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CONSTITUTIONAL COURTS AS SUBJECTS OF JUDICIAL DIALOGUE IN EU COUNTRIES

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INTRODUCTION

This study analyzes the position of the Constitutional Courts as an active subject of the European judicial dialogue. In particular, various aspects of the Constitutional Court's role in the European structure will be presented, distinguishing between three main areas: the Court's role as a promoter of European judicial cooperation, its role as an active interlocutor in the dialogue.

These three main functions are not contradictory and may even overlap. This phenomenon is evidenced by three functions mentioned above: the Constitutional Court as an object of Europeanization and, at the same time, as a driving force of Europeanization. But in short, we can say that the Constitutional Court has undergone an intensive process that has forced it to reconsider key aspects such as the control of the constitutionality of laws, the role of the ordinary judge in controlling constitutionality, the limits of jurisdictional protection of fundamental rights, or the extent of direct procedural dialogue with other jurisdictional bodies

1. Constitutional courts and European judicial dialogue

Unlike ordinary legislation, the constitutions of the Member States are not subject to the influence of EU law, but rather the opposite. EU law is incorporated into national law by through delegation of powers, as provided for in the Constitutions of the Member States themselves. It is the Constitution that acts as a source of EU law, understood as a source that facilitates the incorporation of European rules into domestic law. In the case of Spain, Article 93 of the Spanish Constitution clearly reflects the system of incorporation of EU law, as an autonomous legal order, into the Spanish legal system as a result of the prior transfer of powers deriving from the Constitution, previously agreed upon by means of an organic law[1].

However, the fact that the Constitution acts as a source for the integration of the Union legal system into the domestic legal system does not mean that it has not itself undergone mutations as a result of European rules. On the contrary, the process of European integration, driven by the political will that

[1] López Castillo A. Constitución e integración. El fundamento constitucional de la integración supranacional europea en España y en la RFA, Centro de Estudios Políticos y Constitucionales.

guides it, has led the Member States to align themselves with the collective priorities that characterize the Union. It is therefore not surprising that the Constitutions are reformed, even frequently, in order to adapt them to EU law, which demonstrates both the normative force of the Constitution and its flexibility in relation to EU law.

The Constitution also operates at a different level from EU law. The latter enjoys an autonomy, recognized in the case-law of the Court of Justice, which makes it immune to review by national authorities, including the courts. Although EU law is integrated into the national legal order,it is incorporated while preserving its autonomy, which is why it holds a privileged position within national law that distinguish it from international law[2]. In this case, the Constitution is not just "national legislation", but the supreme norm that includes the basic norms for the functioning of the entire legal order, including EU law in its own statute, but integrated into domestic law.

All of the above explains why the role of the Constitutional Court differs from the role of other national courts when it comes to working with EU law and its application in the settlement of disputes. For the Constitutional Court, EU law is not part of the constitutionality block, but it is also not correct to understand it as another part of ordinary legality. The established classification of EU law as "infra-constitutional law" may be formally correct, but it does not accurately reflect the special position that EU law occupies within the framework of ordinary law. As a result of this particular relationship between European rules and the Constitution, the Constitutional Court defines the precise role of EU law and also shapes its own role as a European constitutional jurisdiction. Added to all this is the importance of the European judicial context and socialization, a process generally referred to as the "European judicial dialogue", which encourages European constitutional jurisdictions to maintain a constant dialogue with each other in order to ensure the coherence of the European constitutional system[3].

National courts are required to apply EU rules, recognizing their direct effect and primacy in order to resolve disputes by ensuring the full effectiveness of European rules. This obligation imposes on courts the duty to recognize, without any interference with national law, the possibility of relying on European rules with direct effect and the power of ordinary courts to apply or annul the rules. While the European Commission exercises the function of supervising the conditions of application of Union law in national

[2] Halberstam, D. 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward. German Law Journal, 16, 2015. pp. 105-146.

[3] Rodríguez Iglesias, G. C. Tribunales constitucionales y Derecho comunitario. En Pérez González, M. (coord.) Hacia un nuevo orden internacional europeo (Es-tudios en homenaje al profesor Manuel Díez de Velasco)1993. pp. 1175-1200. Tecnos.

courts, individuals have more limited remedies, which are limited to the national system of remedies.

The Belgian Constitutional Court does not have the power to review legislation directly in the light of European and international law, but has developed two techniques for indirect review. The first technique used by the Court since 1989 is review through Articles 10 and 11 of the Belgian Constitution, which prohibit any discrimination in the enjoyment of all rights and freedoms, regardless of their origin. The second method, which the Court has been applying since 2004, is the control by means of "analogous" fundamental rights: when the Court exercises control over a fundamental right. Title II of the Constitution takes into account, even ex officio, provisions of international law which guarantee rights or similar freedoms, this may even be a partial analogy[4].

The consequence of this open attitude towards European law is that the Belgian Constitutional Court has widely applied the case-law of the ECHR and has cited it in This approach has several advantages: first, the Court adopts an evolutionary approach in interpreting of the constitutional provisions relating to fundamental rights, most of which have not been amended since 1831; second, the principle of primacy of legal protection in the conflict between constitutional law and supranational jurisprudence is widespread; third, the above-mentioned control maximizes legal protection against restrictions on fundamental rights, which must satisfy, on the one hand, the formal condition of provision by the legislature, if the Constitution so requires, and, on the other hand, the substantive restrictive conditions contained in the ECHR; finally, the Belgian Constitutional Court facilitates dialogue with the ECtHR. Indeed, genuine dialogue requires, in the words of Jürgen Habermas, a "common ground" or the use of a common language that allows the participants in the discussion to understand each other. It is this common language that has consequences for the relationship between the ECtHR and the Constitutional Court. First, several decisions and rulings of the ECtHR contain references to Belgian constitutional jurisprudence. This applies not only to judgments and rulings against Belgium, but also in other cases. The most famous example concerns the ban on the burqa, namely: the ECtHR decision S.A.S. v. Franc[5] of 1 July 2014 cites the decision of the Constitutional Court of Belgium of 06.12.2012 No. 145/2012, since the grounds for concluding that there was no violation in both decisions were almost the same,

[4] Dakir c. Belgique (Requête no 4619/12) URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-175139%22]}; Belcacemi et oussar c. Belgique (Requête no 37798/13) URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-175141%22]}

[5] «S.A.S. проти Франції» (Заява № 43835/11) URL: https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-150987%22]}

in particular the notion of "living together" or the possibility of interpersonal relationships being open as an essential element of collective life within a democratic society.

