2014 Projects Conference
Zagreb, 25 September 2014

Panel session II
The future of human rights litigation in Europe

Jasna Omejec*

The future of human rights litigation in Europe from the perspective of the Judge of the Constitutional Court from a new EU Member State

Dear President Wallis, ladies and gentlemen, dear colleagues,

First of all, please allow me to thank the European Law Institute for inviting me as a speaker at this important Conference.

At present, Croatian citizens live in several different legal areas at the same time: the national one, the legal area of the European Convention and the one of the European Union. Each one of them has its own fundamental rights catalogue. To that end, I would like to point out three observations, which I believe should be put forward today at this conference.

First point: *the national Constitution*. It is necessary to recall that the analogy between constitutional justice in new and old democracies of Europe is to a great measure only apparent.

I agree with Professor Nenad Dimitrijević when he says that the constitutions of European post-communist states simply *took over* the *model* of a future, desirable, "well arranged society" of the kind that exists in developed European democracies. However, did that model correspond with real life in these states? What was that life marked by? Let us recall. Insecurity. Uncertainty. The accumulated problems of transition. A lasting condition of deep economic and financial crisis. Clear recognition that the welfare state concept is simply too expensive for these countries to effectively realise. Severe political instability. An extremely weak democratic capacity of political institutions. An instrumental understanding of the law. The inability of

*Jasna Omejec is the President of the Constitutional Court of the Republic of Croatia and Professor of Administrative Law at the Faculty of Law, Zagreb University.

regular courts to free themselves from the bonds of textual positivism inherited from the communist regime. The inability of regular courts to accept the constitution as grounds for interpreting positive legislation. In sum, the lack of elementary consciousness about the meaning and significance of constitutionalism. All this resulted in a kind of perverted prolongation of the communist type of governing.

Furthermore, the European post-communist constitutions offered democracy as a model of life to millions of people who had spent decades living under rigid communism. These were people with deeply entrenched historical traditions and mentalities difficult to change, people strongly marked by the communist past and by corruptive behaviour as a way of everyday survival. By the very nature of things they could not have been expected to understand and accept true democratic values. So what happened? As an illustration: freedom was understood as mere liberation from communism, not as assuming responsibility for one's own fate within the constitutional framework of protected fundamental rights; the principle of the separation of powers was understood as simply discarding the one-party dictatorship and nothing else; the market economy was understood as consumer welfare, not as the social and economic foundation of democracy, and so on.

Obviously, this development process was completely different from the one in which the old west-European democracies had been created. It seems that the basic reason for this should be sought in the fact that "in the West constitutional democracy developed as the 'superstructure' of a particular system of social relations." On the contrary, in post-socialism "it must function as the 'base', as the frame that will subsequently – if everything goes according to plan – be filled with the social contents of the open society."[1]

What is the main role of the constitutional courts in these societies, where they still do not act within the framework of an already-formed constitutional system? Their role is essentially transformative.[2] In Croatia, through its decisions, the Croatian Constitutional Court - I will call it shortly: the CCRC - has tried to shape the basic value principles of the new democratic society which did not exist before. These decisions of the CCRC have generally been (and still are) accompanied by deep

[1] Dimitrijević, Nenad: Ustavna demokratija shvaćena kontekstualno (*Constitutional Democracy Understood in Context*), Edicija REČ, Fabrika knjiga, Belgrade, 2007, 127.

[2] Stone Sweet speaks about a "*juridical coup d'état",* which could be institutionalised as a successful revision of Kelsen's ground norm *(Grundnorm)*, with transformative effects on law and politics. Stone Sweet, Alec: "The Juridical Coup d'État and the Problem of Authority", *German Law Journal - Special Issue on Stone Sweet*, Vol. 8, No. 10 (October 2007), 915-928. (quotation on p. 917).

agitation, general misunderstanding and strong opposition. Thus they required a strong legitimacy.

This brings us to the second point: *the European Convention*. In the quest for legitimacy of its decisions, the CCRC relied on the European Convention of Human Rights. In its case law, the CCRC has recognised to the Convention a quasi-constitutional national status, although, formally, it enjoys sub-constitutional status.

