Recent developments such as the adoption of the Charter of Fundamental Rights and the Constitutional Treaty may now also need to be taken into account in this reflection-process.

Even without a legally binding Charter, the fact remains that as far as fundamental rights are concerned, we have already now three different types of legal sources co-existing in Europe: national sources, including the fundamental rights contained in the Constitutions of the Member States; international sources, such as the ECHR including the case-law of the European Court of Human Rights; and finally EU law sources, including the case-law of the European Court of Justice. From this perspective, the entry into force of the Charter would only be an additional – albeit important – component of the already existing EU sources.

We also have three different types of jurisdictions applying those different legal sources: the domestic courts of the Member States, the two Courts of the European Union (seated in Luxembourg) and the European Court of Human Rights (seated in Strasbourg). The result is that no jurisdiction in Europe today is absolved from applying or respecting

fundamental rights, which in itself represents already a huge achievement of the European legal and moral culture. The question remains as to what fundamental rights all these jurisdictions are applying and whether they all mean the same thing?

What makes the situation particularly tricky here is the fact that the different legal sources mentioned are not compartmentalized in the sense that each court would have to apply only the fundamental rights of its own legal system. Rather, in most cases different sources will have to be combined, as the legal systems concerned do not only co-exist but overlap each other. This is especially true for the domestic courts of the Member States which, in cases involving EU law, may have to take into account up to three different sources simultaneously: their own national law, the European Convention on Human Rights and EU law. In this respect, domestic courts can be said to play a central role in the European protection of fundamental rights. In EU law they are often called “*Community courts of ordinary jurisdiction*”<sup>1</sup>. In fact, one should add that they are to the same extent “*Convention courts of ordinary jurisdiction*”, as it is first for them to apply the Convention, since the Convention makes it an essential requirement for any complaint to be declared admissible by the Strasbourg Court that it has been duly raised before the domestic courts of the respondent State.

All of this, of course, leads to a fairly high amount of complexity. Do not misunderstand me, however. I am not calling into question the co-existence of those different legal systems, each with its own set of fundamental rights. I am even less denying the legitimacy of such a co-existence, as I consider it an essential part of our legal tradition, which itself reflects nothing but an important aspect of European cultural history and diversity. The fact remains that the co-existence of all these overlapping legal sources raises at least two major challenges for the future: one in respect of efficiency of human rights protection, the other – linked to the first – in respect of the need to preserve legal certainty.

To make clear what I have in mind when talking about efficiency, let me tell you the story of Mr Koua Poirrez, whose case we recently had in Strasbourg<sup>2</sup>. Here was a physically disabled applicant, a national of Ivory Coast, who had been adopted as an adult by a French citizen, although he did not thereby acquire French nationality. He applied for an adult disability allowance, but the French courts turned down his application on the ground of his Ivory Coast nationality. The French court hearing his appeal decided to ask the Court of Justice of the European Communities for a preliminary ruling on the compatibility between the relevant French law and Community law, on the basis that the applicant was a direct descendant of a citizen of the European Union. The Court of Justice found that Community law did not apply to the facts of the case: although the applicant’s adoptive father was indeed a national of a Member State of the European Communities, he did not

<sup>1</sup> Juges communautaires de droit commun ; ordentliche Gemeinschaftsgerichte.

<sup>2</sup> Koua Poirrez v. France, 30.9.2003.

qualify as a migrant worker, since he had always lived and worked in France. On the strength of this Luxemburg judgment, all the French courts which successively dealt with the appeal rejected the applicant's request for a disability allowance. He then applied to the Strasbourg Court which, in a judgment of 30 September 2003, i.e. more than 13 years after he had originally applied, found that the applicant had been the victim of discrimination based on nationality. This was contrary to Article 14 of the Convention taken together with Article 1 of Protocol no. 1, and our Court, ruling on an equitable basis, awarded him 20 000 euros for the damage he had suffered.

What can we learn from this case? Actually there are several lessons. First, it shows the complementarity of the three legal systems involved, but also the complexity of their interplay: French law contained an element of discrimination which Community law was powerless to remedy, because it did not apply in the particular case; accordingly it was only in Strasbourg that the situation could finally be remedied. However, even if Community law had applied, a preliminary ruling on the merits by the Court of Justice would not have prevented the final domestic judgment in the case from being challenged by the applicant before the Strasbourg Court<sup>3</sup>.

The Koua Poirrez case furthermore highlights the problem of the length of proceedings in Europe. As I just said, the applicant had to wait for more than 13 years before finally being vindicated in Strasbourg. Would that be a reason to consider the future abolition of one of the players involved in this type of proceedings, so as to shorten them for the benefit of applicants? The answer is no, because each of these players — the national courts, the Court of Justice and the Strasbourg Court — has a key role to play. While it is true that the Court of Justice had no option but to rule that Community law was not applicable to the facts of the case, it would not have taken much for Community law to apply and for the Court of Justice to be required to rule on whether French law contained an element of discrimination that was contrary to Community law. It would have sufficed if for example the applicant's adoptive father had been a German or Italian rather than a French national.

So what needs to be done about such delays? Our Court says that the member States are responsible for the proper functioning of their judicial systems, and that would certainly be true of our own Court, too. However, part of the solution must undoubtedly come from the domestic courts. It is quite astonishing to find a domestic court inquiring of its own motion about the effects of Community law — which in the event was inapplicable —, but failing to consider the impact of the European Convention on Human Rights, which not only was applicable, but moreover had been violated. If the domestic courts had applied the Convention of their own motion, the applicant might not have had to wait for more than 13 years before receiving his allowances.

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<sup>3</sup> See also *Pafitis and Others v. Greece*, 26.2.1998.



In the long term, we will not escape the need to consider such issues from a wider perspective and the plurality of legal systems involved in terms of their complementarity and interdependence. That should enable us to simplify and streamline the number of procedural steps to be taken by those individuals who seek to assert their rights.

Another major challenge of the years to come will be the preservation of legal certainty and harmony amidst all those different legal sources of fundamental rights, through a coordinated and harmonized approach designed to avoid confusion and relativism in this sensitive but most important area. This implies that while each legal system should be allowed to have its own fundamental rights and levels of protection, adapted to the specificities of the State or system concerned, it is equally essential to have a coherent approach in respect of the rights which are common to most of the legal systems concerned, especially those laid down in the European Convention of Human Rights. Because they are common to *all* European legal systems, they can truly be said to build the *ius commune* of fundamental rights in Europe.

Here we have to be aware of the fact that the same persons may claim the same rights under different legal systems. Remember Mr Koua Poirrez who invoked basically the same right – the right not to be discriminated against – first under French law, then under Community law and finally under the Convention, each time with a different result. Applicants would find it hard to understand – and rightly so – why, if they are so “fundamental”, the meaning and content of the same fundamental rights should vary according to the legal system involved. To take just a few other examples: it would indeed seem hard to justify why the right to liberty and security would have a different effect according to whether or not a person was arrested in pursuance of a European arrest warrant, or why a defendant in anti-trust proceedings should not be able to rely on the same procedural rights for the mere reason that foreign partners were involved in the impugned offence.

Fortunately, a lot has already been achieved in this respect, not least thanks to an excellent informal cooperation between the Constitutional Courts of the EU Member States, the European Court of Justice and the European Court of Human Rights.

The Convention has a lot in common with European Constitutions. The Strasbourg Court has repeatedly qualified the Convention as a « constitutional instrument of European public order »<sup>4</sup>. In 1998, it noted that the Preamble to the Convention refers to the “common heritage of political traditions, ideals, freedom and the rule of law”, of which national constitutions are in fact often the first embodiment.<sup>5</sup> Through the fundamental rights which they set forth, the national Constitutions indeed share the same basic democratic ideals as the Convention, the very essence of which is – as the Court repeatedly put it – respect for human dignity and human freedom.<sup>6</sup>

<sup>4</sup> Loizidou v. Turkey (prel. obj.), 23.3.1995, § 75; Bankovic (dec.), 12.12.2001, § 80.

<sup>5</sup> Communist Party v. Turkey, 30.1.1998, § 28.

<sup>6</sup> Pretty v. UK, 29.4.2002, § 65.

In some Contracting States, like Austria, the Netherlands or San Marino, the Convention has been given constitutional status, whereas in most others it ranges in the hierarchy of norms somewhere in between the Constitution and the ordinary legislation. The Convention itself makes no provision for any particular status in the domestic legal order of the Contracting States, what matters being only that the legal systems concerned operate and produce in practice results in compliance with the Convention. As the Court put it in the Turkish Communist Party case, Article 1 of the Convention, which requires the States Parties to secure the rights and freedoms laid down in the Convention, “makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States’ *“jurisdiction”* from scrutiny under the Convention. It is, therefore, with respect to their *“jurisdiction”* as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention.”<sup>7</sup>

Fortunately, real conflicts between the Convention and a constitutional norm remain quite rare, as Constitutional Courts tend to interpret the Constitution in conformity with the Convention. Moreover, constitutional standards often go beyond the Convention standards, which seek to establish a minimum protection level rather than a uniform one. There are many examples of cases in which the Strasbourg Court drew to a considerable extent on domestic constitutional jurisprudence. This was for instance obvious in the case of *Pretty v. United Kingdom*<sup>8</sup>, in which the applicant, who was paralysed and suffering from a degenerative and incurable illness, alleged that the refusal of the Director of Public Prosecutions to grant immunity from prosecution to her husband if he assisted her in committing suicide, and the prohibition in domestic law on assisting suicide infringed her rights under Articles 2, 3, 8, 9 and 14 of the Convention. In finding that those provisions had not been infringed, the Court endorsed to a large extent the reasons on the basis of which the House of Lords had come to the same conclusion.

Thus we can see a good deal of complementarity between the Convention and the Constitutions of the Contracting States. And I have not even addressed yet the essential role of constitutional adjudication in preserving the future of the Convention system. It is a secret to nobody that the Strasbourg Court has not been devised nor equipped to handle applications from all 800 millions potential applicants living in the Contracting States. This is why I can only call on domestic courts – and constitutional courts in particular – to secure the Convention rights at domestic level, if possible even of their own motion, so that applicants do not have to come to Strasbourg to assert their rights. Nobody, neither the applicants nor the authorities, benefits from judgments delivered 10 years after the relevant facts. Justice delayed is indeed justice denied.

I should mention that in the context of the recent adoption of Additional Protocol 14 reforming the Convention system, a number of recommendations were also adopted by

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<sup>7</sup> Communist Party v. Turkey, supra n.5, § 29.

<sup>8</sup> Supra n. 5.

the Committee of Ministers of the Council of Europe, which are designed to raise awareness of public authorities of their responsibility in respect of Court judgments revealing an underlying systemic violation. Our Court has already taken up this proposal in the case of *Broniowski v. Poland*<sup>9</sup>, which concerned not only the individual applicant Broniowski but 80,000 more so-called Bug River People and potential applicants. So the Court found a systemic violation in this kind of problem. It adjourned all Broniowski follow-up cases and reported to the Committee of Ministers, which is now expected to encourage Poland to introduce new legislation, along with new domestic remedies, to resolve the problem of the Bug River People.

It appears that discussions about the relationship between the Convention and the national Constitutions have recently intensified, following the adoption of the Charter of Fundamental Rights and the Constitutional Treaty of the European Union. Questions are being raised as to the impact of those instruments, in the event of their entering into force. Of course I am not in a position to give a comprehensive answer to those questions here. I would like, however, to make some brief observations from a Strasbourg perspective, focussed on the notions of added value and legal certainty.

Let me first say that I have no difficulty in joining those who consider the Charter of Fundamental Rights to represent an added value for the European Union. In Strasbourg we have always considered that in view of the founding role of fundamental rights, the respect of which is an essential element of the necessary legitimacy of any public action, it is quite normal for the EU to formally adopt its own catalogue of fundamental rights. In addition, it is clear that the Charter contains a wider variety of rights than the Convention does, even though some of those presented as new are nothing else but the legislative translation of well-established Strasbourg case-law, and others lack a proper justiciability.

That, however, is not a problem, since the Convention itself provides for the possibility for the Contracting States to apply higher standards than those of the Convention. What matters much more is that legal certainty in respect of those rights which the Charter borrows from the Convention is not put at risk. In this respect, we have reasons to be optimistic.

First of all, it clearly appears from the wording of the general provisions of the Charter, and especially from Article 52 § 3 (Article II-112 § 3 in the Constitutional Treaty) that the Charter is not intended to compete with or challenge the Convention, but rather to build upon it, by formally introducing its rights as minimum standards which henceforth also apply under EU law. Thus, however paradoxical that may be, the Charter somehow reinforces the Convention in its role as *ius commune* of fundamental rights in Europe.

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<sup>9</sup> *Broniowski v. Poland*, 22.6.2004.

Of course, much will depend in this respect on how the Charter will be interpreted in practice. Here too I have every reason to be confident, in view of the jurisprudence of the European Court of Justice, to which I would like to pay tribute here, as it demonstrates a high sense of responsibility and commitment to maintaining the highest possible level of harmony between the European Convention on Human Rights and EU law.

That is not sufficient per se to guarantee full compliance with the Convention. I do not need to explain that to constitutional judges: the best of intentions and efforts on the part of domestic courts are not necessarily a substitute for an effective review by the Strasbourg Court. This is why, in a move reflecting the parallelism which the Laeken Declaration<sup>10</sup> established between the Charter and accession of the EU to the Convention, Article 7 § 2 of the Constitutional Treaty now provides that the EU should finally take the step of adhering to the Convention.

I do not want to dwell very long on the need for accession, which has now been commonly accepted as a necessity. Let me just mention one aspect of it, which so far has not attracted much attention but which is getting increasingly important: the participation of the EU in Strasbourg proceedings. Under the present system, this participation can only be secured on an *ad hoc* basis, by conferring on the European Commission the status of *amica curiae*. This is for instance how we did it in the *Bosphorus v. Ireland* case, which was heard by a Grand Chamber of the Court yesterday and which raised the questions of Ireland's responsibility under the Convention for having impounded an aircraft in pursuance of EC Regulations adopted with a view to boycotting economic interests of the former Yugoslavia.

As the domestic law of the Contracting States and EU law are getting increasingly intertwined, there is a fair likelihood that ever more cases against States will involve EU law elements. Not only should they be properly argued, including by qualified and duly authorized representatives of the EU with a *locus standi* in the procedure before the Court, but the respondent States should not be left alone when it comes to implementing those parts of a Strasbourg judgment which entail changes to EU legislation. This is why in such cases the EU should be made a defendant alongside the respondent Member State, which can only be achieved through accession. There is therefore some urgency in seeing accession of the EU to the Convention become reality.

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<sup>10</sup> December 2002.

*Prof. Dr. Vassilios Skouris*  
*President of the European Court of Justice*

## **THE POSITION OF THE EUROPEAN COURT OF JUSTICE IN THE EU LEGAL ORDER AND ITS RELATIONSHIP WITH NATIONAL CONSTITUTIONAL COURTS**

### **Summary**

The present article examines the position of the European Court of Justice in the EU legal order and its relationship with national constitutional courts.

The first part is devoted to the position of the ECJ within the EU legal system and it explains why the role of the ECJ is crucial as far as enforcement of EU law is concerned. The jurisdiction of the ECJ over direct actions and preliminary references is examined in order to point out the duplicity of the system of enforcement of EU law by the ECJ and how the jurisdiction of the ECJ over direct actions is uniquely complemented by the preliminary reference procedure. Following that analysis, the article discusses exact nature of the ECJ, and concludes that it can be characterised as a very specific court performing both the functions of a supreme and a constitutional court.

The second part of the article presents the relationship of the ECJ with national constitutional courts. It focuses on the nature of the preliminary reference procedure by underlining the fact that it is a procedure of dialogue between courts. It then explains why, under certain circumstances, national courts are obliged to submit preliminary references to the ECJ and, finally, it discusses whether conflicts of jurisdiction between the ECJ and national constitutional courts can emerge and how they could be resolved.

### **Povzetek**

*V pričujočem referatu je obravnavan položaj Sodišča Evropskih skupnosti (SES) v pravnem redu EU in njegov odnos z nacionalnimi ustavnimi sodišči.*

*Prvi del se posveča položaju SES znotraj pravnega reda EU in pojasnjuje, zakaj je vloga SES odločilna pri uveljavljanju prava EU. Obravnavana je pristojnost SES v zvezi z neposrednimi tožbami in presojo predhodnih vprašanj, pri čemer je poudarjena dvojnost pristojnosti SES, da uveljavlja pravo EU. S tem v zvezi je obravnavano tudi, kako se pristojnost SES, ki zadeva neposredne tožbe, edinstveno dopolnjuje s postopkom odločanja o predhodnih vprašanjih. Sledeč taki analizi, se referat ukvarja z*

*naravo SES in zaključuje, da bi SES lahko opredelili kot posebno sodišče, ki izvršuje naloge tako vrhovnega kot ustavnega sodišča.*

*V drugem delu referata je predstavljen odnos med SES in nacionalnimi ustavnimi sodišči. Drugi del se osredotoča na naravo postopka za presojo predhodnih vprašanj, kjer je poudarjeno, da gre za postopek dialoga med sodišči. Sledi pojasnilo, zakaj so v določenih primerih nacionalna sodišča dolžna zahtevati od SES, da odloči o predhodnih vprašanjih. Referat zaključuje obravnava morebitnih sporov o pristojnosti med SES in nacionalnimi ustavnimi sodišči ter s predlogi za njihovo rešitev.*

## **A) INTRODUCTION**

The European Union has recently completed the most significant enlargement since its creation. As of the 1<sup>st</sup> of May, 2004, it comprises 25 Member States and over 400 million citizens. However, this enlargement has not only increased the size of the European Union. It has also enhanced its complexity. Within the EU there are now 25 legal systems and legal traditions that are required to coexist harmoniously in the context of the EU legal order. The role of the European Court of Justice (hereinafter the “ECJ”), in that respect, will continue to be paramount.

The purpose of this paper is to precisely illustrate that role of the ECJ and describe its relationship with the constitutional courts of the Member States. In the first part, I will attempt to analyse the position of the ECJ in this international setting, outline its jurisdiction and explain in what ways the ECJ may be brought to exercise competences of a constitutional nature. In the second part, I will put the emphasis on the relationship between the ECJ and national constitutional courts by outlining the specifics of the preliminary reference procedure and focusing on the problems that could emerge due to potential conflicts of jurisdiction.

## **B) THE POSITION OF THE EUROPEAN COURT OF JUSTICE IN THE EU LEGAL ORDER**

In the European Community’s 50-year existence one cannot help but noticing an astonishing development: the transformation of an international organization (with relatively limited purposes) to a *quasi* constitutional legal order<sup>1</sup>. As the ECJ itself recognised in its famous *Les Verts* judgment

<sup>1</sup> See among others, Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 Am. J. Int’l L. 1 (1981); Mancini, *The Making of a Constitution for Europe*, 26 Common Mkt. L. Rev. 595 (1989); Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 Am. J. Comp. L. 205 (1990); Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403 (1991).

“the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”<sup>2</sup>.

This development was by no means accidental and it is quite well established that a number of factors contributed to its realisation. Nonetheless, one of the most important factors was the system of enforcement of European Community law, as provided for in the EC Treaty.

I must underline from the outset that EC Treaty has reserved for the ECJ a most crucial role in ensuring adequate and effective enforcement of Community law. By empowering the ECJ with jurisdiction over direct actions against Member States and Community institutions and by introducing the unique mechanism of preliminary reference, the drafters of the EC Treaty have managed to devise a system that, despite its shortcomings, has proven to be one of the main tools for the advancement of European integration.

### **The jurisdiction of the ECJ over direct actions**

Under Article 226 of the EC Treaty, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, it may bring the matter before the ECJ, after following a certain procedure. In addition, Article 227 of the EC Treaty provides that even a Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may also bring the matter before the ECJ.

Indeed, the procedure laid down in Article 226 of the EC Treaty was considered revolutionary at the time of its introduction, precisely because it grants mandatory jurisdiction to an international judicial institution, thus overcoming one of the main problems of international justice. However, it was not until this provision was coupled by the amended Article 228 that one could really assert that the Community had an effective enforcement mechanism. Article 228 vests the ECJ with the power to impose monetary sanctions on a Member State for non-compliance with a judgment of the ECJ.

Apart from powers of judicial review of Member State non-compliance with Treaty provisions, the ECJ also has jurisdiction to examine the legality of acts or omissions of the various institutions of the European Community. Under Article 230 of the EC Treaty, any Member State, the Council or the Commission can challenge the legality of acts - other than recommendations and opinions - adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank.

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<sup>2</sup> See ECJ, *Parti écologiste “Les Verts” v. European Parliament*, [1986] ECR 1339, point 23.

Private plaintiffs can also institute such proceedings provided that they are individually and directly concerned by the act challenged<sup>3</sup>.

Special attention must be drawn to the legal disputes between EU institutions that are brought before the ECJ. Most commonly it is either the Parliament or the Commission that are challenging the legal basis on which legislative acts were adopted, because it is that legal basis that specifies which institutions participate in the decision-making process. These disputes and the case-law that results from them are essentially of a constitutional nature. By interpreting the relevant Treaty provisions the ECJ helps to define more clearly the jurisdiction and competences of each of the EU's institutions.

### **The jurisdiction of the ECJ over preliminary references**

The preliminary reference procedure is a mechanism of dialogue between national courts and the ECJ. Given that much of the primary enforcement of Community law is in the hands of national administrative authorities, Article 234 of the EC Treaty provides the ECJ with the means to ensure the uniform application of EC law throughout the Community. The ECJ has jurisdiction to give preliminary rulings, at the request of national courts, concerning both the interpretation of the Treaty (Article 234 (a) of the EC Treaty) and the validity and interpretation of acts of the institutions of the Community. As a general rule, national courts and tribunals have *discretion* to request preliminary rulings. However, if an issue of Community law is raised before a national court or tribunal, against whose decisions there is no judicial remedy, then the latter is *obliged* to request a preliminary ruling.

Hence, it comes as no surprise that the preliminary reference procedure is of crucial importance in relation to enforcement of EU law. Apart from ensuring uniform application of EU law, it was through preliminary references that the ECJ developed the fundamental doctrines of Community law. Principles such as the doctrine of supremacy<sup>4</sup>, the doctrine of direct effect<sup>5</sup>, the doctrine of implied powers<sup>6</sup>, the protection of human rights within the Community legal order<sup>7</sup>, find their origin in preliminary rulings and have provided EU law with the necessary theoretical background that would ensure effective enforcement

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<sup>3</sup> Under Article 230 of the EC Treaty. It should be noted that actions for annulment by private plaintiffs are brought before the Court of First Instance. Such cases are only heard by the ECJ on appeal.

<sup>4</sup> The doctrine of supremacy was introduced by *Costa v. ENEL* [1964] ECR 585, and evolved in subsequent cases.

<sup>5</sup> The doctrine of direct effect was introduced by the landmark case *Van gen den Loos v. Nederlandse Administratie des Belastingen* 1963 [ECR] 1.

<sup>6</sup> See ECJ, *Commission v. Council (ERTA)* [1971] ECR 263.

See ECJ, *Stauder v. Stadt Ulm*, [1969] ECR 419. For a presentation of the evolution of the ECJ's case-law on this field see, V. Skouris, *Introducing a Binding Bill of Rights for the European Union: Can three parallel systems of protection of fundamental rights coexist harmoniously?*, in *Verfassung im Diskurs der Welt*, Liber Amicorum für Peter Häberle, Mohr Siebeck, Tübingen 2004, p. 261-273.

<sup>7</sup> ECJ, *Francovich and Bonifaci v. Italy*, [1991] ECR I-5357.



*vis-à-vis* Member State law. In the celebrated *Francovich*<sup>8</sup> judgment the ECJ went even as far as to create a *quasi* sanction mechanism by stating:

“[T]he full effectiveness of the Community regulations would be challenged, and the protection of rights that they recognize would be weakened, if individuals did not have the possibility of obtaining *restitution* when their rights are encroached upon by a violation of Community law on the part of a Member State” (emphasis added).

### **Is the ECJ a constitutional court?**

In order to appreciate the exact nature of the ECJ and whether it could be considered as a purely constitutional court, we have to view the system of enforcement of EU law by the ECJ in its entirety. In doing so one cannot help but noticing a basic feature: *duplicity*. Indeed, it can be easily observed that the relevant provisions examined above, ensure the enforcement of Community law on two levels: the Community level (through direct actions) and the Member State level (through preliminary references).

It is interesting to examine briefly the function of this duplicity. First of all, the two levels of judicial enforcement by the ECJ complement each other in a unique way. ECJ judgments on Article 226 actions have a declaratory nature, concern Member States and are not directly enforceable to individual cases. Conversely, preliminary rulings are addressed to national courts and lead to the enforcement of EU law on individual cases. The “centralized” direct enforcement under an Article 226 procedure is coupled with the “decentralized” indirect enforcement under Article 234, with private individuals *de facto* monitoring Member State compliance with EC law.

Secondly, as far as judicial protection of individuals is concerned, the restrictive conditions of direct and individual concern put forward by article 230 of the EC Treaty are somehow balanced by the preliminary reference procedure, in the context of which individuals can incidentally challenge the validity of EU secondary legislation. It is important to also note in that respect that the system of enforcement enjoys far more credibility due to the fact that it actually provides for judicial review of the legality of the acts or omissions by Community institutions.

Finally, the dual character of the system enables enforcement of Community law by the ECJ both in vertical relationships (between Community institutions and Member States, between Community institutions and individuals and between Member States and individuals) and in horizontal relationships among individuals.

<sup>8</sup> ECJ, *Köbler v Republik Österreich*, [2003] ECR I-10239.

In view of all these elements, I believe that the ECJ cannot be considered as a constitutional court in the sense this term is used in national legal orders. It is certainly entrusted with the interpretation of the EU's constitutional charter, it does have jurisdiction to control the legality, with regard to this Charter, of all legislative or administrative measures adopted within the sphere of EU law and lastly it is the only judicial authority that can resolve conflicts of jurisdiction between the EU institutions. However, the ECJ also has jurisdiction over appeals brought against judgments and orders of the Court of First Instance. It will soon have the option of reviewing appellate judgements of the Court of First Instance. In preliminary references it frequently interprets EU law provisions of minor importance. To illustrate this with an example I will only say that the ECJ has rendered judgments on the customs classifications of pyjamas, women's underwear and integrated printer-fax machines. Moreover, an infringement action brought by the Commission against a Member State for failure to comply with certain provisions of the waste management directive can hardly be characterised of a constitutional nature.

Hence, if I were to seek the ECJ's counterpart in national legal orders I would most probably not look towards constitutional courts but towards supreme courts. I do believe though that the most accurate characterisation of the ECJ is that of a very specific court performing both the functions of a supreme and a constitutional court.

### **C) THE RAPPORT BETWEEN THE ECJ AND NATIONAL CONSTITUTIONAL COURTS**

Having described the nature of the ECJ, I would now like to examine its relationship with national constitutional courts. In doing so I will focus on three particular aspects: the nature of the preliminary reference procedure, the obligation to make a reference imposed upon national courts adjudicating at last resort and the issue of possible conflicts of jurisdiction.

#### **The nature of the preliminary reference procedure**

Let me stress out from the very beginning that, from our perspective, the relationship between the ECJ and national constitutional courts is one of cooperation. It is certainly true that EU law may enjoys supremacy over national law and that, most of the times, EU law may also be directly applicable in Member States' legal orders. However, that does not mean that national supreme courts, and especially national constitutional courts, are institutionally subordinate to the ECJ.

On the contrary, the judicial architecture of the European Union and the Member States' judiciaries must be viewed as parallel systems, coexisting within the same supranational structure, and having, in principle, their own proper areas of jurisdiction. If one studies

closely the mechanism of the preliminary reference procedure, one can perceive that it is a perfect illustration of that relationship of cooperation.

The preliminary reference procedure is essentially a dialogue between the national judge and the ECJ. The national court refers a question of EU law to the ECJ along with all the factual and legal issues surrounding the case at hand. The ECJ interprets EU law and provides answers to the questions of the national judge. However, it does not render a definitive judgment on the case since it does not have the jurisdiction to do so. In other words, it does not try the case. It is up to the national judge to proceed to the fact-finding, to the interpretation of the national law applicable and to *the application of EU law*. The ECJ interprets EU law and provides the guidelines for its application by the national judge, but it is in fact the latter that applies EU law on the specific case.

Notwithstanding its collaborative nature, the preliminary reference procedure, as provided for in Article 234 of the Treaty, does impose certain obligations on national courts.

As I hinted earlier in this article, under the Article 234 procedure, where a question of EU law “is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court of Justice.” (emphasis added)

This provision is widely regarded as imposing an obligation on national courts hearing a case at last instance to request a preliminary ruling from the ECJ, if an issue on the interpretation or the validity of EU law arises before that court. National constitutional courts will generally fall upon that definition. Therefore it is important to explain the reasons why such an obligation was included in Article 234.

Given that, as I argued earlier, the preliminary reference procedure was conceived as a mechanism of cooperation and dialogue, it could never have imposed a general obligation upon all national courts to refer cases to the ECJ where issues of EU law arise. Such a solution would be inconceivable not only back in 1957, when the Treaty was signed, but even today.

However, one has to take into account that the preliminary reference procedure was established in order to ensure the uniform interpretation of EU law throughout the European Union. That uniformity would be gravely compromised if there were no adequate safeguards added to a system essentially based on voluntary cooperation. Article 234, paragraph 3, of the EC Treaty constitutes precisely that type of safeguard.

There is however another safeguard in the preliminary reference procedure which does not have a legislative source but finds its basis on the ECJ’s case-law. For several years academics and scholars have debated on whether an infringement of EU law by a supreme

national court can be in anyway prevented or even sanctioned. The ECJ has recently given an answer to that question in the *Köbler* judgment<sup>9</sup>.

In that case, the supreme court of a Member State requested a preliminary ruling from the ECJ. After having been informed of previous pertinent case-law of the ECJ, the national court withdrew the request apparently considering that the question raised was adequately answered by the existing case-law. However, it did not apply the reasoning of that case-law and held otherwise. Mr Köbler, whose claim was dismissed as a result, brought an action for damages against the Member State for reparation of the loss which he allegedly suffered as a result of the national court's ruling. He maintained that the judgment of the national court infringed directly applicable provisions of Community law, as interpreted by the ECJ in its existing case-law.

### **In a landmark judgment the ECJ held that**

“in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.

It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights.”

That statement of principle, which I may add was not considered applicable in this particular case, constitutes another safeguard of the system. If a higher or supreme court disregards its obligation to request a preliminary ruling or disregards the ECJ's interpretation of EU law provisions, then private individuals whose rights are affected can, under certain conditions, hold the Member State liable and ask for reparation of damages.

### **Potential conflicts of jurisdiction**

The last topic I would like to discuss in this part of the article is that of potential conflicts of jurisdiction between the ECJ and national constitutional and supreme courts. I will focus on two more specific issues.

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<sup>9</sup> See ECJ, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR I-4225.

The first one is related to the question of determining which court or tribunal is competent to rule on whether legislative and administrative measures adopted by Community institutions are *ultra vires*. Is it just the ECJ or also the national constitutional courts that will have the authority to decide whether a Community measure is contrary to primary Community law? Could there be conflicts of jurisdiction?

The ECJ has given an answer to that question in its *Foto-Frost*<sup>10</sup> judgment, by stating that it has *exclusive* authority to rule on the validity of the acts of Community institutions even if their validity was challenged before a national court. The ECJ further claimed that this was the only conceivable answer to this question since the Treaty established a complete system of judicial review destined to vest the ECJ with the power to control the legality of acts of Community institutions. Moreover, the ECJ stated that Community institutions are not guaranteed the right to intervene before national court procedures and that a different solution would endanger the coherence of the system of judicial review as provided for in the EC Treaty.

The ECJ's argumentation seems quite persuasive but the German Bundesverfassungsgericht and other constitutional courts have in the past expressed a somehow different view. They have essentially held that it is national constitutional courts that have the ultimate authority to determine whether the act of a Community institution is compatible with their respective national constitutions.

Some commentators refer to this development as a major constitutional crisis. Even the term Mutual Assured Destruction has been employed to describe this issue<sup>11</sup>. Indeed, one can envisage a real problem if acts of Community institutions had a different *status* in each of the 15 national legal orders. However, one has to take into account that this jurisprudence of certain national constitutional courts was developed in the specific field of the protection of fundamental rights and that it was based on the absence of Bill of Rights at the European Union level. The ECJ has since developed a comprehensive case-law on fundamental rights protection and normally subjects EU and national legislative and administrative measures to fundamental rights scrutiny. As a result, it seems that national constitutional courts are gradually adopting a more flexible approach to that issue.

But conflicts of jurisdiction may occur in the field of fundamental rights also in matters of substance. Especially after the upcoming adoption of the Charter of Fundamental Rights of the European Union as a binding legal text, we will be faced with a situation where, as far as EU Member States are concerned, three systems of fundamental rights protection will be applicable: national constitutions, the European Convention on Human Rights and the Charter.

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<sup>10</sup> See Weiler & Haltern, *Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz*, in Slaughter, Sweet, Weiler (editors), *The European Courts and National Courts - Doctrine and Jurisprudence* (1998), p. 362.

I will limit myself to sharing only a few thoughts on that issue. The introduction of a legally binding Bill of Rights for the EU is certainly a very important step forward towards reinforcing the principle of the rule of law in the EU and advancing European integration. However, the incorporation of the Charter into the forthcoming Constitutional Treaty will not literally *introduce* a third system of protection of fundamental rights in Europe. The EU is no stranger to the protection of fundamental rights therefore it would not be an exaggeration to suggest that a third system of protection already exists.

Nonetheless, this does not mean that the added value of a legally binding Charter will be limited. On the contrary, transparency, codification and legal certainty are of paramount importance in the field of fundamental rights protection and they cannot be effectively achieved without the introduction of a legally binding Bill of Rights.

These advantages outweigh all the potential problems. It is true that a multitude of sources of law with sometimes overlapping fields of application is certainly not efficient and can be the source of confusion for private individuals, lawyers and judges. The range of the protected rights and the level of protection can be different from one text to another. The risk of conflicting case-law between the ECJ on the one hand and national supreme courts and the European Court of Human Rights on the other cannot totally be excluded. But these problems are by no means novel and they will surely not be the result of the transformation of the Charter into a binding legal text.

Furthermore, the evolution of fundamental rights protection in the EU clearly demonstrates that such difficulties are not insurmountable and can be resolved in a variety of ways. Differences in the *ratione materiae* field of application of the Charter, of the ECHR and of national constitutions would normally be negligible due to the common long-standing tradition of human rights protection in Europe and to the overall harmonising effect of the ECHR. Conflicting case-law, especially between the ECJ, the ECHR, and national constitutional courts has been a rare and marginal occurrence and that risk can always be minimised by a close cooperation between those courts.

Lastly, even the minor risk of incoherence resulting from the parallel application of three systems of protection of fundamental rights can most probably be reduced by the accession of the EU to the ECHR.

## **D) CONCLUDING REMARKS**

Both the ECJ and national constitutional courts of EU Member States are faced with the reality of an enlarged Europe. 25 Member States means 25 national legal systems, 25 national legal traditions and much more than 25 supreme courts around Europe. Further enlargements are also programmed. Ensuring a better understanding and cooperation

between the institutions entrusted with the administration of justice is paramount to the advancement of European integration.

Another challenge that lies ahead of us is the adoption of the European Constitution. As was the case for EC Treaty, the task of applying the European Constitution will not only fall upon the ECJ but also national courts. It is my firm belief that by codifying the basic principles of EU law, by clearly defining the competences of the EU and by introducing a comprehensive Charter of Fundamental Rights, the European Constitution is likely to bring Europe closer to its 400 million citizens.

*Prof. Dr. P. Nikiforos Diamandouros*  
*European Ombudsman*

## **OPENING SPEECH**

### **Summary**

On 1 May 2004, the European Union celebrated its biggest ever enlargement, welcoming ten new Member States. Just over six weeks later, the Treaty establishing a Constitution for Europe was agreed by the Heads of State and Government of the enlarged Union. In this keynote address, the European Ombudsman explores the consequences of these developments for the work of courts and ombudsmen.

The Ombudsman starts out by reflecting on the relationship between three of the principles laid down in one of the very first Articles of the Constitution (Article I-2), namely the rule of law, democracy and respect for human rights. He goes on to describe the development of the institution of the ombudsman and how it complements the critical role of the courts in upholding these three vital principles. He explains how the existence of the ombudsman institution widens access to justice and can act as a transmission mechanism for diffusing the rule of law culture widely in public administration and society, thereby strengthening both the rule of law and the quality of democracy.

Finally, the Ombudsman speaks of the challenges facing both courts and ombudsmen, most notably the challenge to ensure that these three fundamental principles are widely understood in our societies and put into practice in the everyday relationship between citizens and public authorities throughout the multi-level system of governance that now exists in the European Union. He speaks of his own efforts, via the European network of ombudsmen, to assist and encourage national and regional ombudsmen in the Member States to play their part in ensuring the full and correct implementation of EU law by the public authorities that they supervise, including EU law on human rights.

### **Povzetek**

*Evropska unija je 1. maja 2004 slavila svojo največjo širitev do sedaj in pozdravila deset novih držav članic. Samo dobrih šest tednov kasneje so voditelji držav in vlada razširjene Unije sprejeli Pogodbo o Ustavi za Evropo. Evropski varuh človekovih pravic v svojem nagovoru obravnava posledice teh dogodkov za delo sodišč in varuhov človekovih pravic.*



*Varuh začenja z razmišljanjem o odnosu med tremi načeli, določenimi v enem prvih členov Ustave (I-2. člen), in sicer o načelu pravne države, demokracije in spoštovanja človekovih pravic. Nadaljuje z opisom razvoja institucije varuha človekovih pravic in načina, kako ta dopolnjuje odločilno vlogo sodišč pri ohranjanju omenjenih treh temeljnih načel. Pojasnjuje, kako obstoj institucije varuha omogoča širši dostop do pravnega varstva in kako lahko deluje kot prenosni mehanizem pri širjenju kulture pravne države v javni upravi in družbi ter s tem krepi tako pravno državo kot demokracijo.*

*Na koncu se varuh dotakne izzivov, ki stojijo tako pred sodišči kot varuhi človekovih pravic, predvsem izziva, kako zagotoviti široko razumevanje omenjenih treh temeljnih načel v družbi in njihovo uresničevanje v vsakodnevnih razmerjih med državljani in organi oblasti v celotnem sistemu večstopenjske uprave Evropske unije. Govori o svojih prizadevanjih, da s pomočjo Evropske mreže varuhov človekovih pravic pomaga nacionalnim in regionalnim varuhom v državah članicah, in jih vzpodbuja da prevzamejo svojo vlogo pri zagotavljanju, da organi oblasti, ki jih nadzirajo, popolnoma in pravilno izvajajo pravo EU, tudi pravo EU o človekovih pravicah.*

## **1 Introduction**

On the 1st of May this year, I was in Poland celebrating the biggest ever enlargement of the European Union; an enlargement that put an end to the major, traumatic and profound divisions brought about by the European civil wars of the 20th century. Today, I am delighted to be here in Bled, in Slovenia, another of the new Member States of the European Union, to participate in this important International Conference on “*The Position of Constitutional Courts following integration into the European Union*”.

I wish to thank Dr. Lukic for giving me an opportunity to share with you my thoughts concerning the place of the ombudsman institution in the legal order created by the rule of law, a legal order to whose maintenance courts, and constitutional courts in particular, play a prominent role.

The five months that have elapsed since 1 May have seen agreement by all the Heads of State and Government of the enlarged Union on the Treaty establishing a Constitution for Europe. One of the very first Articles of the Constitution (I-2) sets out the values or principles on which the Union is founded. They are: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

I shall begin my welcome address by reflecting on the relationship between three of these principles; the rule of law, democracy and respect for human rights. Although I do not need to labour the point for this audience, it is important to emphasise the fundamental role that the courts play in securing and maintaining these principles.

I have been invited to speak to you in my capacity as an ombudsman, so I shall focus mainly on how the institution of the ombudsman has developed and how it complements the role of the courts and helps promote good governance in modern societies.

Finally, I shall refer to the challenges that face both courts and ombudsmen in seeking to make EU law become a living reality for the citizens and residents of the Union.

## **2 The rule of law, democracy and human rights.**

In contemporary European legal culture, the rule of law and democracy are thought of as forming an inseparable and, so to speak, natural pair. It is important, however, to recognise that, historically and analytically, they are separate and very different principles.

### 2.1 The rule of law

Historically, the rule of law evolved gradually from the complex nexus of reciprocal rights and obligations characteristic of European feudalism into a relationship between rulers and ruled that places effective limits on the exercise of power and which excludes arbitrary power. In institutional terms, the courts have been and remain the essential foundation upon which the rule of law is built and on which its development and evolution depend.

### 2.2 Democracy

Democracy is a much more recent phenomenon. Associated with the gradual expansion of the right of suffrage to an ever-increasing number of subjects turned citizens, democracy, especially its liberal variant, nowadays enjoys undisputed legitimacy around the world.

Democracy is not just a matter of elections, however. Nor does democracy mean that the winner of the last election enjoys plenary powers. Democracy requires, for example, effective guarantees of political rights, such as freedom of association and freedom of speech. Such rights are now internationally recognised as an important category of human rights.

Furthermore, the exercise of democratic political authority is rarely or never direct. Rather, it is mediated by legally recognised structures, so that power is distributed among different institutions, thus avoiding an excessive concentration of power that could lead to abuse. The mediating structures include independent institutions and bodies charged with the task of monitoring and checking the exercise of official power, to ensure that it remains within its legitimate boundaries.

Democracies can be organised and function in many different ways, but every democracy needs some rules, appropriate to its own circumstances, for the proper and effective

conduct of public business. In other words, democracy requires a democratic constitution. Here too courts — and not least constitutional courts — have a fundamental role in adjudicating on the disputes that inevitably arise in the functioning of a democratic constitution, either between citizens and public authority, or between different public institutions.

### 2.3 The relationship between the principles.

So far, I have presented the rule of law, democracy and respect for human rights as different, but complementary principles. It is important to recognise, however, that complementarity does not mean interchangeability. Each principle has its own proper sphere of application, in which it cannot be replaced and which determines the logic of its relationship to the other principles.

To give but one example that has direct relevance to political problems facing a number of more recent European democracies: the democratic political process, in other words the majoritarian principle, cannot be used to resolve issues relating to respect for human rights that properly belong within the sphere of the rule of law. This applies not just to the political rights that I have already mentioned, but to human rights generally, including the rights of persons belonging to minorities not to be subject to discrimination.

The implication of these considerations is that a strong, independent and well-functioning judicial system is needed not only to secure the rule of law and respect for human rights, but also to sustain the principle of democracy.

## 3 The role of ombudsmen

Where the precondition of a strong, independent and well-functioning judicial system is met, ombudsmen can also play a valuable role in empowering citizens, providing redress and raising the quality of public administration.

### 3.1 The spread and development of the ombudsman institution

The first ombudsman office was created in Sweden in 1809 to check the legality of public officials' actions. During the next century and a half, just two more countries established ombudsmen with general competence: Finland in 1919 and Denmark in 1955. In the 1960s and early 70s, a first wave of global expansion began when older democracies such as Norway, New Zealand, the UK and France set up ombudsmen. They did so mainly in order to tackle citizens' problems with public administration, which expanded and took on new roles in the 20th century, especially after the Second World War, when the welfare functions of the state grew dramatically.

In two subsequent waves of global expansion, ombudsmen were established in many newer democracies as part of their commitment to respect human rights and the principle of democracy:

- From the mid-1970s onwards, ombudsmen were established in post-authoritarian states, such as Spain, Portugal and Greece in Europe and in many countries of Latin America.
- After 1989, ombudsmen were established in post-totalitarian states; that is, in countries formerly ruled by communist regimes.

This sequence of development is reflected in different names: *Ombudsman*; *Commissioner for Administration*; *Médiateur*; *Defensor del Pueblo*; *Commissioner for Civil Rights* and, here in Slovenia, *Human Rights Ombudsman*. It also means that the work of contemporary ombudsmen, including the European Ombudsman, is based on three overlapping and mutually supportive elements: legality, good administration and human rights.

### 3.2 Ombudsmen and the courts

The individual's right to seek a judicial remedy is, of course, the fundamental guarantee of the rule of law and of respect for human rights. Where ombudsmen exist, citizens can choose the non-judicial ombudsman remedy as an alternative to going to court.

As well as being free to citizens, an ombudsman's procedures can usually be more flexible and informal than those of a court, because they do not lead to a legally binding decision. Lack of bindingness does not mean lack of effectiveness, however: where the rule of law and democracy are strong, the public authorities usually follow an ombudsman's recommendations despite their non-binding quality.

Ombudsmen can also complement the work of courts, by working proactively to raise the quality of the public administration. For example, following an own-initiative inquiry, the European Ombudsman drafted the European Code of Good Administrative Behaviour and recommended its adoption by all the Union institutions and bodies as a guide for both citizens and officials. Several of the ombudsmen in the Member States and in the candidate countries have used the Code as a resource to enhance the quality of public administration in their own countries. I hope to publish the Code in the nine new EU languages within the year, thereby bringing the total to 20.

Some ombudsmen, though not all, also have a mandate to refer cases concerning human rights, or more general constitutional questions, to their respective constitutional courts. Sometimes this includes the power to refer the validity of legislation to the constitutional court. This power requires an ombudsman to exercise great care and skill to avoid the

appearance of taking sides in political controversies. The task is made easier if the ombudsman is functioning in a political and social environment where there is widespread understanding of the relationship that I outlined earlier between the rule of law, human rights and democracy. Where these conditions prevail, the existence of the ombudsman institution widens access to justice and can act as a transmission mechanism for diffusing the rule of law culture widely in public administration and society, thereby strengthening both the rule of law and the quality of democracy.

### 3.3 Ombudsmen in the European Union

The situation in the European Union is that we have both the world's oldest national ombudsman office (Sweden, as I already mentioned) and the youngest - Luxembourg - whose first Ombudsman began work in May 2004. My own institution is a relative latecomer, the first European Ombudsman having taken office only in 1995.

Through the European network of ombudsmen, I co-operate closely with ombudsmen in all 25 Member States, at either the national or the regional level, and in some countries - such as Spain - at both levels. The Network helps ensure that complaints are rapidly directed to the competent ombudsman. It also facilitates mutual learning, benchmarking as regards best practice and exchange of information about developments in European Union law. Such information is vital for ombudsmen in the Member States because the activities of public authorities that they supervise increasingly fall within the scope of EU law.

## 4 Making European Union law a living reality

It is difficult, in fact, to overstate the importance of EU law in the process of European integration. Although the initial impetus for integration was, of course, political, legal integration soon outpaced political or even economic, integration.

### 4.1 The courts and European legal integration

This rapid progress was largely due to the Court of Justice, which, at a very early stage, defined the relationship between national and European law in a way that promoted both the rights of individuals and subsidiarity in the system of remedies — before the word “subsidiarity” was ever heard in the context of the European Union. The work of the Court of Justice in this respect has given EU law a dual character in the Member States. On the one hand, it is quasi-constitutional because, for practical reasons, EU law has primacy over national law, including national constitutional law. On the other hand, EU law is part of the ordinary law governing the everyday activities of all public authorities in the Member States and as such, it must be fully and correctly implemented.

A special responsibility falls on national courts to provide effective judicial remedies to protect individual rights under EU law. This is not surprising because EU law is law and, as I have already mentioned, courts are the indispensable foundation for the rule of law.

#### 4.2 The contribution of ombudsmen

I know from experience, however, that some citizens who believe that EU law is not being correctly followed in their Member State want to pursue a non-judicial, rather than a judicial, remedy. Some of them complain to the European Ombudsman, but complaints against public administrations of the Member States are outside my mandate.

Citizens can complain to the Commission, in its role as “guardian of the Treaty.” This can eventually lead the Commission to refer the matter to the Court of Justice under Article 226 of the EC Treaty. Many citizens, though, hope that the Commission will solve their case quickly by administrative means, without the matter having to go to Court. Citizens can also petition the European Parliament about alleged infringements of EU law by a Member State. In practice, it often falls to the Commission to examine these cases as well.

I believe that it would be most effective and in accordance with the principle of subsidiarity for many complaints against public administrations of the Member States that raise EU law issues to be dealt with locally, by an ombudsman in the Member State. I am reinforced in this belief by the fact that implementation of EU law is not just a matter of getting the law in the books right, but also of putting the law into action, in the everyday functioning of the public administration.

This is the only way that European Union law can become a living reality for citizens. To achieve this requires not only effective remedies, but also that public authorities in the Member States have sufficient organisational capacity to follow the law, observe principles of good administration and respect human rights.

Ombudsmen should have an important role to play as regards both remedies and strengthening organisational capacity, because they combine reactive and proactive functions and can create synergies between them. For example, by developing and publicising criteria of good administration, such as the European Code of Good Administrative Behaviour that I mentioned earlier, ombudsmen can:

- make their own findings and recommendations more easily understandable; *and*
- help both citizens and the administration focus on their mutual expectations in a way that promotes trust and more effective communication.

I am already working with our partners from the Member States in the European network of ombudsmen, to assist and encourage them in ensuring the full and correct implementation of EU law by the public authorities that they supervise, including EU law on human rights.

### 4.3 The challenge of the Charter.

The very existence of a body of EU law on human rights is, again, an achievement of the Court of Justice. The Court's case law, which refers both to the European Convention on Human Rights and the constitutional traditions common to the Member States, preceded and inspired the relevant provisions of the Treaties. More recently, the drafters of the Charter of Fundamental Rights of the European Union also drew heavily on the case law of the Court of Justice and, of course, of the European Convention on Human Rights and the case law of the Strasbourg Court.

The European Ombudsman has actively promoted the Charter of Fundamental Rights ever since its proclamation by the European Parliament, the Council and the Commission at the Nice summit in December 2000. In dealing with complaints and in own-initiative inquiries, the European Ombudsman has consistently taken the view that any failure by the Union institutions and bodies to respect the rights contained in the Charter is a form of maladministration.

The Constitution for Europe approved by the Heads of State and Government earlier this year incorporates the Charter and will make it legally binding not only on the Union institutions and bodies, but also on the Member States when they are implementing Union law.

I believe that the Charter is an instrument with great potential to translate fundamental values and principles into reality by empowering citizens and strengthening the rule of law and democracy at all levels of the Union. To achieve this potential requires proactive intervention, to make citizens aware of the new possibilities opened for them by the Charter and to encourage and assist public authorities at all levels of the Union to make the rights and aspirations of the Charter the touchstone for their actions.

## 5 Conclusion

In conclusion, I would like to emphasise that fundamental principles are what make the Union both possible — and necessary. They make the Union possible because they are what unites us, despite differences of nationality, culture, religion or political preference. They make it necessary in the sense that, ultimately, the Union's *raison d'être* is not mere calculation of economic advantage, but the defence and realisation of the fundamental values that we share.

I have emphasised the essential role of the courts, not only for the rule of law and respect for human rights, but also in relation to the constitutional framework of democracy. Where a well-functioning and effective system of courts exist, ombudsmen can complement

their role and act in partnership with them in order to meet the challenge ahead. That challenge is none other than to ensure that the fundamental principles of the rule of law, democracy and respect for human rights are widely understood in our societies and put into practice in the everyday relationship between citizens and public authorities throughout the multi-level system of governance that now exists in the European Union.

Success in pursuit of this goal will result in the deepening of the rule of law, in the improvement of the quality of democracy, in enhanced protection of human rights and in empowerment of the citizen. In endeavouring to meet these challenges, the ombudsman, working in parallel with the courts has an important role to play. It is towards the realisation of these goals and meeting these challenges that I pledge myself to work hard as European Ombudsman, alongside the courts and my fellow ombudsmen in the Member States.



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## **EXPERIENCES OF THE CONSTITUTIONAL COURTS CONCERNING THE EU LEGAL SYSTEM**

### **Summary**

Austria is a relatively young member of the EU as it joined the EU in 1995. Thus it is rather aware of the problems new member states have faced.

From the political and constitutional point of view, Austria's accession to the EU has until then been the most extensive modification of the Austrian constitutional order since 1920, which was adopted in the Constitutional Act on Austria's Accession to the EU (*EU-Beitritts-BVG*). The amendments to the Austrian Constitution (BVG BGBl 1994/1014), which mostly create organizational and procedural starting points, do not constitute direct grounds for solving central legal questions on the basis of the constitutional text itself, but such stem indirectly from the context of the discussions concerning the changes being the consequences of the integration.

The relation between the national constitutional order and the legal order of the EU is essentially based upon the acceptance of *acquis communautaire*, in which the matter also concerns the existence of "two legal orders in one".

Recently Austrian courts have often used the possibility of requesting preliminary rulings. In every event, a preliminary ruling procedure is considered the most important means of cooperation between the Court of Justice and national courts. Concerning such, certain limitations are, however, to be taken into consideration: first, for courts of last resort the duty to request a preliminary ruling does not mean an unlimited duty (*acte clair*-doctrine), and, secondly, an even more important limitation of this duty is the fact that evaluation of the relevancy of a legal issue concerning Community legal order for resolving a case is reserved for national courts.

The primary position of EU law in relation to national law (including constitutional law) entails that EU law cannot be reviewed from the view of the criterion of national constitutional law. Secondary EU law is not subject to any norm contained in the (Federal) Constitution, and concerning such it is not a subject of constitutional review.

Also the Austrian Constitutional Court can review the consistency of national law with EU law only within an incidental procedure. If the Constitutional Court has to deal with a

statutory provision in another procedure not having the nature of a review of norms and the mentioned statutory provision is contrary to a norm of primary or secondary EU law to be applied in the concrete case, the Constitutional Court must apply the norm of EU law without instituting, as its own official duty, a procedure of the constitutional review of an act. If in this framework an issue of the interpretation of EU law arises, also the Austrian Constitutional Court is bound to commence a preliminary ruling procedure.

National law cannot be reviewed and annulled in a procedure of the review of norms due to its inconsistency with EU law, as EU law is not considered constitutional law in the sense of the national legal order. Therefore, EU law is not a criterion for review in the constitutional review of norms.

From the principle of non-interference of EU law with state organization stems that EU law does not limit the Austrian Constitutional Court in exercising its essential tasks, particularly concerning the constitutional review of norms.

If an applicant before the Austrian Constitutional Court asserts that in the previous procedure an administrative authority applied a statutory provision which is constitutionally disputed, there appears the question whether the Constitutional Court may at all consider the constitutional issue before it is not made clear whether this statutory provision is contrary to EU law. If this statutory provision were contrary to EU law, this provision would not be applicable even due to the principle of primacy of EU law, and the Constitutional Court would have no object (of its own) for the review of the act.

Thus, review from the point of view of EU law is generally not a constitutional issue being relevant for the Constitutional Court in its judicial review of norms. In the entire area of public administration (excluding severe mistakes interfering with the constitutional sphere), supervision over respect for EU law is the matter for the Administrative Court and – in the area of ordinary judiciary – for the Supreme Court.

In general we could say that the constitution of a member state is in no manner curtailed due to accession to the EU, and that cooperation between European authorities and national authorities is an important element of balancing in relation to the principle of primacy of the EU-law.

### ***Povzetek***

*Avstrija je sorazmerno mlada članica EU, saj je pristopila šele leta 1995. Zato se prav dobro zaveda težav, s katerimi se soočajo nove članice.*

*S političnega in ustavnega vidika je pristop k EU pomenil najbolj obsežno spremembo avstrijske ustavne ureditve po letu 1920, ki je bila sprejeta v Ustavnem zakonu o*

*pristopu Avstrije k EU (EU-Beitritts-BVG). Amandmaji k avstrijski Ustavi (BVG BGBl 1994/1014), ki večinoma ustvarjajo organizacijska in procesna izhodišča, ne predstavljajo neposrednega temelja za reševanje osrednjih pravnih vprašanj na podlagi samega ustavnega besedila, temveč posredno izvirajo iz konteksta razprav o spremembah, ki so posledica integracije.*

*Razmerje med notranjo ustavno ureditvijo in pravnim redom EU v osnovi temelji na sprejetju *acquis communautaire*, pri čemer gre tudi za vprašanje obstoja “dveh pravnih redov v enem”.*

*V zadnjem času so avstrijska sodišča pogosto izkoristila možnost zahtevati odločanje o predhodnem vprašanju. Postopek odločanja o predhodnem vprašanju vsekakor šteje za najpomembnejši način sodelovanja med Sodiščem Evropskih skupnosti in nacionalnimi sodišči. V zvezi s tem pa je treba upoštevati nekatere omejitve: prvič, sodišča na zadnji instanci niso v vsakem primeru dolžna zahtevati odločanja o predhodnem vprašanju (*doktrina acte-clair*), druga, še bolj pomembna omejitev pa je, da je ocena relevantnosti pravnega vprašanja, ki se nanaša na pravni red Skupnosti, za rešitev primera prepuščena nacionalnim sodiščem.*

*Primarni položaj prava EU v razmerju do notranjega prava (vključno z ustavnim pravom) pomeni, da prava EU ni mogoče presoјati z vidika kriterijev notranjega ustavnega prava. Sekundarno pravo EU ni predmet nobene norme, vsebovane v (zvezni) ustavi, in zato ni predmet ustavne presoje.*

*Avstrijsko Ustavno sodišče lahko presoja skladnost notranjega predpisa s pravom EU samo znotraj posameznega postopka. Če se mora Ustavno sodišče ukvarjati z zakonsko določbo v drugem postopku, ki nima narave ustavne presoje predpisov in je omenjena zakonska določba v neskladju z normo primarnega ali sekundarnega prava EU, ki se uporabi v konkretnem primeru, mora Ustavno sodišče uporabiti normo prava EU, ne da bi po uradni dolžnosti sprožilo postopek ustavne presoje predpisa. Če se v tem okviru pojavi vprašanje interpretacije prava EU, mora tudi avstrijsko Ustavno sodišče začeti postopek za odločanje o predhodnem vprašanju.*

*Notranje pravo se ne more presoјati in razveljavljati v postopku ustavne presoje predpisov zaradi neskladja s pravom EU, ker pravo EU ni ustavno pravo v smislu notranjega pravnega reda. Zaradi tega pravo EU ni kriterij za presojo pri ustavni presoji predpisov.*

*Iz načela nevmešavanja prava EU v državno organizacijo izhaja, da pravo EU ne omejuje avstrijskega Ustavnega sodišča pri izvrševanju njegovih bistvenih nalog, še posebej glede ustavne presoje predpisov.*

*Če pobudnik pred avstrijskim Ustavnim sodiščem zatrjuje, da je v prejšnjem postopku upravni organ uporabil zakonsko določbo, ki je ustavno sporna, se pojavi vprašanje, ali Ustavno sodišče sploh sme obravnavati ustavno vprašanje, preden je razjasnjeno, ali je ta zakonska določba v neskladju s pravom EU. Če bi bila ta zakonska določba v neskladju s pravom EU, se je zaradi načela primarnosti prava EU ne bi smelo uporabiti in tako predmeta presoje Ustavnega sodišča ne bi bilo več.*

*Zaradi tega presoja z vidika prava EU na splošno ni ustavno vprašanje, ki bi bilo pri presoji predpisov relevantno za Ustavno sodišče. Na celotnem področju javne uprave (z izjemo hudih napak, ki posegajo v ustavno sfero), je nadzor nad spoštovanjem prava EU stvar upravnega sodišča in – na področju rednega sodstva – vrhovnega sodišča.*

*Na splošno je mogoče reči, da ustava države članice s pristopom k EU ni na noben način omejena in da je sodelovanje med organi EU in nacionalnimi državnimi organi pomemben element ravnotežja glede načela primarnosti prava EU.*

# ÖSTERREICH UND DIE EUROPÄISCHE UNION ERFAHRUNGEN UND LEISTUNGEN DES ÖSTERREICHISCHEN VERFASSUNGSGERICHTSHOFES

## Gliederung

### Vorbemerkung

#### I. Der Beitritt Österreichs zur EU

##### 1. Die Übertragung von Hoheitsrechten auf die EU

###### a) Der EU-Beitritt als Gesamtänderung der österreichischen

###### Bundesverfassung

###### b) Das EU-Beitritts-BVG und seine Problematik

##### 2. Die Position der österreichischen Bundesverfassung zum Europarecht

##### 3. Integrationsprozess und nationales Verfassungsrecht:

###### Existiert ein integrationsfester Verfassungskern?

###### a) Der Eintritt in einen „Staatenverbund“

###### b) Integrationsschranken?

#### II. Das Verhältnis von nationalem Verfassungsrecht und Gemeinschaftsrecht

##### 1. Übernahme des *acquis communautaire* und Anwendungsvorrang

##### 2. Zwei Rechtsordnungen in einer?

#### III. Der Vorrang des Gemeinschaftsrechts – Herleitung und Bedeutung

##### 1. Schöpfung der Rechtsprechung

##### 2. Bedeutung

##### 3. Reichweite des Anwendungsvorrangs

##### 4. Der Anwendungsvorrang in der Rechtsprechung des *öVfGH*

#### IV. Die Europäische Gemeinschaft als Kooperationsordnung und die österreichische Verfassungsgerichtsbarkeit

##### 1. Institutionelle Autonomie der Mitgliedstaaten

##### 2. Auswirkungen auf die Verfassungsgerichtsbarkeit

##### 3. Vorabentscheidungsverfahren

##### 4. Gesetzesprüfungsverfahren und Bedeutung des Gemeinschaftsrechts

###### a) Gemeinschaftsrecht unterliegt nicht der Normenkontrolle des *VfGH*

- b) Prüfung staatlichen Rechts am Maßstab des Gemeinschaftsrechts – auch der VfGH muss Inzidentkontrolle ausüben
- c) Gesetzesprüfung und Gemeinschaftsrecht
- d) Normenkontrolle im Anwendungsbereich des Gemeinschaftsrechts: das Problem der Präjudizialität und die Grenzen der Prüfungsbefugnis des VfGH

#### 5. Schutz der Grundrechte und Prüfung individueller Staatsakte

### V. Zusammenfassung

## VORBEMERKUNG

Was die Erfahrungen mit dem Europarecht anbelangt, so muss man in Rechnung stellen, dass Österreich ein relativ junges Mitglied der EU ist. Österreich war bekanntlich kein Gründungsmitglied der EWG, sondern ist erst 1995 der EU beigetreten. Daher kennen wir ziemlich gut die Probleme, mit denen die neuen Mitgliedstaaten durch ihren Beitritt (Erweiterungsvertrag von Athen) konfrontiert sind. Andererseits darf man nicht vergessen, dass der österreichische VfGH als das älteste Verfassungsgericht gleichsam der Doyen der europäischen Verfassungsgerichte ist und über eine besonders lange Erfahrung verfügt.<sup>1</sup>

Die Umstellungen für einen neuen Mitgliedstaat sind nicht nur ein quantitatives Problem. Nach dem Beitritt gilt neben der genuin-nationalen Rechtsordnung eine zweite Rechtsordnung, die die Gesamtrechtsordnung vollständig durchdringt, aber mit der nationalen Ordnung „nicht wirklich verwoben ist“.<sup>2</sup>

### I. Der Beitritt Österreichs zur Europäischen Union<sup>3</sup>

#### 1. Die Übertragung von Hoheitsrechten auf die Europäische Union

Dass der Beitritt zur EU mit einer weitreichenden, im Einzelnen und auch für die Zukunft nicht präzise abschätzbaren Kompetenzeinbuße bzw. Kompetenzausübungsschranken, insgesamt also mit der **Abgabe bedeutender Hoheitsbefugnisse** verbunden sein würde, war Österreich und seinen Staatsorganen bei der Erstellung des Beitritts-

<sup>1</sup> Das Reichsgericht der österreichisch-ungarischen Monarchie (österreichische Reichshälfte) war auf Grund der „Dezemberverfassung 1867“ das erste Verfassungsgericht Europas. Rückblickend kann gesagt werden, dass von seinen Kompetenzen am wichtigsten die Grundrechtsbeschwerde (gegen letztinstanzliche Verwaltungsbescheide) war. Ein Schritt in völliges Neuland war aber die Schaffung einer zentralen Normenkontrolle durch den österreichischen Verfassungsgerichtshof (VfGH) in der Bundesverfassung 1920 der damals jungen Republik Österreich. Über die grundlegende Bedeutung und Ausstrahlungswirkung in Europa und später in aller Welt vgl. jüngst *Heinz Schäffer*, Das österreichische/europäische Modell der Verfassungsgerichtsbarkeit und Spanien. In: *Francisco Fernández Segado* (Hrsg), *The Spanish Constitution in the European Constitutional Context/La constitución española en el contexto constitucional europeo* (Madrid 2003), 1119ff.

<sup>2</sup> *Karl Korinek*, Fragen des Gemeinschaftsrechts in der Judikatur des Verfassungsgerichtshofes, in *Korinek*, *Grundrechte und Verfassungsgerichtsbarkeit* (Wien/New York 2003), 303.

<sup>3</sup> Für die Vorgeschichte und die historisch-politischen Hintergründe des österreichischen EU-Beitrittes sowie über den Ablauf des Beitrittsverfahrens sei auf die inzwischen weitläufige Literatur verwiesen. Vgl. zB *Gerhart Holzinger*, Umsetzung und Anwendung des Gemeinschaftsrechts in Österreich, in: *Magiera/Siedentopf*, *Die Zukunft der Europäischen Union* (Berlin 1997), 87 ff. Hans R. *Klecatsky/Siegbert Morscher*, B-VG 10 (Manz'sche Taschenausgabe Wien 2002), Vorwort und Einleitung zu I.A; ferner *Peter Pernthaler*, Europäische Integration und nationales Verfassungsrecht in Österreich, in: *Battis/Tsatsos/Stefanou* (Hrsg), *Europäische Integration und nationales Verfassungsrecht* (Baden-Baden 1995) 437 ff; *Heinz Schäffer*, Europa und die österreichische Bundesstaatlichkeit, in: *Wolfgang Schuhmacher* (Hrsg), *Perspektiven des europäischen Rechts* (Wien 1994) 167 ff; *Heinz Schäffer*, L'adesione dell Austria alla CE: Problemi costituzionali ed internazionali, *Diritto e società* 1994/4, 729 ff.

antrages und bei der Durchführung des Beitritts völlig klar. Gemessen am bis dahin vorhandenen Verfassungsrechtsbestand bedeutete der Beitritt jedenfalls eine **Totalrevision der Verfassung** („Gesamtänderung“ gemäß Art 44 Abs 3 B-VG). Am 12. 6. 1994 fand daher erstmals in Österreich eine **obligatorische Volksabstimmung** im Sinne der genannten Verfassungsvorschrift statt, und zwar über den Gesetzesbeschluss des Nationalrats betreffend das „Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union“ (**EU-Beitritts-BVG**). Politisch und verfassungsrechtlich bedeutete dies die tiefgreifendste Änderung der Bundesverfassung seit ihrem Inkrafttreten (1.10.1920), zumal eine Reihe von fundamentalen Verfassungsprinzipien („Baugesetzen“) grundlegend modifiziert und Österreich in eine größere europäische Gemeinschaft integriert wurde.