This case demonstrates the reciprocal dialogue between high courts. The Belgian Constitutional Court extensively cited and applied the case-law of the ECtHR, and the ECtHR then referred to this Belgian decision to justify a similar ban in another Council of Europe member state. The ECtHR's judgment of 11 July 2017 on the Belgian ban is interesting because it reminds the ECtHR of its subsidiary role in that national authorities are better placed than an international judge to assess local needs and context. Secondly, the number of ECtHR judgments criticizing the case-law of the Belgian Constitutional Court is very limited. The first very well-known judgment is Pressos Compania Naviera[6], which condemned the legislative retroactivity of thirty years. It was also the first case in which the ECtHR extended the scope of Article 1 of the First Additional Protocol to legitimate expectations of compensation claims, where this is sufficiently justified in national law.

Less well known is the Hakimi judgment[7], according to which a person convicted in absentia must be informed of the applicable remedies and time limits. In most cases, the ECtHR agrees with this view of the Constitutional Court. In paragraph 16 of this judgment: "Following the judgment of the Court in the case of Da Luz Domingues Ferreira v. Belgium (no. 50049/99, 24 May 2007), 30 December 2009 The Belgian legislature amended Article 187 § 2 of the Code of Criminal Procedure and introduced Article 442bis, which provides: "If a final judgment of the European Court of Human Rights finds that the European Convention for the Protection of Human Rights and Fundamental Freedoms or the additional protocols thereto (...) have been violated, the reopening shall concern only the proceedings which led to the conviction of the applicant in the case before the European Court of Human Rights or to the conviction of another person for the same act and on the basis of the same means of evidence".

This conclusion is linked to the technique of the Constitutional Court, which consists in following the case-law of the ECHR in its own decisions. A typical example in this respect is the case-law on the principle of non bis in idem. The Belgian Constitutional Court annulled in its decision № 61/2014 of 3 April 2014 the article of the law establishing the principle of "una via" in the principles of prosecution for tax law violations. In the meantime, the

[6] Case of Pressos compania Naviera S.A. and others v. Belgium URL: (Application no. 17849/91) 20.11.1995. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58056%22]}

[7] Affaire Hakimi c. Belgique URL: (Requête no 665/08) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-99717%22]}

Grand Chamber of the ECtHR adapted it into case law in the case of A and B v. Norway (2016)[8]. The Belgian Constitutional Court immediately referred to this decision in its own decisions (e.g. № 121/2017[9]; № 16/2018[10]). The Belgian Constitutional Court also provides greater protection than the ECHR, for example in matters concerning the right of everyone to establish their origin. Thus, according to decision № 20/2011 of 3 February 2011 ("[…] biological and social reality prevails over legal presumptions"). Thus, according to paragraph B14 of the decision of the Belgian Constitutional Court No. 18/2016[11] of 3 February 2016: "it is not justified by the concern to preserve peace in the family when family ties are in fact absent"[12].

In the Belgian Constitutional Court, differences of opinion may also arise because the Constitutional Court is part of an objective judicial review in which norm control is exercised, while the decisions of the ECtHR are based primarily on the facts of the case. Thus, in the pilot judgment W.D. v. Belgium[13] of 6 September 2016, in which the ECtHR found a violation by Belgium of Articles 3, 5 § 1, 5 § 4 and 13 in conjunction with Article 3 of the Convention, stemming from the structural dysfunction associated with the detention of offenders suffering from mental disorders. The ECtHR refers to the Constitutional Court's judgment of № 142/2009[14], which states that the authorities must satisfy the interests of the interned person, but that a refusal to do so does not mean that the relevant legislation is contrary to the Constitution and that it is the responsibility of the courts, not of the judiciary, to review the authorities' compliance with the law in a specific case. The large number of convictions in Belgium in the case of the internment of persons with mental disorders mainly concern the lack of space in specialized and adapted institutions. This situation concerns the application of the law and therefore falls outside the jurisdiction of the Belgian Constitutional Court.

Analyzing the case-law of the Belgian Constitutional Court, we can state that there is an indirect dialogue between the Belgian Constitutional Court and

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[8] Affaire A et B c. Norvège (Requêtes nos 24130/11 et 29758/11) URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-168973%22]}

[9] Decision DCC 17-121 DU 08 JUIN 2017. URL: https://courconstitutionnelle.bj/files/decisions/DCC17-121_8_juin_2017.pdf

[10] Cour constitutionnelle, Arrêt n° 16/2018 du 7 février 2018 URL: https://www.stradalex.com/fr/sl_src_publ_jur_be/document/cconst_2018-16

[11] Arrêt n° 18/2016 du 3 février 2016URL: https://www.const-court.be/public/f/2016/2016-018f.pdf

[12] Arrêt n° 18/2016 du 3 février 2016 URL: https://www.const-court.be/public/f/2016/2016-018f.pdf

[13] Affaire W.D. c. Belgique (Requête no 73548/13) URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-166489%22]}

[14] Cour constitutionnelle, Arrêt n° 142/2009 du 17 septembre 2009. URL: https://www.stradalex.com/en/sl_src_publ_jur_be/document/cconst_2009-142

the ECtHR. The Belgian Constitutional Court incorporates the case-law of the ECtHR in its decisions.

The Constitutional Court is a member of the "Network of Supreme Courts" established by the ECtHR for the purpose of exchanging information between the ECtHR and national high courts.

