

A Falling Tree Makes More Noise Than a Growing Forest

On the Constitutional Courts' Underestimated Contribution to the Domestic Enforcement of the European Convention on Human Rights

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In October 2014, dealing with the question of whether the time has come for the United Kingdom (UK) to have a constitution, the president of the UK Supreme Court, *Lord Neuberger*, presented the following argument in support of a written constitution:

“If we had a constitution, this would presumably have primacy over decisions of the human rights court in Strasbourg and even those of the EU court in Luxembourg. Accordingly, where those decisions appeared to be inconsistent with any fundamental constitutional principles, those principles would prevail. At the moment, without an overriding constitution, it is very difficult for a UK court to adopt such an approach, but it is an approach which, for instance, the German constitutional court has shown itself quite ready to take when appropriate.”¹

Lord Neuberger's reasoning is crystal-clear. An ordinary court, be it even the country's highest court, is not in a position to successfully oppose the European Court of Human Rights (ECtHR). For that purpose a different kind of court is required: a *Bundesverfassungsgericht*-like constitutional court, backed by a written constitution.

UK peculiarities aside, this statement testifies to the widespread perception among legal scholars that constitutional courts are the most effective bulwark to protect national sovereignty against the ever more invasive intrusions by the Strasbourg court. In this view, the relationship between constitutional courts and the ECtHR is understood essentially in terms of op-

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¹ *D. E. Neuberger*, *The UK Constitutional Settlement and the Role of the UK Supreme Court*, Speech at the Legal Wales Conference 2014, 10.10.2014, available at <<https://www.supremecourt.uk>>, para. 32.

position, the German constitutional court being this approach's quintessential champion.

The papers published in this special focus do not intend to challenge this contention. They rather suggest that this is just one side of the coin and aim at situating this opposing role of constitutional courts in a broader picture where judicial cooperation is the rule rather than the exception. While much noise usually accompanies "the falling tree" of a constitutional court's judgment challenging the ECtHR, "the growing forest" of smooth cooperation between the two often goes unnoticed.

Cooperation and opposition, however, is not just a formula to describe the current state of the relationship between constitutional courts and the ECtHR. It can also be a normative approach. The constitutional courts' commitment to the domestic enforcement of the Convention and notably of the ECtHR's case-law is crucial, as constitutional courts are the most influential judicial authority within the domestic legal order. But occasionally voicing conflict with the ECtHR can also be considered, under certain conditions, as a legitimate task of constitutional courts, which can reinforce the legitimacy of the Convention system and its proper functioning, rather than jeopardize them. This is the perspective under which the papers published in this special focus insert themselves in the prolific literature on judicial dialogue between domestic constitutional courts and the Strasbourg court.

The essay by *David Kosař* and *Jan Petrov* helps situate the contribution of constitutional courts in the broader context of the domestic implementation of the Convention. They stress that the effectiveness of the Convention system relies essentially on the cooperation of domestic authorities, that can serve both as "diffusers" of the ECtHR's judgments and as "filters" for potential new violations. Constitutional courts are one of the domestic actors involved in this process, whose contribution is in many way affected and constrained both by the fundamental features of the polity they are embedded in and by their interaction with other domestic actors and, not least, by the players acting within the constitutional courts themselves.

In my paper I propose a comparative analysis encompassing the constitutional courts of six Western European countries to stress a general trend to use the Convention and the ECtHR's jurisprudence as a yardstick for constitutional review, notwithstanding the Convention's lack of constitutional status. I advocate this trend, as far from turning constitutional courts into mere agents of the ECtHR, it paves the way to a balanced relationship between constitutional courts and the ECtHR. This is not only beneficial to domestic compliance with the ECHR but also enhances the legitimacy and the functioning of the whole Convention system.

Conflicts between domestic constitutional law and the Convention are anything but rare. Squeezed between the two, there is no surprise that constitutional courts often let their constitution prevail over the Convention. However, the manner matters. This is what the paper by *Ausra Padskoci-maite* shows by comparing the attitude of the constitutional courts of Lithuania and Russia. In both countries, a direct clash between the constitution and the Convention occurred, and in both cases the constitutional courts in the end upheld the former over the latter. However, while the Constitutional Court of Lithuania confirmed the State's duty to abide by the ECtHR's judgments and therefore called upon the Parliament to amend the constitution, the Constitutional Court of Russia seems to endorse with its authority the political unwillingness to comply with the judgments of the ECtHR. In other words, while the Lithuanian Constitutional Court questions "who" must comply and "how", the Russian Constitutional Court rather questions "whether" to comply or not.

The Italian Constitutional Court is an interesting case-study, since in 2007 it consciously and in a resolute manner decided to accept the Convention and the ECtHR's jurisprudence as a measure of the constitutionality of domestic legislation. *Diletta Tega* examines the relevant body of case-law developed by the Italian Constitutional Court in the last ten years in reviewing domestic legislation in the light of the Strasbourg jurisprudence. Her analysis shows that, despite few cases of open conflict between the two courts, most judgments of the Italian constitutional court express a genuine quest for convergence and a sincere will to enforce the ECtHR's judgments. While this can rightly be considered a good example of the contribution of constitutional courts to the enforcement of the ECtHR, the author does not overlook the frictions produced by the interaction of two different systems of fundamental rights protection, whose differences should not be underestimated.

The Czech Constitutional Court's commitment to the Convention is remarkable too. Suffice it to mention that it was ready to defend its monopoly on the review of national legislation's conformity with the Convention even against a constitutional amendment that would have spread this review among all courts. *Ladislav Vybnánek* investigates the Czech Constitutional Court's attitude through an empirical analysis of the quotations of ECtHR case-law in the constitutional courts' decisions. The data shows a clear trend toward a growing consideration of the ECtHR in the constitutional court's jurisprudence, although the analysis proves that the quotations of the ECtHR are still highly dependent on the attitude of individual judges. Yet, the author warns that extensive references to ECtHR case-law do not nec-

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essarily correspond to a high degree of compliance, as quotations can serve other purposes.

All papers published in this special focus stick to a rather narrow – or traditional – notion of constitutional courts. They refer to constitutional courts as those peculiar institutions detached from other courts – from which they differ as to their composition and jurisdiction – that are entrusted with the task of upholding the constitution and with the exclusive power to nullify statutes passed by Parliament that conflict with the constitution. As it is known, such an institution is peculiar to many of the states of the Council of Europe, but not to all of them. The following papers do not claim that proper compliance with the ECHR can only be achieved through a constitutional court, so that those countries in which such an institution exists are better equipped to respect the Convention's obligations than those where there is no such body. They rather aim at investigating how a specific institution that has been established with the view of upholding the constitution in a pure domestic perspective can adapt its role to a different constitutional landscape strongly affected by the international obligation to protect fundamental rights. They explore the interaction between constitutional adjudication and the Convention system and stress the contribution constitutional courts currently make – and could further give – to a sound, multi-level system of fundamental rights protection in Europe.

The papers published in this special focus were first presented in June 2016 at the Annual Conference of the International Society of Public Law (ICON-S) that took place at Humboldt University in Berlin. We are grateful to the editors in chief of the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – Heidelberg Journal of International Law*, Armin von Bogdandy and Anne Peters, as well as to the managing editor, Rainer Grote, for hosting our contributions in this issue.