#### a) Der EU-Beitritt als Gesamtänderung der österreichischen Bundesverfassung

Anders als manche anderen Staatsverfassungen (vgl etwa Art 79 GG) kennt die österreichische Bundesverfassung keine unabänderlichen Verfassungsinhalte. Während (sog „einfaches“) Bundesverfassungsrecht im allgemeinen unter Beachtung erhöhter Anwesenheits- und Beschlusserfordernisse<sup>4</sup> und unter ausdrücklicher Bezeichnung als Bundesverfassungsrecht erzeugt und abgeändert werden kann, ist eine sog „Gesamtänderung der Bundesverfassung“ nur unter der nochmals erschwerten Bedingung herbeizuführen, dass über einen entsprechenden Parlamentsbeschluss hinaus eine obligatorische Volksabstimmung durchzuführen ist (Art 44 Abs 3 B-VG). Die österreichische Bundesverfassung definiert allerdings nicht, was unter einer „Gesamtänderung“ zu verstehen ist.<sup>5</sup> Nach heute durchwegs herrschender Auffassung sind darunter Verfassungsänderungen zu verstehen, die eines der Grundprinzipien („Baugesetze“) der Bundesverfassung abschaffen oder - was realistischer ist - wesentlich verändern. Als Grundprinzipien nennt die herrschende Lehre: das Demokratie-Prinzip, die republikanische Staatsform, den bundesstaatlichen Aufbau sowie den liberalen Rechtsstaat (samt Grundrechten und einer Gerichtsbarkeit öffentlichen Rechts) einschließlich der Gewaltentrennung. Durch den Beitritt Österreichs zur EU haben – sieht man von der republikanischen Staatsform ab – sämtliche Grundprinzipien gravierende Veränderungen erfahren.<sup>6</sup>

aa) Das **Demokratieprinzip** war insofern betroffen, als durch die Übertragung von quantitativ erheblichen Rechtssetzungsbefugnissen an die Organe der EG, dh insbesondere an den Rat (unter Mitwirkung der Kommission und des Europäischen Parlaments) das **Gesetzgebungsmonopol** der nationalen Parlamente (Nationalrat, Bundesrat und Landtag) deutlich **geschmälert** worden ist. Hinzu kommt, dass die Rechtssetzung in der EG

<sup>4</sup> Für die Erzeugung von Verfassungsvorschriften ist die Anwesenheit von mindestens der Hälfte der Abgeordneten und eine Beschlussfassung mit mindestens 2/3 der Abgeordneten des Nationalrates erforderlich.

<sup>5</sup> Dazu grundlegend *Heinz Peter Rill/Heinz Schäffer*, Kommentierung zu Art 44 B-VG, in: *Heinz Peter Rill/Heinz Schäffer*, Bundesverfassungsrecht. Kommentar (Wien 2001 ff).

<sup>6</sup> Z.B. *Gerhart Holzinger*, Gravierende verfassungsrechtliche Änderungen im Zusammenhang mit einem österreichischen EG-Beitritt, JBl 1993, 2 ff; derselbe, in *Magiera/Siedentopf*, Die Zukunft der Europäischen Union, 87 ff.



nicht in einem der österreichischen Bundesverfassung vergleichbaren demokratischen Repräsentationszusammenhang erfolgt. Die wichtigsten Rechtssetzungsbefugnisse liegen beim Rat, einem staatenbündischen Organ, welches sich aus den Vertretern der Regierungen der Mitgliedstaaten zusammensetzt. Der Rat besitzt nur insofern eine partielle und abgeleitete demokratische Legitimation, als die Ratsmitglieder ihren heimischen nationalen Parlamenten einzeln verantwortlich sind. Eine Gesamtverantwortung des Rates kann bei dieser Konstruktion nicht gegeben sein. Das Europäische Parlament hat bei der „Gemeinschaftsgesetzgebung“ zwar gewisse Mitwirkungsbefugnisse, aber keine Entscheidungskompetenzen, die jenen der nationalen Parlamente gleichkommen würde. Die Rechtserzeugung in der EG ist also im wesentlichen durch exekutivische Rechtssetzung (eine Art „**Regierungsgesetzgebung**“) gekennzeichnet, die nach bisherigem Demokratieverständnis nicht mit dem Demokratieprinzip zusammengeht („Demokratie-Defizit“), und ist überdies durch die besondere Form der **richterlichen Rechtsfortbildung** durch den EuGH ergänzt. Die offene Rechtsfortbildung<sup>7</sup> durch die Gerichtsbarkeit ist nach dem zuvor Gesagten ebenfalls mit dem bisherigen Demokratieverständnis der österreichischen Bundesverfassung unvereinbar, was übrigens der öVfGH bereits früher in einem ganz anderen Zusammenhang erwähnt hat.<sup>8</sup>

bb) **Bundesstaatliches Prinzip:** Von der Übertragung von Rechtssetzungsbefugnissen sind auch Hoheitsrechte der Länder betroffen. Durch die Übertragung einer Vielzahl von Rechtssetzungsbefugnissen des Bundes an die EU verlieren die Länder ihre Mitwirkungsmöglichkeit an der Bundesgesetzgebung durch den Bundesrat. Es werden aber auch Kompetenzen im Bereich der Landesgesetzgebung durch Kompetenzverlagerungen auf die EG beeinträchtigt (zB im Bereich der Wirtschaftsförderung, der Auftragsvergabe, des Baurechts, des Grundverkehrs, des landesrechtlichen Berufe-Rechts, des Landwirtschaftsrechts, des Naturschutzes und des Umweltschutzes). Betroffen ist auch die Landesvollziehung, wenn man insbesondere an die europäische Direktverwaltung im Förderungswesen denkt. Angesichts der ohnedies schon schwachen Kompetenzausstattung der Bundesländer haben die Kompetenzeinbußen und Kompetenzausübungsschranken für sie besonders einschneidende Bedeutung.

cc) Zum **rechtsstaatlichen Prinzip** ist festzuhalten, dass wesentliche Elemente des österreichischen Rechtsstaatskonzepts im Rechtssystem der EG keine Entsprechung finden. Dem Gemeinschaftsrecht ist ein Legalitätsprinzip jener strikten Ausformung, wie es sich im österreichischen Verfassungsrecht entwickelt hat, fremd. Die EG-Rechtsordnung kennt nicht das Gebot der – relativ – strengen Determinierung des Verwaltungs-

<sup>7</sup> Als „innovatorische Rechtsprechung“ gekennzeichnet von Schweitzer/Hummer, Europarecht<sup>5</sup> (Neuwied usw 1996) Rz 455.

<sup>8</sup> Vgl VfSlg 11.500/1987 zur Frage, ob eine offene Rechtsfortbildung durch den Straßburger Menschenrechtsgerichtshof anlässlich der Ratifikation der EMRK von österreichischer Seite mitbedacht und mitbeschlossen worden sei. Der VfGH meinte, dass in einem solchen Falle eine Gesamtänderung der Bundesverfassung notwendig gewesen wäre, woran man aber anlässlich des Beitritts zur EMRK offenbar keinesfalls gedacht hat.

handelns durch das parlamentarisch-demokratisch erzeugte Gesetz, wie es in der österreichischen verfassungsgerichtlichen Judikatur zur Deutung des Art 18 B-VG eine strenge und fein verästelte Ausprägung erhalten hat.<sup>9</sup> Nicht nur hat das europäische Parlament hat im Vergleich zu nationalen Parlamenten eine teilweise andere Funktion, sondern es fehlt in der europäischen Rechtsetzung auch das Gebot der möglichst präzisen Formulierung genereller Rechtsvorschriften.

Tiefgreifend berührt wurde auch das **System der Rechtskontrolle** im Sinne der österreichischen Bundesverfassung. Seit dem Beitritt ist Gemeinschaftsrecht verbindlich nur durch den EuGH auslegbar und in seiner Anwendung (auch auf österreichisches Recht) kontrollierbar. Eine rechtliche Kontrolle dieser gemeinschaftlichen Rechtsvorschriften in Österreich ist selbst dann ausgeschlossen, wenn sie einen Verstoß gegen österreichisches Verfassungsrecht darstellten. Aus dem Vorrang des Gemeinschaftsrechts vor dem nationalen Recht folgt ferner der Verlust des Verwerfungsmonopols des Verfassungsgerichtshofs bezüglich österreichischer Gesetze und Verordnungen: Unmittelbar anwendbares Gemeinschaftsrecht ist von den nationalen Behörden dem österreichischen Recht jedenfalls vorzuziehen, und nationales Recht muss daher im Fall eines Widerspruchs unbeachtet bleiben. Dies bedeutet, dass jedes staatliche Rechtsanwendungsorgan gemeinschaftsrechtswidriges nationales Recht selbst zu prüfen und zu verwerfen hat und dabei letztlich (hinsichtlich Gültigkeit und Auslegung europäischer Normen) nur unter der Kontrolle des EuGH steht.

dd) Beim **Grundrechtsschutz** (der den Kern des „liberalen Prinzips“ ausmacht und im weiteren Sinne auch zum Rechtsstaatsprinzip gezählt werden kann) gibt es nach vorherrschender Auffassung durch den EU-Beitritt heute keine wesentlichen Beeinträchtigungen mehr, weil die Judikatur des EuGH – trotz gewisser rechtsdogmatischer Differenzen – einen dem nationalen Grundrechtskatalog im Wesentlichen gleichwertigen Rechtsschutz über die Figur der allgemein anerkannten Rechtsgrundsätze entwickelt hat. Die Differenzen in diesem Bereich wurden in Österreich nicht als gesamtänderungsrelevant angesehen.

ee) Veränderungen erfuhr schließlich auch das **Gewaltentrennungsprinzip**. Die in der österreichischen Bundesverfassung angelegte Trennung von Gesetzgebung, Verwaltung und Gerichtsbarkeit findet im Rahmen der EG keine wirkliche Entsprechung. Gleichwohl wird gelegentlich angeführt, das Gemeinschaftsrecht kenne eine spezifische Funktionsordnung, die im besonderen auf dem Dualismus der Repräsentation des Gemeinschaftsinteresses und des Interesses der einzelnen Mitgliedsstaaten beruht („institutionelles Gleichgewicht“).<sup>10</sup>

<sup>9</sup> *Heinz Peter Rill*, Kommentierung zu Art 18 B-VG, in: *Heinz Peter Rill/Heinz Schäffer*, Bundesverfassungsrecht. Kommentar (Wien 2001 ff).

<sup>10</sup> *Oppermann*, Europarecht Rz 209; dieselbe Argumentation findet sich auch in der Regierungsvorlage zum österreichischen EU-Beitritts-BVG.

## b) Das EU-Beitritts-B-VG und seine Problematik

Das B-VG über den Beitritt Österreichs zur Europäischen Union (BGBl 1994/744) ist kurz und außerordentlich formal konzipiert. Es besteht aus nur drei Artikeln. Art I ermächtigt „Mit der Zustimmung des Bundesvolkes ...“ die bundesverfassungsgesetzlich zuständigen Organe zum Abschluss des Beitrittsvertrages „entsprechend dem am 12. April 1994 fixierten Verhandlungsergebnis“. Art II sieht ein besonderes parlamentarisches Genehmigungsverfahren vor, welches von der normalen Verfassungsgesetzgebung teilweise abweicht: Der Bundesrat sollte nicht, wie sonst üblich, mit einfacher Mehrheit, sondern mit 2/3-Mehrheit zustimmen.<sup>11</sup> (Hingegen ist eine rangmäßige Einordnung und Kundmachungspflicht nicht vorgesehen worden). Art III betraut die Bundesregierung mit der Vollziehung des EU-Beitritts-BVG (sog Vollzugsklausel).

Dieses B-VG wurde nach parlamentarischer Behandlung im Nationalrat und Bundesrat dem Bundesvolk zur Abstimmung vorgelegt. Bei der Volksabstimmung am 12.6.1994 wurden 4,724.831 gültige Stimmen abgegeben, wovon 3,145.981, das sind 66,58% auf „Ja“ lauteten.<sup>12</sup> Die Unterzeichnung des Vertrages fand am 24.6.1994 in Korfu statt. Die völkerrechtliche Ratifikationserklärung des Bundespräsidenten gegenüber den anderen Vertragsparteien erfolgte, nachdem der Staatsvertrag mit den erforderlichen (erhöhten) Präsenz- und Konsensquoren vom Nationalrat am 11.11. und vom Bundesrat am 17.11.1994 genehmigt wurde. Da auch die nationalen Parlamente aller EU-Mitgliedsstaaten die Beitrittsverträge bis zum Ende des Jahres 1994 ratifizierten, ist **Österreich seit dem 1.1.1995 Mitglied der EU.**<sup>13</sup>

Das EU-Beitritts-BVG löste zwei verfassungspolitische Probleme. Es bot gleichsam einen Ausweg aus einem Auslegungsdilemma, zumal nach österreichischem Verfassungsrecht nicht klar ist, ob durch einen völkerrechtlichen Vertrag überhaupt eine Gesamtänderung der Verfassung herbeigeführt werden kann und darf.<sup>14</sup> Zugleich wurde mit der Technik der besonderen bundesverfassungsgesetzlichen Ermächtigung klargestellt, dass – freilich nur in diesem **einen Fall** – dieser spezielle Weg zur Gesamtänderung einzuschlagen ist.

<sup>11</sup> Hier hätte es der öBundesarat bei einigem politischen Selbstbewusstsein in der Hand gehabt, die Rolle der Länder zu stärken und die schon lange geforderte „Bundesstaatsreform“ herbeizuzwingen. De facto waren aber die parteipolitischen Zwänge stärker: Die Regierungsparteien, die zu diesem Zeitpunkt im Nationalrat nicht über eine 2/3-Mehrheit verfügten, hatten dort den Oppositionsparteien für die Zustimmung zum Beitrittsvertrag weitgehende parlamentarische Befugnisse des Nationalrats zugestanden und ihre Part eigänger im Bundesrat auf die Zustimmung eingeschworen!

<sup>12</sup> Siehe die Kundmachung der Bundesregierung in BGBl 1994/735.

<sup>13</sup> Vgl Art 2 Abs 2 EU-Beitrittsvertrag BGBl 1995/45 in Verbindung mit dessen Schlussklausel sowie die Kundmachung BGBl 1995/50.

<sup>14</sup> In Art 50 B-VG ist bezüglich der parlamentarischen Genehmigung völkerrechtlicher Verträge grundsätzlich auf die Verfassungsänderungen erforderlichen Formalitäten (erschwerte Beschlusserfordernisse und Bezeichnungspflicht) verwiesen, nicht jedoch auf die besondere Regelung, welche für Gesamtänderungen gilt, nämlich das Erfordernis einer obligatorischen Volksabstimmung. Andererseits verlangt Art 44 Abs 3 B-VG eine solche Volksabstimmung zwingend für „jede Gesamtänderung“.

Außerdem war auf diese Weise auch der Inhalt der Ermächtigung und somit die (Zulässigkeit der) Gesamtänderung selbst Gegenstand des Plebiszits.

Es versteht sich von selbst, dass die Bevölkerung mehr den politischen Grundsatzentscheid als die verfassungsrechtlichen Detailprobleme vor Augen hatte, als sie für den Beitritt votierte.

Die beschriebene Technik der Verfassungsänderung hatte noch eine weitere Folge. Angesichts der Ermächtigung auf ranghöchster Stufe (als Totalrevision mit obligatorischer Volksabstimmung) war der Vorgang einer inhaltlichen Normenkontrolle durch den VfGH praktisch entzogen. Das erklärt auch, warum es in Österreich nicht zu einem dem „Maastricht-Urteil“ des deutschen Bundesverfassungsgerichts vergleichbaren Erkenntnis des Verfassungsgerichtshofs gekommen ist. Ein weiterer wichtiger Grund liegt darin, dass die österreichische Bundesverfassung keine vorgängige Prüfung von Staatsverträgen auf ihre Vereinbarkeit mit der Verfassung kennt (wie etwa Frankreich und Spanien).<sup>15</sup>

Es wurde zwar von einigen Europa-Gegnern versucht, den Abstimmungsvorgang anzufechten und das Ergebnis vom Prozeduralen her aufzurollen. Die Anfechtung erfolgte mit der Behauptung, die Willensbildung des Bundesvolkes sei durch einseitige und unzureichende Information der Bevölkerung seitens der Bundesregierung verfälscht worden und es sei den Beitrittsgegnern keine Gelegenheit gegeben worden, ihre Argumente mit gleicher Wirkungschance vorzubringen. Der öVfGH hat diese Anfechtung verworfen, ohne sich auf eine materielle Prüfung der politischen Werbung rund um das Referendum einzulassen.<sup>16</sup>

## 2. Die Position der österreichischen Bundesverfassung zum Europarecht

Gleichzeitig mit dem Inkrafttreten des EU-Beitrittsvertrages (zum 1. 1. 1995) trat auch eine Novellierung der Verfassung (durch die B-VG-Novelle 1994 BGBl 1013; sog. „**EU-Begleitverfassung**“) in Kraft. Sie hat zwar im Ersten Hauptstück der Verfassung nach den „Allgemeinen Bestimmungen“ einen eigenen Unterabschnitt „B. Europäische Union“ eingefügt. Dieser enthält jedoch vor allem organisatorische und verfahrens-

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<sup>15</sup> Nach Art 145 B-VG wäre der öVfGH an sich zuständig, „über Verletzungen des Völkerrechts nach den Bestimmungen eines besonderen Bundesgesetzes“ zu erkennen. Ein solches Bundesgesetz ist bis heute nicht erlassen worden, die Bestimmung ist also unanwendbar. Auch weiß man aus der Entstehungsgeschichte dieser Bestimmung, dass hier an eine Art völkerstrafgerichtliche Funktion gedacht war. – Seit 1964 gibt es mit Art 140a B-VG eine Normenkontrolle des VfGH über Staatsverträge. Diese bedeutet aber – wie die übrigen Normenkontrollbefugnisse des VfGH – eine a posteriori-Kontrolle. Ein solches Verfahren hat bis heute noch nie statt gefunden. Es könnte im Grunde nur zur Feststellung der Verfassungswidrigkeit eines gesetzesrangigen (oder zur Gesetzswidrigkeit eines verordnungsrangigen) Staatsvertrages führen, wenn bei der Ratifikation das Verfahren fehlerhaft war und damit die innerstaatliche Einordnung des Vertrages in den Rechtsquellenrang fehlerhaft erfolgt wäre.

<sup>16</sup> VfGH 30.8.1994, W I-6/94 = VfSlg 13.839/1994.

rechtliche Regelungen, aber keinen ausdrücklichen Integrationsartikel. Geregelt sind in diesem Unterabschnitt die Wahlen zum Europäischen Parlament, die Nominationsrechte zu den Organen der EG/EU, das parlamentarische Mitwirkungsverfahren und die Länder-Mitwirkung bei der Vorbereitung europäischer Rechtssetzungsakte sowie Österreichs Mitwirkung an der Gemeinsamen Außen- und Sicherheitspolitik (GASP) (Art 23a-Art 23f B-VG).<sup>17</sup> Die erwähnte Verfassungsnovelle hat die Bestimmungen über die Verfassungsgerichtsbarkeit formell unberührt gelassen, sie hat also keine expliziten Aussagen zu den Auswirkungen auf die Verfassungsgerichtsbarkeit getroffen.

Der seit jeher nüchternen und programmatischen Aussagen abholden österreichischen Verfassung **fehlt** es daher sowohl an einem „**Bekennnis zu Europa**“ als auch an einer allgemeinen **Öffnungsklausel** und einem zukunfts-offenen „**Integrationshebel**“. Alle zentralen juristischen Fragen können daher nicht aus dem Verfassungstext (des Stammgesetzes) unmittelbar gelöst werden, sondern nur mittelbar aus der Art und Weise, wie das Problem der Gesamtänderung bewältigt wurde und mit welchen Überlegungen die Erläuterungen der Regierungsvorlage zum EU-Beitritts-BVG operiert haben.

Der schon vielfach kritisierte „zerklüftete“ Charakter des österreichischen Bundesverfassungsrechts (es fehlt nicht nur an einer durch Widerverlautbarung konsolidierten Textfassung des Stammgesetzes; es besteht heute auch eine beträchtliche Unübersichtlichkeit infolge zahlreicher außerhalb des Stammgesetzes stehender Verfassungsbestimmungen) wird jedenfalls durch die Übernahme primären und sekundären Gemeinschaftsrechts, welches sogar – von den wenigen, unten noch näher zu erörternden Schranken abgesehen – dem gesamten formellen Verfassungsrecht „vorgeht“, zusätzlich schwerwiegend verschärft.

Die eigentliche „Übertragung von Hoheitsrechten“, also die Ermächtigung zu für und in Österreich unmittelbar verbindlichen Gemeinschaftsrechtsakten liegt im EU-Beitritts-BVG in Verbindung mit dem Beitrittsvertrag, der die Übernahme des *acquis communautaire* (Primärrecht und bisheriges Sekundärrecht, inklusive der dazu ergangenen Rechtsprechung) festgeschrieben hat. Die Reichweite der Übertragung von Hoheitsrechten ergibt sich aus dem<sup>18</sup> Verhandlungsergebnis vom 12. 4. 1994.

Jede substantielle Änderung und Fortentwicklung des EU-Rechts und des Gemeinschaftsrechts (also zB auch der neue Verfassungsvertrag) muss aus der Sicht des österreichischen Verfassungsrechts – sofern es nicht in der Zukunft zur Einführung eines allgemeinen Integrationshebels kommen sollte – auf prinzipiell gleichartigen rechtstechnischen Wegen zustande kommen, wie der beschriebene EU-Beitritt. Nach

<sup>17</sup> Vgl dazu im Einzelnen *Heinz Schäffer*, Österreichs Beteiligung an der Willensbildung in der Europäischen Union, insbesondere an der europäischen Rechtsetzung, ZÖR 50 (1996) 1 ff

<sup>18</sup> Im EU-Beitritts-BVG festgeschriebenen.

österreichischem Verfassungsrecht ist dabei freilich, wie gesagt, zu unterscheiden zwischen baugesetzkonformen Änderungen und solchen, die eine neuerliche Veränderung von „Baugesetzen“ (verfassungsrechtlichen Grundprinzipien) des österreichischen Bundesverfassungsrechts bedeuten würden.

In der Tat hat man schon beim Vertrag von Amsterdam einen rechtstechnisch gleichartigen Weg eingeschlagen.<sup>19</sup> Auch für den Abschluss des Vertrages von Amsterdam wurde wieder eine besondere verfassungsrechtliche Ermächtigung geschaffen.<sup>20</sup> Demnach durfte das Vertragswerk wieder nur mit Genehmigung des Nationalrats und Zustimmung des Bundesrates abgeschlossen werden. Die Beschlussfassung bedurfte in beiden Kammern des österreichischen Bundesparlaments jeweils der Anwesenheit von mindestens der Hälfte der Mitglieder und einer Mehrheit von zwei Dritteln der abgegebenen Stimmen. Anders als in Frankreich<sup>21</sup> hat man weder in Deutschland<sup>22</sup> noch auch in Österreich angenommen, dass durch den Amsterdamer Vertrag wesentliche Eingriffe in die Staatlichkeit (Souveränitätsbeschränkungen) erfolgen. Jedenfalls hat man in Österreich kein Erfordernis einer Gesamtänderung der Bundesverfassung gesehen. Ebenso wie beim Vertrag von Amsterdam verfuhr man in Österreich beim Vertrag von Nizza<sup>23</sup> und jüngst wieder beim Erweiterungsvertrag von Athen.<sup>24</sup> Das heißt also: Aus der Sicht der österreichischen Rechtsordnung waren dies gleichsam „systemimmanente“ Fortentwicklungen und keine grundlegend neuen Integrationschübe.

### 3. Integrationsprozess und nationales Verfassungsrecht: Existiert ein „integrationsfester Verfassungskern“ ?

Angesichts des ständigen Voranschreitens der europäischen Integration erhebt sich freilich die Frage: Ergeben sich „Integrationssschranken“ für die weitere Integration Europas aus dem nationalen Verfassungsrecht?<sup>25</sup>

<sup>19</sup> Daniela Tomasovsky, Verfassungsrechtliche Fragen der Genehmigung des Vertrages von Amsterdam, *Journal für Rechtspolitik* 6 (1998) 313 ff.

<sup>20</sup> BVG BGBl I 1998/76.

<sup>21</sup> Hans-Georg Franzke, Die teilweise Unvereinbarkeit des Vertrages von Amsterdam mit der französischen Verfassung, *DÖV* 1998, 860 ff.

<sup>22</sup> Der Vertrag von Amsterdam enthielt nur in der Ausländerpolitik substanzielle Kompetenzübertragungen. Weitere Vertragsänderungen konsolidieren den gemeinschaftlichen Besitzstand, führten zu horizontalen und vertikalen Kompetenzabgrenzungen bzw. heben bisherige Selbstbeschränkungen der intergouvernemental-völkerrechtlichen Unionssäulen auf. Die Vergemeinschaftung der Asyl-, Einwanderungs- und Visapolitik stellt nach wohl zutreffender Ansicht keinen wesentlichen Eingriff in die Staatlichkeit der MS dar, zumal es dem nationalen Parlament freisteht, entsprechenden Einfluss auf seine Regierung auszuüben. So Ulrich Karpenstein, Der Vertrag von Amsterdam im Lichte der Maastricht-Entscheidung des BVerfG, *DVBl* 1998, 942 ff.

<sup>23</sup> Dazu BVG BGBl I 2001/120.

<sup>24</sup> Dazu BVG BGBl I 2003/53. Eine gleichartige Vorgangsweise ist auch beim kommenden Verfassungsvertrag geplant; vgl. unten Anm. 36.

<sup>25</sup> Dazu für Österreich ausführlich Gerhart Holzinger, *Verh* 12.ÖJT (Wien 1993) 151ff.

a) Der Eintritt in einen „Staatenverbund“

Was für andere Länder vor allem beim Ausbau der EWG zu einer politischen „Europäischen Union“ (mit dem Vertrag von Maastricht) als ein Problem darstellte (nach den Urteilen der Verfassungsgerichte in Deutschland, Frankreich und Spanien bedurfte es hierzu jeweils einer besonderen Verfassungsänderung), wurde für Österreich gleichsam „auf einen Schlag“ gelöst. Österreich hat sich ja auf Grund seines Aufnahmeantrages zur EWG (1989) zunächst als EWR-Mitglied (ab 1992) gleichsam im „Warteraum“ der europäischen Integration befunden, und als es mit Wirkung vom 1. 1. 1995 beiträt, ist dieser Eintritt sogleich in die mittlerweile höher integrierte EU erfolgt. Dies war freilich für Österreich infolge des relativ weitgehenden Souveränitätsverzichts eine Gesamtänderung der Verfassung.

Wie das deutsche Bundesverfassungsgericht mit einer fast genialen Wortschöpfung – offenbar um eine besondere Etappe der voranschreitenden Integration zu kennzeichnen und weitere Integrationsschritte bewussten nationalen Entscheidungen vorzubehalten – formuliert hat: Die EU ist im Gegensatz zu früheren Gebilden kein bloßer Staatenbund mehr, aber auch (noch) kein (Bundes)Staat;<sup>26</sup> sie ist ein „Staatenverbund“<sup>27</sup>. Dieser Ausdruck kennzeichnet sehr treffend einen bereits hohen und fortgeschrittenen Stand der Integration einer supranationalen Gemeinschaft, die aber von Staatlichkeit gleichwohl noch beträchtlich entfernt ist. Der deutsche Verfassungsgesetzgeber ist bekanntlich dem Gedanken des Bundesverfassungsgerichts gefolgt und hat für weitere entscheidende Schritte der Integration (und des Souveränitätsverzichts) im neuen „Europaartikel“ eigene „Integrationssschranken“ erreicht. Die späteren Verträge (Amsterdam, Nizza und Erweiterungsvertrag von Athen) haben den Integrationsprozess maßvoll vorangetrieben und an der Struktur der EU keine grundlegenden Veränderungen vorgenommen.

b) Integrationssschranken?

Anlässlich der Vorbereitungen des EU-Beitritts stand auch in Österreich zur Diskussion, ob nach ausländischem Beispiel (insbesondere in Orientierung an dem deutschen Art 23 GG neue Fassung) ein allgemeiner Vorbehalt zu Gunsten bestimmter Grundwertungen nach Art verfassungsrechtlicher „Integrationssschranken“ in das österreichische Verfassungsrecht ausdrücklich aufgenommen werden sollte. Eine derartige Regelung könnte in Bezug auf künftige Entwicklungen des Gemeinschaftsrechts als zusätzlicher Prüfungsmaßstab für die verfassungsrechtliche Zulässigkeit der damit

<sup>26</sup> Stefan Griller, Der „Sui Generis Charakter“ der EU und die Konsequenzen für die Verfassungsoptionen, in Waldemar Hummer (Hrsg), Paradigmenwechsel im Europarecht zur Jahrtausendwende (Wien/New York 2004) 23ff.

<sup>27</sup> Paul Kirchhof, Europa auf dem Weg zu einer Verfassung?, ZSE 2003, 358ff; Paul Kirchhof, Die rechtliche Struktur der Europäischen Union als Staatenverbund, in Bogdandy (Hrsg), Europäisches Verfassungsrecht (2003) 893ff.

verbundenen Einwirkungen auf die staatliche Rechtsordnung dienen. Weite Teile der Lehre hielten eine solche inhaltliche Grenzziehung der Übertragung von Hoheitsrechten zur Klarstellung und besseren Verteidigung der Grundprinzipien für sinnvoll.

Das österreichische EU-Beitritts-BVG ist aber letztlich **ohne explizite materielle Integrations-schranken** erlassen worden. Die Erläuterungen zur Regierungsvorlage<sup>28</sup> vertreten allerdings die Auffassung, dass die **Schrankenwirkung der Baugesetze** der Bundesverfassung durch die Gesetzestechnik des EU-Beitritts-BVG ausreichend gewahrt werde, weil in ihr eine klar begrenzte Abänderung zum Ausdruck komme. Die österreichische Rechts- und Verfassungsordnung sei keineswegs ohne jede Schranke den Einwirkungen des Gemeinschaftsrechts „ausgeliefert“ worden. Daraus, dass sich die Ermächtigung ausschließlich auf den Abschluss dieses Beitrittsvertrags<sup>29</sup> beschränkt, folgt nach dieser Auffassung<sup>30</sup>, dass der **Souveränitätsverzicht**, der mit dem auf das Beitritts-B-VG gestützten Abschluss dieses Staatsvertrages österreichischerseits geleistet wurde, **mit den vertraglich eingegangenen Verpflichtungen begrenzt** ist.

Für die künftige Entwicklung sind daher zwei Problemkreise zu unterscheiden:

aa) **Keine schrankenlose Integrationsdynamik**

Künftige Änderungen der Gemeinschaftsverträge werden als neue völkerrechtliche Verträge zu behandeln und jeweils für sich auf ihre verfassungsrechtliche Zulässigkeit zu beurteilen sein. Sollte es sich dabei um so weitreichende Änderungen handeln, dass sich dies – gemessen an den nunmehr (schon EU-konform) modifizierten, aber weiterbestehenden Grundprinzipien der österreichischen Bundesverfassung – neuerlich als „gesamtändernde“ Inhalte darstellen würde, so wird der Abschluss eines solchen Vertrages wieder einer besonderen bundesverfassungsgesetzlichen Grundlage bedürfen, die einer Volksabstimmung zu unterziehen ist.

Der neue „**Verfassungsvertrag**“<sup>31</sup> (schon unterzeichnet, noch nicht ratifiziert) bringt eine formelle Vereinfachung des Europarechts, indem er wesentliche Teile des Unionsrechts und des bisherigen Primärrechts in eben diesen Vertrag zusammenfasst, die Rechtsquellen neu benennt und die Fortbildung des nicht im Verfassungsvertrag kodifizierten Rechts einer „einfachen Rechtssetzung“ durch Europagesetze und europäische Rahmengesetze als neues Sekundärrecht überlassen will. Zwar sollen auch die bisherigen Säulen 2 und 3 des Unionsrechts vergemeinschaftet werden, aber nicht in so intensiver Weise wie das bisherige eigentliche Gemeinschaftsrecht (1. Säule). Ob der Verfassungsvertrag für Österreich eine neuerliche Gesamtänderung darstellt und einem obligatorischen Referendum unterliegt, ist von einer Stimme der Lehre unter Berufung auf die nunmehr im

<sup>28</sup> 1546 BlgNR 18.GP, 3ff.

<sup>29</sup> Maßgebend ist das Verhandlungsergebnis vom 12.4.1994!

<sup>30</sup> So auch *Holzinger* in: *Magiera/Siedentopf*, 94.

<sup>31</sup> <http://ue.eu.int/igcpdf/de/04/cg00/cg00086.de04.pdf>



Verfassungsvertrag ausdrücklich verankerte Vorrang-Klausel<sup>32</sup> thematisiert worden.<sup>33</sup> Dagegen meint die überwiegende Zahl der Öffentlichrechtler dass sich materiell an der bisherigen Rechtslage nichts ändern würde,<sup>34</sup> und dass es deshalb aus österreichischer verfassungsrechtlicher Sicht keiner Volkabstimmung bedürfte.<sup>35</sup> Nach der in Österreich herrschenden Ansicht<sup>36</sup> kann der Vorrang des Gemeinschaftsrechts nicht dazu führen, dass die grundlegenden Prinzipien der Bundesverfassung über den Beitritt hinaus weiter verändert werden; einen allgemeinen Vorrang des Europarechts gegenüber diesen Grundprinzipien wollte man anlässlich des Beitritts nicht akzeptieren, sodass (implizit)<sup>37</sup> ein integrationsfester Verfassungskern bestehen bleiben soll.<sup>38</sup>

Fazit: Der entscheidende Schritt ist der Eintritt in die EU. Je später er erfolgt, desto einschneidender wirkt er sich für den Beitrittskandidaten aus. Denn es ist ein ehernes Gesetz der Integration geworden, dass sich ein später eintretender Mitgliedsstaat völlig anzupassen und den gemeinschaftlichen Rechtsbesitzstand (*acquis communautaire*) zu übernehmen hat.

Werden künftige Integrationsschritte für Österreich eine (neuerlich) Gesamtänderung bedeuten? Diese Frage ist nach dem Gesagten anhand der „immanenten Integrations-schranken“ zu beurteilen, also anhand der schon anlässlich des Beitritts gründlich modifizierten verfassungsrechtlichen Grundprinzipien.<sup>39</sup> Nur wenn die EU eine eigene Kompetenz-Kompetenz erhalte und die Ausdehnung ihrer Befugnisse nicht mehr von

<sup>32</sup> Art I-5a: „Die Verfassung und das von den Organen der Union in Ausübung der ihnen zugewiesenen Zuständigkeiten gesetzte Recht haben Vorrang vor dem Recht der Mitgliedstaaten.“

<sup>33</sup> *Theo Öhlinger*, Referendum über Verfassung nötig?, *Die Presse/Rechtspanorama* vom 5. 7. 2004, 20 meint, der Vorrang sei absolut formuliert, eine künftige Revision des Verfassungsvertrages könnte sich über die Grundprinzipien hinwegsetzen. Auch die „Wahrung der nationalen Identität“ sei künftig ausschließlich eine Sache des Unionsrechts, dem EuGH komme dann das letzte Wort zu.

<sup>34</sup> Auch heute kennt die Vorrang-Judikatur keinen Vorbehalt zugunsten der nationalen Verfassungskerne. Trotzdem können diese – etwa ein Mindeststandard im Grundrechtsschutz, das Demokratieprinzip oder der Aufbau des Bundesstaates – von den nationalen Höchstgerichten verteidigt werden, wenn auch um den Preis eines (denkbaren) Konfliktes mit dem EuGH. In diesem Sinne vor allem *Stefan Griller*, Referendum über EU-Verfassung Pflicht? Keine zwingenden Argumente in Sicht, *Die Presse/Rechtspanorama*, 12. 7. 2004, 10.

<sup>35</sup> Ob eine (fakultative) Volksabstimmung aus praktischen Gründen beschlossen wird, ist hingegen eine politische Frage. und Entscheidung.

<sup>36</sup> Siehe nunmehr den zur Begutachtung ausgesendeten Entwurf eines „BVG über den Abschluss des Vertrages über eine Verfassung für Europa“ (GZ. BKA-601.999/00004-V/1/2004 vom 22. 11. 2004). In den Erläuterungen wird darauf verwiesen, dass auch in der österreichischen Literatur nahezu einhellig die Existenz von Integrations-schranken anerkannt ist.

<sup>37</sup> Der Umstand, dass dies nicht im Text des EU-BeitrittsBVG zum Ausdruck kommt, sondern nur aus den Materialien erschlossen werden könne, wird allerdings von *Stefan Griller*, *ZfRV* 1995, 89 (96 f) „zumindest als legitischer Mangel“ bezeichnet.

<sup>38</sup> So zB *Willibald Liehr*, *Der Einfluss des Beitritts Österreichs zur EU auf das österreichische Rechtsleben*. Schriftenreihe der NÖ. Jur. Ges. (Wien 2001) 13f.

<sup>39</sup> Das ist herrschende Lehre. Siehe zB *Stefan Griller*, *ZfRV* 1995, 96 f; *Baumgartner*, EU-Mitgliedschaft; *Holzinger*, Die Auswirkungen der österreichischen EU-Mitgliedschaft auf das österreichische Verfassungsrecht, *Journal für Rechtspolitik* 1996, 167f; *Theo Öhlinger/Michael Potacs*, *Gemeinschaftsrecht und staatliches Recht* (Wien 1998) 60.

den Mitgliedstaaten als „Herren der Verträge“ bestimmt werden könnte, würde sie sich zu einem europäischen Bundesstaat fortentwickeln. Dies wäre gewiss eine „Gesamtänderung“ der österreichischen Bundesverfassung.<sup>40</sup>

#### bb) Das Problem der „ausbrechenden Rechtsakte“

Ein anderes Problem wäre eine grundlegende Änderung des Gemeinschaftsrechts *via facti*: Hier meinten die Erläuterungen zur Regierungsvorlage des österreichischen EU-Beitritts-BVG, dass einer bloß internen **Rechtsfortbildung Gemeinschaftsrechts ohne formelle Vertragsänderung** Grenzen gesetzt seien, auch wenn das nationale Verfassungsrecht die Teilnahme an der EU nur „erschließbar“ an die Wahrung fundamentaler Rechtsgrundsätze bindet! Schon aus gemeinschaftsrechtlicher Sicht wären<sup>41</sup> Sekundärrechtsakte, die in Überschreitung der den Gemeinschaftsorganen übertragenen Rechtsetzungsbefugnisse ergehen, rechtswidrig und daher unzulässig. Die Gemeinschaftsorgane unterliegen diesbezüglich der Kontrolle insbesondere durch den EuGH, der über die Nichtigkeit von Rechtsakten der Gemeinschaftsorgane wegen Widerspruchs mit dem Primärrecht zu befinden hätte. Aber ungeachtet dessen wären solche „*ultra-vires-Akte*“ von Gemeinschaftsorganen aus der Sicht des österreichischen Verfassungsrechts wegen Überschreitung der mit dem Beitrittsvertrag übertragenen Befugnis fehlerhaft und daher bei schwerer und offenkundiger Rechtswidrigkeit – mangels Aufhebbarkeit – als absolut nichtig (unbeachtlich) zu betrachten! Eine solche Beurteilung käme inzidenter jedem Staatsorgan bei der von ihm jeweils zu treffenden Entscheidung zu. Ob diese in den Erläuterungen geäußerte Auffassung Aussicht auf Durchsetzungsfähigkeit und Gefolgschaft im Kreise der Mitgliedsstaaten hat, muss bis auf weiteres dahingestellt bleiben.

Überdies bleibt festzuhalten, dass Österreich – wie auch andere Mitgliedstaaten – mittelbar auch von den Wirkungen der expliziten Integrationsschranken partizipieren können, die in der „Struktursicherungsklausel“ des neuen Europaartikels (Art 23) des deutschen GG stecken.

## II. Das Verhältnis von nationalem Verfassungsrecht und Gemeinschaftsrecht

### 1. Übernahme des *acquis communautaire* und Anwendungsvorrang

a) Länder, die EU als Mitglied beitreten, müssen den sogenannten „rechtlichen Besitzstand“ (*acquis communautaire*) der EU zum Zeitpunkt des Beitritts übernehmen, soweit in den Beitrittsverträgen keine Ausnahmen oder Modifikationen vorgesehen sind. Zu diesem Besitzstand gehört auch die Rechtsprechung des EuGH. Damit anerkennen

<sup>40</sup> Heinz Peter Rill/Heinz Schäffer, Kommentierungen zu Art 1 (Rz 25) und Art 44 B-VG (Rz 51f), in: Rill/Schäffer, Bundesverfassungsrecht. Kommentar.

<sup>41</sup> Im Hinblick auf das Prinzip der Einzelermächtigung.

die Beitrittsländer grundsätzlich auch den Vorrang des Gemeinschaftsrechts vor ihrem innerstaatlichen Verfassungsrecht.

Die Öffnung der österreichischen Rechtsordnung für die EU-Mitgliedschaft durch das EU-Beitritts-BVG erfolgte in Kenntnis und Anerkennung der **Vorrangwirkung des Gemeinschaftsrechts**.<sup>42</sup> Ausdrücklich normiert Art 2 der Beitrittsakte:

„Ab dem Beitritt sind die ursprünglichen Verträge und die vor dem Beitritt erlassenen Rechtsakte der Organe für die neuen Mitgliedstaaten verbindlich und gelten in diesen Staaten nach Maßgabe der genannten Verträge und dieser Akte.“

Dies bedeutet: Unmittelbar anwendbares Gemeinschaftsrecht geht innerstaatlichem Recht im Kollisionsfall vor, wobei es auf den Rang des innerstaatlichen Rechts nicht ankommt. Folglich hat das mit Gemeinschaftsrecht im Widerspruch stehende innerstaatliche Recht ohne weiteres unangewendet zu bleiben. Dieser Anwendungsvorrang des Gemeinschaftsrechts gilt auch gegenüber später erlassenen innerstaatlichem Recht.<sup>43</sup>

Als der EuGH vor Jahren erstmal entschied, dass Gemeinschaftsrecht auch Vorrang vor dem Verfassungsrecht der Mitgliedstaaten genieße (EuGH 17.12.1970, Rs 11/70 – *Internationale Handelsgesellschaft*), führte dies in den Mitgliedstaaten zu unfreundlicher Kritik und abwehrenden Entscheidungen (vgl insb die „*Solange P*“-Entscheidung des dBVerfG).<sup>44</sup> Heute ist der Vorrang des Gemeinschaftsrechts vor dem innerstaatlichen Verfassungsrecht durch die Gerichte der Mitgliedstaaten weitgehend akzeptiert<sup>45</sup> (vgl für Österreich VfSlg 16.050/2000).

Nach weitgehend übereinstimmender Judikatur der Verfassungsgerichte der Mitgliedstaaten findet der Vorrang jedoch eine Grenze an fundamentalen Prinzipien der Verfassung.<sup>46</sup> Für Deutschland: BVerfG 10.12.1993, BVerfGE 89, 155 – Maastricht; für Italien: Corte Costituzionale 23.3.1994 – Zernini;

Hier scheint sich eine grundlegende Diskrepanz aufzutun. Sie ist aber wohl eher von theoretischer als praktischer Bedeutung. Es ist nämlich zu bedenken: Da die wesentlichen Grundsätze, wie Demokratie, Rechtsstaatlichkeit und Schutz der Grundrechte aber auch

<sup>42</sup> Siehe den Bericht des Verfassungsausschusses: 1600 BlgNR 18.GP und die darin abgedruckten Erläuterungen zur Regierungsvorlage.

<sup>43</sup> *Christoph Thun-Hohenstein*, Das Verhältnis zwischen österreichischem Recht und dem Recht der Europäischen Union. Studienarbeit Nr. 107 der Sozialwissenschaftlichen Arbeitsgemeinschaft (Wien 1995) 81.

<sup>44</sup> BVerfGE 37, 271 – *Solange I*.

<sup>45</sup> Siehe den Überblick bei *Thomas Oppermann*, Europarecht<sup>2</sup> (München 1999) Rz 621ff. für Frankreich: drei Entscheidungen des Conseil Constitutionnel (in deutscher Fassung abgedruckt in: EuGRZ 1993, 187 ff).

<sup>46</sup> Für Deutschland: BVerfG 10.12.1993, BVerfGE 89, 155 – Maastricht; für Italien: Corte Costituzionale 23.3.1994 – Zernini; für Frankreich: drei Entscheidungen des Conseil Constitutionnel (in deutscher Fassung abgedruckt in: EuGRZ 1993, 187 ff).

zu den Grundsätzen des Gemeinschaftsrechts zählen;<sup>47</sup> infolge dieser Homogenität besteht – dem Grunde nach – gar kein Konflikt zwischen dem Gemeinschaftsrecht und jenen leitenden Grundsätzen, die die Gerichte der Mitgliedstaaten als Grenze betrachten.

Dass eine Überwachung der gemeinsamen Verfassungsgrundsätze in Europa und die Stellung eines Mitgliedstaates unter eine Art „politischer Kuratel“ durchaus ein gravierendes verfassungspolitisches Problem darstellen könnte, soll hier nur erwähnt, aber nicht näher ausgeführt werden. Der – unter Außerachtlassung aller Spielregeln – inszenierte Fall „EU-14 gegen Österreich“<sup>48</sup> hat immerhin auf Grund der Besonnenheit Österreichs letztlich zu einer Beilegung des politischen Konfliktes und zu einer rechtsstaatlichen Ausgestaltung des allfälligen Aufsichts- und Sanktionenverfahrens für künftige derartige Fälle (im neugefassten Art 7 EUV) geführt.<sup>49</sup>

<sup>47</sup> Vgl insb Art 6 Abs 1 EUV: „Die Union beruht auf den Grundsätzen der Freiheit, der Demokratie, der Achtung der Menschenrechte und Grundfreiheiten sowie der Rechtsstaatlichkeit; diese Grundsätze sind allen Mitgliedstaaten gemeinsam.“

<sup>48</sup> Eine Übersicht zu diesem Problem bei *Heinz Schäffer*, Europa – Raum des Rechts und „Werte Gemeinschaft“. Der Fall Österreich – am Beispiel der rechtswidrigen sogenannten „Sanktionen“ der EU-14 gegen Österreich, in: Essays in Honour of Georgios I. Kassimatis (Athen/Berlin /Brüssel 2004), 827ff.

Die „Causa Austria“ hat seinerzeit Politik und Gemüter heftig bewegt. Erste Stellungnahmen fanden sich bei: *Waldemar Hummer/Walter Obwexer*, Österreich unter >EU-Kuratel<, europablätter 2000, 52ff; *Waldemar Hummer*, Österreich unter EU-Quarantäne, Neue Zürcher Zeitung Nr. 46 vom 24. 2.2000, 9; Frank Schorkopf, Vierzehn gegen Wien, Frankfurter Allgemeine Zeitung Nr. 37 vom 14. 2.2000, 9; Vignes, L’Autriche...? Hélas, c’était indispensable, RMCE 2000, 145 ff; *Waldemar Hummer/Walter Obwexer*, Österreich unter >EU-Quarantäne<, ecolex 2000, 250ff; *Peter Perenthaler/Peter Hilpold* Sanktionen als Instrument der Politikkontrolle – der Fall Österreich, integration 2000, 105ff.

Eine detaillierte Dokumentation und rechtliche Analysen der Ereignisse bietet das Themenheft „Österreich unter europäischer Aufsicht?“ der „Zeitschrift für öffentliches Recht (Austrian Journal of Public and International Law)“ vol. 55 (2000)/3, 229-346 mit einem „Editorial“ von *Heinz Schäffer* und mit Beiträgen von *Günther Winkler*, *Waldemar Hummer/Walter Obwexer*, *Franz Leidenmühler*, *Eugene Regan* und *Ota Weinberger*. (Das genannte Themenheft war gerade abgeschlossen, als der sogenannte Weisenbericht erschien.) Eine rechtliche Analyse versuchten schon im Jahre 2000 auch die folgenden Zeitschriftenartikel: *Frank Schorkopf*, Verletzt Österreich die Homogenität in der Europäischen Union? – Zur Zulässigkeit der „bilateralen“ Sanktionen gegen Österreich, Deutsches Verwaltungsblatt 2000, 1036-1044; *Waldemar Hummer/Walter Obwexer*, Die Wahrung der „Verfassungsgrundsätze“ der EU. Rechtsfragen der „EU-Sanktionen“ gegen Österreich, Europäische Zeitschrift für Wirtschaftsrecht 2000/16, 485-496; *Reinhard Klaushofer*, Die Maßnahme der „EU 14“ und Aspekte der Anwendung von Art. 7 EU und 309 EG, Journal für Rechtspolitik 8 (2000), 297-308; *Roland Winkler*, Der Rechtsschutz gegen Maßnahmen zur Sanktionierung eines EU-Mitgliedstaats wegen Verletzung europäischer Grundwerte und gegen die Maßnahmen der „EU-14“, Journal für Rechtspolitik 8 (2000), 308-327. - Aus der späteren Aufsatzliteratur seien erwähnt: *Ludwig Adamovich*, Juristische Aspekte der „Sanktionen“ der EU-14 und des „Weisenberichtes“, EuGRZ 28 (2001), 89-92; *Benedikt Speer*, Die Europäische Union als Wertegemeinschaft, DÖV 2001, 980-988; *Franz Urlsberger*, Die „europäischen Werte“ und ihr Schutz durch die EU, Journal für Rechtspolitik 10 (2002), 193-208.

Inzwischen erschienen zum Thema sogar einige Bücher, vgl. insb.

*Heribert Franz Köck/Margit Hintersteiner*, Zu den Sanktionen der vierzehn EU-Partnerstaaten gegen Österreich, in: *Köck/Hintersteiner* (ed.), Europa als Sicherheits- und Wertegemeinschaft (Wien 2000); *Frank Schorkopf*, Die Maßnahmen der XIV EU-Mitgliedsstaaten gegen Österreich. Möglichkeiten und Grenzen einer ‚streitbaren Demokratie‘ auf europäischer Ebene“ (Berlin-Heidelberg-New York 2002) und *Anton Pelinka/Waldemar Hummer*, „Österreich unter ‚EU-Quarantäne‘“ (Wien 2002).

<sup>49</sup> Der neue Art 7 EUV enthält nun ausdrücklich ein Gebot zur Anhörung des betroffenen Mitgliedstaates und ein Verfahren unter Einschaltung eines „Weisenrates“.

## 2. Zwei Rechtsordnungen in einer?

– Einige Bemerkungen über theoretische Erklärungsmodelle und ihren praktischen Wert

a) Das hier näher zu analysierende Verhältnis zwischen innerstaatlichem Recht und dem Gemeinschaftsrecht gewinnt seine **Bedeutung** bei verschiedenen konkreten Rechtsfragen; so zB

- für das Aufeinandertreffen einer Norm des EU-Rechts mit einer entgegenstehenden innerstaatlichen Norm;
- für künftige Vertragsrevisionen und sonstige Änderungsinstrumente;
- für das Problem der Einordnung von Regelungsvorhaben der EG bzw der EU im Rahmen der parlamentarischen Mitwirkungsverfahren. (Die Frage: „Wie wäre das betreffende Vorhaben innerstaatlich erzeugt worden“, ist deshalb so schwierig zu beantworten, weil dem Beitrittsvertrag und dem durch diesen übernommenen Recht eben gerade kein bestimmter Rang im Stufenbau der österreichischen Rechtsordnung zugewiesen wurde.)
- Noch schwierigere Fragen können sich im Rahmen der dynamischen Rechtsfortbildung durch den EuGH ergeben, weil fraglich sein kann, ob künftige „Meilensteine“ der Rechtsprechung an der Vorrangregel teilhaben oder unzulässig sind.

b) Nach der auch hier vertretenen Auffassung ergibt sich aus der beschriebenen Vorrangwirkung **kein bestimmter fester Rang des Gemeinschaftsrechtes im Stufenbau der österreichischen Rechtsordnung**. Das **Gemeinschaftsrecht ist vielmehr als ein anderer**, von genuin **innerstaatlichem Recht unterschiedener Rechtskreis**, aber mit unmittelbarer Geltung in Österreich anzusehen.<sup>50</sup>

Geltungsgrund des Gemeinschaftsrechts ist für den einzelnen Mitgliedstaat – solange nicht eine europäische Verfassung entsteht, die so revolutionär ist, dass sie eine eigenständige europäische Staatsgewalt begründet – nach wie vor der Gründungs- oder der Beitrittsvertrag. Die These von der autonomen oder unabgeleiteten Geltung des Gemeinschaftsrechts ist rechtstheoretisch verfehlt. Dieser (von *H.P. Ipsen* mit seiner „Gesamtakttheorie“ begründeten) Lehre kann nicht beigetreten werden, weil sie den offenkundig bestehenden Bedingungs Zusammenhang ignoriert. Die Rechtserzeugung im Rahmen der Gemeinschaft (und folglich auch mit Wirkung für Österreich) wird allerdings von den Regeln des primären Gemeinschaftsrechts und nicht vom österreichischen

<sup>50</sup> So *Thun-Hohenstein*, aao 81; *Heinz Schäffer*, Österreichs Beteiligung an der Willensbildung in der Europäischen Union, insbesondere an der europäischen Rechtsetzung, *ZÖR* 50 (1996) 1 ff. Nach *Gerhard Baumgartner*, EU-Mitgliedschaft und Grundrechtsschutz (Wien 1997) 41, 71, ist das Beitritts-BVG „Integrationshebel“, nicht aber auch „oberste Erzeugungsregel des durch EU-Organe geschaffenen Rechts auf österreichischem Territorium“. Daher ist das Gemeinschaftsrecht nicht zum Bestandteil der [genuin] österreichischen Rechtsordnung geworden und in den Stufenbau integriert worden. Es gilt – kraft seines vom Beitritts-BVG akzeptierten Anspruchs auf autonome Geltung – in Österreich als Gemeinschaftsrecht und ist von den österreichischen Organen anzuwenden bzw zu befolgen.

Verfassungsrecht bestimmt.<sup>51</sup> Dies führt zu der bildhaften Charakterisierung: „zwei unterschiedliche Rechtsordnungen in einer“.

c) Den heutigen Darstellungen der europarechtlichen und verfassungsrechtlichen Probleme liegen meist – mehr oder weniger deutlich ausgesprochen - unterschiedliche „Gedankengebäude“ bzw **rechtstheoretische Erklärungsansätze** zu Grunde. Während der EuGH den Vorrang aus der Eigenständigkeit des Gemeinschaftsrechts ableitet, wird in einer Reihe von Mitgliedstaaten angenommen, der Vorrang des Gemeinschaftsrechts beruhe auf der spezifischen nationalen verfassungsrechtlichen Ermächtigung.<sup>52</sup> Auch die Materialien zum österreichischen EU-Beitritts-BVG scheinen in diesem Sinne auslegbar. Manche meinen zu dem Theorienstreit: **„So lange das praktische Ergebnis stimmt, nämlich der Anwendungsvorrang des Gemeinschaftsrechts im konkreten Einzelfall beachtet wird, dürfte seine unterschiedliche Begründung kaum eine Rolle spielen.“**<sup>53</sup>

Der Wert einer theoretischen Reflexion (im analytischen bzw strukturtheoretischen Sinne) liegt darin, entweder zu zeigen, ob und inwiefern des Postulat der inhaltlichen Konsistenz **einer Rechtsordnung** als selbständige Einheit dargetan werden kann, oder ob zur tauglichen Erklärung von **zwei Ordnungen** ausgegangen werden muss, wobei keine von der anderen abgeleitet ist.<sup>54</sup> Nichtsdestoweniger sind die beiden Ordnungen miteinander auf spezifische Weise „verzahnt“.

Insgesamt lassen sich hier zwei große Gruppen, allenfalls mit zwei Untergruppen von theoretischen Grundauffassungen unterscheiden. Im Grunde scheint es sich fast, wenn auch mit geänderter Terminologie, um eine Wiederkehr der alten Frage von Monismus bzw Dualismus im Verhältnis von Staats- und Völkerrecht zu handeln. Gelegentlich werden nämlich bei der Frage nach der Rechtsnatur des europäischen Gemeinschaftsrechts zwei Meinungsgruppen unterschieden, die einander als „**Traditionalisten**“ und „**Autonomen**“ gegenübergestellt werden.<sup>55</sup>

Für die Traditionalisten entsteht das primäre Gemeinschaftsrecht auf völkerrechtlichem Wege, und auch das sekundäre Gemeinschaftsrecht ist als eine Form von abgeleitetem Völkerrecht erklärbar. Im Gegensatz dazu bestreiten die „Autonomen“ den Völkerrechtscharakter des primären Gemeinschaftsrechts und betrachten dieses als ein Recht „*sui generis*“. Für sie ist die Gemeinschaft eine neue öffentliche Gewalt, deren Verfassung

<sup>51</sup> Vgl nochmals Art 2 der Beitrittsakte: „Ab dem Beitritt sind die ursprünglichen Verträge und die vor dem Beitritt erlassenden Rechtsakte der Organe für die neuen Mitgliedstaaten verbindlich und gelten in diesen Staaten nach Maßgabe der genannten Verträge und dieser Akte.“

<sup>52</sup> Vgl die Darstellung bei *Rudolf Streinz*, *Europarecht* 6 (2003) Rz 179 ff.

<sup>53</sup> In diesem Sinne *Thun-Hohenstein*, a.a.O. 7 unter Bezugnahme auf den Bericht des Verfassungsausschusses (AB: 1600 BlgNR 18.GP).

<sup>54</sup> Als Beispiel für eine solche Analyse *Ota Weinberger*, *Souveränität in der EU*, *Journal für Rechtspolitik* 5 (1997) 81 ff.

<sup>55</sup> Siehe dazu *Schweitzer/Hummer*, *Europarecht* 5 (Neuwied 1996) RZ 73 ff

in den Gemeinschaftsverträgen vorliegt. Das sekundäre Gemeinschaftsrecht fließe daher aus einer **autonomen Rechtsquelle** und bilde eine eigene Rechtsordnung, deren Normen weder Völkerrecht noch nationales Recht der Mitgliedsstaaten seien.<sup>56</sup> Diese Doktrin ist mittlerweile zur **vorherrschenden** Lehre geworden, sie ist Bestandteil der Rechtsprechung des EuGH und zum Teil auch nationaler Gerichte der Mitgliedsstaaten. Ähneln die erste Auffassung dem Monismus mit Primat des Staatsrechts, so ähnelt die zweite dem Monismus mit Primat des Völkerrechts, jetzt also des Europarechts.

Dem stehen aber auch verschiedene dualistische Deutungsversuche gegenüber.

- So gibt die letzten Endes nicht voll auflösbare Widersprüchlichkeit zweier (Teil)Rechtsordnungen dazu Anlass, diese als von einander völlig unabgeleitete Ordnungen zu sehen und ihre Rückführung auf bzw ihre Herleitung aus zwei unterschiedlichen Grundnormen zu postulieren.<sup>57</sup>
- Denkbar ist es aber auch, die beiden Ordnungen im Verhältnis von Dualität und Interaktion zu sehen, wobei dann der staatlichen Ordnung doch noch staatliche Souveränität zugeschrieben wird. Dies ist etwa die Deutung des Rechtsphilosophen *Ota Weinberger* im Anschluss an *Mac Cormick*<sup>58</sup>. Er anerkennt dabei gewisse schwache föderale Züge der EU, betont aber, die Mitgliedsstaaten seien Völkerrechtssubjekte, haben Verfassungsautonomie und eigene Verfassungsgerichtsbarkeit; sie haben ferner eine primär offene Normierungs- und Lenkungscompetenz, so lange keine verbindliche EU-Normierung vorliegt. All dies führe, zusammen mit der prinzipiellen (wenn auch kaum realisierbaren) Möglichkeit des Austritts aus der EU zu dem Schluss, dass die Mitgliedsstaaten eine Art von Eigenständigkeit besitzen, die ihnen - nach wie vor - eine staatliche Willensbildung ermöglicht. Er anerkennt, dass die traditionellen Kategorien der Föderation und des souveränen Staates einer offenen Begrifflichkeit weichen müssten, sieht aber weiterhin wichtige Momente, die für eine neuartige, nämlich modifizierte Souveränität der Mitgliedsstaaten der EU sprechen. Sie seien zwar insoweit nicht souverän (im bisherigen traditionellen Sinne), als für sie das Gemeinschaftsrecht bindend und vorrangig ist; sie seien und bleiben aber im neuen Sinne souverän, weil sie selbständig aktionsfähig seien, dies vor allem zum Schutze ihrer Bürger, aber (letztlich) auch zum Austritt aus der EU. In dieser Sichtweise scheint die alte Figur der „geteilten Souveränität“ (der Bundesstaatstheorie des 19. Jahrhunderts) – zwar nicht terminologisch, aber der Sache nach – wieder-

<sup>56</sup> So schon *Ipsen*, Gemeinschaftsrecht (Tübingen 1972), 59 (mit seiner „Gesamtakt-Theorie“).

<sup>57</sup> So etwa *Wolf-Dietrich Grussmann*, Grundnorm und Supranationalität: Rechtsstrukturelle Sichtweisen der europäischen Integration, *International Journal of Science I* (1997) 80. In Anlehnung an diese Position meint *Baumgartner* (FN 38), dass dieser Widerspruch nicht auflösbar und daher Gegenstand der Verfassungspolitik und Verfassungspraxis sei.

<sup>58</sup> *Journal für Rechtspolitik* 5 (1997), 81 ff.

zukehren. Eine solche Betrachtung könnte sich bewähren, bis in einer viel späteren Entwicklungsphase einmal staatliche Strukturen der EU entstehen.<sup>59</sup>

Mir persönlich will aber scheinen, dass trotz aller ungewohnten Neuerungen im Einzelnen das Zusammenspiel (die „Verzahnung“) der staatlichen mit einer überstaatlichen Ordnung und die mögliche verfahrensmäßige Auflösung der Widersprüche in einer analogen Anwendung der von *Alfred Verdross* formulierten Theorie des gemäßigten Monismus gefunden werden könnte<sup>60</sup>, die sich sinngemäß auf das Verhältnis von Landesrecht und Europarecht übertragen ließe.

### III. Vorrang des Gemeinschaftsrechts – Herleitung und Bedeutung

#### 1. Schöpfung der Rechtsprechung

Der Anwendungsvorrang ist eine Schöpfung der Rechtsprechung. In einer über viele Jahre laufenden Judikaturentwicklung (Rs. *Costa/ENEL*; Rs. *Internationale Handelsgesellschaft*, Rs. *Simmenthal* sowie Rs. *Factortame*) hat der EuGH die wesentlichen Elemente seines Gedankengebäudes zum Verhältnis zwischen Gemeinschaftsrecht und nationalem Recht der Mitgliedstaaten herausgearbeitet. Ausgangspunkt ist der vom EuGH angenommene eigenständige (autonome) Charakter des Gemeinschaftsrechts, verbunden mit dem Ziel der Sicherung der einheitlichen Geltung (Funktionsfähigkeit)<sup>61</sup> des Gemeinschaftsrechts in allen Mitgliedsstaaten. Ansatzpunkte liefern die Verpflichtungen der Mitgliedstaaten aus der „Gemeinschaftstreue“ (ex-Art 5/ Art 10 EGV) und die Rechtswirkungen der Rechtsakte der Gemeinschaft (ex-Art 189/ Art 249 EGV).<sup>62</sup> Daraus wurde der Vorrang von unmittelbar wirkendem Gemein-

<sup>59</sup> Gesondert zu erwähnen ist hier auch die etwas ambivalent zu charakterisierende Lehre von *Peter Pernthaler*, Die neue Doppelverfassung Österreichs, in: Winkler-FS (Wien-New York 1997) 773 ff. Für ihn ist unklar, ob durch die „EU-Verfassung“ in ihrer derzeit geltenden Form ein neues „Baugesetz“ oder ein ganzes „Verfassungssystem“ zusätzlich zu den geltenden Systemprinzipien der österreichischen Bundesverfassung eingeführt worden sei. Die Situation sei deshalb so schwer zu erfassen, weil die das österreichische Verfassungsrecht modifizierende „Europäische Verfassung“ keine Verfassung im traditionellen Sinn einer Staatsverfassung ist, sondern ein höchst heterogenes Bündel von Organisationsvorschriften, materiellem Recht und judikativen Standards des EuGH. Letzten Endes seien durch die Gesamtänderung der Bundesverfassung nicht nur zwei Rechtssysteme, sondern „zwei ganz unterschiedliche Verfassungsordnungen“ entstanden, die nationale und die europäische, „die wenig verbunden nebeneinander bestehen und sich wechselseitig beeinflussen“. Andererseits meint er, man müsse sich heutzutage vom bisherigen nationalstaatlichen Verfassungssystem verabschieden. Denn aus seiner Sicht gilt: „Österreichs öffentliche Ordnung bildet nicht länger einen geschlossenen nationalen Verfassungszusammenhang („Staat“), sondern ist Teil eines europäischen „Gemeinwesens“, das bereits deutlich Züge einer überstaatlichen „rule of law“ sowie eines multinationalen-föderalen europäisch-demokratischen Systems zeigt“. Diese Deutung *Pernthalers* mag staatstheoretisch originell erscheinen, sie ist mit dem positiven österreichischen Recht kaum vereinbar.

<sup>60</sup> Vgl. dazu *Alfred Verdross*, Theorie des gemäßigten Monismus und das Bundesverfassungsgesetz vom 4. März 1964, BGBl. Nr. 59, Juristische Blätter 1965, 566 ff.

<sup>61</sup> EuGH Slg 1964, 1251ff; Slg 1988, 4698/4722.

<sup>62</sup> Dazu *Hans D. Jarass*, Grundfragen der innerstaatlichen Bedeutung des EG-Rechts (Köln usw 1994).



schaftsrecht gegenüber **jedwedem** innerstaatlichen Recht abgeleitet und das Prinzip entwickelt, Gemeinschaftsrecht mache im Falle der Normkollision das mitgliedstaatliche Recht **ohne weiteres unanwendbar**.

Dieser Vorrang des Gemeinschaftsrechts wurde auch gegenüber mitgliedstaatlichem Verfassungsrecht bekräftigt<sup>63</sup>, und es wurde ferner deutlich gemacht, dass der Vorrang des Gemeinschaftsrechts auch gegenüber später erlassenen nationalen Normen gilt, sodass die *lex posterior*-Regel (Derogation) nicht zur Anwendung gelangt.<sup>64</sup> Der EuGH hat schließlich dargelegt, dass der Vorrang des Gemeinschaftsrechts ohne weiteres gilt, also nicht von einer Verwerfung der gemeinschaftsrechtswidrigen innerstaatlichen Norm durch eine mitgliedstaatliche Instanz (ein nationales Verfassungsgericht) abhängig ist.

## 2. Die Bedeutung des Vorrangs

Der vom EuGH postulierte Vorrang ist – wie die neuere Lehre inzwischen klar herausgearbeitet hat, **kein Geltungsvorgang** im Sinne einer Derogation oder der Nichtigkeitsfolge für entgegenstehendes innerstaatliches Recht. Es handelt sich vielmehr um einen **Anwendungsvorrang**.

Treffend hat dies *Oppermann*<sup>65</sup> dahingehend charakterisiert, der EuGH sei den behutsameren Weg gegangen, die gemeinschaftsrechtswidrige Norm lediglich für „ohne weiteres unanwendbar“ zu erklären. Die nationale Norm bleibe zwar in jeder Beziehung „automatisch“ außer Anwendung und Betracht, sie sei aber nicht schlechthin nichtig, sondern könnte in dem (praktisch höchst seltenen) Falle eines Außerkrafttretens der Gemeinschaftsrechtsbestimmung „wieder“ aufleben.<sup>66</sup> Diese Deutung hat nach ihm nicht nur politisch-psychologische Gründe, sondern wirke um der Funktionsfähigkeit der Gemeinschaft willen „rangunabhängig“ im weitesten Sinne, so dass Gemeinschaftsrecht jeglicher Stufe nationale Normen jeden Ranges überlagern kann. Dies gelte nicht nur für gleichsam unproblematische Fälle, sondern auch für schwerwiegende, wo etwa eine – wenn auch ephemäre – EG-Verordnungsbestimmung einem nationalen Grundrecht vorgehe. Hier sei, wenn es schon nötig sei, eine blockierende Wirkung erforderlich, aber auch ausreichend.

## 3. Reichweite des Vorrangs

a) Der Anwendungsvorrang weist, wie schon gesagt, dem **Gemeinschaftsrecht keinen fixen Rang in der mitgliedstaatlichen Rechtsordnung** zu. Er ist nur eine „einfache **Kollisionsregel**“. Und daraus wird wieder geschlossen, dass nur **unmittelbar**

<sup>63</sup> EuGH Slg 1970, 1125 (1135); I-2433 (2473).

<sup>64</sup> EuGH Slg 1964, 1251 (1271); 1978, 629 (644f).

