Conference of European Constitutional Courts
XIIth Congress

The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

Final conclusions

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The subject of this XIIth Conference appeared to be a technical subject. One might expect complex debates about the procedural relations we maintain with the other judicial orders: that which precedes us (our national courts) and that which overarches us (the European courts) or, to put it more bluntly, the courts below and the courts above, without giving any pejorative or complimentary nuance to this designation.

However, in the course of these two days, we have been led to ask ourselves existential questions. We asked ourselves: Who are we? Where are we going? Is there life after the Constitution? Our discussions went beyond the relatively daunting theme of our proceedings. We were obliged to do so, since, in order to analyze our relations with other judicial orders, we had to place ourselves in relation to those other courts.

While our national courts derive their legitimacy from the past history of the democracies and republics, the constitutional courts only have the exciting prospect of writing their history. In relation to those historical courts, are we not anecdotal courts? Our history began in the 20th century whereas until then the world had passed us by. We appeared at a time when the European powers were obliged to ponder over their decline, will it not be our fate to disappear as soon as Europe, having in turn become a power, has established its institutions and courts?

So this is the starting point for some thoughts that will follow: they do not commit the Conference, they do not commit the Court of Arbitration and they do not even commit their author, who merely wishes to outline the provisional state of immediate reflections on subjects that need to mature.

Let us reflect on six questions that have emerged from the debates of these two days.

1. ARE WE (REALLY) COURTS?

This question no longer arises: our status as court entitles us to be present at this conference. However, it is a good idea to examine whether we really deserve this title.

There exists a considerable diversity of constitutional courts: we differ as to they way we operate, the matters we deal with, and the way in which cases are referred to us.

Some courts operate on an *a priori* (preventive review) basis, others on an *a posteriori* (repressive review) basis, on appeal, on incidental appeal, on preliminary questions, while yet others only conduct abstract reviews, or concrete reviews, sometimes both.

We also differ in terms of the matters we deal with: some only deal with statutes, others also handle regulations, yet others judgments, individual decisions, while some take in all aspects of judicial life, including omissions and silences.

As to the way in which cases are referred to us, some only reply to questions put by courts, others only receive questions from politicians, others handle questions from citizens who declare an interest, and there are some who accept cases from everybody (*actio popularis*), and some even have cases referred to them automatically.

Apart from those differences, however, we share the main attributions of the judicial function: we are all independent of the powers, we deal with questions of law, we deliver reasoned decisions and we do not have the last word. Apart from a few examples where, exceptionally, certain courts have reviewed constitutional laws, we serve the Constitution rather than censure it: we check power without ever seizing it. It suffices, says Dean Vedel, for the State to appear in majesty, that is to say, as Constituent, to break our rulings and recapture the sovereignty it received from the people.

One question was asked and the reply to this question could determine whether we are really courts: Are there any among us who carry out a subjective selection among the questions that are put to them? We are happy to observe that no European court has followed the example of our prestigious American counterpart. Certainly we have expedited screening procedures, with limited or no hearings, restricted benches and summary recitals. None of us, however, decides on the admissibility of petitions at his own discretion. We have learnt that the German Constitutional Court - which probably has the widest powers and therefore the heaviest case load - has asked itself recently whether a policy of subjective selection would not allow it to concentrate on cases relating to essential questions. It said no.

If any of us were to take this step, if he were to allow himself to choose at his own discretion the cases he is willing to hear, will he keep his status as judge? Can we introduce a kingly dimension into the public service of constitutional justice that we have taken on? Do we have the right to introduce an arbitrary element into our work whereas the essence of this work is precisely to hunt down this arbitrary element in the other powers?

Now that we reassured of our status as courts, our relations with the other courts are on an equal footing. Before starting on this chapter, however, we may need to dwell on a seemingly technical question that has assumed an unexpected significance during the course of our debates.

2. HOW IS THE CONSTITUTIONAL COURT ACCESSED?

In addition to the diversity already mentioned in the way in which cases are referred to us, there is one feature that emerges from all the reports, namely the minor role of the public prosecutor in constitutional proceedings, except perhaps in Portugal where the Attorney-General figures among the authorities that can initiate constitutionality reviews.

