

Constitutional Courts between Constitutional Law and European Law

Input Paper

The European continent has become a space of *constitutional interdependence* and consequently, national constitutional courts are now embedded in a constitutional fabric made of national constitutions, EU law, European treaties and conventions. This is all the more evident in the domain of fundamental rights.

This constitutional interdependence affects the national constitutional courts' responsibilities: on the one hand they are charged with new duties, because to some extent they are called to serve as European law adjudicators; on the other hand some of their traditional competences are to be adjusted to a more complex legal order.

Moreover, the national constitutional courts' mission overlaps in part with the activity of many other judicial bodies and in particular human rights adjudicators, whose decisions impact the work of national Constitutional courts.

1. How do Constitutional courts react to these facts?

Looking at the national reports and at the questionnaires, the approaches of the Constitutional courts might be synthetically outlined as follows:

- *Implementation and promotion*: although it is a common assumption that European law tends to displace Constitutional courts at the margin of the European legal order, because it primarily relies on the cooperation of lower national Courts, undoubtedly the Constitutional Courts' mission includes the enforcement of European obligations. National constitutions provide *European clauses*, so that European obligations are in a way constitutional obligations. As a consequence, Constitutional courts decide a number of controversies on European grounds and when they invalidate national legislation in contrast with European principles, they contribute to rendering European law more effective. At times, some national courts go even further and promote super-national legal concepts well beyond the European mandate. They disseminate the European legal culture all through their respective legal orders.
- *Reluctance*: a number of Courts are inclined to contain the use of transnational law at the minimum level in their own decisions, decide cases on domestic grounds rather than on European ones, tend to avoid formal referral to super-national law and case law, and escape all contacts with other national or super-national Courts.
- *Defense*: starting in the 1970's an increasing number of Constitutional Courts have over times developed some "*safeguard clauses*" designed to protect the core *values* of the national constitutional identity from all sort of interference from foreign or European law. A similar concern brings some national Courts to mark the boundaries that cannot be trespassed by European law, maintaining the control of the *competences* that pertain to the national constitutional order. Indeed values, fundamental rights and

competences are part and parcel of the aforementioned safeguard clauses that fall within the exclusive jurisdiction of national constitutional courts.

- *Challenge*: occasionally some constitutional courts have challenged straightforward a piece of European legislation or a decision of the European Court on *ultra vires* grounds or for conflict with basic principles of the national constitutional order. At times the challenge has been brought before the European Court; at other times divergences have resulted in a unsettled, mute conflict.

- *Participation*: in recent years an increasing number of Constitutional Courts have contributed to the development of common legal principles, taking an active role on the European stage, interpreting and enforcing European standards and especially making use of the preliminary ruling.

All these approaches often coexist. The same Court may at times be reluctant, cooperative, defensive, challenging, and so on.

2. What constitutional framework for the European space?

It is worth noting that each of these stances reflects and promotes different understandings of the European public square.

Some of them insist on boundaries, limits and divides and therefore tend to advance a context of *constitutional fragmentation*. In many European countries this might be a by-product of the traditional dualist approach to international law, based on a sort of “separate but equal” principle.

At the opposite, and sometimes in consequence of a monist approach to legal integration, other judicial doctrines foster *uniformity*, implying a sort of top-down relationship between European and national constitutional law and between European and national courts.

Overtaking the old dichotomy between dualist and monist views of European integration, a new *pluralist constitutional approach* can be promoted, where harmonization does not overlook diversity, standardization does not disregard disparities, and generality does not ignore singularity.

Constitutional pluralism seems to better correspond to the self-understanding of Europe itself, whose identity is defined by “unity in diversity” and is founded on a “subsidiarity framework”, that requires a core of common legal principles surrounded by a margin of appreciation wide enough to allow national constitutional cultures to survive.

3. New questions about the preliminary ruling

Preliminary ruling is one of the more powerful procedural connectors among courts serving the cause of constitutional pluralism. New signs of interest for this procedure are spreading all over Europe.

In the EU context, an increasing number of constitutional courts have abandoned their reticence and have started referring questions of interpretation or validity of European legislation to the ECJ by means of preliminary rulings.

Moreover, a preliminary procedure is now envisaged in the new Protocol 16 to the European Convention of Human Rights, so that the highest court of each contracting party may request the Strasbourg Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights protected by the Convention.

Finally, a special form of coordination between the ECHR and the ECJ is described in the Draft Agreement for the accession of the EU to the European Convention - the so called prior involvement -, so that, if a case has been taken to Strasbourg without the question having been considered by the Court of Justice of the European Union, the procedure is to be suspended in order for the Court of Luxembourg to be given precedence.

All these signs show that the time is ripe for formal interactions among constitutional and European courts.

In a way, whereas a few years ago the question was *whether* constitutional courts were to join the judicial dialogues taking place among other courts in Europe, at present this question has been given an affirmative answer. Apparently, constitutional courts no longer fear that a preliminary ruling request might raise the expectation of passive obedience to another court. Preliminary ruling is rather seen as an opportunity for national constitutional courts to be *agents* rather than passive *recipients* of the European constitutional construction.

This move towards more engagement of national constitutional courts in European constitutional conversations raises new questions, that might be usefully addressed.

For example:

In case of double preliminary questions – constitutional and European - *what order of priority* should be followed? Is it more convenient that Constitutional courts decide first on national constitutional grounds before the European Courts pronounce their decisions? Is this always true, both for the ECJ and the European Court of Human Rights? Or is the opposite true? What court should have *a final say*, if any? What court should have a “*first say*”, if any? Is it possible that, after asking a preliminary ruling, a constitutional court disregard the statement of the European court, held to be in contrast with the national constitution?

Does a preliminary ruling sent by a constitutional court have an *added value* for the European courts? Does it bring to their attention more arguments useful to a better comprehension of the case? Does it enrich their understanding of the national contexts? Is it therefore useful that a constitutional court refer to the European courts even when other similar questions have already been sent by lower courts?

So far, in Europe, preliminary ruling typically moves from the peripheries to the center. Might it be useful to envisage new forms of preliminary rulings going in other directions, from the center to the peripheries or connecting different peripheries?

Indeed all these question might receive different answers depending on the purpose attached to preliminary ruling. In the perspective of these introductory remarks the question is what kind of preliminary ruling better serves the idea of a pluralist constitutional space in Europe?