Binding Effect of Judicial Decisions – National and International Perspectives

ŠÁMAL, P. – RAIMONDI, G. – LENAERTS, K. (et al.)
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Jörg Polakiewicz is Director of Legal Advice and Public International Law (Legal Adviser) of the Council of Europe since 1 October 2013. Between 2010 and 2013 he was head of the human rights development department in the Council of Europe. Between 2008 and 2010, he was head of the law reform department, covering judicial co-operation and standard-setting in criminal, civil and public law. During this period he served as secretary to the committee set up under the Budapest convention on cybercrime (T-CY) and oversaw the launching of the modernisation of data protection Convention 108.
He joined the Council of Europe in 1993, working on constitutional reform in Eastern and Central Europe (with European Commission for Democracy through Law – Venice Commission), and subsequently in the Council of Europe’s legal service and human rights law and policy division. He is also a professor at the Europa-Institut of the University of the Saarland in Saarbrücken. From 1986 to 1993, he was a research fellow at the Max Planck Institute for Comparative Public and International Law in Heidelberg.

Guido Raimondi, the President of the European Court of Human Rights. He was born in Naples (Italy) in 1953 and earned the master’s degree in law in 1975. He worked as an assistant to the Head of the Department of International Law at the Faculty of Law in Naples from 1976 to 1977. Between 1977 and 1986, he served as the judge of a lower court specialising on the civil and criminal matters. He served in the judiciary until 1986 when he was assigned to the Legal Department of the Ministry of Foreign Affairs (Servizio del Contenzioso diplomatico). From 1989 to 1997 he was a co-agent of the Italian government before the European Court of Human Rights. Subsequently, he worked in several expert boards of the Council of Europe. Between 1997 and 2002, he served in the Advocate General’s office and then as a judge of the Supreme Court of Italy. In May 2003, he joined the International Labour Organization (ILO) as a Deputy Legal Adviser and in February 2008 became the Legal Adviser of this organisation. He has been a judge of the European Court of Human Rights since 5 May 2010 and its President since 1 November 2015. He authored numerous publications in the field of international law concerning human rights in particular.

Pavel Rychetský, president of the Czech Constitutional Court since 2003. He graduated from the Faculty of Law, Charles University, Prague in 1966 and passed both his doctoral and judicial examinations in 1967. He became an assistant professor of Civil Law, Charles Law Faculty, but was forced to leave after the 1968 Soviet occupation. He worked as company lawyer until the end of 1989. In the “Normalization” era, Pavel Rychetský engaged in civic resistance against the totalitarian regime, was a co-founder and one of the first signatories of Charter 77, and published articles in foreign journals and Czech samizdat. He was a member of the Civic Forum and its Council of the Republic. During the 1990s, he was appointed the Czech Prosecutor General, the Deputy Prime Minister of the Government of the Czech and Slovak Federal Republic (CSFR; June 1990 – July 1992), Senator in the Senate, Parliament of the Czech Republic (1996 – 2003), where, until becoming Deputy Prime Minister, he was Chairman of its Constitutional Law Committee and a member of its Mandate and Immunity and Organizational Committees. In 1998–2002 he was Deputy Prime Minister of the Czech Government. From 15 July 2002 to 5 August 2003 he again
served as Deputy Prime Minister, as well as Minister of Justice and Legislative Council Chairman.

**Pavel Šámal**, the President of the Supreme Court of the Czech Republic since 22 January 2015 and the professor of criminal law of the Faculty of Law of the Charles University and the Comenius University in Bratislava. After the successful completion of his studies at the Faculty of Law of the Charles University in Prague in 1977 he received his doctorate degree (JUDr.) in 1980 and he earned his Ph.D. in 1999. He was appointed the associate professor of criminal law in 2001 and subsequently the professor of criminal law, criminology and criminalistics by the President of the Czech Republic in 2006. He began his judicial career at the District Court in Most where he worked from 1979. Later on, he worked as a judge at the Regional Court in Ústí nad Labem and became a judge at the Supreme Court in 1991. He is a judge and a presiding member of a panel of the Criminal Division of the Supreme Court. Furthermore, he has been a member of a working committee of the Government Legislative Council of the Czech Republic for criminal law and a member of the editorial boards of law journals Právní rozhledy, Bulletin advokacie, Soudní rozhledy, Trestněprávní revue and Collection of Decisions and Standpoints – Selection of the Decisions of the European Court of Human Rights, considered to be of the highest importance for the Czech judicial practice by the Supreme Court. He is a member of the International Association of Penal Law (Association Internationale de Droit pénal) since 2002 and a member of the Scientific Councils of the Faculty of Law of the Masaryk University in Brno and the Faculty of Law of the Charles University in Prague. He is also a member of the Commission for the Recodification of Substantive and Procedural Criminal Law, established by the Ministry of Justice.

**Vojtěch Šimíček**, born in a distinctive cultural and industrial Moravian-Silesian metropolis of Ostrava in 1969, he spent a happy childhood there, which resulted in his calm and balanced personality. In 1992, he graduated from the Masaryk University in Brno, School of Law, where he obtained his Ph. D. later in 1995 and became an associate professor there in 2001. He studied in Regensburg, Bochum and Vienna. In addition, he spent five months as an intern in German Bundestag. He loved it everywhere, however, he never really thought about working abroad. In 1996 – 2003, he worked as a law clerk of a Constitutional Court justice. In 2003, he was appointed a judge of the Supreme Administrative Court. Apart from being a president of financial administration collegium, he also served as a president of the seven-member chamber for the electoral matters, matters of local and regional referendum and matters concerning political parties and political movements, and a president of the six-member disciplinary chamber for judges. Since 1992, he also teaches constitutional law and courses related to it at
the Masaryk University in Brno, School of Law. He is an author or a co-author of tens of specialized texts and publications published in the Czech Republic and abroad, he edited several collections of papers, and he is a member of certain editorial boards. He is happily married to a beautiful, tolerant, funny and witty wife, and a father to three mostly well-behaved and kind children. Except of customary upbringing of his kids, he spends his free time passionately indulged in (mainly) collective sports. This joy is in no way spoiled by the fact that he is regrettably not good at any of them. The President of the Czech Republic appointed him a Justice of the Constitutional Court on 12 June 2014.

Katarína Šipulová earned her PhD at the Faculty of Social Studies, Department of European Studies, Masaryk University, Brno, and the MSt title in Socio-Legal Research at the University of Oxford. Her main area of interest is transitional justice and democratization of the Central and Eastern European countries. Katarína Šipulová worked as Head of the International Department of the Czech Supreme Court. She has been an active member of several research projects dealing with human rights as well as international law and its impact on domestic jurisprudence. Katarína has been a co-leader of a project on the application of EU law by the Czech civil courts conducted by the Supreme Court since 2012. Currently, she holds a postdoc position at the Judicial Studies Institute, Masaryk University. She is a member of the Czech Centre for Human Rights and Democratization and governmental Committee for Fundamental Rights and Diskrimináciya.

Jan Wintr, associate professor at the Department of Legal Theory and Legal Teachings of the Faculty of Law of the Charles University of Prague. He earned degrees of law, history, politics and theoretical legal sciences at the Charles University. Within his research he specialises on the field of interpretation of law and the legislation, the parliamentary culture and the constitutional judiciary. He authored various publications, e.g. Metody a zásady interpretace práva (Praha: Auditorium 2013, Česká parlamentní kultura (Praha: Auditorium 2010), and Říše principů. Obecné a odvětvové principy současného českého práva (Praha: Nakladatelsví Karolinum 2006). He is also co-author of 20 let Ústavy České republiky, Komentář, Listina základních práv a svobod (Praha: Wolters Kluwer 2012), Ústava ČR – vznik, vývoj a perspektivy (Praha: Leges 2011) and many others.
Introduction

PAVEL ŠÁMAL AND KATARÍNA ŠIPULOVÁ*

Understanding the Role of a Judgment in a Judicial Dialogue

The term “judicial dialogue” has recently become popular: it is increasingly used in academic discourse, as well as in debates among court officials and judges, concerning further development and co-existence of national and international judicial bodies. Whereas much has been written about the position of international and European law in national constitutional and legal orders**, the term judicial dialogue has not been precisely defined. Hence, it is necessary to consider what exactly is behind judicial dialogue between individual components of the judicial power, not only inside a state, but also on the level of the Council of Europe and of the European Union. The search for an answer also entails a search for a definition of the position and roles of judicial institutions, especially given that the judicial power can, in the present system, be characterised as institutionally segmented and, to a large extent, a differentiated and specialised structure. This brings us to a new concept of the judicial power in a rule of law state, reflecting the recent discourse which included the concept of the separation of the judicial power into the theories of the separation of powers. The separation of the judicial power can be understood, in the narrower sense of the term, as a segmentation and specialisation of a national judicial system*** or, in a broader sense of the word, with this division of the judicial power applying also to European judicial bodies, both in the European Union and in the Council of Europe. This is related to the ongoing European integration and the increasing influence that European courts (the Court of Justice of

* The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the authors.


the European Union in Luxemburg, the CJEU, and the European Court of Hu-
man Rights in Strasbourg, the ECtHR) have on national courts (constitutional
courts as well as general courts). In connection with these processes, all these
courts within the European area are searching for their identity and role, both
in the European judicial system and on the national level.

The European judicial area is, from many points of view, a unique system
that enhances (but also enforces) a certain form of co-existence, communica-
tion, cooperation, and interaction between national courts of individual Mem-
ber States of the Council of Europe and the European Union and international
courts, in particular the the CJEU and the ECtHR. Research as well as legal
practice are only gradually revealing the true form of this judicial dialogue: on
the one hand, we know that both international judicial bodies require and rely
on cooperation from national courts. National courts apply European Union
law and hence become also European courts. Furthermore, national courts (and
judges) apply provisions of human rights treaties as well as ECtHR case law,
which significantly complements the most important human-rights catalogue
for the European region, the European Convention on Human Rights (herein-
after referred to as ECHR, or the Convention). The Convention, although it
was a great inspiration for the Czech Charter of Fundamental Rights, whose
contents correspond to it to a large degree, contains many ambiguous or open
provisions requiring creative and progressive interpretation. On the other hand,
both international judicial institutions require cooperation and collaboration
from national courts. The principles and interpretation of the provisions of the
Convention as well as European Union law would not have much sense if they
were not accepted and applied by courts deciding on the lowest level.

National supreme courts enter this system from a special position, as they
play the specific role of intermediaries and important communication channels
between the European and national levels. The publication Binding Effect of
Judicial Decisions – National and International Perspectives follows up on an
conference held between 19 and 21 June 2017 in Brno, the capital of the Czech
judiciary. It was attended by presidents of supreme and constitutional courts of
Council of Europe Member States, judges from European courts, and leading
academics.

The key question examined by the conference participants in the framework
of the above-mentioned judicial dialogue, and which is now being posed by the
authors of each of the chapters of this publication, is the issue of the binding
effect of the case law of the the ECtHR and the CJEU, the binding effect of
decisions of national courts, and the relationship between constitutional and
general courts within national legal systems.
The Structure and Main Theses of the Publication

This publication strives to answer many questions that have arisen for European legal systems, in particular due to the influence of the decision-making of two European courts, the ECtHR and the CJEU. Part One of the publication, *Theoretical Approaches to the Binding Effect of Judicial Decisions (I)*, therefore focuses on the position of the concept of the binding effect of decisions in continental law. In chapter one, “*Case Law and Precedent in Continental and Anglo-American Law*”, Zdeněk Kühn first presents the different roles of case law and precedent in continental and Anglo-American law, pointing to the fact that the difference lies not solely in how case law is used, but that it also permeates the structural set-up and functions of supreme courts in each of the systems. Nevertheless, in reality, no existing legal system fits a purely theoretical model, and continental systems definitely do not consider case law to be irrelevant. As Kühn notes, whereas Anglo-American courts are bound by precedent, from which they must not diverge at the final stages, continental courts are bound by them in the initial stages (in selecting binding sources).

In the three subsequent contributions, Vojtěch Šimiček, Pavel Šámal, and Jan Passer offer their views on the binding effects of the decisions of the three apex Czech courts. As the opening notes of the authors indicate, the idea that the concept of binding effect of case law only belongs to common law legal systems, is outdated. Although case law has a different position in the Czech legal system (and is more of a guide in interpretation), its importance rises if analogy and a teleological method of interpretation are used. Over time, each of the three apex judicial institutions have taken a somewhat different approach to its binding effect. Nevertheless, as Vojtěch Šimiček shows in Chapter two “*Binding Effect of Constitutional Court Judgments on Constitutional Complaints*”, the question whether decisions are of a binding nature in the Czech legal environment has already become obsolete, and both supreme courts generally accept the precedential nature of the Constitutional Court’s decisions. A new question, which our legal system now has to answer, is which part of a decision is in fact binding for courts. There is a clear hierarchy in the Constitutional Court’s case law, as by the very nature of the matter, a decision (*usnesení*) cannot have a binding effect on the same level as a judgment (*nález*). Furthermore, there is a question as to how the Anglo-American principle of binding effect should be applied within a decision: dividing a decision into the main grounds (*ratio decidendi*) and something extra (*obiter dictum*) is too simplifying and misleading, as is a focus on so-called “headnotes”. Ultimately, it comes down, as Šimiček claims, to the decision-making practice of courts that work with the decisions and infer their nature when applying them.
Introduction

How general courts contend with the Constitutional Court’s case law and judgments in real life is demonstrated by Pavel Šámal and Jan Passer in Chapters 3 and 4, dedicated to the binding effect from the point of the of the Supreme Court and the Supreme Administrative Court. In the introduction to his chapter, “Binding Effect of Decisions of the Supreme Court”, Pavel Šámal agrees with a previously made statement – that the application and protection of fundamental rights is not reserved exclusively to the Constitutional Court (or the ECtHR). Article 4 of the Constitution states that fundamental rights enjoy protection from judicial power, and that the rule of law concept requires that such protection is effective and predictable. Pavel Šámal first introduces theoretical models of the binding effect of judicial decisions in individual European countries and then pays attention to the binding effect of judicial decisions from the point of view of the Czech Republic, distinguishing between the rationalization based on cassation and normative binding effect, also from the point of the constitutional obligation of the Supreme Court to ensure uniformity in the decision-making of lower-level courts. Jan Passer (Chapter 4: “Binding Effect of Case Law in Decisions of Administrative Courts”) continues where the previous contributions leave off, adding the point of view of the Supreme Administrative Court and examining its relationship to functionally superior courts (i.e., namely the Constitutional Court and to some degree the ECtHR or the CJEU). The author of the chapter notes that, due to technological developments, the greater issue is what to do with a large volume of case law, rather than how to find it. Passer therefore considers the potential of dividing the case law of each major court into binding and non-binding decisions.