That being said, the Convention and the case law of the Strasbourg Court have become a main tool in the hands of the CCRC for the transposition of the European legal standards in the domestic legal order. The CCRC's interpretation of constitutional norms in accordance with the European legal standards has been gradually, step by step, promoting the general criteria and guidelines for the governmental actions. At the same time, it has contributed to what is called the "constitutionalisation of legal mind-set." We all know that it is impossible to transform democratic ideals and values into guidelines for national action if there are no changes in our minds. Shortly, the Convention has played a decisive role in bringing the Croatian constitutional law into the European legal space.

Third point: *EU Law*. From the constitutional judiciary point of view, the role of the EU law cannot be compared with the role of the Convention law. Unlike the Convention, the EU law is not meant to have a constitutional status in Croatia. Here, the Constitution retains its superiority. Accordingly, as a rule, ordinary courts, not the CCRC, have to deal with the EU law. Nevertheless, the CCRC considers that the legal principles of the EU law, as well as the interpretation of fundamental rights given by the Luxembourg Court, are extremely important for the Croatian constitutional framework.

We all know that the EU law spreads through the large parts of national legal order through national implementation measures. In this light, the CCRC will undoubtedly carry out abstract control of constitutionality of national regulations for the implementation of the EU law, *if the unconstitutionality is due to the reasons stemming from the national law and not to the features of the sources of the EU law*. To this regard, the CCRC accepts the case law of the German Federal Constitutional Court as a guideline for its own conduct.[3]

[3] For example, the judgment 2 BvR 2236/04, para. 1-201 of 18 July 2005, where the Federal Constitutional Court found in breach of the Constitution the Act on ratification of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1.

Just yesterday the CCRC deliberated on the Ordinance of the Minister of Finance on Consumer Credit Services,[4] the constitutionality of which has been disputed before the CCRC. This Ordinance is a domestic enactment for implementation of the corresponding EU Directive.[5] In addition to the issues of material constitutionality due to the reasons stemming from the national law, the discussion also brought the following question up: Would the CCRC examine whether this particular Ordinance of the Minister is an adequate measure for the proper implementation of the Directive in the national legal order? We shall very soon see what the answer will be.

In addition, the CCRC carefully observes the case-law of other constitutional courts when it comes to making references to the ECJ for a preliminary ruling, as well as the ECJ's case-law. So far, the CCRC has not been in a position to decide on the need to make such a reference.

As to the EU Charter of Fundamental Rights, the CCRC tries to keep track of all essential developments of the Luxembourg jurisprudence. Obviously, the national courts are obliged to directly protect the subjective fundamental rights guaranteed in the Charter whenever certain legal issue falls within the scope of the EU law. It is still not completely clear where the CCRC's position will be.

Having in mind all that has been said, let us try to draw the main conclusion.

Today, we are dealing with many fundamental rights catalogues and enforcement mechanisms in Europe. For a new EU member state, which in addition still carries the traces of communist past on its back, like Croatia, this is an enormous challenge. As regards the constitutional judiciary in general, it is pretty much difficult for me to comment on it, for it might be taken arrogant or even absurd, given that I come from a small country and the youngest EU Member State.

---

[4] Pravilnik o odobrenju za pružanje usluga potrošačkog kreditiranja (Official Gazette Nos. 14/10 and 16/13).

[5] Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, Official Journal L 101, 01/04/1998 P. 0017 - 0023. Article 2 of this Directive reads: "1. Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive no later than two years after the entry into force of this Directive. They shall inform the Commission thereof. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States. 2. The Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive."

However, I dare to recommend that rigorous concepts such as “supremacy” to denote the relationship between the national and European constitutional courts should be avoided. As I see it, it would bring no good if either the Strasbourg Court or the Luxembourg Court position themselves like super courts which impose the uniform logic of hierarchy in legal environment, whose complexity requires the cooperative legal approach.

It seems that regulation of relations between these two European Courts - with regard to the accession of the EU to the Convention that stems from the Lisbon Treaty - is nevertheless a fundamental prerequisite for any further assessment of development of the human rights litigation in Europe. However, it seems certain that: we need to build, what the President of the German Federal Constitutional Court, Professor Andreas Vosskhule, calls *Verbund*, a multilevel cooperation, or network, or dialogue of the constitutional courts, which include national constitutional courts, the Strasbourg Court and the Luxembourg Court.

I will mention just one possible technique of the jurisprudential dialogue, that is, a dialogue through judgments, apart from the mutual adjustment, i.e. referral to judgments of other courts aimed at bringing legal views closer together or at avoiding conflicts within different legal systems, either on national or European level.