We can see in this an indication that we are judges who work in the public interest, which is one of the essential parameters of our proportionality reviews, and it is not necessary for the State to have itself represented before us by an *ad hoc* body to show us what the public good demands.

On the other hand, we see the appearance, particularly in the new democracies, of a new collective player who does not represent a dismemberment of the State: the mediator, ombudsman, defender of the people.

The disappearance of the defender of the public interest and the appearance of the defender of the individual or collective interests is the hallmark of what the appearance of the constitutional courts represents in the history of the Western world. We are there to ensure that the fundamental rights of the individual, which have all too often been suppressed by the

totalitarianism of the last century, are not violated. Dean Rivero observed that in the 19th century, the individual had to be protected by the law; in the 20th century, we realized that he also had to be protected against the law. We are there to achieve the difficult balance between holism and individualism.

This defence of the individual against the powers and the public authorities would have allowed us to close this second question with a flight of poetry if the intervention by Mr Wildhaber, President of the European Court of Human Rights, had not created some unease in our minds. His address provoked discussions that are so important that they merit a special chapter.

3. ARE WE CRITICS OF THE LAW OR GUARDIANS OF THE RIGHTS OF INDIVIDUALS?

President Wildhaber said of the European Court of Human Rights that today it must choose: either become a true constitutional court issuing basic rulings on substantial questions, or allow itself to be inundated by individual applications and risk being unable to deal with them within a reasonable time limit. This question concerns all constitutional courts. It was raised by Dean Favoreu. It was the main subject of a well-known article by our colleague Rubio Llorente.[1] It was put by Judge André Alen in his introductory report.

Must we focus our work on criticism of the law or on the protection of rights? Must we purge the legal system of the unconstitutional impurities that infect it or must we offer a reply to the individual applications that are addressed to us?

According to Mr Wildhaber, there is a «fundamental dichotomy» and a vital choice to be made here by our courts. We should opt for criticism of the law, lest we risk perishing from asphyxia.

But isn't there an inextricable link between observance of the Constitution and breach of individual rights, which but reveals its violation?

Can we say that it's the ordinary courts that must handle individual questions whereas virtually all the Strasbourg case law on Article 6 censures violations by those courts of the rights guaranteed by this article? No doubt we risk becoming suffocated by micro-constitutionality, undoubtedly the proliferation of egoistic disputes may lead us, as Carbonnier puts it, to the «debilitating popularization» of justice, or what the Italians call «microconflittualità» and the Germans «Bagatelljustiz».

But if we want to draw inspiration from what President Wildhaber has said, we must read his report completely. When he says that the Court of Strasbourg must free itself from individual applications, he adds, «The states should be given help, by Europe if necessary, in taking structural measures in order to execute the judgments of the European Court». This method was strictly applied by the European Court in the recent BRUSCO judgment.

[1] Franciso Rubio LLORENTE, *Tendances actuelles de la juridiction constitutionnelle en Europe*, International Yearbook of Constitutional Justice, XII-1996, p. 11.

It is because Italy had adopted a law which, precisely in order to remedy the multiplication of cases brought before the European Court because the reasonable time limit was exceeded, made it possible to secure adequate redress before the Italian courts that the Court was able to disallow the application of Mr BRUSCO. The grounds for this decision was not to avoid bothering the European judges with individual applications but that henceforth the Italian courts should be referred to: it is the non-exhaustion of domestic remedies that made it possible to apply the subsidiarity principle rather than to enter some sort of plea of triviality.[2]

The lesson of this judgment is not that the judges should be allowed to extend the scope of the maxim «*de minimis non curat praetor»* but that they are justified in relieving themselves of cases that can easily be dealt with elsewhere. We would be renouncing our status as judges if we were to send the citizen back into solitude, into the shadows of non-justice, if, without even examining the seriousness of his application, we would decide to dismiss him because the multiplicity of applications prejudices the serenity of our profession.