And finally, Jan Wintr, in his contribution “Position of the Binding Effect of Case Law in the Interpretative Method of Continental Law” (Chapter 5) concludes this part with thoughts on the impact of the discursive binding effect of case law, i.e., the binding effect that is typically present in the precedential convention of law in Anglo-American legal culture and that goes beyond the judge being bound by previous case law, on the method of legal interpretation in continental systems (including the Czech system). Jan Wintr notes that if we do not grant a precedent the binding effect of a formal source of law, the problem automatically arises of how to treat the argumentation based on the case law, and the binding effect of this argumentation within the interpretative method of continental law.

Part Two, Binding Effect of Judicial Decisions in a Multilevel System (II), devoted to the interaction of European judicial institutions: the ECtHR and the CJEU, and national courts, examines the concept of binding effect on the national level and the subsequent life of the case law of the ECtHR and the CJEU in its application by national courts across European jurisdictions.
Its first section – II.A The Concept of Binding Effect and Case Law of the ECtHR, presents the point of view of the Strasbourg court and the relevant reactions of supreme and constitutional courts of Council of Europe Member States. Guido Raimondi (Chapter 6: “Binding Effect of Judicial Decisions: Reflections on the Execution of the Court’s Judgments”) first emphasises the fundamental role of the ECtHR in the process of increasing the protection of individual rights and freedoms and changes in its position (in particular, by putting emphasis on the value of human dignity) vis-à-vis the state. Nevertheless, Raimondi notes that the European system of protection, as well as any judicial system, stands or falls by the enforceability and respect for its decisions. National courts – supreme Czech judicial bodies, and, in particular, the Constitutional Court, as Pavel Rychetský notes in his response to Raimondi (Chapter 7: “Response to Guido Raimondi’s Contribution”), are a dignified partner to the ECtHR in this regard. ECtHR case law has been a source of inspiration for the Czech Constitutional Court on a number of occasions and has enhanced its persuasiveness and the quality of its argumentation. Chapter 8 (“Preliminary Opinions’ pursuant to Protocol No. 16 to the European Convention on Human Rights: Finally, a Platform for an Effective Dialogue between the European Court of Human Rights and National Courts?”) follows up with an analysis of how the mechanism of preliminary opinions introduced by Protocol No. 16 fits into this system of European protection and interaction between the ECtHR and national courts. Jiří Kmec asks whether this new mechanism can indeed enhance dialogue between the ECtHR and national courts and reduce the excessive workload and the number of complaints submitted to the ECtHR. The author sees the greatest potential of preliminary opinions in matters of a structural and systemic nature.

Chapter 9, authored by Jörg Polakiewicz (“Between ‘Res Judicata’ and ‘Orientierungswirkung’ – ECHR Judgments Before National Courts”), which focuses on the obligations of national courts in examining whether there has been a breach of the rights guaranteed by the Convention, provides a nice link to chapters directly concerned with responses of national courts. The author again notes that effective protection of fundamental rights can only be attained by an incorporation of the rights embodied in the Convention (and hence, by their interpretation by the ECtHR).

The four subsequent chapters (10-13) map out the nature of relations between the ECtHR, the Convention, and national courts in selected jurisdictions. Chapter 10 by James Lee, and Chapter 11 by Laurence Lustgarten present the British approach to the legal institute of binding effect, and its changes under the influence of national institutional development, in particular the establishment of the Supreme Court (James Lee: “Common Law Perspective on the Binding
Effect of Judicial Decisions: Reasoning with Precedent in the UKSC”), and under European influence – in the form of the Convention and the UK Human Rights Act, and European Union law (Laurence Lustgarten: “Implementation of ECHR’s Judgments by the UK”). Laurence Lustgarten pays attention not only to the judicial, but also to the executive level, and to the enforcement or respecting of judgments by state authorities.

An interesting comparison is offered by Jean Paul Jacque’s contribution (Chapter 12: “Jurisprudence des cours européennes et rapports de système entre ordres juridiques en Europe avec un regard particulier pour la France”), describing the Francophone environment and approaches, and by the contribution of Mikael Rask Madsen (Chapter 13: “Between Supremacy of Parliament and Erga Omnes Effects: The Bindingness of the European Convention in Danish Law”), who analyses the impact of the binding effect of the Convention on Danish law. The Danish approach offers a fascinating example of an “old” member state of the Council of Europe, present at the birth of the Convention, which was seen, in Denmark, as a mechanism aimed at securing human rights in other countries. Over time, however, Denmark has come under greater pressure and gradually also shifted to the side of “violators”, due to the expansion of the scope of the ECHR. Madsen also notes that even a relatively problem-free state that adheres to the Convention may be prone to taking a sharp stand-point to supranational judicial bodies and question their legitimacy in politically and socially sensitive issues (similar is stated by Lustgarten with respect to UK reactions to the Hutchinson and Hirst cases).

Section Two – II.B The Concept of the Binding Effect and Enforcement through the Prism of the Luxembourg EU Court of Justice, focuses on the other large European court, the Court of Justice of the European Union, asking whether there is indeed transparent dialogue within the Union judicial area. Whereas Koen Lenaerts (Chapter 14: “The Court of Justice and National Courts: A Transparent Dialogue”) offers his views of the preliminary ruling procedure as one of the institutes that contribute to enhancing judicial dialogue between the CJEU and national courts. He presents several recommendations as to the direction in which the proceedings should develop. Catherine Barnard asks in her response (Chapter 15, “The Court of Justice and National Courts: A Transparent Dialogue”) whether the dialogue between the CJEU and national courts is indeed transparent and constructive. Using the example of the Supreme Court of the United Kingdom, she points to the most problematic and destructive elements of inter-court interactions.

Michal Bobek continues on the topic of preliminary ruling procedure in Chapter 16 (“Binding Effect of Decisions of the Court of Justice of the EU in the Preliminary Ruling Procedure”), offering three levels from which a national
judge may view the principle of binding effect: binding effect from the point of view of European Union law (and CJEU case law); binding effect of CJEU decisions, from the point of view of national law, in particular constitutional law; and, finally, the actual binding effect, as implemented in the everyday decision-making of courts. Bobek notes that only a view through all three levels can offer an exhaustive answer as to the nature and fulfilment of the binding effect of CJEU case law. Although, in reality, we only have very few empirical data, it seems that the system works “surprisingly well”.

Another view of the structure of the binding effect of CJEU case law is offered by Irena Pelikánová in Chapter 17 (“Two Aspects of the Binding Effect of Decisions of Union Courts, in Particular the CJEU Tribunal”), who examines specific traits of binding effect from the point of view of direct applications and differences in binding nature, with regards to the hierarchical system of Union courts.

The closing part of the publication is completed with a theoretical thesis by Arthur Dyevre (Chapter 18, “Realism About European Legal Integration: Outline of a Soft Legal Realist Approach”), devoted to the development of the European legal order from the point of view of realistic theoretical approaches. Dyevre offers an alternative to the usual language of literature concerned with “judicial dialogue”, claiming that, rather than a dialogue, we should talk about a judicial negotiation, and that the interaction of the supreme courts of various jurisdictions seems rather less of a constitutional pluralism, and more of a mutual counterbalancing in which courts, including the ECtHR and the CJEU, are aware of the threat posed by aggressive advancement of one’s image and idea of constitutionality with other actors.

The authors of individual chapters across jurisdictions thus agree on the observation that the multi-layered nature of the work of the judicial power is a specific property of the European judicial realm, created by European courts, on the one hand, and national courts on the other. Its fundamental component is the binding effect of judicial decisions and the creation of settled case law, whose objective is fair and uniform decision-making within each European state, based on fundamental ideas of the rule of law within Europe. This indicates that there must be a certain form of judicial dialogue, in the sense of a creation of mutual links, balance, responsibility, and control (checks and balances) which does not apply solely within the traditional division of powers into legislative, executive, and judicial, but which is also required within the judicial power itself. This dialogue and the communication of judicial institutions, whether on the European level or inside each state, enables implementation of the values referred to above. Without such dialogue, the creation or at least the preservation of existing confidence in the judicial power as a whole, as the foundation of a modern democratic state respecting the rule of law, remains a mere illusion.
Part I:

Theoretical Approaches to the Binding Effect of Judicial Decisions
1. Case Law and Precedent in Continental and Anglo-American Law

ZDENĚK KÜHN

1.1. Introduction

England and other common law culture countries have, since the 19th century, been built on the doctrine of binding precedent – a single decision of the supreme court whose conclusions generally bind the court itself as well as all lower courts. On the contrary, in Continental Europe, legal theory has promoted, since the 19th century, the opinion that court decisions are no source of law and cannot be binding. As much as the gap between the originally radically different concepts of continental and Anglo-American law has appreciably narrowed over the course of two centuries, evident differences between the two concepts still prevail. Most standard legal theory and methodology textbooks in continental countries deny that decisions of higher courts would be generally binding or operate as precedents.

For many, this may be hard to understand. In the contemporary European environment, whether on the European continent or beyond the English Channel, it is unquestionable that continental courts, too, create law. For example, the European Court of Human Rights (ECtHR) distinguishes between law in a formal and in a substantive sense. Whereas, in the formal sense, law is only what is designated as such by the given legal system, in the substantive sense, on the other hand, law is everything from which the content of law that is actually effective in society can be inferred, including, in particular, certain doctrinal works and relevant case law. This is of significance, for example, to the possibility of restricting human rights in cases “prescribed by law”.

1 The text is based on and further develops my thoughts from the publication Bobek, M. – Kühn, Z. (eds.) Judikatura a právní argumentace, Prague, Auditorium 2013. I thank Michal Bobek for his advice and valuable comments, of which I have taken advantage in this article. Naturally, all errors are to be attributed to me. The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the author.

Part I: Theoretical Approaches to the Binding Effect of Judicial Decisions

In 1992, in a French case, the applicant as well as the former Strasbourg Commission argued that in Article 8 (2) of the Convention, the words “prescribed by law” pertain to, in the case of continental countries, merely law. According to their arguments, it does hold true that, for example, in the 1979 *Sunday Times* case, the ECtHR included under the term “law” not only written law, but also unwritten law, namely English *judge-made law*; however, this case was only an exception, given the specifics of England as a common law country. To those arguments the ECtHR responded that it is, above all, for national bodies, in particular courts, to interpret and apply national law. Settled case law cannot be overlooked for these purposes. According to the ECtHR:

“It would be wrong to exaggerate the distinction between common law countries and Continental countries... Statute law is, of course, also of importance in common law countries. Conversely, case law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts... Were it to overlook case law, the Court would undermine the legal system of the Continental States almost as much as the *Sunday Times* judgment of 26 April 1979 would have “struck at the very roots” of the United Kingdom’s legal system if it had excluded the common law from the concept of “law”... In a sphere covered by the written law, the “law” is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments.”

The ECtHR’s approach is pragmatic, and oriented towards the “user” of the system, i.e., the individual as the addressee of legal regulation. The ECtHR’s concern, as well as that of the system user, are not doctrinal labels created by the dogmatism of individual national legal orders, but the possibility to know the law and its predictability. A similarly pragmatic approach which understands “law” in its substantive sense thus makes it possible to claim that something is not a source of law, although it determines the contents of law. At the same time, case law must comply with one of the conditions that define law – the need that it be published, and the related prohibition on courts relying in their argumentation on any case law that has not been published.

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4 Kruslin v France, para. 29.

5 Cf. e.g., European Court of Human Rights, case Mooren v Germany, No. 11364/03, judgment of the Grand Chamber of 9 July 2009, Section 76, Section 90-97.
It is interesting that the other European court, the Court of Justice of the European Union, sometimes diverges from this pragmatic, non-dogmatic approach. Its interpretation of the requirements of EU law as to statutory regulation diverges from the ECtHR’s requirements, setting a higher standard. For example, in the case concerning the definition of a risk of absconding as a condition for detaining a foreigner, the text of individual language versions of Regulation (EU) No 604/2013 (Dublin III) was not clear in terms of where and how such risk is to be defined. In the end, the Court of Justice preferred a rigorous approach and insisted on the condition of being defined “by law”. It did so in spite of the argumentation of the Supreme Administrative Court of the Czech Republic (and of the Czech and UK governments), which pointed to the fact that the absence of a statutory definition has been redeemed by the long-term administrative practice and case law of administrative courts. “Only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness,” said the Court of Justice. The question naturally is of what is to a foreigner an indicative list of criteria of the risk of absconding, which the Czech law-giver implemented in the end. Should that list not be, after all, exhaustive? This way, however, we would easily direct European legal culture to a position from which it has already escaped at least once – to the tradition of the detailed and hyper-casuistical Prussian general code of land law [Allgemeines Landrecht für die Preussischen Staaten] from 1794, with its more than seventy-thousand sections.

1.2. Binding effect of case law

In general, binding effect of a precedential nature can be conceived in two extreme concepts. The first possibility is the situation in common law countries. There, theoretically all decisions of a country’s higher courts constitute strictly binding precedents for all lower courts within one judicial hierarchy. The other

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6 Court of Justice of the European Union, judgment of 15 March 2017, C-528/15, Al Chodor, ECLI:EU:C:2017:213, point 43. In the interest of academic propriety, the author of this paper must state that he was the author of the preliminary ruling of the SAC submitted to the Court of Justice of the EU.

7 Section 124 (1) (b) of the Act on the Stay of Foreigners: The police may detain a foreigner if “there is a risk that the foreigner could foil or make more difficult the enforcement of a decision on administrative expulsion, in particular by not stating correct information about his identity or address in the course of the proceedings, or refusing to provide that information, or if he has expressed his intention not to leave the territory, or if such an intention is evident from his actions.”
Part I: Theoretical Approaches to the Binding Effect of Judicial Decisions

extreme is the situation in continental law, where (only theoretically) the decision of the supreme court has no normative effect; if it is accepted by courts in other cases, it only occurs because the court concurs with the argumentation.

