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The Constitutional Court of the Republic of Bulgaria  
Конституционен Съд на Република България

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# COOPERATION OF CONSTITUTIONAL COURTS IN EUROPE – CURRENT SITUATION AND PERSPECTIVES

## I. Constitutional courts between constitutional law and European law

1. Is the Constitutional Court obliged by law to consider European law in the performance of its tasks?

According to the Constitution of the Republic of Bulgaria (Article 5 (4)), any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, is part of the domestic law of the land. Any such treaty takes priority over any conflicting standards of domestic legislation. By adopting this standard, Bulgaria joined the countries that treat standards of international law as superior to the national standards and thus contribute to enhancement of the role of international law. It is important to note that not all international obligations binding on Bulgaria become part of the national legislation. The Constitution provides that of all sources of international obligations for Bulgaria (international custom, international treaties, the binding acts of international organisations and the binding judgments of international courts), only international treaties may become part of the domestic legal order without the need of adopting an express act of primary or secondary legislation for their operation. In its Interpretative Judgment No. 7 of 2 July 1992, the Constitutional Court held that international treaties which have been ratified and which have entered into force for Bulgaria but which are not promulgated in the *State Gazette* do not become part of the domestic law of the land unless they have been adopted and ratified prior to the Constitution now in force and, according to the procedure existing upon their ratification, their promulgation was not mandatory. The range of international agreements which are incorporated into the domestic legal order without adoption of a transposing act in turn is narrowed by the constitutional requirement of Article 5 (4), according

to which only international treaties *which have been ratified, which have been promulgated* and *which have entered into force* take priority over any conflicting standards of domestic legislation. International treaties which come into conflict with the Constitution itself are an exception to this category. To prevent a conflict of such treaties with the constitutional standards, Item 4 of Article 149 (1) of the Constitution expressly empowers the Constitutional Court to pronounce on the consistency of any international treaties concluded by the Republic of Bulgaria with the Constitution prior to the ratification of any such treaties, as well as on the consistency of any laws with the universally recognised standards of international law and with the international treaties whereto Bulgaria is a party.

The manner of transposition of European Union law into the domestic legal order of Member States is closely associated with, and depends on, a clarification of the issue as to whether Community law falls under domestic law or international law, or whether it constitutes an entirely new legal system in its own right. The Bulgarian Constitution does not contain an express provision regulating this matter. Still, in connection with Bulgaria's forthcoming accession to the European Union and the related amendments to the country's Constitution, the Constitutional Court was appraised by the President of the Republic with a petition to interpret constitutional provisions concerning the procedure for amendment of the Constitution. In the reasons to Judgment No. 3 of 5 July 2004, the Constitutional Court stated:

“1. Regarding the adoption of a constitutional provision envisaging empowerment of the bodies of the European Union to adopt decisions and to create legal instruments having supranational, direct and universal effect with regard to the Republic of Bulgaria.

Upon signature of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union and upon its ratification, promulgation and entry into force, Bulgaria becomes a party to the founding treaties of the

European Communities and the European Union (as amended and supplemented) and accepts their content, which is primary Community law regulating exhaustively the Union's institutions and bodies, their competencies and their acts. The acts of primary European Union law constitute international treaties within the meaning given by Article 5 (4) of the Constitution and if the conditions provided for are complied with, their provisions become part of Bulgaria's domestic law.

The European Union also adopts the so-called secondary law. According to Article 249, paragraph 1 of the Treaty establishing the European Community (TEC), the institutions of the European Union "shall make regulations and issue directives, take decisions, make recommendations or deliver opinions"... These acts are adopted pursuant to express provisions adopted in primary law.

Among the acts of secondary European Union law, the regulation occupies the foremost position: it is an act of general application, binding and directly applicable in each of the Member States (Article 249 (2) of the TEC). Another essential act of secondary law is the directive. It is not directly applicable but, according to Article 249 (3) of the TEC, "shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forms and methods" for achieving the objective prescribed therein...