Dean Favoreu nevertheless wished we would clearly define what should be the scope of activity of a constitutional court, that we would limit this activity to the review of statutes and that we would only examine those statutes that raise essential questions of constitutionality. This is also the concern of President Wildhaber.

Yet, is it possible to draw a single profile of a constitutional court without taking into account the specific nature of each country in which it operates?

Our meetings revealed that, beyond the characteristics we have in common, there are differences that it would be rash to try and erase, since we neither have the same age nor the same history. Any kind of classification is arbitrary, yet it seems that the European constitutional courts can be subdivided into three categories.

The first category is that of courts that operate in States that have been democracies for decades, sometimes for centuries, that have only known minor or temporary deviations, but that can rely on their ordinary or administrative courts to take individual applications into consideration. In those States, one can understand that they only want a constitutional court with restricted jurisdiction and limited referral. In those countries, courts with plenary jurisdiction are sometimes jocularly referred to as otherworldly prelacies - one author even spoke of «college of Brahmins» - because, in those countries, political thinking is closer to Jean-Jacques Rousseau than Montesquieu: emphasis is less on checking power than on establishing one's sovereignty. It is not certain, however, whether this residual conception of constitutionality review can be applied throughout Europe.

There is a second category, composed of courts established in States which, in the middle of the 20th century, have known dictatorship or totalitarianism and which feel that they were only able to emerge from this situation precisely by creating constitutional courts with wide powers. How could they have counted on their courts if tyranny was able to establish itself with the complicity of the courts and with observance of the law? Why did they deprive the citizens of individual recourse whereas the law and the courts lent their assistance to their exclusion? In the course of our debates we were able to hear the convergent stories of Spain, Germany, Portugal and, to some degree, Italy, in other words, countries that had felt the need to protect democracy, as soon as it returned, with a constitutional court that is open to all

[2] Decision of inadmissiblity of 6 September 2001, R.U.D.H. 2001, p. 81

citizens, and that did not want to deprive themselves of this safeguard against the temptations of totalitarianism.

No doubt one could question the expediency of such reviews by referring to the figures: 2.5 or 3% of the applications received might suggest a low level of productivity of the institution and an excessive recourse to its services.

But should we judge the usefulness of a court by the same criteria that are used to assess the profitability of a factory?

And, for such a figure to be sociologically valid, should we not take into account the - unquantifiable - number of decisions that owe their constitutionality to the existence of a recourse and to the threat of a censure? Do these figures allow us to take into account the educational role of the decisions of the constitutional courts which, by inspiring those of the other courts and powers, have prevented the latter from committing deviations?

Finally, should we deprive the citizens of the protection of a court on the grounds that the European states are today moving towards democracy, while leaving nothing to guard us against a repetition of history?

The third category is that of the new democracies that have joined us since 1989 and that, having also experienced restricted liberties and mixed powers, fear that the liberties inscribed in their constitutions will remain hollow if their citizens cannot appeal to courts to guarantee the exercise of those liberties. Reading their decisions, to which we have access thanks to the excellent work done by the Venice Commission, we learn that where the democratic order is in the process of establishing itself in those states, this is to a large extent due to the action of constitutional courts with wide powers, and that a limitation of their activity would be felt as a sort of regression in the democratic process.

When the liberties return, and if the constitutional courts do not have the advantage of a long practice or tradition, they need a field in which to gain experience, namely the jurisdictional settlement of conflicts that enables them to progressively and empirically find out up to which point the liberties can be exercised, and from which point it is justified to limit excesses in this area. This is how laws are made. Anthropologists teach us that the judge kings have always preceded the legislator kings and that it is because regulations have first soaked and matured in litigation that they can then be cast into legislative form.

However relevant they may be to what a constitutional court should be, the ideas that are aimed at limiting its role to an abstract review of basic regulations should be qualified according to the current needs of each State. No violence should be done to history. There is no single model for an ideal court that meets the specific needs of each country.

However, this grafting of new courts on the existing legal systems, especially when preliminary referral obliges one court to co-operate with another, may raise delicate questions of hierarchy, even sensitivity. We should therefore look into:

4. OUR RELATIONS WITH THE ORDINARY COURTS

Who has the power to interpret laws?