The paradox is that neither of these ideal models exists in the extreme form described herein. In common law systems, by the practice of distinguishing, or by narrowing the scope of ratio decidendi as the only formally binding part of a decision (if its meaning is ambiguous), lower courts significantly narrow, or in certain cases even circumvent, the stare decisis principle, thereby undermining the authoritative ratio decidendi. In the case of a number of older or disputable precedents, lower courts form, by means of distinguishing, their own exceptions from an otherwise binding and authoritative precedent. And on the contrary, in continental-law systems, courts have always, since the start of the application of large codes in the 19th century, taken heed of case law, although they may not have always cited it.8

Whereas in English or US law, even a single supreme court precedent is decisive and binding, in continental law, we most frequently find references to settled or established case law (in Germany “gesicherte Rechtsprechung”, in France “jurisprudence (bien) établie”, in Italy “giurisprudenza costante”, and in the Netherlands “vaste rechtspraak”). It can therefore be said that the ideologies of precedent in common law and in continental law still differ. Continental ideology concerning application of law rejects the binding effect of a precedent. It only grants normative effects to so-called established case law. On the other hand, Anglo-American common law builds its fundamental ideological thesis on the basis of the binding effect of a precedent, a single precedent.

Below I attempt to explain the causes of the differing ideologies concerning precedent in the European continent, on the one hand, and in common law countries on the other. The seemingly incomprehensible difference between the two legal cultures has its broader systemic reasons. In fact, both systems act rationally: common law insists that precedent is binding, whereas continental law insists on the non-binding nature of a single precedent and it only attributes normative effects to a series of identical decisions.

1.3. Differing understandings of binding effect

The two legal cultures have a different understanding of the very term binding effect. On the one hand, the term binding effect in continental law is usually only

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identified as formal binding effect of a legal regulation: that means a sort of normative sentence carved in stone, from which one cannot diverge. Binding effect is dichotomous: either, a precedent is binding, in which case it must be followed in all circumstances, or it is not binding, and hence, normatively irrelevant. This bipolar logic is then transferred by continental lawyers in how they work with case law. When they talk about the binding effect of a precedent, they mean something far more rigid and formal than do their Anglo-American colleagues.

On the other hand, the Anglo-American concept of the binding effect of precedent is an a priori interpretative concept that allows for various levels of importance. It is not merely about bipolar binding / non-binding effect, but a range, from a strict binding effect to various levels of persuasiveness, to, indeed, absolute normative irrelevance.

To summarise this: a continental lawyer first links the term of binding effect to a statute, or, at best, to a single property of the legal effects of a decision, and adapts his understanding of binding effect to this. The concept of “legislative” binding effect is then automatically projected to the binding effect of a court decision. His Anglo-American colleague, on the other hand, understands the binding nature of law primarily from the point of view of the binding effect of a precedent, i.e., as a flexible and interpretative scale.

Given that the term binding effect is understood differently, it is no surprise that the two cultures arrive at different responses to the question of the binding nature of a precedent. If continental legal theory admitted the concept of a formally binding precedent, the general binding nature of a court decision would consequently be understood far more rigorously in the continent and, in effect, more extensively than in a common law system.

After all, this tendency is evident in an inclination in certain continental legal cultures to understand “headnotes” generated by decisions of supreme courts as a type of a “binding legal regulation” and to work with them as they...
would with a normative legal regulation. In the common law tradition, the *ratio decidendi*, the only binding part of the decision, is distilled from a precedent by interpretation, which is something fundamentally different (and narrower in scope) than an analytical summary of a judgment or a (very general) headnote formulated for ease of orientation at the header of a decision. Furthermore, the normative binding effect of a precedent is, for the future, always restricted by the “chassis” of the facts of the previous case. If a normative headnote is severed from its factual chassis, the scope of its application, and hence also its binding effect, are understandably multiplied. If this severing is combined with the above-described continental understanding of binding effect, this practice in effect grants court decisions in continental legal cultures a scope of binding effect far beyond anything that would be possible in the English common law culture of strictly binding precedent.

1.4. Differing mentalities of judicial systems

In discourse about the different understandings of precedent on the continent and in common law countries, it is often neglected that the judicial systems of the two types of countries are hardly comparable, both from the institutional and personnel point of view. Whereas the mentality of Anglo-American judiciary has essentially compelled the doctrine of precedent, for reasons stated below, the mentality of continental judiciary is far more consensual, and it actually did not really need strict precedential rules from a historical point of view.12

The continental judiciary is based on a hierarchical and bureaucratic ideal of state power. In this model, the judiciary is based on principles of strict hierarchy, the impersonal nature of formal legal norms, and logical legalism. Judges are schooled legal professionals. Judicial bodies existing in this ideal of state power are reminiscent of a bureaucracy, both in their style, thinking, and decision-making. Court decision are “nameless”, drafted for the court as an institution, rather than on behalf of each individual judge, as is the case in the common law system. The form of rationale keeps to one “ideal” style, excessive individuality or originality of style is seen as harmful: it is not the judge, but rather, the court who decides. After all, that is why it was not permitted to publish dissenting opinions in continental law – the court as an institution speaks with one voice, not a cacophony of voices of the deciding judges.

It is characteristic that the judicial body in the system is structured according to a professional (career-based) model. Hence, judges are chosen in an administrative manner at the start of their professional career, their appointment comes briefly after they graduate from law school. The selection of future judges is rather technical, examining the ability of candidates to steer a court procedure and considering candidates’ eligibility primarily on the basis of their school results. Given that the selection of candidates for the position of a judge is apolitical, judges themselves are also in principle apolitical, and essentially also bland figures. The ideal of the continental judicial system enhances conformity: by how young lawyers get to the judicial system (several years of preparation in the judicial system itself, where young lawyers are prepared for their careers in the justice system by older, experienced judges, and hence, they identify with the internal values of the judicial system) or how they are promoted (typically, a judge whose judgments are rarely struck down by appellate courts is promoted to a higher court). The formulation of a strict precedential doctrine can, therefore, seem superfluous in this system – the judiciary is made sufficiently cohesive by the very system of its formation.\footnote{In the Czech context see also BOBEK, Michal. (R)evoluce, která se nekonala – Justice dvacet let poté. \textit{Prítomnost}, léto 2009, pp. 26–29.}

On the other hand, from the institutional point of view, the Anglo-American judiciary is far from a strictly bureaucratic and hierarchical system. Judges are organised in a judicial system by being connected not with a fixed hierarchical structure, but rather by shared ideals and values (Damaška refers to this type of judiciary as a coordinated model\footnote{Supra n 10.}). Whereas in the continental system, an appeal is a normal consequence of a court decision, in the Anglo-American environment, an appeal is expensive and rather exceptional. The judiciary is comprised of judges who are in no way specialised. In the purest form, they were not even trained as lawyers in the past (England until the 19th century). Here, judges look for individual justice in each case, instead of law contained in formalised sources. Judges are very strong individuals who take into account arguments of content and value in their decision-making. Many judges have their own style of legal argumentation or of judgment-writing, originality of style is beneficial and shows the personality of the judge, who is, after all, the main actor in the development of law. That is why the English judicial process has, since time immemorial, incorporated the right of every court to announce its own reasons for the decision.

A political model, emphasising political criteria and preferring judges with life experience is typical for the selection of such judges, as knowing the law
Part I: Theoretical Approaches to the Binding Effect of Judicial Decisions

in this model entails above all, knowing life.\footnote{As Oliver Wendel Holmes, a legend of US law, noted in the introduction to his book \textit{The Common Law} (Harvard, 1881; reprint New Brunswick: Transaction Publishers, 2005), on p. 5: “The life of the law has not been logic; it has been experience.”} Judges are appointed (and in certain American states even elected) at a more advanced age, on the basis of a legible and extensive professional history.\footnote{ABRAHAM, Henry. \textit{The Judicial Process. An Introductory Analysis of the Courts of the United States, England, and France.} 7th Ed., New York, Oxford, Oxford University Press, 1998, pp. 20 ff.} Such a system necessarily requires a doctrine of precedent-supporting discipline inside a judiciary comprised of strong personalities.

“Simply,” concludes the Croatian comparatist Mirjan Damaška in his masterpiece, “whereas a judicial organisation comprised of not excessively hierarchically formed judges may require a doctrine of binding precedent as an internal ideological stabilising factor, a hierarchical career-based judiciary can, rather, do without binding precedent.”\footnote{Supra n 10.}

1.5. Differing concepts of law and its sources

Judicial ideology concerning the application of precedent is derived from the prevailing concept of sources of law, which is derived from a tradition formed by legal science. If doctrinal reflection of precedents is weak, the room for unrestricted discretion of courts is inevitably enhanced. But why is the doctrinal reflection of precedent in continental countries weak? In other words, why is case law in continental countries not traditionally included in the sum of sources of law?

The fact that case law is not a source of law does not mean that court decisions “would not be considered to constitute a part of the legal system. In continental-law countries, however, the exegetic model dominates in the process of application, and it is this domination that conceals the possibility of applying precedent in the application of law.”\footnote{SORIANO, Leonor Moral. The Use of Precedents as Arguments of Authority: Arguments ab exemplo and Arguments of Reason in Civil Law Systems. \textit{Ratio Juris} 93, 1998.} Law is, in the continental concept, described as a set of statutes, a legal norm is identified with the text of a statute. On the other hand, for an Englishman or American, the continental norm is desperately too general or vague: a true norm for them is a casuistic rule that corresponds to judicial application of a general standard to individual typical cases.

Due to law on the European continent being seen solely as a set of statutes, case law is traditionally not analysed in the continental model. It is, so to speak,
below the threshold of significance. The need to specify boundaries on law and legally relevant sources that judges would apply and use in their reasoning arises once a judge is to examine a case that cannot be resolved by a mere simple interpretation of a statutory provision on the basis of a syllogism. It is here that the role of judicial formation of law is traditionally underrated in continental thought. Furthermore, even when it is evident to every critical reader of a decision of a continental court that the solution arrived at in a case cannot be inferred from existing legislation, and that a judge has, by her decision, de facto created law, the judge will insist in her written reasons for her decision that his (sole) source of law was the text of a legal regulation.

Whereas the ideology of the application of continental law underestimates the role of case law, the ideology of the application of law in the common law system, on the other hand, overestimates the role of precedent. Legal thought in the common law system implicitly approaches even simple cases of interpretation of statute with the view that the actual source of law is always a judicial precedent. It is typical that, even in those cases when the interpretation of a statute is clear, the court will support its argumentation by relevant precedents: they, rather than the law, ultimately determine, according to Anglo-American ideology, that the interpretation of law is indeed clear. The US judge Richard Posner aptly noted in this regard that “the citing of precedents exaggerates the importance that a precedent has in terms of influencing the outcomes of a case.”

Hence, if the two legal cultures have a different definition of what they understand as law (an abstract norm versus a specific solution), and thus differently define the structure of sources of law, then it is understandable that each attributes a different status and effects to judicial decisions.

Views of the system of sources of law have, however, been gradually changing in both legal cultures. Common law must, reluctantly, increasingly work with legislation. Whereas English or Irish legislation can at least to some extent maintain the traditional English casuistic style, directly effective Union legislation, which is applied preferentially, is written in the continental style: abstract provisions of Union regulations or directives containing many vague legal terms cause trouble for a number of English or Irish lawyers. On the other hand, the same trouble is felt by more perceptive continental theorists who understand that, in many court decisions, it is no longer possible to hide behind a façade of a nominally all-encompassing and gapless set of legal norms of an exclusively legislative origin.

1.6. Legal certainty attained by other means

In each legal system, a discrepancy arises between the interest in the predictability of law and its stability, on the one hand, and the need for flexible development of law in view of changing social conditions on the other. In 19th Century ideology of the application of law, legal certainty was attained, in the then very different legal cultures of the English common law and the European continent, by different methods. Comparing the approach of the two main legal systems, from the historical point of view, to the contradictory values stated above (dynamism of law versus its stability), we discover that the common law system ensured stability of its primarily judge-made law through the *stare decisis* principle (i.e., the obligation to adhere to precedents that have been set). The flexibility of judge-made law was made possible by distinguishing precedents, and the existence of an escape route in the form of the application of principles of equity. On the other hand, in the continental system of “written law”, predictability and stability were ensured by law being formulated in codes. The flexibility of law was, on the other hand, enabled by highly abstract clauses of such codes as well as the absence of a formal *stare decisis* principle.20

The system of “unwritten” judge-made law in the common law tradition does not strive to describe the system of law exhaustively. It does not strive to be all-encompassing and exhaustive: “There is no systematic and hierarchical theory of sources of law: legal regulations do naturally constitute law, but so do a number of other standards, including court decisions.”21 That means that a system this open in terms of sources of law does not control judges in detail, in terms of the sources they use. The binding agent of the system is the existence of the *stare decisis* principle, that is, the obligation of judges to follow existing precedents.

On the other hand, the binding agent of the ideology of continental law, based on the fiction of an all-encompassing statute, is the fact that the judge is bound by the statute, because in the system of “written law”, it is the statute that exhausts the entire meaning of the term “law”. In a system where, from the point of view of the governing ideology, all issues are dealt with by a statute, the obligation of judges to follow prior court decisions is not particularly relevant. Seemingly, judges arrive at the same solution as their colleague in a prior case simply because they are applying the same statute.


Legal certainty and consistency of decision-making are achieved differently in the two systems. In common law systems, it is ensured primarily “at the output end”: judges can use anything as a source of law at the input end. In terms of the output, however, judges can only arrive at an outcome of a given case that is in line with binding precedents. In continental legal systems, on the other hand, judges are bound more “at the input end”, as concerns the sources on which they can base their decision: they must always use the statute. The spread at the output end can be far greater, as judges are not bound by prior case law, in terms of the acceptable outcome of a specific case.

For that reason, the possibility for a lower court to diverge from the opinion of the court of a higher instance in the continental legal culture serves as a continuous check of the correctness of judicial decision-making. It is always possible that, in a prior case, the judge applied the statute “incorrectly”. Only if we admit the impossibility of using legal methodology to identify, from the text of the law, all potential meanings for individual types of cases, the unifying function of higher courts comes to the fore. The possibility for a court of higher instance to check the case law of lower courts thus contributes to uniformity of judicial decision-making and hence to legal certainty.

And finally, in the event of a major conflict between static values (stability of law, legal certainty) and dynamic values (the need of interpretation appropriate to the given place and time, further development of law), dynamic values usually prevail in the judicial decision-making in both systems; however, this does take place in different ways. In common law systems, it takes place by departing from the existing precedent, or, even more frequently by distinguishing it. In the continental legal system, it takes place, due to the absence of the formal stare decisis doctrine, primarily by diverging decisions of lower courts, which gradually gnaw at the established case law of the superior court and directly or indirectly invite it to change its case law, or by departing from the opinion of the court expressed in case law by the highest court itself. At the final stage, it is, however, evident that the needs of life and social necessity of legal dynamics prevail, and that the outcome of the processes is similar in both large legal cultures.

