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DOCTRINE / STUDIES

INTERACTIONS BETWEEN NATIONAL AND SUPRANATIONAL LEVELS OF JURISDICTION

The Hedgehog Dilemma

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Abstract

Constitutional courts no longer have the final say, but engage in dialogue with lower and superior courts. They review legislation, but are held in check by other judges. Constitutional courts are neither a bulwark nor an instrument of State sovereignty. They belong to a "choir" of courts, all committed to the same task of protecting citizens' rights. National legal systems are opening themselves up to supranational law. The latter features courts that often decide differently from national supreme courts. These, in turn, are required to consider the decisions issued by, and engage in dialogue with, courts beyond the State. In addition, supranational law's infiltration into national legal systems authorises "lower" national judges to pronounce upon the constitutionality of legislation.

Les cours constitutionnelles n'ont plus le dernier mot; au contraire, elles dialoguent avec les cours inférieures et supérieures. Elles examinent les lois, mais sont elles-mêmes contrôlées par d'autres juges. Les cours constitutionnelles ne sont ni un rempart ni un instrument de l'Etat souverain. Elles appartiennent à une « chorale » de tribunaux, tous dédiés/dévoués à la même tâche de protéger les droits des citoyens. Les ordres juridiques nationaux s'ouvrent de plus en plus au droit supranational. Les cours relevant de celui-ci rendent souvent des décisions qui sont contraires à celles des cours suprêmes nationales. Celles-ci, à leur tour, sont tenues de considérer les décisions rendues par les cours supranationales et de dialoguer avec elles. En outre, « les infiltrations » du

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droit supranational dans l'ordre juridique national consentent aussi à ce que les cours inférieures se prononcent elles-mêmes sur la constitutionnalité des lois.

Verfassungsgerichte haben nicht länger das letzte Wort, sondern sind im Dialog mit den Instanzgerichten. Sie überprüfen das Recht, werden aber von anderen Richtern kontrolliert. Verfassungsgerichte sind weder ein Bollwerk, noch ein Instrument staatlicher Souveränität. Sie gehören zu einem „Chor" der Gerichte, die alle zur selben Aufgabe verpflichtet sind, nämlich die Rechte der Bürger zu beschützen. Nationale Rechtssysteme öffnen sich für supranationales Recht. Die jüngste Besonderheit sind Gerichte, die oftmals anders urteilen als nationale oberste Gerichte. Diese sind wiederum angehalten, die Entscheidungen von Gerichten außerhalb des jeweiligen Staates zu berücksichtigen und sich damit auseinanderzusetzen. Zudem legitimiert das Eindringen von supranationalem Recht in nationale Rechtssysteme „untere" nationale Richter, selbst über die Verfassungsmäßigkeit der Gesetze zu entscheiden.

Le corti costituzionali non hanno più l'ultima parola, ma dialogano con le corti inferiori e superiori. Controllano la legislazione, ma sono a loro volta controllate da altri giudici. Le corti costituzionali non sono né un baluardo della sovranità statale, né un suo strumento. Esse appartengono ad un "coro" di corti, tutte impegnate nel compito di proteggere i diritti dei cittadini. I sistemi giuridici nazionali si stanno aprendo al diritto sovranazionale. Nell'ambito di quest'ultimo operano corti che spesso decidono in maniera differente rispetto alle corti supreme nazionali. Queste corti, a loro volta, sono tenute a prendere in considerazione le decisioni rese dalle corti sovranazionali e a dialogare con tali corti. Inoltre, le "infiltrazioni" del diritto sovranazionale nei sistemi giuridici nazionali consentono che anche le corti "inferiori" si pronuncino esse stesse sulla costituzionalità della legislazione.