The question is not a problematic one as far as new regulations are concerned that are subject to a preventive review or to a review that can only be carried out in the days following their promulgation. Our interpretative authority is therefore only the expression of this status of «co-legislator» which the President of the Belgian Senate granted us at our inaugural session.

But what is the extent of our interpretative authority when a court *a quo* submits to us a regulation as it is interpreted, whether the court itself gave a creative interpretation or it submits to an interpretation by the Supreme Court which it does not like and which it refers to us in the hope that we would condemn it?

How to solve this conflict between the authority to interpret statutes which the constitutions grant to the courts and tribunals, and the authority which the same constitutions grant to us to verify whether the statutes are compatible with the Constitution, which inevitably leads us to choose, even to impose the interpretation that renders the statute compatible with the Constitution, even if this is not the interpretation chosen by the Supreme Court?

A first element of the reply may be supplied by the Italian theory of living law: a judicial interpretation is only imposed on us if it is backed up by a case law of the Supreme Court, so that the regulation is submitted to us not merely in its bare text, but with the consolidated meaning given to it by legal practice. This is a tribute paid by the Constitutional Court to the Court of Cassation.

Yet this tribute will only be provisional if it appears that the consolidated interpretation is contrary to the Constitution. Can the Constitutional Court, in this case, suggest another interpretation that makes the regulation compatible with the Constitution? In this case, this suggestion is in fact an injunction, since any court, be it called supreme, should rather interpret the regulations «*ut valeant quam ut pereunt*». The question becomes more complicated when the Constitutional Court makes use of the procedure of conciliatory, neutralizing, constructive or additive interpretation, that is to say, when it rescues the challenged regulation by rewriting it. It is therefore a problem of authority of res judicata that arises, and it is rare that our constitutions help to solve it.

Beyond the questions of prestige or precedence, it is the very coherence of the legal system that is at issue: since interpretation is the necessary means to find out whether a statute is compatible with the Constitution, does the power to adopt one interpretation and to reject another not form an integral part of the mission that has been entrusted to the constitutional courts?

But rather than try to answer this question in a dogmatic way, would it not be better to communicate with the courts that put questions to us and submit to our replies?

It emerges from the reports that, in the majority of cases, no dialogue exists between the constitutional courts and the courts *a quo*.

Many believe that they have the authority to put questions to them. Should inspiration not be drawn from the eight courts that acknowledge that the court *a quo* can act as party to the proceedings?

We suffer from a communication deficit with the other judicial orders. The making of laws and their interpretation in the 20th century is undoubtedly still an act of authority, but above all an activity of communication: the communicational ethic has replaced the authoritarian ethic. We occasionally feel self-important towards the judges who operate in the field and who know better than we do the human problems of those who submit cases to them. Nevertheless, we have every interest in interacting better with them, even in involving them in our deliberations.

Perhaps we might also examine the solution that consists, in countries that have no constitutional court, in referring to a special court composed of members of different «supreme» courts - as is the case in Greece - the questions on which their case laws conflict. By doing so, there should be no fear of causing antagonism and stimulating confrontation: we know, because we experience it every day, that fair deliberation has virtues that make it possible to overcome conflicts that seem irreconcilable.

If it is true, as we have underlined, that we have the educational duty to train the ordinary judges and to inculcate in them the constitutional reflex, we also have the duty to communicate with them.

And it is perhaps that same communication ethic that should inspire the subject of the two next questions.

5. OUR RELATIONS WITH THE EUROPEAN COURT OF HUMAN RIGHTS

This obedience which we demand from the judges who put questions to us, either that we ask them that they accept our interpretations, or that we demand that they submit to the neutralizing, constructive, directive or manipulative interpretations that we impose on them, should we not impose it on ourselves vis-à-vis the higher courts?