A key characteristic of secondary law is that its acts are not international treaties within the meaning given by Article 5 (4) of the Constitution and are not subject to ratification by the national parliaments after their adoption. They operate directly and do not need to be expressly transposed into the national legislation. This is so because the institutions of the European Communities act within their competencies with directly binding legal effect in respect of the institutions and citizens in Member States. At the same time, however, it should be borne in mind that the methods and mechanisms of adoption of the acts of secondary law,

as well as its scope, are determined by primary law which, since it comprises international treaties, is mandatorily subject to ratification...”

In the same Judgment, the Constitutional Court also pronounced on: lifting the constitutional ban on the acquisition of a right of ownership to land on the part of the citizens of the European Union; European citizenship and the consequences arising from it; on the adoption of provisions assigning national State bodies to exercise the representative functions in the bodies of the European Union; on the adoption of a provision regarding the possibility for implementation of *ex-ante* control by the National Assembly in the process of drafting of the acts adopted by the bodies of the European Union; on the adoption of a provision making it possible to surrender Bulgarian citizens to a foreign State or an international court for the purpose of criminal prosecution in the cases where this is provided for in an international treaty whereto the Republic of Bulgaria is a party; on broadening the characteristics of citizens’ equality in accordance with the Charter of Fundamental Rights of the European Union.

Arguably, by this Judgment the Constitutional Court gave the go-ahead for the amendments to the Constitution that the National Assembly passed in 2005. Bulgaria has been a member of the European Union as since 1 January 2007.

## 2. Are there any examples of references to international sources of law?

During the last decade, human rights in the Republic of Bulgaria have turned from an abstract notion into reality. These rights are guaranteed through the ratification of fundamental international human rights instruments, as well as through the adoption by the Bulgarian Parliament of a number of laws by virtue of which Bulgarian legislation in force is brought into conformity with the international instruments. The application of the treaties on the protection of human rights is a typical example of application of international treaties at domestic and international level. What is essential and defining in this case is

domestic application. Guaranteeing the rights and liberties proclaimed in the international treaties on the protection of human rights is above all a responsibility of the national authorities of the contracting States. The principle of *pacta sunt servanda* with regard to the treaties on the protection of human rights includes a positive obligation to adopt the requisite domestic legislation and a negative obligation not to admit the invocation of any provision whatsoever of domestic legislation as an excuse for non-fulfilment of a treaty obligation.

For the first time, the Constitution of Bulgaria of 1991 expressly regulated the correlation between international and domestic law (Article 5 (4) as cited above). The direct application of the international treaties on the protection of human rights is a relatively recent and serious challenge to Bulgarian jurists and State bodies, to Bulgarian courts and in particular to the Bulgarian Constitutional Court.

(A) During its relatively brief history, the Constitutional Court has repeatedly been approached to pronounce on the consistency of provisions of laws with international treaties whereto Bulgaria is a party. The centrepiece among these treaties is the *Convention for the Protection of Human Rights and Fundamental Freedoms*. As early as in its first judgments, the Court has pronounced on such petitions. The judgments are too numerous to be cited, but the essential provisions of the Convention in respect of the inconsistency with which laws or their provisions have been challenged can be listed as follows: Article 2: Right to life; Article 6: Right to a fair trial, right to defence; Article 7: No punishment without law; Article 8: Right to respect for private and family life; Article 9: Freedom of thought, conscience and religion; Article 10: Freedom of expression; Article 11: Freedom of assembly and association; Article 13: Right to an effective remedy; Article 14: Prohibition of discrimination; Article 1 of the Protocol to the Convention: Protection of property; Article 2 of Protocol No. 7 to the Convention: Right of appeal in criminal matters. Most often, the Court has

been appraised to declare inconsistency with Article 6, Article 10 and Article 14 of the Convention.

(B) The *Charter of Fundamental Rights of the European Union* as a Community act has been cited in Constitutional Court judgments in recent years. These are Judgment No. 5 of 2010, Judgment No. 12 of 2010, Judgment No. 15 of 2010, Judgment No. 11 of 2011, Judgment No. 7 of 2012, Judgment No. 3 of 2012, Judgment No. 11 of 2012, Judgment No. 8 of 2013. The provisions which the appraising authorities have most often invoked and, respectively, which the Constitutional Court has referred to in its reasons, are: Article 16: Freedom to conduct a business; Article 17: Right to property; Article 20: Equality before the law; Article 21: Non-discrimination; Article 37: Environmental protection; Article 38: Consumer protection.