22 It is essentially a continental parallel of overruling, although supreme courts on the continent tend to do this in a concealed manner. A change in case law therefore often occurs in an indirect and concealed manner: by expressing a new opinion of the court that is incompatible with an older opinion of the court. Institutions such as the Grand Chamber of the supreme courts were formed in order to avoid such illicit changes in case law.

23 For details see KÜHN, Zdeněk. Aplikace práva ve složitých případech. Právní principy v judikatuře. Prague: Karolinum 2002, Chapter VII.
1.7. Differing functions of supreme courts: prospective and retrospective decision-making

In the continental system, based on a hierarchical ideal of state power, the reviewing function of the supreme court with respect to lower-level courts is emphasised. The fundamental mission of the supreme court is to check whether a lower court has not “erred”. The pure model (France, Italy) precludes any discretion of the supreme court in terms of selecting cases that it is to decide. For that reason, the emphasis put on a precedent being maintained by lower courts is lesser, because the highest courts review the “correctness” of all decisions of lower courts. On the contrary, a precedent plays a greater role in the Anglo-American system, where review of a decision by a higher court is an exception rather than the rule. In that system, the appeals addressed by the same court as that which decided the case play an extensive role. Supreme courts only review several dozen cases per year.24

One can hence imagine two basic models of supreme judicial institutions in the given legal systems. The Anglo-American Model, corresponding to the ideal of coordinated state power, understands the supreme court to be a body that itself determines the cases it is to hear. The supreme court chooses and only addresses cases in which a new precedent can be created, or where an older precedent can be changed, or where another issue of serious importance is concerned in the case.25 The role of such a court is not to check whether precedents are being adhered to, as this check is sufficiently performed by the very existence of the *stare decisis* principle and the great respect it enjoys from judges. Such a supreme court therefore only decides a handful of cases per year, typically several dozen, each of which is then of great importance, and nearly all of which establish binding precedents. There is no right to have a case reviewed by the supreme court. The primary purpose of the supreme court is not to correct mistakes of lower courts, nor to ensure justice in individual cases.26 Its exclusive task is to create new precedential decisions that will be followed

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26 This idea was aptly summarised, in the case of the US Supreme Court, by H. M. Hart in his comments on the 1958 case law of the Supreme Court. In that year, the Supreme Court dealt with a significant number of labour disputes in which federal courts had incorrectly subsumed facts under new federal legislation. In the cases it heard, the Supreme Court also took some of its own evidence. Hart referred to this practice as a “tragic waste of nationally needed funds of the judiciary”, noting that, in the future, the Supreme Court should be concerned with matters of greater importance than justice in an individual case. In: Hart, H. M., The Time Chart of the Justice – The Supreme Court 1958 Term. *Harvard Law Review* No. 84, 73, 1959, p. 98.
in future cases by lower-level courts. In this way, the supreme courts form law *pro futuro*. Hence, this model is *prospectively* oriented.

In the *continental model*, in the purest concept, the court does not have the opportunity to pick and choose cases – on the contrary, it must deal with all cases that come to it. Such a supreme court is an institution primarily focused on correcting legal errors in individual cases. This model is past-oriented, focused *retrospectively*. It serves to ensure uniform case law across the judiciary. The fundamental purpose of retrospective decision-making is correction of all “mistakes” in individual decisions of lower courts. A pure continental model rules out systematic generation of precedents by the supreme court, which has no control over which cases it would hear.27 In a purely retrospective system, a new norm or new interpretation of the law created by a judge is, rather, a by-product of several decisions in a flood of hundreds or thousands of decisions that will have no impact on later practice, because they merely express an established opinion of the court or relate to a case so specific that a conclusion of the court expressed therein is of no precedential value.

Somewhere between these two pure (and extreme) models are a number of mixed or hybrid models. These typically include systems from Germanic legal circles, i.e., including the Czech Republic (this only applies to the Supreme Court, but not the Supreme Administrative Court, which, on the contrary, is a nearly pure example of a solely retrospective model, with unlimited access of applicants), Germany, and Austria. In their legal regulation and in the work of the supreme court of the given jurisdiction, both a retrospective, as well as something of a prospective feature are evident. This is clear first from the (relatively) limited workload of such supreme courts28 and from the fact that

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27 For example, Article 111 (7) and (8) of the Constitution of the Republic of Italy, access to the supreme court is the right of each individual. Due to this unlimited access, the Italian Cassation Court [*Corte (Suprema) di Cassazione*], which is comprised of some 350 judges, hears more than 40,000 cases per year. Similarly, the supreme court of France in the sphere of general justice, the Cassation Court [*Cour de cassation*] has over 100 judges (including “interns”, known as “juges référendaires”), and it decides around 30,000 cases each year. Cf. the current “Rapport annuel de la Cour de cassation” available at http://www.courdecassation.fr. Another case of this pure model is the Czech Supreme Administrative Court: with the exception of asylum cases, this court has no choice in deciding which cases indeed deserve to be decided by the superior courts in administrative matters. See Section 103, Section 104, and Section 104a of the Code of Administrative Procedure.

28 “Relatively” given the above-mentioned situation in Italy and France. Supreme courts in these hybrid models decide not tens of thousands, but only thousands of cases per year. For example, the German Federal Court of Justice [*Bundesgerichtshof*], the supreme federal courts in civil and criminal matters, comprises 126 judges and decides approximately 3,300 cases per year (cf. current annual statistics at http://www.bundesgerichtshof.de). The German Federal Administrative Court [*Bundesverwaltungsgericht*], the supreme court in general administrative matters (there are, however, other specialised federal supreme administrative courts that have
access to these courts is a combination of prospective considerations (issue of material legal importance, irregular case law of appeal courts), which are, however, in real life eroded by the preservation of retrospective elements (typically incorrect evaluation of a case, evaluation of a case in violation of substantive law, etc.). It is, however, evident from the practice of these courts, as well as from the Czech practice, that maintaining a balance between retrospective and prospective elements is difficult in real life. Ultimately, the decision-making of these courts slides towards traditional continental “oversight”, over the correctness of individual decisions.

In line with the nature of the functioning of continental and hybrid models of supreme courts, the continental approach to case law logically prefers to use the term “established case law” instead of “precedent”, in describing the role of prior court decisions. The logic of the operation of the continental system presumes that future qualified normative effects of case law are only linked to decisions of courts of the highest instances that have been confirmed repeatedly as:

(a) the supreme court deciding large quantities of cases in a number of different chambers tends to produce internally discrepant case law. If case law is to fulfil its essential steering function, it cannot be discrepant. That is why the “Grand Chamber” often plays a key role in unifying case law across supreme court chambers, as its decisions are binding as precedents for the supreme court itself. If a legal issue is only decided by a “small” chamber, there is always a chance of a further shift in case law;
(b) It is easier to create established case law, i.e., repeated decisions on a specific matter, at a court that is deciding large numbers of cases. On the other hand, at a court deciding only dozens of cases, this would be a needless waste of time, furthermore in a situation when the strict binding effect of a single precedent is recognised.

specialised jurisdiction in tax or social issues), has 40 judges who decide approximately 2,000 cases per year (see statistics at http://www.bverwg.de).

1.8. Grand Chambers of supreme courts as a challenge to the legal culture of continental countries

I consider the mechanism of institutionalised change in the case law of supreme courts to be one of the most important style-forming elements of continental legal culture, albeit it has been rather neglected by legal theory. The importance of grand or similar chambers lies in the fact that, in the continental legal culture, supreme courts do not act as a single court, but as a relatively lose grouping of small chambers with designated competences. Maintaining unified case law of a continental supreme court, which in real life is, rather, the case law of small chambers, is an exceptionally difficult task. That is why comparing a Grand Chamber to the position of a “quasi-supreme” court that maintains unified case law of a supreme court is absolutely fitting.

Until the end of the last century, changes in case law in the general Czech judiciary took place discretely. At times, they came in the form of a single instance modification, and at other times a longer-term modification of a certain opinion of the court expressed in case law. In real life, it was often very difficult to determine whether a change in case law had indeed taken place, and often, several parallel opinions of the court existed for an extended period. The only possibility for a unification of the Supreme Court’s case law was the adoption of a unifying opinion, which I, however, consider very problematic from the constitutional point of view.

The key problem of the 1990s was the issue of predictability of changes in case law. The Constitutional Court repeatedly emphasised that case law is law in the substantive sense of the word, which entails the obligation of courts to change their case law in a principled and predictable manner that would not disrupt legitimate expectations of the addressees of legal norms.


33 A classic example of theoretical problems with case law in the 1990s is the case dealing with the election of Senator Dagmar Lastovecká – judgment of 18 February 1999 file no. I. ÚS 526/98 (N 27/13 SbNU 203; 70/1999 Coll.).
The large amendment of the Code of Civil Procedure, enacted in 2000, responded to the issue of divergence in case law.\textsuperscript{34} Effective from 2001, the amendment also amended the old Act on Courts and Judges\textsuperscript{35} and created Grand Chambers of Supreme Court divisions, giving them the authority to unify SC case law (Section 27a). The institute of the Grand Chamber proved to be successful. That is why it was also adopted by the new Act on Courts and Judges.\textsuperscript{36} A comparable institute of the Grand chamber has been a component of the Code of Administrative Procedure since its enactment.\textsuperscript{37}

According the currently applicable statutes, all cases in case law (dissenting case law) on the level of supreme courts take place by way of an institutionalised mechanism – a decision of the Grand Chamber of the SC or of the Grand chamber of the SAC, or a unifying opinion of the Constitutional Court Plenum. The only exception is the case law of disciplinary chambers of the SAC,\textsuperscript{38} which, according to the controversial interpretation of disciplinary chambers themselves, cannot be unified by any higher body. With a view to the nature of disciplinary proceedings pertaining to judges, state prosecutors, and court executives, this is a very unfortunate situation, and in my opinion absolutely unacceptable from the constitutional point of view. There have been repeated cases in which diametrically different opinions of the court were rendered as to whether an administrative offence was committed.\textsuperscript{39}

If there were no authority above both supreme courts that would oversee adherence to the use of the grand or Grand chamber for dissenting case law, the importance of this mechanism would be far less. But it has been significantly


\textsuperscript{35} Act No. 335/1991 Coll., on courts and judges.

\textsuperscript{36} Act No. 6/2002 Coll., on courts and judges, Section 20.

\textsuperscript{37} Act No. 150/2002 Coll., Code of Administrative Procedure (see Section 17). There are two grand chambers at the SAC – the vast majority of issues is decided by a seven-member chamber, comprised of the SAC president and six judges. It decides cases forwarded to it by the three-member chamber pursuant to Section 17 (or pursuant to Section 18 Code of Administrative Procedure, which resolves repeated discrepancies between the decisions of the SAC and administrative authorities; it is, however, not used in practice). The nine-member chamber decides matters forwarded to it by the five-member and seven-member chambers and is comprised of the president and eight judges. The latter grand chamber decides on exceptional cases such as election and competence cases, and until recently also about asylum-related matters.

\textsuperscript{38} See Act No. 7/2002 Coll., on proceedings pertaining to judges, state prosecutors, and court executives.

\textsuperscript{39} The question is whether the matter can be remedied by an interpretation of Act No. 7/2002 Coll. in conjunction with an interpretation of those parts of the Code of Administrative Procedure that deal with the expanded chamber, or only by means of an amendment to the acts. According to the case law of disciplinary chambers themselves, only the latter route is possible (cf. Decision of the Disciplinary Chamber of the SAC of 23 March 2012, ref. no. 11 Kseo 4/2009-111, available at www.nssoud.cz).
strengthened by the case law of the Constitutional Court, according to which, diverging from the opinion of the court of a supreme court in a situation when the case had not been presented to the grand chamber, constitutes a breach of the constitutional right to having one’s lawful judge. Given that, in that case, a non-statutory judge ruled on the matter, the Constitutional Court, in line with the spirit of the principle of minimal interference with judicial power, does not render any opinion on the merits of the legal issue at hand, and overrules the decision of the Supreme Court automatically.40

Grand Chambers and their variations significantly enhance the normative force of the case law of supreme courts. Above all, the mechanism of institutionalised unification of the supreme court’s case law reduces the possibility that lower-level courts would not accept case law that has already been unified by a grand chamber or the Plenum. If all arguments against the case law have already been heard, it is essentially not possible to dwell on an opposing opinion of the court (vertical normative effect of the opinion of the court of a grand chamber). The mechanism of institutionalised change is manifest within the Supreme Court itself absolutely formally (horizontal binding effect): a judge of the Supreme Court cannot rule against a decision of a grand chamber of his own court. The only, and entirely exceptional, possibility that he has is to initiate another proceeding on the same or similar legal issue before a grand chamber.

1.9. Summary of the arguments presented

The reasons given above show that the differing concepts of understanding the role of prior court decisions on the European continent and in the Anglo-American common law have real foundations. The differences between the two concepts are not merely “folklore”: Anglo-American judges behave rationally when they consider individual decisions of courts from a certain level of the judicial system and above to be binding, and on the other hand, continental judges behave rationally when they do not deem their individual decisions to be binding.

As has been indicated above, however, the fact that a continental decision cannot be considered strictly binding does not mean that case law would be normatively irrelevant. A number of the differences described above come rather from a simplified understanding of law and its binding effect in the continental system. And as this simplified understanding of law and its binding

40 Cf. judgment of 20 September 2006, file no. II. ÚS 566/05 (N 170/42 SbNU 455) or judgment of 11 September 2009, file no. IV. ÚS 738/09 (in relation to the SC) or in relation to the SAC, judgment of 18 April 2007, file no. IV. ÚS 613/06 (N 68/45 SbNU 107).
effect transforms, the pressure is increased for a new concept and description of the general normative function of a judge’s decision in continental countries. Continental theory must not neglect case law as a source of law, and must, on the contrary, strive to describe in greater detail the functioning of institutions such as Grand Chambers of supreme courts.
2. Binding Effect of Constitutional Court Judgments on Constitutional Complaints

VOJTĚCH ŠIMÍČEK

A joke has been going around about the Lord Speaker of the House of Lords, Lord Eden, who, while on a business trip, lost his way in the fog and asked a random passer-by: “Chap, where are we?” The answer he got was: “In your car.” Smiling, Lord Eden turned to his companion and said: “That was an excellent and correct Parliamentary speech: succinct, true, and it did not tell us anything we would not already know.”