The form of jurisprudential dialogue, which is discussed a lot these days, is the explicit dialog through court judgments. This dialog is equally applied in the case law of the Luxembourg Court, the Strasbourg Court and national constitutional courts. Many examples of this influence could be given. Let me mention just a few examples. The Luxembourg Court has applied this dialog in the case *Kadi* of 2008,[6] where it reviewed the Council’s regulation ordering the freezing of funds of persons and entities associated with known terrorist organisations.[7]

---

[6] Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, joined cases C-402/05 & C-415/05P, judgment of 3 September 2008.

[7] That regulation had been adopted in accordance with resolution of the United Nations Security Council. The Court of Justice reviewed the lawfulness of the regulation in the light of fundamental rights. It held that freezing of funds without respecting basic procedural guarantees amounted to a breach of the claimants’ right to be heard and the right to effective judicial review as enshrined in Articles 6 and 13 of the Convention. Referring to *Chahal v. United Kingdom* (ECHR, 1996), it declared that individuals must be accorded sufficient procedural guarantees in the context of the fight against terrorism. Interestingly, the Court of Justice further found that the freezing of funds constituted an unjustified restriction of the right to property, referring to procedural requirements inherent in Article 1 of Protocol 1 to the European Convention on Human Rights.

It was also applied in the case-law of the Strasbourg Court in the Grand Chamber judgment *Al-Khawaja and Tahiri vs. United Kingdom* of 2011,[8] and vice versa, in the judgment of the Federal Constitutional Court of Germany in the case of Preventive Detention I and II of 2011, which responded to the violations of the Convention rights established by the Strasbourg Court in the case *M. vs. Germany* of 2009.[9] By this judgment the German Court prevented the potential systemic violation from taking place.

This is the so-called cross-fertilization of jurisprudence between several courts. It is extremely important with regard to the two European Courts. Maybe the best example of this fertilisation is the principle of "equivalent protection" established in the case-law of the Strasbourg Court in the case *Bosphorus Airways v Ireland* (2005).[10] At this point I would like to recall the words of the former president of the Strasbourg Court, Sir Nicholas Bratza who said: "There is also scope for judicial dialogue through judgments... There is, of course, as things stand, no formal, direct channel permitting such communication or exchange within the Convention system. Whether there should be a new, purpose-made procedure for dialogue between national courts and the European Court is a question now under consideration in the broader reflection on future reforms."[11]

Speaking of Croatia, I would like to recall the ECJ's *Fransson* judgment[12] which deals with the *ne bis in idem* principle laid down in Article 50 of the Charter. The CCRC has had some trouble with interpreting the *ne bis in idem* principle given by the Strasbourg Court in the case of *Maresti against Croatia* of 2009[13] and the Fransson judgment has been really important to us. The CCRC is now trying to find the right response to the *Maresti* judgment, and the Luxembourg judgment could be of help.

I believe, this is the right avenue for us to take.

---

[8] Case of *Al-Khawaja and Tahery vs. The United Kingdom*, judgment of 15 November 2011, nos. 26766/05 and 22228/06.

[9] Case of *M. vs. Germany*, judgment of 17 December 2009, no. 19359/04

[10] *Case of Bosphorus vs. Ireland* [GC], judgment of 30 June 2005, no. 45036/98.

[11] Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year Friday 27 January 2012, Address by Sir Nicolas Bratza President of the European Court of Human Rights.

[12] Åklagaren v. Hans Åkerberg Fransson, case C-617/10, judgment of 26 February 2013.

[13] *Maresti vs. Croatia*, judgment of 26 June 2009, no. 55759/07.

Finally, let me address Croatian lawyers. Dear colleagues, we need to be aware that the novelties introduced by the Convention and the EU law are "multi-faceted processes based on a tendency to undermine all previously accepted stable borders", as Karl-Heinz Ladeur has put it.[14] Accordingly, let us join in the learning alliance - or *Lernverbund*, as our German colleagues call it. Nothing but learning and raising our own capacity for the dialogue can be effective tools for the successful participation in the European multi-level judicial cooperation.

Thank you for your attention.

[14] Karl-Heinz Ladeur, European Law as Transnational Law – Europe has to be Conceived as an Heterarchical Network and Not as a Superstate!, *German Law Journal*, Vol 10, No. 10, p. 1362.