The reports that were presented by the supranational courts to this conference begin in a generally flattering way. They underline that between them and us there is no relationship of subordination and that there is no hierarchy. They talk of complementarity, partnership, and sought-after cooperation. It is to be feared, however, that these are just euphemistic diminutives, because when we come to the crux of the problem we come across the word primacy. Isn't primacy a form of hierarchy? Does it not imply a form of subordination? We also come across the word subsidiarity, but subsidiarity in two senses. It refers to the margin of appraisal that is left to the states. But where the requirement of exhaustion of domestic remedies is concerned, it is specified that these domestic remedies must faithfully apply European law: functional subsidiarity is coupled with a duty of obedience.

As far as the European Convention on Human Rights is concerned, most of our courts admit that it is one of their main sources of inspiration, but the majority refuse to be bound by the case law of the European Court and by its interpretations.

Is this a tenable position? We are led to clarify or censure courts *a quo* that are obliged to apply the regulations of the European Convention. Can we deprive our reasoning of an intellectual aspect that must necessarily be present in theirs?

Should the solidarity that ought to exist among all the constitutional courts and the building of a common European legal culture not necessarily be coupled with the will to incorporate the regulations of the Convention and the case law of Strasbourg in our arguments?

Representatives of the States that have recently signed up to democracy have asked us to incorporate the European Convention in our review standards, because in this way we would give a European educational dimension to our judgments. It is less interesting for a small country - for example Belgium - to deliver a decision based on the observance of its Constitution, since it only affects ten million people.

But if we all adopt the habit of looking for inspiration in a standard on a European scale, which concerns 42 States, it is to eight hundred million people that we will be addressing a message of applied democracy.

There is only one reservation, however. If we refuse to submit slavishly to Strasbourg, it is for a different reason than pride or chauvinism. This reason cannot be found in the reports or in our decisions, but it can be heard in the secrecy of our deliberations. It is true that, in the current state of affairs, Europe unceasingly moves us forward towards greater democracy. It is also true that the treaties generally protect the fundamental rights better than our constitutions. But are we sure that this stage in history that we have reached today will last forever? History can take a nasty turn. Are we sure that the horrors that we have witnessed fifty years ago will not return? And are we sure that they will not return by an international route? Must we, judges of the Constitution, avert our eyes when a standard of an international dimension presents itself before us? Must we unreservedly rally to monistic positions and tolerate that the Constitution, which it is our mission to ensure that it is observed by our States, can be violated because some States got together to do so?

It is a kind of democratic precautionary principle that we apply by seeking inspiration in the European Convention, without however giving ourselves over to absolute obedience to international law, since history has shown us that it is sometimes by the international route that democracy is abandoned.

6. OUR RELATIONS WITH THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Our relations with the Court of Justice of the European Communities, the demarcation of our control in relation to that which it exercises, and the inclusion of European law in the standards that we review are the most delicate questions being considered. They will be dealt with separately.

a. Can we access the Court of Justice?

Three courts say yes, three say no. Sometimes a distinction is made according to whether we have an appeal lodged with us or whether a preliminary question is put to us. In the latter case, it has been claimed that we should detach the Community law aspect from the dispute and refer it back to the court *a quo* so it can access the Court of Justice directly.

Beyond the theories that justify one solution or another, it seems that, more practically, the question may resolve itself if we consider that the preliminary question, if it is useful to the settlement of the dispute, is one of the constituents of a fair trial and that it cannot be detached from it.

It is known that the European Commission has already asked itself whether, in the event that a court systematically refuses to refer to the Court of Justice, it could not lodge an appeal of default against the State to which this court belongs. Some have contemplated pleading, in Strasbourg, that the refusal to put a preliminary question may constitute a breach of the principle of fair trial and, consequently, a violation of Article 6 of the European Convention. We read in the Austrian report that, according to a constant case law of the Austrian Court, the refusal to refer to the Court of Justice of the European Communities may constitute a violation of the right to a court of law.

Considered in this way, the question should be dealt with, not by a theoretical and formal approach, but by asking oneself what the purpose and organization of the process requires. One should bear in mind the extra time that the litigant loses when he is obliged to artificially split up his application according to the legal disciplines that apply to it.

b. Can we ourselves perform a conventionality review by incorporating Community law in the standards of which we ensure the compliance?