Los tribunales constitucionales ya no tienen la última palabra, sino que dialogan con tribunales inferiores y superiores. Controlan la legislación, pero también están sujetos al control de otros jueces. Los tribunales constitucionales no son ni un baluarte ni un instrumento de la soberanía del Estado. Pertenecen a un "coro" de tribunales, implicados todos en la misma tarea de proteger los derechos de los ciudadanos. Los ordenamientos jurídicos nacionales se abren cada vez más a normas supranacionales. Y éstas crean tribunales que con frecuencia toman decisiones distintas a las de los tribunales supremos nacionales. Éstos, a su vez, deben tener en cuenta las decisiones emanadas de tribunales supraestatales y han de dialogar con ellos. Además, la infiltración de las normas de origen supranacional en los ordenamientos nacionales también permite que los tribunales "inferiores" se pronuncien por sí mismos acerca de la constitucionalidad de la legislación.

Keywords: supranational courts; judicial review; judicial dialogue; constitutional courts; judicial interactions

Mots-clefs: cours supranationales; contrôle constitutionnel; dialogue des juges; cours constitutionnelles; interactions entre cours

Stichwörter: supranationale Gerichte; richterliche Überprüfung; gerichtlicher Dialog; Verfassungsgerichte; richterliche Beeinflussung

Parole chiave: corti sovranazionali; controllo di costituzionalità; dialogo tra corti; corti costituzionali; interazione tra corti

Palabras clave: tribunales supranacionales; control judicial; diálogo entre tribunales; tribunales constitucionales; interacciones judiciales

Contents

I. SHIPS PASSING IN THE NIGHT?

Only a decade ago, the French scholar Louis Favoreu wrote that "constitutional courts are the last bulwark of State sovereignty", and that "they cannot be subject to external checks".

Today, constitutional courts no longer have the final say, but rather engage in dialogue with lower and superior courts. They review legislation, but are held in check by other judges. Constitutional courts are neither a bulwark nor an instrument of State sovereignty.

Ten years ago, constitutional courts could at most be defined as "ships passing in the night", to use Henry Wadsworth Longfellow's poetic metaphor; in other words, they had only fleeting contact with each other. Today, they belong to a "choir" of courts, all committed to the same task of protecting citizens' rights.

According to the "Project on International Tribunals and Courts", there are 125 supranational and international courts. To these, one must add an equivalent number of quasi-judicial bodies – "Compliance Committees", "Inspection Panels", "Article 1904 NAFTA Binational Panels", "Administrative Panels of the WIPO Arbitration and Mediation Centre for Uniform Domain Name Dispute Resolution", and the like. If one

compares these numbers with the number of States (there are currently 193 Member States of the UN), it is easy to see that there are many more courts than States.

The great majority of these courts were established in the last twenty years. Since the 1990s, the number of international courts and tribunals has grown rapidly: compulsory means of quasi-judicial dispute settlement have been developed, whereby the complaining party can bring his case before an impartial body and the party against whom the complaint is brought cannot avoid a third-party decision.

Not long before, there were only six operative international courts. In the years between 1985 and 2000, fifteen new permanent adjudicative mechanisms and eight quasi-judicial procedures were introduced.

Previously, it was generally agreed that "law without adjudication is [...] the normal situation in international affairs" and, according to Article 33(1) of the Charter of the United Nations, parties can choose any means they wish for the peaceful settlement of disputes.

The family of global courts and quasi-judicial bodies includes very diverse institutions, such as the WTO's DSB, the EU's ECJ, the Court of Arbitration for Sport, the WB's IP, the Aarhus Convention Compliance Committee, the ICTY, and the ICC. The latter does not judge cases or controversies, but "situations"; the WTO AB can authorise retaliatory measures, i.e. judge-controlled infringements of the law; the Aarhus Convention Compliance Committee can impose obligations for the future, and therefore is not only a "reactive" body, but also a "proactive" body.

II. THE INFALLIBILITY OF SUPREME COURTS

I will begin with a famous quote from the US Justice Robert Houghwout Jackson. Appointed to the Supreme Court by Franklin Delano Roosevelt, he was later chosen by President Truman to act as Chief Prosecutor at the Nuremberg trials – the role which brought him international prominence. As a Justice of the Supreme Court, in *Brown v. Allen* Jackson wrote the renowned phrase: "we are not final because we are infallible, but we are infallible only because we are final". This statement has always been interpreted as a warning to judges, to be conscious of their own fallibility.