<sup>65</sup> *Thomas Oppermann*, Europarecht (1991) Rz 540 f.

<sup>66</sup> Und könnte auch vom VfGH im Wege der abstrakten Normenkontrolle geprüft werden und zumindest bei Widerspruch zum innerstaatlichen Verfassungsrecht aufgehoben werden.

**anwendbares** Gemeinschaftsrecht diesen Anwendungsvorrang entfalten könne. Im Einzelnen gilt:

- Bei **Primärrecht** ist jeweils zu prüfen, inwieweit der EuGH der betreffenden Bestimmung unmittelbare Anwendbarkeit zuerkannt hat (oder inwieweit man in Anwendung der von ihm aufgestellten Kriterien zu diesem Ergebnis gelangen müsste).
- Beim **Sekundärrecht** ist zwischen den einzelnen verbindlichen Handlungstypen des Gemeinschaftsrechts zu unterscheiden. **Verordnungen** sind ja kraft ausdrücklicher Anordnung des EGV unmittelbar anwendbar. Hinsichtlich der **Richtlinien** ist der aus Rechtsprechung des EuGH abzuleiten, dass der Einzelne unter den vom EuGH genannten Voraussetzungen auch aus Richtlinienbestimmungen unmittelbare Rechte ableiten kann. In Ermangelung fristgemäß erlassener Durchführungsmaßnahmen kann sich der Einzelne auf Bestimmungen einer Richtlinie, die inhaltlich als unbedingt und hinreichend genau erscheinen, gegenüber allen innerstaatlichen, nicht richtlinienkonformen Vorschriften berufen. Gleiches gilt für die an bestimmte natürliche oder juristische Personen gerichteten **Entscheidungen**, die eine für die Adressaten unmittelbare Wirkung aufweisen und daher auch entgegenstehendem innerstaatlichen Recht vorgehen. (Hingegen sind nicht verbindliche Handlungstypen wie die in Art 249 (ex Art 189) EGV vorgesehenen Empfehlungen bzw. Stellungnahmen nicht unmittelbar anwendbar und können dementsprechend keinen Vorrang gegenüber innerstaatlichem Recht entfalten.)

b) Aus den Materialien zum EU-Beitritts-BVG wird in Österreich verschiedentlich der Schluss gezogen, dass das Gemeinschaftsrecht rangmäßig zwischen der verfassungsrechtlichen Grundordnung (Prinzipien) und dem „einfachen“ Bundesverfassungsrecht einzustufen sei.<sup>67</sup>

Bei nüchterner und realistischer Betrachtung wird man aber vielmehr anerkennen müssen, dass der Anwendungsvorrang dem unmittelbar anwendbaren Gemeinschaftsrecht keinen festen Rang im Stufenbau der österreichischen Rechtsordnung zuweist. Das Gemeinschaftsrecht ist einfach ein anderer, von genuin innerstaatlichem Recht zu unterscheidender Rechtskreis mit unmittelbarer Geltung und gegebenenfalls auch unmittelbarer Anwendbarkeit in Österreich.

#### 4. Der Anwendungsvorrang in der Rechtsprechung des öVfGH

Auch der VfGH hat den Anwendungsvorrang des EG-Rechts zu beachten, freilich nur im Rahmen der von ihm zu besorgenden Aufgaben (VfSlg 15.215/11998). Gleiches

<sup>67</sup> Vgl. *Harald Stolzlechner*, Die Auswirkungen einer Mitgliedschaft Österreichs in der Europäischen Union auf die Österreichische Verfassungsordnung, in: *Waldemar Hummer* (Hrsg), Die Europäische Union und Österreich (1994) 163 ff; ferner *Theo Öhlinger*, Verfassungsrecht 5 (Wien 2003) Rz 159-161; *Peter Bosek/Petra Pani*, Grundzüge des Verfassungsrechts 2(o.J., Wien 1998) 6 f. (mit einer etwas schematischen Übersichtsdarstellung).

gilt für die Vorlagepflicht, welche ihn ebenfalls nur im Rahmen seiner Zuständigkeiten betrifft (VfSlg 16.627/2002).

Der VfGH bekennt sich grundsätzlich zum Anwendungsvorrang (VfSlg 15.448/1999) und sieht sich zur Durchsetzung des Gemeinschaftsrechts in jedem Stadium des Verfahrens verpflichtet, etwa auch wenn der Widerspruch zum Gemeinschaftsrecht erst nachträglich durch ein Urteil des EuGH offenkundig wird.

Es mag durchaus sein, dass die Unanwendbarkeit einer innerstaatlichen Vorschrift erst mit einem (späteren) Urteil des EuGH offenkundig wird. Dann ist der (in einem Grundrechtsbeschwerde verfahren) belangten Behörde zwar kein subjektives Fehlverhalten vorzuwerfen; der VfGH hat aber den (später) deutlich gewordenen Fehler aufzugreifen. Er vergleicht die Anwendung einer innerstaatlichen Vorschrift, die dem unmittelbar anwendbaren Gemeinschaftsrecht offenkundig widerspricht, mit einer „Gesetzlosigkeit“, und damit als Grundrechtseingriff – zB als gesetzlosen Eigentumseingriff (VfSlg 15.815/2000) oder als „Willkür“ (Gleichheitsverletzung, VfSlg 15.19/2000)

Die Bereitschaft des VfGH, den Anwendungsvorrang anzuerkennen geht so weit, dass er in einem konkreten Fall einer Vorschrift des Sekundärrechts Vorrang vor einer organisatorischen Vorschrift der Bundesverfassung zuerkannte.

Dieses signifikante Urteil betraf das Verhältnis von Telekommunikationsrichtlinie und Art 133 Z 4 B-VG (VfSlg 15.427/1999). Nachdem die Umsetzungsfrist schon abgelaufen war, kam der VfGH zu dem Schluss, die erwähnte RL sei (in Bezug auf das Erfordernis eines Einspruchsverfahrens gegen die Entscheidung einer nationalen Regulierungsbehörde) hinreichend genau, um unmittelbar wirksam zu sein.

Aus der RL folge, dass es irgendein wirksames (aufsteigendes) Rechtsmittel an eine unabhängige Stelle geben müsse, nicht aber, welche nationale Instanz zuständig ist. Aus der Bundesverfassung sei abzuleiten, dass gegen Entscheidungen von Kollegialbehörden mit richterlichem Einschlag nur die Anrufung des VwGH in Betracht komme. Dem stand jedoch (lediglich) Art 133 Z 4 B-VG entgegen. Bei dieser Lage folgte der VfGH, der Anwendungsvorrang des Gemeinschaftsrechts müsse durchschlagen, so dass für den Anwendungsbereich der RL die Ausschlussklausel des Art 133 Z 4 B-VG verdrängt wird und im Ergebnis doch die Zuständigkeit des VwGH gelte.

## IV. Die Europäische Gemeinschaft als Kooperations-Ordnung und die Verfassungsgerichtsbarkeit<sup>68</sup>

Als Österreich (mit Wirkung vom 1.1.1995) der EU beitrug, kam es zunächst zu intensiven Erörterungen darüber, ob nicht der VfGH wesentlich an Bedeutung einbüßen<sup>69</sup> und der Schutz der Grundrechte (der unter Umständen dem Gemeinschaftsrecht weichen muss) geschwächt würde. Die nun fast zehnjährige Praxis seit dem EU-Beitritt Österreichs zeigt aber, dass sich die Ängste und Befürchtungen nicht bewahrheitet haben. Es lässt sich vielmehr zeigen und dogmatisch begründen, dass das Recht der EU in weiten Bereichen nicht auf eine Dominanz der EU abzielt, sondern dass im Gemeinschaftsrecht eine Kooperation zwischen den Organen der EU und jenen der Mitgliedstaaten angelegt ist.

### 1. Institutionelle Autonomie der Mitgliedstaaten

Unseren Überlegungen voranzustellen haben wir vor allem nochmals einen Hinweis auf Art 6 EUV, der in seinem Abs 2 ausdrücklich betont: „Die Union achtet die nationale Identität ihrer Mitgliedstaaten.“ Damit erklärt das Europarecht ausdrücklich seinen Respekt vor der **nationalen Verfassungsautonomie**. Ein Mitgliedstaat wird aus der Sicht der Union als Einheit gesehen. Für die Organe der Gemeinschaft ist es unmaßgeblich, wie die Entscheidungsfindung in den einzelnen Mitgliedstaaten vor sich geht. Für das Gemeinschaftsrecht ist es also gleichgültig, ob ein Mitgliedstaat ein Einheitsstaat oder ein Bundesstaat ist (was seinerzeit als „Bundesstaatsblindheit“ charakterisiert wurde); es ist auch unerheblich, ob einzelne Regionen über Autonomie verfügen, inwieweit das Parlament die Schaffung genereller Normen an Verwaltungsorgane delegiert, welche Aufgaben Gemeinden oder Organen der beruflichen Selbstverwaltung zukommen, ob Gesellschaften des Handelsrechts mit behördlichen Aufgaben „beliehen“ werden können usw. Nur ausnahmsweise schreibt das Gemeinschaftsrecht bestimmte Qualitätserfordernisse oder Standards für Behörden oder das Verfahren vor. Die Rechtsprechung geht daher ausdrücklich von einer **institutionellen und prozeduralen Autonomie der Mitgliedstaaten** aus, sodass das Staatorganisationsrecht als einer der beiden großen Bereiche des Verfassungsrechts durch den Beitritt zur Union in seinem Kern unverändert bleiben kann.

<sup>68</sup> Vgl. darüber zuletzt *Kurt Heller*, Die Auswirkungen des Gemeinschaftsrechts auf nationale Verfassungen sowie *Peter Jann*, The Relation between a Constitutional Court and the European Court of Justice (ECJ) in the light of the ECJ's Case Law [Papers presented at the Conference „National Constitutional Courts and the European Court of Justice“, Round Table, Vienna 13th February 2004].

<sup>69</sup> Eine drastische Formulierung war, der VfGH würde zu einem besseren Bezirksgericht im Rahmen Europas absinken!

## 2. Auswirkungen auf die Verfassungsgerichtsbarkeit<sup>70</sup>

Mit der gemeinschaftsrechtlichen Vorrangregel ist allen Gerichten und – wie der EuGH in ständiger Rechtsprechung sagt – auch allen Verwaltungsbehörden, insgesamt also allen Staatsorganen die Aufgabe gestellt, in den von ihnen zu entscheidenden Fällen das relevante staatliche Recht auf seine Vereinbarkeit mit dem Gemeinschaftsrecht zu überprüfen und es bei mangelnder Übereinstimmung nicht anzuwenden (außer Betracht zu lassen). Diese Kompetenz aller Gerichte und Verwaltungsbehörden zur **Prüfung staatlicher Normen**, insbesondere staatlicher Gesetze **am Maßstab des Gemeinschaftsrechts (dezentrale Normenprüfungs- und -verwerfungskompetenz)** hat in den meisten Mitgliedstaaten der EU eine **tiefgreifende Veränderung des Rechtssystems** mit sich gebracht.

In den Ländern mit zentralisierter Verfassungsgerichtsbarkeit (wie Österreich und jenen Ländern, die dem österreichischen Modell im Prinzip gefolgt sind) kam es dadurch zu einer Durchbrechung des verfassungsgerichtlichen Normenkontrollmonopols. Die dezentrale (inzidente) Normenkontrolle ist freilich in der Praxis eine höchst wirksame Kompetenz geworden, weil und insoweit sie mit dem Vorabentscheidungsverfahren in Verbindung steht.

<sup>70</sup> *Karl Korinek*, Zur Relevanz von europäischem Gemeinschaftsrecht in der verfassungsgerichtlichen Judikatur, Tomandl-FS (Wien 1998) 465; *Theo Öhlinger*, Verfassungsfragen einer Mitgliedschaft zur Europäischen Union (Wien 1999) 200f, 217ff; *Theo Öhlinger/Michael Potacs*, Gemeinschaftsrecht und nationales Recht 2 (Wien 2001) 151ff; *Michael Potacs*, VfGH und Anwendungsvorrang, ZfV 2001, 756; *Rudolf Thienel*, Anwendungsvorrang und Präjudizialität im amtswegigen Normenprüfungsverfahren vor dem VfGH, ZfV 2001, 342; *Heinz Schäffer*, Kommentierung zur Art 140 B-VG, RZ 98ff, in: *Rill/Schäffer*, Bundesverfassungsrecht. Kommentar (Wien 2001ff).

### 3. Das Vorabentscheidungsverfahren (Art 234 EGV)<sup>71</sup>

a) Danach können alle staatlichen Gerichte („Gerichte“ im Sinne des Art 234 EGV)<sup>72</sup> Fragen der Gültigkeit bzw Fragen der Auslegung des von ihnen anzuwendenden Gemeinschaftsrechts an den EuGH herantragen; letztinstanzlich entscheidende Gerichte sind dazu sogar verpflichtet. Auch wenn der EuGH in einem solchen Verfahren nur über den Inhalt von Gemeinschaftsrecht absprechen darf, so geht es der Sache nach doch sehr häufig um die Frage der Konformität staatlicher Regelungen mit dem Gemeinschaftsrecht. Österreichische Gerichte haben übrigens in den letzten Jahren von dieser Möglichkeit in einem weit überdurchschnittlichen Maße Gebrauch gemacht.<sup>73</sup> (Dies gilt besonders für die ordentliche Gerichtsbarkeit und für den Verwaltungsgerichtshof, aber auch für den VfGH.)

Anders als andere Verfassungsgerichte Europas der österreichische VfGH hat keine „Berührungängste“. Er hat inzwischen bereits drei Mal Vorabentscheidungsersuchen an den EuGH gerichtet.

Die auf Grund von Vorabentscheidungen ergangenen Entscheidungen des VfGH betreffen

- den Fall „Energieabgabenvergütung“ (VfSlg 15.450/2001),

<sup>71</sup> Dazu *Manfred Dausies*, Das Vorabentscheidungsverfahren nach Art 177 EEG-Vertrag 2 (München 1995). Österreichische Literatur hierzu: *Franz Zehetner*, Zum Vorlagerecht nationaler Gerichte an den Gerichtshof der Europäischen Gemeinschaften, EuR 1975, 113; *Norbert Schoibl*, Zum Umfang der Vorlagepflicht nationaler Gerichte an den Europäischen Gerichtshof nach Art 177 EGV, wbl 1996, 10; *Bernhard Schima*, Das Vorabentscheidungsverfahren vor dem EuGH unter besonderer Berücksichtigung der Rechtslage in Österreich (Wien 1997, <sup>2</sup>2004); *Gerhard Kohlegger*, Aktuelle Entwicklungen im Vorabentscheidungsverfahren, ZfRV 1998, 89; *Gerte Reichelt* (Hrsg), Vorabentscheidungsverfahren vor dem Gerichtshof der Europäischen Gemeinschaft. Europäische Erfahrungen und österreichische Perspektiven (Wien 1998); *Peter Jann*, Das Vorabentscheidungsverfahren: Grundfragen, Verfahrensablauf und Vorlageverpflichtung, in: *Michael Holoubek/Michael Lang* (Hrsg), Das EuGH-Verfahren in Steuersachen (Wien 2000) 13; *Peter Fischer/Heribert Franz Köck/Margit Maria Karollus*, Europarecht <sup>4</sup> (Wien 2002) Rz 1424ff.

<sup>72</sup> Der EuGH legt den Gerichts begriff autonom, also allein auf Grundlage des Gemeinschaftsrechts und losgelöst vom nationalen Begriffsverständnis aus (ständige Rechtsprechung seit EuGH 30. 6. 1966, Rs 61/65 *Vaasen-Göbbels*, Slg 1966, 584). Insgesamt stellt er aber folgende Typusmerkmale ab:

- Unabhängigkeit der Einrichtung,
- Einrichtung auf gesetzlicher Grundlage,
- ständiger Charakter,
- obligatorische Gerichtsbarkeit und
- Entscheidung nach Rechtsnormen.

In Österreich sind unter Zugrundelegung dieses Gerichts begriffs nicht nur die Gerichte im Rahmen der ordentlichen Gerichtsbarkeit (OGH und Untergerichte) und die Gerichtshöfe des öffentlichen Rechts (VwGH, VfGH) zu verstehen, sondern auch folgende Einrichtungen als „Gerichte“ anzusehen: die Unabhängigen Verwaltungssenat und der Unabhängige Bundesasylsenat (Art 129a-129c B-VG) sowie die Kollegialbehörden mit richterlichem Einschlag gemäß Art 133 Z. 4 B-VG (zB Unabhängiger Umweltsenat, Oberster Patent- und Marken senat, die Agrarbehörden nach Art 12 Abs 2 B-VG, die Telekom-Control-Kommission), sowie bestimmte andere unabhängig und weisungsfrei gestellte Verwaltungsbehörden sui generis (wie zB das Bundesvergabeamt nach Bundesvergabe gesetz 2002).

<sup>73</sup> *Bedanna Bapuly/Gerhard Kohlegger*, Die Implementierung des Gemeinschaftsrechts in Österreich (Wien 2003) 583-737 (Übersicht über die österreichischen Vorabentscheidungsverfahren).

- die Frage Datenschutz-RL und Rechnungshofkontrolle von „Großverdienern“ in staatsnahen Betrieben (VfGH 28.11.2003, KR 1/00-3) und
- die Frage des Wahlrechts von Unionsbürgern bei der Wahl zur Vollversammlung einer Arbeiterkammer (VfGH 3. 12. 2003, W I-14/99).

Bislang hat kein Verfassungsgericht in der EU mehr Vorlageanträge aufzuweisen als der öVfGH.<sup>74</sup> Seine Bereitschaft, dem Gemeinschaftsrecht auch im verfassungsgerichtlichen Verfahren zum Durchbruch zu verhelfen – dazu gehört naturgemäß die Einholung von Vorabentscheidungen des EuGH –, wird in der Literatur allgemein als sehr positiv angesehen.<sup>75</sup>

b) Jedenfalls ist das **Vorlageverfahren nach Art 234 EGV** das wohl wesentlichste **Instrument der Kooperation zwischen dem EuGH und den nationalen Gerichten**.<sup>76</sup> Das betont der EuGH selbst immer wieder, erst jüngst wieder in einem österreichischen Fall (EuGH 5. 2. 2004, Rs C-380/01, *Gustav Schneider/Bundesministerium für Justiz*):

„Das Vorabentscheidungsverfahren ist ein Mittel der Zusammenarbeit zwischen dem EuGH und den Gerichten der Mitgliedstaaten, um den staatlichen Gerichten Hinweise über die Auslegung des Gemeinschaftsrechts zu geben, die sie für die Entscheidung des anhängigen Rechtsstreites brauchen.“ (mit Hinweisen auf Vorjudikatur, zB Urteil *Meilicke* Rn 22 und Beschlüsse *La Pyramide* Rn 10 und *Nour* Rn 10).

Der EuGH ist kein Rechtsmittelgericht, das über dem nationalen Höchstgericht der Mitgliedstaaten steht. Der EuGH interpretiert gemeinschaftsrechtliche Normen oder beurteilt deren Gültigkeit, überlässt aber die konkrete Lösung des Einzelfalles dem nationalen Richter in den Mitgliedstaaten (arbeitsteiliges Verhältnis).<sup>77</sup>

c) Im Prinzip sind unterinstanzliche Gerichte **berechtigt**, letztinstanzliche Gerichte **verpflichtet**, eine Vorabentscheidungsfrage zu stellen, falls sie dies für die Lösung eines Falles für notwendig erachten. Nationale Gerichte aller Instanzen sind dazu verpflichtet, ein solches Vorabentscheidungsersuchen zu stellen, wenn es um die Gültigkeit einer gemeinschaftsrechtlichen Norm geht<sup>78</sup>. Nationale Gerichte dürfen nicht selbst einen

<sup>74</sup> Siehe die Statistik bei *Peter Jann*, The Relation between a Constitutional Court and the European Court of Justice (ECJ) in the light of the ECJ's Case Law [Papers presented at the Conference „National Constitutional Courts and the European Court of Justice“, Round Table, Vienna 13th February 2004], 7 Anmerkung 14.

<sup>75</sup> In diesem Sinne zuletzt wieder *Zuzanna Chojnacka*, Zur Kooperation von EuGH und nationalem Verfassungsgericht, ZÖR 59 (2004), 415ff, allerdings mit Methodenkritik an der Interpretationsweise des VfGH.

<sup>76</sup> Der Gedanke der Kooperation findet sich schon bei *Pierre Pescatore*, Das Vorabentscheidungsverfahren nach Art 177 EWG-Vertrag und die Zusammenarbeit zwischen dem Gerichtshof und den nationalen Gerichten, Bayerische Verwaltungsblätter 1987, 33ff.

<sup>77</sup> EuGH Slg 31/1963, 63, Rs 28-30/62, *Da Costa & Schaake*.

<sup>78</sup> EuGH Slg 4199/1987 Rs 314/85, *Foto Frost*.

Gemeinschaftsrechtsakt für unrechtmäßig (nichtig) erklären. Während also nationale Gerichte das Gemeinschaftsrecht anwenden und damit notwendigerweise auch auslegen müssen, ist einzig und allein die durch den EuGH vorgenommene Interpretation allgemein gültig und verbindlich.

Die Grundregel von der Vorlagepflicht bedarf jedoch einiger einschränkender Anmerkungen:

Die **Vorlagepflicht für letztinstanzliche Gerichte ist keine uneingeschränkte Verpflichtung**. Nach der sogenannten „*acte clair*“-**Doktrin** besteht selbst für letztinstanzliche Gerichte eine Ausnahme, wenn

- die gestellte Frage nicht entscheidungserheblich ist,
- die fragliche Gemeinschaftsbestimmung bereits Gegenstand einer Auslegung durch den EuGH war oder
- wenn die richtige Anwendung des Gemeinschaftsrechts so offenkundig ist, dass für einen vernünftigen Zweifel kein Spielraum bleibt.<sup>79</sup>

d) Die Vorlagepflicht wird vom VfGH sehr genau und ernst genommen. Unmittelbar nach dem EU-Beitritt hat er die Rechtsprechung entwickelt, dass die **Unterlassung der Vorlage** einer vorlagepflichtigen Frage der Interpretation des Gemeinschaftsrechts an den EuGH aus der Sicht der nationalen Verfassung als Grundrechtsverletzung (**Entziehung des gesetzlichen Richters**) zu werten ist (VfSlg 14.390/1995, 14.607/1996, 14.889/1997, 15.138/1998, 15.507, 15.657/1999, 16.055/2000, 16.118, 16.157, 16.183, 16.391/2001).<sup>80</sup>

e) Eine andere, praktisch noch bedeutsamere Grenze für die Vorlagepflicht liegt aber darin, dass die **Beurteilung der Relevanz** der gemeinschaftsrechtlichen Frage für die Lösung des Falles **den innerstaatlichen Gerichten vorbehalten** ist.<sup>81</sup> Der EuGH geht in seiner Rechtsprechung zum Vorlageverfahren stets von einer Trennung der Aufgaben (Arbeitsteilung) des EuGH und des vorlegenden Gerichtes aus und betrachtet sich nicht als ermächtigt, Gründe und Ziele der Vorlage nachzuprüfen oder gar die von ihm ausgelegten Normen auf den konkreten Fall anzuwenden.

In der Regel ist es allein Sache des vorliegenden Gerichts, über die Erheblichkeit der vorgelegten Fragen zur Entscheidung eines Rechtsstreites zu befinden (Urteile *Bosmann* Rn 59; *PreußenElektra* Rn 38 und *Canal Satélite Digital* Rn 18).

<sup>79</sup> EuGH Slg 3415/1982, Rs 283/81, *CILFIT*, Rn 21.

<sup>80</sup> Da der VfGH seit jeher in ständiger Rechtsprechung das Recht auf ein Verfahren vor dem gesetzlichen Richter im umfassenden Sinn verstanden hat, hat er auch den EuGH als „gesetzlichen Richter“ betrachtet. Würde ein innerstaatliches Organ eine vorlagepflichtige Frage der Interpretation des Gemeinschaftsrechts nicht dem EuGH zur Vorabentscheidung vorlegen, so verletzte dieses Organ die gesetzliche Zuständigkeitsordnung, zu der auch Art 234 EGV gehört, und entzöge den Parteien des bei ihm anhängigen Verfahrens insofern den gesetzlichen Richter, als eine dem EuGH zur Entscheidung vorbehaltene Frage nicht durch diesen gelöst werden könnte.

<sup>81</sup> EuGH 15. 7. 1964, Rs 6/64, *Costa/ENEL* uam.



Steht die erbetene Auslegung aber in keinem Zusammenhang mit dem anhängigen Rechtsstreit, indem eine rein gedankliche Fragestellung vorgelegt wird oder die tatsächlichen und rechtlichen Angaben fehlen, die für eine zweckdienliche Beantwortung benötigt werden, kann die Entscheidung über die Vorlagefragen abgelehnt werden (Urteile *PreußenElektra* Rn 39 und *Canal Satélite Digital* Rn 19).

Die Aufgabe des EuGH im Rahmen des Art 234 EGV besteht nämlich darin, zur Rechtspflege in den Mitgliedstaaten beizutragen und nicht darin, Gutachten zu allgemeinen Fragen abzugeben.

(EuGH 5. 2. 2004, Rs C-380/01, *Gustav Schneider/Bundesministerium für Justiz*).<sup>82</sup>

Während der EuGH im Vertragsverletzungsverfahren die Vereinbarkeit nationalen Rechts mit dem Europarecht beurteilt, was notwendigerweise die Auslegung nationalen Rechts mit einschließt, hat er sich im Rahmen der Vorabentscheidung auf die fallbezogene, wenngleich abstrakte Verdeutlichung des Gehalts einer europarechtlichen Norm zu beschränken! Aus diesem Grund hat das vorlegende Gericht die **Frage abstrakt und eventuell in Alternativform** zu stellen. Falls die vom nationalen Richter vorgelegte Frage nicht ausreichend abstrahiert ist, erachtet sich der EuGH für befugt, den gemeinschaftsrelevanten Kern herauszuschälen.

Insgesamt erfüllt der Vorabentscheidungsverfahren nicht nur die Funktion, die Rechtseinheit in der gesamten EU zu gewährleisten, sondern es fördert darüber hinaus den Dialog und die Zusammenarbeit zwischen der Gemeinschaftsgerichtsbarkeit und der nationalen Gerichtsbarkeit.<sup>83</sup>

#### 4. Die Bedeutung des Gemeinschaftsrechts im Gesetzesprüfungsverfahren Österreichs

##### a) Gemeinschaftsrecht unterliegt nicht der Normenkontrolle des VfGH.

Der grundsätzliche Vorrang des Gemeinschaftsrechts vor dem gesamten staatlichen Recht (einschließlich des Verfassungsrechts) hat zur Folge, dass Gemeinschaftsrecht nicht am Maßstab des staatlichen Verfassungsrechts geprüft werden kann. Sekundäres Gemeinschaftsrecht fällt unter keine der von der österreichischen Bundesverfassung

<sup>82</sup> Auszugsweise abgedruckt in: *Wirtschaftsrechtliche Blätter* 2004, 180.

<sup>83</sup> Fischer/Köck/Karollus, *Europarecht* 4 RZ 1427002E

erfassten Rechtsformen und ist auch insofern nicht Gegenstand verfassungsgerichtlicher Normenkontrolle.<sup>84</sup>

b) Prüfung staatlichen Rechts am Maßstab des Gemeinschaftsrechts

Auch der VfGH muss den Anwendungsvorrang beachten und Inzidentkontrolle ausüben.

Der **Anwendungsvorrang** des Gemeinschaftsrechts bedeutet, wie schon ausgeführt, dass alle staatlichen Behörden (Gerichte und Verwaltungsbehörden) Gemeinschaftsrecht anzuwenden und ihm bei Widerspruch zu späterem staatlichen Recht jedenfalls Vorrang zu geben haben. Daraus resultiert die **inzidente Prüfungszuständigkeit** – und Prüfungspflicht – aller Behörden (Gerichte und Verwaltungsbehörden) in Bezug auf die Konformität staatlichen Rechts gegenüber unmittelbar anwendbarem Gemeinschaftsrecht.

Bei einem Widerspruch zu Gemeinschaftsrecht ist staatliches Recht

- entweder **nicht anzuwenden** oder,
- sofern dies möglich ist, im Sinne einer **gemeinschaftsrechtskonformer Interpretation** anzuwenden.

Kommt eine Behörde dieser Verpflichtung nicht nach, kann die darauf gestützte Entscheidung in den gegebenen gerichtlichen oder administrativen Instanzenzügen angefochten und damit die Vorfrage der Gemeinschaftsrechtskonformität des Gesetzes in der höheren Instanz neu aufgerollt werden. Jedes Gericht ist befugt, letztinstanzliche Gerichte sind im Zweifelsfall nach Art 234 EGV verpflichtet, die Frage dem EuGH zur Vorabentscheidung vorzulegen. Der EuGH entscheidet allerdings nur über die Geltung und Auslegung des Gemeinschaftsrechts. Das nationale Gericht hat sodann zu entscheiden, ob das solcherart verbindlich ausgelegte Gemeinschaftsrecht im konkreten Fall relevant ist, und ihm gegebenenfalls den Vorrang einzuräumen.

Auch der VfGH hat im Sinne des zuvor Gesagten die Konformität des staatlichen Rechts (nur) inzident zu prüfen (VfSlg 15.215, 15.368). Liegt dem VfGH in einer anderen Verfahrenart<sup>85</sup> als der Normenkontrolle eine gesetzliche Vorschrift vor, die einer auf denselben Fall anwendbaren Regelung des primären oder sekundären Gemeinschaftsrechts widerspricht, so hat er die gemeinschaftsrechtliche Norm anzuwenden, ohne von Amts

<sup>84</sup> Eine Schranke bilden die (schon im Rahmen des EU-Beitritts Österreichs veränderten) Grundprinzipien der österreichischen Bundesverfassung nur bezüglich künftiger Änderungen des primären Gemeinschaftsrechts, sofern diese nicht einer Volksabstimmung unterzogen werden. Künftiges sekundäres Gemeinschaftsrecht, das einem Grundprinzip widerspräche, wäre hingegen aus österreichischer Sicht absolut nichtig, weil keiner staatlichen Rechtssatzform unterstellbar und keinem Fehlerkalkül unterliegend. Absolute Nichtigkeit wäre auch anzunehmen, wenn Handlungen von Gemeinschaftsorganen unter offenkundigem Verstoß gegen das Prinzip der begrenzten Einzelermächtigung gesetzt würden und sich eindeutig als krasse ultra-vires-Akte („ausbrechende Rechtsakte“) darstellten.

<sup>85</sup> ZB Grundrechtsbeschwerde, Wahlverfahrenskontrolle, ua.

wegen ein Gesetzesprüfungsverfahren einzuleiten. Stellt sich in einem solchen Zusammenhang die Frage der Auslegung des Gemeinschaftsrechts, so ist auch der VfGH zu einem Vorabentscheidungsersuchen verpflichtet.<sup>86</sup>

### c) Gesetzesprüfung und Gemeinschaftsrecht

Für die verfassungsgerichtliche Normenkontrolle staatlichen Rechts ergeben sich aus der besonderen Struktur und den Wirkungen des Gemeinschaftsrechts folgende Konsequenzen.

Eine Prüfung und allfällige **Aufhebung** staatlichen Rechts im Normenprüfungsverfahren **wegen Widerspruchs zum Gemeinschaftsrecht kommt nicht in Betracht**, weil Gemeinschaftsrecht nicht Verfassungsrecht im Sinne der staatlichen Rechtsordnung (in Österreich: im Sinne des Art 140 B-VG) ist. **Gemeinschaftsrecht ist daher kein Prüfungsmaßstab in der verfassungsgerichtlichen Normenkontrolle.**<sup>87</sup>

### d) Normenkontrolle im Anwendungsbereich des Gemeinschaftsrechts:

Das Problem der Präjudizialität und die Grenzen der Prüfungsbefugnis des VfGH

Aus dem erwähnten Prinzip der Nichteinmischung der EU in die Staatsorganisation ergibt sich aber für den VfGH vor allem, dass er durch das Gemeinschaftsrecht **nicht gehindert** ist, seinen wesentlichen Aufgaben nachzukommen, insbesondere die **Normenkontrollfunktion** – im Wesentlichen – wie früher auszuüben. Er kann also nach wie vor prüfen, ob Bundes- und Landesgesetze der Verfassung entsprechen, und zwar sogar dann, wenn es sich um Gesetze handelt, die zur Umsetzung von Gemeinschaftsrecht ergehen. Die Gesetzgebungsorgane sind aber seit dem EU-Beitritt verhalten, sowohl das Gemeinschaftsrecht als auch das innerstaatliche Verfassungsrecht zu beachten. Dieser **Grundsatz der doppelten Bindung** ist inzwischen (seit 1997) fester Bestandteil der Rechtsprechung des VfGH (VfSlg 14.863/1997, 15.106, 15.205/1998, 16.027/2000, 16.260/2001). Der Umstand, dass für bestimmte (Teil)Regelungsbereiche gemeinschaftsrechtliche Vorschriften bestimmter Art entstehen, bewirkt (nach Ansicht des VfGH) keineswegs, dass der innerstaatliche Gesetzgeber bei der Regelung dieses Bereiches insgesamt nicht mehr an die verfassungsrechtlichen Vorgaben gebunden wäre. Hier ist jedenfalls – auch wenn der Gerichtshof dies nicht so gesagt hat – an das vom nationalen Gleichheitssatz geprägte allgemeine Sachlichkeitserfordernis gesetzlicher Regelungen zu denken. Dementsprechend unterliegen gesetzliche Regelungen auch dann der verfassungsgerichtlichen Kontrolle, wenn es sich um Ausführungsregelungen zum Gemeinschaftsrecht handelt.

<sup>86</sup> Der öVfGH war übrigens das erste Verfassungsgericht, das einen Vorabentscheidungsantrag an den EuGH stellte: vgl. den schon oben zitierten Beschluss VfSlg 15.540 (EnergieabgabevergütungsG).

<sup>87</sup> Ein Normenkontrollantrag, der ausschließlich einen Verstoß gegen Gemeinschaftsrecht geltend macht, wäre mangels tauglicher (verfassungsrechtlicher) Bedenken von vornherein als unzulässig zurückzuweisen. *Karl Korinek* in Tomandl-FS 469f; *derselbe* in *Holoubek/Lang* (Hrsg), Verfassungsgerichtliches Verfahren 40; *Theo Öhlinger/Michael Potacs*, Gemeinschaftsrecht und staatliches Recht (1998) 153.

Behauptet etwa ein Beschwerdeführer vor dem VfGH, dass im bisherigen Verfahren vor der Verwaltungsbehörde eine gesetzliche Bestimmung angewendet wurde, gegen die verfassungsrechtliche Bedenken bestehen, die aber möglicherweise auch dem Gemeinschaftsrecht widerspricht, so stellt sich die Frage, ob der VfGH überhaupt auf die Verfassungsfrage eingehen kann, bevor geklärt ist, ob die Bestimmung dem Gemeinschaftsrecht widerspricht. Würde sie nämlich dem Gemeinschaftsrecht widersprechen, so wäre die Bestimmung eben wegen des Anwendungsvorrangs des Gemeinschaftsrechts innerstaatlich gar nicht anwendbar,<sup>88</sup> und der VfGH hätte gar kein geeignetes Objekt für seine Gesetzesprüfung.

Zur Prozessvoraussetzung der Präjudizialität:

Der VfGH darf im Rahmen der **konkreten Normenkontrolle** (sei es von Amts wegen oder auf Gerichtsantrag) ein Gesetz nur dann prüfen, wenn er selbst bzw das antragstellende Gericht das Gesetz im konkreten Anlass gebenden Fall anzuwenden hätte. Hat eine Behörde, die die beim VfGH angefochtene Entscheidung getroffen hat, eine solche Bestimmung angewendet, oder stellt ein Gericht wegen verfassungsrechtlicher Bedenken beim VfGH den Aufhebungsantrag, so prüft der VfGH die Argumente der Behörden und Gerichte nur grob nach. Ist die Anwendbarkeit eines Gesetzes im Einzelfall zumindest plausibel („denkmöglich“), so enthält sich der VfGH einer detaillierten Nachprüfung der Frage der Anwendbarkeit, weil er ja sonst der Entscheidung in der Hauptsache, die nicht von ihm zu treffen ist, vorgreifen würde. (Dies ist langjährige Rechtsprechung des VfGH).<sup>89</sup>

Da nun der Vorrang des Gemeinschaftsrechts eine Frage der Anwendung von Bestimmungen des Rechtes des Mitgliedstaates ist, wendet der VfGH denselben Gedanken (bzw Maßstab) einer bloß groben Nachprüfung der Anwendbarkeit auch beim Problem der Anwendung von Gemeinschaftsrecht an.

<sup>88</sup> So tatsächlich im Falle VfSlg 15.450/21001 - Energieabgabenvergütung. [Nach Vorlagebeschluss vom 3.10.1999 (Vorlage zweier Fragen betreffend die Qualifikation einer Energieabgabenvergütung als staatliche Beihilfe im Sinne des EGV) und Vorabentscheidungs-Urteil des EuGH 8.11.2001,C-143/99 entschied der VfGH mit Erk 13.12.2001, B 2251/97]:

Da das EnergieabgabenvergütungsG nicht gemäß Art93 Abs3 EGV der Kommission notifiziert wurde, hätte jene Bestimmung des Gesetzes, welche die Regelung der Energieabgabenvergütung zu einer Beihilfenregelung machte, im Hinblick auf das Verbot des Art93 Abs3 EG-Vertrag nicht „durchgeführt“ werden dürfen. Es hätte daher bereits der Gesetzgeber das EnergieabgabenvergütungsG (mit der einschränkenden Regelung des §2 Abs1)so nicht erlassen dürfen.

Auch keine Anwendung des Gesetzes durch den VfGH, keine Einleitung eines amtswegigen Gesetzesprüfungsverfahrens.

<sup>89</sup> ZB VfSlg 9911, 14.774, 14.891, 15.576. Der VfGH erachtet sich zur Verneinung der Präjudizialität (und damit zur Zurückweisung des Normenkontrollantrages) nur dann für berechtigt, wenn die Präjudizialität „ganz offenbar“ fehlt. Vgl dazu *Michael Potacs*, Entscheidungsbesprechung, JBl 1999, 172; *Michael Potacs*, Die Europäische Union und die Gerichtsbarkeit öffentlichen Rechts,14. ÖJT (Wien 2000) I/1, 103, *Rudolf Thienel*, ZfV 2001, 777; *Gerhart Holzinger*, Die Bedeutung des Vorabentscheidungsverfahrens für das verfassungsgerichtliche Verfahren, in *Michael Holoubek/Michael Lang*, EuGH-Verfahren 65.

Der VfGH geht davon aus, dass es an der **Prozessvoraussetzung „Präjudizialität“ nur dann mangelt, wenn eine innerstaatliche Norm von einer gemeinschaftsrechtlichen Regelung offenkundig verdrängt wird** (VfSlg 15.368/1998). Ist es hingegen „denkmöglich“, dass die innerstaatliche Norm anzuwenden ist, oder wurde sie tatsächlich angewendet, kann sie Gegenstand der Normenkontrolle sein. Falls die so geprüfte Norm nicht aufgehoben wird, muss aber noch das im Anlassfall entscheidende Gericht (oder auch der VfGH selbst in seinem Ausgangsverfahren, bzw einem Grundrechtsbeschwerdeverfahren) die Frage des Vorrangs des Gemeinschaftsrechts selbstständig prüfen (VfSlg 15.215/1998).<sup>90</sup>

Zusammenfassend kann festgehalten werden:

- Der VfGH prüft die Verfassungswidrigkeit österreichischen Rechts auch, wenn die Anwendung dieses Rechts wegen des Vorrangs von Gemeinschaftsrecht zweifelhaft ist.
- Nur wenn die Nichtanwendbarkeit offenkundig ist, ist der Vorrang des Gemeinschaftsrechts auch für den VfGH relevant.

**Die Prüfungsbefugnis, die der VfGH auf diese Weise in Anspruch nimmt, widerspricht nicht dem Prinzip der Effektivität des Gemeinschaftsrechts.** Der VfGH hat das damit begründet, er habe seine Normenkontrollaufgabe immer dann wahrzunehmen, wenn die Behörde das verfassungsrechtlich „verdächtige“ Gesetz zumindest denkmöglich angewendet hat. Nur ein solches Präjudizialitätsverständnis entspreche seiner Bereinigungsaufgabe. Das Erfordernis der Effektivität des Gemeinschaftsrechts verlange keine einschränkende Interpretation.

- Führt die Prüfung des vielleicht gemeinschaftsrechtswidrigen Gesetzes nicht zur Aufhebung, so wird die gemeinschaftsrechtliche Frage nicht berührt – eine Vorabentscheidung bleibt immer möglich. Führt die Prüfung hingegen zur Aufhebung des Gesetzes, entsteht ebenfalls kein Konflikt mit dem Gemeinschaftsrecht.
- Wird aber eine möglicherweise (nicht offenkundig, aber vielleicht doch) gemeinschaftsrechtswidrige gesetzliche Regelung wegen Verstoßes gegen nationales Verfassungsrecht aufgehoben, so kann darin ebenfalls keine Beeinträchtigung des Gemeinschaftsrechts liegen. Im Ergebnis wird aber durch die Aufhebung jedenfalls Rechtsklarheit und Rechtssicherheit geschaffen.

Umgekehrt muss man festhalten: Der Anwendungsvorrang ist für den VfGH dann relevant, wenn er offenkundig zur Nichtanwendung einer österreichischen Gesetzesbestimmung führt. In mehreren Fällen, bei denen der VfGH eine Bestimmung zunächst auch für verfassungsrechtlich bedenklich hielt, wurde deren Nichtvereinbarkeit mit dem

<sup>90</sup> Probleme können sich allerdings ergeben, wenn durch die Aufhebung einer staatlichen Rechtsvorschrift eine gemeinschaftsrechtswidrige Rechtslage hergestellt wird.

Gemeinschaftsrecht erst später durch ein neu ergangenes Urteil des EuGH „offenkundig“. In solchen Fällen musste der VfGH das Gesetzesprüfungsverfahren einstellen.<sup>91</sup>

Bezüglich anderer Normenkontrollverfahren ergibt sich in diesem Zusammenhang: Ein **Individualantrag** richtet sich gegen unmittelbar in die Rechtsposition eines Einzelnen eingreifende generelle Rechtsnormen. Ein solcher Antrag ist unzulässig, wenn die bekämpfte Norm unmittelbar anwendbarem Gemeinschaftsrecht widerspricht. Die bekämpfte Norm ist aber wegen des Anwendungsvorrangs gar nicht anzuwenden, folglich kann der Antragsteller durch sie nicht in seinen Rechten verletzt sein (VfSlg 15.771/2000).

Das Problem der Präjudizialität stellt sich jedenfalls nicht im Verfahren der **abstrakten Normenkontrolle** (Normenkontrolle ohne konkreten Anlassfall). Eine gemeinschaftsrechtswidrige Rechtsvorschrift ist nämlich in konkreten Rechts-Fällen zwar nicht anzuwenden, verliert aber nicht ihre Geltung (Anwendungsvorrang bedeutet nicht Derogation im Sinne des Ausscheidens aus dem Rechtsbestand). Insofern kann eine derartige Norm im abstrakten Prüfungsverfahren jedenfalls auf ihre Übereinstimmung mit höherrangigem staatlichen Recht geprüft und bei mangelnder Übereinstimmung aus diesem Grund aufgehoben werden.

## 5. Schutz der Grundrechte und Prüfung individueller Staatsakte

Im Spannungsverhältnis Gemeinschaftsrecht/nationales Recht besteht an sich die Gefahr, dass eine gemeinschaftsrechtliche Vorschrift wegen ihres Vorranges auch dann angewendet werden muss, wenn sie den (nationalen) Grundrechten widerspricht. Da aber alle wesentlichen Grundrechte nach der Rechtsprechung des EuGH schon bisher Teil der „allgemeinen Rechtsgrundsätze“<sup>92</sup> sind, könnte ein nationales Gericht die Frage der Gültigkeit (Nichtigkeit) einer sekundärrechtlichen Bestimmung mit Vorlage nach Art 234 EGV an den EuGH herantragen.

Es soll nicht verkannt werden, dass gewisse Probleme (nicht nur Randprobleme) und schwierige Konstruktionsfragen übrig bleiben.

- Erstens könnte der innerstaatliche Grundrechtskatalog über den gemeinschaftsrechtlichen Grundrechtsschutz hinausgehen. Ob hier eine derart starke Reserviertheit berechtigt ist, wie sie seinerzeit das dBVerfG mit seiner Solange I-Entscheidung zum Ausdruck brachte, muss doch bezweifelt werden.

<sup>91</sup> VfSlg 15.448/1999 (Pharmazeutische Gehaltskasse). In der Hauptsache ging das Verfahren für die Betroffenen dennoch positiv aus, weil die nachteilige Bestimmung (wegen des Vorrangs des Gemeinschaftsrechts) nicht mehr angewendet werden konnte.

<sup>92</sup> und künftig (infolge Einbau der EU-Grundrechte-Charta in den Verfassungsvertrag) verbindliches Primärrecht sein werden.

Eine Bestandsaufnahme der Rechtsprechung des EuGH stimmte einen Autor, der sich monographisch mit diesem Thema beschäftigt hat zuversichtlich<sup>93</sup>. Er meint, dass durch den EU-Beitritt zwar der verfahrensrechtliche Weg des Einzelnen zur Wahrung seiner Grundrechte grundlegend modifiziert wurde, dass aber das Niveau des Grundrechtsschutzes keine gravierenden Veränderungen, vor allem keine signifikanten Verminderungen erfahren hat. Er hebt allerdings hervor, dass im Bereich der Klagemöglichkeiten auf Gemeinschaftsebene ein gewisser rechtsstaatlicher Reformbedarf besteht, zumal der Einzelne echte Verordnungen ebenso wie Richtlinien nicht direkt beim EuGH bekämpfen kann.

Die Entwicklung scheint nun mit dem breiten europäischen Grundrechte-Kalatalog eher dahin zu gehen, dass letztlich geschriebene Grundrechte auch auf europäischer Ebene rechtlich verankert werden und dass die Art der Rechte zum Teil weiter geht als sie in den nationalen Katalogen verankert waren.

- Zum anderen könnte gesetztes Primärrecht selbst grundrechtswidrig sein. Es ist zu hoffen und zu erwarten, dass der EuGH eine solche Spannungslage (innerhalb des Primärrechts) mit einer grundrechtsfreundlichen Interpretation löst.
- Denkbar ist ferner, dass ein im Gemeinschaftsrecht und in der EMRK anerkanntes Grundrecht angesichts der wirtschaftlichen Grundfreiheiten eine unterschiedliche Beurteilung der Eingriffe im Bereich der Verhältnismäßigkeitsprüfung (bei Abwägung der Rechtsgüter) erfährt (zB Eigentum/Erwerbsfreiheit – Einschränkung durch Werbeverbote aufgrund legitimer öffentlicher Interessen, wie zB Gesundheitsschutz durch Tabakwerbeverbot). Eine institutionelle oder prozedurale Lösung wäre hier notwendig. Immerhin gilt es in Zukunft drei verschiedene Grundrechtskataloge zu harmonisieren, den nationalen, jenen der EMRK und den EU-Grundrechte-Katalog (künftig Bestandteil des Verfassungsvertrages).

Die skizzierten Gefahren dürften eher ein theoretisches Problem darstellen, zumal der VfGH seit dem Beitritt Österreichs zur EU noch nie gehindert war, eine innerstaatliche Grundrechtsbestimmung wegen entgegenstehenden Gemeinschaftsrechts nicht anzuwenden.

Umgekehrt ist es aber schon vorgekommen, dass andere innerstaatliche Verfassungsbestimmungen letztlich außer Acht zu lassen waren, wenn sie dem europäischen Grundrechtsstandard widersprachen. Damit kann sich aus dem Gemeinschaftsrecht eine Grenze für sogenannte „Verfassungsdurchbrechungen“ ergeben. So hatte zB der gemeinschaftsrechtliche Datenschutz (DatenschutzRL 95/46/EG) Vorrang vor einer österreichischen verfassungsrechtlichen Spezialregelung, die eine Transparenz (Offenlegung und Publikation) von Gehältern leitender Angestellter im Bereich der staatsnahen Wirtschaft angeordnet hatte und absichern wollte. Das Beispiel zeigt übrigens auch die

<sup>93</sup> Gerhard Baumgartner, EU-Mitgliedschaft und Grundrechtsschutz (Wien 1997).

praktische Bereitschaft des EuGH zur Arbeitsteilung und Kooperation mit nationalen Gerichten.

Im Jahre 2000 beanspruchte der österreichische Rechnungshof (unter Berufung auf das BezügebegrenzungsBVG 1997) im Rahmen der allgemeinen Gebarungsprüfung die Einsichtnahme in Unterlagen betreffend Bezüge und Ruhebezüge im Bereich des ORF, der Wirtschaftskammer Steiermark und des Landes Niederösterreich. Da ihm die Einsichtnahme in sämtliche Unterlagen zum Zweck der namentlichen Einkommensberichterstattung verwehrt wurde, machte der Rechnungshof ein einschlägiges Verfahren zur Feststellung seiner Prüfungsbefugnis beim VfGH anhängig. Das Problem bestand nun darin, ob die – das österreichische Datenschutz-Grundrecht durchbrechende – Regelung des BezügebegrenzungsBVG oder die europäische Datenschutz-Richtlinie prävaliere. Angesichts dieses Zweifels stellte der VfGH ein Vorabentscheidungsersuchen zur Auslegung der Datenschutz-RL und ihrer unmittelbaren Anwendbarkeit an den EuGH (Beschluss VfSlg 16.050/2000).

Mit Urteil v 20. 5. 2003, C-465/00, sprach der EuGH aus, dass ein Widerspruch zur Datenschutz-RL<sup>94</sup> dann vorliege, wenn die nationale Verfassungsregelung (§ 8 BezügebegrenzungsBVG) nicht mit Art 8 EMRK in Einklang gebracht werden kann. Die Feststellung, ob dies der Fall sei, obliege allerdings den nationalen Gerichten. Zugleich seien die in diesem Fall relevanten Bestimmungen der RL in dem Sinn unmittelbar anwendbar, dass sich ein Einzelner vor den nationalen Gerichten auf sie berufen könne, um die Anwendung entgegenstehender innerstaatlicher Rechtsvorschriften zu verhindern. Im Ergebnis hat dann der EuGH die Veröffentlichung von Bezügen unter Namensnennung als nicht notwendig und angemessen erachtet. (EuGH 20.5.2003, Rs C-465/00/ua – *Rechnungshof/ORF u.a.*)<sup>95</sup> **Die weiteren Stufen der Verhältnismäßigkeitsprüfung überließ der EuGH dem nationalen Verfassungsgericht.**

Im Anschluss daran und unter Beachtung des EuGH-Urteils kam der öVfGH zu dem Schluss, dass zwar die Bekanntgabe der Gehälter an den Rechnungshof gemeinschaftsrechtlich und verfassungsrechtlich unbedenklich ist, nicht aber die öffentlich zugängliche namentliche Publizierung (Erk VfGH 28.11.2003, KR 1/00). Der VfGH gab somit der (insoweit) unmittelbar anzuwendenden Datenschutz-RL Vorrang im Sinne der Ent-

<sup>94</sup> Richtlinie 95/46/EG des Europäischen Parlaments und des Rates vom 24. Oktober 1995 zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten und zum freien Datenverkehr.

<sup>95</sup> Im Einzelnen kam der EuGH in Auslegung der Europäischen Datenschutz-RL zu der Auffassung, die RL stehe einer nationalen Regelung (wie der dem Ausgangsverfahren zugrunde liegenden) „nicht entgegen, sofern erwiesen ist, dass die Offenlegung, die nicht nur die Höhe der Jahreseinkommen der Beschäftigten von der Kontrolle des Rechnungshofes unterliegenden Rechtsträgern betrifft, wenn diese Einkommen einen bestimmten Betrag überschreiten, sondern auch die Namen der Bezieher dieser Einkommen umfasst, im Hinblick auf das vom Verfassungsgesetzgeber verfolgte Ziel der ordnungsgemäßen Verwaltung der öffentlichen Mittel notwendig und angemessen ist, was die vorlegenden Gerichte zu prüfen haben.“



scheidung des Europäischen Gerichtshofes und gründete die ihm verbleibende Verhältnismäßigkeitsprüfung auf Art 8 EMRK (Privatlebensschutz).

## V. Zusammenfassung

Die Darstellung hat gezeigt, dass die gemeinschaftsrechtliche Beurteilung im Allgemeinen keine verfassungsrechtliche Frage ist, die für den VfGH in seiner Normenkontrolle relevant ist. Die Überwachung der Einhaltung des Gemeinschaftsrechts im ganzen Bereich der öffentlichen Verwaltung ist in Österreich – abgesehen von schwerwiegenden Fehlern, die in die Verfassungssphäre reichen<sup>96</sup> – Sache des Verwaltungsgerichtshofes, und im Bereich der ordentlichen Justiz Sache des OGH; von dort kamen und kommen die meisten Vorabentscheidungsersuchen an den EuGH.

Die große Bereitschaft des VfGH, dem Gemeinschaftsrecht auch im verfassungsgerichtlichen Verfahren zum Durchbruch zu verhelfen – dazu gehört naturgemäß die Einholung von Vorabentscheidungen des EuGH –, wird in Österreich allgemein positiv gesehen, insb angesichts der Tatsache, dass kein Verfassungsgericht in der EU mehr Vorlageanträge vorweisen kann als der VfGH.

In einer gewissen Verallgemeinerung lässt sich ferner sagen, dass die nationale Verfassung durch den Beitritt zur EU keineswegs ihre Bedeutung verliert, und dass die Kooperation zwischen EU-Organen und nationalen Organen ein gewisses ausgleichendes Element gegenüber dem Vorrangprinzip darstellt. Man könnte auch verkürzend sagen: **Gemeinschaftsrecht hat den Vorrang, aber die Organe pflegen die Kooperation.** Dieser Geist der Zusammenarbeit wird nicht zuletzt auch durch Kontakte (Besuche und Konferenzen) von Richtern der nationalen Gerichte untereinander und mit den Richtern des EuGH mit Leben erfüllt.

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<sup>96</sup> Die Verletzung der Vorlagepflicht nach Art 234 EGV kann – wie schon oben gezeigt – auch grundrechtsrelevant sein: Verletzung des Rechts auf den „gesetzlichen Richter“ ! Grobe Außerachtlassung von Rechtsvorschriften stellt als Willkür eine Verletzung des Gleichheitssatzes dar.

*Prof. Dr. Valerio Onida*  
*President of the Constitutional Court of Italy*

## **THE PRESENTATION OF ITALIAN EXPERIENCES**

### **Summary**

The Italian Constitutional Court has for a long time dealt with the problem of the relation between national law and European law. Regarding such, the most important principles are those that concern the direct effect of Community law in member states and the primacy of Community law over national law. Although, in this connection, the Constitutional Court accepted the so-called dualist doctrine and its differentiation between the domestic legal order and the Community legal order, it never objected the mentioned principles. Otherwise, in Italy the basis for the application of Community law is the “transfer of sovereignty,” which is embodied in Italy’s accession to the EU Treaties in Article 11 of the Constitution. In the opinion of the Constitutional Court, the only restriction on the full application of Community law is the fundamental principles of the Italian constitutional order and the fundamental rights determined in the Constitution. In this context, the Constitutional Court assumed for itself the power to review the constitutionality of legislation implementing EC Treaties.

In this regard, the question is raised who in the Italian legal order is to resolve possible disputes between Community norms and the domestic legislation. At first the opinion was that this concerned a review of the constitutionality of such norms, and that the Constitutional Court was empowered to carry out such, given the fact that ordinary courts lacked the power of constitutional review. Subsequently, however, this became disputed as it entailed that the Constitutional Court not only became the guardian of the Constitution, but also of Community law. In the *Granital* case, the Constitutional Court thus decided that in Italy Community norms are directly applicable, which entails that ordinary courts are obliged to respect such, in cooperation with the Court of Justice of the European Communities (ECJ), in the event of a conflict. Only if the fundamental constitutional principles are violated can ordinary courts commence a procedure before the Constitutional Court.

Otherwise the existing system of relations between the two legal systems does not exclude all cases of possible intervention by the Constitutional Court, in the event of conflicts between the domestic law and the Community law. Such a situation would occur if in the adoption of executive regulations the Government exceeded the powers transferred to it by the Parliament, which must be in conformity with Community norms. In such a case the Constitutional Court, as the court of last instance, should have to consult the ECJ. However, hitherto the Constitutional Court has tried to avoid substantive decision-making

in such cases. It nevertheless recognized its full jurisdiction concerning requests that the national Government directly lodges before the Court with regard to the unconstitutionality of regional legislation in connection with alleged violations of obligations under the Community law.

Such a system does not cause problems when the matter concerns a conflict between norms that regulate the same subject-matter and which are directly applicable. A problem occurs when there is a conflict between a domestic norm and a principle originating from Community law (e.g. the principle of non-discrimination). Ordinary courts deciding such issues would not be in conformity with the Italian Constitution, as such a case concerns, as a matter of fact, constitutional issues, and Italian law does not provide for decentralized constitutional review. Such cases should fall either within the powers of the ECJ, when "European" legal issues are involved, or within the powers of the Constitutional Court, when the matter concerns national legal issues. This line, however, is difficult to determine due to the intertwining of both spheres.

### **Povzetek**

*Italijansko Ustavno sodišče se že dolgo časa sooča s problemom razmerja med nacionalnim pravom in evropskim pravom. Pri tem sta najpomembnejši načeli neposrednega učinka prava Skupnosti v državah članicah in primata prava Skupnosti nad nacionalnim pravom. Četudi je v tej zvezi Ustavno sodišče sprejelo t. i. dualistično doktrino in njeno razlikovanje med domačim pravnim redom in pravnim redom Skupnosti, omenjenima načeloma ni nikoli nasprotovalo. Sicer je temelj za uporabo prava Skupnosti v Italiji »prenos suverenosti«, ki se je odrazil v pristopu Italije k Pogodbam ES in v 11. členu Ustave. Edina omejitev polne uporabe prava Skupnosti pa so po mnenju Ustavnega sodišča temeljna načela italijanskega ustavnega reda in temeljne pravice iz Ustave. Ustavno sodišče ima v zvezi s tem pristojnost presoje glede ustavnosti zakonodaje, ki pomeni izvrševanje Pogodb ES.*

*V tej zvezi se zastavlja vprašanje, kdo naj v italijanskem pravnem redu rešuje morebitne spore med normami Skupnosti in domačo zakonodajo. Najprej je prevladalo mnenje, da gre za področje presoje ustavnosti takšnih norm in da je za to pristojno Ustavno sodišče, ob dejstvu, da redna sodišča nimajo pristojnosti ustavne presoje. Kasneje se je to izkazalo kot sporno, saj je pomenilo, da je Ustavno sodišče postalo ne le varuh Ustave, temveč tudi prava Skupnosti. Tako je v zadevi Granital Ustavno sodišče odločilo, da so norme Skupnosti neposredno uporabljive, pri čemer so te norme dolžna upoštevati redna sodišča ob sodelovanju Sodišča Evropskih skupnosti (SES), če pride v tej zvezi do dvoma. Le če so kršena temeljna ustavna načela, so redna sodišča dolžna sprožiti postopek pred Ustavnim sodiščem.*

*Sicer pa obstoječi sistem razmerij med dvema pravnima sistemoma ne izključuje vseh primerov možne intervencije Ustavnega sodišča v zadevah konfliktnosti med domačim pravom in pravom Skupnosti. Do takšne situacije bi lahko prišlo, če bi vlada pri podzakonskem urejanju prekoračila pristojnosti, ki jih je nanjo prenesel parlament in morajo biti usklajene z normami Skupnosti. V takšnem primeru bi se Ustavno sodišče, kot sodišče zadnje instance, moralo posvetovati s SES. Vendar se je Ustavno sodišče vsebinskemu odločanju v takšnih zadevah doslej izogibalo. Priznalo pa je svojo polno pristojnost glede zahtev, ki jih nacionalna vlada sproži neposredno pred sodiščem glede neustavnosti regionalne zakonodaje v zvezi z zatrjevanimi kršitvami obveznosti iz prava Skupnosti.*

*Sistem ne povzroča težav, ko gre za konflikt med normama, ki urejata isto materijo in sta neposredno uporabljivi. Težava nastane, ko gre za konflikt med domačo normo in načelom, ki izhaja iz prava Skupnosti (npr. načelo nediskriminacije). Če bi o takšnih vprašanjih odločala redna sodišča, bi to ne bilo skladno z italijansko Ustavo, kajti v takšnem primeru gre v bistvu za ustavna vprašanja, italijansko pravo pa ne pozna decentralizirane ustavne presoje. Za takšne zadeve bi torej moralo biti pristojno bodisi SES, ko gre za »evropska« pravna vprašanja, bodisi Ustavno sodišče, ko gre za nacionalna pravna vprašanja. To mejo pa je zaradi prepletanja obeh sfer pogosto težko določiti.*

The Italian Constitutional Court has for a long time tackled the problems raised by the relationship between domestic law and European law (Community law), and has developed articulated jurisprudence on the matter, which has evolved over time.

The two fundamental principles under discussion, affirmed by the European Court of Justice, are those of the direct effect of Community law within Member States, at least with respect to 'self-executing' norms, and of the primacy of Community law over domestic law.

Although the Italian Constitutional Court has never embraced the 'monist' theory, with which the Court of Justice works, but has rather embraced the 'dualist' doctrine and its distinction-separation between domestic legal order and the Community one, it has never disputed the two principles mentioned above.

In its first pronouncements on the matter during the earlier years, the Constitutional Court set forth the foundation for the application of Community law in Italy, and of its primacy over domestic law, as part of a 'transfer of sovereignty' by the State in favor of European supra-national institutions, realized through Italy's adherence to the Treaties and justified by Article 11 of the Constitution, according to which Italy "agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order

ensuring peace and justice among Nations”. Not only, therefore, are derogations to domestic law, including constitutional law, deriving from obligations assumed in light of the European Treaties, not in contrast with the Constitution, but indeed the system of European integration, once realized through adherence to the Treaties, is itself constitutionally guaranteed, and therefore no longer freely available to ordinary domestic legislators: the two principles of direct effect and of the primacy of Community law are part of this system.

The only limit to the full applicability of Community law, according to our Court, is the unviolable nature of the supreme principles of the Italian constitutional order and of the essential core of the unalienable rights guaranteed by the Constitution (the so-called ‘counter-limit’). If a Community norm should be deemed in contrast with such principles – but this is obviously a hypothetical, presumably destined to remain as such – the Constitutional Court has reserved itself the power of judicial review over the constitutionality of the ordinary laws that implemented the Treaties.

There remained the issue of determining who, within the Italian constitutional order, was competent to resolve conflicts between Community norms and superseding domestic legislative norms, perhaps in contrast with the former. At first, it was believed that these would take shape as issues pertaining to the constitutionality of such norms, to be resolved solely by the Constitutional Court. Indeed, under the Italian system, common judges ruling over concrete cases do not have the power to disapply a law because they deem it unconstitutional. They must rather raise the issue, as incidental to the proceeding underway, before the Constitutional Court, which is the only court empowered to strike down a law on constitutional grounds. A domestic law in contrast with Community law would have to have been declared unconstitutional because contrary to Article 11 of the Constitution.

This solution, however, was not satisfactory, on one hand because it limited the direct applicability of Community law until the incompatible domestic law was annulled by the Court. On the other hand, it forced the Constitutional Court to improperly become the custodian, other than of the Constitution (according to its fundamental function), also of the observance of Community law. And if a doubt had been raised as to the interpretation of the violated Community norm, it would have become inevitable to invoke the European Court of Justice’s jurisdiction, pursuant to Article 234 of the EC Treaty: with the result that the Constitutional Court would have been left with the only task of translating the decision of the Court of Justice into a decision striking down an incompatible domestic law.

This point was defined by the Constitutional Court in its judgment No. 170 of 1984 (the *Granital* case). In this decision the Court held that Community norms are directly applicable in Italy without running into any obstacles present in domestic laws, even if later passed by Parliament, that may be incompatible therewith. This is due to the fact that in areas assigned by the Treaties to the competence of the European Union, the domestic legal order has so-to-speak “retracted itself”, leaving room to Community law. Hence, every

judge and every administrative authority has the power and duty to directly apply Community law over incompatible domestic laws. Doubts as to conflicts between domestic laws and Community law must not be posed by ordinary judges to the Constitutional Court as constitutional issues (and if they are brought before the Court, it rules them to be inadmissible). Rather, they must be resolved directly by the ordinary judge, giving priority to Community law, and if necessary, requesting a preliminary ruling by the European Court of Justice on the matter, pursuant to Article 234 of the EC Treaty. Only if the Community norm should appear as contrary to the supreme principles of domestic constitutional law (the so-called ‘counter-limit’), would a judge then have to raise before the Constitutional Court issues on the constitutional legitimacy of laws implementing the European treaties.

In this manner, the Constitutional Court has managed to maintain as distinctly separate its own function from that requested of the Court of Justice in terms of Community law. The Constitutional Court guarantees the observance of the Constitution as to domestic laws contrary to it (and also as to Community laws in the only hypothetical instance that these are in conflict with supreme principles). The guarantee of the observance of Community law and of its primacy over domestic laws passed by Parliament is entrusted to ordinary judges, under the supervision of the Court of Justice.

Apart from the theoretical instance of a triggering of the “counter-limit”, a conflict may arise if domestic judges were to find that a particular area, regulated by domestic laws, was not assigned to the Union’s competence by the Treaties, when instead, secondary Community legislation in fact regulated it. In this case, the concrete impact of the “transfer of sovereignty” to the Union set in motion by the Treaties would become rather controversial. This hypothetical, however, would result in a violation of the Treaties by secondary Community legislation: and it would be up to the Court of Justice, through a preliminary ruling, to resolve the doubt with binding effects on all Member States.

The current system of relations between the two legal orders, as evidenced by the constitutional jurisprudence that developed after the Granital case, does not however erase all instances of a possible involvement by the Constitutional Court in issues of compatibility between domestic law and Community law. It is still in fact possible that issues which indirectly involve such problems may be raised before the Constitutional Court.

That is, it may happen that the conformity of a law to a constitutional provision other than Article 11 (an issue which the Constitutional Court may and must pronounce itself on) depends upon its conformity with a Community norm. A typical case is the one in which Parliament delegates to the Government the task of enacting legislation, provided that the Government conform such legislation to Community norms. In this case, in order to establish whether the limits of the delegation were observed, one would have to determine whether the obligation to conform to Community legislation was respected. Such Community legislation would function, in the constitutional ruling, as an “interposed norm”. It would

be up to the Constitutional Court, as a court of last resort, to consult the Court of Justice, preliminarily, on the perhaps not evident interpretation of the Community norm. Cases of this nature have been raised, but to date the Court has avoided ruling on their merits. It finds that in any event the problem of conformity with Community law conditions the very applicability of the domestic law by a judge, and therefore, the relevance of the constitutional issue in the concrete case. If a doubt does arise regarding the interpretation of a Community law, case law on the point states that it is for the ordinary judge, and not the Constitutional Court, to request a preliminary ruling by the Court of Justice.

The only case in which the Court recognized it had full jurisdiction to decide the merits of issues of compatibility between domestic and Community law was that of claims brought directly before the Court by the national government challenging regional laws as unconstitutional due to their alleged violation of the obligations deriving from Community law. In such cases the Court found that the flaw in the regional law required the Court to strike it down so as to safeguard certainty in the law. Should doubts arise on the interpretation of the Community norm which is assumed to have been violated, the Court could not, however, avoid requesting a preliminary ruling before the Court of Justice. This, however, has not happened to date.