From August 1, 2018 – the date of entry into force of Protocol № 16 to the ECHR – an instrument for direct dialogue with high courts, which may, in the context of a pending case, request advisory opinions from the ECHR. Ukraine ratified Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms[15] on October 5, 2017, which entered into force on August 1, 2018, in accordance with its preamble: "Considering the expansion of the Court's competence to give advisory opinions, which will further contribute to strengthening the interaction between the Court and national authorities and thus support the implementation of the Convention in accordance with the principle of subsidiarity"[16]. The importance of Protocol No. 16 in that it institutionalizes the dialogue and opens it in both directions with the possibility for the highest national courts to express their objections to certain Strasbourg case-law and to indicate the specificities and which national interests need to be taken into account is something that may prompt the ECtHR to review its case-law on this issue or at least to expand its margin of appreciation.

It is appropriate in the study to pay attention to the judicial dialogue of the Spanish Constitutional Court. In Spain, the amparo procedure is an important addition to the arsenal of legal remedies when an individual suffers from the incorrect application of EU law, in particular the fundamental principles of this legal system. In the case-law, which first emerged from Constitutional Court Decision 145/2012 and was then consolidated by the plenary session in Constitutional Court Decision 232/15, the Constitutional Court has openly confirmed from the outset that "it is this Court that must ensure respect for the principle of the primacy of Union law when [...] there is an authentic interpretation made by the Court of Justice of the European Union itself. In these cases, ignoring and excluding this rule of EU law, as interpreted by the Court of Justice of the European Union, may lead to an "unjustified and arbitrary choice of the rule applicable to the proceedings", which may lead to a violation of the right to effective judicial protection"[17].

[15] Протокол № 16 до Конвенції про захист прав людини і основоположних свобод. URL: https://zakon.rada.gov.ua/laws/show/994_002-13#Text

[16] Протокол № 16 до Конвенції про захист прав людини і основоположних свобод. URL: https://zakon.rada.gov.ua/laws/show/994_002-13#Text

[17] STC 145/2012, de 30 de julio, FJ 5.

he exposition is as follows: “The Court of Justice of the European Union has now developed a consolidated case-law replete with the obligation of the courts of the Member States to ensure the enforcement of such decisions [...] The Court of Justice of the European Union has repeatedly held that ‘the courts [of the Member States] are required, under Article 267 of the Treaty on the Functioning of the European Union], to take into account, however, that the rights of the individual derive not from that decision but from the provisions of Community law itself which have direct effect in the interests of the individual in the national legal system.’ As a result of the above, the ordinary courts of the Member States, when faced with a national provision which is incompatible with EU law, are obliged not to apply the national provision, whether it was subsequent to or prior to the establishment of the rule of EU law. This obligation, the existence of which is an integral part of the principle of primacy set out above, is incumbent on the judges and courts of the Member States, regardless of the rank of the national rule, which allows for a decentralized review by the ordinary courts of the compatibility of national legislation with European Union law”[18].

The consequences of this doctrine are clearly visible in the analysis carried out by the Constitutional Court in a specific case, which was subsequently brought to light in Constitutional Court Decision № 232/15[19]. The Court ruled on the compatibility of the temporary scheme for the maintenance of civil servants with Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work, in conditions that are contrary to those previously applied by the Spanish courts. Despite the legal confirmation of the new criterion by the Luxembourg court, the High Court of Justice of Madrid continued to apply the previous and already disavowed methodological approach, to which the Constitutional Court reacted strongly with the following words:

“The judgment of the Administrative Chamber of the High Court of Madrid (i) does not cite or assess the case-law of the Court of Justice of the European Union relied on, nor, what is truly relevant to the case, does it cite or assess the order of Lorenzo Martínez of 9 February 2012 [...].

By that judgment (and the reasoning), the Chamber has failed to substantiate the essential arguments of the defendant, such as the existence of that precedent, issued in a case identical to that which was the subject of the resolution, and also the fact that it follows from the Court of Justice of the European Union, which is responsible for resolving, without prejudice, the doubts as to the interpretation of the Directive relied on by the party; and, by failing to do so, it also decided the appeal with an “unreasonable and arbitrary

[18] STC 145/2012, FJ 5.
[19] STC 232/2015, 5 de noviembre.

choice of the rule applicable to the proceedings" (Judgment of the Constitutional Tribunal 145/2012), since it decided on its own, autonomous and exclusive decision, with the interpretation of Article 4.1 of Directive 1999/70/EC, imposed and indicated by the authority competent to do so, with a binding nature (Judgment of the Constitutional Tribunal 145/2012), thereby violating the principle of the primacy of European Union law".

The question referred for a preliminary ruling has become a cornerstone of the European judicial system, facilitating a direct dialogue without intermediaries between national judges and the Court of Justice. The reference to a preliminary ruling has been a fundamental source of interpretative uniformity in the European legal area, and its virtuality is based on the principle of trust between the courts of the Member States and the supreme courts of the European Union[20].

However, for the system to function properly, it is essential that each party plays its part, which requires that, in the case of national courts of last instance, they take all appropriate precautions and verify that the interpretation they give when deciding the case is the most convincing and well-founded. In case of doubt, it is important that higher national courts refer to a previous ruling on interpretation or validity in order to ensure that the correct interpretation of European rules comes from a single interpreter common to all Member States. This responsibility lies with national courts of last instance, which are obliged to refer questions for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. As is well known, this obligation has been mitigated by the case-law of the Court of Justice of the EU in the Cilfit and Da Costa[21], cases, according to which courts of last instance are exempted from the question when an EU rule is "clear" or has been "explained" by the Court of Justice itself.

Each Member State may provide for internal mechanisms to monitor and filter unlawful judicial decisions, including those leading to a refusal to refer a matter for preliminary ruling. In the case of Spain, the remedy available to individuals is the ordinary system of appeals and, ultimately, the amparo remedy before the Constitutional Court. When a decision has exhausted all avenues of appeal, including a request to quash the proceedings, a person may invoke a breach of the effective judicial protection provided for in Article 24 of the Constitution by filing an appeal for amparo with the Constitutional Court.