(C) In its judgments, the Constitutional Court has also referred to other international sources of law at European level, such as:

the *European Social Charter*: Judgment No. 13 of 2003, related to a wrongful restriction, according to the petitioners, of the social rights of disadvantaged persons; Judgment No. 12 of 2010 regarding the right to paid annual leave; Judgment No. 7 of 2012 regarding the workers' right to freedom of association in organisations and unions, and the liability to a sanction for workers who have not concluded a collective agreement with their employers;

the *European Charter of Local Self-Government*: Judgment No. 12 of 1999, related to amendments to the Local Self-Government and Local Administration Act and to the Local Elections Act; Judgment No. 11 of 2001, concerning the exclusive right of municipal councils to dispose of municipal property; Judgment No. 14 of 2000 occasioned by the limitation of the powers of local authorities by central government; Judgment No. 9 of 2000, Judgment No. 2 of 2001 and Judgment No. 16 of 2001, concerning municipal budgets; Judgment No. 6 of 2009: Article 9, paragraph 3 of the Charter, according to which "part at least of the financial resources of local authorities shall derive from local taxes

and charges of which, within the limits of statute, they have the power to determine the rate”; Judgment No. 4 of 2011: in connection with provisions of the Election Code challenged by the petitioners.

In quite a few judgments, the Constitutional Court has also referred to provisions of the *Treaty establishing the European Community* and the *Treaty on the functioning of the European Union*. Comparatively numerous judgments have also cited *EU directives* which the National Assembly is supposed to consider in drafting particular laws. Certainly, the directives are not international treaties, but owing to their frequent invocation, we will just mention some of the areas to which they apply: energy, value added tax, public procurement and competition, free movement of EU citizens within the Community, market access to port services, right of ownership, environment, social rights, economic enterprise, etc.

(D) On more than 40 occasions, the Constitutional Court has been approached to pronounce on inconsistency of legal provisions with universally recognised standards of international law. The more important such standards are:

the *Universal Declaration of Human Rights*: mainly under Article 7: equality before the law; Article 10: entitlement in full equality to a fair and public hearing by an independent and impartial tribunal; Article 11: right to defence; Article 19: right to freedom of opinion and expression; Article 21: right to participate in free elections; Article 24: right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay;

the *International Covenant on Civil and Political Rights*: under Article 6: right to life; Article 14: equality before the courts and tribunals, right to defence; Article 15: no penalty without law; Article 17: right to privacy, home, family, correspondence, honour and reputation; Article 18: right to freedom of thought, conscience and religion; Article 19: right to hold opinions, freedom of speech; Article 22: right to freedom of association; Article 25 (c): right to equal access to all public services; Article 26: equality before the law;



the *International Covenant on Economic, Social and Cultural Rights*: under Article 2: guaranteeing the exercise of rights without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; Article 8 (d): right to strike.

The Constitutional Court of Bulgaria has furthermore referred to the Convention on the Rights of the Child, the International Labour Organisation (ILO) Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, ILO Convention No. 97 and Convention No. 98, ILO Convention No. 52 concerning Annual Holidays with Pay, ILO Convention No. 95 concerning the Protection of Wages, and the Convention on Environmental Impact Assessment in a Transboundary Context. The Court has also pronounced specifically (by Judgment No. 2 of 1998) on the consistency of the Constitution with the Framework Convention for the Protection of National Minorities.

3. Are there any specific provisions of constitutional law imposing a legal obligation on the Constitutional Court to consider decisions by European courts of justice?

The Constitution of the Republic of Bulgaria does not contain a provision imposing an obligation on the Constitutional Court to consider judgments of the European Court of Human Rights (ECtHR). But, as Constitutional Court Judgment No. 29 of 1998 states, "... the Court must consider the case-law of the European Court of Human Rights in Strasbourg in interpreting provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms because this Convention is part of the domestic law of the land and the judgments of the European Court of Human Rights have a binding force for all bodies in this country, including with regard to interpretation, by virtue of Article 46 of the Convention".