The set up currently used, according to which every ordinary judge, who is faced with a conflict between an internal legislative norm and a Community norm, must apply the latter over the former without raising any constitutional issue (perhaps, if necessary, requesting a preliminary ruling to the Court of Justice) works without encountering any problems when the conflict arises between two norms that regulate (hypothetically in a different manner) the same subject matter and that are both directly applicable. In establishing the *regula juris* to apply in the concrete case, the judge will choose the norm belonging to the so-called “federal” legal order over the one belonging to the Member State’s domestic legal system.

Complications may ensue, however, if the conflict is not between two norms regulating the same subject matter, but between a (domestic) norm establishing a specific legal regime and a *principle* deriving from Community law: for example, the principle of non-discrimination. In this case, too, a problem of compatibility between domestic law and the Community’s legal order (its principles) may arise that should be solved in favor of the Community law, in light of the principle of the primacy of “federal” law. Once such conflict is acknowledged, what would derive from it would be the application, instead of the incompatible domestic norm, of a rule identified interpretatively by the judge using the common criteria used to integrate the legal system (by argument *a contrario*, by analogy, or with reference to general principles). The Italian Constitutional Court has at times followed this line of reasoning, stating that the ordinary judge’s obligation to apply Community law over a conflicting domestic norm, must also stand when the directly applicable Community law is a judgment by the Court of Justice ascertaining such contrast.

This problem, however, is destined to become more pronounced as developments in Community law tend toward a growing expansion of areas governed by it and toward the greater affirmation of the full applicability in these areas of principles which tend to coincide with those contained in domestic Constitutions: for example, with respect to fundamental rights (also as a consequence of the insertion of the Nice Charter of Fundamental Rights in the European Constitution).

In fact, if we were to allow that a national judge must and should directly deny the application, and therefore the effectiveness, of a domestic law when he or she finds it in contrast, not with a directly applicable Community norm, but with principles or fundamental rights deriving from Community law (hypothetically coinciding with rights and principles provided for by the Constitution), such judge would in fact exercise a power that, in the Italian system, the Constitution does not allow: that of disapplying a domestic law in force, without raising the constitutional issue before the Constitutional Court (given the Italian system of centralized judicial review of statutes).

In fact, the conflict between domestic norm and directly applicable Community norm may be framed in terms of a separation between the two systems, with the preferential application of the norm belonging to the “federal system”. Instead, the conflict between the domestic norm with principles that are present in both systems (such as those pertaining to fundamental rights) cannot but be resolved by way of express judicial review over the constitutionality of laws, which, in our system, is exercised by the Constitutional Court. The problem is not just a hypothetical one. In the jurisprudence of ordinary Italian judges there are already cases that deny the application of a domestic law because it was found to be in contrast with norms contained in the European Convention on Human Rights and Fundamental Freedoms considered as Community law (given the references made to it in European treaties).

Naturally, it is unassailable that the observance of the rights guaranteed by the European Convention on Human Rights must prevail over the application of domestic law, in the case of a violation of such rights. However, the problem is to know who shall have jurisdiction to apply such primacy: whether it should be domestic judges, according to their judgment, or only the Court of Justice pronouncing itself on the interpretation of Community law, or the Constitutional Court.

The attribution of such a power to individual ordinary judges could, in my opinion, bring to the upset of the very principles that preside over the Italian system of constitutional review.

It would be less illogical to attribute such power to judges *only after* the incompatibility of a domestic law with Community law was affirmed in a judgment by the Court of Justice. However, in this way, too, a new system of judicial review over statutes would be established, centered around the Court of Justice (which would adjudicate not only the



validity of acts by the Union, but also the validity of national laws with respect to principles of Community law), and alternative to the one provided for by the domestic Constitution. It could be supposed that judicial review should be exercised by the Court of Justice when the subject at issue pertains to an area attributed to the competence of the Union, and by the Constitutional Court when the issue pertains to a Member State competence. The only problem remaining would be possible inconsistencies between the jurisprudence of the two Courts in the application of the same rights or principles. This distinction, however, would not always be easy to point out, given the common intertwining between domestic law and Community law.

No doubt, instead, may be raised over the power and duty of every national judge to interpret domestic law, in as much as it is possible, in conformity, other than with the Constitution, with Community law (as interpreted by the Court of Justice), and with the European Convention on Human Rights (as, in turn, interpreted by the European Court of Human Rights in Strasbourg).

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## **CASE-LAW OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY REGARDING: THE POSITION OF CONSTITUTIONAL COURTS FOLLOWING INTEGRATION INTO THE EUROPEAN UNION<sup>1</sup>**

### **Summary**

The Constitutional Court of Germany has several times been requested to review the conformity of Community law with the Constitution. By doing so, the Constitutional Court recognized and in its decisions brought to the foreground two questions: the question of the effective protection of the rights of individuals against the acts of Community authorities, and the question of the democratic legitimacy of the legislative authority of the European Union.

The Constitutional Court of Germany decided on the relation between the Constitutional Court of Germany and the Court of Justice in a case which referred to the Maastricht Treaty. The establishing treaties of the European Community are transferred into German law through ratifying acts (*Zustimmungsgesetze*). By means of such acts, the Constitutional Court reviews the conformity of the amendments of the treaties with the German Constitution. Under the Treaty on the European Union, Germany is obliged to carry out intergovernmental cooperation and is bound by internationally binding measures which interfere with the sphere of fundamental rights. Inasmuch as these measures are implemented in the territory of Germany, they fall within the scope of review by the Constitutional Court. The protection of fundamental rights is to such extent not covered by supranational law.

The interpretation of secondary Community legislation falls within the competence of the Court of Justice, as it is the only authority which can guarantee a unified legal interpretation throughout the entire Community territory. If the Court of Justice interpreted secondary legislation in a manner which interfered with constitutionally protected rights that are not protected at the Community level, the Constitutional Court would be in such cases – theoretically – competent. The same would apply in cases in which, irregardless of the fact whether a certain right is recognized within the Community, a measure interfered

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<sup>1</sup> “*Die Stellung der Verfassungsgerichte bei der Integration in die Europäische Union*”. I thank my expert co-worker at the Federal Constitutional Court, Mr. Wolfgang Hilker, for his significant contribution to the present report.

with the essence of constitutionally guaranteed rights. However, for the admissibility of such review high obstacles should be surmounted.

Finally, there is also a question on preliminary rulings as regards Article 234 of the Treaty establishing the European Community. A duty to request a preliminary ruling is binding on all national courts of the Member States, thus also constitutional courts. However, if such interpretation is of constitutional importance, the duty to request a preliminary ruling does not exclude the jurisdiction of the Constitutional Court. The Constitutional Court must, regardless of a decision of the Court of Justice, review whether interference is necessary for "ensuring a general unlimited standard of fundamental rights." Moreover, the violation of the duty to request a preliminary ruling concerns the Constitutional Court inasmuch as the violation of the right to a lawful judge may occur in cases in which lower courts do not request a ruling from the Court of Justice, as the Court of Justice is "a lawful judge" for the review of the conformity of national law provisions with Community law.

### **Povzetek**

*Ustavno sodišče Nemčije je bilo že večkrat poklicano, naj presodi skladnost zakonodaje Evropske skupnosti z Ustavo. Pri tem je Ustavno sodišče prepoznalo in v odločbah postavilo v ospredje dva sklopa vprašanj: vprašanje učinkovitega varstva pravic posameznika v razmerju do aktov organov Skupnosti ter vprašanje demokratične legitimacije zakonodajne oblasti Evropske unije.*

*Odnos sodelovanja med nemškim Ustavnim sodiščem in Sodiščem Evropskih skupnosti (SES) je nemško Ustavno sodišče obravnavalo v primeru, ki se je nanašal na Maastrichtski sporazum. Ustanovne pogodbe Evropske skupnosti so prenesene v nemško pravo z zakoni o ratifikaciji (Zustimmungsgesetze). Z njihovo pomočjo lahko Ustavno sodišče preiskuje skladnost sprememb in dopolnitev pogodb z nemško Ustavo. Nemčija je s Pogodbo o Evropski uniji zavezana k medvladnemu sodelovanju in mednarodnopravno zavezujočim ukrepom, ki posegajo na področje temeljnih pravic. Če se ti ukrepi izvajajo na območju Nemčije, spadajo v okvir presoje Ustavnega sodišča. Varstvo temeljnih pravic se do te mere ne pokriva s nadnacionalnim pravom.*

*Če gre za interpretacijo sekundarne zakonodaje Skupnosti, je za presojo pristojno SES, ki edino lahko zagotavlja enotno pravno interpretacijo v celotnem prostoru Skupnosti. Če bi SES sekundarno zakonodajo interpretiralo tako, da bi le-ta posegala v ustavno varovane pravice, ki na ravni Skupnosti niso varovane, bi bilo Ustavno sodišče v tem primeru - teoretično - pristojno. Enako bi veljalo takrat, ko bi, ne glede na to, ali je določena pravica priznana v Skupnosti, ukrep posegel v bistvo ustavno zagotovljene pravice. Vendar bi bilo za dopustnost takšne presoje treba premagati visoke ovire.*

*Dr. Hassemer na koncu obravnava še vprašanje predložitve predhodnega vprašanja v skladu z 234. členom Pogodbe o ustanovitvi Evropske skupnosti. Obveznost predložitve predhodnega vprašanja zavezuje vsa notranja sodišča držav članic, torej tudi ustavno sodišče. Če je takšna interpretacija ustavnega pomena, obveznost predložitve ne izključi pristojnosti ustavnega sodišča. Ustavno sodišče mora ne glede na odločitev SES preizkusiti, ali je poseg nujen zaradi "zagotavljanja splošnega neomejenega standarda temeljnih pravic." Kršitev predložitvene obveznosti zadeva ustavno sodišče tudi tako, da je mogoča kršitev temeljne pravice do zakonitega sodnika, kadar nižje sodišče primera ne predloži SES, kajti za presojo skladnosti določbe notranjega prava s pravom Skupnosti je SES zakoniti sodnik.*

## **1. The Position of the Federal Constitutional Court of Germany in the German Constitutional Order**

Proceeding from the experiences of the politically unsteady period of the Constitution of the Weimar Reich, which found its end by means of democracy, the leading idea founding the Federal Republic was to place a normatively strong constitutional restraint on the political process. The Federal Constitutional Court was established as a guardian of the Constitution, and could be appealed to by all the state authorities in order to decide conflicts in the political process.<sup>2</sup>

In the course of European integration, the Federal Constitutional Court was requested to review the conformity of Community law with the German Constitution several times. Thereby the Constitutional Court recognized in particular two integration barriers and brought them in foreground of its decisions: firstly, there is the question of the effective guarantee of the protection of fundamental rights of individuals against acts of Community authorities,<sup>3</sup> and secondly, the question of the democratic legitimacy of the legislature of the European Union.<sup>4</sup>

Before introducing the leading decisions of the Federal Constitutional Court, a brief review of the Constitution is needed. Two articles which deal with German integration into the European Community/Union can be found.

To begin with, the first paragraph of Article 24 of the *Grundgesetz* (hereinafter - the Constitution) has been part of the Constitution since 1949, and determines that the Federation may by law transfer sovereign powers to intergovernmental institutions, and therewith it reflects the openness of the Constitution to integration. In 1992 Article 24 of

<sup>2</sup> Vogel, *ibidem* (pg. 201, et sub.).

<sup>3</sup> Thus, not only the objective guarantee but also the procedural possibility to implement fundamental rights as subjective rights (Scheuing, *ibidem*, Vol. 163).

<sup>4</sup> Vogel, *ibidem*, (pg. 209).

the Constitution was amended by Article 23 of the Constitution as regards integration into the European Union. The first paragraph of the above-mentioned Article reads as follows: “In order to realize the idea of a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and which guarantees a level of protection of fundamental rights essentially comparable to that afforded by this Constitution. **To this end the Federation may transfer sovereign powers by law with the consent of the *Bundesrat*.** The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Constitution, or make such amendments or supplements possible, shall be subject to the second and third paragraphs of Article 79.”

The third paragraph of Article 79 of the Constitution determines that certain fundamental principles of the German Constitution are not open to constitutional amendments (“the guarantee of eternity”). In other words, the first paragraph of Article 23 of the Constitution grants the power to the Federal legislature to grant the European Union sovereign rights within the limits of the third paragraph of Article 79 of the Constitution (BVerfGE 89, 155 <172>).<sup>5</sup>

The remaining paragraphs of Article 23 of the Constitution concern the participation of the *Länder* in transferring sovereign rights to the European Union. They are not of importance for the discussion below.

## 2. A Review of the Decisions of the Federal Constitutional Court (chronological)

### a) BVerfGE 22, 293, *et sub*.

In one of its first decisions, in 1967 the Federal Constitutional Court presented general deliberations concerning the nature of the European Community. In the decision it wrote: “The Community is not itself a state, even a federal state. It is a community of a special nature engaged in a process of continuous integration, an “inter-governmental institution” within the meaning of the first paragraph of Article 24 of the Constitution, to which the Federal Republic of Germany – like the other Member States – has transferred particular sovereign rights. This means that a new public authority has been created, independent and autonomous in relation to the state authority of the individual Member States (BVerfGE 22, 293 <296>).”

The Federal Constitutional Court explicitly left open whether and to what extent the Federal Constitutional Court can compare Community law to the fundamental-rights norms of the Constitution in the context of a procedure on admissibility brought before it. This

<sup>5</sup> For more on resolving the conflicts between German constitutional law and European integration through the legislature changing the Constitution, see: Scheuing, *ibidem*, pg. 166, *et sub*.

namely depends on “whether and in what sense one may speak of the EEC authorities being bound by the fundamental-rights order of the Federal Republic of Germany” (BVerfGE, *ibidem* <298, *et sub.*>). The concrete constitutional complaint was dismissed as inadmissible, as it was aimed directly against a regulation of the Community (BVerfGE, *ibidem* <297>). It follows from the decision that for the jurisdiction of the Federal Constitutional Court the formal qualification of the authority which issued the challenged legal act is decisive. An authority standing outside the structure of the German State organization does not exercise any German public authority. It is not important in this case that the public authority of the EEC can arise only through the collaboration of German State authority (through the transference of sovereign acts pursuant to the first paragraph of Article 24 of the Constitution) (BVerfGE, *ibidem* <297>).

b) BVerfGE 37, 271, *et sub.* (“Solange I”)

In the decision known as “Solange I,” dated 1974, the Federal Constitutional Court continued its case-law. In the decision it recognized that Community law stems from an autonomous legal source. It did not draw the conclusion from the fact – differently than the European Court of Justice – that owing to the independence of the legal source, any special national law (legislation) cannot have primacy.<sup>6</sup> The Federal Constitutional Court on the contrary established that the two legal spheres, standing side by side one another, with their own developed validity, are independent (BVerfGE 37, 271 <278>). The binding effect of the case-law of the European Court of Justice on a national Constitutional Court cannot develop already due to the fact that the two standards which must be established in each review do not correspond (BVerfGE 52, 187 <200>). The European Court of Justice reviews the conformity with primary and secondary Community law, the standard for a review by the Federal Constitutional Court is the Constitution. The Federal Constitutional Court therefore does not need to deal with the question of whether national provisions are in compliance with Community law.

In the event that both legal spheres are affected, there is a conflict between secondary Community law and the German Constitution; due to the special meaning of the Constitution as regards the constitutional structure, the Federal Constitutional Court gave primacy to national law. Therefore it was judged that “as long as”<sup>7</sup> the integration process has not progressed to the degree that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity which is adequate in comparison with

<sup>6</sup> According to the case-law of the European Court of Justice, Community law has primacy over national law. This applies also to national constitutional law. By establishing the Community the Member States have vested sovereign rights for an unlimited period of time through the transference of their own sovereign rights. Thereby a legal system developed which is binding on its members and itself. Community law stems from an autonomous legal source and is therefore independent, which entails that it cannot claim supremacy over national law (quoted by Jäger/Broß, *ibidem*, pg. 14, *et sub.*).

<sup>7</sup> This is the word after which this decision (and also decision BVerfGE 73, 339) is named – and not a female name!

the catalogue of fundamental rights contained in the Constitution, secondary Community law will still be reviewed according to the standards of the Constitution (BVerfGE 37, 271 <285>). The Federal Constitutional Court nevertheless does not carry out national constitutional protection in the narrower sense. The Court has, on the contrary, explicitly acknowledged that the limitations of the German Constitution in the interests of the Community could in principle be justified (BVerfGE, *ibidem* <289>).

Due to such case-law of the Federal Constitutional Court, a court which holds that a regulation of Community law which is important for a decision is not applicable due to a violation of constitutional fundamental rights, is obliged, following an application to the European Court of Justice, to submit the case to the Federal Constitutional Court for a decision. An application to the European Court of Justice in accordance with Article 177 of the Treaty (now Article 234 of the Treaty) is anticipated (BVerfGE 85, 191 <203, *et sub.*>; 106, 275, <295>), due to the fact that as long as the applicability of a Community provision regarding its compatibility with Community law is not cleared, it lacks its relevance for a decision. Such is namely a pre-condition for a constitutional review by the Federal Constitutional Court (BVerfGE 82, 159 <191>; Jäger/Broß, *ibidem* <15>).

c) BVerfGE 73, 339, *et sub.* (“Solange II”)

Although the European Community has not yet adopted a catalogue of fundamental rights similar to the Constitution and implemented it, the Federal Constitutional Court in the “Solange II – Decision,” dated 1986, pronounced its requirement regarding regular control of Community law regarding its compliance with German fundamental rights. Thereby the Court took into consideration the case-law developed and implemented by the European Court of Justice, which regarding the concepts, contents, and the manner of implementation matches the standards of the fundamental rights of the Constitution. All the main bodies of the Community have professed to be guided by their respect for fundamental rights as arising in particular from the constitutions of the Member States and the European Convention on Human Rights in exercising their competencies and pursuing the goals of the Community, and to consider such to be their legal duty. This justifies – irrespective of the non-existent catalogue of fundamental rights – a withdrawal “for the time being from carrying out the judicial function”.<sup>8</sup> The principle of enjoying its own competence for such review is thus not relinquished, but temporarily suspended. The headnotes of the decision read as follows:

“As long as<sup>9</sup> the European Communities, in particular European Court of Justice case-law, generally ensure effective protection of fundamental rights against the sovereign authorities of the Communities which is regarded as substantially the same as the protection

<sup>8</sup> Kirchhof, *ibidem* (454).

<sup>9</sup> Compare with footnote 136.

of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution.” (BVerfGE, *ibidem* <340>)

d) BVerfGE 89, 155, *et sub.* (“Maastricht”)

In proceeding with a constitutional complaint based on a violation of Article 38 of the Constitution (the fundamental right to general, direct, free, equal and secret elections to the German Parliament) and challenging the ratifying act (*Zustimmungsgesetz*) to the Treaty of Maastricht, the Federal Constitutional Court dismissed the complaint as admissible but not founded. The Court in the decision further concretized and refined its principles. In the decision both limitations of integration were discussed.

(1) The Federal Constitutional Court reviewed the question of whether due to the Treaty of Maastricht the protection of the competencies of the German Parliament was to such a substantial extent transferred to the Council of Ministers that, according to Article 20 and the third paragraph of Article 79 of the Constitution, the utterly necessary minimum requirements of democratic legitimacy, meaning the sovereign power stemming from the citizens, could no longer be preserved, and thereby the right to participate in the legitimacy of the state authority through elections, guaranteed in Article 38 of the Constitution, was violated (BVerfGE, *ibidem* <172, 182>).<sup>10</sup> In other words, the issue was whether the elected Parliament was granted substantial competencies.

In addition to this, the Senate held that the Treaty of Maastricht does not establish a European state, but only a confederation of states which is essentially based on the Member States. The Member States are “the Masters of the Treaties” (BVerfGE, 89, 155 <190>). Such Treaties concluded for an indefinite period could thus be annulled by a contrary Act (BVerfGE, *ibidem*).

In this confederation of states the duties of democratic authority and supervision, at least regarding the crucial points, fall to the parliaments of the Member States. This means that the European Union and the European Communities were conferred only limited individual competencies on the basis of the previous Treaties in each case and that carrying out of the additional competencies of the Community is possible only on the basis of the appropriate amendments of the Treaties. However, such amendments to the Treaties depend on the affirmative decisions of the parliaments of the Member States. The Treaties should be

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<sup>10</sup> Vogel, *ibidem* (pg. 207).



foreseeably enacted, also in cases in which the Community authorities exercise the conferred sovereign authorities, as only in such manner could the national legislature accept responsibility for the ratifying act (*Zustimmungsgesetz*).

In addition to the cooperation of the national parliaments regarding the ratifying acts (*Zustimmungsgesetze*), the German Parliament influences the European policies of the Federal Government also through their parliamentary responsibility (Articles 63, 67 of the Constitution). Community competencies should therefore be primarily carried out by the Council of Ministers, as only its members have democratic authority through the parliaments of the respective Member States. In view of such cooperation - and influencing possibilities of the German Parliament, the Treaty of Maastricht did not eliminate the decision making - and supervisory abilities of the Parliament in a manner contrary to democratic principles.<sup>11</sup> The German Parliament therefore retained – as determined by Article 38 of the Constitution – competencies of substantial importance (BVerfGE, *ibidem* <189 et sub., 207>).

Compared to the national parliaments, the European Parliament has at the moment only a supporting function, which is becoming stronger as its influence on the policies and legislation of the Community grows. The decision (of crucial importance) that the democratic foundations of the Union gradually mature with integration and also with the progression of integration in the Member States, preserves a lively democracy. An excessive amount of duties and competencies undertaken by the Union would weaken democracy at the level of the states (the national level), as the parliaments of the Member States would no longer to an appropriate extent be able to participate in the authority of the implemented sovereign power of the Union (BVerfGE, *ibidem* <186>).

In order also in the future to be able to review whether in the legal regulations of the Union constitutional democratic principles were sufficiently considered, the Federal Constitutional Court retained the power to review also in the future whether “the legal acts of European institutions and bodies stay within the limits of their allowed sovereign rights, or if they exceed such”<sup>12</sup> (BVerfGE, *ibidem*, <156>).

The Federal Constitutional Court drew such a standard of review from the first paragraph of Article 23 of the Constitution, which requires the ratifying act (*Zustimmungsgesetz*) for the amendments of the treaty foundations of the European Union and for comparable regulations (BVerfGE, *ibidem*, <210>). Provided that the Federal Constitutional Court establishes that the legal regulations adopted by the Community bodies cannot be attributed to the democratically authorized transference of the sovereign rights, such have no binding effect in the German national territory. It follows from the above-mentioned that German

<sup>11</sup> Compare with Scheuing, *ibidem*, pg. 186, *et sub.*, to the review of this decision.

<sup>12</sup> Owing to such drastic wording the Court was faced with critique; “Maastricht” was less Europe-friendly than “Solange II”. Such critique might be justified.

state authorities may not apply such in Germany for constitutional reasons. It is the matter of a legal regulation being contrary to state competencies and consequently to democracy also if the regulation is based on such interpretation by the Community bodies that amounts to the expansion of a treaty; therefore the regulation does not require State bodies to apply it in the national legal system without the ratifying act (*Zustimmungsgesetz*), as the Treaty of the Union basically differentiates between carrying out narrowly limited, recognized sovereign competency and the amendment of the Treaty (BVerfGE, *ibidem*, <210>). A “competence over competence” was not proclaimed by the Union, and such does not belong to it (BVerfGE, *ibidem*, <197>).<sup>13</sup>

The “open space” of the German constitutional system provides for the entry of the Community legal order into the national legal order, but it is at the same time limited regarding the creation of Community law for the first time (appropriate competence is needed).<sup>14</sup>

(2) Secondly, they are limited by the effects of the Community regulations, as no violations of identity-forming basic values may be connected therewith.<sup>15</sup>

Considering the “Solange Decision,” which generally dealt with the protection of fundamental rights, the Federal Constitutional Court in the “Maastricht Decision” repeated that an important diminishing of the fundamental-rights standards is not connected with progressive integration. Furthermore, the Federal Constitutional Court guaranteed that effective protection of fundamental rights is generally guaranteed to the inhabitants of Germany also against the sovereign powers of the Community. In the EU, the guaranteed protection of fundamental rights is substantially similar to the absolutely necessary protection of fundamental rights determined in the Constitution, particularly as the existence of fundamental rights is generally guaranteed. The Federal Constitutional Court guarantees such also against the sovereign power of the Community (BVerfGE, *ibidem* <174, *et sub.*>). Also regulations stemming from the special public authority of the supranational organization which are separated from the state authorities of the Member States concern those who enjoy fundamental rights in Germany. Thereby they consider the guarantee of the Constitution and the duty of the Federal Constitutional Court to protect fundamental rights in Germany and not only against German state authorities. In view of the above-mentioned, the Federal Constitutional Court changed the direction of hitherto existing case-law, according to which constitutional review could apply exclusively to regulations of German state powers, *i.e.* to decisions of courts, the administrative acts of authorities, or the measures of the constitutional bodies of the Federal Republic (BVerfGE 37, 271

<sup>13</sup> See Scheuing, *ibidem*, pg 195, *et sub.*, for the critique of the Maastricht Decision. Particularly regarding the question whether the Federal Constitutional Court could decide at the last instance on the limitations of the Community competencies or if such falls within the jurisdiction of the Community, compare with Hirsch, *ibidem*.

<sup>14</sup> Hirsch, *ibidem*, pg. 2459

<sup>15</sup> Hirsch, *ibidem*, pg. 2459

<283>; 58, 1 <27>). In the future, violations of the fundamental rights which are based directly on Community law and which do not require national regulations could also be implemented before the Federal Constitutional Court.<sup>16</sup>

The Federal Constitutional Court restrictively draws attention to the fact that it exercises its competencies regarding the applicability of secondary Community law in Germany in a “cooperative-relationship” with the European Court of Justice, thereby the European Court of Justice guarantees the protection of fundamental rights in each individual case for the entire territory of the Community, to the effect that the Federal Constitutional Court can therefore limit itself to the general guarantee of the absolutely necessary standards of fundamental rights (BVerfGE 89, 155 <175> with regard to BVerfGE 73, 339 <387>). It follows from the above-mentioned that the European Court of Justice is competent to protect the fundamental rights of the citizens of the Federal Republic of Germany against the regulations of national (German) public power which are adopted on the basis of secondary Community law. The Federal Constitutional Court takes action only in cases in which the European Court of Justice does not respect the standards of the fundamental rights which the Federal Constitutional Court established in the “Solange II Decision” (BVerfGE 73, 339 <378-381>).

e) BVerfGE 102, 147, *et sub.* (“Regulation of the Bananas Market”)

In the decision regarding the regulation of the banana market in 2000, the Federal Constitutional Court uprightly preserved its case-law regarding the protection of fundamental rights against the legal regulation of the Community. Someone who wishes to assert before the Federal Constitutional Court a violation of a fundamental right through secondary Community law must demonstrate that the development of European law, including the case-law of the European Court of Justice after the pronouncement of the “Solange II Decision,” declined in terms of the necessary standard of fundamental rights. Therefore, the reasoning of an application or a constitutional complaint must reason in detail that in each case the irrevocably required protection of fundamental rights is in general not guaranteed. This requires a confrontation of the protection of fundamental rights at the national and community level in a manner such as carried out (BVerfGE 102, 147) by the Federal Constitutional Court in the “Solange II Decision” (BVerfGE 73, 339 <378 to 381>). In the concrete case the application was dismissed as inadmissible.

In practice this decision may lead to the conclusion that by the smooth running of events in the future a court or a citizen will be barely able to reason that the protection of fundamental rights within the Community had sunk under the threshold defined in the

<sup>16</sup> In BVerfGE 58, 1 (27) with reference to BVerfGE 22, 293 (295); 37, 271 (283, 285, *et sub.*) was established that the Federal Constitutional Court may not refer directly against the governmental acts of the Union.

“Solange II Decision”. This is going to be more difficult particularly through the fast approaching farewell of the European Union Charter of fundamental rights.<sup>17</sup>

f) The decision of the First Chamber of the Second Senate dated 17 February 2000 the “**Alcan Decision**” (NJW 2000, 2015)

While the subject of the decision on the EU Regulation on bananas was integration limitations of the protection of fundamental rights, the subject of the Alcan Decision was furthermore the second regarding Maastricht judgment applied integration limitation, namely a review of the competence conformity of Community legal acts. Concerning the individual case, the Federal Constitutional Court denied the existence of “overstepping legal acts”, without insisting on its interpretation in the review reasoned in the Maastricht judgment. The course of the decision is the same as in the decision on the EU regulation on bananas.

### 3. Summary

The cooperative relationship between the Federal Constitutional Court and the European Court of Justice can be, deriving from the Maastricht Decision, summarized as follows:

a) The establishment of primary Community law is subject to the respective national ratifying act (*Zustimmungsgesetz*) and to direct and primary constitutional supervision by the Federal Constitutional Court.<sup>18</sup> The Federal Constitutional Court thereby reviews the compliance with the Constitution of the changes, amendments, and extensions of the Treaty.<sup>19</sup>

In so far as the Federal Republic of Germany is bound by the European Union Treaty to intergovernmental cooperation or to internationally binding interferences of constitutional importance, all such interferences, in the event that they are in Germany, can be fully reviewed by the Federal Constitutional Court. The protection of fundamental rights in this sense does not overlap with supranational law which requires primacy. If the Federal Constitutional Court establishes that if such was carried out by the state could violate fundamental rights, such is prohibited by the Constitution (BVerfGE 89, 155 <177>).

b) In so far as it is a matter of the interpretation of secondary Community law, the supervisory competence of the European Court of Justice dominates as only it can

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<sup>17</sup> See Nicolaysen/Nowak, *ibidem*, pg. 1234, on the critique for what reason the Federal Constitutional Court instead of withdrawing from its case-law, sets insurmountable obstacles regarding the admissibility.

<sup>18</sup> Scholz, *ibidem*, Rn. 24.

<sup>19</sup> In this sense there is also a question whether the interpretation of a treaty is presented as a widening of the treaty without the consent of the national legislature.

guarantee a unified legal interpretation in the entire territory of the Community.<sup>20</sup> If the interpretation of secondary Community law by the European Court of Justice interferes with protected fundamental rights which – as reasoned in detail by the constitutional complainant – do not appear at the Community level (thus neither in the common tradition of fundamental rights or in the European Convention on Human Rights), then the supervisory competence of the Federal Constitutional Court consequently remains – theoretically – in existence. The same applies also in cases in which – despite fundamental rights recognized in the Community – the interference encroaches on the existence of the fundamental rights guaranteed by the Constitution. However, for such the admissibility obstacles are high, almost too high to be overcome in practice (compare with the “European Union regulation on bananas”).

#### 4. The Duty to Request a Preliminary Ruling

Finally, the issue of the duty to request a preliminary ruling in accordance with Article 234 of the Treaty establishing the European Community (prior Article 177 of the Treaty establishing the European Community) needs to be addressed.

a) The duty to require a preliminary ruling binds all national courts, thus also the Federal Constitutional Court. In cases where such interpretation is of constitutional importance, this cannot preclude the supervisory competencies of the Federal Constitutional Court. The Federal Constitutional Court must, directly after the decision of the European Court of Justice, review whether competence which is claimed to be to the benefit “of the general competence of the unlimited standards of fundamental rights” (BVerfGE 89, 155 <174>) require an interference.

b) The violation of the duty to require a preliminary ruling according to Article 234 of the Treaty establishing the European Community furthermore concerns the Federal Constitutional Court in such a manner that the provision on a lawful judge as determined by the Constitution can be violated by a specialized court if it does not fulfill the duty to submit a case to the European Court of Justice in order to clarify the disputed compliance of a national legal norm with Community law. The European Court of Justice is a “lawful judge” in the sense of the second sentence of the first paragraph of Article 101 of the Constitution.<sup>21</sup>

References:

1. Hirsch, Günter, *Europäischer Gerichtshof und das Bundesverfassungsgericht – Kooperation oder Konfrontation*, NJW 1996, 2457 et seq.

<sup>20</sup> Compare with Scholz, *ibidem*.

<sup>21</sup> Compare with Jaeger/Broß, *ibidem*, pg. 15 with reference to BVerfGE 73, 339 (367).

2. Jäger, Renate/Broß, Siegfried, Die Beziehungen zwischen dem Bundesverfassungsgericht und den übrigen einzelstaatlichen Rechtsprechungsorganen - einschließlich der diesbezüglichen Interferenz de Handelns der europäischen Rechtsprechungsorgane, *EuGRZ* 2004, 1 et seq.
3. Kirchof, Paul, gegenwartsfragen an das Grundgesetz, *JZ* 1989, 453 et seq.
4. Limbach, Jutta, Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa, *NJW* 2001, 2913 et seq.
5. Nicolaysen, Gert/Nowak, Carsten, Teilrückzug des BVerfG aus der Kontrolle der Rechtmäßigkeit gemeinschaftlicher Rechtsakte: Neuere Entwicklungen und Perspektiven, *NJW* 2001, 1233 et seq.
6. Scheuing, Dieter H., Deutsches Verfassungsrecht und europäische Integration, in: *Gemeinsames Verfassungsrecht in der Europäischen Union*, 1998, p. 157 et seq.
7. Scholz, Rupert; in *Maunz/Dürig/Herzog/Scholz*, Stand: Okt. 1996, Art. 23
8. Vogel, Wolfram, Verfassungsgerichte in der europäischen Integration: Deutschland und Frankreich im Vergleich, in: *Demokratiethorie und Demokratieentwicklung*, 2004, p. 197 et seq.

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## **IMPLEMENTING EUROPEAN STANDARDS INTO THE CASE-LAW OF THE CONSTITUTIONAL COURT**

### **Summary**

The first part of the paper deals with the genesis of the constitutional amendments adopted due to the integration of Slovenia into the European Union (collectively referred to as the European article). These constitutional amendments, which are based on an abstract (the proposals to explicitly mention integration into the European Union in the Constitution were not accepted) and restrictive approach are critically evaluated, and it is concluded that they correctly enabled from the constitutional viewpoint the integration of Slovenia into the European Union. Two of the adopted amendments have the greatest significance. The first establishes that the legal acts and decisions of international organizations shall be applied in Slovenia: “in accordance with the legal regulation of these organizations,” which enables the direct application and primacy of EU law. The second refers to the motives for the integration of Slovenia into international organizations (respect for human rights, democracy and the principles of the rule of law), and according to the evaluation of the constitutional legal experts, it enables the Constitutional Court to interfere in individual exceptional cases if these values were in any manner endangered by EU law. With reference to this, it is established that the European Union has recently, particularly by adopting the Charter of Fundamental Rights of the European Union in 2000 and by adopting the Constitution for Europe, invested a great deal in the development and the protection of human rights.

The second part deals with more than forty-years of experience of the Constitutional Court of the Republic of Slovenia, which is important from the viewpoint of the new demanding tasks which await the Court following integration into the European Union. Thereby most of the attention is devoted to the decisions of the Constitutional Court which refer to the case-law of foreign courts, *e.g.* the German Federal Constitutional Court, the Supreme Court of the USA, and the European Convention on Human Rights and the case-law of the European Court of Human Rights. The Constitutional Court has so far referred to the European Convention on Human Rights in more than 300 decisions, and in approximately 80 cases it has referred in the reasonings to the case-law of the European Court of Human Rights. An analyses of these cases shows that the Constitutional Court did not restrict itself to the very few decisions of the European Court of Human Rights in which Slovenia was a defendant. Of particular importance are references to the European Convention on Human Rights and the case-law of the European Court of

Human Rights in cases in which the level of the protection of individual human rights is lower in the Constitution of the Republic of Slovenia than in the European Convention on Human Rights. The case-law of Slovenian courts regarding adjudication within a reasonable time is critically discussed.

The closing part proposes an amendment to the Constitution which would revoke the competence of the Constitutional Court to review the constitutionality of executive regulations which can cause disputes to be reviewed before the Constitutional Court which are in other states of the European Union considered only at the level of lower courts, and a petition to draft a special agreement on mutual informing and co-operation of the constitutional courts in cases in which they review cases which refer to EU law.

### **Povzetek**

*Referat v prvem delu obravnava genezo ustavnih sprememb, sprejetih zaradi vstopa Slovenije v Evropsko unijo (ti. evropski člen). Ko kritično ocenjuje te ustavne spremembe, ki temeljijo na abstraktnem (zavrjnjeni so bili predlogi, da se v Ustavi izrecno omeni vstopanje v Evropsko unijo) in restriktivnem pristopu, ugotavlja, da so vendarle omogočile z ustavnopravnega vidika korektno vključevanje Slovenije v Evropsko unijo. Iz referata izhaja, da imata največji pomen dve sprejeti spremembi. Prva ugotavlja, da se pravo mednarodnih organizacij v Sloveniji uporablja "v skladu s pravno ureditvijo teh organizacij", kar omogoča neposredno uporabo in primat prava Evropske unije. Druga govori o motivih vključevanja Slovenije v mednarodne organizacije (spoštovanje človekovih pravic, demokracije in načel pravne države) in po oceni ustavnopravnih strokovnjakov omogoča Ustavnemu sodišču, da bi v posameznih izjemnih primerih lahko posredovalo, če bi bile te vrednote s pravom Evropske unije kakorkoli ogrožene. Ob tem ugotavlja, da je Evropska unija v zadnjem obdobju, še posebej s sprejemom Listine temeljnih pravic v Evropski uniji v letu 2000 in ob sprejemanju Ustave za Evropo, veliko investirala v razvoj in varstvo človekovih pravic.*

*V drugem delu referat obravnava tiste izkušnje dosedanjega, več kot štiridesetletnega delovanja Ustavnega sodišča Republike Slovenije, ki so pomembne z vidika novih zahtevnih nalog, ki ga čakajo po vstopu Slovenije v Evropsko unijo. Pri tem posveča največ pozornosti tistim odločitvam Ustavnega sodišča, ki se kakorkoli ukvarjajo z judikaturu tujih sodišč, na primer nemškega Zveznega ustavnega sodišča in Vrhovnega sodišča ZDA ter z Evropsko konvencijo o človekovih pravicah (EKČP) in judikaturu Evropskega sodišča za človekove pravice (ESČP). Ustavno sodišče se je doslej na EKČP sklicevalo v več kot 300 odločitvah, v približno 80 primerih pa se je v obrazložitvi svojih odločitev sklicevalo na judikaturu ESČP. Analiza teh primerov kaže, da se v njih Ustavno sodišče ni omejevalo na zelo maloštevilne odločbe ESČP, v katerih je bila Slovenija tožena stranka. Poseben pomen ima sklicevanje na EKČP in judikaturu*



*ESČP v primerih, kadar je raven varstva posameznih človekovih pravic v Ustavi Republike Slovenije nižja, kot v EKČP. Kritično obravnava prakso slovenskih sodišč glede sojenja v razumnem roku.*

*V sklepnem delu je podan predlog za spremembo Ustave, ki bi ukinila pristojnost Ustavnega sodišča, da presoja ustavnost podzakonskih aktov, zaradi česar se pred Ustavnim sodiščem znajdejo spori, ki so v drugih državah Evropske unije komaj na ravni nižjih sodišč rednega sodstva in predlog za pobudo za oblikovanje posebnega sporazuma o medsebojnem informiranju in sodelovanju ustavnih sodišč, kadar obravnavajo zadeve, povezane s pravom Evropske unije.*

## **1. Introduction**

In the present paper I discuss two issues which are important for the functioning of the Constitutional Court of the Republic of Slovenia following the integration of Slovenia into the European Union. The first refers to the constitutional amendments connected with integration into the European Union (collectively referred to as the European article), by which the constitutional framework for the functioning of the Constitutional Court when deciding cases in the jurisdiction of the European Union is determined. The second issue is an analysis of the previous decisions of the Constitutional Court which refer to foreign and international law, and particularly to Council of Europe law, and which are important from the viewpoint of preparing for the new tasks which await the Constitutional Court following the integration of Slovenia into the European Union. In the conclusion I also propose adopting an agreement on the mutual co-operation of the constitutional courts of the member states of the European Union.

## **2. The Amendments of the Constitution of the Republic of Slovenia required by Integration into the European Union**

Why were the amendments of the Constitution of the Republic of Slovenia connected with the integration of Slovenia into the European Union (collectively referred to as the European article), needed and necessary? At least for practical problems with reference to such issues as are regulated by the amendments that address the extradition of citizens

of Slovenia<sup>1</sup> and the purchase of real estate by aliens,<sup>2</sup> the justification of which is doubtful in the opinion of many, or at least not reasoned convincingly enough.<sup>3</sup> To a much greater extent they were necessary for principled reasons.

The 1991 Constitution of the Republic of Slovenia is an independence constitution that was adopted half a year after the attainment of independence, as it concluded the process of gaining independence of Slovenia which had originated in the former Yugoslav federation as one of its member republics. The constitutional process of its development, in which the transition (the changing of the economic and political systems) and the attainment of independence ran parallel, can be traced back to at least 1989. Until that time numerous amendments to the Constitution of 1974<sup>4</sup> had been adopted, whose number rose to exactly one hundred by the attainment of independence. It is indeed true that individual documents and political statements from the period of attaining independence indicated that the attainment of independence on the grounds of self-determination does not serve its own purposes and does not mean that Slovenia gave up the prospect of aligning itself with states arising in the territory of the former Yugoslav Federation or with other European states. However, the Constitution of the independent Republic of Slovenia did not contain provisions which would at least indirectly address integration into international organizations in general, and into organizations of a supra-national nature separately, nor did it mention the European Union. Therefore, the opinion of certain respected lawyers who co-authored the Constitution that constitutional amendments are not necessary in order to join the European Union, as the right to self-determination, as provided by the Constitution, enables not only the transfer of the exercise of sovereign rights to the bodies of international organizations but also to return such rights to the competence of the state, could not be accepted.<sup>5</sup> Similar also holds true for the viewpoints claiming that the constitutional provision

<sup>1</sup> Already before the amendments, the Constitution permitted the extradition of citizens of the Republic of Slovenia in cases covered by treaties that are binding on Slovenia. By the amendment the constitutional prohibition against extraditing citizens of Slovenia to a foreign country was abolished (Article 2 of the Constitutional Act Amending Chapter I and Articles 47 and 68 of the Constitution of the Republic of Slovenia, adopted on 3rd March 2003).

<sup>2</sup> By the amendment of the Constitution the principle of reciprocity and the determination of a special two-thirds majority vote of all deputies for adopting a law and the ratification of a treaty which provides for the possibility of a purchase (Article 3 of the Constitutional Act) were eliminated from the provision on the possibility of aliens purchasing real estate.

<sup>3</sup> The arguments for such amendments were that Slovenia had promised them and/or that also other member states of the European Union have similar provisions in their constitutions.

<sup>4</sup> The most renowned is amendment X, which reads that the self-determination of the Slovenian nation, which also contains the right to secede, is permanent, integral and inalienable. See also: C. Ribičič, *Ustavopravni vidiki osamosvajanja Slovenije* (The Constitutional Aspects of the Attainment of the Independence of Slovenia) Uradni list, Ljubljana, 1992, pgs. 19 *et sub*.

<sup>5</sup> Compare Dr. Peter Jambreč, *Temeljna in trajna pravica slovenskega naroda do samoodločbe* (The Fundamental and Permanent Right of the Slovenian Nation to Self-determination), in *Komentar Ustave Republike Slovenije* (Commentary of the Constitution of the Republic of Slovenia), edited by L. Šturm, FPDEŠ, Ljubljana, 2002, pgs. 36, 37. The author emphasized that Slovenian constitutional doctrine in a “programmed manner determines the intention and will of the national state to respect the principles of international law (the Plebiscite Act), to align with other states, and to, *inter alia*, integrate into the European Community and other alliances with states (The Declaration on Independence)...”

regarding treaties also suffices for accession into the European Union.<sup>6</sup> Integration into the European Union entails consequences too far-reaching to be enabled without an explicit constitutional basis or to be treated as the mere ratification of a treaty.

Integration into the European Union is of such importance not only from the viewpoint of constitutional law, but also from the viewpoint of international law, that it could not be carried out correctly without constitutional amendments. In 1997 the associate membership of Slovenia alone required a minor intervention into the Constitution, thus even before the ratification of the part of the Association Agreement which referred to the acquisition of ownership rights to real estate by aliens.<sup>7</sup> On the other hand, it is indeed true that certain members of the European Union do without the explicit constitutional provisions which would form the basis for integration into the European Union and for establishing the primacy of EU law over internal (domestic, national) law.

A change of the constitutional order upon integration into the European Union is very far-reaching for every new member state. Therefore, it is difficult to thoroughly express such a change with amendments to only certain individual provisions of the normative part of a Constitution. From this viewpoint, what were not studied thoroughly enough in the proceedings to amend the Constitution were deliberations on amending the preamble to the Constitution,<sup>8</sup> on creating a special preamble to the Constitutional Act Amending the Constitution,<sup>9</sup> and on creating a larger number of new constitutional provisions which would in detail regulate numerous important changes.<sup>10</sup> In view of the fact that none of

<sup>6</sup> According to Article 8 of the Constitution, ratified and published treaties are applied directly and are superior to laws and regulations (however, not the Constitution).

<sup>7</sup> The Constitutional Court gave an opinion binding on the National Assembly in case No. Rm-1/97 which reads that the provision of the Association Agreement which pledges the amendment of the Constitution by means of which citizens of the member states of the European Union could acquire ownership rights to real estate, is inconsistent with the Constitution. The Constitutional Court decided that “the National Assembly may not approve the ratification of a treaty by which the state would, by its authority, bind itself to the implementation of an international obligation, if it knew that it was at the time of deciding on the approval thereof (according to the terminology of the Constitution, in ratification proceedings to approve a treaty as domestic law) inconsistent with the Constitution. In such case, it would be a case of a decision by the National Assembly which would to a certain extent prejudice the decision of the constitution framer or it would put the constitution framer in a position similar to this...” (Paragraph 35 of the reasoning).

<sup>8</sup> Borut Šinkovec, *Približevanje članstvu v Evropski Uniji in ustava* (Rapprochement between Membership in the European Union and the Constitution), *Pravna praksa*, No. 422/1999, pg. 15. In Germany the importance of the European integrations is stated in the preamble to its Constitution, which speaks of the German nation as an equal partner in the united Europe.

<sup>9</sup> The proposition on the preamble to the European article would leave the preamble to the Constitution untouched, it would however emphasize the importance of the integration of Slovenia into the European Union. Compare Ciril Ribičič, *Interpretativna moč preambule ustave* (The Interpretative Power of the Preamble to the Constitution), *Pravna misao*, Sarajevo, No. 3-4/2004, pg. 13.

<sup>10</sup> Dr. Ivan Kristan, *Razprti pogledi stroke ob predlogu ustavne preнове* (The divided opinions of the Profession on the Proposal of the Constitutional Renovation), *Pravna praksa*, No. 29/2001, pg. 3, and *Evropsko povezovanje in ustava* (European Alignment and the Constitution), VIII. Dnevi javnega prava, Portorož, 2002, pgs. 213 *et sub*. The author draws attention to the fact that in the opinion of certain experts “in the Constitution “europeanisation” should be regulated substantially more broadly, as it follows from the Government proposal that special attention should be particularly devoted to the transfer of sovereign rights to the EU.”

the above-mentioned suggestions were seriously discussed, we may speak about a “European deficit” in the Constitution of the Republic of Slovenia until the eventual new amendments are adopted. There can be no allowance for the excuse of a lack of time and knowledge, as the integration of Slovenia into the European Union did not come about overnight, and not unexpectedly quickly.

More convincing is the argument that such a deficit could be observed in the constitutions of almost all members of the European Union, including the new ones. The European articles are more like unnatural supplements, and the constitutions like patched trousers, rather than like amendments which are brought into constitutional systems as a result of membership in the European Union and which are systematically integrated into their texts. The truth is that the European articles in general deal more with the form than with the contents of European integration, and more with the manner, proceedings and limitations regarding the transfer of competencies than with the competencies itself. If such patching is comprehensible in the old members of the European Union who co-created a gradual transformation of the European Communities, it is less justified in the new members, who joined the European Union at a time when it had already gained a distinctive supra-national, supra-state meaning. Its supporters draw attention to the possibility of further constitutional amendments following integration into the European Union.

In amending the Constitution of the Republic of Slovenia a realistic, restrictive, pragmatic, and, it could be said, minimalist approach prevailed: what should be amended was only what was necessary in order for Slovenia to be smoothly integrated into the European Union. One of the starting points of such an approach was the standpoint that it is not realistic to expect that by means of the constitutional amendments Slovenia could be ensured a better position and awarded a greater influence in the European Union than the Union is willing to acknowledge to other member states.<sup>11</sup> Indeed, such a realistic approach is by itself convincing: Slovenia was not in the position to negotiate for itself a special, asymmetrical position in the European Union. The task of the constitutional amendments should thus have been to enact in the Constitution approximately certain content in a manner and the structure similar to that of other member states. Perhaps it is not essential that such an approach deprived Slovenia of a creative restlessness and (perhaps also a

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<sup>11</sup> Compare the discussion at the public presentation of opinions on the constitutional amendments which refers to international integration and the co-operation carried out by the Constitutional Commission of the National Assembly held on 17th June 2002. At the discussion Franc Testen drew attention to the fact that individual members of the European Union cannot themselves choose the conditions under which they would integrate into the EU, but the same rules apply to all. Thus, it is doubtful whether the limitations and reservations, even if written into the Constitution, were at all admissible or effective: whoever wants to make an omelet, which in the EU is the same for all the states, must break an egg...The opposite standpoint was adopted by Dr. Ivan Kristan, who strived for a larger number of constitutional amendments, and for the amendments of the Constitution to enable the transfer part of the sovereign rights to the European Union. In his opinion, these provisions are reasonable from the viewpoint of the Constitution and its function, notwithstanding the external effects of such provisions.

naïve) feeling of sovereignty and freedom in deciding on integration into the European Union as well as a search for the best possible constitutional solutions.

More fundamental is the question of whether such a minimalist approach contributed to the fact that Slovenia did not succeed and knew or did not even try to ensure for itself in any area something similar to what Denmark (regarding real estate) and Finland (regarding the role of the parliament in deciding on the matters referring to the European Union) had previously managed, or to what this time around Poland (regarding the transitional period for the purchase of real estate) and Slovakia (regarding a statement on the option to leave the European Union) did.<sup>12</sup> The statement on the option to leave the European Union could be one of such particularities of the Slovenian Constitution whose purpose would naturally not be to ensure a special privileged position for Slovenia, but which would mean an explicit statement on something which would as a potential option be acquired by all the member states (and thus before the option of leaving the Union was explicitly included in the Constitution for Europe). The argumentations that the option of leaving is in any case a matter of course or that Slovenia would not have benefited in the process of attaining independence if the right to secede had been provided in its Constitution are not convincing enough. The truth is just the opposite - that such statement on the option to leave would be substantiated by the practical experiences of Slovenia and would be an expression of the conviction of its citizens that they are joining the European Union on the basis of their free choice, and that no one can ever prevent them from leaving the Union if such will changed.

A pragmatic and realistic approach already prevailed regarding the initial question: a concrete, abstract or combined approach. It was a question of whether to concretely mention the integration of Slovenia into the European Union in the Constitution, or to define rules for the integration of the state into international organizations (and defensive alliances) in general. An examination of the materials of the Constitutional Commission shows that the official reasoning in favour of adopting an abstract approach, as opposed to numerous and extensive arguments in favour of adopting concrete or combined approaches,<sup>13</sup> were limited to reasons of a mostly pragmatic nature.<sup>14</sup> In addition, a certain discrepancy between the adopted abstract approach and the fact that for the referendum

<sup>12</sup> Some constitutions explicitly mention, as regards concluding treaties, also the possibility to withdraw from such or the possibility of their termination.

<sup>13</sup> Supporters of these two approaches emphasized that the European Union and its law have numerous particularities by which they are differentiated from other international organizations and their acts, and owing to this fact it is theoretically disputable and dangerous in practice to treat them as just one of the international organizations.

<sup>14</sup> The nature of the European Union is allegedly disputable, and difficulties could be caused also by the eventual change of the name of the European Union in the future. The greatest weight is laid upon the finding that an abstract approach is more appropriate in view of the fact that the Constitution is also in the remaining parts based on general and abstract provisions. Compare Dr. Miro Cerar, *Ustavna podlaga za prenos suverenosti in za vstop v obrambne zveze* (The Constitutional Basis for the Transfer of Sovereignty and for Integration into Defensive Alliances), *Podjetje in delo, Dnevi slovenskih pravnikov, Portorož*, 2003, pgs. 1466, 1467.

on integration into the European Union (and NATO) it could be observed that the rules which generally apply for a (legislative) referendum were changed. Particularly two changes (to consider only valid votes and the prohibition on calling a second referendum regarding the same question – both regarding the adoption of a law on the ratification of a treaty)<sup>15</sup> were foreseen with the purpose of increasing the possibility of the passage of the concrete referendum on integration into the European Union (and particularly into NATO).

The adopted constitutional amendments enabled the constitutionally correct integration of Slovenia into full European Union membership. With reference to such, the text stating that the legal acts and decisions of international organizations shall be applied in Slovenia “in accordance with the legal regulation of these organizations” is decisive. This concerns the primacy of EU law over national law. Not adopting a standpoint which would conceal this fatal change with the excuse that it is a case of something which is understandable *per se*, is comprehensible and correct. By this provision Slovenia consented not only to the direct application of EU law but also to the supremacy of such law over the national legal order. However, it would be an exaggeration to understand its contents as if EU law was superior also to the Constitution of the Republic of Slovenia. It is the Constitution and its amendments that are the legal basis for the integration of Slovenia into the European Union. To deny the Constitution, to relegate it to the status of a legal act inferior to EU law, would undermine the constitutional foundation of the integration of Slovenia into the European Union. Provided that EU law was by itself superior to the Constitution, the constitutional amendments would not be needed, as with the integration of the state into the European Union its legal order would automatically apply, notwithstanding the contents of the constitutional provisions. In such a case, it would not be a matter of transferring the exercise of individual sovereign rights of the state to the European Union but an overall denouncement of the sovereignty of Slovenia and its Constitution.

Only one of the consequences of such unacceptable interpretation would be that the Constitutional Court of the Republic of Slovenia, as a guardian of human rights and constitutionality, would lose the reason for its existence. The fact that in individual cases the European Court of Justice has indeed given priority to EU law over a national constitution does not entail a final resolution of this issue. It is expected that also in the future there will be dialogues between the constitutional courts of the individual member states and the European Court of Justice in cases of conflicts between EU law and national constitutions, as has been the case in the past, *e.g.* with the German Federal Constitutional Court (Solange I and II). This particularly applies for the area of the protection of human rights.

In the European article the above-mentioned amendment of the Constitution which ensures the primacy of EU law in Slovenia has its anti-pole in the provision which determines that

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<sup>15</sup> Article 1 of the Constitutional Act.

international organizations to which the exercise of part of the sovereign rights is transferred must be based “on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law.”<sup>16</sup> This is the most important part of the adopted amendments.<sup>17</sup> This provision is in compliance with the general approach of the Constitution towards human rights, both in the preamble and in the normative section. It left the door slightly open for interventions by the Constitutional Court in exceptional cases. The Court will not be allowed to react in cases in which national interests in general are violated by EU law, but only in cases if violations occur in connection with ensuring human rights and fundamental freedoms, democracy and the principles of the rule of law.

It is an instance of a particular safety fuse which will “burn out” only in the event something important goes very wrong in the European Union. Certainly this could happen only very exceptionally. Particularly if it is considered that the European Union has of late invested a great deal in the development of human rights.<sup>18</sup> For example: in drafting the Constitution of Europe, the Union placed great stress upon human rights, as (1) it included a modern catalogue of rights and freedoms in the Constitution (The Charter of Fundamental Rights of the European Union), (2) it recognized the great importance of the provisions on human rights in the constitutions of the member states and that of the European Convention on Human Rights, (3) it emphasized the meaning of the case-law of the European Court of Human Rights, and (4) it obligated the European Union to accede to the European

<sup>15</sup> Article 1 of the Constitutional Act.

<sup>16</sup> The provision which refers to Slovenia entering into defensive alliances is somehow different, as it does not connect the above-mentioned values with defensive alliances but with the states with which Slovenia enters into such alliances.

<sup>17</sup> Compare Petja Toškan, *Evropski člen in ustavna zaščita temeljnih človekovih pravic* (The European Article and the Constitutional Protection of Fundamental Human Rights), *Pravna praksa*, No. 3/2002, pg.4. In the author’s opinion, the Government did the right thing, as it had not bound the validity of EU law in Slovenia to the conformity of such law with the national Constitution. “However, the absence of the explicit constitutional provision does not mean that human rights are not protected, in the extreme cases also at the national level.” The fact that the power of the legal order of the European Union follows from the constitutions of the member states is a basis for the option of the exceptional interference of national constitutional courts: “The Slovenian Constitutional Court will thus be able in extreme cases of violations of fundamental human rights on the basis of EU regulations in proceedings with a constitutional complaint to use the argument that the Constitution of the Republic of Slovenia is a source of the legal power of the EU and of transfer of sovereignty to the EU – EU competence is derivative and exists as a delegation of sovereignty which follows from the Constitution.”

<sup>18</sup> With reference to this, Dr. Mirjam Škrk draws attention to the fact that “according to Article 6 of the EU Treaty, liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law are principles which are common to the Member States.” (*The Role of the Constitutional Court of the Republic of Slovenia Following Integration into the European Union*, Constitutional Court of RS and the Venice Commission, Bled, 2004).

Convention on Human Rights.<sup>19</sup> However, the European Convention on Human Rights and the case-law of the European Court of Human Rights do not proceed from the primacy of European law concerning human rights over national law,<sup>20</sup> but from the principle of subsidiarity and from the principle that in concrete cases the law which guarantees a higher degree of protection of rights must be applied.

### **3. The Constitutional Court and the European Court of Human Rights**

Notwithstanding the particularities, complexity and the difficulties of having a clear overview of EU law, the Constitutional Court has been preparing for the new challenges which await in the European Union by resolving all the legal issues which have arisen in connection with foreign and international law in general, and European law regarding human rights in particular, the case-law of international courts, and especially the European Court of Human Rights.

The particularity of the Slovenian Constitutional Court compared to the constitutional courts of other new member states of the European Union is that in Slovenia the Court has more than forty years of tradition, as it was established already in 1963 (as the court

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<sup>19</sup> The Venice Commission at its 57th plenary session adopted an Opinion (Opinion on the Implications of a Legally-binding EU Charter of Fundamental Rights on Human Rights Protection in Europe, Venice, 13th December 2003), in which it emphasized that the accession of the European Union to the European Convention on Human Rights is of fundamental importance from the viewpoint of the level of the protection of human rights and ensuring the legal certainty of the citizens of the member states of the Council of Europe, which are also members of the European Union. It could be said that this Opinion represents the complete negotiation position of the Council of Europe for the negotiations with the European Union as regards the manner of the implementation of the decision on the accession to the European Convention on Human Rights, which is stated in the Constitution for Europe. The Venice Commission emphasized that the accession to the European Convention on Human Rights should be carried out in a manner such that the relation between the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union (which became legally binding by its incorporation into the Constitution for Europe) is such as the relation between the European Convention on Human Rights and national constitutions, and the relation between the European Court of Human Rights and the European Court of Justice is similar to the relation between the European Court of Human Rights and national constitutional courts. The European Court of Justice could require from the European Court of Human Rights an opinion on how to interpret the European Convention on Human Rights before reaching a final decision, and acts of the bodies of the European Union would be subjected to supervision by the European Court of Human Rights from the viewpoint of whether they respect minimal standards determined by the European Court of Human Rights regarding the protection of human rights. Thus a different interpretation of the European Convention on Human Rights by the European Court of Human Rights and the European Court of Justice which regard human rights in a different manner, would be avoided: "...the Luxemburg Court decides human rights issues in the broader context of Community law and the purposes and functions of European integration, while the Strasbourg Court deals only with human-rights issues, leaving it to the domestic courts to decide the issue in its broader context."

<sup>20</sup> From this viewpoint, the contents of Article 53 of the Charter of Fundamental Rights of the European Union is illustrative as it explicitly prohibits such interpretation of this Charter which would limit the degree of rights determined by EU law, treaties signed by the member states of the EU, by the European Convention on Human Rights, or by the national constitutions.



of one of the republics of the former Yugoslav federation). Irrespective of its then substantially narrower competencies, the Constitutional Court had acquired the basic knowledge, experience and technical conditions for its later activities already before the attainment of independence. Prior to the change in the political system the Court represented the institution which weakened the system of the assembly system based on the principle of the unity of powers.<sup>21</sup> By reviewing the constitutionality of laws it limited the arbitrariness of the legislature, and by certain decisions it made an important contribution to the development of human and minority rights.<sup>22</sup> The above-mentioned applies for the period after 1974 when the Constitution of the Republic of Slovenia and the Constitutional Court were given a more important role,<sup>23</sup> which was particularly emphasized at the time of attaining independence, when the federal powers could not legally prevent certain constitutional amendments and the attainment of the independence of Slovenia based thereupon.<sup>24</sup>

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<sup>21</sup> There exist also opposite opinions which present the Constitutional Court from this period as one of the institutions which merely fortified and strengthened the undemocratic system. Compare Franc Testen, Uvodni (na)govor predsednika Ustavnega sodišča RS (Opening Speech of the President of the Constitutional Court of the Republic of Slovenia), *Podjetje in delo*, No. 8/2001, pg. 1621.

<sup>22</sup> For example the Constitutional Court of SRS already in 1970 decided (U-I-31/69) that the law which determined bilingual primary education in the area in which the Hungarian minority lives, was not inconsistent with the Constitution. For an overview of the decisions which refer to human rights, See: Dr. Arne Mavčič, Dr. Marijan Pavčnik, *Temeljne pravice in razlagalna vrednost ustave* (Fundamental Rights and the Interpretative Value of the Constitution), in: *Slovenija in EKČP* (Slovenia and European Convention on Human Rights), zbornik razprav, Svet za varstvo človekovih pravic in temeljnih svoboščin (Council for the protection of human rights and fundamental freedoms), Ljubljana, 1993, pgs. 27 *et sub*.

<sup>23</sup> Following the constitutional amendments in 1974 onward, it is unfair to present the Constitutional Court of Slovenia as a component of the Constitutional Court of Yugoslavia. The Republic Constitution namely could not be inconsistent with the Federal Constitution, however, the Federation did not have effective legal remedies for abolishing such inconsistencies as they occurred.

<sup>24</sup> See also: Ciril Ribičič, *Ustavnopравни vidiki osamosvajanja Slovenije* (The Constitutional Aspects of the Attainment of Independence of Slovenia), Uradni list, Ljubljana, 1992.

Numerous times in the reasoning of its decisions the Constitutional Court has referred to the case-law of some of the most respected foreign courts (particularly the German Federal Constitutional Court<sup>25</sup> and the Supreme Court of the USA<sup>26</sup>) and to the UN conventions and charters.<sup>27</sup>

From the viewpoint of the future role of the Constitutional Court, while resolving individual disputes it has been most important to consider the European Convention on Human Rights and the case-law of the European Court of Human Rights, not only regarding constitutional complaints but also when reviewing the constitutionality of regulations. The European Court of Human Rights operates on the grounds of the principle of subsidiarity, thus the affected persons may refer to it only after they have exhausted all the legal remedies provided in the state which they have taken action against. It must be taken into consideration that the Council of Europe has developed an effective system for the protection of human rights. Minimum standards for the protection of human rights<sup>28</sup> determined in the case-law of the European Court of Human Rights, are binding on all the member states of the Council of Europe. These states more or less regularly pay the amounts determined by the European Court of Human Rights in its decisions as just satisfaction to injured persons for the violations of rights determined by the European Convention on Human Rights, as well as the costs of proceedings. If they do not do so they are threatened with criticism and eventual sanctions imposed on them by the Council

<sup>25</sup> The similarities of the constitutional regulation and the regulation of the position and competencies of the constitutional courts in the Federal Republic of Germany and the Republic of Slovenia contribute to the fact that the Constitutional Court in the reasonings of its decisions (around 20 cases) and some judges in their separate opinions (Dr. Lovro Šturm, Dr. Peter Jambrek and Matevž Krivic) have referred to the case-law of the German Federal Constitutional Court. This was the case regarding the following issues: the right of ownership, the prohibition on the operation of political parties, the understanding of the principle of the rule of law, the competence of a court to determine the manner of executing judgments, awarding custody of children, judicial supervision of elections, the separation between the State and religious communities, the freedom of religion, the position of the state radio and television, the equality of the voting right.

<sup>26</sup> The Constitutional Court has several times referred to the famous judgment in the Miranda case (e.g. in the reasoning of decision No. Up-134/97), and to other cases from the area of the protection of rights in criminal proceedings, to which also some judges in their separate opinions have referred. Thus, the Constitutional Court in the above-mentioned case stressed that according to a more recent understanding of the privilege against self-incrimination, which was introduced by the Miranda case, a defendant has the right to remain silent: "This means that the state may not legitimately require testimonial evidence which would incriminate an individual. The privilege is fulfilled only in cases in which a person is ensured the right to remain silent unless in the unimpeded carrying out of their will they decide to speak." (Paragraph 10, footnote 5)

<sup>27</sup> Compare the reasoning of the decision in case No. U-I-221/00, which refers to the right to asylum (Paragraphs 4 and 13 of the reasoning). The Constitutional Court, inter alia, emphasized that the UN Convention requires consideration of all the relevant circumstances: "also the fact whether in the respective state there exists numerous systematic serious, obvious or mass violations of human rights."

<sup>28</sup> Luzius Wildhaber, the President of the European Court of Human Rights, emphasized that the system of the protection of human rights within the framework of the Council of Europe and the European Court of Human Rights should be differentiated from the uniformity upon which the European Union builds, as the Council of Europe is restricted to a guarantee of the minimum common measures which should strengthen the protection of human rights in the member states (Luzius Wildhaber, *Človekove pravice: vprašanje ravnotežja?* (Human Rights: The Question of Balance?), *Dignitas*, No. 15-16/2003, pg. 5). Compare also: Clare Ovey, Robin White, *European Convention on Human Rights*, Oxford, 2002, pg. 14.

of Europe. In certain states, also in Slovenia, retrials regarding criminal proceedings for which the European Court of Human Rights has established violations of human rights may occur, and such decisions may also be respected in passing measures of clemency. Nevertheless, the possibilities which the European Court of Human Rights has in enforcing human rights must not be overestimated, as the Court cannot itself substitute for weaknesses which the judicial systems of the member states have in this area.<sup>29</sup>

However, in its decisions the European Court of Human Rights broadly interprets the range and the boundaries of the discretion of states (the margin of appreciation): they are obliged to fulfill minimum standards of the protection of human rights, but are independent in deciding on the manner of protection and in determining higher standards and a higher level of the protection of rights in accordance with their particularities and needs.<sup>30</sup> Slovenia has already had some painful experiences with the decisions of the European Court of Human Rights. This particularly refers to Slovenia being found guilty in November 2000 for the inhumane treatment by the police which injured German citizen Rehbock while arresting him (*Rehbock v. Slovenia*, App. No. 29462/95), and who had entered its territory with the intention to sell drugs.<sup>31</sup> Currently Slovenia is facing conviction in numerous cases regarding violations of the provision of the European Convention on Human Rights which refers to adjudication within a reasonable time.<sup>32</sup> Up to the present a decision by the European Court of Human Rights which directly incriminates the Constitutional Court of Slovenia for a violation of human rights determined in the European Convention on Human Rights, has not yet been adopted, but decisions have always referred to the judgments of regular courts.

The European Convention on Human Rights has been directly cited in more than 300 decisions of the Constitutional Court, and in approximately 80 cases the Constitutional

<sup>29</sup> Dr. Anton Perenič draws attention to the limited reach of the European Court of Human Rights, and thus on a symbolic level calls attention to the fact that human right grew over the boundaries of individual states, (Svet Evrope in človekove pravice) [The Council of Europe and Human Rights], in *Dokumenti človekovih pravic z uvodnimi pojasnili*, Ljubljana, 2002, pg. 57. In his opinion, the work of the European Court of Human Rights is also in Slovenia bound with excessive hopes and illusions, and thus due to the poor knowledge of the European Convention on Human Rights and functioning of the European Court of Human Rights.