As a general rule, the Constitutional Court states that the standard of review applicable to cases where a court refuses to refer a matter for a

[20] Ruiz-Jarabo Colomber, D. La Justicia de la Unión Europea. Civitas. 2011

[21] Cilfit y otros (283/81, EU:C:1982:335) y de 27 de marzo de 1963, Da Costa y otros (28/62 a 30/62 EU:C:1963:6).

preliminary ruling is the same as that applicable to other judicial decisions. According to the Constitutional Court:

"The existence of rules of Union law does not alter the standard of constitutionality generally established for judicial decisions interpreting and applying the law to a specific case. Where doubts arise as to the interpretation of a rule of European Union law or its application in relation to the facts of the dispute and the judicial authority decides not to initiate consultation, it is constitutionally decisive that this is done by means of a rational interpretation of the legal system and is therefore not the result of a patent error or arbitrariness"[22].

However, in judgment 58/2004, the Constitutional Tribunal accepted an additional case in amparo, in cases where a national court, obliged to refer a question for a preliminary ruling under Article 267(3) TFEU, fails to fulfil this obligation and, moreover, fails to apply national legislation contrary to EU law, the parties suffer a breach of the fundamental right to effective judicial protection (Article 24 of the Constitution), namely in its aspect of the right to a fair trial. The judgment raised some doubts, since the Constitutional Court found a breach of law in a case in which the Spanish court of last instance not only failed to refer a question for a preliminary ruling but also failed to apply a parliamentary law. According to some commentators, judgment 58/2004 created a case of protection in amparo in all those cases where the body of last instance does not question the previous decision and does not apply the law, regardless of whether the conditions of Cilfit or Da Costa were met. This approach seems to have been confirmed a few years later, in judgment 194/2006, but in a case where EU law was not applied[23].

Throughout the judgment, the Plenary Session of the Constitutional Court extends the protection of Article 24 of the Constitution also to cases of non-application of normative norms.In addition, the Constitutional Court confirms that the degree of control it will exercise regarding the refusal to refer the matter to a preliminary ruling will depend on the outcome of the contested decision: if the court of last instance decides to uphold the relevant national rule under consideration, the review of the obligation to refer the matter to the preliminary ruling the decision will be reduced and subject to a standard of reasonableness and arbitrariness. However, when the judicial decision under review does not apply national law without referring the matter to a preliminary ruling, the Constitutional Court opens the door to strict and even stricter amparo review than that provided for by the doctrine of the express act.

[22] SSTC 27/2013, FJ 6; 212/2014, FJ 3; 99/2015, FJ 3; 135/2017, FJ 4, y 22/2018, FJ 3.

[23] Huelin Martínez de Velasco, J. Las implicaciones constitucionales del incum-plimiento del deber de plantear cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea (Una aproximación "pos-Lisboa"). Revista Española de Derecho Europeo, 39, 2011. pp. 375-412

The intervention of the Constitutional Court as a guarantor of the proper functioning of the previous decision also forced it to distinguish the conditions of the dialogue with the previous decision in Europe from the internal dialogues required by the Spanish Constitution itself. As written by A. García: "The Spanish ordinary courts have at their disposal the question of unconstitutionality provided for in Article 163 of the Spanish Constitution, which allows them to refer to the Constitutional Court their doubts about the validity of the law applicable to the case. The issue of unconstitutionality operates in terms that are procedurally similar to the issue of a preliminary ruling, to the extent that both mechanisms are formulated as procedural incidents with a suspensive effect on the main proceedings"[24].

This approach raises a number of doubts and it is obvious that it is not compatible with EU legislation.By creating a double standard of constitutional protection depending on whether or not the court of last instance applies a national rule because of its compatibility or incompatibility with EU law, the State finds itself in a position of advantage and procedural advantage, which hinders judicial review and weakens the position of persons relying on EU law, even if they do so successfully. This will be particularly true in the contentious-administrative procedure, where it is the Administration, as the defendant, that generally defends the legality and, therefore, the applicability of national rules. Whenever the Administration loses a dispute in the context of which a Spanish rule was inapplicable because it is contrary to EU law and no question has been referred for a preliminary ruling (even if the requirements of a clear act and a specified act are met), a channel of protection is opened to it, and to it alone, in the context of which the person does not avail himself. Such a result is questionable and casts serious doubts on the timeliness of the doctrine established by the Constitutional Court in STC 37/2019.

During the first years of Spain's accession to the European Communities, the operation of both references did not lead to procedural dysfunction. On the contrary, both instruments remained within their respective powers, one of which provided a concentrated control of the constitutionality of laws in Spain, while the other guaranteed the uniformity of the interpretation of EU law. However, the growing extension of EU law and the increasingly frequent collisions between national law and European rules led to the ordinary courts being faced with certain dilemmas, especially at a practical level: whether a Spanish law raised doubts as to its compatibility with both the Constitution and EU law. Was the ordinary judge obliged to follow any particular decision? Was there any constitutional obligation to give priority to either of these avenues, or did the judge have discretionary powers to decide depending on the particularities of each case?

[24] Alonso García, R. El juez español como juez comunitario. Tirant lo Blanch. 2003

This tension, described as the problem of the "double jeopardy", was exacerbated as the time limits for deciding questions of unconstitutionality were extended by several years, while previous decisions were processed within fifteen months, sometimes through urgent procedures that were aired for three or four months. In addition to the practical desirability of obtaining a faster response from the Court of Justice, the Constitutional Court could see its function as a centralized expert for reviewing the constitutionality of laws that were questioned for reasons of procedural efficiency.

All this was raised in the context in which the Court of Justice was called upon to rule on this issue, albeit in the wake of the debate that had arisen in France following the creation of the so-called "priority question of unconstitutionality". The French mechanism, which empowered the Court of Cassation and the Council of State to refer questions of unconstitutionality of laws to the Constitutional Council, operated in the same way as the Spanish question of unconstitutionality, but parliamentary debates in the French National Assembly showed that there was also an aim to limit the role of the European courts. both the Court of Justice of the European Union and the European Court of Human Rights, avoiding referrals to those courts[25]. In the context of this debate, the Court of Justice was to rule in the Melki and Abdeli case[26], in which it confirmed the established European case-law that national courts have a margin of appreciation to choose one or the other, but that national law cannot establish the use of one over the other, in particular the national priority over the European one. The approach of the Melki and Abdeli doctrine aims to ensure the autonomy of the judge faced with a dilemma, while his final decision is not conditioned by the obligations of national law.