I can promise that my contribution, too, will be (given how extensive the topic is), succinct, true, and it will not tell the reader anything he would not already know. In spite of that, I think that certain things should be said repeatedly, and aloud.

According to Article 89 (2) of the Czech Constitution “enforceable decisions of the Constitutional Court are binding for all bodies and persons.” The binding nature of the Constitutional Court’s decisions is inferred from this provision in a positivist manner; however, I do think that decisions of the Constitutional Court would be binding even if there were no such article in the constitutional order. The binding nature of decisions of the Constitutional Court (as well as the binding nature of decisions of general courts) does not flow from this single article of the Constitution, but from the very meaning of the institution and from its position within the constitutional system. That is another reason why I agree with Z. Kühn that “Czech discourse on the binding effect of the Constitutional Court’s judgments for general courts in fact pertains to the significance of court decisions in a continental legal order in general.”

Professional, judicial, as well as political discourse on the theme of the binding nature of decisions of the Constitutional Court has been ongoing practically since the beginning of the 1990s when the Constitutional Court was

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41 The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the authors.
established. I am of the opinion that, at the beginning, the discussion was entirely understandable, as the Constitutional Court was a brand-new body and had to fight for its “place in the sun”; however, at this point, the discussion should advance much further than was the case at the creation of constitutional judiciary.

The 1990s were also characterised by a certain cohabitation of constitutional and general judiciary, which was not always an easy process. Let us remember, for example, cases of those who refused military service, a number of restitution cases, or case law pertaining to the first Senate (upper chamber of the Czech Parliament) election. The Constitutional Court was established not only as a brand-new element of the system of bodies designed to protect law. Many judges from its first decade had had a very different life story than judges of general courts; often, their education was different, they came from a different set of values, and even used different terminology. A famous statement from that era, by the Slovenian judge Župančič, was that paradoxically constitutional judiciary had been accepted by citizens and politicians, while resistance against the authority of newly established constitutional courts came “from places where one would least expect it. It is not coming from new law-givers or from the executive branch of state power: resistance is coming from the remainder of the judiciary, from general courts.”

Discussions from the 1990s as to whether decisions of the Constitutional Court are binding at all are, however, a matter of the past (although the famous provocative saying that law is merely a prediction of how courts will decide should certainly not apply), and today, I do not know anyone who would entirely deny the binding effect of the decisions, and in some cases, it is admirable how well decisions of the Constitutional Court were accepted, although

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46 Many expert texts have been published on this issue, for example KLÍMA, Karel (ed.). Závaznost rozhodování ústavních soudů. University of West Bohemia in Pilsen, 2004. More recent works include chiefly BOBEK, Michal, KÜHN, Zdeněk (eds.). Judikatura a právní argumentace. 2nd edition, Prague: Auditorium, 2013, in particular Chapter 13.
47 Now we can remember with a kind smile that some Supreme Court judges claimed in their statements pertaining to constitutional complaints that general courts are not public authorities and because the Constitutional Court is outside of the system of general courts it is not at all authorised to review their decisions. See, e.g., HOLLÄNDER, Pavel. Role Ústavního soudu při uplatňování Ústavy v judikatuře obecných soudů. In. ŠIMÍČEK, V ojtěch (ed.) Ústava České republiky po pěti letech, Masarykova univerzita, Brno, 1998, pp. 38 ff.
they were questionable and extremely sensitive. In particular, in relation to the Supreme Court, I dare say that, compared to the former sometimes a priori rejection of the Constitutional Court’s decisions, which unfortunately resulted in verbal ping pong, today, all that is left is only a sort of “nudging” that does not call the functioning of the system into question.

Entirely different are the questions whether all decisions of the Constitutional Court are binding (and how), whether they must be respected as a whole, or only some of their parts (the operative part of the decision, principal reasons), and what should be done if we want to follow the Constitutional Court’s case law, but that case law is not unified and we do not known which case law we should in fact follow.

I will offer at least several theses with respect to the discussion on these issues that I will examine further. My goal is nothing more than to disprove, in a Jeeves-like fashion, several myths or at least inaccuracies: the myth that (1) protection of fundamental rights is a privileged domain of the Constitutional Court, whereas the task of general courts is merely to apply sub-constitutional law, (2) only the principal reasons of a decision are binding, (3) there is no hierarchy of decisions of the Constitutional Court, (4) the nature of a decision can be identified solely from the headnote, and (5) dissenting views weaken the binding nature of a decision.

### 2.1. Courts should “compete” in the protection of fundamental rights

To explain my first thesis, I will use an example that certainly is not one from the Constitutional Court’s “showcase”. In 2005, the Constitutional Court decided two constitutional complaints with identical contents, submitted by Ukrainian couples challenging decisions of administrative courts with the same contents; in one case, the constitutional complaint was rejected as manifestly

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49 Here I mean, for example, acceptance of the judgment of the Constitutional Court in the M. Melčák case by the entire political elite – although understandably with some “teeth-grinding” (Constitutional Court of the Czech Republic, judgment of 10 September 2009, file No. Pl. ÚS 27/09, No. 318/2009 Coll., N 199/54 ŠbNU 445).

50 See Constitutional Court, judgment of 8 August 2005, file no. II. ÚS 186/05 and Constitutional Court of the Czech Republic, decision of 20 July 2005, file no. IV. ÚS 189/05. All decisions of the Constitutional Court are available at http://nalus.usoud.cz. In the judgment quoted, which followed the issuance of a dismissing decision, the Constitutional Court stated that “this conclusion was reached by the 2nd chamber of the Constitutional Court, knowing that the constitutional complaint of Ms. P, filed in a situation of similar facts and with similar argumentation, was rejected by a decision of 20 July 2005, file no. IV. ÚS 189/05, as clearly unfounded. The 2nd chamber of the Constitutional Court disagrees with the conclusions of the court stated in
unfounded, whereas in the other, the constitutional complaint was granted. To the honour of the Constitutional Court, we must add that the Court immediately realised this mistake and adopted a unifying opinion.\textsuperscript{51} Stated very succinctly, the issue at hand pertained to the extent of the constitutional right to an interpreter, pursuant to Article 37 (4) of the Charter, in relation to the translation of documents used by parties to the proceedings in their communication with the Court.\textsuperscript{52} In the case in which the Constitutional Court granted the constitutional complaint, it bound administrative courts by its opinion of the court, according to which “if there is any question as to whether a party to proceedings is, given his linguistic abilities, able to adequately respond to the court’s request that he comply with certain procedural obligations or exercise his procedural rights in the Czech language (or he does not respond at all for the same reason), the court’s action must also be rendered in a language that the party to the proceedings understands, or appoint an interpreter for him. Otherwise, the equality of parties to the proceedings that is guaranteed by the constitutional order and law is not ensured.”

I admit that I am not certain how the regional court proceeded in this case. If I were in its position, I would have to weigh, on the one hand, the binding judgment of a three-member chamber rendered in a specific matter, and on the other hand the unifying opinion of the Plenum that was issued later, and from which it follows that the Constitutional Court has changed its previously held opinion, using a method prescribed by law. In other words, the regional court found itself in a typical conflict between the cassation and precedential type of binding effect of a Constitutional Court decision.

In this situation, I personally would prefer the opinion set out in the cassation judgment of the chamber, but not due solely to the fact that it was issued directly in a case, but, in particular, with a view to its specifics. The matter of the case lay in the fact that the Constitutional Court informed the administrative court that if it does not translate and send its notices to parties in a language comprehensible to them, it is not violating their constitutional

\textsuperscript{51} Constitutional Court of the Czech Republic. Unifying opinion of the Plenum of 25 October 2005, file no. Pl.ÚS-st. 20/05, ST 20/39 ShNU 487.

\textsuperscript{52} See the headnote of the quoted unifying opinion of the Plenum: “The fundamental right of a party to proceedings to being assisted by an interpreter, within the meaning of Article 37 (4) of the Charter of Fundamental Rights and Freedoms, cannot be extended by interpretation or by a specification of Article 36 (1) of the Charter of Fundamental Rights and Freedoms as a general provision on fair process. The fundamental right guaranteed in Article 37 (4) of the Charter of Fundamental Rights and Freedoms does not extend to written communication with parties to the proceedings, and vice versa. This does not preclude statutory regulation from granting a higher standard.”
rights; however, this definitely does not indicate that the court would be forbidden from doing so. It is not, at the same time, possible to overlook the fact that proceedings concerning the granting of international protection are typically vertical proceedings, with the state exercising its magisterial powers, which in these proceedings does not enjoy any fundamental rights, on the one hand, and the protection seeker on the other, who naturally enjoys such rights.

The situation would be more complicated if general courts were not deciding in cases of the typical magisterial relationship of the state to an individual, but in the case of an equal relationship of two private persons. In that case, I would prefer to apply the newer (precedential, rather than cassation) opinion of the court contained in the unifying opinion of the Plenum53 (this situation is called “incidental retrospective” by theorists; it is based on the principle that if we decide that an existing rule is incorrect, we must also decide that it has always been incorrect54).55 Seen pragmatically – if we took as decisive the binding opinion of the court expressed in a specific case, then in “round two” of the proceedings, the Constitutional Court would have to prefer the opinion of the Plenum, as any other solution would not make sense. Furthermore, in this case, it does hold true that if we grant one entity more rights, the position of the other party to the proceedings would not change. This other party to the proceedings is not the state (or the appropriate public authority), which does not enjoy any fundamental rights, but another entity that enjoys fundamental

53 For an opposing opinion which in these cases clearly prefers a cassation binding effect see e.g.: BOBEK, Michal, KÜHN, Zdeněk. (eds.) Judikatura a právní argumentace. 2nd edition. Prague: Auditorium, 2013, pp. 373–375.
54 “A principle in all continental-law countries (as well as in the common law system) is the application of a judge-made standard to all cases being currently heard by lower courts or to all applications submitted after the date on which a new precedent was set. This applies regardless of when the actions corresponding to the matter of the legal norm took place.” BOBEK, Michal, KÜHN, Zdeněk. (eds.) Judikatura a právní argumentace. 2nd edition. Prague: Auditorium, 2013, pp. 149, 151.
55 An exception from this principle of incidental retrospective was accepted by the Constitutional Court, for example in the unifying opinion of 25 November 2014, file no. Pl.ÚS-p. 39/14 (297/2014 Coll., ST 39/75 SbNU 707), in which it stated, above all, that “in the cases at hand the relationship between the state and the applicant seeking compensation for non-financial harm is purely vertical, and hence, the application of (albeit incorrect) opinions of the court cannot cause harm to the legal sphere of other persons. It must also be assumed that the Constitutional Court is deciding in a situation when applicants’ claims had already been granted in several other, legally comparable cases. The Constitutional Court would therefore see departing from case law in this situation, to the detriment of several applicants (pure prospective), whose claims have not yet been granted, as clearly unfair, and by doing so, it would generate further inequity and wrong, even within a group of persons who in a principally comparable legal situation, duly claimed their rights; nevertheless, some of them were “lucky enough” to have their cases decided before this departure in case law.”
rights. This means that, by accepting the opinion that the Plenum of the Constitutional Court called outdated or erroneous, rights of this other entity would be groundlessly extended or reduced.

Perhaps the most important provision pertaining to the topic at hand is embodied in Article 4 of the Constitution, according to which fundamental rights and obligations are under the protection of judicial power. That means not solely that of the Constitutional Court, but of all courts. Seen in this light, the binding effect of the Constitutional Court’s case law should not be seen, *prima facie*, such that if the Constitutional Court does not find a certain regulation unconstitutional, general courts cannot overrule it and grant the parties more rights. The relationship of the Constitutional Court in the protection of fundamental rights should not be seen as a peloton of cyclists, in which the Constitutional Court jealously protects its position as the leader, making sure that nobody goes ahead of it and that all other competitors must respect its exclusivity. On the contrary, even the leader may run out of energy from time to time, and need to recover, which is why he welcomes others trying to overrule it in the protection of fundamental rights, because ultimately it will mean far less work for him.

### 2.2. Something (seemingly) said beyond the scope may be of greater importance than the principal reasons of a decision

It is understood as self-evident that only that part of the grounds of a Constitutional Court decision that is directly related to the operative part of the decision can be taken as binding. In particular, things not stated by the court itself, things that do not constitute its own opinion⁵⁶ (narration of the case, recapitulation of the statements of the parties, etc.), cannot be binding.

In certain cases, the Constitutional Court provides an internal structure to the grounds for the decision, distinguishing the so-called principal reasons of its decision from something that is said beyond their scope (obiter dictum). Whereas the binding effect of principal reasons is evident, the situation of the part “beyond” is often far more complicated. If the court expresses “beyond the scope”, a moralising thesis, attempts to make a joke, or shows off by quoting

⁵⁶ To lighten matters up, there has been a case when the court erroneously made the headnote from the statement of one of the parties (the decision arrived at an absolutely different conclusion), which that same party (an administrative authority) fondly repeated in other court proceedings, probably relying on the court’s low vigilance and the mistaken assumption that only headnotes are binding and nothing else needs to be read.
an interesting literary source, it is evident that there is no point considering whether this part of the grounds are indeed binding.

In many cases, however, the obiter dictum consists of a specific message sent to the court whose decision has been struck down. The Constitutional Court, for example, strikes down a court’s decision “solely” for a fundamental breach of the right to a fair process (e.g., a hearing was not ordered, although the parties to the proceedings insisted on it), whereby it opens up procedural room for that court to render a procedurally flawless decision this time. At the same time, the Constitutional Court discovers in this part of its review that the general court set out in an entirely erroneous direction (e.g., it applied a legal provision that is no longer effective, overlooked newer case law, etc.). In that case, it will use the obiter dictum as a message to draw the court’s attention to the fact that it should again carefully consider its evaluation of the case on the merits, and gives it “hints”, for example, in the form of specific case law, which it should study – nothing more and nothing less. If the judge concerned reads this message well, he renders a new decision that is flawless, not only in procedural terms, but also in substantive terms. Otherwise, there is the risk that, in (and we must add, absolutely needless) “round two” of proceedings before the Constitutional Court, this decision will again fail, although this time for different reasons than the first time. Does that, though, mean that such obiter dictum is not binding? I think not.