<sup>30</sup> See also Clare Ovey, Robin White, *European Convention on Human Rights*, Oxford, 2002, pgs. 39-41. The authors emphasized a broad understanding of the range of the discretion of states which vacillates depending on which rights it refers to, what the circumstances of a given case are, what the degree of differentiation of a given regulation in the Member States is, etc.

<sup>31</sup> Due to this judgment, Slovenia not only amended regulations on supervising the protection of human rights from the side of the police, but also the legal regulation that enables detainees to communicate.

<sup>32</sup> The European Court of Human Rights opines that Slovenia does not have an effective legal remedy against violations of this right. Compare the dissenting opinion of Dr. Ciril Ribičič in case No. Up-138/03. In this dissenting opinion it was emphasized that the majority of the applications from Slovenia to the European Court of Human Rights refer to adjudication within a reasonable time. The European Court of Human Rights drew clear criteria for a review of in which cases it is a matter of a violation of the convention right to adjudication within a reasonable time which Slovenia does not regard or regards to a lesser extent than other states which in the past encountered serious judicial delays, recently e.g. Portugal, Croatia or Slovakia.

Court has directly referred to the case-law of the European Court of Human Rights in the reasonings of its decisions. Such reference can also be observed in several separate opinions filed by Constitutional Court judges.<sup>33</sup> Furthermore, it must be considered that often the expert materials (the reports which are drafted by the legal advisers of the Constitutional Court), which are a basis for the decisions of the Constitutional Court, contain an overview of the case-law of the European Court of Human Rights without always directly mentioning such in the text of the decision. Since the ratification of the European Convention on Human Rights in 1994, references to the Convention and the case-law of the European Commission for Human Rights and the European Court of Human Rights has continuously increased, and as a consequence in recent years there has hardly been any important decision which has not arisen from an analysis of the decisions of the European Court of Human Rights. Thus, the Constitutional Court has referred to the European Convention on Human Rights and the case-law of the European Court of Human Rights also in cases in which the complainants have not mentioned them in their applications.<sup>34</sup>

The Constitutional Court is naturally not restricted to cases in which the European Court of Human Rights decided on the basis of applications from Slovenia, although the Court pays particular attention to them. It is understandable that one of the preliminary questions which the Constitutional Court must answer in conducting a review is whether a constitutional complainant would be successful before the European Court of Human Rights. If the answer to this question is affirmative, the Constitutional Court must grant the constitutional complaint as admissible, as in Slovenia the European Convention on Human Rights is a binding legal act, superior to national legislation. Moreover, it is also entirely undisputed that regarding the interpretation of the European Convention on Human Rights, the opinion of the European Court of Human Rights is decisive.<sup>35</sup> Such interpretation

<sup>33</sup> It is worth drawing attention to the standpoint in the dissenting opinion of Dr. Ciril Ribičič in case No. U-I-272/98 that the case-law of the European Court of Human Rights should not be applied as a basis for a reasoning, potentially narrowing the human rights provisions of the Constitution. In his opinion, Slovenia willfully decided to "limit to a greater extent the interferences with individuals' privacy than followed from international acts on human rights and freedoms and the case-law of the European Court of Human Rights." Therefore, it would be an abuse of the European Convention on Human Rights if on its basis the constitutional provisions on the possible interferences with an individual's privacy were interpreted more narrowly. Compare with Andraz Tersek, A Constitutional Law Analysis of the Relation between Articles 35 and 37.2 of the Constitution of the Republic of Slovenia, *Pravna praksa*, Nos. 10-12, 2003, pgs. XII *et sub*.

<sup>34</sup> Boštjan M. Zupančič is of the opinion that the decisions of the European Court of Human Rights actually have *erga omnes* effect, as this concerns a special kind of constitutional decision making by which the European Court of Human Rights performs a quasi-legislative function when interpreting the European Convention on Human Rights. (On Interpreting Judicial Precedent and Judgments, especially the Judgments of the European Court of Human Rights. *Revus*, No.2/2004, pgs 24-27.)

<sup>35</sup> The German Federal Constitutional Court has emphasized, in connection with the rights of the father to meet with his child, that German courts are bound by the European Convention on Human Rights and the case-law of the European Court of Human Rights in concrete cases, and that the Constitution must be interpreted in accordance with the internationally assumed obligations of Germany. That is the reason that courts in repeated decision-making must take into consideration the European Convention on Human Rights as it is interpreted by the European Court of Human Rights, but its final decision should not be prejudiced by the decision of the European Court of Human Rights (BvR 1481/04)

is not formally binding on the Constitutional Court,<sup>36</sup> however in reality it must nevertheless be respected considering similar subsequent cases if the Court does not wish to risk Slovenia being found in violation before the European Court of Human Rights. It is unrealistic to expect that regarding cases from Slovenia the European Court of Human Rights might depart from the standards it developed over the last thirty years for cases of deciding within a reasonable period of time.

In recent years constitutional complainants have more and more often referred not only to constitutional provisions but also to the provisions of the European Convention on Human Rights, but less often, however, to the decisions of the European Court of Human Rights in cases similar to theirs. The Constitutional Court reviews constitutional complaints differently in relation to the European Convention on Human Rights as compared to the case-law of the European Court of Human Rights, and thus regarding the relation of the contents of the European Convention on Human Rights to the Constitutional provisions regulating individual constitutional rights. In cases in which the provisions of the Constitution and the European Convention on Human Rights regarding an individual right are the same or very similar, the Constitutional Court foremost applies the Constitution and only exceptionally are violations of both the Constitution and the European Convention on Human Rights reviewed in parallel.<sup>37</sup> In a few cases the Constitutional Court explicitly stated that in such cases the European Convention on Human Rights could not have been violated if the Court had established that there had been no violation of the Constitution.<sup>38</sup> Moreover, the Constitutional Court refers to the Constitution in cases in which the Constitution guarantees a higher level of the protection of an individual right compared to the European Convention on Human Rights. In cases in which the European Convention on Human Rights is more demanding than the Constitution or the case-law of the European Court of Human Rights guarantees a higher level of protection of rights, the Constitutional Court refers to the European Convention on Human Rights and the decisions of the European Court of Human Rights. Only such manner of deciding by the Constitutional Court is in compliance with the last paragraph of Article 15 of the Constitution, which explicitly determines that no rights regulated by legal acts in force in Slovenia (the European Convention on Human Rights is undoubtedly such an act) may be restricted on the grounds that this Constitution does not recognize that right or recognizes it to a lesser extent.

<sup>36</sup> Ales Galič warns that the Constitutional Court must interpret unclear legislative provisions in a manner in accordance with the Convention (The European Convention on Human Rights and the European Court of Human Rights, in Constitutional Judgments, Editors M. Pavčnik and A. Mavčič, CZ, Ljubljana 2000, p. 329).

<sup>37</sup> Such a case is the reasoning of the decision in case No. U-I-60/03, which refers to compulsory detention in psychiatric institutions, and in which the Constitutional Court simultaneously, in parallel and in an intertwined manner considered allegations on the violation of the provisions of the Constitution and the provisions of the European Convention on Human Rights.

<sup>38</sup> Such reasoning can be found, *inter alia*, in cases Nos. Up-3/97, U-I-135/00, and Up-85/03. In the latter case, which refers to adjudication within a reasonable time, the Constitutional Court reasoned its decision as follows: "Owing to the fact that according to the above-stated it does not follow from the complainant's allegations that human rights and fundamental freedoms which are ensured by the Constitution were violated by the challenged order, also his allegation on the violation of the European Convention on Human Rights is not substantiated."

An overview of all the decisions in which the Constitutional Court referred to the European Convention on Human Rights and/or to the case-law of the European Court of Human Rights shows that most often these were cases that concerned the following rights (listed in the order of frequency of the reference): detention and other forms of the deprivation of liberty,<sup>39</sup> adjudication within a reasonable time,<sup>40</sup> the right to a fair trial,<sup>41</sup> the right to examine witnesses and present evidence,<sup>42</sup> the right to asylum and extradition,<sup>43</sup> inhuman treatment,<sup>44</sup> the right to family life and rights of children,<sup>45</sup> religious freedom,<sup>46</sup> impartiality and exclusion of a judge,<sup>47</sup> the adversary principle and the principle of equality of arms,<sup>48</sup> the free choice of a legal representative,<sup>49</sup> the right to judicial protection (access to court),<sup>50</sup> the position of minor offence judges,<sup>51</sup> the right to an effective legal remedy,<sup>52</sup> calling a public hearing,<sup>53</sup> privilege against self-incrimination,<sup>54</sup> the presumption of innocence,<sup>55</sup> the protection of personal data,<sup>56</sup> freedom of trade unions,<sup>57</sup> the right of residence,<sup>58</sup> the right to the protection of property,<sup>59</sup> etc.

#### 4. Conclusion

The fundamental characteristic of the Constitution of the Republic of Slovenia is connected with the fact that its adoption in 1991 rounded off the beginning of a sovereign

<sup>39</sup> Compare the reasoning of the decision in case No. Up-286/01 which refers to house arrest. In its decision that in cases of house arrest it is a matter of the deprivation of liberty and restriction of personal freedom (and not only a limitation of the freedom of movement), it referred to the provisions of the European Convention on Human Rights and the case-law of the European Court of Human Rights.

<sup>40</sup> The Constitutional Court established a violation of the convention right to adjudication within a reasonable time, *inter alia*, in the decision in case No. Up-123/95.

<sup>41</sup> Compare the reasoning of the decision in case No. Up-229/96.

<sup>42</sup> Compare the reasoning of the decision in case No. U-I-27/95.

<sup>43</sup> Compare the reasoning of the decision in case No. Up-27/94.

<sup>44</sup> Compare the reasoning of the decision in case No. Up-78/00.

<sup>45</sup> Compare the reasoning of the decision in case No. U-I-284/94.

<sup>46</sup> Compare the reasoning of the decision in case No. U-I-68/98.

<sup>47</sup> Compare the reasoning of the decision in case No. Up-270/01.

<sup>48</sup> Numerous decisions of the European Court of Human Rights are cited in the reasoning of the decision in case No. Up-546/01.

<sup>49</sup> Compare the reasoning of the decision in case No. U-I-204/99.

<sup>50</sup> Compare the reasoning of the decision in case No. Up-13/99.

<sup>51</sup> Compare the reasoning of the decision in case No. Up-159/96.

<sup>52</sup> Compare the reasoning of the decision in case No. U-I-272/97.

<sup>53</sup> Compare the reasoning of the decision in case No. Up-197/02.

<sup>54</sup> Compare the reasoning of the decision in case No. Up-134/97.

<sup>55</sup> Compare the reasoning of the decision in case No. U-I-289/95 and the separate opinions of Dr. Boštjan M. Zupančič and Dr. Peter Jambreč in the cited case.

<sup>56</sup> Compare the reasoning of the decision in case No. U-I-25/95.

<sup>57</sup> Compare the reasoning of the decision in case No. U-I-57/95.

<sup>58</sup> Compare the reasoning of the decision in case No. U-I-172/02.

<sup>59</sup> Compare the reasoning of the decision in case No. U-I-23/93.(4) Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations."

and independent Slovenia. Therefore, the amendments which were required by integration into the European Union were perhaps even more necessary than in most other new member states. By adopting these constitutional amendments a minimalist and abstract approach prevailed, due to which we may speak about a European deficit in the Constitution, nevertheless they enabled the correct and smooth integration of Slovenia into the European Union from the constitutional point of view. With reference to this, it is important that on one hand they explicitly enabled the direct application and recognized the primacy of EU law, and on the other hand, by emphasizing values on basis of which Slovenia is integrating into the European Union, they preserved the position of the Constitution and left the door slightly open for interventions by the Constitutional Court in exceptional cases if the enforcement of the constitutionally determined level of the protection of human rights and freedoms, democracy and principles of the rule of law were endangered. This is an instance of a particular safety fuse, whose meaning is narrowed considering the fact that the European Union has of late invested a great deal in the development of human rights and will become even narrower if the Constitution for Europe is adopted and the written guidelines regarding human rights and freedoms, particularly the approach of the European Union to the European Convention on Human Rights, are implemented.

The previous case-law of the Constitutional Court regarding cases in which it has encountered the case-law of foreign courts, international law in general, and European human rights law in particular, shows that its ability to successfully operate in this area has been building up gradually, from concrete case to concrete case. The case-law in this area is for the Constitutional Court of such a young state as Slovenia, enviably extensive and consistent, and particularly refers to the application of the European Convention on Human Rights and the case-law of the European Court for Human Rights. An analysis of the above-mentioned case-law shows that the Constitutional Court has grown gradually as regards such contents, organization and personnel, as the first instances of formally mentioning the European Convention on Human Rights differ like night and day from the recent decisions, which follow from a complex analyses of the provisions of the European Convention on Human Rights and the case-law of the European Court for Human Rights, and from the elaborated criteria on the mutual effect thereof and the Constitution. Currently the Slovenian Constitutional Court implements European standards without any trouble or with only rare exceptions (deciding within a reasonable period of time), and without any significant difficulty deals with cases with concern the application of European law. This has also already positively reflected on decisions in the first cases which refer to EU law.

On the other hand, due to the complexity, scope, extensiveness, the difficulties of having a clear overview, and other particularities of EU law, the role of the Constitutional Court following integration into the European Union is undoubtedly more complex and demanding than it was in relation toward Council of Europe law. Furthermore, for the member states substantially different obligations naturally follow from EU law than from Council of Europe law. However, by implementing their new role the Constitutional Court of the

Republic of Slovenia and the constitutional courts of all other new member states of the European Union can lean directly on the abundant experience of the EU - fifteen members. Not only regarding the question of how to prepare to work in the new organizational circumstances and personnel wise, but also in reviewing individual concrete cases. It is namely very unlikely that disputable questions with reference to the application of any norm of EU law would appear only before one of the constitutional courts of one of the member states, but such will rather simultaneously appear in different parts of the European Union. With reference to such, it would be worthwhile in Slovenia to once again consider the proposal for an amendment to the Constitution which would revoke the competence of the Constitutional Court to constitutionally review executive regulations. There are a number of reasons which speak in favor of such amendments, such as with regard to the unburdening of the Slovenian Constitutional Court, the inability to judge the constitutionality of such regulations, and regarding cases of implementing spatial planning acts. In addition to this, such competence may also lead to the situation that before the Constitutional Court disputes will be reviewed which refer to the implementation of EU law, which in other states will be considered only at the level of lower instances of the regular judiciary.

For the successful functioning of constitutional courts in the member states of the European Union, in general and for their activities which refer to the European Court of Justice in particular, knowledge of the case-law and other information about the same activities of other courts are of great importance. Therefore, I propose that the constitutional courts gathered at the conference "The Position of Constitutional Courts Following Integration into the European Union" (the Constitutional Court of the Republic of Slovenia and the Venice Commission, Bled, 2004) initiate a petition to draft a special agreement on the mutual co-operation of the constitutional courts within the framework of the Conference of European Constitutional Courts, by which fast and up-to-date mutual informing at the request of any of the courts will be ensured. It would be worth determining by such agreement the instances, framework of the contents, and the manner of carrying out such, perhaps even a form for filing petitions to other constitutional courts, as well as to determine the timeframe in which the constitutional courts obligate themselves to reply thereof. Such mutual assistance, even if not formalized, would be particularly valuable for the constitutional courts of the new member states of the European Union in the initial period of their membership, and in the future also for the constitutional courts of the states which are candidates for integration into the European Union regarding its future enlargement.



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## **THE ROLE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA FOLLOWING INTEGRATION INTO THE EUROPEAN UNION**

### **Summary**

Despite the fact that the Constitutional Court of Slovenia played a dramatic role during the ratification of the Europe Association Agreement between the EC and Slovenia, the Court was actually not faced with the issue of the constitutionality of EU law during the approachment period 1997–2004. Taking into account its jurisprudence, the Constitutional Court of Slovenia will be obliged to develop the relation with regard to EU law and the European Court of Justice – ECJ (including the Court of First Instance – CFI). The constitutional basis for the direct applicability (and supremacy) of EU law was determined in Article 3a of the Constitution (as amended in 2003).

It must be noted that since the accession of Slovenia to the EU, the Constitutional Court has already dealt with two cases that touched upon the applicability (or non-applicability) of EU law. In the *Bankruptcy Procedure* Case the Constitutional Court decided that the EU national's constitutional right to the equal protection of rights was not violated because prior to EU accession the national courts had rejected the application of the EU regulation on insolvency procedures and had instead applied the national bankruptcy legislation. In addition, it declined to review the conformity of the national bankruptcy act with the EU regulation on the grounds of the supremacy of EU law which required the direct application of such regulation. In the *Animal Feed Rules* Case the constitutionality of national rules was challenged, which in fact incorporated the EU directive on animal feed. With respect to the latter, the preliminary ruling before the ECJ had been instigated by the UK Court which had also passed an interim measure in order to suspend the application of the challenged directive in the UK. Consequently, on the basis of the Constitutional Court Act the Slovenian Constitutional Court passed an interim measure and thus suspended the application of the Animal Feed Rules until the preliminary ruling decision is passed by the ECJ.

Both cases illustrate the Constitutional Court's genuine readiness to adopt the doctrine of the supremacy and direct applicability of EU law. Within its jurisdiction arising from Article 160 of the Constitution and taking into account the 'European Article' 3a, the Slovenian Constitutional Court will have to develop its own case-law concerning the constitutionality of the EU (amending and accession) treaties and secondary EU law. Apart from its

jurisdiction to review normative legal acts (including treaties), it will also be faced with EU law in relation to constitutional rights and freedoms while examining constitutional complaints.

At this point it is also too early to predict if the Constitutional Court of Slovenia endeavors to retain the primacy of the domestic Constitution in relation to the protection of fundamental rights as was done some time ago by the German and Italian Constitutional Courts.

### **Povzetek**

*Kljub temu, da je slovensko Ustavno sodišče igralo dramatično vlogo med ratifikacijo Evropskega pridružitvenega sporazuma med ES in Slovenijo, se sodišče v obdobju približevanja med leti 1997-2004 dejansko ni srečalo z vprašanjem ustavnosti prava EU. Upoštevač svojo ustavnosodno presojo bo moralo slovensko Ustavno sodišče razviti svoj odnos do prava EU in do Evropskega sodišča v Luksemburgu – ES (vključno s Sodiščem prve stopnje – CFI). Ustavno podlago za neposredno uporabo (in primat) prava EU predstavlja 3.a člen Ustave (spremenjena leta 2003).*

*Opozoriti je treba, da je po vstopu Slovenije v EU Ustavno sodišče že obravnavalo dva primera, ki sta se dotaknila uporabe (ali neuporabe) prava EU. V zadevi o stečajnem postopku je Ustavno sodišče odločilo, da državljanu EU ni bila kršena ustavna pravica do enakega varstva pravic, ker je državno sodišče pred vstopom v EU zavrnilo uporabo uredbe EU o postopkih v primeru nesolventnosti ter je namesto tega uporabilo državno stečajno zakonodajo. Poleg tega je zavrnilo presojo skladnosti državnega stečajnega zakona z uredbo EU iz razloga primarnosti prava EU, ki narekuje neposredno uporabo te uredbe. V zadevi o presoji Pravilnika o živalski krmi je šlo za izpodbijanje njegove ustavnosti, pri čemer je v tem pravilniku v celoti inkorporirana Direktiva EU o živalski krmi. V zvezi s slednjo je angleško sodišče sprožilo postopek predhodne presoje pred ES in začasno zadržalo njeno uporabo v Združenem kraljestvu. Sledeč temu je slovensko Ustavno sodišče na temelju Zakona o Ustavnem sodišču začasno zadržalo izvrševanje Pravilnika o živalski krmi do odločitve o predhodnem vprašanju pred ES.*

*Oba primera kažeta na izvirno pripravljenost Ustavnega sodišča, da sprejme doktrino o primarnosti in neposredni uporabi prava EU. V okviru svoje pristojnosti, kot izhaja iz 160. člena Ustave, in upoštevač 3.a 'evropski člen' Ustave, bo moralo slovensko Ustavno sodišče razviti svojo lastno ustavnosodno prakso v pogledu ustavnosti mednarodnih pogodb EU (o spremembah in širitvi) ter sekundarne zakonodaje EU. Poleg svoje pristojnosti, da presoja normativne akte (vključno z mednarodnimi pogodbami), se bo s pravom EU srečevalo tudi v odnosu do ustavnih pravic in svoboščin pri obravnavanju ustavnih pritožb.*

*Na tej točki je prezgodaj napovedati, ali si bo slovensko Ustavno sodišče skušalo pridržati primat domače Ustave v odnosu do varstva temeljnih pravic, kot sta to pred časom storili nemško in italijansko Ustavno sodišče.*

## Introduction

Following its case-law, the Constitutional Court of the Republic of Slovenia will have to shape its attitude towards EU law and the European Court of Justice in Luxemburg (hereinafter ECJ) on the basis of its present and future jurisprudence in concrete cases. By doing so it will give substance to and demonstrate its understanding of Article 3a of the Constitution of the Republic of Slovenia, particularly its first and fourth paragraphs.<sup>1</sup>

In cases with a European element the Constitutional Court of the Republic of Slovenia will inevitably come across the nature, scope and characteristic features of European law, the role of the ECJ in interpreting and applying such law within the framework of its jurisdiction (particularly from the viewpoint of questions referred to the ECJ for a preliminary ruling), and the comparative constitutional case-law of other European constitutional courts and the highest courts of national jurisdictions. In so doing, the Constitutional Court of Slovenia will inevitably be confronted with the extent of its own jurisprudence, particularly in light of its position and jurisdiction as determined by the Constitution and the Constitutional Court Act. Finally, eventually the Court will be faced with the decision whether to retain a “caveat” in view of the protection of constitutional rights and fundamental values according to the national Constitution.

The Constitutional Court played a dramatic role in the procedure for ratifying the Europe Association Agreement (hereinafter EAA) in 1997.<sup>2</sup> As the guardian of the Constitution, within its jurisdiction in accordance with the second paragraph of Article 160 of the Constitution, it (preliminarily) reviewed the consistency of the provisions of EAA which referred to the acquisition of real-estate by aliens (natural persons and legal entities) with the then provision of Article 68 of the Constitution, which prohibited the possibility of aliens acquiring such real-estate, except by inheritance, under condition of reciprocity.<sup>3</sup>

<sup>1</sup> Article 3a of the Constitution of the Republic of Slovenia reads as follows:

“(1) Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

<sup>2</sup> The Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part, signed in Brussels on 10 June 1996, came into force on 1 February 1999. Official Gazette RS, No. 44/97, IT, No. 13/97.

<sup>3</sup> Dr. Wedam Lukić, *Položaj Ustavnega sodišča po vključitvi v Evropsko Unijo (The Position of the Constitutional Court Following Integration into the European Union)*, Slovene Law and the Economy upon EU Accession, Portorož 21 – 23 April 2004, Faculty of Law/Facultas iuridica, 2004, p. 93.

The decision of the Constitutional Court (an opinion which in the event of an established unconstitutionality of a treaty is binding on the National Assembly) was followed by the first amendment of the Constitution before the ratification of the EAA.<sup>4</sup> The Constitutional Court later rejected or dismissed all petitions for a subsequent review of the constitutionality of the EAA.<sup>5</sup> Moreover, from the viewpoint of the EAA, the Court did not review the Ordinance on Procedures and Conditions for the Lease of Areas Along Highways for the Construction of Premises for Accompanying Activities and on Determining the Amount of Reimbursement for the Use of These Areas of 1996, as the challenged Ordinance ceased to be in force before the commencement of the applicability of the Association Agreement, and the petitioner did not challenge the later Ordinance with the same title and did not request its review from the viewpoint of compliance with the above-mentioned international agreement.<sup>6</sup> In case U-I-94/97 the Court rejected the petition of a foreign legal entity for the review of the consistency of the Order on the Manner of Carrying Out Payment Transactions with Foreign Countries with the provision of Article 63 of the EAA, as the petitioner was a legal entity which was not a resident of the EU.<sup>7</sup>

The Constitutional Court encountered EU law several times during the period leading up to Slovenia joining the EU. However, it did not substantially decide on the question of the eventual constitutionality of this law.<sup>8</sup>

Shortly after the integration of Slovenia into the EU on 1 May 2004<sup>9</sup> the Constitutional Court reviewed two “European cases”.<sup>10</sup> In the decisions thereof the Court already indicated certain elements of its orientation towards the application of EU law in the Slovenian constitutional and national legal order, which will be discussed below.

<sup>4</sup> *Ibidem*. See also Rm-1/97 dated 5 June 1997 (Official Gazette RS, No. 40/97 and OdlUS VI, 86). As regards the binding nature of an opinion in cases of establishing unconstitutionality, see Rm-1/97, paragraph VII of the disposition and paragraph 39 of the reasoning.

<sup>5</sup> Decisions U-I-190/97 dated 30 September 1997 (OdlUS VI/2, 119), U-I-203/97 dated 16 September 1997 (OdlUS VI/2, 115), and U-I-197/97 dated 21 May 1998 (OdlUS VII/1, 93).

<sup>6</sup> Decision No. U-I-296/96 dated 19 March 1998 (Official Gazette RS, No. 42/98 and OdlUS VII/1, 19), paragraph 14 of the reasoning.

<sup>7</sup> Order dated 13 December 2001 (OdlUS X/2, 216). Article 63 is placed in the chapter entitled *Current Payment and Movement of Capital* and introduces the principle of the freedom of movement of capital into an associated Member State.

<sup>8</sup> During the association period the Constitutional Court reviewed certain normative acts, particularly executive regulations, which were based on EU regulations or directives, however, not from the viewpoint of the question of the conformity of these European acts with the Constitution. See e.g. the review of the Medical Services Act, decision No. U-I-321/02 dated 27 May 2004 (Official Gazette RS, No. 62/04), particularly paragraph 23 and footnotes 5 and 6.

<sup>9</sup> For the Association Agreement of Slovenia and the other nine accession states to the EU, see Official Gazette RS, No. 12/04, II, No. 3/04.

<sup>10</sup> The constitutional complaint of a foreign legal entity regarding the inability of being informed of the commencement of bankruptcy proceedings before a national court and the petition for the review of the Compulsory Settlement, Bankruptcy and Liquidation Act (hereinafter Bankruptcy procedure case), order (not published) No. Up-328/04 and U-I-186/04 dated 8 July 2004; Order on the temporary suspension of certain provisions of the Rules on the Quality, Labeling and Packaging of Animal Feed (hereinafter Animal Feed Rules Case) No. U-I-113/04 dated 8 July 2004, Official Gazette RS, No. 83/04.

## Scope, Nature and Certain Characteristic Features of the Application of EU law

The doctrine of direct effect (*l'effet direct*) of Community law is valid at least in principle regarding all binding Community law including the EC Treaties, secondary legislation, and international agreements concluded by the Community.<sup>11</sup>

Ilešič and Grilc list among the **primary sources** of the Community the establishing treaties and their amendments, and also agreements between the Community and third countries.<sup>12</sup> The European Community as an international legal person (Article 281 of the Treaty Establishing the European Community – hereinafter the EC Treaty) has a contractual capability to conclude treaties with one or more states and with other international organisations. The general authority for concluding treaties with other international legal entities can be found in Article 300 of the EC Treaty, and in Article 133 of the EC Treaty particularly for the area of concluding tariff and trade agreements.<sup>13</sup> Theory considers as **secondary legal sources** regulations, directives, decisions or individual legal acts, and recommendations and opinions which are not legally binding, as well as other Community acts.<sup>14</sup>

The term EU law *stricto sensu* differs from “*acquis communautaire*” (in English, *Community patrimony*), which contains the entire legislation, principles, political policies, the case-law of the European Court of Justice, and the treaty obligations which were accepted by the Member States.<sup>15</sup> The term *acquis communautaire* is not entirely defined and often refers to the enlargement of EU members. According to Grilc and Ilešič, the Treaty on the European Union (hereinafter the EU Treaty) raised the term of *acquis* to the level of the primary legal source of the European Community.<sup>16</sup>

As already indicated in the introduction, one of the fundamental characteristic features of legally binding EU law is its **direct effect**. The legal basis for this is Article 249 of the EC Treaty, which in its second paragraph states that a regulation shall have general application, shall be binding in its entirety and directly applicable in all Member States of the European Union. The third paragraph of the same article determines that a directive shall be binding

<sup>11</sup> “The most problematic issues concern international agreements and EC directives.” P. Craig, G. de Búrca, *EU Law, Text, Cases and Materials*, Third Edition, Oxford University Press, 2003, p. 178.

<sup>12</sup> P. Grilc, T. Ilešič, *Pravo Evropske unije (European Union Law)*, First Volume, Faculty of Law and Cankarjeva založba, Ljubljana, 2002, pp. 81-84.

<sup>13</sup> Consolidated version of the Treaty Establishing the European Community (TEC), Official Journal of the EC, C 325/33, dated 24 December 2002.

<sup>14</sup> Grilc, Ilešič, *op.cit.*, pp. 84-91.

<sup>15</sup> V. Trstenjak, *Acquis communautaire in slovensko pravo (Acquis communautaire and Slovenian Law)*, Podjetje in delo, 6-7/2000/XXVI, p. 843, see also Grilc, Ilešič, *ibidem*, pp. 91-96.

<sup>16</sup> Grilc, Ilešič, *ibidem*, p. 92. See the fifth indent of Article 2 and the first paragraph of Article 3 of the EU Treaty (Consolidated Version of the Treaty on European Union, originally signed in Maastricht on 7 February 1992), Official Journal of the European Community, C 325/5, 24 December 2002. A directive shall be binding, as to the result to be achieved, upon the Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed.”

on each Member State to which it is addressed regarding the result to be achieved, but shall leave to the national authorities the choice of form and method. According to the fourth paragraph, a decision (an individual legal act) shall be binding in its entirety upon those to whom it is addressed.<sup>17</sup>

The second, third and fourth paragraphs of Article 249 of the EC Treaty:

“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

The fifth paragraph determines that recommendations and opinions shall have no binding force.

In its case-law the European Court of Justice has developed and strengthened the nature of the direct effect of EU law and its direct applicability in the Member States. In the landmark decision *Van Gend en Loos*, the ECJ, *inter alia*, wrote that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and that the provision of the EEC Treaty on the prohibition of tariffs for the Member States does not require any legislative intervention on the part of the states; this provision must be interpreted as producing direct effects and creating individual rights which national courts must protect.<sup>18</sup>

The rule that all citizens of all the Member States must be treated equally on the basis of the primary sources of the Community, without an implementing measure, was established by the ECJ in the case *Reyners v. Belgium*.<sup>19</sup>

The ECJ decided in favour of direct effect also for the secondary sources of the Community. The direct applicability of a Community regulation upon its entry into force and irrespective of any national legal measure on its implementation into the national legislation, was, *inter*

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<sup>17</sup> The second, third and fourth paragraphs of Article 249 of the EC Treaty:

“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon the Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.”

<sup>18</sup> *Van Gend en Loos v. Netherlandese Administratie der Belastingen*, [1963] ECR 1.”... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals...

- The implementation of Article 12 does not require any legislative intervention on the part of the states...

- It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect. “

<sup>19</sup> [1974] ECR 631.

*alia*, decided by the ECJ in the case *Amsterdam Bulb BV v. Produktschap voor Siergewassen*.<sup>20</sup>

In contrast to regulations, according to the third paragraph of Article 249 of the EC Treaty, the position of directives is different. A directive is binding on each Member State to which it is addressed regarding the result to be achieved, but the choice of form and methods is left to the national authorities. Direct national implementation of directives is thus foreseen in the EC Treaty.<sup>21</sup> Nevertheless, in the case *Van Duyn v. Home Office*, in proceedings to review a question referred for a preliminary ruling, the ECJ allowed the possibility of the direct applicability of a directive before a national court, under the condition that the nature, scheme and the text of the provision which is the subject of review allow that such provision may have a direct effect on the relations between the Member States and individuals.<sup>22</sup> In the case *Pubblico Ministero v. Tullio Ratti*, the ECJ repeated the possibility of the direct effect of a directive, and furthermore explained that a Member State which does not adopt implementing measures for the implementation of a directive by a prescribed time-limit, cannot rely on the omission of its duty toward an individual.<sup>23</sup> In the *Marshall* case, the ECJ decided that with regard to the Establishing Treaty a directive cannot be enforced against an individual, but only against a contracting party, *i.e.* a public body, in a concrete case against a Health Authority.<sup>24</sup> In this case the ECJ furthermore drew attention to the difference between a regulation and a directive, and consequently allowed only vertical and not horizontal direct applicability of a directive.<sup>25</sup>

The case *Francovich and Bonifaci v. Italy*<sup>26</sup> refers to the failure of the Italian Government regarding the implementation of the Community directive on the protection of employees in the event of the insolvency of an employer. In this case the ECJ introduced a principle on the liability of the state and consequently the possibility of claiming an indemnity against such state in cases in which it did not implement a directive, *i.e.* in cases in which in its national law the measure is not provided for in accordance with the directive which was not implemented.<sup>27</sup> This judgment, which is important from several viewpoints, substantially contributed to the enforcement of the effect of directives which are not implemented.<sup>28</sup>

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<sup>20</sup> [1977] ECR 137. See, *inter alia*, *Commission v. Italy*, [1973] ECR 101. For a detailed review of regulations regarding the consequences of their application, see also Grilc, Ilešič, *op.cit.*, pp. 110-111. As regards the entering into force of regulations, directives and decisions, see Article 254 of the EC Treaty.

<sup>21</sup> Craig, de Búrca, *op.cit.*, p. 202.

<sup>22</sup> [1974] ECR 1337.

<sup>23</sup> [1979] ECR 1629.

<sup>24</sup> *Marshall v. Southampton and South-West Hampshire Area Health Authority* (Teaching), [1989] ECR 723.

<sup>25</sup> Craig, de Búrca, *op.cit.*, pp. 207-208.

<sup>26</sup> [1991] ECR 1-5357.

<sup>27</sup> Craig, de Búrca, *op.cit.*, p. 259.

<sup>28</sup> *Ibidem*.

The provision of Article 249 of the EC Treaty determines that decisions of the Community as individual acts are binding; however, it does not explicitly prescribe their direct applicability. In the case *Franz Grad v. Finanzamt Traunstein*, the ECJ allowed a differentiation between the effects of a regulation and a decision. With reference to such, it stressed that the above-discussed difference does not exclude the right of individuals to enforce claims before national courts, and that the effect of a decision can thus be the same as the effect of the direct applicability of a regulation.<sup>29</sup> In the same case the ECJ set criteria for an obligation determined by a decision: this must be unconditional, clear and specific enough as to have direct effect.<sup>30</sup>

It appears that some authors unconditionally regard treaties between the Community and other international legal entities as primary legal sources of the EU. Craig and de Búrca are in this respect somehow more reserved and allow that in view of their direct effect only those international agreements which are concluded by the Community and are precise enough and unconditional may share some fundamental characteristic features of EU law.<sup>31</sup> The ECJ in its older case-law was not willing to allow the direct effect of treaty obligations; *inter alia*, this was the case in the individual aspects of the Agreement on GATT, especially because the subjects affected thereby usually challenged the legality of the Community legislation.<sup>32</sup>

The ECJ handled the case *Portugal v. Council* similarly in reviewing the WTO Agreements.<sup>33</sup> On the other hand, the ECJ recognized the direct effect of the provisions of the Co-Operation Agreement between the EEC and Yugoslavia of 1980.<sup>34</sup> In the series of recent cases which referred to the Europe Association Agreements, the ECJ decided that their provisions on the right to establishment have direct effect, and that it is possible to thereby challenge national legislation before national courts.<sup>35</sup>

A further characteristic feature of EU law considering its relation toward the national law of the Member States is its autonomy and supremacy. **Autonomy** means the independence of the EU legal order, which has been developing independently from the

<sup>29</sup> [1970] ECR 825.

<sup>30</sup> Craig, de Búrca, *op.cit.*, p. 193.

<sup>31</sup> *Ibidem*, pp. 193-194.

<sup>32</sup> *Ibidem*, pp. 194-195.

<sup>33</sup> [1999] ECR I-8395.<sup>47</sup> It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions." For a critical analysis of the ECJ case-law and the Court of First Instance (CFI) from this viewpoint, see G.A. Zonnekeyn, The Latest on Indirect Effect of WTO in the EC Legal Order The Nakajima Case Law Misjudged?, *Journal of International Economic Law*, 2001, JIEL 2001.3 (597).

<sup>34</sup> *Racke v. Hauptzollamt Mainz* [199] ECR I-3655.

<sup>35</sup> Cases C-63/99, *Gloszczuk*, C-257/99, *Barkoci and Malik*, C-235/99, *Kondova* and C-268/99, *Jany*, according to Craig and de Búrca, *op.cit.*, p. 201.



legal systems of the Member States.<sup>36</sup> EU bodies have original legislative competences and for the validity of their legislative acts do not require the subsequent approval of the legislative or executive bodies of the Member States.<sup>37</sup>

As has the doctrine of direct effect, **the doctrine of the primacy** of EU law in relation to national laws has also developed through the ECJ case-law. In the case *Hauer v. Land Rheinland-Pfalz*,<sup>38</sup> the Court decided that the goal of establishing a common market between different states would be destroyed if Community law was subordinate to the national laws of different states.

Apart from the already mentioned case *Van Gend en Loos*, the case *Flaminio Costa v ENEL*<sup>39</sup> is regarded as one of the fundamental decisions of the ECJ from the viewpoint of the primacy of EU law. In this case, the ECJ defined the Community as an international legal person with unlimited duration and with certain elements of supra-nationality. In the *ENEL* case, the ECJ *inter alia* decided that from the viewpoint of the Community the position that a subsequent unilateral (legislative) measure of a state has priority over a legal system which the states accepted on the basis of reciprocity is unacceptable. Craig and de Búrca analyzed five key arguments which the ECJ established in the *ENEL* case, among which the last is perhaps most distinctive: that the language of direct applicability in Article 249 of the EC Treaty would be meaningless if the Member States could negate the effect of Community law by passing subsequent (*lex posterior*) inconsistent legislation.<sup>40</sup> Also other writers recognize that the *Van Gend* and *Costa* cases are decisive from the viewpoint of enforcing the doctrines of the direct effect and primacy of EU law.<sup>41</sup>

In the case *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,<sup>42</sup> the ECJ decided that the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of the national constitutional structure. It was the decision of the ECJ in this case that led to a “potentially serious dispute” between the German Federal Constitutional Court and

<sup>36</sup> Grilc, Ilešič, *op.cit.*, p. 101.

<sup>37</sup> *Ibidem*.

<sup>38</sup> [1979] ECR 3727.

<sup>39</sup> [1964] ECR 585, 593.

<sup>40</sup> Craig, de Búrca, *op.cit.*, pp. 278-279.

<sup>41</sup> T. Buergenthal, Self-Executing and Non-Self-Executing Treaties in National and International Law, Académie de droit international, Recueil des Cours, 1992, IV, Tome 235 de la collection, 1993, p. 330. “The Van Gend and Costa cases, when read together, make quite clear that directly applicable Community law creates rights directly enforceable by individuals in the national courts of the Member States, where it take precedence over any inconsistent domestic law.”

<sup>42</sup> [1970] ECR 1125.

the ECJ.<sup>43</sup> In the just as prominent *Simmenthal* case,<sup>44</sup> the ECJ decided that national courts are not allowed to apply national acts which are contrary to Community law irrespective of when such national act was adopted. National courts must respect the full application of the provisions of Community law and thereby *ex officio* refuse to apply any conflicting provisions of national legislation, even if adopted subsequently; the court does not need to await its amendment or abrogation.<sup>45</sup> The clear message of the ECJ in the *Simmenthal* case was that, even if the constitutional court is the only national court empowered to decide on the constitutionality of a national law, when a conflict between national law and Community law arises before another national court, that court must give immediate effect to Community law without awaiting the prior ruling of the constitutional court.<sup>46</sup> The principle of primacy thus does not require the abrogation of a national act but only its non-application.<sup>47</sup>

In applying EU law the Member States are also bound by **the principle of loyal interpretation**. This principle has its legal foundation in Article 10 of the EC Treaty, which binds the Member States to take all the appropriate measures to ensure fulfilment of the obligations arising from this Treaty or resulting from action taken by the institutions of the Community. Simultaneously they are bound to abstain from any measure which could jeopardize the fulfilment of the objectives of the EC Treaty. Pursuant to this doctrine, national courts are obliged to interpret national law in light of the meaning and purpose of EU law even if it is a case of directives or other legal sources of the EU which do not have direct effect, and thereby guarantee EU law its effective application.<sup>48</sup>

The Slovenian Constitutional Court referred to the principle of loyal interpretation in the above-mentioned case U-I-321/02 in reviewing the Medical Services Act, with reference to extending the working time of doctors during their on-call duty.<sup>49</sup>

<sup>43</sup> Craig, de Búrca, *op.cit.*, p. 280.

<sup>44</sup> *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629.

<sup>45</sup> “24. The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.”

<sup>46</sup> Craig, de Búrca, *op.cit.*, p. 282.

<sup>47</sup> Grilc, Ilešič, *op.cit.*, p. 106.

<sup>48</sup> Cases *Von Colson v. Land Nordrhein-Westfalen*, [1984] ECR 1981, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, [1990] ECR 1-4135 and *Salvatore Grimaldi v. Fonds des Maladies Professionnelles*, [1989] ECR 4407, according to Craig and de Búrca, *op.cit.*, p. 305.

<sup>49</sup> “Par. 23...Last but not least, such interpretation is also required by the principle of loyal interpretation, according to which national law must be interpreted in light of Community law. It also follows from the case-law of the ECJ that Community law must be interpreted in a manner such that the on-call duty of doctors, within the framework of which doctors must be available at their work place, is in its entirety added to the working time of doctors.”

With reference to this, attention must be drawn to the fact that the Slovenian Constitutional Court has in principle already declared itself in favour of the direct effect and primacy of EU law in the above-mentioned case Up-328/04/U-I-186/04 (“the Bankruptcy Procedure Case”). It dismissed the constitutional complaint of the complainant, a foreign legal entity, resident of the EU, which alleged the violation of Article 22 of the Constitution (the equal protection of rights), as the bankruptcy court in its case applied national procedural law and not Council Regulation (EC) No. 1346/2000 of 27 May 2000 on proceedings in cases of insolvency, and it did not instruct the complainant on the time-limits for reporting bankruptcy proceedings. It was namely a case of the application of a procedural norm, and in the complainant’s case the procedures before regular Slovenian courts had been concluded before the integration of Slovenia into the EU. Simultaneously the complainant challenged the Compulsory Settlement, Bankruptcy and Liquidation Act for the same reasons. The Constitutional Court dismissed the petition and reasoned that on the grounds of the fourth paragraph of Article 3a of the Constitution, acts and decisions adopted within the framework of the EU are applied in Slovenia in accordance with the legal regulation of these organizations. The Court gave direct and binding effect to the Regulation to which the petitioner referred, and in paragraph 10 of the reasoning, *inter alia*, wrote:

“In the event it is proved that a national legal norm is contrary to a legal norm from the Regulation, in a concrete case a court may not apply such legal norm of national law due to the principle of supremacy, *i.e.* the primacy of Community law. It is thus demonstrated that the challenged act, only because it does not incorporate the provisions of the Regulation, is not inconsistent with Article 22 of the Constitution. As the Regulation is not a treaty, the complainant cannot claim the alleged inconsistency with Article 8 of the Constitution merely by the allegation that the challenged act is inconsistent with the Regulation. In view of the above-mentioned, the Constitutional Court dismissed the petition as manifestly unfounded.”

In its relatively short and summarized reasoning the Constitutional Court thus adopted the fundamental elements of direct effect and the principle of primacy, as interpreted by the ECJ. The Constitutional Court in the discussed case announced that regarding the challenged national norm, it would not establish its unconstitutionality only for the fact that it is inconsistent with EU law, as according to EU law it suffices that national courts, including the Constitutional Court, do not apply such norm,<sup>50</sup> and establishing its possible

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<sup>50</sup> According to the standpoint of the ECJ, they are not allowed to apply it.

unconstitutionality is not necessary. The courts, including the Constitutional Court, are obliged to apply EU law.<sup>51</sup>

We would like to draw attention to an additional constitutional aspect. Owing to the fact that in the concrete case it was a matter of a secondary legal source of the Community, the Constitutional Court clearly stated that the legal basis thereof is Article 3a, and not Article 8 of the Constitution. The latter namely refers to the meaning and the effect of the principles and norms of international law within the Slovenian constitutional and legal order.<sup>52</sup> The same approach as for secondary sources of the EU should in principle also be applied for primary sources, at least those which are part of the “*acquis communautaire*”. This consequently means that the Constitutional Court, except in cases of new amending treaties or accession treaties, will not deal with the hierarchical placement of EU law into the Slovenian constitutional and legal order, as determined by Article 153 of the Constitution (the conformity of legal acts).

#### The role of ECJ (and CFI) in Interpreting and Applying EU Law

Article 220 of the EC Treaty determines that the ECJ and the Court of First Instance (hereinafter CFI), each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

We are primarily interested in the role of the ECJ from the viewpoint of the possible case-law of the Slovenian Constitutional Court. From this perspective, the competence of the ECJ to give preliminary rulings according to Article 234 of the EC Treaty is particularly

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<sup>51</sup> In the discussed case the Constitutional Court was satisfied with the fact that it was a case of the constitutionally consistent application of a national procedural norm. The courts were not obliged to apply the EU regulation, as at the time of deciding Slovenia was not a member of the EU. As it was a matter of a procedural norm, the Constitutional Court at the time of its deciding, as Slovenia was already in the EU, was not obliged to consider it. The decision of the Constitutional Court in this case was unanimous. From a formal viewpoint, such decision of the Constitutional Court cannot be alleged to be unconvincing. However, the solution in the concrete case raises certain questions from the viewpoint of the principle of loyal interpretation. “Laws and normative legal acts must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.” (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

<sup>52</sup> Article 8:

“Laws and normative legal acts must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly.”

important.<sup>53</sup> According to this provision, the ECJ has jurisdiction to interpret EU law in cases where such question is raised before any court or tribunal of a Member State, if it considers that a decision on the question is necessary to enable it to pass judgment. In such case, according to the second paragraph of Article 234 of the EC Treaty, any national court (or tribunal) may request that the ECJ give a ruling thereon. Under certain circumstances and conditions, the jurisdiction of the ECJ according to Article 234 is foreseen according to Article 68 of the EC Treaty also for the IV Chapter of the EC Treaty, entitled *Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons*. Although after Maastricht the ECJ became the court of the EU, the jurisdiction of the ECJ according to Article 234 of the EC Treaty is nevertheless in principle limited to the first pillar of the Community.<sup>54</sup>

Prior to the Nice Treaty all the requests to give preliminary rulings were addressed to the ECJ.<sup>55</sup> The provision of Article 225 of the EC Treaty in the first paragraph determines the jurisdiction of the CFI, and in the third paragraph of the same article it now accords jurisdiction also to the CFI to hear and determine questions referred for a preliminary ruling in specific areas laid down by the Statute of the Court of Justice.<sup>56</sup> Decisions given by the CFI on questions referred for a preliminary ruling may exceptionally be subject to review by the ECJ, under the conditions and within the limits laid down by the ECJ's Statute, where there is a serious risk of the unity or consistency of Community law being affected (third subparagraph, third paragraph of Article 225 of the EC Treaty). The question of the delimitation of competencies between the ECJ and the CFI to give preliminary rulings at the present exceeds the subject of our discussion, and below we only refer to the provision of Article 234 of the EC Treaty and to the eventual case-law of the ECJ.

The provision of Article 234 was foreseen as the mechanism through which national courts and the ECJ have engaged “in a discourse on the appropriate reach of Community law.”<sup>57</sup> Article 234 gives the ECJ the power to interpret the EC Treaty (and the acts of

<sup>53</sup> Article 234:

“The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

<sup>54</sup> P. Jann, *The Relation between a Constitutional Court and the European Court of Justice (ECJ) in the light of the ECJ's Case-Law*, paper at the conference entitled *National Constitutional Courts and the European Court of Justice*, Round Table, Vienna, 13 February 2004, p. 4.

<sup>55</sup> Craig, de Búrca, *op.cit.*, p. 478.

<sup>56</sup> *Ibidem*. The third paragraph of Article 225 of the EC Treaty: “The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.”

<sup>57</sup> Craig, de Búrca, *op.cit.*, p. 432.

the institutions), but does not specifically empower it to apply EU law to the facts of individual concrete cases.<sup>58</sup> The distinction between the interpretation and application of EU law is meant to be one of the fundamental characteristic features of the division of authority between the ECJ and national courts: the former is empowered to interpret, and the latter to apply EU law to the facts of a concrete case.<sup>59</sup>

Theory recognizes that with the authority of its case-law the ECJ has gained power in relation to the national courts of the Member States. The original conception of this relationship was intended on the horizontal and bilateral levels, according to which national courts were separate but equal.<sup>60</sup> In the course of developing the ECJ case-law, this relationship grew steadily more vertical and multilateral.<sup>61</sup>

In view of the future case-law of the Slovenian Constitutional Court the third paragraph of Article 234 of the EC Treaty is particularly important, which reads that where any such question is raised in a case pending before a court (or a tribunal) of a Member State against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the ECJ. It is difficult to foresee in advance how often the Slovenian Constitutional Court will face the dilemma of whether to raise a question referred to the ECJ for a preliminary ruling, within the scope of its jurisdiction to review the constitutionality (and legality) of normative legal acts (the first paragraph of Article 160 of the Constitution, *the jurisdiction of the Constitutional Court*). Moreover, this question undoubtedly arises also in the framework of its competence to decide constitutional complaints (the third paragraph of Article 160 of the Constitution).<sup>62</sup>

With reference to the above-mentioned, we would like to draw attention to the case *Sri CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*,<sup>63</sup> in which the ECJ, *inter alia*, drew attention to the relationship between the second and third paragraphs of Article 234. The message is that national courts of last instance are not obliged to refer to the ECJ a question concerning the interpretation of EU law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be,

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<sup>58</sup> *Ibidem*, p. 472.

<sup>59</sup> *Ibidem*.

<sup>60</sup> *Ibidem*, p. 433.

<sup>61</sup> *Ibidem*.

<sup>62</sup> Wedam Lukić, *op.cit.*, pp. 96-98.

<sup>63</sup> [1982] ECR 3415.

can in no way affect the outcome of the case. If, however, those courts consider recourse to Community law to be necessary to decide a case, they are obliged to refer to the ECJ any question of interpretation which may arise.<sup>64</sup>

In the case *International Chemical Corporation v. Amministrazione delle Finanze dello Stato*,<sup>65</sup> the subject of review was a Council regulation. The ECJ, *inter alia*, stated that the main purpose of its review according to Article 234 of the EC Treaty is to ensure the uniform application of EU law by national courts. Uniform application of EU law is imperative not only when such law must be interpreted, but also in cases if before the ECJ a question on the validity of an act of any of the Community institutions arises.<sup>66</sup> This case is important due to the precedential effect of ECJ decisions according to Article 234 of the EC Treaty. While the ECJ stated that its rulings on the validity of a Community regulation according to Article 234 of the EC Treaty will have *erga omnes* effects, the Court has made it clear that national courts cannot themselves find the norms of EU law to be invalid.<sup>67</sup> Moreover, regarding precedential effect, it must be clarified that regardless of the fact that the judicial decisions of the ECJ are one of the most important legal sources of EU law, the ECJ is not bound by its own judicial decisions, although in practice it only with difficulty and rarely withdraws from them.<sup>68</sup>

In the case *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*,<sup>69</sup> regarding the question of whether a national court may establish the invalidity of a Commission decision, the ECJ decided that national courts do not have jurisdiction to proclaim Community acts to be invalid. Only the ECJ has such exclusive jurisdiction on the basis of Article 234 of the EC Treaty (before Article 177).

It must be emphasized that the jurisdiction of the ECJ is limited to Community law. Within the framework of its jurisdiction regarding preliminary rulings, the ECJ is not competent to establish the constitutionality and legality of national provisions.<sup>70</sup> With consideration of the full sovereignty of the Member States, such jurisdiction remains with national courts.<sup>71</sup>

<sup>64</sup> *Ibidem*. “10. Secondly, it follows from the relationship between paragraphs (2) and (3) of Article 177 (now 234, M.Š.) that the courts or tribunals referred to in paragraph (3) have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.”

<sup>65</sup> [1981] ECR 1191.

<sup>66</sup> “11. The main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which is to be defined; it is just as imperative when the Court is confronted by a dispute as to the validity of an act of the institutions.”

<sup>67</sup> Craig, de Búrca, *op.cit.*, p. 444.

<sup>68</sup> Grilc, Ilešič, *op.cit.*, p. 351.

<sup>69</sup> [1987] ECR 4199.

<sup>70</sup> Jann, *op.cit.*, p. 4.

<sup>71</sup> *Ibidem*.

According to Article 242 of the EC Treaty, actions brought before the ECJ shall not have suspending effect; however, the ECJ may, if it considers that circumstances so require, order that the application of the contested act be suspended. According to Article 243 of the EC Treaty, the ECJ may in any case before it prescribe any necessary interim measures. The EC Treaty does not contain the provision that interim measures against Community acts can be prescribed by national courts. However, in the case *Atlanta Fruchthandels-gesellschaft (I) v. Bundesamt für Ernährung und Forstwirtschaft*,<sup>72</sup> the question arose whether national courts may prescribe an interim measure against a regulation, regarding which proceedings are pending according to Article 234 (then Article 177) of the EC Treaty. The ECJ decided that the EC Treaty must be interpreted in a manner such that it allows national courts to prescribe interim measures, but it set certain conditions for doing so.<sup>73</sup>

Shortly after Slovenia's integration into the EU, the Constitutional Court of the Republic of Slovenia encountered the question of prescribing interim measures against a Community act. In the above-mentioned case U-I-113/04, also referred to as "*the Animal Feed Rules Case*", Slovenian companies producing animal feed (JATA and others), challenged before the Constitutional Court the Rules on the Labelling and Packaging of Animal Feed, which the Government issued on the basis of the Directive of the European Parliament and of the Council on the marketing and composition of animal feed. The petitioners alleged the unconstitutionality of the Rules, *inter alia*, due to a violation of free economic initiative (Article 74 of the Constitution), and motioned that the Constitutional Court suspend the challenged Rules. With reference to such, they alleged that the challenged Rules entirely incorporate the Community directive, regarding the validity of which a court in the UK has already requested that the ECJ give a preliminary ruling on, and against which in the UK it prescribed interim measures according to the criteria set by the ECJ. The implementation of the contested directive was allegedly suspended also by some other courts in the Member States of the EU. The Constitutional Court by six votes against three temporarily suspended the challenged Rules on the basis of Article 39 of the Constitutional Court Act until the decision of the ECJ on the validity of the above-mentioned directive is reached (case C-453/03).

In the reasoning the Constitutional Court firstly established on the basis of Article 3a of the Constitution that the case concerned an EU directive, and that considering the fact that the petitioners challenged the provisions of the Rules, in its contents they actually challenged the directive itself, for the review of which the ECJ is indeed competent. The Constitutional Court in the discussed case, *inter alia*, established:

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<sup>72</sup> [1995] ECR I-3761. See also cases *Factortame and others*, [1990] ECR I-2433 and *Zuckerfabrik Süderdith-marchen and Zuckerfabrik Soest*, [1991] ECRI-451.

<sup>73</sup> 1. There must exist a serious doubt on the validity of a Community act which a national court had to bring before the ECJ; 2. a serious and irreparable damage must be imminent; 3. a national court must consider Community interests and, 4. it must respect any decision or an interim measure which was adopted by the ECJ (or CFI) regarding a challenged Community act.



“8. As regards the fact that the Constitutional Court did not have to decide on the question whether it is, on the basis of the first and third indents of the first paragraph of Article 160, competent to review the consistency of (statutes and executive) regulations with the Constitution, including situations which entail the direct implementation of European directives into the national legal order... As for the fact that in the concrete case [also] the question of the validity of the Directive which is the grounds for the Rules arose, the Constitutional Court did not have to review the question of whether and under what conditions the Constitutional Court would be in a position to suspend the implementation of the Rules, if it was merely a question of their compliance with the Constitution. In the system of legal protection, as ensured by Community law, individuals namely have the option to challenge before competent courts of a Member State not only the normative legal acts of that Member State, which entail the implementation of Community acts in the national legal order, but also the Community institutions’ acts themselves, and to request their temporary suspension in proceedings before the courts of the Member State.”

Notwithstanding the fact that in the above-mentioned case it was only a matter of an Order on a temporary suspension according to the Constitutional Court Act, the precedential effect of this case might be of a particular importance for the future case-law of the Constitutional Court. It may be re-established that also the order of the Constitutional Court on the temporary suspension of the Rules on Animal Feed follows from the autonomy and primacy of EU law. From this perspective, the Constitutional Court cannot be criticized for anything. Although the Constitutional Court for the present has left open the question what position it should take regarding its jurisdiction in cases of the review of executive regulations (the third indent of the first paragraph of Article 160 of the Constitution), if EU acts were incorporated therein, it seems that in the discussed case it has already crossed the Rubicon. *Implicitly* it has already declared in favour of such jurisdiction, as on 8 July 2004 it issued an interim measure according to Article 39 of the Constitutional Court Act. In so doing, the Constitutional Court placed itself in a position which is in other Member States held by lower, most often administrative courts. It is indeed true that regarding a review of normative legal acts, the jurisdiction of the Slovenian Constitutional Court is very broad, and it is competent also to review the constitutionality and legality of executive regulations. Consequently, the Constitutional Court is already overloaded with work due to cases of an exclusively national character. Following integration into the EU this scope of work might even be extended, as we may speculate that a majority of the directives is incorporated into national law through executive regulations, and that the Slovenian Government will follow such practice also in the future. Therefore, it would be worthwhile for the Constitutional Court within the framework of its jurisdiction according to the Constitution and statute,<sup>74</sup> and in compliance therewith, to find a way such that in reviewing executive regulations which entail the implementation of EU acts it will not act as the court of first instance, but the court of last resort. The latter also pertains to the

<sup>74</sup> In this case the Constitutional Court Act.

Constitutional Court regarding its position as determined by the Constitution. By all means, the Slovenian Constitutional Court has in this respect some additional manoeuvring space as regards the legal interest which must be demonstrated by every petitioner, and which it did not make good use of in case U-I-113/04. For this reason alone and not because of the acknowledgement of the autonomy and primacy of EU law, the above-mentioned order was not voted for unanimously.

For the relationship between national courts, including constitutional courts, and the ECJ, the “*acte claire*” doctrine as set forth by the ECJ is also important. According to this doctrine, national courts, including the highest court, may refrain from their duty to submit a question to the ECJ referred for a preliminary ruling, if the disputed provision of EU law has already been interpreted by the ECJ or if the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.<sup>75</sup> The ECJ has enforced the “*acte claire*” doctrine in the above-mentioned *CILFIT* case.<sup>76</sup>

#### Some Questions from the Case-Law of Other Constitutional (and the Highest) Courts of the Member States

The primary question which the constitutional courts of the new Member States of the EU, including the Slovenian Constitutional Court, are interested in is how often up to the present have the constitutional or other highest courts of the Member States of the EU referred to the ECJ questions for a preliminary ruling. The Austrian Constitutional Court has so far done so four times, and the Belgian twice, whereas other constitutional courts are much more reserved. Up to the present such matters have not been brought before the ECJ by the German Federal Constitutional Court, the Italian Constitutional Court, the Spanish Constitutional Court, the Portuguese Constitutional Court and the French Constitutional Council.<sup>77</sup> Other courts which have referred to the ECJ within the scope of their jurisdiction according to Article 234 of the EC Treaty, have not necessarily done so in the function of constitutional courts.<sup>78</sup> Wedam Lukić draws particular attention to the German Federal Constitutional Court and the Spanish Constitutional Court, in particular with reference to their jurisdiction regarding constitutional complaints, which the Slovenian Constitutional Court also has.<sup>79</sup>

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<sup>75</sup> Jann, *op.cit.*, p. 5.

<sup>76</sup> “16. Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.”

<sup>77</sup> According to Jann, *op.cit.*, p. 6.

<sup>78</sup> E.g. House of Lords, UK, *ibidem*.

<sup>79</sup> Wedam Lukić, *op.cit.*, p. 97.

Another question concerns the relationship between EU law and constitutional law from the viewpoint of the primacy of EU law. Some constitutional courts of the Member States have been faced with this problem. The most well-known in this respect is the case-law of the German Federal Constitutional Court. In its renowned *Solange I* case of 1974 it adopted the standpoint that the application of the secondary sources of EU law is in the Federal Republic of Germany subject to unlimited review by the Federal Constitutional Court regarding fundamental rights.<sup>80</sup> The Federal Constitutional Court softened this position in the *Solange II* case and contented itself with the protection of fundamental rights at the Community level, and theoretically retained for itself their judicial review.<sup>81</sup>

The decisions of the German Federal Constitutional Court that followed gave the impression that the Court once again wanted to activate its claim to be competent to carry out judicial review. This particularly holds true for the prominent *Decision on Maastricht* of 1993, which referred to the review of the German Law Approving the Maastricht Treaty. The German Federal Constitutional Court decided that the ratification of the Maastricht Treaty was in accordance with the Constitution; however, in its decision it not only decided on the constitutional competence of Germany regarding the ratification of the above-mentioned Treaty, but also regarding the future position should the Community wish to exercise powers which were not precisely defined in the Treaty.<sup>82</sup> Other authors also agree that the text of this decision gives the impression that by this decision the Federal Constitutional Court retained for itself a permanent, although substantially limited supervisory role over the ECJ in view of respect for fundamental rights.<sup>83</sup> The German Federal Constitutional Court changed its previous standpoint in its judgment of 2000 on the market organization for bananas.<sup>84</sup> In 1994 the ECJ confirmed the conformity of the Regulation on bananas with EU law. On the grounds of this decision, the Frankfurt Administrative Court referred to the Federal Constitutional Court, which did not review the question of the conformity of the Regulation on bananas with German fundamental rights, and declared the reference to be inadmissible.<sup>85</sup> In the reasoning of its decision, the German Constitutional Court only retained its claim to be competent to review EU law under very strict conditions, not only in a procedural but also in a substantive sense.<sup>86</sup>

<sup>80</sup> D. H. Scheuing, The Approach to European Law in German Jurisprudence, 5 German Law Journal No. 6 (1 June 2004) – European & International Law, visited at the web site on 29 June 2004, p. 4.

<sup>81</sup> *Ibidem*. “It therefore seemed as if the *Bundesverfassungsgericht* finally had accepted the protection of fundamental rights on the Community level as sufficient and as if the Court would only theoretically still be interested to uphold its claim to respective judicial review.”

<sup>82</sup> Craig, de Búrca, *op.cit.*, p. 293.

<sup>83</sup> Scheuing, *op.cit.*, p. 4.

<sup>84</sup> *Ibidem*.

<sup>85</sup> *Ibidem*.

<sup>86</sup> *Ibidem*. “Since such a general falling back on the European level is practically excluded, the reasoning of the *Bundesverfassungsgericht* in its banana decision of 2000 may be read as the long-awaited farewell to its inappropriate claim for a German fundamental rights control over Community law.” Regarding the comment on the banana decision of 2000, see also Craig, de Búrca, *op.cit.*, pp. 296-298.

The Italian Constitutional Court also initially resisted the superior position of EU law. In the *Frontini* case it expressed reservations similar to those of the German Federal Constitutional Court. The *Frontini* case of 1984 was followed by the case of *Granital*,<sup>87</sup> in which the Italian Constitutional Court adopted the position that Italian courts are not allowed to apply national law which is contrary to EU law, and must directly apply the later. With reference to this, it insisted on the standpoint that law which is contrary to European law is still valid until abrogated by the Constitutional Court.<sup>88</sup>

A different path was chosen by the Austrian Constitutional Court. Perhaps the reason lies in the fact that Austria, together with Sweden and Finland, became a member of the EU in 1995, when the integration system and consequently also the protection of EU law at the Community level were much more defined than in the initial period after the conclusion of the Treaty of Rome. Following integration into the EU, the Austrian legislature was forced to abide by EU law and national constitutional law.<sup>89</sup> Thus, the Austrian Constitutional Court has developed the “principle of double commitment” toward EU law.<sup>90</sup> It is the concept of the parallel validity of both legal orders, national and European: if EU law must be applied, it has priority, and a national norm which is not in compliance therewith, remains untouched; however, it must not be applied in circumstances in which EU law applies.<sup>91</sup> The Austrian Constitutional Court still reviews the compliance of Austrian legislation with the Constitution, although the application of contested legislation might be questionable due to the primacy of EU law.<sup>92</sup> EU law namely cannot be violated if a norm which is inconsistent with EU law is abrogated due to its inconsistency with the Constitution.<sup>93</sup> If in cases of “*acte claire*” the non-application of national legislation is clear, EU law is consequently applicable by the Constitutional Court.<sup>94</sup> If it is shown during the review of a norm before the Austrian Constitutional Court due to its alleged unconstitutionality, because it is allegedly contrary to EU law, that the alleged is indeed true on the grounds of an ECJ decision, the proceedings before the Constitutional Court are dismissed.<sup>95</sup>

### Instead of a Conclusion – Some Possible Guidelines for the Constitutional Court of the Republic of Slovenia Following Integration into the EU

<sup>87</sup> *Spa Granital v. Amministrazione delle Finanze*, decision No. 170 dated 8 June 1984. According to Craig and de Búrca, p. 299.

<sup>88</sup> Wedam Lukić, *op.cit.*, p. 96 and footnote 8.

<sup>89</sup> K. Heller, The Relation of Community Law and National Constitutional Law in the Light of the Austrian Constitutional Court, paper at the conference entitled National Constitutional Courts and the European Court of Justice, Round Table, Vienna, 13 February 2004, p. 3.

<sup>90</sup> *Ibidem*.

<sup>91</sup> Wedam Lukić, *op.cit.*, p. 96.

<sup>92</sup> Heller, *op.cit.*, p. 4.

<sup>93</sup> Wedam Lukić, *op.cit.*, p. 96.

<sup>94</sup> Heller, *op.cit.*, p. 4.

<sup>95</sup> *Ibidem*, p. 5.

According to Article 1 of the Constitutional Court Act, the Constitutional Court is the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms. As such it has already encountered its first two cases which referred to the application of EU law.

It is evident that the Slovenian Constitutional Court in general accepts the autonomy, direct effect and primacy of EU law, which is a legal order *sui generis*, and which does not concern international law.<sup>96</sup> The Constitutional Court stated this in cases Up-328/04/U-I-186/04.

The jurisdiction of the Constitutional Court is determined in Article 160 of the Constitution.

According to the first paragraph of Article 160 of the Constitution, the Constitutional Court has jurisdiction to review laws and other normative legal acts, and through its case-law has also developed the possibility to carry out the subsequent review of treaties. Within this framework the Constitutional Court will have to develop its attitude particularly towards primary EU legislation. With reference to the latter, a question on the subsequent review of amending and accession treaties arises. It is more likely that the Constitutional Court, which according to the second paragraph of Article 160 of the Constitution has jurisdiction to carry out a preliminary review of constitutionality of treaties (similarly as the French Constitutional Council and the Spanish Constitutional Court), will review future primary legislation on the amending of and accession to the EU in such proceedings. Thus, it will enable the legislature to solve the possible constitutional impasse position by amendment of the Constitution.

With regard to the review of the secondary legal sources of the EU and their conformity with the Constitution, a question on regulations and decisions arises. This refers to cases of binding EU acts, whose review is not foreseen by the Constitution. Nevertheless, with regard to the principle of direct effect, they apply in the Member States. Will the Constitutional Court thus on the grounds of the authorizing norm of Article 3a of the Constitution find itself not competent to review such acts? The Constitutional Court will have to adopt a position regarding this question in its future case-law.