If the conventional standard corroborates the constitutional standard, if it is sufficiently clear to be applied without making the preliminary diversion over Luxembourg, is it not our duty to guarantee its application, with every domestic court being a European court?

Is it judicious to locate the domestic law aspect of the lawsuit and to dissociate it from its international law aspect since the primacy of Community law does not allow any court to ignore the requirements thereof?

The question becomes more delicate when, instead of complementing each other, the constitutional standard and the conventional standard conflict with each other. Can we give preference to the European conventional standard without embarking on an implicit, even surreptitious revision of our Constitution, regardless of the procedures provided by our constitutions themselves for the revision thereof? It is a question that was raised long ago in the doctrine and has not been solved yet.

Furthermore, if a constitutional court assumes the task of enforcing supranational law to the detriment of its Constitution, it claims the power of the last word because, by saying what Community law imposes, it says to the Constituent itself what it is now prohibited from doing. This is an objection that has been formulated at another colloquium by Professor Favoreu, and we may wonder whether those questions can be resolved without changing our organic laws and our constitutions.

c. Can we, using the expedient of our constitutionality review, review Community law regulations?

This is the most difficult question. To suggest in what way it could be broached, we will confine ourselves to recalling the Matthews judgment, which Mr Melchior Wathelet, Judge with the Court of Justice of the European Communities, spoke about. Mrs Matthews, who lived in Gibraltar, wanted to take part in the elections for the European Parliament, but by one of those curious subdivisions of institutional law, Gibraltar is part of the European Community but not of the United Kingdom. By virtue of a European act of 20 September 1976, the right to take part in the elections to the European Parliament did not apply in Gibraltar. Mrs Matthews could therefore not vote. She appealed to Strasbourg by alleging a violation of Protocol no. 1. The question could be solved in a very simple way by the European Court which, until then, had a constant case law of non-interference in the affairs of the European Union. It had all the more reason for upholding this case law if we remember that, for many years now, the Court of Justice of the European Communities has incorporated the European Convention and its fundamental rights in its review standards, which could have justified the Court in Strasbourg declining jurisdiction. But that is not what it did.

It found that Mrs Matthews was being deprived of the fundamental right of franchise by an act of primary European law, therefore unassailable in Luxembourg, and rather than hide behind the watertightness of the judicial orders, it vindicated Mrs Matthews because « to accept the Government's contention that the sphere of activities of the European Parliament falls outside the scope of Article 3 of Protocol No. 1 would risk undermining one of the fundamental tools by which "effective political democracy" can be maintained.»[3]

By doing so, the European Court applied a fundamental rule of the deontology of courts. It did not get caught up in complicated questions of admissibility or jurisdiction. It asked itself whether Mrs Matthews could be assured of being jurisdictionally guaranteed respect for a fundamental right. It applied the «Solange» rule, which is dear to the German Constitutional Court.

This case serves as a parable because it illustrates - and we return to our point of departure - that a judge is not only a professional who is able to intellectually handle rules of procedure and legal concepts, but also someone who ensures that no one finds himself defenceless before the arbitrariness of government authority. It is remarkable that this case was not recalled to us and extolled by a judge from Strasbourg but by a judge from Luxembourg: not by the «encroaching» judge but by the «encroached» judge.

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The lesson that could be learnt from these two days is that if it is sometimes incumbent on us to extend our review into areas that appear to fall outside our scope, it is not because of pride and not necessarily because we are choosing sides between dualistic and monistic positions. It is because no violation of a fundamental right can be left without a judge. It is because we cannot tolerate any democratic deficit in our States. This rule can be applied to all the major questions raised by the theme of our conference.

As long as our national courts are there to guarantee the fundamental rights in an effective way, we can withdraw into the elitist review of legislative regulations. But as long as this

[3] Judgment Matthews vs United Kingdom of 18 February 1999

review does not exist, we are not allowed to diminish the plenary jurisdiction that our constitutions give us.

The day when Europe will have become a Nation State, organized in such a way that it will have courts with plenary jurisdiction and open to all, we may agree to disappear, or become decentralized courts of the main European court.

But as long as we have not reached that stage, it would be rash to want to renounce our control or to reduce its scope.