However, this oft-cited passage is the conclusion of a broader line of reasoning. Jackson wrote that "[c]onflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final".

Thus, Jackson perceived the Supreme Court's strength to lie in its "finality", its solitary position at the apex of the legal system, pursuant to which it has the final say and therefore becomes infallible. If a court superior to the Supreme Court existed, he argued, many of the latter's decisions would be reversed.

Justice Jackson's theoretical hypothesis is now becoming a reality. National legal systems are opening themselves up to supranational law. The latter features courts that often decide differently from national supreme courts. These, in turn, are required to consider the decisions issued by, and dialogue with, courts beyond the State. In addition, supranational law's infiltration into national legal systems also authorises "lower" national judges to pronounce upon the constitutionality of legislation; in other words, "lower" judges can now take possession of the constitution and evaluate the constitutionality of norms, interpreting them in a constitutionally compatible manner, and stopping only when obliged to refer them to the constitutional court, the only body empowered to strike them down. Thus, reviews for constitutionality become diffuse, and at the same time constitutional courts' once-exclusive position is eroded. This also leads to a change in the very nature of review by supreme courts for constitutionality. In other words, as observed by Gustavo Zagrebelsky, we have transited from a "closed" constitutional law to a "constitutional globalisation", a "universal constitutionalism", or an "incipient judicial cosmopolitism".

III. THE TRANSNATIONAL LAW OF LIBERTIES

In this section, I will briefly examine the steps of this complex evolution.

The starting point is the opening up of national legal systems to non-national law – the phenomenon that German jurists call *Völkerrechtsfreundlichkeit*. An example is Article 25 of the German *Grundgesetz*, which states that the general rules of international law are an integral part of the federal law, that they take precedence over national law and that they directly create rights and obligations for German citizens. Furthermore, Articles 232 and 233 of the Constitution of the Republic of South Africa state that customary international law is law in the South African legal system, unless it is inconsistent with the Constitution or with an Act of Parliament; in addition, when interpreting legislation, courts must prefer an interpretation that is consistent with international law. Further examples are Articles 10 and 11 of the Italian Constitution, according to which the Italian legal system must conform to the generally recognised norms of international law, and consents to limitations of its sovereignty. In addition, Articles 5, 190 and 193 of the Federal Constitution of the Swiss Federation establish that the mandatory provisions of international law take precedence over the national constitution itself.

Therefore, national law retracts, while supranational law prevails. Indeed, my second point is that international treaties and agreements proliferate: the European Convention on Human Rights, the Charter of Fundamental Rights of the European

Union, the American Convention on Human Rights, the Treaty Establishing the Economic Community of West African States, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc.

International agreements such as these contain rules to ensure and protect citizens' rights; like "shadow" or "surrogate" constitutions, these rules overlap (and sometimes conflict) with those enshrined in national constitutions.

Furthermore, significant problems arise with regard to the "connections" between supranational legal orders, such as that between EU law and ECHR law that the Court of Justice of the European Union is called upon to solve. The Court of Justice has stated that as long as the EU has not formally acceded to the ECHR, the latter cannot be considered a legal instrument incorporated into EU law; EU law, in turn, does not regulate relations with the ECHR nor determine the conclusions that national courts can reach if the rights protected by the Convention conflict with those enshrined in national law.

The opening up of national constitutional orders and the development of global norms give rise to a third phenomenon: "domestification", the process through which international human rights become effective within national legal orders. Treaties and conventions become national law, which can be enforced in national courts.