4. Is the jurisprudence of the Constitutional Court influenced in practice by the jurisprudence of European courts of justice?

Bulgaria is a Member State of the European Union. As emphasised above, it is desirable that the Constitutional Court should consider the judgments of the ECtHR and of the Court of Justice of the European Union. The extent to which the two courts influence the jurisprudence of the Bulgarian Constitutional Court is measured by the frequency at which their judgments are referred to in the reasons of the national court. This will be discussed in the next point.

5. Does the Constitutional Court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights?

The Constitutional Court often refers to the case-law of the European Court of Human Rights. Thus, Judgment No. 29 of 1998, with regard to the Doctors and Dentists Professional Organisations Act, challenged before the Court, cites two judgments of the Strasbourg Court: Judgment of 27 May 1981 (on the compulsory membership of the *Ordre des médecins*, a public-law institution established by Royal Decree of the King of the Belgians) and Judgment of 13 August 1981 in the Case of *Young, James and Webster v. the United Kingdom*. Judgment No. 3 of 2002 on the Classified Information Protection Act cites two judgments of the ECtHR regarding freedom of information: Judgment in the Case of *Leander v. Sweden* of 26 March 1987 and Judgment in the Case of *Gaskin v. the United Kingdom* of 7 July 1989. Constitutional Court Judgment No. 12 of 2003 on the Religious Denominations Act refers to Judgment of 26 October 2000 in the Case of *Hasan and Chaush v. Bulgaria*, Judgment of 14 December 1999 in the Case of *Serif v. Greece* and Judgment of 12 December 2001 in the Case of *Metropolitan Church of Bessarabia and Others v. Moldova*. In connection with challenged amendments to the Criminal Procedure Code concerning the special surveillance means, including the use of undercover

agents, the Constitutional Court in Judgment No. 10 of 2010 referred to Judgment of 26 March 1996 in the Case of Doorson v. the Netherlands, Judgment of 23 April 1997 in the Case of Van Mechelen and Others v. the Netherlands, Judgment of 20 November 1989 in the Case of Rowe, Davies, Jasper and Fitt v. the United Kingdom, Judgment of 20 November 1989 in the Case of Kostovski v. the Netherlands and Judgment of 27 October 2004 in the Case of Edwards and Lewis v. the United Kingdom. The inadmissibility of restricting the freedom of movement due to pecuniary obligations is reasoned in Constitutional Court Judgment No. 2 of 2011 by two judgments of the Strasbourg Court: Judgment of 23 May 2006 in the Case of Riener v. Bulgaria and Judgment of 26 November 2009 in the Case of Gochev v. Bulgaria. In two judgments (Judgment No. 11 of 2011 and Judgment No. 11 of 2012), related to the introduction of lustration rules, the Constitutional Court referred to the judgments in the Case of Sidabras and Dziautas v. Lithuania (applications nos. 55480/00 and 59330/00) and the Case of Rainys and Gasparavicius v. Lithuania (applications nos. 70665/01 and 74345/01); the Case of Zdanoka v. Latvia (application no. 58278/00). The new Act on Forfeiture to the Exchequer of Unlawfully Acquired Assets was challenged before the Constitutional Court. In Judgment No. 13 of 2012, the Court pronounced, referring to ECtHR judgments related to protection of property: Judgment in the Case of Arcuri v. Italy, Judgments in the Cases of Walsh v. the United Kingdom and Phillips v. the United Kingdom, and Judgment of 8 June 1976 in the Case of Engel and Others v. the Netherlands. Further references include Constitutional Court Judgment No. 7 of 2004 – Judgment of 20 November 1989 in the Case of Kostovski v. the Netherlands; Constitutional Court Judgment No. 3 of 2010 – Judgment of 21 December 2006 in the Case of Borisova v. Bulgaria and Judgment of 14 January 2010 in the Case of Tsonev v. Bulgaria; Constitutional Court Judgment No. 6 of 2013 – Judgment in the Case of De Geouffre de la Pradelle v. France (application no. 12964/87) and Judgment in the Case of Serghides and

Christoforou v. Cyprus (application no. 44730/98). In a number of other judgments, the Bulgarian Court has referred to the case-law of the ECtHR without citing specific judgments of the Strasbourg Court.