The Supreme Administrative Court has dealt with an interesting case in this regard: in a judgment that was contested by a cassation complaint, a regional court dealt with certain points of the application, and with respect to certain others, it stated that they were claimed late, and that it is unable to concern itself with them, due to the concentration of proceedings principle; nevertheless, it did so, albeit only as obiter dictum. In that respect, the Supreme Administrative Court stated that “distinguishing between the principal reasons of a decision (ratio decidendi) and speaking on certain fact of law or fact beyond their scope (obiter dictum) cannot be viewed too schematically, and certainly they must not be in any way overrated. This distinction is an expression of the opinion of the deciding court, as to what it considers to be the core of the matter, and what is of significance, for example, only for greater comprehensibility, as an additional explanation of certain issues, an elucidation of the thoughts of the court, etc. In both instances, however, it is the court’s opinion being expressed, and in a magisterial manner: in the form of an individual legal act. This form of decision is binding as a whole, and it cannot therefore be a priori ruled out that the part designated as obiter dictum cannot be binding. Bluntly put: the opinion of a court as to whether something is or is not obiter dictum can be, in the practical use of the given decision, modified to a great degree, and it can
happen that the two parts described may be interchanged. This is aside from the fact that deciding courts do not always clearly distinguish which part of the grounds was intended as the principal part and which only as a supplementary explanation, which does not make for an easy interpretation of its decision. In a situation when it is generally accepted that a legal norm has, to a great degree, a life of its own, independent of its grammatical expression in the text of the regulation, and that finding its true meaning is, above all, a task for the person interpreting it, this thesis must necessarily apply similarly to work done with case law. It is often the case that only through interpretation and application does it become clear which parts of courts’ decisions prove over time to be the principal, binding, precedential parts, and which, on the other hand, have only of a very narrow, purely informative, meaning.  

It can be summarised that, in real life, the ratio decidendi and obiter dictum of a decision of the Constitutional Court can often not be distinguished, and not even the part of the ground stated “beyond the scope” is void of legal importance – and in certain cases, of binding effect. It also holds true that (just as in the common law tradition), the decision as to which part of the grounds will become ratio, and which will be merely obiter, is not to be made by the judge rendering the decision, but by the judges who subsequently interpret and apply the decision.

2.3. A decision is not the same as a judgment

Another myth that one encounters is the failure to distinguish between forms of Constitutional Court decisions. Sometimes, we encounter the opinion that the Constitutional Court has spoken on a certain issue in a judgment; nevertheless, it has also issued three decisions with the opposite meaning, where constitutional

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57 Judgment of the Supreme Administrative Court, file no. 2 Afs 67/2008, in: www.nssoud.cz. Consequently, the court stated in the end that “it does not view as decisive the fact that the regional court only dealt with the said group of claims made in the application in the part of the grounds designated as “obiter dictum”. The important thing is that it did not leave any of the claims out entirely, and hence, this part of the cassation complaint cannot be granted.” Evidently, the court was led by the pragmatic thought that striking down the contested judgment of the regional court would, in this situation, be purely formalistic, as it would not result in anything but the subsequent rendering of an entirely identical decision, changed only to the extent that one or two lines of the grounds would be removed, which erroneously distinguish the principal reasons from the obiter dictum.

58 “It is not for the court ruling on the matter to determine from which part or from which arguments contained in a judgment it should distil the ratio decidendi and which contain only non-binding obiter.” That is why judges in the common law tradition do not structure their decisions into “obiter” and “ratio”, as only that way are they prevented from “accumulating in their hands an excessive amount of law-forming authority.” BOBEK, Michal, KÜHN, Zdeněk. (eds.) Judikatura a právní argumentace. 2nd edition, Prague: Auditorium, 2013, p. 55.
complaints were rejected as clearly not grounded. In the worst case, the situation may be interpreted as “three is more than one”, and in the better case that the Constitutional Court has no evident opinion of the court which should be respected. Relatively recently, for example, the Supreme Court has stated that “it is, naturally, aware of the Constitutional Court’s case law concerning the higher precedential force of judgments as compared to the precedential force of decisions. Nevertheless, given that the Constitutional Court has yet to express in a judgment conclusions similar to those found in the judgment of 11 October 2016, […] the Supreme Court did respect the binding opinion of the court expressed by the Constitutional Court in the cassation judgment rendered on the matter, but it does not see any convincing reasons as to why it should not stick to its settled case law, which has been found constitutionally compliant on many instances by decisions of the Constitutional Court.”

It should therefore be noted that only judgments constitute Constitutional Court decisions on the merits.60 That is why the Constitutional Court has also explicitly emphasised61 that the “purpose of proceedings concerning a constitutional complaint is the protection of fundamental rights or freedoms, which is reflected in the nature and contents of decisions dismissing [applications for leave to appeal], which, among other things, serve as a procedural vent that frees up decision-making capacity; it definitely cannot serve as alibi for public authorities, which, however, often use, in this very manner – as confirmation of their opinions of the court, court decisions protecting fundamental rights that are partially (and sometimes not at all) based on the merits.”

For the same reason, after all, legal regulation explicitly presumes the use of a unifying mechanism only in cases of divergence from an opinion of the court stated in the Constitutional Court’s judgment, but not a decision.62 It flows from this that the lawmaker probably did not expect that a decision could contain an opinion of the court worthy of being changed by means of a unifying opinion of the Plenum. I critically note with respect to the Constitutional Court that sometimes there is an evident effort to include, in decisions rejecting constitutional complaints for being manifestly unfounded, legal argumentation of such detail that the difference between it and a dismissive judgment is eliminated; this sometimes results in significant lack of understanding or can even confuse users as to which opinions of the court are binding for them.

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60 According to Section 54 (1) of Act on the Constitutional Court “the Constitutional Court decides on the merits of a matter by a judgment, and on other matters by a decision.”
61 Constitutional Court of the Czech Republic, judgment of 13 September 2007, file no. I. ÚS 643/06.
62 See Section 23 of the Act on the Constitutional Court.
In another judgment, the argumentation of the Constitutional Court went yet further, distinguishing very clearly the cassation and precedential binding effect of the Constitutional Court’s judgment, emphasising that “the relationship between the Constitutional Court and general courts are not characterised by a one-directional dictate; on the contrary, a dialogue between the two must be possible.” Essentially, it is in order to ensure that general courts “reflect” the case law of the Constitutional Court, which means to decide in line with the constitutional principles presented herein, but in a considered manner, not by a slavish, senseless copying of its opinions. As a reflection, the Constitutional Court accepts also the transposition of serious arguments leading to a conclusion as to why it would not be appropriate, given relevant differences of fact, to apply the said principle in another case. “That means that a general court can distinguish [a case] from the Constitutional Court’s decisions and transpose competing thoughts solely on the basis of its own honest and firm conviction, stemming from objectively justifiable reasons that, in line with constitutional interpretations of the Constitutional Court generally, the decision concerned cannot be applied to a case that differs factually (known as “distinguishing”), or if it is convinced on the basis of an interpretation or understanding of the principles and rules of the legal order as a whole (primarily, but not exclusively, constitutional principles and rules), that the Constitutional Court could and should reconsider the constitutional interpretation concerned. If a general court proceeds thus, then the fact that the Constitutional Court does not, in the end, accept the changes it has proposed, does not suffice to conclude that the general court erred, thereby breaching Article 89 (2) of the Constitution.”

An example of such an emancipated treatment of the Constitutional Court’s case law is the approach taken by the Supreme Administrative Court, which emphasised that constitutional norms merely indicate the target, but not necessarily the only way to reach that target. “Therefore, the task of the Constitutional Court on the constitutional level is to guarantee that the phenomenon known as denegatio iustitiae does not occur in these cases; the task of administrative courts is to provide detailed arguments as to which of the possible solutions of judicial protection is not only constitutionally compliant but also most efficient and rational. […] The Supreme Administrative Court therefore maintains that the above-mentioned situation, of not grappling with a major position of argument, has occurred, and that consequently it is not obliged to fully apply the opinion of the Constitutional Court to the case at hand, as it is firmly convinced

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63 Constitutional Court of the Czech Republic, judgment of 13 November 2007, file no. IV. ÚS 301/05.
that the opinion of the court, according to which judicial protection is only guaranteed in proceedings concerning an application challenging objections to an execution order, was not only not refuted by the Constitutional Court, but not even examined, and hence, it is possible to distinguish from its opinion of the court.  

2.4. The actual will of the Constitutional Court must be inferred (although it may not always be easy)

Closely related to the above is, in my opinion, the greatest problem in terms of the binding nature of the Constitutional Court’s decisions, which is the non-uniformity of its case law. If, for example, we discover that the opinions of the court contained in the Constitutional Court’s decisions are inconsistent, but that there are, on the one hand, opinions from dismissive decisions, and, on the other, case law from judgments, it is not a fundamental problem, as

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65 A similar case is the judgment of the Supreme Administrative Court of 3 December 2009, file no. 2 Aps 2/2009, which states that “the Supreme Administrative Court fully respects the precedential nature of the case law of the Constitutional Court, nevertheless, this respect cannot be mistaken for a mechanical taking over of its opinions of the court. Thus seen, the contents of the cited Constitutional Court judgment, file no. I. ÚS 1835/07, indicates that the Constitutional Court did not at all deal with the quoted case law of this court, which drew up a very detailed mechanism of procedural means to protect against potential licence in the initiation and execution of a tax inspection: the possibility of submitting objections and the obligation of the tax administrator to decide about them within a certain period; defending against a tax inspection as against an illegitimate intervention, and the related possibility for an administrative court to order that it is impermissible to carry on in violating the rights of a tax entity (Section 87 (2) Code of Administrative Procedure), i.e., to factually prohibit the tax inspection from carrying on and to order the restitution of the situation prior to the intervention (e.g., to lay down the obligation to hand back accounting or other documents that have been seized); ineffectiveness of the commencement of a tax inspection if it has only been commenced formally, but not factually. The Supreme Administrative Court maintains that the solutions which it has previously offered constitute a sufficiently effective mechanism to defend against license on the part of the tax administrator during the execution of a tax inspection. Hence, this court fully respects and shares the objective pursued by the Constitutional Court in its judgment file no. I. ÚS 1835/07: protection against licence on the part of the tax administrator and minimisation of its intervention in the autonomous sphere of a tax entity. It only holds that the same objective can also be attained through means other than those chosen by the Constitutional Court in the quoted judgment; and given that in the judgment, the Constitutional Court did not explicitly rule out that effective protection of the same constitutionally guaranteed rights are not adequately protected by the means offered by settled case law of the Supreme Administrative Court, we find ourselves in a situation when the Constitutional Court’s judgment file no. I. ÚS 1835/07 does not adequately deal with all possible and applicable fundamental arguments and at the same time, it is not evident that it would be doing this on purpose. In that situation, the Supreme Administrative Court maintains that it is free to distinguish itself from the said opinion of the court of the Constitutional Court.”
courts applying these should overcome the discrepancy by knowing that only judgments are binding, and that the informative value of dismissive decisions lies only in the fact that the Constitutional Court did not select those cases for review on the merits – that it did not find the constitutional complaint admissible.66

A serious problem occurs when opinions of the court contained in judgments of the Constitutional Court stand against each other. The statute has provisions for such cases, which provide for a unifying mechanism in the form of unifying opinions of the Plenum67; nevertheless, it must be critically admitted that the mechanism has thus far been used only sporadically (although a certain minor shift can be observed in the third decade).68 In real life, we see a factual distinction from case law, that is, either a distinction made without admitting it, or by way of (often not really convincing and rational) distinctions.69 Doctrine distinguishes between a genuine and non-genuine change of case law: the genuine type is made by a method foreseen by the law, whereas the non-genuine type by way of a change in the relevant conditions (rebus sic stantibus) or distinction (distinguishing).70 In these cases, the challenge lies in how practice should work with the Constitutional Court’s case law. The Constitutional Court itself is well aware of the situation: it offers, as a solution, a certain algorithm of steps to take in cases when decisions of the Constitutional Court are not uniform: judgments rendered by the Plenum are always of a greater weight than those of chambers, and the precedential force of any judgment is greater

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66 Legislative developments correspond to this conclusion, as after the amendment of the Act on the Constitutional Court effected by Act No. 404/2012 Coll., the Constitutional Court may only provide grounds for its decisions rejecting an application by stating a statutory reason due to which it is dismissing the application. Simply put, it is not at all obliged to explain the reasons due to which it has found the constitutional complaint clearly unfounded. The fact that it practically does not take advantage of this option changes little.

67 See Section 13 and Section 23 of the Act on the Constitutional Court which stipulate that should a chamber arrive at an opinion of the court departing from the opinion of the court of the Constitutional Court stated in a judgment, it shall submit the issue to the Plenum for evaluation. The Plenum may only adopt a departing opinion of the court by a qualified majority of at least nine judges.

68 The database of the Constitutional Court shows that only 32 such unifying opinions were adopted in the 23 years for which the Constitutional Court has existed; six of them were between 2014 and 2016.

69 As one example for all, I state the judgment of 13 November 2007, file no. Pl. ÚS 2/07 (N 193/47 SbNU 539), in which the Constitutional Court explains in a very unconvincing, or even self-serving manner, a conclusion of the court (in my opinion entirely correct) as to why it is no longer necessary, following the enactment of the Code of Administrative Procedure, to send a notice requesting the payment of a court fee to the party to the proceedings if it has already been sent to that party’s lawyer.

than that of a decision. If there is a difference in argumentation between two judgments, a court should choose as the governing one “that solution of a case that would be more consistent with the general case law of the Constitutional Court. […] Whereas the assumption applies that each judgment is of general application, among decisions, precedential effects should only be attributed to those which the Constitutional Court has selected, by a decision of its Plenum, for publication in the Collection of Judgments and Decisions of the Constitutional Court.”

Judicial practice, too, must contend with this non-uniformity. It has developed a sort of “soft algorithm” for proceeding in this regard: “If there are, at the time of a general court’s decision, several competing opinions of the court of the Constitutional Court, with respect to which it cannot be clearly determined which is earlier and which is more recent, that which shall be determinative for the general court will be, with a view to all circumstances and on the basis of a rational analysis and consideration, the one considered to be the prevalent opinion in the Constitutional Court’s case law. The facts decisive for the evaluation shall include, but not be limited to, the number of decisions holding this or that opinion of the court, their form, the level to which arguments on the given legal issue have been elaborated, and also the level to which the solution of the given legal issue constituted a principal reason for the decision or, on the other hand, supporting, supplementary or obiter dictum argumentation.”