This "incorporation" can take place in various ways. However, in all cases, international norms do not enter national systems on the basis of hierarchical or "arborescent" criteria, and do not affirm themselves therein on the basis of their supremacy, but rather, by virtue of their "primacy" (a distinction first made by the Spanish *Tribunal Constitucional*), they assume a place alongside national norms, "one next to the other". The Italian Constitutional Court has noted that the different formulations available in the various catalogues of rights "integrate one another, completing each other by means of interpretation" (Judgment No. 388 of 1999).

However, supranational law is gradually acquiring greater strength, as recently also noted by the Swiss Supreme Court in the *Thurgovia* case (2C_828/2011, of 2012), concerning the European Convention on Human Rights.

Therefore, we are witnessing the development of what Mauro Cappelletti, twenty years ago, called the "transnational law of liberties", a development that can be ascribed, on one hand, to the decline of the nation State as the sole source of law and justice, and on the other, to the international opening of national legal systems.

IV. NEW GUARDIANS OF THE LIBERTIES

My fourth point is that the plurality of national and supranational charters is accompanied by another phenomenon: a proliferation of guardians of the liberties, at both supranational/global and national levels.

In the supranational and global contexts, there are the European Court of Human Rights (ECtHR), the Court of Justice of the European Union, the Inter-American

Court of Human Rights, the Court of Justice of the Economic Community of West African States, and the African Court of Justice for Human and Peoples' Rights.

However, these courts are not the only guardians of the rights enshrined in the constitutional charters they apply. Indeed, due to domestification, the treaties, agreements, covenants and charters that guarantee rights and freedoms are also part of national legal systems. Therefore, national courts too are guardians of these rights and freedoms, and establish relations with supranational courts, circumventing – and therefore marginalising – national constitutional courts.

The decisions of supranational courts on individuals' rights are binding in national legal systems, albeit in different ways, depending upon the regions and countries involved. An example is *Serap v. Republic of Nigeria*, handed down by the African Court of Justice for Human and Peoples' Rights in 2012 (ECW/CCJ/JUD 18/12). The case concerned the right to health, to adequate living standards and to protection of the environment in the Niger Delta. Another example is the decision of the Inter-American Court of Human Rights in *Padilla Pacheco* (912/2010), a case raising issues relating to the right to life, personal integrity, freedom and judicial protection.

Supranational law percolates into national legal orders in many different ways; this makes it difficult to draw a general conclusion, raising instead many questions. Does the European Convention of Human Rights have *supra*-constitutional status (as in the Netherlands), constitutional status (as in Austria) or sub-constitutional status, as in Italy? Or does it rank as ordinary legislation, with the consequence that a subsequent national law can nullify rights acquired at the supranational level? How can rights granted in a broader context be coordinated with those granted at the national level?

As for judicial protection, is it better for national courts – as ordinary courts called upon to apply also those supranational norms that guarantee rights – to declare the inapplicability of national law that is inconsistent with supranational law, even if the national measure was enacted subsequently? Or would it be preferable for domestic courts to refer inconsistent domestic norms to their respective constitutional courts, to be struck down?

In addition to relations between legal systems and their respective rules, there are also relations between the various courts and their respective powers. The configuration of the latter type of ties may assume several different shapes. National courts may apply supranational norms directly, or may refer decisions on domestic violations of rights to supranational courts. Domestic judges may evaluate the observance of rights enshrined in supranational norms and directly declare the inapplicability of the conflicting domestic norms (as occurs in Italy for EU law). Otherwise, once they have performed this check, national judges may also defer the task of striking down the non-compatible domestic norms to other national courts (i.e. constitutional courts), as the Italian Constitutional Court did in 2007 on the European Convention of Human Rights. Domestic courts may adapt to supranational law as interpreted by supranational courts (as occurs in Italy), or may be obliged only

to "consider" the interpretation of supranational law given by the relevant judges (as in Germany and the United Kingdom).