Directives are implemented into national legislation, and case U-I-113/04 has already shown where the fundamental dilemmas of the Slovenian Constitutional Court lie. Due to its jurisdiction determined in the third indent of the first paragraph of Article 160 of the Constitution, the Constitutional Court has the power to decide on the conformity of executive regulations by which the Government implements numerous directives. At this point the observation of ECJ Justice Jann, that the constitutional courts are not as often faced with the application of EU law as other national courts, due to the fact that EU law

<sup>96</sup> Regarding the subject that EU law is a *sui generis* system which is not international law, see Wedam Lukić, *op.cit.* p. 95.

does not usually interfere with cases which are handled by the constitutional courts, cannot be overlooked.<sup>97</sup> From this perspective, the Slovenian Constitutional Court might be an exception owing to its extensive jurisdiction, were it not to find the mechanisms by which it would prevent itself from becoming a court of first instance for the review of directives (here we refer to the directives which are implemented into the national legislation in the form of executive regulations).

In the future the Constitutional Court will also have to adopt a position regarding the application and the effect of EU law in reviewing constitutional complaints. This refers to the situation where in reviewing constitutional rights, the Constitutional Court acts as the court of the highest instance, which is, as already seen, under the conditions determined in the third paragraph of Article 234 of the EC Treaty, obliged to bring the matter before the ECJ for a preliminary ruling. In this connection an issue is raised whether not referring a question for a preliminary ruling to the ECJ is by itself a violation of a human right.<sup>98</sup> It is allegedly a violation of the rights to judicial protection and to a lawful judge, due to the fact that the ECJ has exclusive jurisdiction for the interpretation of EU law.<sup>99</sup>

Finally, before the Slovenian Constitutional Court a principal question is raised whether in its attitude towards EU law the Constitutional Court will try to retain the primacy of the national Constitution in view of the protection of fundamental rights, as has been previously done by the German Federal and the Italian Constitutional Courts. The constitutional basis for such possibility is given in the first paragraph of Article 3a, which envisages the transfer of "... the exercise of part of its sovereign rights to international organizations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law...". It is difficult to foresee when (and whether at all) the Slovenian Constitutional Court will be faced with the situation that it will have to adopt a position whether it gives priority to EU law or to constitutional rights and fundamental constitutional values. However, we may not overlook that Article 6 of the EU Treaty declares that liberty, democracy, respect for human rights and fundamental freedoms and the rule of law are common to all the Member States,<sup>100</sup> and as such an inalienable part of EU law, which the ECJ is given jurisdiction to ensure the respect thereof.

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<sup>97</sup> Jann, *op.cit.*, p. 6.

<sup>98</sup> Wedam Lukić, *op.cit.*, p. 98.

<sup>99</sup> *Ibidem*. The German Constitutional Court discussed this matter in the case of Ms Rinke. The German Federal Constitutional Court considered that the constitutional right to judicial protection is violated if a German court did not make enough effort as regards having knowledge of EU law, and did not reach a decision to refer a question for a preliminary ruling. Scheuing, *op.cit.*, p. 10.

<sup>100</sup> It is a case of a norm also referred to as a programme norm. "1. The Union is founded on the principle of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." "The second paragraph refers to fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The third paragraph refers to respecting the national identities of the Member States, and the fourth paragraph determines that the EU shall provide itself with the means necessary to attain its objectives and carry through its policies.

*Dr. Christos Artemides*  
*President of the Supreme Court of Cyprus*

## **THE PRESENTATION OF CYPRIOT EXPERIENCES**

### **Summary**

As citizens of the Republic of Cyprus we are indeed very proud because our country satisfied all the criteria and passed with flying colours all the preparatory steps before joining the European Union, together with the other nine member states, on 1<sup>st</sup> May, 2004.

The people of Cyprus hold high hopes and have great expectations in the fulfilling of the ideals enshrined in the European Union Agreement for freedom, security and respect of human rights and fundamental freedoms of the individual in a democratic society.

All the above principles are embodied in the 1960 Constitution of the Cyprus Republic. Part II of the Constitution is wholly devoted to the provisions safeguarding those rights and freedoms. The Republic of Cyprus has also ratified by law, in 1962, the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court, as well as all the other courts of the Republic, have since 1960 proved to be the unbending guardians of the civil rights and liberties of the person. Indeed, the case law of our Supreme Court shows that we safeguard very strictly the fundamental freedoms and human rights.

The Republic of Cyprus welcomes the adoption of the European Constitution, and hopes that all the countries of the European Union will ratify it, and also that the Union will accede to the Convention for the Protection of Human Rights and Fundamental Freedoms, thus giving jurisdiction on the matter to the European Court in Strasbourg. It is my humble opinion that no serious problem would arise in bringing into conformity the European Union Laws with the laws of the member states, since the ideals and goals of the European Union are common. What is needed is determination and good faith. The Supreme Court of the Cyprus Republic feels strong in spirit and has also the necessary knowledge and experience to meet the challenges arising from our joining the European Union. We, therefore, feel confident for the future. The perspectives are bright.

## **Povzetek**

*Državljeni Republike Ciper smo zelo ponosni, ker je naša država izpolnila vse pogoje in uspešno prehodila pot do pridružitve Evropski uniji skupaj z ostalimi devetimi državami članicami.*

*Državljeni Cipra so imeli v zvezi s pridruževanjem in članstvom v Evropski uniji, veliko upov in velika pričakovanja za izpolnitev idealov, zapisanih v Pogodbi o Evropski uniji, kot so svoboda, varnost in spoštovanje človekovih pravic in temeljnih svoboščin posameznika v demokratični družbi.*

*Vsa ta načela vsebuje Ustava Republike Ciper iz leta 1960. Drugo poglavje Ustave je v celoti posvečeno določbam, ki varujejo temeljne pravice in svoboščine. Republika Ciper je leta 1962 z zakonom ratificirala Konvencijo o varstvu človekovih pravic in temeljnih svoboščin.*

*Vrhovno sodišče je v svoji praksi od leta 1960 z drugimi ciprskimi sodišči dokazalo, da je nepopustljiv varuh človekovih pravic in svoboščin posameznika. Iz naše sodne prakse je razvidno, da zelo strogo varujemo temeljne svoboščine in pravice.*

*Republika Ciper pozdravlja sprejem Ustave Evropske unije in upa, da bodo ta pomembni instrument ratificirale vse države članice, ter da bo Evropska unija pristopila h Konvenciji o varstvu človekovih pravic in temeljnih svoboščin, s čimer bo na tem področju pridobilo pristojnost Evropsko sodišče v Strasbourgu.*

*Moje skromno mnenje je, da pri usklajevanju zakonodaje držav članic z evropsko zakonodajo ne bo težav, saj so ideali in cilji Evropske unije skupni vsem. Potrebna sta le volja in zaupanje. Vrhovno sodišče Republike Ciper ima močno voljo, kot tudi potrebno znanje in izkušnje, da se sooči z izzivi, nastalimi ob naši pridružitvi Evropski uniji. Zaradi tega samozavestno stopamo v svetlo prihodnost, ki se nam obeta.*

As citizens of the Republic of Cyprus we are indeed very proud because our country satisfied all the criteria and passed with flying colours all the preparatory steps before joining the European Union, together with the other nine member states, on 1<sup>st</sup> May, 2004. Cyprus, a small but beautiful island in the Eastern Mediterranean with just below a million inhabitants, is widely acknowledged as having a good and stable economy, with its people enjoying a high standard of living. There has never been any appreciable group of eurosceptics in Cyprus. I have the view, although I do not profess to be an expert in the field, that our joining the European Union will not bring an upheaval in the country's small and versatile economy or social structure.



The citizens of Cyprus looked upon the path leading to the European Union, and now as members of it, with high hopes and great expectations for the fulfilling of the ideals embodied in the preamble of the Maastricht agreement on 7<sup>th</sup> February 1992. These ideals and common goals constitute a concrete basis in the aspirations of Cypriots for the solution of the long standing political problem of their country. Their longing for a viable and lasting solution stands on the strong pillars of the principles of freedom, democracy and respect of human rights and fundamental freedoms, in a state where the rule of law will prevail.

Our Supreme Court is well familiar with the above principles. They are embodied in our 1960 Constitution, when the Cyprus Republic was established. Part II of the Constitution is wholly devoted to the provisions safeguarding the fundamental rights and freedoms, as same have been specified and ratified in the Rome Agreement and the Convention for the Protection of Human Rights and Fundamental Freedoms, which the Republic of Cyprus ratified by law in 1962. (Photocopy of Part II of our Constitution is attached).

The Supreme Court of Cyprus, which exercises a wide jurisdiction i.e. first instance in some cases, appellate, administrative and revisional, functions also as Supreme Constitutional Court, with jurisdiction to declare laws, bylaws and administrative decisions as unconstitutional. It also gives its opinion when the President of the Republic refers to the Court a law, passed by the House of Representatives, whether this law or any provision in it, is unconstitutional. In exercising its jurisdiction the Supreme Court, as well as all the Courts of the Republic, have proved to be the rigid and unbending guardians of the civil rights and liberties of the person. Our case law is rich in this field, and starts right from the beginnings of the Cyprus Republic. In fact, our firm stance in safeguarding the fundamental rights and freedoms, led, in some cases, the Court to proceed even further than the case law of the European Court of Human Rights. Recently, the Plenum of the Court has ruled that a person, whose right to private telephone communication had been violated, by recording it through a mechanical device, had a right of action against the intruder, and was awarded damages, although no law provides that this intrusion is actionable as a tort. In spite of this, we held that the violation was actionable per se. We are also more strict than the European Court of Human Rights on another important topic. According to our binding precedent, evidence obtained through the violation of a constitutional right is objectionable and, therefore, rejected by the court.

The Republic of Cyprus is welcoming the adoption of the European Charter – Constitution, and hopes that this important instrument will be ratified by all member states. For us, its most important part is the one safeguarding the fundamental rights and freedoms, although, admittedly, this is done in general terms that lack the lucidity a legally binding instrument should have. Its application though may rest in good faith and in the common endeavour to safeguard the rights of the individual and the good administration of the public affairs by the government.

I venture to express the humble opinion that no serious conflict would arise between the rights envisaged in the European Union Constitution, and those provided for in the European Convention, although this subject has created much controversy and theoretical discussion. I trust that the European Union would sign the Convention for the Protection of Human Rights and Fundamental Freedoms, so that the European Court of Human Rights will be the ultimate judge in all cases of violation of its provisions by a member state. The European Community Court has, after all, ruled, if I am right, that every E.U. member state is obliged to respect the decisions of the European Human Rights Court.

Another serious problem that poses for consideration, in fact it has been the topic for discussion in a number of conferences and seminars, is the conformity of the laws of the E.U. member states with the European corpus of binding rules i.e. treaties, agreements and directives, known in short as European *acquis*. I have the view that the differences of opinion arising on this subject are mostly theoretical and of a rather exaggerated importance. The problems, if any, would arise in due course, along with the relevant decisions of the courts of the member states. I expect that the courts will apply the national law in such a way that their decisions would not contradict the *acquis communautaire*. In the rare case, when this could not be done, because the national law is in direct contradiction with an E.U. obligation, then, it is my humble opinion, that the member state should take appropriate steps so as to conform its law with the E.U. legal obligations. And this because, the agreement, which unified the 25 member states, is unique in history and content. It is not an ordinary bilateral or multilateral agreement on a specific topic or subject, on which the states have common interest. I will not elaborate on this serious subject further. I could only stress, in synopsis, the fact that the E.U. agreement regulates in practice the daily life of the citizens of the member states, and to a great extent the administration of the affairs of each state by its government and other public organs. The sublime ideal and goal of the E.U. agreement will prove to be successful only if the member states are ready and willing to abide by its provisions.

Our Supreme Court feels, therefore, strong in spirit, as well as in background knowledge and experience, to meet the new challenges, arising from our joining the E.U. The ardent desire of the citizens of Cyprus, as I have stressed earlier, is focussed on their lawful and valid expectations that the principles, which have united Europe, will truly lead the thoughts and behaviour of the citizens and governments of every member state. These principles must prevail over and above any other consideration, and in particular political or economic interests of the great powers, so that each and every one of the citizens of the member states will feel that the main purpose for the unification of Europe is the advancement of a better quality of life for them.

*Dr. Jiří Mucha*

*Judge of the Constitutional Court of the Czech Republic*

## **THE PRESENTATION OF CZECH EXPERIENCES**

### **Summary**

- 1) Introduction – acknowledgement for the invitation
- 2) Thema of the Contribution – The application of Community law in the Czech legal order, the relationship of the national constitutional system and of the Constitutional Court of the Czech Republic to the Community law and constitutional system and to the European Court of Justice and the recent developments in the European system of the protection of human rights, represented namely by the European Convention on Human Rights, and most recently also the Charter of Fundamental Rights of the European Union – all that from the point of view of the Constitutional Court and its future operation.
- 3) Constitutional Basis of the Application of the Community Law in the Czech Republic's Legal Order
- 4) Relationship of the National Constitutional System and of the Constitutional Court of the Czech Republic to the Community Law System and to the Jurisdiction of the European Court of Justice
- 5) European Convention on Human Rights and the Charter of Fundamental Rights of the European Union – Development of the European System of the Protection of Fundamental Rights
- 6) Conclusion

### ***Povzetek***

*Prispevek obravnava tri sklope vprašanj in sicer v prvem sklopu razpravlja o ustavnem temelju za uporabo prava Skupnosti v pravnem redu Republike Češke, v drugem o razmerju med nacionalnim ustavnim sistemom in češkim Ustavnim sodiščem ter pravom Skupnosti in pristojnostjo Sodišča Evropskih skupnosti. Tretji del pa se nanaša na odnos med varstvom temeljnih pravic v okviru EU in Evropskega sodišča za človekove pravice.*

*V prvem delu je najprej predstavljena sprememba 10. člena Ustave, ki namesto prejšnje določbe o neposrednem učinku in primarnosti mednarodnih pogodb o človekovih pravicah govori o takšni moči splošnih mednarodnih pogodb. Poleg tega opozarja na nov 10.a člen Ustave, ki pomeni prenos določenih pravic na mednarodno organizacijo ali ustanovo (t. i. integracijska klavzula), ki je po avtorjevem mnenju edini ustavni temelj za uporabo prava Skupnosti v češkem pravu, ne pa sprememba 10. člena Ustave, kot so menili nekateri.*

*V drugem delu, kjer je v ospredju položaj Ustavnega sodišča v novi situaciji, avtor razpravlja o vprašanju, ali je Ustavno sodišče sploh "sodišče" v smislu 234. člena Pogodbe o ustanovitvi Evropske skupnosti (PES), ki tako sodišče obvezuje oziroma mu daje možnost vlaganja zahtev za odločanje o predhodnih vprašanjih na Sodišče Evropskih skupnosti (SES). Avtorju se zdi prav, da bi bilo tako tudi v češkem primeru predvsem zaradi splošne definicije sodišča, kamor kljub svoji specifičnosti nedvomno spada tudi Ustavno sodišče, ter iz bolj pragmatičnih razlogov. Predvsem v slednjem primeru bi to pomenilo odlično priložnost za to, da bi se SES lahko primerno seznanilo z nacionalnimi pogledi na določena sporna vprašanja glede razvoja človekovih pravic. Funkcijo Ustavnega sodišča v zvezi s postopkom po 234. členu PES vidi predvsem v nadzoru splošnih sodišč glede spoštovanja obveznosti postavljanja predhodnih vprašanj, opustitev česar bi lahko pomenila kršitev temeljne pravice do zakonitega sodnika.*

*V zvezi z razvojem evropskega sistema varstva človekovih pravic je avtor po eni strani navdušen zaradi naglega razvoja takšnega varstva v EU predvsem glede Evropske Ustave, po drugi strani pa je zaskrbljen zaradi morebitnega podvajanja sistemov in standardov varstva človekovih pravic s strasbourškim sistemom. V ta namen se mu zdi idealna rešitev pristop EU k Evropski konvenciji o varstvu človekovih pravic, zaveda pa se, da to na žalost ni povsem realna možnost.*

In my contribution I would like to mention three circles of issues connected with the membership of the Czech Republic in the European Union: the constitutional basis upon which Community law is applied in the Czech legal order; the relationship of the national constitutional system and of the Constitutional Court of the Czech Republic to the Community law and constitutional system and to the European Court of Justice; and finally the recent developments in the European system of the protection of human rights, represented namely by the European Convention on Human Rights, and most recently also the Charter of Fundamental Rights of the European Union – all that from the point of view of the Constitutional Court and its future operation.

## **Constitutional Basis of the Application of the Community Law in the Czech Republic's Legal Order**

After modifying the Czech Constitution in the year 2001 through the so called euro-amendment, i.e. the Constitutional Act No. 395/2001 Coll., the constitutional anchorage of the application of the Community law in the national legal order of the Czech Republic is being mentioned above all in the context of the following two articles of the Czech Constitution:

Article 10 of the Constitution, in its amended wording, provides that promulgated international treaties, which were consented for ratification by the Parliament and by which the Czech Republic is bound, form part of the legal order; should a provision of an international treaty differ from a provision of a law, the international treaty shall be applied. Compared to the previous wording of this article, which ensured an immediate binding force and primacy over a law only for international treaties on human rights and fundamental freedoms, the Czech constitutional system has undergone a remarkable move from a dualistic to a monistic view of the relationship between international and national law in general and in the relationship to the international treaties in particular; in connection with this, the special category of international treaties on human rights, as well as the privileged position of this special category of international treaties, were abolished.

The completely new Article 10a of the Constitution then contains the so called “integration clause” that created an essential constitutional basis for the accession of the Czech Republic to the European Union: through an international treaty, some powers of the Czech Republic's bodies can be delegated to an international organisation or institution. The integration clause thus enabled the Czech Republic to assign, through the accession agreement, a part of its own powers to the European Union.

Some opinions appeared in expert discussions, which called in question the constitutional anchorage of the application of the Community law in the national law; these opinions considered solely the above-mentioned Article 10 of the Constitution as a basis for such application. This article appears to be insufficient in the light of the doctrine of the primacy of the Community law over the national law. This is, however, an inadequate understanding of the overall philosophy of the so called euro-amendment of the Constitution – the constitutional basis of incorporation and application of the Community law in the Czech Republic is exactly and exclusively the “integration clause”, i.e. the above mentioned Article 10a of the Constitution. As a consequence of the assignment of powers of some bodies of the Czech Republic to the European Union through the accession agreement, in thus delimited sphere the national legislation is either not applied any more (in the area of the exclusive competency of the European Union), or the national legislation is applied concurrently with Community acts operating on the basis of the rules of the European Union (in the area of shared competency of the Union and a member state).

Articles 10 and 10a of the Constitution apply to various types of international treaties. Hence there is no need to deal with the question of the application of the directives and regulations of the European Union under the stipulations of Article 10, i.e. only if they provide something different than a law. In the light of Article 10a of the Constitution, some resources of the Community law, e.g. regulations, are in fact applied instead of laws, albeit of exactly the same contents, and as a consequence of the delegation of some powers they have a factual application primacy not only over laws (which is normal with international treaties covered by Article 10 of the Constitution), but in principle also over the national Constitution.

#### Relationship of the National Constitutional System and of the Constitutional Court of the Czech Republic to the Community Law System and to the Jurisdiction of the European Court of Justice

What consequences can the extension of the effect of the Community law upon the Czech Republic have for the powers and the operation of Czech Constitutional Court? This is an extremely broad set of issues, therefore on this forum I cannot but concentrate on a few brief remarks, which obviously express merely my own views of this matter; the Constitutional Court as an institution shall formulate its approach through its specific decision-making activity in the future.

A question arising in this context from the practical point of view at the first place is, whether the Constitutional Court of the Czech Republic is a court as follows from Article 234 of the Treaty establishing the European Community, meaning a court that refers preliminary questions to the European Court of Justice concerning controvertible aspects of interpretation or validity of a provision of Community law. The practice of the constitutional courts of the European Union member countries and the positions of these courts towards the procedure pursuant to Article 234 of the Treaty establishing the European Community are well known to be different from one another; hence a universally acceptable approach does not seem to exist.

It must be stated beforehand, that even if the Constitutional Court will be such a court as follows from Article 234 of the Treaty establishing the European Community, the fact itself will not divest namely the Supreme Court and the Supreme Administrative Court, i.e. the two paramount courts of the ordinary judiciary in the Czech Republic, of their position of courts against the rulings of which no appeal is possible, and therefore have a principal obligation as per Article 234 par. 2 of the Treaty establishing the European Community to refer a preliminary question to the European Court of Justice. A constitutional plea, in fact, is not a remedy as follows from Article 234 par. 3 of the Treaty establishing the European Community; the Constitutional Court is not just another instance in the ordinary judiciary – it is not superior to ordinary courts; a constitutional plea essentially serves the purpose of defending fundamental rights based on the national Constitution,

which is a different purpose than that of a remedy as stipulated in Article 234 of the Treaty establishing the European Community. But in spite of that, I assume that the Czech Constitutional Court should feel free to undergo, in certain circumstances, the procedure as follows from Article 234 of the Treaty establishing the European Community, although these circumstances are likely to be of a rather exceptional nature – due to the position of the ordinary judiciary and above all the Supreme Court and the Supreme Administrative Court.

First of all a reference should be made to the fact that the issue of the definition of a court as per Article 234 of the Treaty establishing the European Community is an issue of the Community law rather than national law. The European Court of Justice understands a court according to Article 234 of the Treaty establishing the European Community on the one hand as a body defined as a court by national law, and upon the other hand as a body that is not defined as a court by national law, but meets some characteristic features laid down by the European Court of Justice (it must be a body established on the basis of a statute that has an obligation to make decisions independently and in accordance with law and that performs systematically its judging functions – i.e. issues binding decisions on rights and duties of individual persons and/or corporate entities). The Constitutional Court of the Czech Republic then undoubtedly is a body that meets this Community definition of a court as per Article 234 of the Treaty establishing the European Community.

Also considering pragmatic reasons, it would not be suitable to exclude a possible intervention of the Constitutional Court at the European Court of Justice based on a procedure stipulated under Article 234 of the Treaty establishing the European Community. The institute of a preliminary question provides national courts with a relatively effective opportunity to formulate their own idea of accurate interpretation of the Community law and get the European Court of Justice acquainted with the impact of its own interpretation in individual cases and with their own national peculiarities. Convincing arguments of a national court can inspire the European Court of Justice to create an exception from its previous interpretation of Community law, or even to change the case law. In such a context, an intervention of the Constitutional Court could be opportune and expedient namely in the issues of interpretation and application of Community standards of fundamental rights by the European Court of Justice. The Constitutional Court would have an opportunity to formulate its own opinion concerning the purport and interpretation of the European human rights principles; its argumentation should, however, be based on the perspective of the Community law with comparative utilisation of the constitutional arrangements of other member countries of the European Union and of the case law of the European Court of Human Rights – i.e. not exclusively or prevalingly on the perspective of interpretation of the standards provided by the national Constitution. In fact, it follows from the logic of the decentralized system of European law, that any national court, including a constitutional court, becomes a European court when deciding on matters involving the Community law.

As I mentioned before, the use of the procedure under Article 234 of the Treaty establishing the European Community by the Constitutional Court is likely to be rare and exceptional; the Constitutional Court will be able, however, by way of deciding on constitutional pleas lodged by individuals, to defend the application of the Community law wherever not a mere violation of the ordinary Community law will be in question, i.e. without the human rights dimension, but where the fundamental rights will be jeopardized. The Constitutional Court will fulfil its role of protection of human rights in the best manner by merely monitoring, in principle, whether the national courts meet their obligation to refer a case to the European Court of Justice for preliminary judgment pursuant to Article 234 of the Treaty establishing the European Community. The Constitutional Court will also be able to decide by itself upon appropriate interpretation of the Community law based on a constitutional plea; this, however, only when the given rule has been already interpreted by the European Court of Justice; its role will be strictly subsidiary and the case law of the Constitutional Court must follow upon the case law of the European Court of Justice. Should an ordinary court, against the decision of which no appeal is possible, fail to observe its obligation to refer a preliminary question to the European Court of Justice as stipulated under Article 234 of the Treaty establishing the European Community, repeal of such a final judgment by the Constitutional Court will be possible based on a constitutional plea, on the basis of the violation of the right to a statutory judge guaranteed by Article 38 of the Charter of Fundamental Rights and Freedoms.

### **European Convention on Human Rights and the Charter of Fundamental Rights of the European Union – Development of the European System of the Protection of Fundamental Rights**

Finally please allow me to make several observations concerning the recent development of the European system of the protection of fundamental rights.

The Draft Treaty establishing a Constitution for Europe envisages in Title II of Part 1, Article I-7, dedicated to fundamental rights, the undertaking of two steps, which in the case of the acceptance of the Constitution of the European Union in the proposed wording may mean a remarkable change in the European system of the protection of human rights: the Charter of Fundamental Rights is to become a part of the European Constitution, and the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

If we avoid superficial enthusiasm and assess the presumable development soberly, we cannot avoid a question whether the European Union has really set out on a journey towards the strengthening of the protection of an individual, or rather to a chaos of different procedures, to a mutual competition of dual case laws, and finally to double standards of the protection of fundamental rights in Europe. Naturally, this is a question of the future



relationship between two existing systems of the protection of fundamental rights, i.e. between the relatively stable system of the European Convention on Human Rights in the framework of the Council of Europe, and the dynamically developing system of the European Union.

Forty-five member states of the Council of Europe are now parties to the European Convention on Human Rights, including all twenty-five states of the European Union, which are subject to the control mechanism of the European Court of Human Rights. The states, with only rare exceptions, abide by the judgments of the Strasbourg Court – their respect to these judgments is even surprisingly high. While in the former case law of the Strasbourg bodies any complaints aiming directly against the acts of the bodies of the European Communities used to be rejected as inadmissible *ratione personae* stating that the European Communities are not party to the Convention, a noteworthy development has been marked the last few years. The most distinct decision thus far, modifying the approach of the Court in this area, is the judgment of the European Court in the case of *Matthews vs. United Kingdom* from the year 1999, in which, for the first time ever, a member state of the European Union was condemned for a conduct based immediately on the Community law. Other complainants have based their petitions on the *Matthews* case in the meantime. This development in the case law of the Strasbourg Court probably means of the incentives contributing to larger efforts at pushing ahead the accession of the European Union to the European Convention. But will the inception of the Charter of Fundamental Rights of the European Union and its incorporation into the constitutional treaty represent any substantial benefit for a citizen of the Union? I admit I am rather sceptical in this respect. I am afraid the Charter does not fully meet the objective it was created for; in fact, the objective was supposed to be mainly a better transparency and simplification of the protection of fundamental rights for individuals.

From the material point of view, the Charter of Fundamental Rights is nothing but a compilation of the stipulations of the European Convention, which was the main resource of its contents, and relevant stipulations of some more recent international treaties, as well as a reflection of some relevant case laws of the European Court of Justice and the secondary legislation of the European Communities; in simple words, it does not bring about anything that was not contained already in the above mentioned sources – and this regards also the “modern” rights connected with bioethics or with the right to the protection of personal data. The Charter includes, however, some stipulations, the inclusion of which into the catalogue of fundamental rights – in the sense of subjective individual rights – is rather doubtful, such as, for example, a proclamatory setting of principles and goals (diversity of cultures), access to medical care, environmental protection, and consumer protection.

In my view, the most sophisticated – and today not more than theoretical, I am afraid – solution would have been the accession of the Communities to the European Convention

before the actual inception of the Charter. The observance of the rights included in the today's Charter, which overlap with the European Treaty, would then be singularly guaranteed and controlled by the Strasbourg Court on the basis of direct complaints from the citizens regarding all acts of national and Union authorities.

The current wording of the Article 7 of the Constitutional Treaty practically leaves only two realistic options of the future development:

The Charter will become a binding part of the Constitution, but the Union will not use the newly created legal possibility to access the Convention. From the point of view of an integral protection of the fundamental rights in Europe, such a solution would not be providential – it would establish the existence of two binding and mutually overlapping catalogues of fundamental rights, offering two completely different procedural options of seeking a judicial protection, controlled by two courts having different competencies, with the subsequent risk of a gradual yet inevitable rise of two different standards of human rights in a should-be integrated legal and political area of the European Union .

The second – and in my view, with the present status quo, the only relatively satisfactory – alternative is (even upon the assumption of a legally binding Charter) the accession of the Union to the European Convention and its engagement in the Strasbourg system of the protection of fundamental rights. This would eliminate the threat of an impending procedural duality of the protection and the rise of different interpretations of the same fundamental rights in Europe. The multi-stage, expensive and time-demanding system of judicial protection of fundamental rights, which is already burdening for a citizen both at the national and the European levels, would perhaps not have to become even less transparent and comprehensible.

*Prof. Dr. Eerik Kergandberg*  
*Judge of the Supreme Court of the Republic of Estonia*

## **ROLE OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT OF THE REPUBLIC OF ESTONIA<sup>1</sup> IN THE EUROPEAN UNION<sup>2</sup>**

### **Summary**

In Estonia, the political choice for the laconic Constitution Amendment Act, comprising of four articles, instead of the thorough revision of the existing Constitution, or inserting a special chapter on EU into the Constitution, was made. This choice was highly criticized by the majority of the Estonian legal community. As another matter of dispute, the necessity of the so-called defence clause was debated over. As a result, the draft bill of the Constitution Amendment Act was complemented by a provision stating that Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia, so as to provide extra safeguards for the possible future development of EU integration.

As to the readiness of the Estonian Constitutional Court to operate in new circumstances, long-standing tradition in taking account of the principles of European law in national administering of law may be observed in the practice of the Constitutional Review Chamber of the Supreme Court of Estonia. In respect of the so-called “hard cases”, where the question of the supremacy of the EU law over the national constitutions is addressed, giving meaning to these “fundamental principles” serving as a safeguard from the absolute supremacy of the EU law, will fall within the competence of the Constitutional Courts, who should co-operate in improving a thorough discussion upon the subject.

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<sup>1</sup> In Estonia, no separate Constitutional Court has been established. However, according to the Estonian Constitution, The Supreme Court of Estonia as the highest court in the state is also conferred with the powers of constitutional review (Art 149 (3)). According to Art 152 (2) of the Constitution, The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution. Constitutional review petitions are heard by the Constitutional Review Chamber, which consists of 7 members, or by the Supreme Court sitting *en banc* (19 justices). Hereafter, the term “Constitutional Court” will be used to designate the bodies of the Supreme Court conferred with the powers of constitutional review.

<sup>2</sup> The speaker would like to thank Ms Berit Aaviksoo, a counsel of the Constitutional Review Chamber of the Estonian Supreme Court, for preparing the materials for the present report.

## **Povzetek**

*Namesto celovite revizije obstoječe Ustave ali vključitve posebnega poglavja o EU, so v Estoniji sprejeli politično odločitev za lakonični Ustavni zakon o spremembah Ustave, ki obsega štiri člene. Takšno odločitev je večina estonske pravne skupnosti močno kritizirala. Veliko pa so razpravljali tudi o nujnosti t. i. obrambne klavzule. Kot rezultat tega so predlog omenjenega Ustavnega zakona dopolnili z določbo, ki je Estoniji omogočila priključitev Evropski uniji v skladu s temeljnimi načeli Ustave Republike Estonije, da bi tako zagotovili dodatna jamstva v primeru možne prihodnje širitve EU.*

*Glede pripravljenosti estonskega Ustavnega sodišča, da deluje v novih okoliščinah, je treba opozoriti na ustaljeno tradicijo Ustavnosodnega oddelka Vrhovnega sodišča Estonije da upošteva načela evropskega prava pri nacionalnem pravnem odločanju. Odločanje o t. i. "težkih primerih", kjer gre za vprašanje nadvlade prava EU nad nacionalnimi ustavami, bo tako ob upoštevanju pomena teh "temeljnih načel" kot varovalk zoper absolutno supremacijo prava EU v pristojnosti ustavnih sodišč, ki bodo morala sodelovati in tako dopolnjevati celovito razpravo o teh vprašanjih.*

## **Introduction**

This report concentrates upon two major issues. In the first part of the report, constitutional amendment to the Constitution of the Republic of Estonia related to the integration of Estonia into the European Union as well as concurrent discussion in Estonian legal profession are discussed. Secondly, the questions of the novel role of the Estonian Constitutional Court after integration into the Union, and the readiness of the Estonian Constitutional Court to operate under new circumstances are addressed.

### **1. Constitutional amendments related to integration into the EU**

On September 14<sup>th</sup>, 2003, Estonian citizens adopted in referendum the Constitution of the Republic of Estonia Amendment Act (hereafter Constitution Amendment Act). The first article of this, so-called Third Act,<sup>3</sup> reads as follows: "Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia." According to article 2 of the same act, "[a]s of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the

<sup>3</sup> With the Constitution itself being the first and The Constitution Implementation Act the second one.

rights and obligations arising from the Accession Treaty.”<sup>4</sup> Apart from this very general clause, no more amendments to the Constitution were made.

The political choice in favour of the laconic Third Act, instead of the thorough revision of the existing Constitution, or inserting a special chapter on EU into the Constitution, which had also been discussed, posed a heated debate in Estonian society. Before the referendum, several public statements by renowned legal scholars and practitioners were made both in favour and against the Third Act. While the politicians and civil servants preferred not to amend the Constitution, initiating a motion for complementing the Constitution with an Independent Third Constitutional Act; legal scholars, on the other hand, emphasized the need for a legitimate and legally correct entrance into the EU.<sup>5</sup>

### 1.1. Problems related to the Constitution Amendment Act

According to Mr Rait Maruste, the former Chief Justice of the Estonian Supreme Court,<sup>6</sup> and the now Judge of the European Court of Human Rights, who was one of the severest opponents of the Third Act, along with joining with the EU, the existing relations of power will shift so dramatically, that emerging collisions cannot be bridged by mere general clause. In his view, the thorough revision of the existing articles of the Constitution should have been preferred, instead.

Other main constitutional problems raised with relation to the Third Act were the following. Firstly, the Third Act does not fit into the Estonian Legal order, as Estonia’s traditions provide that laws are amended by introducing amendments directly into the laws themselves instead of existing in parallel. Secondly, Estonian Constitution settles down very rigid amendment procedures, which do not include an act, which would exist independently besides the Constitution instead of amending it. Thirdly, the Third Act would provide unlimited interpretation possibilities and therefore no legal certainty.<sup>7</sup>

As of today, there is a strong pressure for making additional EU-related amendments to the text of the Estonian Constitution so as to overcome the so-called “European deficit” in the Constitution of Estonia and cure harms of the legal uncertainty in this respect. According to Mr Maruste, alongside with integration into the EU, Estonia waived a part of its sovereignty and thereby reached into new phase in constitutional development, where hitherto existing fundamental constitutional principles like sovereignty need to be reworded and rendered new meaning.

<sup>4</sup> Available in English at: <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>, last accessed on 9/09/2004. For full text of the act, see Annex.

<sup>5</sup> See, for example: A. Albi. Estonia’s Constitution and the EU: How and to What Extent to Amend It? *Juridica International VII*, 2002, pp. 39-48.

<sup>6</sup> Also the *ex officio* Chairman of the Constitutional Review Chamber.

<sup>7</sup> For a more detailed critics on the Third Constitutional Act see: A. Albi. Estonia’s Constitution and the EU: How and to What Extent to Amend It? *Juridica International VII*, 2002, pp. 39-48.

After political consensus had been reached on opting for the Third Act, new problems related to the accession emerged. Now attention shifted to the possible risks involved with the unconditional acceptance of the principle of the supremacy of the EU law.

## 1.2. Adding the so-called defence-clause to the Constitution Amendment Act

The initial text of the draft Constitution Amendment Act stated simply, that “[i]n case of Estonia’s membership in the European Union, the Constitution will be applied, taking into consideration the rights and obligations arising from the Accession Treaty.”<sup>8</sup>

This wording of the Third Act deserved severe critics from part of some legal scholars. Mr Lauri Mälksoo, the now counsel of the Chancellor of Justice of the Republic Estonia in international and EU-related matters, pointed to risks related to the possible future developments of the European Union and argued for adding additional safeguards into the text of the act.

In his words, the unconditional acceptance of supremacy of the EU law over the national Constitution in the constitutional text were inappropriate and unnecessary. While accepting the principle of supremacy as such, he pointed to the ongoing political integration in the framework of the EU, and to the possibility of extensive interpretation of the Treaties which could lead to reaching out to the most “sovereign” spheres that could possibly harm the identity of the member state and the fundamental principles of its Constitution.<sup>9</sup>

Resting on this kind of critique, the so-called crisis or defence-clause was added to the draft bill of the Constitution Amendment Act on the initiative of the Chancellor of Justice of Estonia.<sup>10</sup> The final text of the draft bill of the Constitution Amendment Act read as follows: “Estonia may belong to the European Union *in accordance with the fundamental principles of the Constitution of the Republic of Estonia* (Art 1). As of Estonia’s accession to the European Union, the Constitution of the Republic of Estonia applies

<sup>8</sup> Draft bill of the Constitution of the Republic of Estonia Amendment Act as of 16.05.2002, available in Estonian at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=021360008&login=proov&password=&system=ems&server=ragne1>.

<sup>9</sup> L. Mälksoo. Kuidas muuta põhiseadust? (How to Change the Constitution?) Postimees, 13 May 2002 (in Estonian).

<sup>10</sup> According to the Estonian Constitution, the Chancellor of Justice, in addition to supervising the guaranteeing of constitutional rights and freedoms of individuals by state agencies, also examines the conformity of laws adopted by the Riigikogu, regulations of the Government of the Republic and ministers, also regulations of municipal councils and local governments as rules of behaviour or general acts or legislation of general application with the Constitution and laws. The Chancellor of Justice has the right and the obligation to propose to a body which passed a law or regulation to bring into conformity any legislative act of general application which is in conflict with the Constitution or the law. If the body which passed the legislation disagrees with the proposal of the Chancellor of Justice, the Chancellor of Justice has the right to propose to the Supreme Court that the disputable provision of the law or regulation should be repealed.

taking account of the rights and obligations arising from the Accession Treaty. (Art 2)". This text was passed as law in referendum.

On introducing the defence-clause into the Constitution Amendment Act, Estonia rested upon the practice of the other Member States of the EU, who also have created legal "emergency exits" and guarantees for protection of the fundamental values of the constitution, which do not question the principle of supremacy of the EU law, but set certain limits to it. In this respect, the *Maastricht* decision<sup>11</sup> of the Constitutional Court of the Republic of Germany and Art 23 (1) of the German Constitution were primarily borne in mind.

The defence-clause is clearly future-oriented and should be invoked in and only in case of negative developments of the European Union. As to what constitute "the fundamental values of the Estonian Constitution", the Estonian politicians preferred to opt for the "open list" so as to refrain from potential self-restraint in this respect. Basically, the principles of human dignity, social and democratic state based on law; principles of the state based on liberty, justice and law; and the obligation to preserve Estonian nation and culture, are concerned.

The further elaboration of the content of "the fundamental values of the Estonian Constitution" falls within the competence of the Constitutional Court of Estonia, should the necessity ever occur.

If the EU law got into conflict with the fundamental principles of the Estonian Constitution, it were the Constitutional Court, who would have the possibility to assess the validity of the EU law and apply the fundamental principles of the Constitution. In this respect, the Constitutional Court will act as the "ultimate stronghold" of the fundamental principles of the Estonian Constitution. If the contradiction couldn't be eliminated, the defence clause could act as the crisis clause and serve as constitutional basis for initiating the withdrawal from the European Union.

## 2. The novel role of the Constitutional Court and its readiness for new challenges

European law, the Council of Europe human rights law, and the case-law of the European Court of Human Rights, in particular, has influenced Estonian legal thinking from the very beginning of re-establishing national legal order after Estonia's regaining of independence in 1991. In developing the Constitution of Estonia, adopted on June 28<sup>th</sup>, 1992, European law in its wider sense, embracing, above all, the European Convention on Human Rights and the practice of the European Court of Human Rights, was taken as the basis. This means that the Estonian Constitution has been written in the spirit of the Council of Europe.<sup>12</sup>

<sup>11</sup> 89 BVerfGE 155.

<sup>12</sup> J. Laffranque. Co-existence of the Estonian Constitution and the European Law. *Juridica International* VII 2002, pp. 17-27.

## 2.1. Application of the European law by the Constitutional Court of Estonia

References to the Council of Europe human rights law have thus been quite ordinary in the decisions of the Constitutional Review Chamber and the Supreme Court sitting *en banc*. During the eleven years of its postwar existence, the Constitutional Review Chamber has frequently applied provisions of the European Convention of Human Rights and used the relevant practice of The European Court of Human Rights in its argumentation.

As to the EU law, there has been relatively little space for the Estonian courts to rely on EU law before accessing the EU on May 1<sup>st</sup>, 2004. However, already as early as in 1994, the Constitutional Review Chamber of the Supreme Court stated the following: “In democratic states the law and general principles of law developed in the course of history are observed in law-making as well as in law application, including the administration of justice. ***In creating the general principles of law for Estonia the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered.***”<sup>13</sup> On the basis of this decision, already prior to the accession it was generally assumed that the generally recognized principles of European law served as an integral part of the Estonian legal system.

One can also find references to the Charter of Fundamental Rights of the European Union in the practice of the Constitutional Review Chamber of the Supreme Court. In its 2003 decision the Constitutional Review Chamber used the Charter as an interpretative aid in exploring the content of a national constitutional norm, stating that “[a]rticle 41 of one of the most recent international documents on fundamental rights – the European Union Charter of Fundamental Rights – directly refers to the right to good administration.” The Court observed the following: “The Charter of Fundamental Rights of the European Union is not yet legally binding on Estonia, but – as it is also expressed in the preamble of the Charter – it is based, *inter alia*, on the constitutional tradition and the principles of democracy and the rule of law, common to the member states of the European Union. The principles of democracy and the rule of law, as well as other general principles and values of law valid in the European legal space, are also valid in Estonia.”<sup>14</sup> In one of its latest decisions, the Constitutional Review Chamber also referred to the Charter, stating that “[p]ursuant to the Charter of Fundamental Rights of the European Union, which is not yet legally binding on Estonia at present, the Union recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.”<sup>15</sup>

<sup>13</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of 30 September 1994 No III-4/A-5/94. Available in English at: <http://www.nc.ee/english/>, last accessed on 10/09/2004.

<sup>14</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 No 3-4-1-1-03. Available in English at: <http://www.nc.ee/english/>, last accessed on 10/09/2004.

<sup>15</sup> Judgment of the Constitutional Review Chamber of the Supreme Court of 21 January 2004 No 3-4-1-7-03. Available in English at: <http://www.nc.ee/english/>, last accessed on 10/09/2004.



As described earlier, the doctrine of the supremacy of European law over national constitutions is generally well accepted and repeatedly assured by the European Court of Justice. Nevertheless, the national high courts have from time to time shown their distrust of the idea of absolute supremacy by developing concepts like “constitutional identity” or “fundamental constitutional principles” refining the idea of supremacy. So far, no “hard cases” have arisen, but, in view of the further integration, this shouldn’t be excluded from academic discussion. In my view, constitutional courts conferred with the powers to give meaning to the “fundamental constitutional principles” of a given constitution, should stand at the forefront of this debate, by elaborating co-operation and change of views in this respect.

## 2.2 Judicial capacity in light of EU integration

Until May 1<sup>st</sup>, 2004, the Community law stood very much for a foreign law for a national judge from any candidate country. Membership of the European Union means among other things that national courts are expected to apply Community law as their national law. Thus the national judge is faced with the obligation to familiarise his or herself with the novel legal system so as to feel comfortable with applying hitherto unfamiliar norms just like those of domestic law. A justice of the Constitutional Court is no exception in this matter.

The justices of the Supreme Court have participated in numerous conferences, seminars and trainings on EU law. Especially since 2001 the number of academic and educational events touching on themes related to accession has increased. However, justices’ contact with EU law has been mainly through their special field. While justices of administrative law background know the respective branch of EU law *et cetera*, general overview and more concrete knowledge on the role of domestic judiciary in European Union as well as basics of EU law are more modest.

After publication of the third regular report (the so-called progress report) of 2000 by the European Commission, the Estonian Ministry of Justice revised the training programme for judges and prosecutors, which now includes special emphasis on EU-specific training. Thus the situation should still be improving in field of EU law.

Annex

The Constitution of the Republic of Estonia Amendment Act,<sup>16</sup> passed September 14th, 2003, entered into force 14 December 2003.

“At a referendum held on 14 September 2003 on the basis of § 162 of the Constitution of the Republic of Estonia, the people of Estonia adopted the following Act amending the Constitution:

<sup>16</sup> Available in English at: <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022>, last accessed on 10/09/2004.

- § 1. Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia.
- § 2. As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty.
- § 3. This Act may be amended only by a referendum.
- § 4. This Act enters into force three months after the date of proclamation.”

*Prof. Dr. Egidijus Kūris*

*President of the Constitutional Court of the Republic of Lithuania*

## **THE CONSTITUTIONAL COURT OF LITHUANIA AND LITHUANIA'S MEMBERSHIP IN THE EUROPEAN UNION<sup>1</sup>**

### **Summary**

The Constitutional Court of the Republic of Lithuania decides on the conformity of laws and other regulations as well as the acts of the President of the Republic and the Government with the Constitution of the Republic of Lithuania. The Constitutional Court is also competent to review the conformity of treaties with the Constitution. Its functions and operation are regulated by the Constitutional Court Act and the Rules of Procedure of the Constitutional Court.

In the Republic of Lithuania the process of integration into the European Union took a similar course as in other accession states. One of the most important changes which enabled the adoption of the *aquis* and the transfer of certain state competencies to the European institutions was the amendment of the Constitution. The amendments of the Constitution related to joining the European Union had already been initiated before the actual joining; the provisions on the property rights of aliens and the provisions on the right to vote were amended, and the provisions on the position of the *acquis* in the national legal order of Lithuania were added after the actual joining. Article 47 of the Constitution, referring to property rights, was amended several times, and with each amendment Lithuania somewhat loosened the regulation of aliens acquiring ownership rights. Due to the fact that the law still provides for certain restrictions on the ownership rights to farm land, not only for aliens but also for citizens, the Constitutional Court is at present reviewing a petition on its consistency with the Constitution. Furthermore, the amendment of Article 119 of the Constitution enabled citizens of the Union with permanent residence in the Republic of Lithuania to vote and to be elected to local community authorities.

The transfer of competencies from national to European institutions also required the amendment of a constitutional provision which granted the right to exercise the sovereign

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<sup>1</sup> The article prepared on the basis of the presentation at the International Conference "The Position of Constitutional Courts Following Integration into the European Union" (Bled, Slovenia, 1 October 2004).

rights of the state only to certain state authorities (the parliament, the government, and the courts). Following the ratification of the Agreement on establishing association with the European Community and the Union, Lithuania adopted a Constitutional Act, by which it transferred certain state competencies to European institutions. Moreover, the Constitutional Act established that the provisions of the *acquis* are a constituent part of the Lithuanian legal order, and that they are superior to the provisions of national laws and other regulations.

The Constitutional Court took an active part in the integration process which led Lithuania to full membership in the European Union. From the adoption of the Constitution of Lithuania onwards, the Constitutional Court in its decision making has respected the provisions of the European Convention on Human Rights and Freedoms, which are respected also by the European Union (Article 6 of the European Union Treaty), and followed the case-law of the European Court of Human Rights; prior to joining the European Union, the Constitutional Court in its decisions also referred to the *acquis*. Thus, in deciding on the constitutionality of capital punishment in 1998, it referred to the Resolution of the European Parliament dated 13 July 1997.

Since integration into the European Union, the Constitutional Court has been faced with new challenges. Its future position will foremost depend on the competencies which the Court will claim for itself regarding a review of the consistency of the provisions of the *acquis* and national law, as well as regarding its relation toward the European Court of Justice. In the opinion of the Court of Justice, the Court of Justice is competent to decide whether European institutions exceed their competencies in applying individual provisions, thus on the applicability of *the acquis*, however, among Lithuanian legal experts there is not yet a uniform answer to the question whether the Constitutional Court should be regarded as the court of last instance, which must in such a case refer a preliminary question to the Court of Justice. In spite of the doubts of the national courts, the Court of Justice is convinced that constitutional courts, irregardless of their particular role, are not excluded from this circle. The Constitutional Court of Lithuania acknowledges that it has yet to find the balance between the principles of the *acquis* and the supremacy of the Constitution, however, this task will not be easy, as the purpose and the task of the Constitutional Court are clearly determined – to guarantee the constitutionality of regulations and the supremacy of the Constitution of the Republic of Lithuania within the legal order.

### ***Povzetek***

*Ustavno sodišče Republike Litve odloča o skladnosti zakonov in drugih predpisov, aktov predsednika republike in vlade z Ustavo Republike Litve, pristojno pa je tudi za odločanje o skladnosti mednarodnih pogodb z Ustavo. Njegove funkcije in delovanje urejata Zakon o Ustavnem sodišču ter Poslovnik Ustavnega sodišča.*

*Proces priključevanja Evropski uniji se je v Republiki Litvi odvijal po podobnih vzorcih kot v ostalih državah pristopnicah. Ena najpomembnejših sprememb, ki je omogočila prevzem korpusa evropskega prava in prenos nekaterih državnih pristojnosti na evropske institucije, je bila sprememba Ustave. Spremembe Ustave, povezane z vstopom v Unijo, so se pričele že pred samim vstopom; spremenile so se določbe o lastninski pravici tujcev ter volilni pravici, po vstopu pa so bile dodane določbe o položaju evropskega prava v notranjem redu Litve. Določba 47. člena Ustave v zvezi z lastninsko pravico je bila spremenjena večkrat, z vsako spremembo pa je Litva nekoliko sprostila režim pridobivanja lastninske pravice za tujce. Ker zakon še vedno določa nekatere omejitve lastninske pravice na kmetijskih površinah tako za državljane kot za tujce, Ustavno sodišče prav zdaj presoja pobudo o njegovi skladnosti z Ustavo. Tudi 119. člen Ustave je s spremembo omogočil državljanom Unije s stalnim prebivališčem v Republiki Litvi voliti in biti izvoljen v organe lokalnih skupnosti.*

*Prenos pristojnosti nacionalnih institucij na evropske je prav tako zahteval spremembo ustavne določbe, ki je izvrševanje državne suverenosti podeljevala le nekaterim državnim organom (parlamentu, vladi in sodiščem). Litva je po ratifikaciji Sporazuma o pridružitvi Evropski skupnosti in uniji sprejela ustavni zakon, s katerim je prenesla nekatere do tedaj državne pristojnosti na evropske institucije. Ustavni zakon določa tudi, da so določbe evropskega prava sestavni del litvanskega pravnega sistema, ter da imajo premoč nad določbami domačih zakonov in drugih predpisov.*

*V integracijskih procesih, ki so Litvo pripeljali do polnopravnega članstva v Uniji, je aktivno sodelovalo tudi Ustavno sodišče. Pri odločanju je od ustanovitve dalje sledilo določbam Evropske konvencije o človekovih pravicah in svoboščinah, ki jih spoštuje tudi Unija (člen 6 PEU), ter sodni praksi Evropskega sodišča za človekove pravice; že pred vstopom v EU se je v svojih odločitvah sklicevalo tudi na evropsko pravo. Tako se je pri odločanju o ustavnosti smrtne kazni leta 1998 sklicevalo na Resolucijo Evropskega parlamenta z dne 13. junija 1997.*

*Pred Ustavnim sodiščem so po vstopu v Unijo novi izzivi, predvsem bo njegov bodoči položaj odvisen od pristojnosti, ki si jih bo v zvezi s presojo skladnosti določb evropskega in nacionalnega prava ter odnosa med njim in Sodiščem Evropskih skupnosti (SES) vzelo samo. Po mnenju SES je le to pristojno odločati o tem, ali so evropske institucije s posamezno določbo prekoračile svoje pristojnosti, o veljavnosti evropskega prava torej, vendar pa med litvanskimi pravnimi strokovnjaki še ni enotnega odgovora na vprašanje, ali je tudi Ustavno sodišče šteti za sodišče zadnje instance, ki mora na evropskega v takem primeru nasloviti predhodno vprašanje. Kljub pomislekom nacionalnih sodišč je SES prepričano, da ustavna sodišča s svojo specifično vlogo niso izvzeta iz tega kroga. Litvansko Ustavno sodišče priznava, da bo moralo šele poiskati ravnovesje med načeli evropskega prava in vrhovnostjo Ustave, ta naloga*

*pa ne bo lahka, saj je namen in naloga Ustavnega sodišča jasno določena – zagotavljanje ustavnosti predpisov ter vrhovnost Ustave Republike Litve v pravnem sistemu.*

## Introduction

Article 105 of the Constitution of the Republic of Lithuania defines the competence of the Constitutional Court: the Constitutional Court shall consider and adopt a decision whether the laws of the Republic of Lithuania and other acts adopted by the Seimas (i.e. the Parliament) are not in conflict with the Constitution of the Republic of Lithuania.

The Constitutional Court shall also consider if the following are not in conflict with the Constitution and the laws:

- acts of the President of the Republic;
- acts of the Government of the Republic.

Also, the Constitutional Court shall present conclusions:

- whether there were violations of election laws during elections of the President of the Republic or elections of members of the Seimas;
- whether the state of health of the President of the Republic permits him to continue to hold office;
- whether international treaties of the Republic of Lithuania are not in conflict with the Constitution;
- whether concrete actions of members of the Seimas and State officials against whom an impeachment case has been instituted are in conflict with the Constitution.

The activities of the Constitutional Court are, in particular, regulated by the Law on the Constitutional Court and the Rules of the Constitutional Court (the latter adopted by the Constitutional Court itself).

Certain aspects of the powers and the activities of the Constitutional Court have been interpreted in the rulings of the Constitutional Court. For example, in its rulings, the Constitutional Court stated that it is only the Constitutional Court that enjoys powers to officially interpret the Constitution.<sup>2</sup> The official interpretation of the Constitution is superior

<sup>2</sup> The 30 May 2003 Constitutional Court Ruling “On the Compliance of Paragraph 2 of Article 4 of the Republic of Lithuania Law on the Supplement and Amendment of Articles 86 And 87 of the Law on the Elections to Municipal Councils and Its Supplement with Article 881 with the Constitution of the Republic of Lithuania and on the Compliance of Government of the Republic of Lithuania Resolution No. 457 ‘On the Dismissal of the Chief of the Vilnius County’ of 11 April 2003 with the Constitution of the Republic of Lithuania and Paragraph 1 of Article 9 of the Republic of Lithuania Law ‘On the Procedure of Publication and Coming into Force of Republic of Lithuania Laws and Other Legal Acts’” (Official Gazette *Valstybės žinios*, 2003, No. 53–2361); the 29 October 2003 Constitutional Court Ruling “On the Compliance of Government of the Republic of Lithuania Resolution No. 458 “On the Approval of the Methods for Calculation of Damage Inflicted on Nature as a Result of Violation of Environmental Protection Laws” of 8 November 1991 with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2003, 103–4611); the 13 May

in relation to all other interpretations.<sup>3</sup> Pursuant to the official interpretation of the Constitution, the Constitutional Court investigates whether sub-statutory acts adopted by the Seimas are not in conflict with not only the Constitution, but, also, whether these sub-statutory acts are not in conflict with the laws (although such powers of the Constitutional Court are not explicitly mentioned neither in the Constitution nor in the Law on the Constitutional Court).<sup>4</sup> Besides that, the Constitutional Court has interpreted that it has

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2004 Constitutional Court Ruling “On the Compliance of Items 1, 2 and 3 of Paragraph 1 of Article 4 (wording of 3 April 2003) of the Republic of Lithuania Law on Seimas Provisional Investigation Commissions with the Constitution of the Republic of Lithuania, as well as on the petition of a group of members of the Seimas, the petitioner, requesting to investigate whether Seimas of the Republic of Lithuania Resolution No. IX-1868 “On the Conclusion of the Provisional Commission of the Seimas for Investigation Into Possible Threats to Lithuanian National Security” of 2 December 2003 is not in conflict with the Constitution of the Republic of Lithuania and Articles 3 and 8 (wording of 3 April 2003) of the Republic of Lithuania Law on Seimas Provisional Investigation Commissions” (Official Gazette *Valstybės žinios*, 2004, No. 81–2903).

<sup>3</sup> Kūris E.: “Konstitucinis Teismas ir įstatymų leidyba: žvilgsnis iš vidaus” in *Teisės problemos*, 2004/1(43).

<sup>4</sup> The 30 March 2000 Constitutional Court Ruling “On the Compliance of the 6 October 1998 Seimas of the Republic of Lithuania decision to reject a draft resolution of the Seimas ‘On Forming a Special Investigatory Commission’ and the 6 October 1998 Seimas of the Republic of Lithuania Resolution ‘On the Proposal of a Group of Members of the Seimas of 28 September 1998 “On the Initiation of Impeachment Proceedings Against the Member of the Seimas Audrius Butkevičius” with the Constitution of the Republic of Lithuania, Part 1 of Article 24, Article 238, Parts 1 and 3 of Article 239 and Articles 241 and 243 of the Statute of the Seimas of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2000, No. 28–784); the 18 February 1998 Constitutional Court Ruling “On the Compliance of the Republic of Lithuania Law “On the Amendment and Supplementation of the Law on the Governing of the County, as well as the Recognition of the Law on the Government Representative as Null and Void,” as well as the 12 December 1996 Seimas of the Republic of Lithuania Resolution “On Supplementation of the Republic of Lithuania Civil Service List of Offices of ‘A’ Level Officials,” with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1998, No. 18–435); the 5 March 2004 Constitutional Court Ruling “On the Compliance of Item 1 of Resolution of the Supreme Council of the Republic of Lithuania No. I-619 ‘On Application of the Republic of Lithuania Law on Individual Income Security’ of 27 September 1990, as well as on Compliance if Item 6.1.1 (Wording of 6 November 1996), Item 6.1.4 (Wording of 6 November 1996), Item 6.1.5 (Wording of 6 November 1996), Item 7 (Wording of 6 November 1996), and Item 9 of the Regulations on Granting the Social Allowance and Payment Thereof as Approved by Government of the Republic of Lithuania Resolution No. 808 ‘On the Approval of the Regulations on Granting a Social Allowance and Payment Thereof’ of 5 July 1996, as well as on the Compliance of Item 5.1.1, Item 5.1.7 (Wordings of 17 April 2000 and 14 July 2000), Item 5.1.8 (Wordings of 17 April 2000 and 14 July 2000), Items 5.4, 5.5.2 and 9 of the Regulations on Granting the Social Allowance and Payment Thereof as Approved by Government of the Republic of Lithuania Resolution No. 441 ‘On the Approval of the Regulations on Granting the Social Allowance and Payment Thereof’ of 17 April 2000 with the Constitution of the Republic of Lithuania and Paragraph 1 of Article 10 (Wording of 3 November 1994) of the Republic of Lithuania Law on Individual Income Security” (Official Gazette *Valstybės žinios*, 2004, No. 38–1236); the 13 May 2004 Constitutional Court Ruling “On the Compliance of Items 1, 2 and 3 of Paragraph 1 of Article 4 (Wording of 3 of April 2003) of the Republic of Lithuania Law on Seimas Provisional Investigation Commissions with the Constitution of the Republic of Lithuania, as well as on the Petition of a Group of Members of the Seimas, the Petitioner, Requesting to Investigate whether Seimas of the Republic of Lithuania Resolution No. IX-1868 ‘On the Conclusion of the Provisional Commission of the Seimas for Investigation into Possible Threats to Lithuanian National Security’ of 2 of December 2003 Is Not in Conflict with the Constitution of the Republic of Lithuania and Articles 3 and 8 (Wording of 3 of April 2003) of the Republic of Lithuania Law on Seimas Provisional Investigation Commissions” (Official Gazette *Valstybės žinios*, 2004, No. 81–2903).

the powers to investigate whether laws and sub-statutory acts adopted by the Seimas, the President of the Republic and the Government are not in conflict with the constitutional laws (which, despite their title, are of a lower legal force than that of the Constitution but of a higher legal force than that of ordinary laws) and whether the constitutional laws are not in conflict with the Constitution.<sup>5</sup> As to the constitutionality of the sub-statutory acts adopted by ministries, agencies, county (regional) and municipal authorities, these issues fall within the competence of administrative courts.

Since the establishment of the Constitutional Court in 1993 until 1 August 2004, the Constitutional Court has received 418 petitions and inquiries, concerning the compliance of 1024 legal acts (parts, i.e. norms or provisions, thereof) with the Constitution and laws. 209 rulings, decisions and conclusions have been adopted by the Constitutional Court. More than 300 legal acts (parts thereof) were recognised to be in conflict with the Constitution.<sup>6</sup>

<sup>5</sup> Constitutional laws provided for in Paragraph 3 of Article 69 of the Constitution are different from other laws, first of all, by the procedure of their adoption and amendment: constitutional laws are adopted when more than half of all members of the Seimas vote for them, while amended by at least 3/5 majority vote of all members of the Seimas, while ordinary laws are adopted and amended by a simple majority of those Members of the Seimas participating in the sitting voting in favour thereof. The said procedure of adoption and alteration of laws is not applied to amendments to the Constitution – constituent parts of the Constitution, which sometimes are also named constitutional laws. Constitutional laws are ones which are directly referred to as such in the Constitution and are adopted pursuant to the procedure established in Paragraph 3 of Article 69 of the Constitution, as well as the laws entered into the list of constitutional laws and adopted pursuant to the procedure established in Paragraph 3 of Article 69 of the Constitution. See the 2 April 2001 Constitutional Court Ruling “On the Compliance of Paragraphs 2, 3, 4, and 5 of Article 5, Item 3 of Article 12 and Paragraph 3 of Article 16 as well as Item 5 of Paragraph 9 of the same article of the Republic of Lithuania Law on the Restoration of Citizens’ Rights of Ownership to the Existing Real Property with the Constitution of the Republic of Lithuania and on the Compliance of Paragraphs 2, 3, 4, and 5 of Article 5 as well as Item 3 of Article 12 of the same law with Article 8 of the Constitutional Law on the Subjects, Procedure, Terms, Conditions and Restrictions of the Acquisition into Ownership of Land Plots Provided for in Paragraph 2 of Article 47 of the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2001, No. 29–938); the 24 December 2002 Constitutional Court Ruling “On the Compliance of Paragraph 3 of Article 3 (wording of 12 October 2000), Paragraph 4 of Article 3 (wording of 12 October 2000), Item 2 of Paragraph 1 of Article 5 (wording of 12 October 2000), Paragraph 1 of Article 18 (wording of 12 October 2000), Items 2, 3, 4, 8, and 15 of Paragraph 1 of Article 19 (wording of 12 October 2000), Items 1, 5, 7, 9, 12, 15, 16, 17, and 18 of Paragraph 1 of Article 21 (wording of 12 October 2000), Item 6 of the same Paragraph (wordings of 12 October 2000 and 25 September 2001), and Item 14 of the same Paragraph (wordings of 12 October 2000 and 8 November 2001) of the Republic of Lithuania Law on Local Self-government, as well as the Republic of Lithuania Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution, and the Republic of Lithuania Law on the Entering into the List of Constitutional Laws of the Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution, with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2003, No. 19–828).

<sup>6</sup> The full-text English translations of Constitutional Court rulings are available on the internet pages of the Constitutional Court (<http://www.lrkt.lt>) and the Seimas (<http://www.seimas.lt>).



## **I. Amendments to the Constitution of Lithuania Related to Lithuania's Integration into the European Union Amendments to the Constitution of Lithuania: General Overview**

The Constitution of the Republic of Lithuania was adopted by referendum on 25 October 1992 and went into effect on 2 November 1992. Since then, the Constitution has undergone eight amendments/supplements: Articles 47 and 119 of the Constitution were amended/supplemented twice each, while Articles 57, 84, 118 and 150 of the Constitution were amended/supplemented once; besides, together with the amendment of Article 150, the Constitution was supplemented with the Constitutional Act "On the Membership of the Republic of Lithuania in the European Union".

Only few of the mentioned constitutional amendments/supplements were not related to Lithuania's integration into the EU. Namely:

- by the amendment to the Article 119 of the Constitution adopted on 12 December 1996, the term of powers of members of the municipal councils was prolonged from a two-year to a three-year period;
- on 20 March 2003, Article 84 of the Constitution was supplemented and its Article 118 was changed: Item 11 of Article 84 of the Constitution was supplemented with a new provision that the President of the Republic shall, upon approval of the Seimas, appoint and dismiss the Prosecutor General of the Republic of Lithuania; in Article 118 (wording of 20 March 2003) of the Constitution the constitutional status of the prosecutor's office was consolidated;
- the 13 July 2004, amendment of Article 57 of the Constitution established a regular date of elections of the Seimas, i.e. elections shall take place at the year of the expiration of the powers of the members of the Seimas on the second Sunday of October.

One of the constitutional amendments, namely, the second amendment of Article 119 of the Constitution (of 20 June 2002), was only partly related to Lithuania's integration into the EU. By the said amendment, the term of powers of members of the municipal councils was prolonged from a three-year to a four-year period. However, the amendment of 20 June 2002 also contained provisions concerning the rights of foreign nationals (including citizens of the EU member states) to participate in elections to municipal councils (see *infra*).

Other constitutional amendments/supplements, including both amendments/supplements to Article 47, as well as supplement of Article 150 of the Constitution and the Constitutional Act "On the Membership of the Republic of Lithuania in the European Union" by which the Constitution was supplemented, were directly inspired by Lithuania's EU-integration aspirations (see *infra*).

**Amendments to the Constitution of Lithuania  
Related to Lithuania's Integration into the European Union  
Adopted prior to Lithuania's Accession to the European Union**

**Land Ownership**

On 20 June 1996, Article 47 of the Constitution was supplemented. This Article regulates acquisition of land as ownership.

Paragraphs 1 and 2, Article 47 (in their initial wording) of the Constitution used to provide: Land, internal waters, forests, and parks may only belong to the citizens and the State of the Republic of Lithuania by the right of ownership.

Plots of land may belong to a foreign state by the right of ownership for the establishment of its diplomatic and consular missions in accordance with the procedure and conditions established by law.

So, Article 47 of the Constitution prohibited all legal persons, save the above-mentioned exceptions, and everyone who was not a citizen of the Republic of Lithuania, to acquire land, internal waters, forests, and parks as ownership.

On 12 June 1995, the Europe Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Republic of Lithuania, of the Other Part, was signed (the Agreement went into effect on 1 February 1998).<sup>7</sup> In pursuance with the provisions of this Agreement, and also attempting to liberalise purchase and sale of land in Lithuania, the Seimas, on 20 June 1996, supplemented Article 47 of the Constitution. The 20 June 1996 wording of Paragraph 2, Article 47 of the Constitution read:

Municipalities and other national entities, as well as those foreign entities conducting economic activities in Lithuania that are specified by the constitutional law according to the criteria of European and Transatlantic integration, may be permitted to acquire the ownership of non-agricultural land plots required for the construction and operation of buildings and facilities necessary for their direct activities. The procedure, conditions, and restrictions for the acquisition of the ownership of such a plot shall be established by a constitutional law.<sup>8</sup>

Along with this amendment to the Constitution, the Seimas, on 20 June 1996, adopted the Constitutional Law on the Entities, Procedure, Terms and Conditions and Restrictions of the Acquisition into Ownership of Land Plots Provided for in Paragraph 2, Article 47 of

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<sup>7</sup> The Europe Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Republic of Lithuania, of the Other Part (Official Gazette *Valstybės žinios*, 1998, No. 11–226).

<sup>8</sup> The Law on the Supplement of Article 47 of the Constitution of the Republic of Lithuania (Official Gazette *Valstybės žinios*, 1996, No. 64–1501).

the Constitution of the Republic of Lithuania.<sup>9</sup> It was provided for in Article 4 of this constitutional law that the criteria of European and Transatlantic integration embarked on by Lithuania shall be met by the foreign entities which, judging by the indicators of their origin, are from:

- the European Union member states or States Parties to the Europe Agreement which have established the Association with the European Communities and their member states;
- states which at the moment of the enactment of this Law are members of the Organisation for Economic Co-operation and Development (OECD) or the North Atlantic Treaty Organisation.