The Constitutional Court addressed this issue in 2016 in a Plenary Resolution (ATS 168/2016). At that time, the Court had already presented its case-law in the Melki and Abdeli cases and had the opportunity to repeat it for a second time in the Austrian context, another Member State with a system of concentrated constitutional review of laws.The Spanish Constitutional Court has thus sought ways of preserving its autonomy as guarantor of concentrated control over the constitutionality of laws, while at the same time facilitating judicial dialogue between the ordinary Spanish courts and the Court of Justice. The result is a balanced doctrine used by the Constitutional Court, which gives "priority" to a question referred for a preliminary ruling under Article 267 TFEU.

The Constitutional Court's approach can be described as formalistic, since it follows a literal interpretation of the legislation in order to conclude that it

[25] León Alonso, M. La cuestión prioritaria de constitucionalidad: un nuevo de-safío para la justicia constitucional francesa. Revista General de Derecho Público Comparado, 10. 2010

[26] Sentencia de 22 de junio de 2010 (C-188/10).

is constitutionally necessary to give priority to Article 267 TFEU. This conclusion goes much further than what the Melki and Abdelli doctrine implies, but for the Constitutional Court it is a consequence of the very requirements of the Constitution. In fact, as provided for in Article 163 of the Spanish Constitution, as well as in Article 35.1 of the Organic Law on the Constitutional Court, the question of unconstitutionality must always relate to a legal provision that is "applicable to the case"[27]. However, if an ordinary court refers a question for a preliminary ruling on its doubts as to the compatibility of that law with EU law, a negative conclusion on the law will lead the court to fail to apply the principle of the rule of law. And to the extent that the factual premise of the question of unconstitutionality is the existence of a law "applicable to the case", a law that is contrary to EU law is not law. Thus, the logical-formal argument leads to the conclusion that the question referred to the Court for a preliminary ruling is of importance for the same court, after clarifying doubts about compliance with EU law, to refer its doubts about constitutionality to the Constitutional Court.

In the words of the Spanish Constitutional Court itself: "While a question referred for a preliminary ruling by a judicial body concerning a legal provision is pending, on the grounds that it may be incompatible with European Union law, that body may not raise the question of unconstitutionality under that same rule until the Court of Justice of the European Union has ruled. The possible incompatibility of national legislation with EU law would be the reason for its inapplicability in the proceedings and, consequently, one of the conditions necessary for the admissibility of a question of unconstitutionality would be absent; that the provision with the status of law in question is 'applicable to the case'. The simultaneous submission in the present case of a question referred for a preliminary ruling to the Court of Justice of the European Union and the question of unconstitutionality therefore renders the latter inadmissible on account of non-compliance with the requirement of applicability (Article 37.1 of the Law on the Constitutional Tribunal)."

The Spanish doctrine eases the task of the ordinary judge, who previously faced a dilemma that the Constitutional Court itself described in Decision 168/2016 as a "complex situation." This situation was further complicated by the long wait to which the unconstitutionality incident subjected the ordinary courts and the parties, which could have been overcome by recourse to Luxembourg, but at the cost of undermining the role of the Constitutional Court as guarantor of the constitutionality of laws. The solution chosen by the

[27] Roca, E. y Couso, S. ¿Es real el diálogo entre tribunales? Cuestión prejudicial y control de constitucionalidad por vulneración de derechos y libertades fundamen-tales. Teoría y Realidad Constitucional, 39, 2017. pp. 529-548

Constitutional Court in Case 168/2016 is somewhat formalistic, but in pragmatic terms it solves various problems, reducing the discretionary powers of the ordinary judge, while promoting European dialogue and avoiding any risk of incompatibility with Union law. Furthermore, it avoids entering into nuances and contradictions such as those recently encountered by the Italian Constitutional Court in the same case[28]. As is well known, any initiative that limits the power of a national court to refer a question for a preliminary ruling risks infringing Article 267 of the Treaty on the Functioning of the European Union. The doctrine laid down in Decision 168/2016 neutralises this risk.

In the Melloni case, nothing more than a margin of manoeuvre for the constitutional courts of the Member States arose in situations where national law increases the level of protection of a fundamental right beyond that afforded by EU law. This raised the question of the interpretation of the first order, a few years after the entry into force of the Charter of Fundamental Rights of the European Union, Article 53 of which provides, in clearly ambiguous terms, a conflict rule which a priori allows Member States to raise the level of protection to higher levels than those provided for by the Charter. In addition to all this, the specific case concerned none other than the European arrest warrant, a paradigmatic instrument of criminal judicial cooperation, fundamental in the fight against crime in the European area, but closely linked to fundamental values and extremely sensitive to the constitutional traditions of the Member States.

In the Melloni case, the Constitutional Court was faced with a clearly exceptional situation: the Court's own case-law had raised the fundamental right to a fair trial to a level that few precedents in Europe had, to the point of a constitutional prohibition on the extradition of persons convicted in absentia to a third country[29]. This prohibition, which stems from the external dimension of the substantive content of the fundamental right to a fair trial, had its roots in extradition practice, but quickly came up against the European arrest warrant and Framework Decision 2002/584/JHA on the European arrest and extradition procedures between Member States, which in no way expressly recognised a practice as widespread as the Spanish one.On the contrary, the Framework Decision relied on the case-law of the European Court of Human Rights in order to establish certain conditions under which a conviction in absentia could be enforced in another Member State by means of a European arrest warrant, meaning that the warrant could be enforced in cases where a

[28] Alonso García, R. La puesta en práctica por la Corte costituzionale de la protección multinivel de derechos en la UE. Parte I. Working Paper IDEIR, 37.

[29] Arroyo Jiménez, L. Derecho europeo y tutela judicial efectiva (II): el derecho a una resolución fundada en Derecho. Almacén del Derecho. URL: https://almacendederecho.org/derecho-europeo-y-tutela-judicial-efectiva-ii-el-derecho-a-una-resolucion-fundada-en-derecho

person had been convicted in absentia and certain conditions were met (conditions which were met in the case of Mr Melloni).