Such a complex situation requires adaptations and collaboration. The former were introduced by means of norms (e.g. the principle of the prior exhaustion of national remedies, in the case of the European Convention of Human Rights, or the principle of subsidiarity, introduced in the same context by the Protocol No. 15 recently added to the Convention), or of "judge-made law" (such as the doctrine of national margin of appreciation introduced by the Strasbourg Court in relation to the application of the European Convention of Human Rights; or the doctrines of the "supreme principles" and of "counter-limits" – *controlimiti* – formulated by the Italian Constitutional Court in relation to EU law, in Judgments Nos. 30 of 1971 and 183 of 1973).

Second, this complex situation requires increasingly close collaboration between judicial systems, especially between supreme or constitutional courts; this is achieved by increasing both references to each others' case law, and meetings and contacts. The influences and interconnections, the mutual legitimation, and the references to comparison as a method of interpretation that have consequently arisen, have prompted remarks as to the existence of a "*Verbund* of the constitutional courts".

However, this too is not enough, because some countries attempt to evade this system of mutual checks. An example is the United Kingdom, where it has been lamented that its free people, the historical pioneer of the path towards freedom and democracy, are forced to renounce self-government; and they wish "to make [their] Supreme Court supreme". The UK situation will not be examined in detail here; I will only recall that the reactions registered there can also be ascribed to the absence of a national written constitution, that can act as a barrier or filter to the automatic incorporation of supranational law. Such a "gap" is not filled by the enactment of the Human Rights Act 1998.

V. CONSTITUTIONAL COURTS ARE NO LONGER ALONE

In this framework, constitutional courts' tasks are eroded from above and below, and their powers are limited by the need to take into consideration supranational courts' case law. However, while constitutional courts (partially) lose the ability to have the final say, while they must also heed the opinions of other courts, they also become less solitary bodies, as they acquire a new role: that of interlocutors with supranational legal orders, of arbiters of the opening and closing of domestic legal systems, and even of the speed at which supranational legal orders progress (consider the role of the German *Bundesverfassungsgericht* with its judgments on the Lisbon Treaty and on the ECB's OMTs). The overall beneficiaries of this evolution are national civil societies, given the consequent expansion of rights and the diffusion of the checks on their observance by legislative and executive bodies.

The evolution described thus far also affects the very nature of constitutional courts' work, and the horizontal expansion of the checks on the observance of rights.

The choral nature of the checks on the compliance with national and supranational charters transforms the nature of the judgments issued by constitutional courts, enhancing a specific component thereof: the evaluation of the reasonableness, the use of balancing techniques, and the control of the proportionality of national measures. Constitutional courts are increasingly called upon to compare and weigh rules and their applications at both national and supranational levels: for example, courts may be asked to ascertain whether individuals deprived of their personal freedom can also be deprived of their right to vote; or whether private parties against whom judgment was delivered on the basis of irregularly collected evidence are entitled to fresh proceedings (these cases involved the UK and Italy respectively). When dual protection is available, the task of comparing, weighing, and evaluating the proportionality and reasonableness of the various feasible interpretative outcomes is enhanced. Indeed, this keeps reviewers under review, and avoids arbitrary decisions on their part. A related aspect is the courts' task of advancing the protection of rights, a task which they pursue with highly diverse formulations, such as the "maximum expression of guarantees" asserted by the Italian Constitutional Court (Judgment No. 317 of 2009, echoing a famous phrase coined by Paolo Barile); or the principle of "progressivity of protection" endorsed by the Argentinian Supreme Court, according to which "all state measures having deliberately regressive nature in terms of human rights require a more accurate consideration, and must be fully justified in terms of the entirety of rights foreseen". In these cases, courts must clearly engage in comparison and weighing.

Second, vertical openness induces horizontal openness. National courts take into consideration decisions issued by supranational courts, even though these may concern other countries and do not apply to it *stricto sensu* (e.g. the Mexican Supreme Court's report on the *Padilla Pacheco* case, mentioned above). The laws of other countries gain relevance for supranational judges who decide a case involving a different country, as occurs, for example, with the ECtHR's doctrine of consensus: according to this doctrine, when reviewing the proportionality of a country's application of its margin of appreciation, the ECtHR must consider how many ECHR Contracting States have adopted a certain measure (for example, how many have accepted abortion or divorce). Domestic courts become interested in acquainting themselves with the legal solutions adopted in other countries, due to the implications that these may have in subsequent judgments concerning the domestic system.