It should also be noted that a court’s decision is something completely different than a so-called headnote. I have repeatedly encountered opinions that only the headnote is binding, that there is no use reading anything but the headnote, etc. That is why it is necessary to keep in mind that the only purpose of headnotes is to give readers initial information to let them decide whether the case is of interest to them and whether they want to read the whole decision. But if they want to cite something from the decision, it is appropriate to quote the precise section of the grounds, not only the headnote. Headnotes are often formed rather randomly, may not be formulated at all in an apposite manner, and, in particular, must not lead to being generalised and to being treated essentially as a legal norm. That is why the Supreme Administrative Court has explicitly stated that “what is known as the headnote, that is, the summary of the opinion of the court contained in the decision, created for the purpose of publication in a collection of court decisions, does not represent a generally applicable rule capable of independent existence; on the contrary, it must be

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71 Constitutional Court of the Czech Republic, judgment of 13 November 2007, file no. IV. ÚS 301/05.
72 Supreme Administrative Court, judgment file no. 2 Afs 37/2005.
73 Judgment of the Supreme Administrative Court of 2 June 2005, file no. 2 As 57/2008.
viewed in the context of the legal regulation it is to interpret and in the context of the facts of the case and the legal circumstances of the decision from which it comes. It is therefore a mistake to absolutize headnotes and to use them in argumentation regardless of the specific circumstances of the case at hand.”

2.5. Informative value of dissenting opinions

In certain cases, a Constitutional Court decision accompanied by dissenting opinions is, for that reason, thought to be less binding than a unanimous decision.

In this regard, it is above all appropriate to note that while each judge has the right to state a dissenting opinion if he disagrees with a decision or the reasoning given for it, he is under no obligation to do so.74 It is not customary, as is the case, for example, at the German Federal Constitutional Court, to publish an (anonymised) number of votes.

That does, however, necessarily mean that the public do not learn how judges have voted unless the judge in the minority exercises his right to state a dissenting opinion. Hence, even decisions that both professionals and the general public consider to have been approved unanimously, may in fact have passed by a narrow majority of votes.

For that reason, too, I would be very cautious in accepting the simplified view according to which a decision of the Constitutional Court to which one or several judges appended a dissenting opinion is binding to a lesser degree than a unanimous decision. From the formal point of view, all decisions of the Constitutional Court are fully valid regardless of the number of votes by which they were approved. After all, I am convinced that decisions containing a dissenting opinion should not be automatically interpreted as being factually “weaker”, but rather, as a confirmation of the fact that the court is doing its work very responsibly and that it carefully considered both solutions that offered themselves.

Furthermore, what is of relevance is not only information as to whether there was a dissenting opinion, but whether it was true dissent, or only a so-called concurring opinion75, and, in cases of actual dissent, what their basis was: whether the authors disagree with the entire argumentation of the

74 Cf. Section 22 of the Act on the Constitutional Court.
75 E.g., 9 of 14 judges held a dissenting opinion in the decision of the Constitutional Court of the Czech Republic of 28 February 2012, file no. Pl. ÚS 26/11 (Home Births), but only in the grounds of the decision. In this case, one cannot infer from these grounds any general message that the Constitutional Court would strive to convey.
majority, or whether, in fact, they identify with its fundamental outlines, yet, for some reason, arrives at a different conclusion (for example, considers the legal regulation that was contested to be indeed very poorly drafted, but has more imagination than their colleagues and can therefore, unlike them, imagine a constitutionally compliant interpretation, or are, in the long-term, motivated by restraint as concerns the Constitutional Court’s interventions in legal regulations, do not accept a certain type of opinion, etc.).

2.6. Conclusion

By committing at the very beginning not to state anything that others would not already know, and I think I have fulfilled that promise diligently, I have made the conclusion very easy for myself. I do not need to summarise the outcome of my research. All I need to do is to modestly note the words of the national revivales Kollár, from his work Daughter of Fame (Slávy dcera): “Work every day with diligent enthusiasm on the hereditary role of the nation. The paths may be different, only let us all have identical will.” Paraphrased to fit the present topic, whether we work at the Constitutional Court or a general court, we have only one task: to protect fundamental rights of our clients, that is, parties to the proceedings, as well as we can. The fact that we do not always fully agree in executing that task is absolutely natural, and were it not so, we would not need a relatively complicated system of courts, but could do with a single central brain of mankind. What is essential is that we all honestly and truly search for the most equitable solutions and not resort to solutions that are alibis, excessively cautious or even cowardly, and simple in intellectual terms. And in all this effort, let us not forget common sense, because there can never be enough of that. After all, let us remember how the Central Brain of Mankind compared to the wits of Grandpa Drchlik in the famous Czech TV series “The Visitors”.

63
3. Binding Effect of Case Law in Decisions of Administrative Courts

JAN M. PASSER

Traditional theory linking the binding effect of case law solely to the common law system can be considered practically obsolete. Without doubts, the case law has its place also in continental legal systems. Although its weight is different; formally, it is more a guide for interpretation than an autonomous source of law, this conclusion is relativized in the event when the teleological reduction or analogy are used.

Supreme judicial instances in the Czech Republic do not share a single theory of the binding effect of case law. Each has developed an autonomous doctrine focused, quite understandably, primarily on the binding effect of its own case law for courts or entities that should follow that case law, either generally or in a specific case that is being decided. To a more limited extent, a delimitation with respect to the case law of other courts that may be of relevance in the decision-making of a given supreme judicial instance may be encountered.

From the point of view of the administrative judiciary, the position of the Supreme Administrative Court is crucial. This court has striven to create a comprehensive doctrine of the binding effect of case law for Czech administrative courts.

The springboard of its substantially broader concept can be seen in the legislative framework. In accordance therewith, the Supreme Administrative Court ensures, for example, unified decision-making of administrative courts;77 regional courts are bound by decisions of the Supreme Administrative Court in a specific case78; and the Supreme Administrative Court is bound by its own case law, even outside of a specific case – meaning that an opinion of the court formerly adopted in a different case may only be departed from through the decision of the grand chamber79.

On this basis the Supreme Administrative Court set up rules according to which it is bound by case law, both in specific cases and in general. Furthermore, it delimited the relationship of its own decisions to the case law of the

76 The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the author.
77 Section 12 of the Code of Administrative Procedure.
78 Section 110 (4) of the Code of Administrative Procedure.
79 Section 17 of the Code of Administrative Procedure.
Constitutional Court and of European courts, i.e., in particular, of the Court of Justice of the EU (hereinafter referred to as “CJ EU”). And finally, it developed a concept of the binding effect of case law in relation to regional courts as administrative courts of first instance.

In particular cases (i.e., in the event of a repeated cassation complaint), the Supreme Administrative Court too is bound by a decision or opinion it has already expressed in the same case. This conclusion is based on the statutory restriction of repeated cassation complaints towards legal claims which the Supreme Administrative Court has not yet addressed in the case at hand. Exceptions from this boundedness indicate a hierarchisation in work with the case law. In addition to the possibility of taking into account a change in factual or legal findings, the development of relevant case law is of relevance to breaking through the boundedness imposed by an opinion of the court already once expressed in the same case. If the Supreme Administrative Court renders repeated decisions on the same matter, it may depart from its previous decision and opinion of the court if, during the time between the first and second decisions, the grand chamber of the Supreme Administrative Court, the Constitutional Court, the European Court of Human Rights (hereinafter referred to as “ECtHR”) or the Court of Justice of the EU ruled on the same legal issue differently.

In the hierarchy, the grand chamber stands above basic three-member chambers, the Constitutional Court above the grand chamber, and the ECtHR and the CJ EU have an open position in relation to the Constitutional Court.

The hierarchisation mentioned above has consequences in terms of the general binding effect of case law, as well. If a basic three-member chamber departs from an opinion of the court expressed on an earlier occasion by another three-member chamber, it constitutes a breach of the obligation to submit the matter to the grand chamber, and at the same time, a judicial conflict of decisions of equal weight arises, which must be, in the next similar case, settled by submitting the case to the grand chamber. If a basic three-member chamber fails to respect an opinion of the court stated on an earlier occasion by the grand chamber, this does not represent a judicial conflict but rather, a judicial excess. This excess does not automatically result in the need to unify case law, as the opinion of the grand chamber continues to apply – it could not have been outweighed by the opinion of a three-member chamber which, in terms of the binding effect of case law, stands lower.

80 Section 104 (3) (a) Code of Administrative Procedure.
81 E.g., Supreme Administrative Court, judgment of 8 July 2008, ref. no. 9 Afs 59/2007-56.
82 E.g., Supreme Administrative Court, judgment of 29 September 2010, ref. no. 1 As 77/2010-95.
The case law of the Supreme Administrative Court in the context described above does not address situations when a decision or opinion of the court of the grand chamber is formulated so vaguely that it permits multiple interpretations. In that case, the use of one of the legitimate interpretations would have to be considered to mean development of case law pursuant to the decision of the grand chamber, establishing a binding case law practice. Any other chamber wishing to invoke such a decision of the grand chamber, using another legitimate interpretation, would find itself in a position of conflicting case laws. In other words, a legitimate (meaning not arbitrary) interpretation of an opinion of the court of the grand chamber by a basic three-member chamber could only be changed through the grand chamber.

The general binding nature of case law in an extent going beyond the decision-making framework of a specific case is not without purpose in the interpretation of the Supreme Administrative Court. Predictability of court decisions aims at the protection of the principle of legal certainty as an attribute of a democratic state governed by the rule of law, and the equality of the parties in court proceedings. A groundlessly divergent evaluation of comparable cases constitutes judicial arbitrariness. Uniformity of case law is compliant with the principle that a legal order should have internal unity and be of a non-contradictory nature. A legal order requires that comparable legal institutes are viewed the same way, even if they are regulated in different legal regulations or pertain to different legal disciplines. Of significance to the person to whom a legal regulation is addressed is that the same legal institute has the same contents and meaning as a whole.

With a view to the principles stated above, the Supreme Administrative Court has imposed a self-restriction, in the form of restraint in departing from its case law. It recognises the stability of case law as a condition of legal certainty. A need of a departure from case law must prevail over the interests of people acting in good faith on the expectation of its continued existence. The Supreme Administrative Court links the increased demands in terms of the stability of its case law to the decisions of its grand chamber. The principal reasons justifying a departure from its current opinion of the court include a change in opinions of courts whose case law the Supreme Administrative Court is obliged to take into account, within the framework of the hierarchy of case law mentioned above – aside from the above-mentioned possibility of departing from previous case law in cases of different facts or a change in the legal framework.

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83 E.g., Supreme Administrative Court, judgment of 12 August 2004, ref. no. 2 Afs 47/2004-83.
84 E.g., Supreme Administrative Court, decision EP SAC of 1 July 2015, ref. no. 5 Afs 91/2012-41.
85 E.g., Supreme Administrative Court, judgment of 8 January 2009, ref. no. 1 Afs 140/2008-77.
86 E.g., Supreme Administrative Court, judgment of 7 May 2008, ref. no. 1 As 17/2008-67.
Courts superior in terms of case law include, above all, the Constitutional Court. The Constitutional Court’s case law does not amount to legal regulations, but it represents a binding interpretative guide for decisions in cases similar in terms of facts and law.\(^\text{87}\) Not respecting the opinion of the Constitutional Court expressed in a judgment constitutes not only a breach of Article 89 (2) of the Constitution\(^\text{88}\), but also a breach of the principle of equality and legal certainty.\(^\text{89}\) Hence, if any of the chambers of the Supreme Administrative Court decides to depart from the court’s existing case law, not because it would disagree with with the opinion of the SAC, but in order to respect the general binding effect of the decision of the Constitutional Court, it need not activate the grand chamber.\(^\text{90}\) The same applies in cassation decisions on specific matters. If the Supreme Administrative Court has bound a regional court by a cassation judgment and the opinion of the Supreme Administrative Court has been, in the meantime, overruled by case law of the Constitutional Court, the regional court is obliged to take into account the opinion of the Constitutional Court.\(^\text{91}\)

The obligation to respect the case law of the Constitutional Court is not challenged, even by its lack of uniformity, with which administrative courts must contend, using principles of interpretation.\(^\text{92}\) An “arbitrary” interpretation of decisions of the Constitutional Court is, however, out of the question.\(^\text{93}\)

If an administrative court decides, in an exceptional case, to distinguish its case from case law of the Constitutional Court,\(^\text{94}\) it must do so “with an open visor”, for justified, duly explained, and convincing reasons,\(^\text{95}\) for example, in the event of a change in social or economic conditions,\(^\text{96}\) and its solution must result in an effective protection of the same constitutional rights that the Constitutional Court sought to protect\(^\text{97}\). Equal protection of constitutional rights may serve as a legitimate reason for distinguishing from the Constitutional Court’s case law also in situations when this follows from the existing case law

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\(^{87}\) E.g., Supreme Administrative Court, decision EP SAC of 11 January 2006, ref. no. 2 Afs 66/2004-53.

\(^{88}\) Enforceable decisions of the Constitutional Court are binding for all bodies and persons.

\(^{89}\) E.g., Supreme Administrative Court, judgment of 22 February 2006, ref. no. 3 Ads 45/2004-75.

\(^{90}\) E.g., Supreme Administrative Court, judgment of 17 April 2008, ref. no. 4 Ads 5/2005-84, or decision EP SAC of 11 January 2006, ref. no. 2 Afs 66/2004-53.

\(^{91}\) E.g., Supreme Administrative Court, judgment of the SAC of 25 February 2009, ref. no. 8 Afs 3/2009-101.

\(^{92}\) E.g., Supreme Administrative Court, judgment of 2 June 2005, ref. no. 2 Afs 37/2005-82, or judgment of the SAC of 6 February 2008, ref. no. 6 Ads 62/2003-111.

\(^{93}\) E.g., Constitutional Court, judgment of 25 January 2005, file no. III ÚS 252/04.

\(^{94}\) E.g., Supreme Administrative Court, decision EP SAC of 12 January 2011, ref. no. 1 Afs 27/2009-98.

\(^{95}\) E.g., Supreme Administrative Court, judgment of 6 February 2008, ref. no. 6 Ads 62/2003-111.

\(^{96}\) E.g., Supreme Administrative Court, judgment of 14 September 2005, ref. no. 2 Afs 180/2004-44.