The Constitutional Court was faced with a case in which there was a conflict between the levels of protection of a fundamental right. On the one hand, the fundamental right to a fair trial was enshrined in Article 47 of the Charter of Fundamental Rights of the EU, which appeared to allow, in accordance with the case-law of the European Court of Human Rights, the enforcement of a sentence in absentia in certain circumstances; and, on the other hand, the same fundamental right in the Spanish domestic dimension, which prohibited the execution of an arrest warrant where a conviction had been handed down in absentia, regardless of the circumstances of the case. Faced with this dilemma, the Constitutional Court decided to refer the question to a preliminary ruling in which it asked the Court of Justice whether the interpretation given by the EU legislature in the Framework Decision was compatible with Article 47 of the Charter. And if the answer to this first question was in the affirmative, the Constitutional Court then asked the Court to clarify whether a national court could increase the level of protection of a fundamental right and thus supersede EU law.

The Court's answer was somewhat predictable.In the ECtHR ruling, the Court of Justice of the EU upheld the European body's choice that a fundamental right is not infringed when the execution of an arrest warrant concerns a conviction in absentia that meets certain conditions. The Court then confirmed its traditional position (established before the Charter entered into force in 2009) and categorically stated that national legislation cannot increase the level of protection of a fundamental right if this results in a breach of EU law, as was the case in Melloni.

The decision in Åkerberg Fransson qualified the traditional case-law and gave a categorical result in favour of the primacy of EU law only in cases where the issue was "entirely determined by EU law". That is, in cases where EU law did not leave a discretion to the Member State. However, where EU law imposes obligations with discretionary limits, in such cases the national court may choose between the level of protection it considers most appropriate, provided that this does not affect the unity, primacy and effectiveness of EU law. According to the Court: "[W]hen a court of a Member State is called upon to review the compatibility with fundamental rights of a provision or national measure implementing EU law within the meaning of Article 51(1) of the Charter, in a situation where the action of the Member States is not entirely determined by EU law, the national authorities and courts remain competent to apply national standards of protection of fundamental rights, provided that such application does not affect the level of

protection provided for by the Charter, as interpreted by the Court of Justice, or the primacy, unity and effectiveness of EU law"[30].

European judicial dialogue is not articulated solely through previous decisions. Communication between courts, in terms which give meaning to case-law and the interpretation of law, is a practice that develops in the European area through several channels. It is true that Article 267 of the Treaty on the Functioning of the European Union is a paradigm for dialogue between courts with decisive interpretative consequences, but it is important not to ignore other formats in which the Constitutional Court, as well as its European counterparts, participate.

Dialogue also operates within the Union through other mechanisms of judicial cooperation, such as the European arrest warrant and other instruments of cooperation in criminal matters, where courts must carry out an analysis of compliance with fundamental rights standards, sometimes conflicting standards. Moreover, in a system such as the European one, where cooperation mechanisms are based on the principle of mutual recognition based on mutual trust, dialogue is articulated not only when these mechanisms are used, but also when courts disagree with each other in the interpretation of these instruments or in the mutual recognition of their decisions. This situation is increasingly common in cases of criminal judicial cooperation, when the executing court has doubts as to the observance of basic fundamental rights standards in the State of the country in question. The CJEU has recognised that the executing courts have certain powers to verify these standards in the responding country, but they are always subject to prior consultation, checks and a communication process which, in short, obliges the courts to "dialogue" with each other in order to reach a common interpretation of the cooperation mechanisms.

And in a society that is highly "mediatised" and subject to the daily and intense influence of current events and immediacy, dialogue can also function in para-judicial forums, but very effectively.An example of how dialogue was formulated outside jurisdictional channels, but on a matter of paramount importance for Union law and the constitutional law of the Member States, is that which followed the judgment of the German Federal Constitutional Court of 5 May 2020 in the Weiss cas[31]. On that day, the German Supreme Court declared the Court's judgment ultra vires in Germany, and later did the same with the European Central Bank's judgment. Although the effects of the judgment were limited in time, the reaction was not long in coming, and a few days later the Court of Justice of the EU published an unprecedented press release in which it stressed the importance and validity of the principle of the

[30] Akerberg Fransson (C-617/10, EU:C:2013:105) apartado 29

[31] Sentencia de la Sala Segunda del TC alemán, de 5 de mayo de 2020.

rule of law of the EU. In its press release, the Court of Justice also recalled the importance of the principle of equality between Member States, clearly alluding to the fact that the most economically and demographically prominent state in the Union could not adopt common European rules of its own accord, for fear of destroying the European project. A few days later, the President of the German Federal Constitutional Court and the rapporteur of the judgment began giving interviews in an unprecedented media blitz, defending the reasoning behind the judgment and rejecting criticism, including that of the Cour[32]. Shortly afterwards, the President of the Court of Justice, Cohen Lenaerts, published an article in an online symposium on the influence of German law on the European legal sphere, in which he elaborated on the approach of the press release published by the Court of Justice in May last year. Meanwhile, Germany's Federal Constitutional Court has undergone a series of changes, including a change of president and the renewal of other judges, in a process that is expected to allow the German court to qualify the provisions of its May 5, 2020, ruling.

In short, the "dialogue" in the European judicial sphere, and especially in the constitutional area, has reached an extraordinary degree of complexity and sophistication, going beyond the traditional dialogue of the pre-judicial decision through Article 267 of the Treaty on the Functioning of the European Union. When assessing whether judicial dialogue is positive or negative, useful or not, or, in short, when assessing the judges who conduct the dialogue, it is necessary to take into account all the options for dialogue that currently exist. As has been observed, these options are not rare and show no signs of losing intensity in the future.

2. Wittgenstein's Scale: Dialogues between Ordinary and Constitutional Courts

The use of these foreign decisions must be for the purpose of implementing fundamental human rights. It is necessary to promote a broad debate that will allow all the conflicting voices to be heard until a common denominator is found, which will be more or less abstract according to the difficulties that arise.