VI. A "GREAT DISARRAY" OR "THE GREATEST TRIUMPH OF CONSTITUTIONAL COURTS"?

Over thirty years ago, the afore-cited Louis Favoreu wondered "if, in a few years' time, we will be able to make sense of the tangle of competences on the protection

of fundamental rights in Europe". Ten years ago, he returned to the subject in an even more pessimistic tone, observing that "a great disarray appears to be taking shape", a "tangle of competences", which he deemed to be "counterproductive" and "catastrophic". He described the European "jurisdictional landscape" thus: "Ordinary jurisdictions [...] apply the Constitution, the European Convention on Human Rights and general principles of European law, and soon, undoubtedly, the Nice Charter. Constitutional courts apply their own constitutions, which contain a catalogue of fundamental rights and, exceptionally, the European Convention on Human Rights; the Luxembourg Court applies the case law of the Charter of Fundamental Rights (pending the implementation of the Nice Charter) and possibly the European Convention on Human Rights; the European [Strasbourg] Court applies the European Convention on Human Rights, 'imposing' its interpretations upon ordinary jurisdictions, in some cases even upon constitutional courts, but without a real 'constitutional authority' to do so, since it cannot invalidate domestic acts".

More recently, the Italian sociologist Maria Rosaria Ferrarese has noted that the proliferation of judicial and para-judicial bodies prompts a paradox: a "limitation of the [...] role" of constitutional courts yet, at the same time, their "triumph". The proliferation of institutions empowered to have the final say indicates that what truly matters is not who speaks last, but rather who participates in the dialogue.

Supreme or constitutional courts are caught in a continuous conflict, or at least tension, with politics, more precisely with legislative bodies. In addition to this tension, a new one has emerged: that between domestic legal orders on one hand, and supranational/global ones on the other. In this context, courts are often called upon to perform various functions – intermediation, limitation, prompt – and in this respect, their attitudes differ greatly. See, for example, the case of prisoners' voting rights, and the relations between the UK Supreme Court and the Council of Europe and ECtHR; the German Federal Constitutional Tribunal's decisions concerning its relations with the European Union (*Solange* and *Ja, aber* cases); the cases on relief teachers, the Italian Constitutional Court and EU law; the case of the Swiss pensions, the Council of Europe and the Strasbourg Court; and the US Supreme Court's cases involving the death penalty and detention without trial.

These tensions certainly have a cost, as they introduce complexity and some confusion into legal systems. However, they also bring great benefits, both because they broaden the protection of citizens' rights, and because citizens are pushed – due to the system's provisional nature – to constantly seek new ways to obtain this protection.

In light of his dual experience as a Spanish constitutional judge and an Advocate General of the European Court of Justice, Pedro Cruz Villalón, applied the hedgehog dilemma – expounded by Arthur Schopenhauer and also by Sigmund Freud – to the "crowded house" of rights in Europe, marked by a plethora of courts, each entitled to pass judgment in the final degree. According to this dilemma, in winter, hedgehogs

seek to resist the cold by becoming close to each other; however, this also places them at risk of injury from their peers' sharp quills. European courts too, like the hedgehog, must learn to strike the appropriate balance between cooperation and isolation.[1]

1 P. Cruz Villalón, *Rights in Europe: The Crowded House*, King's College London, Centre of European Law, Working Papers in European Law, no. 01/2012. To avoid tensions, the author proposes that each court focus on its own specific identity. On this reading, the ECtHR's identity would be that of a "Court of Auditors"; the ECJ's, that of a "Supreme Court for an International Polity"; and that of national constitutional courts, of a "Court for the Normative Constitution".