For the time being, the Constitutional Court case-law makes fewer references to the judgments of the Court of Justice of the European Union. For example, in Judgment No. 22 of 1998, analysing part of the powers of the Commission on Protection of Competition, the Court referred to a judgment of the European Court of Justice. The same applies to Judgment No. 5 of 2004 and Judgment No. 5 of 2008. Judgment No. 1 of 2008, with regard to the extension of liability for value added tax to private enforcement agents and notaries, cites Judgment of 26 March 1987 in Case 235/85 and Judgment of 25 July 1991 in Case C-202/90 of the European Court of Justice. Constitutional Court Judgment No. 11 of 2011 mentions the case-law of the European Court of Justice on the right to pursue a freely chosen occupation and the admissible restrictions of this right.

The presence of the case-law of the European Court of Justice in the Constitutional Court judgments is modest for the time being not for lack of interest but because the enormous part of the petitions on inconsistency refer to the Convention for the Protection of Human Rights and Fundamental Freedoms.

6. Are there any examples of divergences in decisions taken by the Constitutional Court and the European courts of justice?

In Judgment No. 1 of 2000, the Constitutional Court declared the unconstitutionality of the political party United Macedonian Organisation Ilinden. The European Court of Human Rights, however, rendered judgment according to which the refusal of the Bulgarian court to register that party violates the various aspects of the freedom of association and the right to hold rallies, meetings and demonstrations.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the Constitutional Court taking it into consideration in its decisions?

The Constitutional Court does not have detailed information on the direct application of the international treaties on the protection of human rights and, respectively, of the Bulgarian courts considering the jurisprudence of European courts of justice. Still, the work of the Supreme Administrative Court to this effect can be characterised in most general terms. The Court occupies a special position in Bulgaria's contemporary judicial system. It has a remarkable history of establishment, actual functioning, closure and restoration. After it was closed down by the People's Courts Organisation Act of 1948, the Supreme Administrative Court was restored on 1 December 1996. It is a special judicial body and a court of last resort in administrative justice. During the years of its renewed existence, the Supreme Administrative Court has rendered a number of judgments and rulings in connection with the application of the Convention relating to the Status of Refugees of 1951, the Convention relating to the Status of Stateless Persons of 1954, the Convention against Discrimination in Education of 1960, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Protocol relating to the Status of Refugees of 1966, the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child of 1989 and the ILO Unemployment Provision Convention, 1934 (No. 44). Quite a few acts of the Supreme Administrative Court concern the application of regional international treaties on the protection of human rights, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention and the Framework Convention for the Protection of National Minorities. Interpreting the provisions of these international treaties, the national courts must take into consideration their specificity and abide by the generally accepted rules for interpretation of

international treaties, as well as the interpretative case-law of the international enforcement bodies. In this respect, the case-law of the Supreme Administrative Court has evolved over the years. The Court increasingly does not limit itself to referring to the relevant treaty provisions by citing them accurately, but also provides its own interpretation of these provisions, proceeding from their nature as instruments of international law. The Court resorts to international interpretative case-law in greater depth and invokes it specifically in its judgments and rulings. This ascertainment applies mainly to the application of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Supreme Administrative Court interprets the provisions of the Convention on the basis of the content of these provisions as established by the European Court of Human Rights. An emphasis should also be laid on the contribution of the Supreme Administrative Court to the execution of the ECtHR judgments against Bulgaria for violations of the CPHRFF. By its judgments pursuant to Littera (h) of Article 231 (1) of the Code of Civil Procedure (which enables the interested party to move for a reversal of an enforceable judgment where a ECtHR judgment has found that there has been a violation of the Convention), the Supreme Administrative Court has not only reversed preceding court rulings rendered in violation of the Convention but has also criticised, with good reason, the insufficient legislative amendments implemented after the European Court of Human Rights rendered the judgment against Bulgaria.

The eased access to the European international case-law in recent years, including through information technologies and its unofficial translation into Bulgarian, will undoubtedly be improving the performance of all Bulgarian courts.