Although this constitutional amendment and the constitutional law implementing it in part broadened the circle of persons who could acquire land in Lithuania, the said constitutional law establishing its implementation as to its content was not in line with requirements of the EU law: citizens of the EU member states could not acquire agricultural land, nor land for construction of non-economic buildings or facilities, there were restrictions for citizens of the EU member states to acquire forest land. In case these provisions had not been amended, such EU-underlying freedoms would have been infringed: the freedom of establishment, the freedom of movement as well as the freedom to provide services.

The quoted constitutional provisions were of discriminatory nature also in another respect: Article 47 (wording of 1996) of the Constitution in certain aspects also used to restrict the right of national entities to acquire land, as national legal persons and municipalities (as well as the above-mentioned foreign entities) were not permitted to acquire agricultural land, and their right to acquire forest land was also restricted.

On 23 January 2003 the Law on the Alteration of Article 47 of the Constitution was adopted.<sup>10</sup> The now valid Paragraph 3, Article 47 of the Constitution provides:

In the Republic of Lithuania foreign entities may acquire the ownership of land, internal waters, forests, and parks subsequent to a constitutional law.

On 20 March 2003, the Constitutional Law on the Entities, Procedure, Terms and Conditions and Restrictions of the Acquisition into Ownership of Land Plots Provided for in Paragraph 2 of Article 47 of the Constitution was set forth in a new wording. The title of the said constitutional law was also changed; it is now called the Constitutional Law on the Implementation of Paragraph 3 of Article 47 of the Constitution. In this constitutional law

<sup>9</sup> The Constitutional Law on the Entities, Procedure, Terms and Conditions and Restrictions of the Acquisition into Ownership of Land Plots Provided for in Paragraph 2 of Article 47 of the Constitution of the Republic of Lithuania (Official Gazette *Valstybės žinios*, 1996, No. 64–1503).

<sup>10</sup> The Law on Alteration of Article 47 of the Constitution of the Republic of Lithuania (Official Gazette *Valstybės žinios*, 2003, No. 14–540).

it is provided that, the foreign entities that meet the criteria established in the said constitutional law have the right to acquire land, internal waters and forests in Lithuania under the same procedure and conditions (and in pursuance with the same restrictions) as citizens and legal persons of the Republic of Lithuania. The EU citizens fall under the category of foreigners who meet the established requirements and they may acquire land in Lithuania under the same rules which are applied to persons of the Republic of Lithuania. It is noteworthy that in the Agreement of Lithuania's Accession to the European Union a seven-year interim period is defined: during this period the foreign entities meeting the established criteria cannot acquire agricultural and forest land, save the foreigners who have been residing in Lithuania for at least three years and who have been earning their living by means of agriculture, and the foreign legal persons and other foreign organisations that established their branches or subsidiaries in Lithuania.

In this context, it must be noted that on 28 January 2003 the Seimas adopted the Provisional Law on Acquisition of Agricultural Land<sup>11</sup> which established special conditions for acquisition of agricultural land for all persons (both Lithuanian and foreign ones), as, for instance: a requirement for a person who has acquired a certain plot of agricultural land as ownership to move to live to the county in which the acquired land is situated; maximum amounts of agricultural land permitted to be acquired by natural and legal persons; the right of priority in acquisition of agricultural land granted to certain categories of persons; etc.

On 5 March 2003, the Constitutional Court received a petition of a group of members of the Seimas as regards the compliance of the Provisional Law on Acquisition of Agricultural Land with the Constitution. The case is being prepared for investigation in a public hearing of the Constitutional Court.

On 15 July 2004, the Seimas adopted a new wording of the Provisional Law on Acquisition of Agricultural Land, which diminished the number of restrictions to acquire agricultural land as ownership. At present, the said restrictions include only an established maximum agricultural land plot permitted for acquisition, the sequence in the course of purchase of land by right of priority, as well as the prohibition to transfer land within 5 years of the day of its acquisition from the state by right of priority.

The Constitutional Court may, subsequent to Article 69 of the Law on the Constitutional Court, adopt a decision to dismiss the initiated legal proceedings in case the legal act due to the compliance of which with the Constitution one applied to the Constitutional Court is annulled and when the Constitutional Court is applied to by an entity that is not a court.

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<sup>11</sup> The Republic of Lithuania Provisional Law on Acquisition of Agricultural Land (Official Gazette *Valstybės žinios*, 2003, No. 15–600).

However, in each particular case the Constitutional Court adopts an individual decision.<sup>12</sup> The Constitutional Court has not adopted any decision concerning dismissal or non-dismissal

<sup>12</sup> The 5 April 2000 Constitutional Court Ruling “On the Compliance of Sub-item 4.7 of the Regulations for Operational Activities of the System of Internal Affairs of the Republic of Lithuania approved by 30 September 1993 Government of the Republic of Lithuania Resolution No. 731-19 ‘On the Approval of the Regulations for Operational Activities of the System of Internal Affairs of the Republic of Lithuania’ with the Constitution of the Republic of Lithuania and Item 7 of Part 3 of Article 7 of the Republic of Lithuania Law on Operational Activities” (Official Gazette *Valstybės žinios*, 2000, No. 30–840); the 14 March 2002 Constitutional Court Ruling “On the Compliance of Paragraph 2 of Article 11 of the Republic of Lithuania Law on Pharmaceutical Activities with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2002, No. 28–1003); the 10 May 2002 Constitutional Court Ruling “On the Compliance of resolution of the Government of the Republic of Lithuania No. 649 ‘On the Status of Land Used by the Lithuanian Academy of Agriculture and the Approval of the Zoning Scheme of Its Use’ of 25 August 1993, Resolution of the Government of the Republic of Lithuania No. 294 ‘On the Partial Amendment of Resolution of the Government of the Republic of Lithuania No. 649 of 25 August 1993’ of 19 April 1994, Resolution of the Government of the Republic of Lithuania No. 350 ‘On the Supplementation of Resolution of the Government Of The Republic Of Lithuania No. 649 “On The Status Of Land Used By The Lithuanian Academy Of Agriculture and the Approval of the Zoning Scheme of Its Use” of 25 August 1993’ of 9 March 1995 with the Constitution of the Republic of Lithuania, Item 5 of Article 12 of the Republic of Lithuania Law “On the Procedure and Conditions of the Restoration of the Rights of Ownership of Citizens to the Existing Real Property” (wording of 15 July 1993), Item 8 of Article 12 of the Republic of Lithuania Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property (wording of 13 May 1999) and Item 4 of Article 13 of the Republic of Lithuania Law on Land Reform (wording of 15 July 1993)” (Official Gazette *Valstybės žinios*, 2002, No. 48–1867); the 3 June 2002 Constitutional Court Ruling “On the Compliance of Resolution of the Government of the Republic of Lithuania No. 99 ‘On the Deductions for Building, Repair and Maintenance of Public Automobile Roads’ of 23 February 1993 with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2002, No. 55–2199); the 4 March 2003 Constitutional Court Ruling “On the Compliance of Article 14 of the Republic of Lithuania Law ‘On the Procedure and Conditions of Restoration of the Rights of Ownership of Citizens to the Existing Real Property’ (wording of 12 January 1993), Paragraph 1 of Article 2 and Item 5 of the same paragraph, Articles 15, 20, and 21 of the Republic of Lithuania Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property (wording of 15 January 2002), Items 2, 4, 5, and 6 of Paragraph 1 of Article 15, as well as Paragraphs 2 and 4 of the same article, Paragraph 10 of Article 16 and Article 20 of the Republic of Lithuania Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property with the Constitution of the Republic of Lithuania, and on the Compliance of Government of the Republic of Lithuania Resolution No. 27 ‘On the Buying Out of the Residential Houses Which are Indispensable for State Necessities’ of 17 January 1994 with the Constitution of the Republic of Lithuania and Article 14 of the Republic of Lithuania Law ‘On the Procedure and Conditions of Restoration of the Rights of Ownership of Citizens to the Existing Real Property’ (wording of 12 January 1993)” (Official Gazette *Valstybės žinios*, 2003, No. 24–1004); the 17 August 2004 Constitutional Court Ruling “On the Compliance of Section 3 of Item 18 of the Procedure for Submission, Consideration and Issuance of Permits Concerning Applications Requesting to Acquire Non-agricultural Land Plots as Ownership to National and Foreign Entities Established in the Constitutional Law on the Entities, Procedure, Terms and Conditions and Restrictions of the Acquisition into Ownership of Land Plots Provided for in Paragraph 2 of Article 47 of the Constitution of the Republic of Lithuania (wording of 10 December 1998), which was confirmed by Government of the Republic of Lithuania Resolution No. 1423 “On the Confirmation of the Procedure for Submission, Consideration and Issuance of Permits Concerning Applications Requesting to Acquire Non-agricultural Land Plots as Ownership to National and Foreign Entities Established in the Constitutional Law on the Entities, Procedure, Terms and Conditions and Restrictions of the Acquisition into Ownership of Land Plots Provided for in Paragraph 2 of Article 47 of the Constitution of the Republic of Lithuania” of 10 December 1998 with the Constitution of Republic of Lithuania, Article 4 of the Republic of Lithuania Law on Courts (wording of 24 January 2002) and Article 5 of the Republic of Lithuania Law on the Legal Proceedings of Administrative Cases (wording of 19 September 2001)” (Official Gazette *Valstybės žinios*, 2004, No. 129–4634).

of the legal proceedings in this case yet. In any case, as, in the new wording of the Provisional Law on Acquisition of Agricultural Land, the number of restrictions to acquire agricultural land as ownership was diminished, however, certain restrictions remained, the dismissal may be only partial.

## **Elections to Municipal Councils**

Article 119 (in its initial wording, as well as in its 12 December 1996 wording) of the Constitution used to provide that only citizens of the Republic of Lithuania may elect members of the municipal councils, and may themselves be elected to the municipal councils.

Such constitutional provision was not in line with Article 19 of the Treaty Establishing the European Community, which provides:

Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.

Therefore, on 20 June 2002, Article 119 of the Constitution was amended by providing that the members of the municipal councils shall be elected for a four-year term, as provided for by law, from among citizens of the Republic of Lithuania and other permanent residents of the administrative unit by the citizens of the Republic of Lithuania and other permanent residents of the administrative unit, on the basis of universal, equal and direct electoral right by secret ballot.<sup>13</sup> Thus, the right (both active and passive) to participate in elections to municipal councils is not linked with citizenship and is guaranteed not only to citizens of the Republic of Lithuania, but also to other residents of the administrative territorial unit. It shall be emphasised that, the Constitution does not restrict the said right to only Lithuanian citizens and citizens of the EU member states but also guarantees it to the nationals of *all* states (or persons without citizenship) permanently residing in the respective administrative unit.

Along with this constitutional amendment, the Seimas adopted the Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution of the Republic of Lithuania<sup>14</sup>. The latter was recognised by the Constitutional Court in the ruling of 24 December 2002 to be in conflict with the Constitution.<sup>15</sup>

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<sup>13</sup> The Law on Alteration of Article 119 of the Constitution of the Republic of Lithuania (Official Gazette *Valstybės žinios*, 2002, No. 65–2629).

<sup>14</sup> The Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution of the Republic of Lithuania (Official Gazette *Valstybės žinios*, 2002, No. 65–2630).

<sup>15</sup> It was provided in the Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution of the Republic of Lithuania, that the provision of Article 1 of the Law on

## Transfer of Powers: The Need for Yet Other Constitutional Amendments

In the areas specified in the treaties establishing the EU and other treaties, upon which the EU is based, the EU enjoys exceptional competence (regulation of internal market, agricultural policy, commerce policy, fisheries, etc.). Also, under the subsidiarity principle, the Community takes actions in the areas that do not belong to its exclusive competence, however, the member states are unable to properly reach the goals of the proposed action, while the Community, due to the extent or effect, might reach them more easily. While implementing their competence in such areas, the EU institutions enjoy the right to issue mandatory legal acts, including regulations and directives. This *inter alia* means that the member states transfer part of their legislative competence to these institutions.

Article 4 of the Constitution provides for execution of the Nation's supreme sovereign power only directly or through its democratically elected representatives, and Article 5 provides that the State power is executed by the Seimas, the President of the Republic and the Government, and the Judiciary.

Before to Lithuania's accession to the EU, there had been extensive discussions in Lithuania as regards the necessity to regulate, in the Constitution, the transfer of part of the competence of national institutions to the EU. It was argued that, the Constitution did not provide for transfer of implementation of part of the competence of national institutions to the EU. The discussions concentrated on the issue whether, keeping to the opinion of the Court of Justice of the European Communities (the European Court of Justice, ECJ)

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the Alteration of Article 119 of the Constitution of the Republic of Lithuania concerning the participation, under the law, of other permanent residents of the administrative unit in the elections of municipal councils shall be applicable as of the day of the entry into effect of the Seimas resolution, which will appoint the second election of municipal councils for a four-year term of office. The Constitutional Court noted that the date of entry into effect of constitutional provisions and beginning of their application must be established in the law on the alteration of the Constitution itself (and not in the act of a lower legal force); if such a law on the alteration of the Constitution does not provide for such a date, the amendment goes into effect upon expiration of one month of the adoption of such a law. Thus, it is not permitted to establish the date of entry into effect of a constitutional provision and beginning of its application by an act of lower legal force – constitutional law. This is one evidence of how confusing is the title “constitutional law”. See the 24 December 2002 Constitutional Court Ruling “On the Compliance of Paragraph 3 of Article 3 (wording of 12 October 2000), Paragraph 4 of Article 3 (wording of 12 October 2000), Item 2 of Paragraph 1 of Article 5 (wording of 12 October 2000), Paragraph 1 of Article 18 (wording of 12 October 2000), Items 2, 3, 4, 8, and 15 of Paragraph 1 of Article 19 (wording of 12 October 2000), Items 1, 5, 7, 9, 12, 15, 16, 17, and 18 of Paragraph 1 of Article 21 (wording of 12 October 2000), Item 6 of the same Paragraph (wordings of 12 October 2000 and 25 September 2001), and Item 14 of the same Paragraph (wordings of 12 October 2000 and 8 November 2001) of the Republic of Lithuania Law on Local Self-government, as well as the Republic of Lithuania Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution, and the Republic of Lithuania Law on the Entering into the List of Constitutional Laws of the Constitutional Law on the Procedure of the Application of the Law on the Alteration of Article 119 of the Constitution, with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2003, No. 19–828).

as stated in *Costa v. ENEL* (1964), the transfer by the states of the part of their competence amounts to the limitation of the sovereign rights of the member states, or whether the member states transfer only a part of their competence to the EU institutions (which are delegated part of the state competence) in order to implement sovereign rights in certain areas together with other EU member states, however this does not amount to loss or limitation of sovereignty/national independence.<sup>16</sup>

According to their legal nature, the treaties establishing the EU are international treaties. Under Paragraph 3, Article 138 of the Constitution of Lithuania, international treaties which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania. Also, under the Constitution, such international treaties in the Lithuanian system of legal sources have the power of the law.<sup>17</sup>

On the other hand, Paragraph 2, Article 11 of the 22 June 1999 Republic of Lithuania Law on International Treaties reads:

If a ratified treaty of the Republic of Lithuania which has entered into force establishes norms other than those established by the laws, other legal acts of the Republic of Lithuania which are in force at the moment of conclusion of the treaty or which entered into force after the entry into force of the treaty, the provisions of the treaty of the Republic of Lithuania shall be applicable.”<sup>18</sup>

As far back as in 1995, in its ruling interpreting the constitutional provision “international treaties which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania”, the Constitutional Court pointed out that under the Constitution it is only the legislator who can decide, by way of ratification, which act of international law is a constituent part of the legal system of the Republic of Lithuania that has the power of the law.<sup>19</sup>

For a certain period of time, some Lithuanian lawyers and politicians argued that even without a relevant constitutional amendment, acts (regulations) of direct application, adopted by the EU, would be part of the legal system of the Republic of Lithuania, since such their

<sup>16</sup> Vadapalas V.: “Lietuvos Respublikos stojimo į Europos Sąjungą konstituciniai pagrindai” in *Europos Sąjungos teisė ir Lietuva*, Justitia, Vilnius, 2002, p. 24.

<sup>17</sup> The 24 January 1995 Constitutional Court Conclusion “On the Compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1995, No. 9–199).

<sup>18</sup> The 22 June 1999 Republic of Lithuania Law on International Treaties (Official Gazette *Valstybės žinios*, 1999, No. 60–1948).

<sup>19</sup> The 17 October 1995 Constitutional Court Ruling “On the Compliance of Part 4, Article 7 and Article 12 of the Law of the Republic of Lithuania ‘On International Treaties of the Republic of Lithuania’ with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1995, No. 86–1949).



status would stem from the treaties which have been ratified by the Seimas and have the power of the law.

However, later, a conclusion was drawn that provisions of Paragraph 3, Article 138 of the Constitution, as well as the amendments already made (of Articles 47 and 119 of the Constitution) were not sufficient for Lithuania's integration into the EU and the consolidation of the status of the EU law in Lithuania, and that other constitutional amendments/supplements were indispensable *inter alia* for these purposes. The first relevant draft amendment to the Constitution was submitted to the Government as far back as on 13 February 2001, however, the issue of delegation of the competence of national institutions to the EU, as well as the status of the EU law in Lithuania, was not solved until the accession of Lithuania to the EU.

Following the signing (on 16 April 2003, in Atsens) of the Accession Treaty between the member states of the EU, and the ten new member states, Lithuania, on 10–11 May 2003, held a referendum in which Lithuanian citizens by an overwhelming majority approved Lithuania's membership in the EU.

The Accession Treaty was ratified by the Seimas on 16 September 2003. It shall be noted that, at that time, the Constitution did not contain any provisions concerning the status of the EU law in Lithuania.

### **Amendments to the Constitution of Lithuania Related to Lithuania's Integration into the European Union Adopted after Lithuania's Accession to the European Union**

As mentioned, the process of drafting of the constitutional amendments pertaining to the issues of delegation of the competence of national institutions to the EU and the status of the EU law in Lithuania, started as far back as in 1998, when the working group which had to draft legal acts necessary for accession of Lithuania to the EU was established under instruction of the Board of the Seimas. By its 1 March 2001 Resolution, the Seimas formed a commission for drafting amendments to the Constitution.

Several draft amendments to the Constitution were prepared, proposing changes to Articles 136 and 138 of the Constitution (pertaining, consequently, to the participation of the Republic of Lithuania in international organisations, and to ratification/denouncing of international treaties, as well as the status of international treaties in the legal system of Lithuania).

At that time, it was also debated whether constitutional amendments/supplements related to Lithuania's membership in the EU had to be decided by referendum.

The Seimas, on 4 June 2002, adopted a new Republic of Lithuania Law on Referendum, which came into force on 1 January 2003. This law does not provide that a referendum is necessary for such constitutional amendments/supplements.

After discussions that lasted for several years it was decided to adopt the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union” and to incorporate it into the Constitution. On 13 July 2004, a second voting took place at the Seimas by means of which the Law on Supplementing the Constitution of the Republic of Lithuania with the Constitutional Act of the Republic of Lithuania “On the Membership of the Republic of Lithuania in the European Union” and Supplementing Article 150 of the Constitution of the Republic of Lithuania was adopted, which went into effect on 14 August 2004. By respectively supplementing Article 150 of the Constitution, the said Constitutional Act was granted a status of a constituent part of the Constitution.<sup>20</sup>

It has to be emphasised that the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union” was adopted and came into effect months later after Lithuania’s accession to the EU.

In Paragraph 1, Article 1 of the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union” the issue of the delegation of the part of state competence to the EU has been decided in the following way:

The Republic of Lithuania, being a Member State of the European Union, shares or entrusts the competence of state institutions to the European Union in the areas specified by treaties, upon which the European Union is based, and to the extent that it would, together with other Member States of the European Union, commonly fulfil the membership obligations in these areas and enjoy the membership rights.

The Constitutional Act “On the Membership of the Republic of Lithuania in the European Union” also regulates the issue of relation of national and the EU law. Paragraph 2, Article 1 of the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union” provides:

The norms of the European Union law are a constituent part of the legal system of the Republic of Lithuania. If it concerns the treaties upon which the European Union is based, the norms of European Union law shall be applied directly, while in case of collision of legal norms, the former shall enjoy supremacy over the laws and other legal acts of the Republic of Lithuania.

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<sup>20</sup> Article 150 (wording of 13 July 2004) of the Constitution stipulates that a constituent part of the Constitution are: the 11 February 1991 Constitutional Law “On the Lithuanian State”; the 8 June 1992 Constitutional Act “On the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions”; the 25 October 1992 Law “On the Procedure of Entry Into Effect of the Constitution of the Republic of Lithuania”; the Constitutional Act of the Republic of Lithuania “On the Membership of the Republic of Lithuania in the European Union”.

Thus, Lithuanian lawyers draw an almost unanimous conclusion that the primary sources of the EU law have become a constituent part of the legal system of Lithuania and their status is *not different* from the rest of international treaties ratified by the Seimas, while in case of collision such EU law norms enjoy supremacy over laws and other legal acts of the Republic of Lithuania.

From the standpoint of the constitutional review, it must be emphasised that the notion “shall enjoy supremacy over the laws and other legal acts of the Republic of Lithuania” *does not include the Constitution itself*. In this context, it must be emphasised that Part 1 of Article 7 of the Constitution of the Republic of Lithuania provides:

Any law or other act, which is inconsistent with the Constitution, shall be invalid.

It also has to be emphasised that this article of the Constitution, as well as other articles of Chapter 1 of the Constitution, may be amended *only by referendum* (Part 2 of Article 148). Such a referendum in which Lithuanian voters would renounce Part 1 of Article 7 of the Constitution is clearly beyond imagination.

## II. The Constitutional Court after Lithuania’s Accession to the European Union: New Challenges

### Extra-national Factors in Constitutional Interpretation: *Experience Accumulated*

Prior to Lithuania’s accession to the EU, extra-national factors in interpretation of the Constitution by the Constitutional Court manifested themselves, first and foremost, through the link of the jurisprudence of the Lithuanian Constitutional Court with the jurisprudence of the European Court of Human Rights (ECHR). From the very beginning of the activities of the Constitutional Court, the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms and ECHR decisions were one of the sources of inspiration of decisions of the Constitutional Court.<sup>21</sup> After the Convention

<sup>21</sup> The Constitutional Court of Lithuania used to take account of the ECHR jurisprudence even before the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See the 27 May 1994 Constitutional Court Ruling “On the Compliance of the parts of item 3 of the Law of the Republic of Lithuania ‘On Appending and Amending the Law of the Republic of Lithuania “On the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property,”’ adopted 15 July 1993, by which Parts 5 and 6 of Article 4 of the Law ‘On the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property’ of 18 June 1991 have been amended, as well as items 14, 15, 16, 17, 18 and 19, by which Article 12 of said Law has been appended by items 10, 11, 12, 13, 14 and 15, with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1994, No. 42–771); the 18 November 1994 Constitutional Court Ruling “On the Compliance of item 3, Part 2, Article 58 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1994, No. 91–1789); the 20 April 1995 Constitutional Court Ruling “On the Compliance of Articles 7 and 9.3 of the Statute of Radio and Television of Lithuania as well as items 3 and 12 of the Regulations of the Technical Commission for Organisation of Competitions Regarding the Lease of Radio and Television Programmes Broadcasting State Facilities to Private Broadcasting Services with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 1995, No. 34–847).

had been ratified on 5 May 1995, it, subsequent to Article 138 of the Constitution, became part of the legal system of Lithuania. Due to that the Convention, as well as all international treaties (ratified by the Seimas) has the power of the law, the Constitutional Court does not investigate the compliance of national laws with the Convention. However, the Court, in the course of interpretation of the constitutional human rights provisions in the cases where the constitutionality of laws or sub-statutory acts pertaining to human rights is investigated, always takes account of the relevant jurisprudence of the ECHR.

On the other hand, Paragraph 2, Article 6 of the Treaty on the European Union provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the EU member states, as general principles of Community law. Thus, the Convention and the case-law of the ECHR are directly related to the EU law. The ECJ, as well as national courts, directly applies the convention, while taking account into the case-law formulated in ECHR decisions.<sup>22</sup> In this regard the important thing is that the Constitutional Court of Lithuania has noted many a time that the jurisprudence of the ECHR as a source of interpretation of law is important also to interpretation and application of Lithuanian law.<sup>23</sup> Up to 1 August 2004, the Constitutional

<sup>22</sup> Wathelet M., Van Raepenbusch S.: “Les relations entre les Cours constitutionnelles et les juridictions nationales, y compris l’interférence en cette matière, de l’action des juridictions européennes. Rapport de la Cour de justice des Communautés européennes” in *Conférences des Cours constitutionnelles européennes*. XIIème Congrès, Bruxelles, 2002, p. 25.

<sup>23</sup> The 8 May 2000 Constitutional Court Ruling “On the Compliance of Part 12 of Article 2, Item 3 of Part 2 of Article 7, Part 1 of Article 11 of the Republic of Lithuania Law on Operational Activities and Parts 1 and 2 of Article 1981 of the Republic of Lithuania Code of Criminal Procedure with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2000, No. 39–1105); the 19 September 2002 Constitutional Court Ruling “On the Compliance of Paragraph 2 of Article 27 of the Republic of Lithuania Law on Telecommunications (wording of 11 July 2000), Paragraph 1 of Article 2 of the Republic of Lithuania Law on the Amendment of Article 27 of the Law on Telecommunications, Paragraph 4 of Article 57 of the Republic of Lithuania Law on Telecommunications (wording of 5 July 2002), Item 4 of Paragraph 3 of Article 7 of the Republic of Lithuania Law on Operational Activities (wording of 22 May 1997), Item 6 of Paragraph 3 of Article 7 of the Republic of Lithuania Law on Operational Activities (wording of 20 June 2002), Paragraph 1 of Article 48 (wording of 26 June 1961) and Paragraph 1 of Article 75 (wording of 29 January 1975) of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2002, No. 93–4000); the 23 October 2002 Constitutional Court Ruling “On the Compliance of Article 8 and Paragraph 3 of Article 14 of the Republic of Lithuania Law on the Provision of Information to the Public with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2002, No. 104–4675); the 24 March 2003 Constitutional Court Ruling “On the Compliance of Paragraph 2 of Article 41 of the Code of Correctional Labour of the Republic of Lithuania (wording of 2 July 1997) with the Constitution of the Republic of Lithuania” (Official Gazette *Valstybės žinios*, 2003, No. 29–1196); the 4 July 2003 Constitutional Court Ruling “On the Compliance of Paragraph 2 of Article 11 (wording of 21 December 2000) and Paragraph 3 of Article 13 of the Republic of Lithuania Law on the State Pensions of Officials and Servicemen of the Interior, the Special Investigation Service, State Security, National Defence, the Prosecutor’s Office, the Department of Prisons and of the Establishments and State Enterprises which are Subordinate to the Latter with the Constitution of the Republic of Lithuania, also on the Compliance of Section 2 of Item 25 (wording of 25 May 2001) of the Regulations for Granting and Payment of State Pensions of Officials and Servicemen of the Interior, the Special Investigation Service, State Security,

Court of Lithuania, in its rulings, directly referred to 44 cases of the ECHR and 4 decisions of the European Commission of Human Rights.

Even before Lithuania's membership in the EU, the Constitutional Court of Lithuania, in its rulings, also used to give references to the EU legal acts. For example, the Constitutional Court, while considering the constitutionality issue of the death penalty provided for by the sanction of Article 105 of the Criminal Code, referred to the 13 June 1997 Resolution of the European Parliament.<sup>24</sup> While deciding on the constitutionality of the Law on Telecommunications, the Constitutional Court referred to the 28 June 1990 Directive 90/388/EEC on competition in the markets for telecommunications services adopted by the European Commission.<sup>25</sup> In a ruling on the constitutionality of the Law on Pharmaceutical Activities with the Constitution, the Constitutional Court also referred to the example of the European Union (and its individual member states), but in a "reverse" manner stating the absence of direct EU regulation: the Constitutional Court noted that the EU law did not regulate specific issues of the ownership of pharmacies leaving these issues to be regulated by the member states.<sup>26</sup>

The jurisprudence of the Constitutional Court of Lithuania holds almost no references to the jurisprudence of the ECJ. However, the general principles of law such as proportionality, legal certainty, protection of legitimate expectations, equality of persons, non-discrimination, also the principles pertaining to procedural rights (the right to be heard, the right to defence, effective judicial protection, etc.), protection of privacy, etc., are formulated by the Constitutional Court in a very similar fashion as in the jurisprudence of the ECJ. The identity of general principles of law generated by the ECJ and the Constitutional Court of Lithuania witnesses also the fact that the mentioned principles, being authentic principles of the EC/EU law and authentic principles of Lithuanian law, arise from the same legal values originating from the same legal civilisation—the Western legal tradition.<sup>27</sup>

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National Defence, the Prosecutor's Office, the Department of Prisons and of the Establishments and State Enterprises which are Subordinate to the Latter as approved by Government of the Republic of Lithuania Resolution No. 83 of 20 January 1995 with the Constitution of the Republic of Lithuania and on the Compliance of Item 5 of the said regulations with Paragraph 4 of Article 16 of the Republic of Lithuania Law on the State Pensions of Officials and Servicemen of the Interior, the Special Investigation Service, State Security, National Defence, the Prosecutor's Office, the Department of Prisons and of the Establishments and State Enterprises which are Subordinate to the Latter" (Official Gazette *Valstybės žinios*, 2003, No. 68–3094).

<sup>24</sup> The 9 December 1998 Constitutional Court Ruling "On the Compliance of the Death Penalty Provided for by the Sanction of Article 105 of the Republic of Lithuania Criminal Code with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 1998, No. 109–3004).

<sup>25</sup> The 6 October 1999 Constitutional Court Ruling "On the Compliance of Parts 1, 2 and 3 of Article 8 and Parts 7, 8 and 9 of Article 16 of the Republic of Lithuania Law on Telecommunications with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 1999, No. 85–2548).

<sup>26</sup> The 14 March 2002 Constitutional Court Ruling "On the Compliance of Paragraph 2 of Article 11 of the Republic of Lithuania Law on Pharmaceutical Activities with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 2002, No. 28–1003).

<sup>27</sup> Kūris E.: "The Constitutional Court and Interpretation of the Constitution" in Jarašiūnas E., Kūris E. Lapinskas K., Normantas A., Sinkevičius S., Stačiokas S. *Constitutional Justice in Lithuania*, The Constitutional Court of the Republic of Lithuania, Vilnius, 2003, pp. 280–281.

## The EU Law and the Constitutional Review

One of fundamental EU law principles is the principle of superiority of the EU law in regard of the national law. In the monistic understanding of the relation between the EU law and national law, this superiority is valid both in regard of national laws and sub-statutory acts, as well as national constitutions. Therefore, in this paradigm, there should arise no issue of the compliance of norms of the EU law with the national constitution.

There is also another opinion, similar to that of the Spanish Constitutional Court, according to which two legal systems co-exist in parallel in the state, i.e., norms of the EU law constitute an autonomous (however, non-isolated) set of norms. In this paradigm, the constitutional courts enjoy competence to present conclusive interpretation of internal legal norms, while the ECJ—to present interpretation of the EU law. It is also important that the treaties establishing the EU themselves emphasise the respect for national constitutional traditions and the principle of the rule of law. Having this in mind, the practice formulated by the German Federal Constitutional Court according to which the issue of the constitutionality of norms of the EU law might be considered, first, where provisions of the EU law violate fundamental human rights, and, second, where the EU institutions, when adopting mandatory acts, overstep the competence ascribed to them in the treaties establishing the EU.<sup>28</sup>

In this context, it is worthwhile to note that the Constitutional Court has not yet expressed any position concerning the status of the EU law with respect to the Constitution of Lithuania. Some justices of the Constitutional Court maintain that

the European Union, its institutions and its law would be nothing without the will of its member states. The European Union law is derived from the will of the member states (and it is not important that the Treaty Establishing the European Community and the Treaty on European Union are called primary law),<sup>29</sup> therefore one could speak only about ‘special’ superiority of the European Union law, since such superiority is grounded only on the fact that the countries establishing the EU or acceding to it, basing themselves on the opportunities consolidated in their constitutions, entrusted to the European Union to solve certain questions. And it is possible to speak about the priority of the European

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<sup>28</sup> In the 1993 Maastricht decision the German Federal Constitutional Court noted that legal acts of EU institutions must ensure protection of fundamental rights and freedoms to German citizens, thus establishing that EU law, while enjoying supremacy over national law, cannot violate the constitutional principles of the state, to which belong guarantees of fundamental rights and freedoms. In 1973, the Italian Constitutional Court also presented its opinion according to which, by granting priority for the EU law in regard of laws passed by the parliament, it kept the right to decide whether norms of EU law may be applied in Italian internal law in case they are in conflict with the fundamental rights and freedoms entrenched in the Constitution, and provided the ECJ did not remove this conflict.

<sup>29</sup> Jaradiūnas E.: “Lietuvos Respublikos Konstitucija ir Europos integracija“ in *Konstitucija, nacionalinė teisė ir Europos teisė*, Lietuvos Respublikos Konstitucinis Teismas, Vilnius, 2004, p. 23.

Union law only within the limits provided for in the treaties establishing the European Communities and the European Union.<sup>30</sup>

It has been already said that, according to the Constitution, supremacy of the EU law over the Lithuanian laws and other legal acts does not include supremacy over the Constitution of Lithuania. On the other hand, it has been suggested by some lawyers that the Constitutional Court of Lithuania does not have the power to investigate the compliance of the EU legal acts with the Constitution. The answer to this question may vary depending on whether it is an issue of the primary, or of the secondary EU law.

Under Article 105 of the Constitution of Lithuania, the Constitutional Court shall present conclusions whether international treaties of the Republic of Lithuania are not in conflict with the Constitution. Such conclusion, before ratification of the international treaty by the Seimas, was presented only once.<sup>31</sup> The Constitutional Court of Lithuania was not addressed to investigate constitutionality of the primary sources of the EU law in a preliminary review procedure.

However, in Lithuania, the bulk of the constitutional review is *succeeding review*, i.e. *a posteriori* review of the constitutionality of legal acts that have already been adopted and come into force. Therefore, the question remains whether the succeeding control of the primary sources of the EU law is possible. Some justices of the Constitutional Court have expressed the opinion that the Constitutional Court is entitled to investigate the constitutionality of the treaties establishing the EU (including the forthcoming Constitutional Treaty), as of any other ratified treaty, on the grounds of Paragraph 1, Article 7 of the Constitution (as quoted above). Also, some lawyers maintain that the Constitutional Court could investigate whether the laws whereby these treaties were ratified are not in conflict with the Constitution according to the form, as well as to the procedure, established by the Constitution, of adoption, signing, publishing or entry into effect of the said laws. Thus, indirectly, it would be possible to decide on the constitutionality of the treaties itself, since the ratified international treaty is inseparable part of the law on ratification of the treaty.<sup>32</sup> Still, from a realistic point of view, it would be hard to imagine a situation where the Constitutional Court, after Lithuania has already become a member of the EU, would have to present a conclusion concerning the constitutionality of the accession of Lithuania to the EU, i.e. to implement *a posteriori* constitutional review, both in view of the principle

<sup>30</sup> *Ibid.*, pp. 23-24.

<sup>31</sup> The 24 January 1995 Constitutional Court Conclusion "On the Compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 1995, No. 9–1999).

<sup>32</sup> Sinkevičius V.: "The Jurisdiction of the Constitutional Court" in Jarašiūnas E., Kūris E. Lapinskas K., Normantas A., Sinkevičius S., Stačiokas S. *Constitutional Justice in Lithuania*, The Constitutional Court of the Republic of Lithuania, Vilnius, 2003, p. 117.

*pacta sunt servanda* of international public law, and the embarrassments which would arise in case the Constitutional Court expressed an opinion that the provisions of the treaty on accession of Lithuania into the EU are in conflict with the Constitution of Lithuania.

Moreover, if the Constitutional Court, hypothetically, had to investigate the constitutionality of the treaties establishing the EU, the question would arise whether the Constitutional Court would not become an “autonomous” interpreter of the said treaties which are already interpreted by the ECJ. Therefore, a great many of lawyers have stated their position that upon the entry of the treaties constituting the EU primary law into effect, *in case there was no resort to preliminary review prior to the ratification of the said treaties*, these treaties (while taking into account the 1969 Vienna Convention on the Law of Treaties) shall be considered to be in conformity with the Constitution. There is not any case-law of the Constitutional Court on this issue.

In this context, it also should be noted that the Constitutional Court has also powers to investigate the compliance of a sub-statutory acts which are ascribed to its jurisdiction (a Government resolution, a decree of the President of the Republic) with an international treaty (or, technically, with a law whereby this treaty was ratified, since the ratified international treaty is inseparable part of the law on ratification of the treaty). So far, the Constitutional Court has not decided any cases of such kind. However, the Constitutional Court has accepted one petition requesting to investigate the compliance of a Government resolution with a ratified international treaty (namely, the European Charter of Local Self-Government), and one petition requesting to investigate the compliance of a decree of the President of the Republic with a ratified international treaty (namely, the European Convention for the Protection of Human Rights and Fundamental Freedoms). These petitions have not been considered yet. Interestingly enough, in deciding such cases the Constitutional Court will have to put itself in the position of the interpreter of international legal instruments, alongside with the relevant international bodies.

As it was already mentioned, the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union” was adopted and came into effect months later after Lithuania’s accession to the EU. Therefore, hypothetically, a very specific problem may emerge before the Constitutional Court of Lithuania if it *ever* has to decide on the constitutionality of the EU law-based legislation *during* the period when Lithuania was already a member of the EU however relevant constitutional provisions consolidating the status of the EU law in the Lithuanian legal system were not in place. So far, no such petitions were received.

In the sense of the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union”, regulations, i.e. the secondary sources of the EU law, stem from the Treaties upon which the EU is based, thus they have to be applied directly, while in case of collision they will enjoy supremacy over laws and other legal acts of the Republic of Lithuania.



As to the directives, on the basis of which national statutes and sub-statutory legislation is passed, they are, also, formally beyond the scope of the Constitutional Court's jurisdiction. On the other hand, the said statutes and sub-statutory legislation (based on the EU directives) clearly falls *within* the jurisdiction of the Constitutional Court. There are certain grounds for speculation in what form such statutes and sub-statutory legislation (based on the EU directives), if recognised unconstitutional by the Constitutional Court, should be amended so the EU requirements (as set forth in the directives) are met without infringement on the Constitution.

There, also, may arise a specific question of validity and application of the EU regulations adopted *prior* to Lithuania's accession to the EU. Due to organisational and financial problems of translation (which, from a practical standpoint, are quite understandable), most of the EU regulations adopted before 1 May 2004 are not accessible in Lithuanian. The first volumes of the *Official Journal of the European Union*, subsequent to the Council Regulation in part amending Regulation (EEC, Euratom, ECSC) No. 2290/77 have to be published gradually from 1 May 2004 until the end of 2004. Meanwhile, Paragraph 2, Article 7 of the Constitution of the Republic of Lithuania provides: "Only laws which are published shall be valid." The Constitutional Court has held that the said constitutional provision of Paragraph 2, Article 7 of the Constitution has to be interpreted in an expanding manner, i.e. in such a way that the notion "laws" includes not only legal acts, which have the power of the law, but also other legal acts (including sub-statutory legislation).<sup>33</sup> The Constitutional Court has also stated that, in order to be valid (in Lithuania), a legal act must be published in its entirety (with all its constituent parts), publicly, and in Lithuanian.<sup>34</sup> This requirement is directly linked *inter alia* with the principle of legal certainty, which is also the principle of the EU law. However, so far, only a small part of the EU regulations adopted prior to 1 May 2004, are available in Lithuanian (mostly on an internet page). Yet, the Constitutional Court has not expressed its opinion as regards the issue of application of Paragraph 2, Article 7 of the Constitution of the Republic of Lithuania to the EU regulations.

<sup>33</sup> The 29 October 2003 Constitutional Court Ruling "On the Compliance of Government of the Republic of Lithuania Resolution No. 458 "On the Approval of the Methods for Calculation of Damage Inflicted on Nature as a Result of Violation of Environmental Protection Laws" of 8 November 1991 with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 2003, 103–4611). Still before, the Constitutional Court held that legal acts adopted by the Government must be published regardless of whether the legal acts adopted by the Government are normative or individual, as well as regardless of the fact as to what entities or circles of entities they are meant (The 29 November 2001 Constitutional Court Ruling "On the Compliance of the Government of the Republic of Lithuania Decision 'On the request of the company "Danisco Sugar" A/S to acquire certain shares of sugar sector enterprises' entered into the minutes of the sitting of 22 July 1998 of the Government of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the Compliance of the provisions of Articles 3 and 8 of the Republic of Lithuania Law 'On Procedure of Publication and Coming Into Force of Republic of Lithuania Laws and Other Legal Acts' with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 2001, No. 102–3636).

<sup>34</sup> The 29 October 2003 Constitutional Court Ruling "On the Compliance of Government of the Republic of Lithuania Resolution No. 458 'On the Approval of the Methods for Calculation of Damage Inflicted on Nature as a Result of Violation of Environmental Protection Laws' of 8 November 1991 with the Constitution of the Republic of Lithuania" (Official Gazette *Valstybės žinios*, 2003, No. 103–4611).

## The Constitutional Court of Lithuania and the European Court of Justice

In the opinion of the ECJ, it is only the ECJ itself which is competent to decide whether the EU institutions did not exceed their competencies, while national constitutional courts cannot decide on the compliance of the EU law with national constitutions before they apply to the ECJ.<sup>35</sup>

However, a question arises whether the Constitutional Court falls in the category of courts provided for in Article 234 of the Treaty Establishing the European Community. Paragraph 3, Article 234 of the said Treaty provides that where a question of interpretation of the this treaty or of other acts of the EU laws is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the ECJ (for a preliminary ruling containing official interpretation of the EU law). The applicability of this norm to constitutional courts in various states is not the same.<sup>36</sup>

This issue is debated in Lithuania as well. The Constitutional Court of Lithuania has not yet expressed its position on the issue.

Under the Constitution, decisions of the Constitutional Court of the Republic of Lithuania are final and not subject to appeal. Thus, the Constitutional Court, beyond any doubt, is the court of the last instance. However, the Constitutional Court deals *only with issues of norm control*, so the question of whether it is to be regarded as a court of the last instance in terms of Article 234 which must apply to the ECJ for a preliminary ruling, remains open. In this context, the position expressed by the former President of the ECJ shall not be neglected:

Under certain circumstances, the interpretation of Community law or the question of validity of a Community legal act might be decisive for the solution of a dispute before a constitutional court. In such case, the constitutional court would be under an obligation to refer such a question to the Court of Justice for a preliminary ruling. In other words: the specific functions of constitutional courts can not exempt them from the obligation established by Article 234 of the EC Treaty.<sup>37</sup>

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<sup>35</sup> Iglesias R. C. G.: "National Constitutional Courts and European Community Law" in *Constitutional Justice and the Rule of Law*, The Constitutional Court of the Republic of Lithuania, Vilnius, 2003, p. 68.

<sup>36</sup> For example, in Germany an opinion prevails that the Constitutional Court itself may but does not have to apply to the ECJ, however, in the case *Solange II*, the German Federal Constitutional Court held that Article 177 of the EC Treaty grants the ECJ exclusive competence to adopt decisions in regard of national courts concerning interpretation of the Treaty as well as regards the validity and interpretation of instruments of the secondary EU law. On the other hand, the Constitutional Court of Austria quite often resorts to the preliminary rulings of the ECJ.

<sup>37</sup> Iglesias R.C.G.: *Op. cit.*, p. 57.

In any case, the uniform understanding of the EU law—one of the prerequisites of efficient and successful European integration—can only be ensured by the EU, and not by national courts. Therefore, when facing issues pertaining to the constitutionality of (at least) the laws and sub-statutory legislation based on the EU directives, the Constitutional Court could resort to relevant preliminary rulings provided by the ECJ.

As pursuant to Paragraph 2, Article 1 of the Constitutional Act “On the Membership of the Republic of Lithuania in the European Union”, the norms of the European Union law are a constituent part of the legal system of the Republic of Lithuania, in this country it is *not possible* to speak of parallelism of the two systems. In principle, two legal systems—the EU law and national *constitutional* law—may *in fact* be parallel only if there are no overlapping competences. But if, and when, competences do overlap, *each system has arguments to defend its superiority*. Legally, the issue cannot be resolved otherwise as only by a case-by-case convergence of the two systems, as neither the superiority of the national Constitution over any legal act (including the treaties establishing the EU) which is consolidated in the Constitution, nor the principle of the superiority of the EU law which is the underlying principle of the whole European integration can be sacrificed.

This requires *mutual amicability* in interpretation—both on the part of the ECJ which has competence to interpret the EU law and on the part of national constitutional courts which interpret national constitutions. Not only national constitutional courts but also the ECJ have to search for a balance between the principles of the superiority of the EU law and the superiority of national constitutions, *as two conflicting legal values, both of which have their validity in their constituting documents*—respectively, the national Constitution and the European Treaties. As to the justices of the constitutional courts, they would remain guardians of the national constitutions and the national constitutional identity first of all,<sup>38</sup> otherwise the very rationale of the national constitutional court would disappear. However, if, and when, certain provisions of the national constitutions may be in conflict with the EU law, *ad hoc* constitutional amendments may be the solution. Still, this would be the task not for the Constitutional Court but for the Seimas.

Annex:

## Relevant Provisions of the Constitution of the Republic of Lithuania

### Article 4

The Nation shall execute its supreme sovereign power either directly or through its democratically elected representatives.

<sup>38</sup> Wyrzykowski M.: “Konstitucinis Tribūnolas ir Lenkijos narystė Europos Sąjungoje: Keletas problemų“ in *Konstitucija, nacionalinė teisė ir Europos teisė*, Lietuvos Respublikos Konstitucinis Teismas, Vilnius, 2004, p. 56.

### **Article 5**

In Lithuania, the Seimas, the President of the Republic and the Government, and the Judiciary, shall execute State power.

The scope of power shall be limited by the Constitution.

State institutions shall serve the people.

### **Article 7**

Any law or other act, which is inconsistent with the Constitution, shall be invalid.

Only laws which are published shall be valid.

Ignorance of the law shall not exempt one from liability.

### **Article 47**

The right of exclusive ownership of the subterranean, as well as internal waters, forests, parks, roads, historical, archaeological and cultural objects of State importance shall belong to the Republic of Lithuania.

The exclusive rights to the airspace over its territory, its continental shelf, and the economic zone in the Baltic Sea shall belong to the Republic of Lithuania.

In the Republic of Lithuania foreign entities may acquire the ownership of land, internal waters, forests, and parks subsequent to a constitutional law.

Plots of land may belong to a foreign state by right of ownership for the establishment of its diplomatic and consular missions in accordance with the procedure and conditions established by law.

### **Article 119**

The right of self-government shall be guaranteed to the administrative units of State territory which are provided for by law. It shall be implemented through corresponding municipal councils.

The members of the municipal councils shall be elected for a four-year term, as provided for by law, from among citizens of the Republic of Lithuania and other permanent residents of the administrative unit by the citizens of the Republic of Lithuania and other permanent residents of the administrative unit, on the basis of universal, equal and direct electoral right by secret ballot.

The procedure for the organisation and activities of self-government institutions shall be established by law.

For the direct implementation of the laws of the Republic of Lithuania, the decisions of the Government and the municipal council, the municipal council shall establish executive bodies accountable to it.

### **Article 136**

The Republic of Lithuania shall participate in international organisations provided that this does not conflict with the interests and independence of the State.

### **Article 138**

The Seimas shall ratify or denounce the following international treaties of the Republic of Lithuania:

- 1) concerning the alteration of the State boundaries of the Republic of Lithuania;
- 2) concerning political cooperation with foreign states, mutual assistance, as well as treaties of defensive nature related to the defence of the State;
- 3) concerning the renunciation of the use of, or threatening by, force, as well as peace treaties;
- 4) concerning the presence and status of the armed forces of the Republic of Lithuania on the territories of foreign states;
- 5) concerning the participation of the Republic of Lithuania in universal international organisations and regional international organisations;
- 6) multilateral or long-term economic treaties.

Laws as well as international treaties may also provide for other cases in which the Seimas shall ratify international treaties of the Republic of Lithuania.

International treaties which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania.

### **Article 148**

The provision of Article 1 of the Constitution that the State of Lithuania shall be an independent democratic republic may only be altered by referendum provided not less than 3/4 of the citizens of Lithuania with the electoral right are in favour thereof.

The provisions of the First Chapter “The State of Lithuania” and the Fourteenth Chapter “Alteration of the Constitution” may only be altered by referendum.

Amendments of the Constitution concerning other chapters of the Constitution must be considered and voted upon in the Seimas twice. There must be a period of not less than three months between these votes. The draft law on the alteration of the Constitution shall be deemed adopted by the Seimas if, in each of the votes, not less than 2/3 of all the members of the Seimas vote in favour thereof.

An amendment to the Constitution which is not adopted by the Seimas may be presented repeatedly to the Seimas for reconsideration not earlier than one year after it was initially rejected.

## **The Constitutional Act of the Republic of Lithuania “On the Membership of the Republic of Lithuania in the European Union”**

The Seimas of the Republic of Lithuania,

- executing the will of citizens of the Republic of Lithuania, expressed in the referendum on the membership of the Republic of Lithuania in the European Union, which took place on 10-11 May 2003,
- convinced that the European Union respects human rights and fundamental freedoms, and that the Lithuanian membership in the European Union will contribute to more efficient securing of human rights and freedoms,
- noting that the European Union respects the national identity and constitutional traditions of its Member States,
- seeking to ensure the full rights participation of the Republic of Lithuania in the European integration as well as the security of the Republic of Lithuania and welfare of its citizens,
- having ratified, on 16 September 2003, the Treaty Between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, signed in Athens on 16 April 2003,

adopts and proclaims this Constitutional Act:

1. The Republic of Lithuania, being a Member State of the European Union, shares or entrusts the competence of state institutions to the European Union in the areas specified by treaties, upon which the European Union is based, and to the extent that it would, together with other Member States of the European Union, commonly fulfil the membership obligations in these areas and enjoy the membership rights.
2. The norms of the European Union law are a constituent part of the legal system of the Republic of Lithuania. If it concerns the treaties upon which the European Union is based, the norms of European Union law shall be applied directly, while in case of collision of legal norms, the former shall enjoy supremacy over the laws and other legal acts of the Republic of Lithuania.

3. The Government shall inform the Seimas about proposals to adopt acts of European Union law. The Government shall consult with the Seimas concerning the proposals to adopt acts of European Union law, which regulate the areas that, under the Constitution of the Republic of Lithuania, are related with the competence of the Seimas. The Seimas may recommend the position of the Republic of Lithuania to the Government as regards these proposals. The Seimas Committee on European Affairs and the Committee on Foreign Affairs may, under the procedure established by the Statute of the Seimas, present the opinion of the Seimas to the Government concerning the proposals to adopt acts of European Union law. The Government assesses recommendations or opinions presented by the Seimas or its committees and informs the Seimas about their execution under procedure established by legal acts.

4. The Government shall consider proposals to adopt acts of European Union law under procedure established by legal acts. As regards these proposals, the Government may adopt decisions or resolutions for the adoption of which the provisions of Article 95 of the Constitution are not applicable.

*Prof. Dr. Aivars Endziņš*

*Chairman of the Constitutional Court of the Republic of Latvia*

## **THE POSITION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA FOLLOWING INTEGRATION INTO THE EUROPEAN UNION**

### **Summary**

There are several topical constitutional legal issues, which are connected with the procedure of accession of Latvia to the European Union. The membership in the EU has been decided in a referendum with an impressive predominance of “for”. But the referendum was on the issue whether to join the EU. It was not on the issue whether to amend Articles 1 and 2 of the Satversme. Several persons have submitted constitutional claims to the Constitutional Court, in this or that way trying to challenge the legitimacy of the Amendments, the referendum as well as the Agreement on the Accession. They hold that the accession of Latvia to the EU is anti-constitutional, as the Saeima was not authorized to adopt the Amendments, without amending Articles 1 and 2 of the Satversme. Up to now these claims have not complied with the requirements, set out in the Constitutional Court Law, therefore cases have not been initiated.

The Constitutional Court will be able to review such a case only then, when it receives an application, which complies with the requirements of the law. Up to now all the particular applications have been submitted as the constitutional claims. In none of the cases the persons have managed to substantiate that their fundamental rights, set out in the Satversme, are violated. However, there is a possibility that the Latvian Constitutional Court may have to reach the “Maastricht Judgment” of its own.

Secondly, the Constitutional Court has to review cases in which such Latvian legal norms, which follow from the EU law, are challenged. As concerns these cases, the Constitutional Court has a double task – it has to elaborate a theoretical and methodical basis for reviewing such cases, at the same time giving interpretation of a particular legal issue.

At the moment we have already announced the Judgment in a case like the above. The Constitutional Court pointed out that after joining the European Union the Republic of Latvia has to honour the liabilities, following from the Accession Treaty. With this Judgment the Constitutional Court has made a relevant step to express its viewpoint on the interaction of the EU norms and those of Latvia, as well as on the international liabilities of Latvia, undertaken before accession to the EU.



However, this does not mean that all the issues of this sector have been solved. Especially problematic for Latvian constitutional law will evidently be the issues on the mutual interaction of the EU acts and the Satversme. On the one hand, to a certain limit one can agree with the general viewpoint that in case of collision the Community Laws prevail over the national laws and that priority of application of the Community Laws is absolute. At the same time one has to take into consideration that the national constitutional norms are not homogenous either. Every constitution includes the norms, which set out the constitutional basis of the State. Usually a more complicated procedure for amending the norms has been determined and some of the norms shall not be amended. These norms do not have and cannot have a lower legal force than the EU documents.

### **Povzetek**

*S pristopom Latvije k Evropski uniji je povezanih nekaj aktualnih vprašanj. O članstvu v EU je bilo odločeno na referendumu s prepričljivo večino glasov "za". Toda referendumsko vprašanje je bilo, ali pristopiti k EU ali ne, in se ni nanašalo na vprašanje, ali naj se spremenita prvi in drugi člen Ustave (Satversme). Nekaj posameznikov je pred Ustavnim sodiščem že vložilo ustavne pritožbe, v katerih na tak ali drugačen način izpodbijajo legitimnost ustavnih sprememb, referendumu ali Sporazuma o pristopu. Zatrjujejo, da je bil pristop Latvije k EU protiustaven, ker parlament (Saeima) ne bi smel sprejeti sprememb Ustave, ne da bi spremenil njen prvi in drugi člen. Do sedaj te ustavne pritožbe niso izpolnjevale pogojev, določenih v Zakonu o Ustavnem sodišču, in zato do presoje še ni prišlo.*

*Ustavno sodišče bi v takšni zadevi lahko odločalo le v primeru, če bi prejelo vlogo, ki bi izpolnjevala zakonske pogoje. Do sedaj so bile vse vloge vložene kot ustavne pritožbe. V nobenem primeru pritožnikom ni uspelo utemeljiti, da so bile kršene njihove temeljne, v Ustavi zagotovljene pravice, vendar pa obstaja možnost, da bo moralo Ustavno sodišče sprejeti svojo "Maastrichtsko sodbo".*

*Poleg tega mora Ustavno sodišče odločati v zadevah, v katerih se izpodbijajo tisti latvijski predpisi, ki izhajajo iz evropskega prava. Ustavno sodišče ima v teh primerih dvojno nalogo – preučiti mora teoretično in praktično podlago za presojo teh primerov ter ob tem interpretirati posamezno pravno vprašanje.*

*Nedavno je bila razglašena sodba v primeru, opisanem v prejšnjem odstavku. Ustavno sodišče je poudarilo, da mora Republika Latvija od pristopa k EU spoštovati obveznosti, ki izhajajo iz pristopne pogodbe. S to sodbo je Ustavno sodišče napravilo velik korak k izražanju svojega stališča o medsebojnem razmerju med predpisi EU in latvijskimi predpisi kot tudi o mednarodnih obveznostih Latvije, ki jih je sprejela pred pristopom k EU.*

*To pa ne pomeni, da so bila rešena vsa vprašanja s tega področja. Še posebej bodo za latvijsko ustavno pravo problematična vprašanja razmerja med predpisi EU in Ustavo. Po eni strani se je do neke meje mogoče strinjati s splošnim stališčem, da v primeru kolizije zakonodaja Skupnosti prevlada nad notranjo zakonodajo, ter da je primarnost uporabe prava Skupnosti absolutna. Vendarle pa je treba upoštevati, da notranje ustavne določbe prav tako niso homogene. Vsaka ustava vsebuje določbe, ki predstavljajo ustavni temelj države. Ponavadi je za spremembo ustave predpisan bolj zapleten postopek, nekaterih določb pa se sploh ne sme spreminjati. Te določbe nimajo in ne morejo imeti manjše pravne moči kot dokumenti EU.*

The place and role of the Republic of Latvia Constitutional Court in the processes of Euro-integration, to our mind, may be viewed in a wider and narrower aspect.

On the one hand, i.e. in the wider aspect, the entire activities of the Constitutional Court for the last almost eight years have been directed to approximating the Latvian legal system to that of the European State system. The idea of a democratic and law-based state is the basis for functioning of the state legal system within the European Union. As concerns the above, nothing has changed after May 1. Everyday activities are going on; so that, when reviewing particular cases, in every particular case the Latvian legal norms shall be commensurable with the basic values of a democratic and law-based state.

On the other hand, i.e. in the narrower aspect, joining of Latvia to the European Union has advanced new and more complicated tasks for the Republic of Latvia Constitutional Court. We can mainly speak of two mutually closely connected blocks of problems:

First of all there are several topical constitutional legal issues, which are connected with the procedure of accession of Latvia to the European Union. Namely, at present nobody in Latvia is doubting that “*de facto*” Latvia is within the European Union. However, the Constitutional Court is receiving many applications in which the submitters challenge the fact whether Latvia has joined the European Union “*de facto*”. That is – the submitters hold that accession to the EU has been anti-constitutional.

Secondly, the Constitutional Court has to review cases in which such Latvian legal norms, which follow from the EU law, are challenged. As concerns these cases, the Constitutional Court has a double task – it has to elaborate a theoretical and methodical basis for reviewing such cases, at the same time giving interpretation of a particular legal issue.

And now I shall discuss the two above blocks in more detail. In many cases the roots of these problems shall be looked for in the relevant Amendments to the Republic of Latvia Satversme (Constitution). As is well-known, Amendments to the Republic of Latvia Satversme<sup>1</sup> were adopted by the Saeima on May 8, 2003 and promulgated on May 22

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<sup>1</sup> The Law “Amendments to the Republic of Latvia Satversme”.

(henceforth – the Amendments to the Satversme). They are connected with the issue of accession and functioning of Latvia in the EU.

As I have many times spoken about the above amendments from the platforms of European activities, I shall remind just the most important issues.

As is well-known, when renewing its independence, Latvia renewed also the validity of the old (passed in 1922) Republic of Latvia Satversme. When elaborating the Amendments to the Satversme, connected with the accession and functioning of Latvia in the EU, the norms of the Satversme and their contents had to be re-evaluated and analyzed by taking into consideration the context of the reality of the contemporary world. The most essential issue was: is it necessary and admissible to textually amend Articles 1 and 2 of the Satversme. These Articles determine that “Latvia is an independent and democratic republic” and “the sovereign power of the State of Latvia is vested in the people of Latvia”. The most essential issue of the discussions with regard to the above Articles was “Does the participation of Latvia in the EU contract the contents of Articles 1 and 2?” From the answer to the above question depended the procedure, under which the Satversme permits accession to the EU.

Both – the working group under the guidance of the former Minister of Justice and the members of the Parliament reached the decision that there was no necessity to amend Articles 1 and 2 of the Satversme.

The Amendments to the Satversme are expressed in a very concise and laconic way, which complies with the style of the Satversme. The Amendments express Article 68 and 79 in the new wording:

“ **68.** *All international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the Saeima.*

*Upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institutional competencies to international institutions. International agreements in which a part of state institution competencies are delegated to international institutions may be ratified by the Saeima in sittings in which at least two thirds of the members of the Saeima participate, and a two-thirds majority vote of the members present is necessary for ratification.*

*Membership of Latvia in the European Union shall be decided by a national referendum, which is proposed by the Saeima.*

*Substantial changes in the terms regarding the membership of Latvia in the European Union shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the Saeima.*

*79. An Amendment to the Constitution submitted for national referendum shall be deemed adopted if at least one-half of the electorate has voted in favour.*

*A draft law, decision regarding membership of Latvia in the European Union or substantial changes in the terms regarding such membership submitted for national referendum shall be deemed adopted if the number of voters is at least half of the number of electors as participated in the previous Saeima election and if the majority has voted in favour of the draft law, membership of Latvia in the European Union or substantial changes in the terms regarding such membership”.*

On September 20, on the basis of Amendments to the Satversme, the referendum took place in Latvia. 1 010 467 voters took part in it. 676 700 voters (66,97%) from all the persons, who participated in the referendum) voted “for”, 325 980 (32,26%) were “against”.<sup>2</sup> 7 787 (0,77%) of the votes were declared as invalid. On October 30, 2003 the Saeima ratified the so-called EU Agreement by law.<sup>3</sup>

Not going deep into the Latvian constitutional law, at the first moment it might seem that there are no problems as the membership in the EU has been decided in a referendum with an impressive predominance of “for”. However, one shall take into consideration that the referendum was on the issue whether to join the EU. It was not on the issue whether to amend Articles 1 and 2 of the Satversme.

Article 77 of the Satversme determines:” If the Saeima has amended the first, the second, the third, the fourth, the sixth or the seventy-seventh Article of the Constitution, such amendments, in order to come into force as law, shall be submitted to a national referendum”. Besides, one has to take into consideration that the majority of votes determined for both referendums differ. As can be seen from the cited Article 79 of the Satversme, an Amendment to the Constitution submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. In its turn, the decision regarding membership of Latvia in the European Union shall be deemed adopted if the number of voters is at least half of the number of electors as participated in the

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<sup>2</sup> On the final results of the referendum on the membership of Latvia in the EU. Latvijas Vēstnesis 07.10.2003, see also the home page of the Central Election Committee [www.cvk.lv](http://www.cvk.lv).

<sup>3</sup> The Law “ On the Agreement between the Kingdom of Belgium, the Kingdom of Denmark, the Federative Republic of Germany, the Republic of Greece, the Kingdom of Spain, the Republic of France, Ireland, the Republic of Italy, the Duch of Luxemburg, the Kingdom of Netherlands, the Republic of Austria, the Republic of Portugal, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Estonia, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Republic of Slovakia on the accession of the Czech Republic, Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia to the European Union”, adopted on October 30, 2003, promulgated on November 12, 2003; Latvijas Vēstnesis 12.11.2003, No. 159 (2924).

previous Saeima elections and if the majority has voted in favour of the membership of Latvia in the European Union.

Euro-optimists and Euro-pessimists interpret the results of September 20, 2003 referendum in a different way. Euro-optimists stress that 997 754 voters or 71,51%<sup>4</sup> of persons, having the right to vote, participated in the previous Saeima elections. On September 20, 2003 for the accession to the EU voted about 68% of the above figure, which evidently suffices for taking the decision.

Euro-pessimists in their turn like to stress that from all the persons, having the right to vote, only 48% were “for”, but 23% - “against”. The latter figure is of no legal importance. Even if a much greater percentage of all the persons, having the right to vote, would have voted for membership of Latvia in the EU, all the same they would have voted for such a membership of Latvia in the EU, which does not change Articles 1 and 2 of the Satversme and delegates competence to the EU only “with an aim of strengthening democracy”.

The “last stronghold” of Euro-pessimists is the statement that the accession of Latvia to the EU is anti-constitutional, as the Saeima was not authorized to adopt the Amendments, without amending Articles 1 and 2 of the Satversme.<sup>5</sup> After the adoption of the Amendments to the Satversme several persons have submitted constitutional claims to the Constitutional Court, in this or that way trying to challenge the legitimacy of the Amendments, the referendum as well as the Agreement on the Accession. In the last claim with a similar argument the legitimacy of the Euro-Parliament elections is challenged. Up to now these claims have not complied with the requirements, set out in the Constitutional Court Law, therefore cases have not been initiated.

Is the Constitutional Court the institution, which – by giving a juridically argued viewpoint– shall solve the dispute on whether the accession of Latvia to the EU has been constitutional or anti-constitutional? Looking from the procedural viewpoint, the issue has two parts. First of all – are the particular cases within the competence of the Constitutional Court? Secondly, which persons and on what cases experience the right of submitting a claim on the particular issues.

As concerns the first issue, there is no dispute about the fact that in accordance with Article 16, Item 2 of the Constitutional Court Law the Constitutional Court shall review cases regarding compliance with the Constitution of international agreements signed or entered into by Latvia (even before the Saeima has confirmed the agreement).

<sup>4</sup> See [http://web.cvk.lv/pub/?doc\\_id=27934](http://web.cvk.lv/pub/?doc_id=27934)

<sup>5</sup> Pleps. What is the Constitutional Basis for the Accession of our State to the EU. The Word of the Lawyer. 17.06.2003; No. 23 (281).

In its turn, disputable is the issue whether the Constitutional Court may assess the compliance of a law on amendments to the Satversme with the Satversme. I should like to note that there are no norms in the Satversme, which directly authorize the Constitutional Court to assess the conformity of such a law with the Constitution or several of its norms. In the practice of the Constitutional Court there is no judgment, which solves the above issue. However, quite regular is the practice of the Constitutional Court Panels to refuse initiating a case on the assessment of mutual conformity of different norms of the Satversme. In its turn, the attitude to the issue of whether the Amendments to the Satversme have been adopted under the procedure envisaged by the law is positive.

Thus on November 11, 2003 the Fourth Panel of the Constitutional Court received five analogous applications.<sup>6</sup> All of them requested declaration of 1) parts of Articles 68 and 79 of the Republic of Latvia Satversme;

2) referendum on the membership of Latvia in the European Union; 3) the Saeima decision on the adoption (in the first reading) of the draft Law “On the Agreement between the Member States of the EU and the Candidate States on the Accession to the EU” as unconformable with Articles 1, 2, 77, 89 and 40 of the Republic of Latvia Satversme. The 4<sup>th</sup>. Panel of the Constitutional Court concluded that the claims, formulated in the above way, were not within the competence of the Constitutional Court and refused to initiate a case.

Inter alia the 4<sup>th</sup>. Panel concluded that:

*“In compliance with Article 85 of the Satversme and Article 16 (Item 1) of the Constitutional Court Law the Constitutional Court shall review cases concerning the compliance of laws with the Satversme.*

*Trying to interpret the term “law” of the above norms, one shall take into consideration that the aim of the legislator, when establishing the Constitutional Court has first of all been to create an efficient mechanism for the protection of the priority of the Satversme norms. And it would be at variance with the above aim to assume that the Constitutional Court may not assess the conformity of those laws with the Satversme, which envisage amending the Satversme, but are not passed under the procedure, envisaged by the Satversme. The Constitutional Court is authorized to review issues on the fact whether particular norms have become the norms of the Satversme under the procedure established by law. Namely, whether the Saeima has not violated the procedure, when passing the norms.*

*At the same time one shall take into consideration, that the Satversme determines the procedure of amending it, besides the Satversme does not envisage that the Consti-*

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<sup>6</sup> Applications on initiating a case at the Constitutional Court (Registration Nos. 119-123, 2003).

*tutional Court shall review the compliance of one norm with other norms or the Satversme as a whole. If a norm has been incorporated in the Satversme, it is an integral part of it and has a corresponding legal force.”*

Thus the Constitutional Court would be authorized to review the case on whether the Saeima has adopted the Amendments to the Satversme, concerning accession to the EU, under the procedure, envisaged by the law.

Certainly, the Constitutional Court will be able to review such a case only then, when it receives an application, which complies with the requirements of the law. Up to now all the particular applications have been submitted as the constitutional claims. In none of the cases the persons have managed to substantiate that their fundamental rights, set out in the Satversme, are violated.

