

Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives

Notes on the Congress Theme

1st Thematic subsection: “Constitutional Courts between Constitutional Law and European Law”

Today, the role of constitutional courts is no longer restricted to the interpretation of national constitutional law in isolation. For a variety of reasons, the impact of European law on constitutional law and the mutual influences between European law and national law have increased in recent years. This applies first and foremost to the field of fundamental rights, but also to other aspects of constitutional law which are determined or influenced by international conventions at the regional level, particularly conventions concluded within the framework of the Council of Europe. Examples to be mentioned in this context are the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, the European Charter of Local Self-Government and the Framework Convention for the Protection of National Minorities. In addition, the constitutional courts of member states of the European Union are confronted by the additional legal stratum of EU law, characterised by a strong dynamic impact and unconditional mandatory application.

Against this background, constitutional courts fulfil an *intermediary function* of constantly growing significance which ultimately results in a strengthening of the rule-of-law principle not only at national but also at European level.

In this process, constitutional courts have a twin function of providing “translation” and “legitimacy”. The *translation function* does not so much relate to linguistic translation into the national language as to the fact that constitutional courts transpose the rulings handed down by European courts on the basis of European legal doctrine into national constitutional law and adapt them to fit national categories.

Areas of paradigmatic significance in this context are different nuances in the approach to the rule-of-law principle or different conceptions with a view to fundamental rights doctrine (third-party effects, organisational and protection duties, institutional guarantees, and others).

Their function of providing *legitimacy* arises from the interaction of national constitutional courts with European courts. Whenever constitutional courts address European case law or European law-making – even if this exploration may at times include criticism – and ultimately endorse European jurisprudence, they strengthen the jurisprudential role of European courts and thus augment their legitimacy.

In light of this situation, the following questions arise:

- In which areas does European law affect the interpretation of constitutional law?
- Are the rulings of European courts quoted in decisions of constitutional courts and thus given more consideration by other courts in their decisions?
- Will a national constitutional court arrive at the same or a similar conclusion as a European court even though it may use a different reasoning derived from constitutional law?
- Is there a critical distance between the reasoning of national constitutional courts with a view to European court rulings?

2nd Thematic Subsection: "Interaction between Constitutional Courts"

Whereas constitutional court decisions did not have a significant mutual influence until the 1980s, their mutual impact has become noticeably stronger since the early 1990s. In this context, influences are already discernible at the level of constitution-building, for instance as regards the implementation of different models of constitutional jurisdiction, and also in constitutional jurisprudence.

The mutual impact of constitutional-court decisions is limited for various reasons. In recent years, the dismantling of language barriers, the institutionalised exchange of leading decisions and regular bilateral meetings between constitutional courts have, however, considerably heightened mutual awareness of the development of different solutions to common problems.

In this context one must also explore a potential *indirect* mutual impact of constitutional court activities. The decisions of constitutional courts also inform court judgements at European level to a considerable extent. National solutions in the field of public law doctrine, particularly as regards fundamental rights, may have model character for European solutions. Whenever national solutions are acknowledged in European decisions, which will then in turn inform decisions taken by national courts in other states, this constitutes a mutual influence between constitutional courts, with European courts acting as intermediaries and catalysts.

Given this situation, the following questions arise:

- What are the prerequisites for the perception and reception of decisions by constitutional courts in other countries? Are there obstacles to such reception?
- Is there a tendency to make reference to other constitutional law systems?
- Which *soft law* documents are used to assist with the interpretation of constitutional law?
- Are comparative law studies and expert opinions a significant element of constitutional-court jurisprudence?

3rd Thematic Subsection: “Interaction between European Courts”

In the recent past, there are signs of a growing mutual reception of rulings, particularly between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). A main contributing factor to this process is the development of the international law framework. The intended accession of the European Union to the European Human Rights Convention is the most obvious illustration of this development. One may also expect additional momentum for the development of fundamental and human rights to be provided by the Charter of Fundamental Rights and its enshrinement in the Lisbon Treaty. The CJEU and the ECtHR already make regular reference to each other’s rulings, with the ECtHR basing its interpretation of the rights secured by the Convention on the Charter of Fundamental Rights, and the CJEU invoking decisions by the ECtHR for determining the substance of general principles of laws as well as, in the recent past, for its interpretation of fundamental rights provided by the Charter.

Against this backdrop, the following questions arise:

- In which areas does the CJEU make reference to the rulings of the ECtHR and/or constitutional courts on the fundamental rights enshrined in the ECHR?
- To what extent does the ECtHR make reference to EU law and the concomitant court decisions for its interpretation of the ECHR?
- What impact will the EU's accession to the ECHR have on mutual reception?
- Where are the limits and risks of such mutual reception?