To this end, the Court must verify the similarity or textual proximity between the Constitution of its country and the Constitution of the country where the constitutional decision to be applied was made. This proximity is important when it is intended to carry out constitutional implementation. But grammatical proximity, as has been noted, is not sufficient, since it is necessary to verify the compatibility of constitutional practice, objectives

[32] German Judges Strike Back, Say ECB Isn't Master of Universe, Bloomberg, 12 de mayo de 2020.

between similar institutions and, a fortiori, between constitutional assumptions (judicial regime or Constitutional Court, any prohibitions or exceptional and express authorizations addressed to constitutional justice in any of the constitutions compared).

It is necessary to emphasize the common elements (...) more than a simple comparison between constitutional bodies. It is necessary to gather a broad knowledge of the constitutional law of each of the countries under analysis[33].

It is impossible even in a few minutes to summarize one of the most significant developments in constitutional justice in recent decades, especially on such a delicate issue as the limitation period. But – even beyond the thousands of pages of commentary on it – the simple writing of the sentence allows for some extrapolations without betraying too much of its meaning.

It should be noted that, following the reference to the previous judgment, the Grand Chamber in the judgment c.d.Taricco bis provided, at the request of the Constitutional Court, an "authentic" hermeneutic of both arts. 325, p. 1 and 2 of the Treaty (TFEU), and the so-called "Tarikko rule", which confirms the existence of the obligation to cancel the national limitation period whenever the application of the specified legislation would be an obstacle to the imposition of effective and convincing criminal penalties (in a significant number of cases of serious fraud, which affects the financial interests of the European Union) or will lead to a shorter limitation period than that provided for by it national legislation. According to the Luxembourg Court, this duty of non-application was limited only when it entailed "a violation of the principle that offenses and punishments must be determined by law due to insufficient precision of the applicable legislation, or with the retroactive application of legislation that established a more severe system of punishment, than the one that was in effect at the time the offense was committed" (§ 62). According to the UN Court, this was a matter for a "national court": if it considered that "the duty not to apply the provision of the Criminal Code in question is contrary to the principle that offenses and punishments should be defined by law, it would not is obliged to fulfill this duty, even if compliance with it would make it possible to correct a national situation incompatible with EU law" (§ 61).

The interlocutor in Luxembourg is therefore the Italian national court, and it could not be otherwise: it is the one entrusted with assessing the consequences of the derogation imposed on it for the purpose of compatibility with the principle of legality/determination.

[33] Revista Brasileira de Estudos Constitucionais. Ano 3, número 12, outubro/dezembro de 2009. Belo Horizonte: Fórum, 2009, pp. 51 e 52.

The Constitutional Court – when, after a previous referral, it returns to reconsider the issue (decision no. 115 of 2018) – says differently: and, even in this case, it could not be otherwise.

Having reiterated that the limitation period must be considered as a substantive institution and therefore falls within the scope of the principle of substantive criminal legality set out in art. 25, paragraph two of the Constitution. – thus bringing with it the consequences of typicality, certainty and foreseeability – the Court clearly points out the lack of certainty that characterizes both art. 325, paragraphs 1 and 2, TFEU (for the part from which the "Taricco rule" can be deduced), and the "Taricco rule" itself.

This leads to consequences which ultimately constitute a model of decision-making, but which are envisaged in the future and in general terms as a competent procedure dictated by the judge of the laws.

Firstly, "while it is true that only the Court of Justice must uniformly interpret EU law and determine whether it has direct effect, it is also undeniable that ... an interpretative result which is not in accordance with the principle of determinism in the criminal sphere cannot have citizenship in our legal system";

Hence the second statement – "the general judge cannot apply the "Tarikko rule" since it is contrary to the principle of determinism in criminal matters enshrined in Art.25, second paragraph, of the Constitution» and is "he highest principle of the Italian constitutional order".

Thirdly, "the competent authority for the review requested by the ECJ is the Constitutional Court, which has the exclusive task of finding out whether EU law contradicts the highest principles of the constitutional order and, in particular, the inherent rights of the individual". In this regard, an important role played by the ordinary judge is "to call into question the constitutional legitimacy of the national legislation that gives rise to the European standard that gives rise to the alleged conflict".

First, what – as already noted – in relations with ordinary judges, when they also have full confidence (and not a simple suspicion) that supranational law has gone beyond constitutional "contradictions" (that is, it has gone by the way of collision with the "higher principle of the constitutional system of Italy"), "they cannot do anything but refer the relevant issue to the consideration of the Constitutional Court". In other words, an ordinary judge is not a judge who is obliged to exempt himself from the obligation not to apply a national rule in favor of a European Union rule, and even if he is sure of friction, he will not be able to apply a double application (of a national rule due to an alleged conflict with a supranational legislation; supranational rule due to the alleged contrast with one or more higher principles of the Italian constitutional order). In short, it will only be necessary to stop and raise the

issue: it is not his job to find out whether EU law does not contradict the highest principles of the constitutional order, even when such a contrast is obvious.

From another perspective, the Court does not only establish (obviously) what are the "supreme principles of the Italian constitutional order", but above all what can be traced from time to time from the practice of Luxembourg.

The Taricco case is emblematic in this regard. The Court of Justice seeks and fights to ensure that the text of the Taricco explanatory memorandum states that the principle of the legality of offences and penalties belongs to the constitutional traditions common to the Member States; whereas, as enshrined in Article 49 of the Statute, it is binding on the Member States when they implement EU law; whereas it follows from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) that, under Article 52(3) of the Charter, the right guaranteed by Article 49 of the Charter has the same meaning and scope as the right guaranteed by the ECHR; that, in short, supranational law recognizes criminal legality in a way that is no less fundamental (in terms of theoretical architecture, intensity of protection, source, etc.) than the Italian constitutional order, and that is why EU law "concerns" it at least as much as Italian constitutional law. Well, to the Constitutional Court, all this seems superfluous: because, despite all this (in addition to all this, to recall the metaphor of scale) there is the national constitutional identity that seems to have an exclusive and absorbing effect on every other subject. As if to say, saying that, in the end, the latter is the "independent variable" and is located in a strong nucleus that is destined to prevail in the dialogue.