For example, in its February 25, 2004 decision on the refusal to initiate a case, the 4<sup>th</sup>. Panel of the Constitutional Court established:” The submitters of the application point out that by the referendum, which was realized in accordance with Article 2 of the Law “On the Referendum and Initiation of the Laws”, Articles 1 and 2 of the Republic of Latvia Satversme were violated as “the Latvian people were deprived of the sovereign power of the state and the principles of democracy were violated”. Neither “the sovereign power of the State”, nor “the principles of democracy” are included in the Satversme or catalogues on human rights of the international human rights documents, and they cannot be regarded as the fundamental rights of the persons.”

It is interesting to note that none of the submitters of constitutional claims has made references to the Satversme norms, which are analogous to Article 38 of the Fundamental Law of the German Federative Republic and which were made use of in the constitutional claims to Bundeverfassungsgericht in the “Maastricht case”. However, there is a possibility that the Latvian Constitutional Court may have to reach the “Maastricht Judgment” of its own. We do understand what responsibility it will be for the Constitutional Court.

However, even in case if the constitutionality of the process of accession is not challenged at the Constitutional Court, it sooner or later will have to solve the issue on the interaction of different EU acts with the Latvian legal norms.

As I have already mentioned, after May 1, 2004 essential problems are connected with the fact that the Constitutional Court has to review cases in which the Latvian legal norms, which follow from the European Union Law, are challenged.

At the moment we have already announced the Judgment in a case like the above. On the basis of the claim by the Riga Northern District Court was initiated case No. 2004-01-06 “On the Conformity of Article 114<sup>2</sup> of the Latvian Administrative Violation Code

with the April 9, 1965 Convention on Facilitation of International Maritime Traffic”. It has been established in the above case that there is variance between the national legal norm (the challenged norm) and the norm of the Directive as well as the norm of the international agreement (Standard 3.15 of the Convention).

In its July 7, 2004 Judgment the Constitutional Court stressed that “ *The person applying legal norms, also the court, when establishing discrepancy between the international legal norm and the national legal norm of Latvia, shall apply the international legal norm.*”<sup>7</sup> At the same time the Constitutional Court pointed out that after joining the European Union the Republic of Latvia has to honour the liabilities, following from the Accession Treaty. In accordance with the above act the Council Directive 2001/51/EK is also binding on Latvia.”<sup>8</sup>

Inter alia the Constitutional Court established that “*Article 307 of the Foundation Agreement of the Consolidated European Community regulates the above cases, setting out that European Laws do not affect former agreements, but the Member States shall try to eliminate these unconformities. However, at the time while the Member State has not carried out any activities (denouncement, expression of pretexts) the international agreement shall be applied (see case C-158/91 Criminal proceedings against Jean-Claude Levy).*”<sup>9</sup>

Inter alia the Constitutional Court decided: “ to declare the following text of the first part of Article 114<sup>2</sup> of the Latvian Administrative Violation Code: “for carrying one or several persons from the foreign states to the Republic of Latvia if the above persons do not have valid travel documents for crossing the Republic of Latvia border and if it has been realized by the carrier of maritime transport” as unconformable from May 1, 2004 with Standard 3.15 of the International Convention on Facilitation of Maritime Traffic, signed in London on April 9, 1965 and null and void as regards the carriers of those states, which are Contracting States of the above Convention but are not EU Member States.”

With this Judgment the Constitutional Court has made a relevant step to express its viewpoint on the interaction of the EU norms and those of Latvia, as well as on the international liabilities of Latvia, undertaken before accession to the EU.

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<sup>7</sup> Judgment in Case No. 2004-01-06 “On the Compliance of Article 1142 of the Administrative Violation Code with April 9, 1965 Convention on Facilitation of International Maritime Traffic”, July 7, 2004.

<sup>8</sup> Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the German Federative Republic, the Republic of Greece, the Kingdom of Spain, the Republic of France, Ireland, the Republic of Italy, Great Duchy of Luxemburg, the Kingdom of Netherlands, the Republic of Austria, the Republic of Portugal, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (the Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia on the Accession to the European Union.

<sup>9</sup> Judgment in Case No.2004-01-06 “On the Compliance of Article 1142 of the Administrative Violation Code with April 9, 1965 Convention on Facilitation of International Maritime Traffic”, July 7, 2004.



However, this does not mean that all the issues of this sector have been solved. Especially problematic for Latvian constitutional law will evidently be the issues on the mutual interaction of the EU acts and the Satversme. As I have mentioned before, the Latvian voters have taken their decision on the accession to the EU under the procedure, established by the Satversme. When choosing either “yes” or “no”, the Latvian citizens on the one hand have taken into consideration the requirements of the Satversme. That is – Articles 1 and 2 of the Satversme remain unchanged. Secondly – delegation of the State competence shall take place “with an aim of strengthening democracy”.

Naturally at the moment there is no court practice in Latvia, which contains the solution of the above issue. I may express only the viewpoint of my own. On the one hand, to a certain limit I do agree with the general viewpoint, expressed by the EU law experts, namely, in case of collision the Community Laws prevail over the national laws and that priority of application of the Community Laws is absolute. Therefore in cases of collision, every Community legal norm to be applied<sup>10</sup> directly prevails over every national legal norm of the state. Thus the priority of the Community Laws shall be in effect as concerns all the national norms, inter alia also the constitutional norms of Member States”.

On the other hand, the higher force of the EU acts is not absolute. The EU is not a state; it has no sovereignty of its own. EU has only these competencies, which the Member States have delegated to it and only in the amount the EU has received. If the EU passes legal acts, which do not follow from the essence of the EU or which may endanger e.g. the existence of the Latvian statehood or democracy, then the Republic of Latvia Satversme and not the above acts shall be applied.

I have to agree to the viewpoint, repeatedly voiced at international forums by the Republic of Lithuania Constitutional Court justice Stačiokas, namely, that the constitutional law of the EU is created by the corresponding EU acts and the constitutions of all the EU Member States.

At the same time one has to take into consideration that the national constitutional norms are not homogenous either. Every constitution includes the norms, which set out the constitutional basis of the State. Usually a more complicated procedure for amending the norms has been determined and some of the norms shall not be amended. These norms do not have and cannot have a lower legal force than the EU documents.

Of course, the above issue is mainly theoretic.

Looking from the effectivity angle I can only agree with the viewpoint of the Rector of the Riga Graduate School of Law prof. Norbert Reich that “in the practice of our time,

<sup>10</sup> Gatawis S., Broks E., Bule Z. The European Law. Riga, 2002, Eurofaculty, p. 107.

superiority is not the issue of hierarchy but that of the uniformity. Community rights is a separate legal system, with its sources, specific influence on states and individuals, with its own methods of interpretation and revision... Superiority is not an aim in itself but the means for reaching uniformity in interpretation and application".<sup>11</sup>

Latvia has some advantages as concerns just these issues. The laconic Satversme is a good material for interpreting it in conformity with the EU Law by systemic approach to it, only if the EU institutions do not use their competence with ill intentions. The Constitutional Court has a good practice in interpreting the Satversme in conformity with the European Court of Human Rights practice. And I hope that at one of our next meetings I shall be able to tell you how the Republic of Latvia Satversme is being successfully interpreted under the conditions of the EU.

Thank you for your attention!

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<sup>11</sup> Norbert Reich, Cristopher Godar and Ksenia Vasilyeva. *Understanding the EU Law: Aims, Principles and Methods of the Community Rights*. Riga: The Agency of the Court House, 2004, pp.41-42.

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## **THE PRESENTATION OF HUNGARIAN EXPERIENCES**

### **Summary**

1. The Hungarian Constitutional Court was established at the beginning of the political changes. Its competence has been regulated with the aim to create a strong Constitutional Court as a guarantee of the Rule of Law and protection of human rights. The competence includes the control of international treaties too.
2. The Constitution has been amended in order to establish the constitutional basis of the accession to the European Union. According to the new constitutional rule some powers will be exercised jointly with other Member States.
3. The Constitutional Court has taken measures in preparation for the new tasks after the accession.
4. In the future a series of meetings and loyal cooperation are needed for resolving the problems.

### **Povzetek**

*Madžarsko Ustavno sodišče je bilo ustanovljeno leta 1989, na začetku političnih sprememb v državi, s čimer se je v državi vzpostavil nadzor nad dejavnostjo parlamenta in tako tudi nad bodočim demokratičnim razvojem. Pristojnosti so bile določene s ciljem ustvariti močno Ustavno sodišče, ki bi delovalo kot porok pravne države in varovanja človekovih pravic.*

*Ustava določa, da so pristojnosti Ustavnega sodišča podrobneje določene v Zakonu o Ustavnem sodišču. Na prvem mestu je treba omeniti kontrolo ustavnosti pravnih norm, za katero lahko postopek sproži vsakdo, ne da bi moral za to dokazati pravni interes. Po političnih spremembah je prav ta abstraktna naknadna presoja ustavnosti postala pomemben instrument sprememb pravnega sistema. Ustavno sodišče presoja tudi neustavnost zakonov, sprejetih v parlamentu, ki jih predsednik republike še ni podpisal in objavil, ter neustavnost mednarodnih pogodb. V teh dveh primerih gre za predhodno presojo ustavnosti, vendar je mogoče a posteriori presojati tudi mednarod-*

ne pogodbe, ki so že postale del notranjega pravnega reda. Precej nenavadna je pristojnost Ustavnega sodišča, da po uradni dolžnosti ali na pobudo presoja, ali je zakonodajalec opustil svojo dolžnost zakonskega urejanja, zaradi česar je kot posledica opustitve nastal neustaven položaj. Še ena pomembna pristojnost sodišča je abstraktna interpretacija Ustave, s katero so bila razrešena nekatera vprašanja v zvezi s človekovimi pravicami. Poleg tega lahko vsakdo, ki meni, da so mu bile kršene ustavne pravice, ob upoštevanju zakonskih pogojev, pri Ustavnem sodišču vložiti ustavno pritožbo.

Postopek priključevanja Republike Madžarske Evropski uniji je zahteval ustavne spremembe, ki so zadevale predvsem področje suverenosti ter obveznosti, ki jih je Madžarska sprejela s pridružitvenim sporazumom. Spremembe in dopolnitve Ustave v zvezi s slednjimi so se dotaknile predvsem pravil volitev v Evropski parlament ter določb glede volitev članov parlamenta in volitev članov predstavniških teles lokalnih vlad.

Madžarska se je z vstopom v Evropsko unijo odpovedala tudi izvrševanju dela svoje suverenosti, za kar je tako kot mnogo drugih držav članic dopolnila Ustavo. Prvi odstavek 2/A. člena določa, da Republika Madžarska kot država članica Evropske unije lahko izvršuje določene ustavne pristojnosti skupaj z drugimi državami članicami, če je to potrebno zaradi pristojnosti, ki so bile z ustanovnimi pogodbami prenesene na Skupnosti in Unijo in jih izvršujejo institucije Evropske unije. V utemeljitvi Zakona o spremembah Ustave je zapisano tudi, da ima komunitarno pravo neposredni učinek ter supremacijo nad nacionalnim pravom.

Doslej se je Ustavno sodišče Republike Madžarske nekajkrat posredno srečalo s pravom Skupnosti in Unije, zadnja odločitev se je nanašala na parlamentarni zakon za implementacijo uredbe Skupnosti, ki naj bi veljal retroaktivno. Sodišče je 25. maja 2004 odločilo, da več določb tega zakona krši načela pravne države in so torej neustavne.

Po avtorjevem mnenju bi se lahko odnos med ustavnimi sodišči držav članic in Sodiščem Evropskih skupnosti spremenil s sprejemom Evropske Ustave, ki bo vključevala Listino Evropske unije o temeljnih človekovih pravicah. Pri uporabi določb v zvezi s človekovimi pravicami bi lahko ne glede na pojasnila, ki so bila pripravljena na pobudo predsedstva Konvencije, prišlo do nejasnosti in različnih interpretacij. Družbeni, politični in ekonomski pogoji ter miselnost in vrednote v posameznih državah članicah so namreč precej različni. Prav zato avtor meni, da je potrebno za boljše razumevanje razlik med državami sodelovati in preučevati sodno prakso drugih sodišč, pomembna pa se mu zdijo tudi redna srečanja ustavnih sodišč.

## **I. Amendment of the Constitution in connection with the Treaty of Accession to the European Union**

1. Prior to World War II Hungary did not have a written constitution. There were some rules, considered to have constitutional character, formulated by different statutes and constitutional principles developed by customary law.

As a result of the takeover of the political power in 1948 the constitutional system changed and the first written constitution, drafted on basis of the constitution of the Soviet Union, was enacted in 1949. Some years after the revolution of 1956 a slow transformation of system started.

In 1989 the political changes gained momentum and, in the framework of the round-table conference, the opposition and the government had negotiations on establishing a new, democratic system. As a result of the agreement reached the Constitution was amended in 1989. One of the important features of the amendment was the inclusion of human rights in the Constitution taking into consideration the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The first free elections took place in May 1990, after it a new Parliament and a new government started activity. Since that time the Constitution has been amended several times.

2. The accession of Hungary to the European Union necessitated the amendment of the Constitution. Act I of 2002 on the amendment of the Constitution contained the new rules which were regarded as conditions of the accession. The amendment concerned two main fields.

The first main question was sovereignty. The Hungarian Parliament adopted a rule which is known in several Member States of the European Union. Paragraph (1) Article 2/A states that the Republic of Hungary, as a Member State of the European Union, by virtue of treaty, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities. The powers mentioned above may be exercised by way of the institutions of the European Union. The grounding presented by the Minister of Justice to the Parliament simultaneously with the bill on the amendment of the Constitution has stated in connection with the proposed insertion of Article 2/A that the law of the European Union as developed by legislation and the Court of Justice of the European Communities will be applied according to the Treaties and the Republic of Hungary will undertake to abstain from any measure which could jeopardise the attainment of the objectives of the Treaties and to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaties as provided for

by Article 10 of the Treaty of Rome (ex Article 5). It has also been stated by the grounding that the law of the Union has direct effect and takes precedence over national law. The general grounding of the bill has underlined, however, that the treaties founding the European Union will be applied on basis of the Constitution. The joint exercise of constitutional powers is limited to the extent of necessity and to the sphere provided for by the treaties. The extension of the sphere requires a new amendment of the Constitution.

The second main field concerned by the amendment of the Constitution covers various questions. Different rights and duties under the Treaty of Accession which was to be signed and ratified were closely connected with rules of the Constitution. Therefore, the Constitution was to be amended so that there are no contradictions with the Treaty of Accession. Thus, e.g. rules on the election of Members of the European Parliament had to be provided for and provisions for the elections of Members of Parliament and Members of the representative bodies of local governments were to be amended.

## **II. Role and Competence of the Constitutional Court of the Republic of Hungary**

1. The Constitutional Court was established in 1989. An important issue of the negotiations of the National Roundtable, requested by the Opposition, was the institutional protection of the Constitution by means of a Constitutional Court and ensuring the possibility to anyone to initiate a procedure of the Constitutional Court controlling conformity of legal rules to the Constitution. It was important for the Opposition to have some kind of constitutional control over the activity of the Parliament (the composition of which was unknown at that time as the elections took place several months later) as a guarantee of the future democratic development. An agreement has been reached on this point, too. Thus, the draft of an Act on the Constitutional Court together with the draft on the amendment of the Constitution became part of the compromise of the National Roundtable<sup>1</sup>.

Act XXXI. of 1989 on the amendment of the Constitution inserted Article 32/A defining main tasks of the Constitutional Court. According to this provision the Constitutional Court reviews the constitutionality of laws and annuls any law and other statutes that it finds to be unconstitutional. Everyone has the right to initiate proceedings of the Constitutional Court in cases specified by law. A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law regulating the organisation and functioning of the Constitutional Court. Act XXXII. of 1989 on the Constitutional Court was passed immediately after the amendment of the Constitution.

2. On basis of the special political circumstances of its establishment the Constitutional Court has an important role and a wide competence. The aim to be achieved by establishing

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<sup>1</sup> Kukorelli, István, *A magyar Alkotmánybíróság létrejötte* (Establishing the Hungarian Constitutional Court), in: Kukorelli, István (ed.) *ALKOTMÁNYTAN* (Theory of Constitution), I., Budapest 2002, 388.

the Court was clearly expressed by the ministerial grounding of the bill submitted to the Parliament. The establishment of the Constitutional Court is a guarantee of the Rule of Law and protection of fundamental rights.

The establishment of the Austrian Constitutional Court, based on works of Adolf Merkl and Hans Kelsen<sup>2</sup> had an influence on Hungarian constitutional theory. The Austrian theory and practice of the control of constitutionality of legal norms have been the basis of the regulation. The activity of the German Constitutional Court after World War II had also been an example for establishing and regulating the Constitutional Court in Hungary. Later on the comparative analysis has been used in the work of the Hungarian Constitutional Court and decisions of several other Courts have been studied and taken into consideration in several cases<sup>3</sup> but German influence has remained predominant. Decisions of the European Court of Human Rights are usually taken into consideration in cases where serious questions of human rights are at issue. Since some years decisions of the Court of Justice of the European Communities have also been quoted and since the accession it has become practice to study the case-law of the Court.

3. On basis of the provisions of the Constitution the Act on the Constitutional Court specifies the competence of the Court. This short paper does not give a complete information on the competence of the Court. Reference is made only to questions which can be of interest from the point of view of the topic of the conference.

On the first place the control of constitutionality of legal norms and other legal means of state control can be mentioned. A special feature of the Hungarian regulation is that everybody has the right to initiate proceedings of the Court without any time limit and without any interest to be proved. The competence of the Court does not include, however, any review of the Constitution itself. The *abstract, a posteriori* kind of control without any time limit has been an important means of transforming the legal system after the political changes. Not only the legislator but the Constitutional Court, too, has worked simultaneously in establishing a new legal system.

An important part of the activity of the Constitutional Court is the preliminary (*a priori*) examination of the unconstitutionality of Acts voted by the Parliament but not signed and not promulgated by the President of the Republic as well as unconstitutionality of international treaties.

<sup>2</sup> Karl Korinek, GRUNDRECHTE UND VERFASSUNGSGERICHTSBARKEIT, Wien. New York 2000, 246, 248, 279-280.

<sup>3</sup> László Sólyom, *Introduction to the Decisions of the Constitutional Court of the Republic of Hungary*, in: László Sólyom and Georg Brunner, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, Ann Arbor 2000, 4-5.

In case an international treaty has been incorporated into the Hungarian legal system the act incorporating the treaty will be subject to a *posteriori* examination of unconstitutionality as it has been mentioned above.

A rather unusual competence of the Court, in comparison with other Constitutional Courts, is the elimination of unconstitutionality manifesting itself in omission. The Court is entitled to examine either *ex officio* or upon anybody's motion whether the legislator has failed to comply with its duty to legislate and as a result of the omission an unconstitutional situation has been created. If the Court states the unconstitutionality manifesting itself in omission, the organ will be requested to provide for his duty by the time limit set by the Court.

One of the important tasks of the Court is the *abstract* interpretation of the Constitution. Some questions of principles concerning human rights have been interpreted by the Court in this way.

The Constitutional Court has no competence in ordinary litigations. In case, however, someone's constitutional rights have been violated when applying a legal rule which is unconstitutional and the aggrieved party has exhausted all legal remedies or there is no legal remedy, he or she may submit a constitutional complaint to the Constitutional Court within sixty days after the receipt of the final decision. The Court examines in this case the unconstitutionality of the legal rule applied. The control of constitutionality does not concern the decision applying the rule.

### **III. Experiences in the field of the law of the European Union up to September 2004**

1. Prior to the accession the Constitutional Court has organised a one year course on European Law for the councillors who have an important role in the functioning of the Court. At the end of the course the participants of the course have visited the Court of Justice of the European Communities and have got the opportunity to study the activity of the Court in Luxembourg. (A similar course has been organised on human rights studying the case law of the European Court of Human Rights.)

Obviously the application of community law has not been the task of the Court. Nevertheless, there were a few cases which were in indirect contact with the community law. The first decision concerned an application challenging some provisions of the Act on the Constitutional Court in connection with the promulgation of the so-called Europe Agreement. In the decision 4/1997 of 22. January 1997 the Court held that it had jurisdiction to examine the constitutionality of the law promulgating an international treaty and the review extended to the examination of the question whether provisions of the treaty were in harmony with the Constitution. If the Court holds the treaty or some of its provisions



unconstitutional, the decision concerns the domestic law not the treaty directly. Following the decision the legislator is required to harmonise the national legal norms with the assumed international obligations either by modifying the agreement or by amending the Constitution<sup>4</sup>.

Decision 30/1998 of 25 June 1998 concerned the application of Article 2 of Act I of 1994 on promulgation of the Europe Agreement<sup>5</sup>. The Court held that there was a constitutional requirement criteria of application specified by Section 62 of the Europe Agreement will not be applied directly by Hungarian authorities. Furthermore, the Court held that provisions of Government Decree 230/1996 of 26 December 1996 on promulgation of some rules of implementation were unconstitutional but the annulment was suspended. The reason of stating unconstitutionality of the rules was that criteria of application were not fixed, they were dependent on the developing practice of the community law. According to the decision it is contrary to the Constitution that Hungary, not being a member State of the Union at that time, has to transform (incorporate) rules not adopted by Hungarian legislator. Consequently, rules which have not been incorporated in the Hungarian law cannot be applied by Hungarian authorities. The decision has underlined that the international agreement was valid but it was the task of the legislator to establish harmony with the Constitution by modifying the agreement. In 2002 the modified text of the Agreement was promulgated and the proceedings were finished<sup>6</sup>.

Recently a decision has been handed down concerning an Act of Parliament implementing Commission Regulations on transitional measures in respect of trade in agricultural products and taxation of surplus stocks. This was a case of *a priori* examination of an Act adopted by the Parliament but not signed and not promulgated by the President of the Republic. Proceedings were initiated by the President. The decision 17/2004 of 25 May 2004 stated that the Commission Regulations were promulgated in 2003 and the acceding countries were called upon to take necessary measures implementing the Regulations. It has also been referred to by the decision that at earlier stages of enlargement of the Communities (in 1985 and 1994) similar Regulations were adopted and the Court of Justice of the European Communities has examined the validity of the respective Regulation. Nevertheless, a bill on implementing the Regulations was voted by the Parliament only in April 2004 envisaging the date of entry into force in May but with a retroactive effect. The only question the Court examined was the way of implementation by a domestic law. The Court held that several rules of the Act violated principles of the Rule of Law and therefore, they were unconstitutional.

<sup>4</sup> Excerpts from the decision Sóloy, Brunner (note 3.) 356-363.

<sup>5</sup> The decision has been analysed by Allan Tatham, Constitutional judiciary in Central Europe and the Europe Agreement, International and Comparative Law Quarterly Vol. 48. (1999) 913-920.

<sup>6</sup> Decision 483/B/1996 of 27 May 2002

#### IV. Future cooperation

There is an abundant literature on possible problems of the relationship between national Constitutional Courts of Member States of the Union and the Court of Justice of European Communities. It seems to me that the adoption of the Constitution including the Charter of Fundamental Rights will create a new situation. To mention only one example from the literature it has been stated that “The future status of the Charter is undoubtedly among the most important issues facing the future of the Union. ... If it were to become a binding part of a new constitution for the Union, its impact both directly and indirectly on Member States’ legal systems would be profound.”<sup>7</sup>

One of the important problems will be the determination of constitutional values. The Preamble of the Charter refers to common values. Later on reference is made to constitutional traditions common to the Member States. Paragraph 4 Article 52 recognises fundamental rights as they result from the common constitutional traditions of the Member States.

The interpretation of the rules (including common traditions and common values) seems to be uncertain. Probably, that was the reason why at the meeting Heads of State or Government in Brussels on 17/18 June 2004 an agreement was reached to add a new paragraph (paragraph 7) to Article II-52 saying that the explanation drawn up as a way of providing guidance in the interpretation of the Charter shall be given due regard by the Courts of the Union and of the Member States.

It has been explained several times that social, political, economic conditions, and the mentality of the people, the values are different in the different Member States. Coordination of the interpretation of basic values by way of dialogue of the courts is needed.<sup>8</sup>

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<sup>7</sup> Patrick Birkinshaw, *A Constitution for the European Union? – A letter from Home*, *European Public Law* 10 (2004) 74.

<sup>8</sup> Tamara K. Hervey and Jeff Kenner, Introduction, in: Tamara K. Hervey and Jeff Kenner (ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Oxford 2003, x.\* Abbreviated working version of paper for discussion; Seminar in Bled/Slovenia [under the auspices of the Constitutional Court of Republic of Slovenia], September 28- 30th, 2004.

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## **THE COMPETENCE OF THE CONSTITUTIONAL TRIBUNAL AND THE 2003 TREATY OF ACCESSION**

### **SOME REFLECTIONS ON THE ECJ PRELIMINARY RULINGS AND ON THE “LEGAL QUESTIONS” BEFORE THE CONSTITUTIONAL TRIBUNAL OF THE REPUBLIC OF POLAND\***

#### **Summary**

Both European treaties and the constitutional provisions of member states of the EU only partially determine the interplay between European supranational law and the national regulations of member states. Concerning such, prior to, during, and after the negotiations for accession to the EU, member states have only in rare occasions completely adjusted their constitutional provisions, which points to the fact that these are usually short, general and incomplete.

In connection with this, two approaches have in general prevailed: the first mainly stems from the powers of the Court of Justice of the European Communities (the ECJ) and deals with the supremacy clause. This entails the almost unconditional precedence of European regulations when and if such collide with national regulations. Such a clause certainly guarantees the adjustment and uniformity of Community law in all member states. In this respect, if national courts determine the unconstitutionality of a national law, they have the right to submit the case to the ECJ for a preliminary ruling. In connection with this, a question is raised whether this also applies to constitutional courts: can a case of conformity with European law also be a case of constitutionality in the framework of the national legal order of a member state.

The second alternative approach deals with caution when the primacy of supranational regulations is concerned, as the powers of EU institutions should only be necessary with regard to exclusive “European” matters; otherwise they should only play a subsidiary role in the economic and public life of member states. Such exclusive matters should be determined by legal rules, given that only within such frameworks should EU law have supremacy effects. In this sense it should not be allowed that, in light of the implementation

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of EU legal provisions or the ECJ's powers, the constitutional system of any member state is amended without appropriately amending its national constitution.

The role of the EU Council should also be brought into question, as the representatives of the Governments create the most important legislation without national parliaments, which casts doubt on the democratic legitimacy of such institution. Additionally, the case of the ECJ concerns a specific (i.e. monopolistic) position in comparison with the Polish judicial system. This also requires specific responses to the newly created situation.

The next difficulty is that, according to the Polish Constitution, European treaties and the accession treaty have the status of "ratified treaties", which gives the Constitutional Tribunal the possibility to review their conformity with the Constitution. This could cause complications if the Tribunal finds them to be unconstitutional. To this effect, it would be necessary to amend the Constitution and more precisely determine on one hand the status of European (in particular non-treaty) law and, on the other hand, the powers of the Constitutional Tribunal in this respect.

Furthermore, it is not clear who is empowered, and on the basis of which regulations, to determine matters which fall within the exclusive jurisdiction of the EU, and those which fall within the jurisdiction of member states. The next problem is the fact that the supremacy of European law does not have a basis determined in the Constitution (or the treaty). Also, it is not clear how to act in the event that a certain act is disputed in both "European" (the request for a preliminary ruling) and constitutional terms. Their mutual relations need still to be determined. Moreover, according to the Constitution, Polish judges are only subordinated to the Constitution and the law, which means that they do not have clear constitutional authorization to file requests for a preliminary ruling by the ECJ.

### ***Povzetek***

*Tako evropske pogodbe kot tudi ustavne določbe držav članic EU le delno določajo medigro med evropskim nadnacionalnim pravom in nacionalnimi predpisi držav članic. Pri tem so pred, med in po koncu pogajanj za pristop k EU ustavne določbe držav članic le redko temu povsem prilagodili, kar kaže na to, da so te navadno skope, splošne ter nepopolne.*

*V tej zvezi sta se na splošno oblikovala dva pogleda: prvi izhaja predvsem iz pristojnosti Sodišča Evropskih skupnosti (SES) in govori o klavzuli prevlade. Ta pomeni skoraj brezpogojno prednost evropskih predpisov, če in ko ti pridejo v kolizijo z nacionalnimi. Takšna klavzula seveda jamči usklajenost in enotnost prava Skupnosti v vseh državah članicah. Pri tem imajo nacionalna sodišča, tudi če ugotovijo neustavnost nacionalnega zakona, pravico, da zadevo predložijo SES v predhodno odločanje. V tej zvezi se*

*zastavlja vprašanje, ali to velja tudi za ustavna sodišča, ali je torej vprašanje skladnosti z evropskim pravom lahko obenem tudi vprašanje ustavnosti v okviru domačega pravnega reda države članice.*

*Drugi alternativni pristop govori o previdnosti, ko gre za primat nadnacionalnih predpisov, kajti pristojnosti ustanov EU naj bi bile nujne le glede izključno "evropskih" zadev, drugače pa naj bi igrale le subsidiarno vlogo v ekonomskem in javnem življenju držav članic. Takšne izključne zadeve naj bi bile določene s pravnimi pravili, pri čemer naj bi le v teh okvirih imelo pravo EU primat. V tem smislu naj ne bi dovolili, da bi v luči izvrševanja pravnih določil EU ali pristojnosti SES ustavni sistem katere koli države članice spreminjali brez ustreznih sprememb nacionalne ustave.*

*Določeno mero kritičnosti terja tudi vloga Sveta EU, kjer lahko predstavniki vlad oblikujejo najpomembnejšo zakonodajo mimo nacionalnih parlamentov, kar zbuja dvom v demokratično legitimnost takšnega početja. Poleg tega gre v primeru SES za specifični (tj. monopolistični) položaj v primerjavi s poljskim sistemom sodstva, kar seveda terja specifične odzive na novo nastalo situacijo.*

*Nadaljnja težava je v tem, da imajo po poljski Ustavi evropske pogodbe in pristopna pogodba status "ratificiranih mednarodnih pogodb", kar daje Ustavnemu tribunalu možnost njihove presoje z Ustavo. To lahko povzroča zaplete, če bi tribunal ugotovil njihovo neustavnost. V ta namen bi bilo treba spremeniti Ustavo in bolj določno opredeliti po eni strani status evropskega (še posebej ne-pogodbene) prava po drugi pa tudi pristojnosti Ustavnega tribunala v tej zvezi.*

*Poleg tega ni jasno, kdo in na podlagi katerih predpisov je pristojen za določanje izključne pristojnosti EU in pristojnosti držav članic. Nadaljnji problem predstavlja dejstvo, da primat evropskega prava nima točno določene ustavne (oziroma pogodbene) opore. Ni pa tudi jasno, kako ravnati v primeru, če je nek akt tako "evropsko" (zahteva po predhodnem odločanju) kot tudi ustavno sporen. Njuno medsebojno razmerje bi bilo treba šele opredeliti. Povrh vsega pa so poljski sodniki po Ustavi podrejeni le Ustavi in zakonu, kar pomeni, da nimajo jasnega ustavnega pooblastila za vlaganje zahtev za predhodno odločanje na SES.*

The interplay between the European supranational law and the national regulations of the EU member states is only partially determined, from one side, by the European treaties and on the other side, by constitutional legislation of the member countries. It should be stressed that the constitutions of the member states were established by far before the accession and then they were quite rarely sufficiently modified when the negotiations to enter the EU were initiated and then finalized. The most of the constitutional acts of the member states do contain only vague and general (fragmentary) provisions dealing with the EU institutions as well as with the European law.

In general, the two alternative approaches should be noticed. The first one, derived mostly from jurisdiction of the European Court of Justice, is based on “supremacy clause”. It tends to underline almost unconditional priority of the European regulations when confronted with the “national” acts issued by the respectively legitimized bodies in all the member countries. Its purpose is to guarantee harmonization and uniformity of Community law in all the member states.

Both the concepts of supremacy of European law and of its direct effect have been developed by the European Court of Justice (ECJ) on the basis of art. 234 ETC<sup>1</sup>. From the very beginning the ECJ proclaimed that this provision (formerly: art. 177) is “essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community”<sup>2</sup>.

The ECJ has adopted a welcoming attitude to such a standpoint for the new member states. In particular, in *Menacarte* case from Portugal the ECJ stressed that the effectiveness of the system established under art. 234 ECT requires the national organs (courts) to have the wide possible powers to refer questions to the Court of Justice in the case pending raises a question of Community law. In the same case, the ECJ underlined that even the national court (or tribunal) declared a provision of national law unconstitutional; it did not lose the right, or escape the obligation, to refer questions to the ECJ<sup>3</sup>.

The opinion, mentioned above, has raised a question whether such a statement refers to the constitutional court (or tribunal). In other words: is it possible, that the issue of conformity with European law may be, at the same time, an issue of “constitutionality” within the internal legal system of a given member state? In addition, can the constitutional court (or tribunal), after solving the problem of “conformity with national constitution” in the same case, raise an issue of “conformity with the Community law”? And is it obliged to refer the second question to the ECJ aiming at receiving the adequate preliminary ruling? Or has it only a right (a “kind of freedom”) to refer to the ECJ (due to its recognized “monopoly” to interpret Community law)? Can it decide on the basis of the national constitution and, in addition, of its own interpretation of the EU law?

The second and alternative interpretation is determined by far-going carefulness *vis-à-vis* a kind of preponderance of supranational regulations. Both the recognized (and defended) national sovereignty and the attributive nature of the EU competences (in particular, in the field of legislation as well as in field of public administration) are pointed as the crucial and, to some extend, the decisive arguments. Another, subsidiary

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<sup>1</sup> The numbering used for Treaty provisions is that of the consolidated version of Treaties after Amsterdam.

<sup>2</sup> Case 166/73 *Rheinmühlen v. Einfuhr- und Vorratsstelle für Getreide*, [1974] ECR 33, 38, para 2.

<sup>3</sup> Case C- 348/89, *Mecanarte*; supra note 3, para 64. See also: A. Kleine, *Reform of the System of References for Preliminary Rulings*; in: *Studia z prawa Unii Europejskiej [ Studies on European Union Law]*, Cracow 2000, p.126.

argumentations come from the procedural aspect of law-making processes within the European Union.

According to this opinion the institutions of the EU should be endowed only with such competences which are regarded as indispensable to carry the “exclusively European” (“Community”) functions and to fulfill the EU “exclusive” tasks. According to Maastricht Treaty the EU plays only a subsidiary role in economic and public life of the member states’ activities. The decisive tasks have remained with the legislatures, the public administration as well as with the judiciary of the member states. So there is only a limited reason to “transmit” both the regulatory competences and the controlling ones towards the EU institutions. Thus the necessity of the EU exclusive competence should touch only the limited areas. The respective competences should be, in addition, pointed precisely by law; only within their frames there are justified reasons for EU law priority and for unconditional implementation of the “supremacy” clause concerning the EU law.

According to the second opinion both parallel and the competitive (concurring) legislation (when the same areas remain regulated simultaneously by European and national law of the member states) should be seen mostly in light of lacking precision in delimitation of respective competences. Such omissions are probable, in particular, on the level of treaty regulation; at that time there was quite difficult to foresee all the consequences of the future development of ongoing European integration.

Those who tend to be adherent to the second way of thinking try to argue, that the kind of carefulness shown in transmission of attributes of public power from the state to supranational (EU) level is, at least partially, justified by a strong and legitimized desire to preserve the constitutional distribution of power among the constitutional institutions of a given member country. Every step in “transferring “the competences has its significant and visible impact on internal “power network”. In addition, it has also an outside impact and importance, in particular, for interplay between the respective EU and national public institutions. There is no real reason to allow that the constitutional system of a given member state will be modified without adequate changes of the national constitution, mostly *via* implementation of the EU legal provisions or *via* the ECJ jurisdiction – they said.

Some skepticism (as it has been mentioned in point 2) - also in terms of legal argumentation - is derived from the situation, when the most important European legislation is drawn up by the Council of European Union, a body composed by the representatives of the member countries’ cabinets. The same cabinets serve as the institutions whose “internal” constitutional functions in the field of law-making are limited to submitting the proposed bills when the decisive legislative competences are realized by parliament, whose political legitimization is by-far better established. Taking into account the necessity of democratic legitimization and the entire parliamentary tradition of most of the EU member countries, the situation of such kind should be regarded as quite paradoxical. At least, it will be very

difficult to consider this systemic solution as shaped in line with the bulk of democratic expectations.

According to the provision of art. 234 ETC and due to the ECJ own interpretation the European Court of Justice (in Luxemburg) is recognized (up to the Treaty of Nice, which tends to add some the Court of First Instance competences) the only court equipped by the possibility to offer a binding and respected the EU law interpretation. This *sui generis* monopolistic position has not relevant equivalent in frames of the constitutional arrangements of the most member states. In the Republic of Poland, at least the two institutions, the Constitutional Tribunal and the Supreme Court are equipped with the highest interpretative competences; the Constitutional Tribunal preserving its “last word” in issues of “constitutionality” (“conformity with the constitutional provisions”). Also the Supreme Administrative Court has preserved some influential competences.

It seems to be, in addition, of some importance that the European Court of Justice has its impact on harmonization of EU law mostly *via* its preliminary rulings, i.e. *via* mechanism enabling the ordinary (or special) courts of the member states to refer questions to the ECJ. Thus the task of unification and harmonization is mostly of the reactive then preventive nature. It, in addition, remains dependent of the courts, decision to run with the respective question in case; this situation may create some doubts pertaining to functional efficacy of such procedure.

The controlling possibilities of the European Court of Justice on one side and of the national constitutional courts (or tribunals) on the other remain different in terms of criteria used for evaluation. In case of the ECJ the judgments are determined exclusively by the European Treaties as well as by the general principles of legal interpretation. In case of the national constitutional courts and the supreme courts their activities are based and determined by the national constitutional and (in case of the supreme courts) statutory regulations. In those frames the constitutional provisions are considered to be the “supreme law” and “the core of the country’s legal system”.

From the Polish perspective one should point additional set of difficulties. According to the provisions of Chapter II of the Constitution of April 2<sup>nd</sup>, 1997 the European treaties as well as the accession treaty received the status of “ratified international treaties”, which form the second highest category of legal acts in the constitutionally determined hierarchy of “sources of law”, next to the Constitution.

However such position allows to the Constitutional Tribunal to review the constitutionality of those treaties and in case of non-conformity with the constitutional provision, to make them non-binding and thus eliminated from the national system of law. Simultaneously, the national constitutional tribunal has no competence to eliminate the treaties under consideration from the EU legal system. It is necessary to add, that the practical possibility



to question the legality of the European treaties is, due to membership status of the EU states, of a really limited scale.

To clarify the legal situation two alternative solutions may be proposed. The first one is to amend the provisions of Chapter II of Constitution of Poland and to add a set of provisions concerning the constitutional status of European non-treaty law. In such a situation the competences of the Constitutional Tribunal should be also clarified. The second and alternative solution is to separate more precisely the two spheres of competence: this of the EU bodies and the other one, of the member states. As a result the two parallel “lines” of control would be established: within the sphere “covered” by European regulations the exclusive control by the European Court of Justice and within the sphere of national law the control of constitutionality being the competence of the “national” Constitutional Tribunal. The possibility of “interfering” competences will be, by far, reduced. It is of some importance, that the Treaty of Amsterdam extended the ECJ competence to give preliminary rulings. In addition, the Treaty of Nice allows dealing with these proceeding to the Court of First Instance (CFI).

The complex nature of Community law makes the interpretations of the binding legal acts in all the member countries after accession much more complicated than before accession. First of all, it is necessary to draw-up the border line between the sphere of exclusive competence of the EU (and the European Community) and the sphere which constitutes the member states’ competence. The ECJ should be regarded being “a guardian” of “legal order” only in the first sphere of activity. But it seems to be not very clear who (which institution, European one or, in addition, the national one, i.e. the Constitutional Tribunal) is empowered to resolve this legal question? And according to which regulations?

It seems to be quite reasonable, however, to accept double control on some pieces of interfering legislation. The ECJ will control their “conformity” with legal content of the European treaties as well as with the “higher” European acts (when the strict legal hierarchy will be established). The Constitutional Tribunal will control conformity with the national (Polish) constitutional provisions. The first type of control can result in elimination of a given provision from the EU legal system. The result of the second type of control – in terms of the EU law – remains not so clear.

The priority of the constitutional regulation and its superiority constitutes the core of principles of the most of the EU member states’ legal systems. In this context the competences of the constitutional courts (or tribunals) are seen as the institutional guarantee of such order. After accession this established tradition has become confronted with the principle of supremacy of European law, according to which the national legislation non-coherent with the EU law should be replaced in processes of its implementation by the European law provisions.

The legal difficulty and a kind of dilemma caused by this requirement<sup>4</sup> is that the supremacy of European law is not derived from constitutional provisions and even the precise treaty regulation. It is created *via* interpretation of the European Community Treaty and, additionally, by jurisdiction of the European Court of Justice. In other words, the ECJ competence is lacking of strict, precise and recognized constitutional justification. According to national legal criteria, a kind of written constitutional competence is mandatory for any activities of a given important public organ. The “purely jurisdictional” justification does not fit to the national constitutional standards of legality.

The another practical problem has been raised as connected with right to refer a legal question to the Constitutional Tribunal and, in case of doubts dealing with conformity with EU law, to the European Court of Justice. The mutual relation between the “question of constitutionality” and the preliminary question to the European Court of Justice (and, according to the Treaty of Nice, additionally to the Court of First Instance) is not, up-to now, precisely described in legal terms (both national and the European).

As it was mentioned, the preliminary questions have its legal source in art.234 of European Community Treaty and aims at desired unification of implementation practices of the EU law. However, in case of Poland the right to submit such a question to ECJ is, to some extent, diminished by provision of art.178 of the Poland’s Constitution of 1997, according to which “the judges are independent in fulfilling their duties and they remain subordinated only to Constitution and to the statutes”. Even, if someone will add the provision of art. 90 para.2 of the Polish Constitution (containing an obligation to respect “the ratified international treaties”) still the right to refer the preliminary question to the ECJ has no constitutional “empowering clause”. The lacking regulation can be regarded as a visible limitation of the expected courts’ activities, even when the risk of erroneous interpretation (and then: implementation) of the EU law by the member countries’ courts (or the other institutions) remains both high and costly.

Both jurisdiction of the European Court of Justice and the doctrine of European law urge the member states to be active in elimination of those national regulations which remain non-coherent with the EU law provisions. This kind of activity is regarded to be necessary due to cohesion of the Community (and EU)<sup>5</sup>. In this context the EU law is considered to be an autonomous legal system. Quite paradoxically, the same European regulations should be implemented as an integral part of the legal order of all the member countries. And

<sup>4</sup> See M.Szpunar, *Wpływ członkostwa Polski w Unii Europejskiej na sądownictwo – zagadnienia wybrane, w: Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki [ The Impact of Poland’s Accession to European Union – Selected Issues, in: Poland’s Accession to the European Union.The Accession Treaty and Its Consequences], “Zakamycze”, Krakow 2003, p. 279.*

<sup>5</sup> *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970, ECR 1125]; *167/73 Commission v. France* [1974, ECR 359]; see also: F. Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in: “Modern Law Review” 1993, no.19, p.19-20.

because of this *status* the institutions (organs) of the member states (whose competences are regulated by a given country constitution) ought to interfere in implementation (and interpretation) of the EU law. In such context also the constitutional courts (tribunals) have their “sphere of interference” on the border-line between the EU and the member state activities.

In *Dzodzi v. Belgian State*<sup>6</sup> the European Court of Justice said that neither the wording of art. 234 nor the article’s purpose indicated the authors of the Treaty intended to exclude from the Court’s jurisdiction consideration of requests for preliminary rulings on a Community provision where the national law of the member country refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that country. The similar opinion was expressed also in *Gmurzynska-Bscher* case<sup>7</sup>.

According to *Pardini* judgment<sup>8</sup> as well as *Zabala Erasun* case<sup>9</sup> the European Court of Justice is not empowered to give a ruling unless a case is pending before the national court. In other words: the ECJ has no own initiative to form a ruling; it remains dependent on questions raised by the national court. In this respect, the situation seems to be similar to that which concerns the Constitutional Tribunal and its competences in case of the “legal questions” based on problems of “constitutionality”.

The European Court of Justice has declared, that “the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court defines the factual circumstances on which those questions it is asking or, at the very least, explains the factual circumstances on which those questions are based”<sup>10</sup>. It also added: “those requirements are of particular importance in the field of competition, which is characterized by complex factual and legal situations”.

In other words, the ECJ has confirmed a requirement, that the question should refer to concrete circumstances (both factual and legal) and the legal issue had to be of importance for the national court’s judgment. Here, once again the analogy with the “legal questions” referred to the Constitutional Tribunal of Poland is quite clear: the issue raised in frames of “legal question” has to be of a real and not only hypothetical significance for a case at stake and the entire question must be relevant to the dispute before the court.

<sup>6</sup> See joined cases C-297/88 and 197/89, *Dzodzi v. Belgian State*, [1990, ECR I-3763].

<sup>7</sup> See C 231/89, *Gmurzynska-Bscher v. Oberfinanzdirektion Koln*, [1990, ECR I-4003].

<sup>8</sup> Case *Pardini v. Ministero del commercio* [1988, ECR 2041].

<sup>9</sup> Case *Zabala Erasun*, C-24/92.

<sup>10</sup> Case C-157/92, *Banchero*, supra note 22.

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## **NATIONAL JUDICIARY AFTER THE ACCESSION OF THE SLOVAK REPUBLIC TO THE EUROPEAN UNION**

### **Summary**

After joining the European Union, a new level of relations has arisen in the Slovak Republic between the Slovak judiciary and the European Court of Justice.

Under the Art. 7 (2) of the Constitution of the Slovak Republic legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic.

The Slovak Courts recognize all principles related to the interpretation and application of the EU law, notably the preferential application of the Communitarian law and its immediate application. It is necessary to emphasize that the national courts have to proceed in such way and to solve this conflict through the preference and application of the communitarian rule in the scope of their own power, *ex offi*, developing their own initiative.

Under § 109 sect. 1 (c) of the Slovak Rule of Civil Procedure the proceedings shall be suspended if the court has arrived to a conclusion that there is a question on preliminary reference which must be decided by the European Court of Justice. After suspension of the case, the court sends a preliminary reference to the European Court of Justice and awaits its decision.

The law of the European Communities is superior to the law of the member states (let's leave aside the delicate issue of the superiority of the communitarian law to national constitutional law). The priority of the communitarian law requires unified application of this law in all member states.

The crucial question is whether the Constitutional Court belongs to courts which should make a preliminary reference. It depends, but most of the opinions on this issue have agreed to involve Constitutional Courts to the scope of Art. 234 of Treaty on European Communities.

In my opinion (see also case *Köbler v. Austria*) it may happen that a member state under certain circumstances could be responsible for breaching its liability to submit the preliminary question under Art. 234 of Treaty on European Communities. This problem, however, I would consider opened.

Relaying on the obligation and possibility of a national court to submit the case to the Court of Justice for decision on the preliminary question, it is necessary to underline that if a national court was a last instance court and in spite of this fact it did not submit the case to the Court of Justice, the communitarian law would be violated.

The position of the Constitutional Court of the Slovak Republic and its basic powers have not changed after our accession to the EU. However some new relations of the Constitutional Court and the general judiciary have arisen.

The relations between the European Court of Human Rights and the Constitutional Court remain the same. After 1 May, 2004 a form of new cooperation was created with the European Court of Justice in Luxembourg.

### **Povzetek**

*Po vključitvi Slovaške republike v Evropsko unijo so se odnosi med sodno oblastjo Slovaške ter mednarodno sodno institucijo, ki v Uniji igra vlogo varuha enotne razlage in uporabe komunitarnega prava – Sodiščem Evropskih skupnosti (SES), dvignili na novo raven. S tem se spreminja tudi položaj slovaškega Ustavnega sodišča, institucije, ki je do priključitve Slovaške Evropski uniji 1. maja 2004 odločala popolnoma neodvisno. Ustavno sodišče je pristojno za presojo ustavnosti postopkov pred splošnimi sodišči, še posebej z vidika ustavnega načela poštenega sojenja, razen v primeru, ko je za to pristojno kakšno drugo sodišče, ponavadi višje sodišče v pritožbenem postopku.*

*Po drugem odstavku 7. člena Ustave lahko Slovaška republika z mednarodno pogodbo, ratificirano in objavljeno v skladu z zakonom, ali na podlagi takšne pogodbe, prenese izvrševanje dela svojih pristojnosti na Evropske skupnosti in Unijo. Pravno obvezujoči predpisi Skupnosti in Unije imajo prednost pred zakoni Slovaške republike.*

*Slovaška sodišča priznavajo vsa načela v zvezi z razlago in uporabo evropskega prava, še posebej poudarjajo primarnost in neposredno uporabo. Treba je poudariti, da morajo nacionalna sodišča upoštevati določbe evropskega prava po uradni dolžnosti in pri tem razvijati lastno iniciativo.*

*Po 109. členu oddelka 1 (c) slovaškega Zakona o pravnem postopku se postopek prekine, če sodišče ugotovi, da je naletelo na vprašanje, v zvezi s katerim bo potrebna predhodna obravnava pred SES. Po prekinutvi postopka nacionalno sodišče posreduje predhodno vprašanje SES in počaka na odločitev.*

*Kot rečeno, uživa evropsko pravo primarnost nad pravom držav članic, pri čemer pa ni mogoče mimo občutljivega vprašanja primarnosti evropskega prava v odnosu do*

*ustavnega prava posamezne članice. Ključno vprašanje je, ali sodijo ustavna sodišča v krog sodišč, ki so dolžna postaviti predhodno vprašanje, kadar se v postopku soočijo z vprašanjem razlage evropskega prava. Mnenja sicer niso popolnoma enotna, vendar se večina strinja, da se morajo tudi ustavna sodišča ravnati po določbah 234. člena Pogodbe o ustanovitvi Evropskih skupnosti.*

*Slovaško Ustavno sodišče oziroma njegov predsednik prof. dr. Ján Mazák se strinja, da je država članica v določenih okoliščinah lahko odgovorna za kršitev obveznosti naslovitve predhodnega vprašanja, saj opustitev omenjene obveznosti, če gre za sodišče zadnje instance, pomeni kršitev komunitarnega prava, vendar obenem dodaja, da v zvezi s tem še ni mogoče sprejeti nobenih zaključkov.*

### **Introductory remarks**

The Slovak general judiciary has acted in the system of judicial power relatively independently so far. The power of the Constitutional Court of the Slovak Republic interferes only with its position, powers and independent decision-making activity. This constitutional regulation of the Constitutional Court powers is reflected in the powers (and also in the duty) of the Constitutional Court to review the constitutionality of the procedures of general courts, especially from the point of view of constitutional principles of fair trial, if such powers and duty do not belong to any other court according to law, i. e. usually the court of higher instance in the appellate proceedings (Article 127 paragraph 1 of the Constitution of the Slovak Republic).

After joining the European Union, a new level of relations has been opened in the Slovak Republic between the Slovak general judiciary and nowadays an international judicial authority acting in the European Union as a guardian of unified interpretation and application of communitarian law - the European Court of Justice.

This newly created relation between the national judiciary and European Court of Justice raises many issues demanding systemic solution.

### **Readiness of the Slovak legislation**

The Slovak legal system settled the issues regarding the accession of the Slovak Republic to the European Union especially in the basic law of the state (in the Constitution). It is enough to mention one article of the Constitution of the Slovak Republic that have direct connection with the communitarian law and the position of general judiciary.

Pursuant to Article 7 paragraph 2 of the Constitution, the Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or

on the basis of such treaty, transfer the exercise of a part of its power to the European Communities and the European Union. **Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic.** The take-over of legally binding acts demanding the implementation will be realised through the law or government regulation pursuant to Article 120 paragraph 2.

To some basic principles of procedures of national courts after joining the European Union during negotiations and discussions on court agenda

### **On the immediate applicability of the communitarian law**

The primary rule is, that the national courts of member states are obliged to apply directly those communitarian standards which fulfil the communitarian **conditions of the immediate applicability.**

The immediate **positive application** of the communitarian rule means the direct application of this rule instead of incompatible national regulation, or application solving the legal situation not defined by any national regulation.

Under the immediate **negative application** of the communitarian rule is to be understood the application in order to achieve the state in which the incompatible national regulation will not be used. This usually leads to quashing decisions issued on the basis of this national regulation without need of positive application of the communitarian rule. From this also follows that it concerns the application of the communitarian rule for the **purpose of review the legality or lawfulness of a national regulation or act** (decision) issued on its basis.

The national courts of the member state are obliged, **ex offio**, to use immediately applicable communitarian rules. It always applies, if the national procedural norms stipulate, *ex offio*, to apply the national law. Furthermore, the national courts have to apply, *ex offio*, the communitarian rules also that time, if this application is necessary for guaranteeing the protection of rights resulting for a person from the specific communitarian rules.

### **On the preferential application of the communitarian law**

The preferential application of the communitarian law is solved in the above-mentioned Article 7 paragraph 2 of the Constitution.

The duty of the national courts (and also of other public authorities) to **apply preferentially the applicable communitarian** rules prior to the incompatible national rule means that the national courts are in case of such **conflict** always have to apply communitarian rules

and at the same time have not to apply or not to take into consideration the national regulation which is incompatible with these rules.

It is necessary to emphasize that the national courts have to proceed in such way and to solve this conflict through the preference and application of the communitarian rule in the scope of their own power, *ex offio*, developing their own initiative.

Under § 109 sect. 1 (c) of the Rule of Civil Procedure the proceedings are suspended if the court had arrived to a conclusion that there is a question on preliminary reference which must be solved by ECJ. After suspension of the case, the court

### **On the proceedings on the preliminary question**

The law of the European Communities is superior to the law of the member states (lets leave aside the delicate issue of the superiority of the communitarian law to national constitutional law). The priority of the communitarian law requires unified application of this law in all member states. The application process of the communitarian law consists of two fundamental issues:

1. **Unified interpretation** of the communitarian law, while the unified interpretation must precede the unified application of this law in member states
2. The communitarian legal acts are considered valid in national environment and for that reason the national courts cannot reject the application of the communitarian legal acts only on the basis that **they have arrived to the conclusion on invalidity or ineffectivity of the said communitarian legal acts.**

These problems are solved **in proceedings on preliminary question under Article 234 of the EC Treaty** the purpose of which is especially the interpretation of the primary and secondary law and the review of the validity of the secondary legal acts. For that reason the proceedings on preliminary question are procedural enforcement of the **priority of the communitarian law on the national level.**

**The obligation to submit the case** to the Court of Justice for decision on the preliminary question relates only to a national court which proceeds in the case in the last instance in accordance with the judicial organisation and powers and competences under the Constitution and laws regulating these issues. In Slovakia there are two such courts. The Supreme court and The Constitutional court, sometimes it could be also a competent regional court.

The question is whether the Constitutional court belongs among courts, which should make a preliminary references. It depends, but most of opinions on the mentioned question have agreed with involving constitutional courts to the scope of art. 234 TEC.



The possible effects of violation of a national court's obligation to submit the case to the Court of Justice under Art. 234 of the Treaty

Relaying on the obligation and possibility of a national court to submit the case to the Court of Justice for decision on the preliminary question, it is necessary to underline that if a national court has been a last instance court and in spite of this fact it did not submit the case to the Court of Justice **the communitarian law has been violated**. Such a qualification of a national court negligence follows from the fact that the national court has to respect the Art. 234 of the Treaty if it is a last instance court. Violation of this obligation may result in commencement of proceedings before the Court of Justice in special type of proceedings on violation of obligation following from the EC Treaty. Charged will be the member state whose court has not fulfilled its obligation under the quoted Art. 234 of the Treaty. The charge against the member state is justified for a simple reason. In spite of the independence being a functional principle of a national judicial system a member-state court remains a public power authority of the concerned state and the violation of the obligation following from the EC Treaty de jure is assigned to the member state.

### **On application of the domestic procedural code**

In proceedings on communitarian claims and rights the national courts hear and decide these cases usually **under the domestic procedural rules**.

The work of national courts on application of domestic procedural regulations in proceedings in which cases following from communitarian standards are heard and decided abide by the **requirements of equivalence and efficiency**.

The issue of competency of the national courts in relation to cases following from communitarian law

Under fixed case-law of the Court of Justice **it is a matter of every member state to define which court shall be competent locally and concerning the subject matter of the lawsuit when the subject of the proceedings is an individual right based on the communitarian law**. The member states shall be liable for the effective protection of this right in every single case and it is not the task of the Court of Justice to solve that under whose jurisdiction shall the individual case fall.

### **Some remarks to the position of the Constitutional court of the Slovak Republic**

The position of the Constitutional Court of the Slovak Republic and its basic powers have not changed after our accession to the European Union. However, there are some

new issues of relations towards the Slovak judiciary, the European Court of Human Rights and the Court of Justice of the European Communities.

**The first sphere of the new relations** is the one between the Constitutional Court and the general judiciary in the Slovak Republic with special aspect to the fundamental right to judicial protection under Art. 46 sec. 1 of the Constitution. Part of this right is also that everyone shall have the right that in his/her case the adequate legal basis be applied. After accession to the European Union as a legal basis serve also the communitarian regulations which shall have precedence over laws of the Slovak Republic (Art. 7 sec. 2 of the Constitution of the Slovak Republic). There is a question whether the Constitutional Court will consider a violation of the fundamental right to judicial protection if a general court applies a Slovak law instead of a communitarian regulation, although the latter shall have priority? The second similar question would be whether a general court will infringe the fundamental right to judicial protection if it was obliged to appeal to the European Court of Justice under Art. 234 sec. 3 of the EC Treaty and it did not fulfil this obligation?

The right answer seems to be “Yes”.

**The relation between the European Court of Human Rights (ECHR) and the Constitutional Court** remains the same. The Constitutional Court will continually respect the doctrine created by the ECHR in the proceedings of the protection of human rights and fundamental freedoms. The Constitutional Court recognizes the leading role of this European Court in the interpretation and application of the Convention on protection of human rights and fundamental freedoms.

After 1 May, 2004 a **new form of cooperation and dialog was created with the European Court of Justice in Luxembourg (ECJ)**.

In these relations there are two basic issues. The first one is whether the Constitutional Court shall be considered a Court in the meaning of Art 234 sec. 3 of the EC Treaty. From the aspect of the previous case-law there is no doubt that the Constitutional Courts belong to courts which in their capacity as last instance courts may, or more precisely, must refer preliminary questions to the European Court of Justice. There is no reason for excluding the Constitutional Court from the scope of the cited Article of the EC Treaty, however, this question will be answered only through the specific decisions of the Constitutional Court.

The second problem is the protection of fundamental rights and freedoms which make part of the doctrine of the ECJ and the application of its standards especially regarding some differences in the approach of the European Court of Human Rights and the European Court of Justice to the protection of the human rights and fundamental freedoms. Whose side will the Constitutional Court of the Slovak Republic join is not clear. It appears that in

the future the only solution will be the coordination of the doctrinal approaches both of the protectors of fundamental rights and freedoms. In the meantime in case of different opinions of the two European Courts the Constitutional Court of the Slovak Republic will follow the approach applied by other Constitutional Courts of the European Union, or it will try to find its own solution.

### **Concluding remarks**

The Slovak judiciary is expecting its transformation into effective part of the European judicial system. The right attitude might be a cautious optimism in spite of some expected difficulties. We are entering into a stabilised system and it has acted relatively long time in the fixed legal environment. We have at our disposal experiences, case-law, developed doctrine and the willingness of the colleagues from the member states to share their experiences gained on their way from national judge to the European one. The rest, I think will be our task. The first step is to get general knowledge then to learn special know-how and finally the improvement of skills in application of the communitarian law.

THE DECLARATION  
DÉCLARATION  
DEKLARACIJA

## DÉCLARATION

Les participants de la conférence internationale "Position of Constitutional Courts following integration into the European Union", réunis à Bled du 30 septembre au 2 octobre 2004 à l'initiative de la Cour constitutionnelle de Slovénie avec le soutien de la Commission de Venise, ont examiné de manière approfondie les conséquences de l'appartenance à l'Union européenne sur le rôle et les compétences des cours constitutionnelles nationales, en particulier en ce qui concerne la primauté du droit de l'Union européenne et la situation de ces cours au regard de l'article 234 du Traité sur l'Union européenne. Dans la perspective de la signature du Traité constitutionnel européen un intérêt particulier a été accordé à la protection des droits fondamentaux et aux relations entre le système de la Convention européenne des Droits de l'homme et les ordres juridiques nationaux et de l'Union européenne.

Les membres des cours constitutionnelles des nouveaux pays de l'Union européenne ont tous souligné l'importance historique et juridique de l'appartenance à l'Union européenne et insisté sur les questions concrètes auxquelles les cours ~~ont~~ <sup>avaient</sup> désormais à répondre; notamment les conséquences de la suprématie du droit européen, l'étendue de contrôle de la législation nationale transposant le droit européen, l'interprétation de la Charte des droits fondamentaux de l'Union européenne et la conciliation entre la souveraineté nationale et le transfert des compétences à l'Union européenne. Tout en notant l'accent sur les spécificités de chaque pays, et liaison avec sa propre histoire, sa tradition juridique et le rôle de la cour constitutionnelle au sein des juridictions nationales, les intervenants ont constaté qu'ils avaient désormais à tenir compte de la double

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appartenance à l'Union européenne et à la Convention européenne des Droits de l'homme et de la nécessité de renforcer l'efficacité de la garantie des droits fondamentaux offertes aux citoyens des pays membres. Cette situation tend nécessairement à rapprocher les jurisprudences nationales et européennes. Elle implique une véritable coopération entre les cours des ~~ten~~ pays de l'Union européenne, le Cour de justice des Communautés européennes et le Cour européenne des Droits de l'homme. Les représentants des cours constitutionnelles et des cours européennes ont insisté sur l'utilité de promouvoir des échanges réguliers entre les cours, de développer l'organisation d'un véritable réseau efficace d'échanges d'informations et de soutenir les efforts tendant à mieux faire connaître les droits fondamentaux tant parmi les juristes que les citoyens.

Didier MAUS  
A Bled, le 1<sup>er</sup> octobre 2004



## THE DECLARATION

*Bled, October 1, 2004*

The participants of the international conference on “The Position of Constitutional Courts Following Integration into the European Union” assembled at Bled, September 30 to October 2, 2004, upon the initiative of the Constitutional Court of the Republic of Slovenia and with the support of the Venice Commission, have comprehensively discussed the effects of their integration into the European Union as well as the position and jurisdiction of the Constitutional Courts of the member States. In particular, they have discussed the supremacy of the European Union Law and the position of the Constitutional Courts of the member States concerning Article 234 of the Treaty establishing the European Communities. In the light of their having signed the Treaty establishing a Constitution for Europe, special attention was paid to the fundamental rights of their citizens and to the relations between the system of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the national legal systems and the European Union.

The judges of the Constitutional Courts of the new member States of the European Union have emphasized the historical and legal significance of adherence of their States to the European Union and specific issues which hence the Courts will have to address: especially concerning the ramifications deriving from the supremacy of European law, the expansion of the judicial review of legislation implementing European Union law, the interpretation of the Charter of Fundamental Rights of the European Union, and the necessary reconciliation between national sovereignty and the transfer of powers to the European Union. Emphasizing the individuality of each State emanating from its own distinct history and legal tradition, and considering the position of Constitutional Courts within the framework of national jurisdictions, the participants have established that from now on the implications of the twofold commitment, to the European Union and to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the need to strengthen the protection of fundamental rights of citizens of the member States must be carefully taken into consideration. Such a state of affairs requires rapprochement between the national and the European case law. This implies genuine cooperation between the Courts of the member States of the European Union, the Court of Justice of the European Communities, and the European Court of Human Rights.

The members of the Constitutional Courts and the European Courts have insisted on the advantage of continuous communication between the Courts, the intensification of a truly efficient network of data exchange. They have also emphasized the need for a sustained effort leading to better awareness of fundamental rights among both legal profession and citizens.

## DÉCLARATION

*Bled, du 1 octobre 2004*

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Les membres des cours constitutionnelles des nouveaux pays de l’Union européenne ont tous souligné l’importance historique et juridique de l’appartenance à l’Union européenne et insisté sur les questions concrètes auxquelles les cours auront désormais à répondre, notamment les conséquences de la supériorité du droit européen, l’étendue du contrôle de la législation nationale transposant le droit européen, l’interprétation de la Charte des droits fondamentaux de l’Union européenne et la conciliation entre la souveraineté nationale et le transfert des compétences à l’Union européenne. Tout en mettant l’accent sur les spécificités de chaque pays, en liaison avec sa propre histoire, sa tradition juridique et la place de la cour constitutionnelle au sein des juridictions nationales, les intervenants ont constaté qu’ils avaient désormais à tenir compte de la double appartenance à l’Union européenne et à la Convention européenne des Droits de l’homme et de la nécessité de renforcer l’efficacité de la garantie des droits fondamentaux offertes aux citoyens des pays membres. Cette situation tend nécessairement à rapprocher les jurisprudences nationales et européennes. Elle implique une véritable coopération entre les cours des pays de l’Union européenne, la Cour de justice des Communautés européennes et la Cour européenne des Droits de l’homme.

Les représentants des cours constitutionnelles et des cours européennes ont insisté sur l’utilité de poursuivre des rencontres régulières entre les cours, de développer l’organisation d’un véritable réseau efficace d’échanges d’informations et de soutenir les efforts tenant à mieux faire connaître les droits fondamentaux tant parmi les juristes que chez citoyens.



## DEKLARACIJA

*Bled, 1. oktobra 2004*

Udeleženci mednarodne konference "Položaj ustavnih sodišč po vključitvi v Evropsko unijo", zbrani od 30. septembra do 2. oktobra 2004 na Bledu, so na pobudo Ustavnega sodišča Slovenije in ob podpori Beneške komisije poglobljeno obravnavali posledice pridružitve k Evropski uniji z vidika vloge in pristojnosti ustavnih sodišč držav članic, zlasti glede primarnosti prava Evropske unije in položaja teh sodišč po 234. členu Pogodbe o ustanovitvi Evropskih skupnosti. V luči podpisa Pogodbe o Ustavi za Evropo je bila posvečena posebna pozornost pomenu temeljnih pravic in tudi razmerjem med sistemom Evropske konvencije o varstvu človekovih pravic in temeljnih svoboščin ter nacionalnimi pravnimi redi in Evropsko unijo.

Člani ustavnih sodišč novih držav članic Evropske unije so poudarili zgodovinski in pravni pomen pripadnosti Evropski uniji in izpostavili konkretna vprašanja, na katera bodo sodišča morala odslej odgovarjati, zlasti: posledice primarnosti evropskega prava, razširitev presoje zakonodaje, ki pomeni uresničevanje evropskega prava, razlaga Listine temeljnih pravic Evropske unije ter vzpostavitev nujnega ravnovesja med nacionalno suverenostjo in prenosom pristojnosti na Evropsko unijo. S poudarkom na posebnosti vsake države v povezavi z njeno zgodovino, pravno tradicijo in položajem ustavnega sodišča v okviru nacionalnih pristojnosti, so razpravljavci ugotovili, da je treba odslej upoštevati posledice dvojne pripadnosti, Evropski uniji in Evropski konvenciji o varstvu človekovih pravic in temeljnih svoboščin, ter potrebo po krepitvi varstva temeljnih pravic državljanov držav članic. Takšno stanje zahteva zблиževanje nacionalnih sodnih praks in evropske sodne prakse. Vključuje pristno sodelovanje med sodišči držav članic Evropske unije, Sodiščem Evropskih skupnosti in Evropskim sodiščem za človekove pravice.

Predstavniki ustavnih sodišč in evropskih sodišč so poudarili, da je koristno nadaljevati redna srečanja med sodišči, okrepiti organizacijo resnično učinkovite mreže izmenjave podatkov in si prizadevati za boljše poznavanje temeljnih pravic tako med pravno stroko kot med državljani.