Then comes the story of the so-called "double bias", that is, judgment № 269 of 2017 and the novelties of the principle that it brings through the "clarification" (contained in paragraph 5.2. of the judgment, continued by Marta Cartabia), which is much more important than the judgment: someone wrote that it is a stage of constitutional justice, at least as important as the judgment in the Granital case (№ 170 of 1984).

To understand the novelty, it is necessary to recall for a moment some things that are very well known: namely, that the antinomy between a rule of national law and a rule of EU law with direct effect entails a "non-applicability" established and declared exclusively by an ordinary judge (non-application), possibly after a prior reference to the Court of Justice of the EU of Art. 267 EC; that a national rule which is not applied in this way naturally "no longer has any relevance" to the regulation of the case and, therefore, cannot be the subject of a constitutional review; that this review has a residual place in the three "classical" exceptions to this mechanism of non-application, namely: in the case of an antinomy between a rule of national law and an EU

rule without “direct effects”; when its application “involves criminal liability” (judgment no. 28 of 2010); finally, when the application of an EU rule undermines a “fundamental principle of the constitutional order”, a “counter-limitation”, precisely as happened in the Taricco case. Outside these cases, in the relationship between a domestic rule and a self-executing EU rule, the incident of constitutionality is not est in mundo: its object would be absent.

Whenever an ordinary judge scrutinizes a national norm “which is subject to doubt as to its illegality both in relation to the rights protected by the Italian Constitution and in relation to those guaranteed by the Charter of Fundamental Rights of the European Union in the Community sphere. the question of constitutionality must be raised, without prejudice to the possibility of referring to the Court for a preliminary ruling on the interpretation or validity of EU law under Article 267 TFEU”.

Why is Court Decision №269/2017 prescriptive? For many reasons, all of which have already been expertly substantiated by the doctrine that commented on this decision. For if it is true that traditionally what falls within the ratio decidendi of a decision is prescriptive, and what falls outside it is not an obituary, this limit is very uncertain when the decisions of the Constitutional Court are referred to ordinary judges. Constitutional jurisprudence is decided by rules as well as by principles (to bother with Dworkin’s distinction), and often – as it should be for the High Court – principles are more important than rules. The rule regulating the antinomy between national and supranational rules and giving ordinary judges the right not to apply the former was “proclaimed by the Constitutional Court itself” (Granital judgment no. 170 of 1984) at the end of the dialogue with the Court of Justice of the EU (Costa vs Enel judgments of 1964; Van Gend and Loos (1963); Frankovich of 1990, etc.) and then implemented by ordinary judges, as happened many years later for the relationship between national law and the ECHR.Ordinary judges, according to the Constitutional Court, used the norms of the European Charter as a “constitutional” parameter.

The “political” reason is more obvious: in the inextricable interweaving in many matters of principles and rules between those proclaimed in the European Charter and equivalent rights guaranteed by the Constitution, the Court considered it appropriate to emphasize once again the timeliness (temporary, but also substantial) of intervention with undoubted advantages. Secondly, this is the replacement of the erga omnes effect (with a possible recognition of unconstitutionality) with the effect of the non-application of a national rule by a separate general judge. In practice, under the “traditional” mechanism, a national rule, even if it is not applied by an ordinary judge in a specific case under consideration and is replaced by a “European” rule, continues to live in the national legal system.

In Italy, judgment no. 49 of 2015 is a judgment of the "Western" canon of the so-called "consolidated jurisprudence". According to it, not every isolated judgment of the ECtHR (which does not reveal, in essence, any consolidated orientation) obliges the national judge to apply the stated principle to different hypotheses, even if they abstractly fall under the same or similar decided cases. Thus, according to the Constitutional Court, until the appearance of a "consolidated law", the national "living law" continues to apply.

CONCLUSIONS

Constitutional courts in democratic countries are extremely important institutions, because even the most perfect constitution is of little importance if it is not enforced.

When studying the phenomenon of constitutional courts, the comparative law method or the method of constitutional comparison should be used, since states approach constitutional law and constitutional jurisdiction in different ways. Nevertheless, there is a mutual influence of constitutional culture, which leads to unified forms and to the development of models that are then adapted by states, especially in the sphere of relations between constitutional courts, parliaments and politics in Europe.

To understand each constitution, it is necessary to understand the historical context in which it arose, therefore constitutional courts must interpret it taking into account this context. In the process of constitutional development of each country, the process of amending the constitution is extremely important not only for the development of democracy, but also reflects the constitutional system of the country as a whole.

SUMMARY

Since the Constitution is the highest in rank and more important for the state than other laws, its creation and amendment are subject to special requirements, which are usually defined in the constitution itself. These requirements can take different forms and shapes and differ in each country in order to ensure the stability and protection of the constitutional order, national security and territorial integrity and constitutional rights and freedoms of the individual. Therefore, the constitutional court is important in the mechanism for protecting the constitution. The presence of a centralized system of constitutional control has advantages. One of the advantages is a unified judicial decision, since no court, except the constitutional one, has the authority to review legislation that, in its opinion, contradicts the constitution; contradictory judicial decisions of different instances are impossible (unlike in a diffuse system). Since only one court can decide on the constitutionality of laws, there is greater legal certainty than in a diffuse system.

The vast majority of EU countries adhere to the dualistic model of incorporation of the ECHR. Recent comparative constitutional studies have demonstrated the multiplicity of factors contributing to the determination of the effects of the ECHR in domestic law. The interaction between constitutional rights and human freedoms and the rights guaranteed in the ECHR is the form and essence of judicial protection. The issue of legal reasoning used by the Constitutional Court and ordinary judges to establish new interpretative paradigms requires special attention. Among these paradigms, the appeal to casuistry and the concept of "greater extension of rights" are undoubtedly those that have caused profound transformations in constitutional theory since their introduction. The decisions of the ECtHR are able to influence constitutional interpretation due to their status as the "preferential interpreter" of the ECHR, since the constitutional review of the Constitutional Court must take into account the specifics of the case decided by the ECtHR in order to declare a legal norm unconstitutional.

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