\(^{97}\) E.g., Supreme Administrative Court, judgment of 3 December 2009, ref. no. 2 Aps 2/2009-52.
of the Supreme Administrative Court and the Constitutional Court did not take this alternative interpretation into consideration.

The overview presented here shows that administrative courts, or, more precisely, the Supreme Administrative Court, works with the case law of the Constitutional Court as with the case law of a “higher instance”, which is generally binding in all comparable cases. In a number of decisions, it has defined this binding effect in a categorical, nearly absolute manner. At the same time, prima facie in distinction from the previous conclusion, it allows for a relatively broad possibility of distinguishing from the opinion of the court of the Constitutional Court. What is, then, the true position of the Supreme Administrative Court with respect to the Constitutional Court?

This position can be characterised as an attempt of the Supreme Administrative Court to carry on a dialogue, being aware of its weaker position. Its acceptance of the case law of the Constitutional Court is, essentially, a rule, with defined exemptions. The exemptions do not lie in areas in which the Supreme Administrative Court would reserve a judicially independent position, but in the form, the maintenance of which allows it to disagree with the Constitutional Court. The very definition of the conditions subject to which distinguishing from the case law of the Constitutional Court is possible rules out an abuse of the possibility by the Supreme Administrative Court and guarantees acceptance of the opinion of the court of the Constitutional Court as superior, unless the Constitutional Court has accepted the competing opinion of the court of the Supreme Administrative Court. After all, this approach corresponds to the views held by the Constitutional Court of the binding effect of its case law and of the possibilities for general courts to distinguish from it.98 The reservation of a certain level of autonomy can be seen as positive. Albeit limited, the possibility of disagreeing opens communication between the two courts. If dialogue is the means of development in law, it prevents rigidity on both sides, which would threaten if dialogue were excluded.

In relation to both European courts, the Supreme Administrative Court has not developed its own concept of working with the case law of the European Court of Human Rights. The reason probably lies in the fact that the SAC considers that case law analogous to that of the Constitutional Court and, in principle, it does not assume that a major conflict could arise between the two human rights courts. This naturally does not mean that it would not invoke it if required.

Unlike the European Court of Human Rights, the Court of Justice of the EU enjoys a special position in the case law of the Supreme Administrative

98 Cf. e.g., Constitutional Court of the Czech Republic, judgment of 13 November 2007, file no. IV. ÚS 301/05.
Court. CJ EU case law was a guide in interpretation even prior to the Czech Republic’s accession to the EU Treaty, as an analogy of indirect effect which the Supreme Administrative Court granted to EU law.\textsuperscript{99} The very first application of the case law of the Court of Justice of the EU occurred not only prior to accession, but prior to the establishment of the Supreme Administrative Court, at the end of the 1990s, in a judgment of the High Court in Olomouc in a competition case.\textsuperscript{100} After accession, the case law of the Court of Justice of the EU attained a standard position, becoming a mandatory guide for interpretation.\textsuperscript{101} As already mentioned, the CJ EU decision allows for a departure from an existing opinion of the Supreme Administrative Court, without the need of activating the grand chamber.\textsuperscript{102}

CJ EU case law became interesting when, in part due to a contribution from the Supreme Administrative Court, it got into a conflict with the opinion of the Constitutional Court in a series of decisions on “Czechoslovak pensions”.\textsuperscript{103} With a certain simplification, we can say that, in this conflict, the Supreme Administrative Court preferred the case law of the Court of Justice of the EU, applying the principle of priority of EU law. This fact does not, however, mean that it accepted that principle without reservation. Certain hierarchisation can be expected in the event of a conflict between EU law and matters that the court would see as the solid core of the Constitution.

In this regard, the flexible approach of the Supreme Administrative Court corresponds to the fact that the relations between constitutional courts of Member States, the Court of Justice of the EU, and the European Court of Human Rights are not defined in a rigid form; rather, each of the institutions mentioned views these relations and its role within them differently. For other institutions obliged to work with their case law (such as the Supreme Administrative Court), this means, on the one hand, greater demands, but on the other, this situation allows it, in the event of competing opinions of the court, to work with case law more flexibly, providing it with some “manoeuvring space”.

The Supreme Administrative Court examined the relevance of case law not only with respect to its own decisions, but also with respect to regional courts. Their frame of reference includes their own case law as well as that of

\textsuperscript{99} E.g., Supreme Administrative Court, judgment of 29 September 2005, ref. no. 2 Afs 92/2005-45.
\textsuperscript{100} High Court in Olomouc, judgment of 14 November 1996, ref. no. 2 A 6/96.
\textsuperscript{101} E.g., Supreme Administrative Court, judgment of 29 August 2007, ref. no. 1 As 3/2007-83.
\textsuperscript{102} E.g., Supreme Administrative Court, judgment of 15 August 2008, ref. no. 5 Azs 24/2008-48.
\textsuperscript{103} E.g., Supreme Administrative Court, judgment of 25 August 2011, ref. no. 3 Ads 130/2008-204, Court of Justice of the European Union, judgment in case C-399/09, Supreme Administrative Court, judgment of 31 August 2001, ref. no. 6 Ads 52/2009-88, Constitutional Court of the Czech Republic, judgment of the CC of 31 January 2012, file no. Pl. ÚS 5/12, Supreme Administrative Court, decision of 9 May 2012, ref. no. 6 Ads 18/2012-82.
other regional courts. According to the Supreme Administrative Court, diverging decisions of regional courts in similar cases would be undesirable, unless a subsequent decision deals with a previously expressed opinion of the court.\textsuperscript{104} Hence, in addition to their obligation to follow and respect the case law of the Supreme Administrative Court, the Constitutional Court, and European courts, from which they may distinguish cases under similarly restrictive conditions as the Supreme Administrative Court,\textsuperscript{105} regional courts must also work with case law on the horizontal level.

It is evident that the multitude of sources of case law with which an administrative judge must deal is not negligible. As of not long ago, only selected decisions of supreme courts had been published. The development of modern technologies, with the culture of transparency, has led to the publication and easy on-line availability of an increasing volume of information. The Supreme Administrative Court was a pioneer among supreme courts when it began publishing its decisions on its website shortly after it was established. Today, more than a decade later, its website features a complete database of its own decisions and of a significant portion of decisions of administrative formations of regional courts, and its openness is no longer exceptional. This situation must undoubtedly have an impact on work with case law.

The database of decisions of administrative courts contains nearly 113,000 decisions, of which 73,000 are decisions of the Supreme Administrative Court itself.\textsuperscript{106} The public database of decisions of the Constitutional Court provides access to more than 68,000 decisions of the Constitutional Court.\textsuperscript{107} The European Court of Human Rights grants access to more than 55,000 of its decisions.\textsuperscript{108} The Court of Justice of the EU offers a nearly identical number of decisions.\textsuperscript{109}

Consequently, administrative judges find themselves in a situation when nearly 300,000 decisions are of potential relevance to their decision-making.

\textsuperscript{104} E.g., Supreme Administrative Court, judgment of 20 September 2007, ref. no. 2 As 94/2006-51.
\textsuperscript{105} E.g., Supreme Administrative Court, judgment of 31 January 2007, ref. no. 2 Azs 21/2006-59, Supreme Administrative Court, judgment of 16 August 2006, ref. no. 1 Aps 2/2006-68, Supreme Administrative Court, judgment of 25 May 2009, ref. no. 8 As 25/2009-66, and Supreme Administrative Court, judgment of 1 June 2011, ref. no. 1 As 6/2011-347.
\textsuperscript{106} Precisely 112,952 administrative court decisions, of which 73,694 were decisions of the Supreme Administrative Court; situation as at 28 August 2017, search form for administrative court decisions at www.nssoud.cz.
\textsuperscript{107} Precisely 68,611 decisions of the Constitutional Court, situation as at 28 August 2017, search form for administrative court decisions at www.nssoud.cz.
\textsuperscript{108} Precisely 55,519 decisions, situation as at 28 August 2017, search form at hudoc.echr.coe.int.
\textsuperscript{109} Website of the CJ EU and its case law search form grant access to precisely 34,726 decisions, situation as at 28 August 2017; the search form at curia.europa.eu; searches in older case law are possible due to EUR-Lex, which as at 28 August 2017 contained 55,698 decisions.
In this context, an association with Milan Kundera’s thesis of the morals of an archive as opposed to the morals of the essential comes to mind, or perhaps with the thoughts of Antoine de Saint-Exupéry on the legitimacy of the requirement of obedience, conditioned on the possibility of executing that requirement. In other words, is it even possible for judges, faced with the need to decide or to take part in decisions in several dozen cases each month, to analyse, when making a decision, the mass of pre-existing case law with which they are obliged to work and the relevant part of which they should deal in a credible manner? And if the response to the previous question is affirmative, we must ask whether that requirement is of any effect.

Not very long ago, effective work with such a volume of case law would not have been possible at all. Working with case law without thorough hierarchisation that allows for a reduction of its relevant volume to an acceptable level (i.e., a volume that can be physically processed), using published decisions, etc., would be practically impossible. The morals of the essential was *conditio sine qua non* to any meaningful use of case law, and, through it, the level of its binding effect.

At the same time, however, the opinion that computers would not replace lawyers in the present generation, prevailed. The game of chess could serve as an example. At the grand master level, a computer first beat a human in 1996.

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110 “And I will go yet further: a work is what a novelist recognises as value at the time of balancing. Because life is short, the reading is long, and literature kills itself with its maddened productivity. Starting with himself, each novelist should eliminate everything that is secondary, profess for himself and for others the morals of the essential!

But there are not only authors, hundreds, thousands of authors; there are also researchers, armies of researchers who, led by the opposite moral, accumulate everything that they can find in order to succeed. Everything, their highest goal. Everything, including mounds of drawings, crossed-out paragraphs, chapters eliminated by the author and published by researchers in what they call “critical” editions under the perfidious name “variants”, which goes to say that if words still have any meaning whatsoever, everything that the author has ever written is of the same value and is equally intended for publication.

The morals of the essential have yielded to the morals of the archive. (The ideal of the archive: a sweet equality ruling over an immense mass grave.)”


111 “If I ordered a general to fly from one flower to another like a butterfly, or to write a tragic drama, or to change himself into a sea bird, and if the general did not carry out the order that he had received, which one of us would be in the wrong?

You, said the little prince firmly.

Exactly. One must require from each one the duty which each one can perform, the king went on. Accepted authority rests first of all on reason. If you ordered your people to go down and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable.”

Part I: Theoretical Approaches to the Binding Effect of Judicial Decisions

It was a machine that had been developed for six years for this very purpose.\textsuperscript{112} Chess, with some $10^{120}$ options, is a relatively simple game. Since then, a machine has beaten man in the far more complex game of go (some $10^{800}$ options), but also in poker, in which it has even learned to bluff. Intel is working to develop chips designed directly for neuron networks, Google and Microsoft are developing machine learning. The Chief Justice of the US Supreme Court answered the question whether he can imagine a day when artificial intelligence will be used in the judiciary, by saying that that day had already come, and that this fact exerts immense pressure on the work of the judiciary.\textsuperscript{113}

I am convinced that contemporary search engines will look primitive in comparison with the tools that we will have in the near future. The problem does not, or soon will not, lie in the possibility or ability to look up prior case law that is relevant to the case at hand. Of essence will be working with the decisions that have been found and taking them into account effectively in considering the case at hand and its specific aspects. Existing case law of supreme courts sometimes tends to express opinions of the court too generally, but at the same time, it maintains continental quantity due to the set-up of procedural rules. That causes permanent pressure in terms of maintaining consistency in case law, and in terms of the constitutional requirement of individualised decision-making in individual cases.

Hence, case law often serves as a burden with which one has to contend en route to a decision, rather than a tool helping to resolve the matter. The judge is Odysseus between the Scylla of the law and Charybdis of its interpretation, and decisions often require that a sailor has to be sacrificed from time to time, in the form of one or several decisions, in order to be able to navigate on.

Would this situation be resolved by categorising case law even at the level of each supreme court? By creating the category of “binding” decisions on the one hand and on the other a category of decisions which are not granted that status? Should we build on the basis of principles to which the binding effect of case law is linked, a similar distinction seems impossible. Equality of parties to the proceedings, principles of legal certainty and predictability of court decisions, ban on judicial arbitrariness, etc., rule out the possibility for certain decisions to be granted the status of a binding guide for interpretation, whereas

\textsuperscript{112} E.g., https://www.novinky.cz/veda-skoly/historie/224101-den-kdy-pocitac-poprve-porazil-cloveka.html

\textsuperscript{113} http://technet.idnes.cz/ai-neuronove-site-soudce-0xi-/veda.aspx?c=A170523_161130_veda_dvz
others could be departed from without problem. Furthermore, let us not forget that hierarchisation of case law before the ascent of modern technologies reflected, above all, the fact that is was factually not available (with the exception of published decisions). The factually different level of binding effect reflected a reality which is far removed from our own.

Unless a significant change occurs in how we view case law and its binding effect, in terms of the principles with which it is linked, we must look for other ways of coping with the increasing number of relevant decisions. How to comply with the requirement of identical decision of similar legal issues, while having to take into account all specific circumstances of the given case and the requirement of deciding the matter fairly?

One of the routes offering themselves is a significant reduction of the number of cases examined by supreme courts. If their decisions are to serve as beacons marking the way, their light cannot be disrupted by light pollution coming from many other decisions that have no general application. In this regard, we could seek inspiration in those legal systems that filter cases submitted to supreme courts.

Also, the work of the supreme courts themselves would deserve a bit of a review. A less generalising, openly casuistic nature of their decision would better allow for working with the existing volume of case law, seen as an aid, rather than an obstacle. The contents of a file constitute merely a simplified reflection of a far richer reality, and the narrative part of a decision is further simplification of those simplified facts that have resulted in a certain decision. If generalising conclusions are formulated on this basis, the court is de facto developing a new rule for cases that may significantly differ from the matters addressed by existing case law. But without giving the future reader of the decision any opportunity to find this out. It is evident that such a concept of case law and its importance goes significantly beyond the scope of a mere interpretative guide.

Furthermore, the number of “interpretative guides” that judges are obliged to apply at this point, and the level of their generality, can seduce them to compile passages from existing decisions, instead of finding an original solution for the dispute before them. Algorithmic decision-making of this type, however efficient, lacks one of the fundamental attributes of judicial decision-making: case law should be an instrument serving the application of law, not a self-fulfilling and self-renewing target.

The essence of law is the art of good and justice.114 Professor Jan Sokol wrote about justice that we are unable to define it precisely, but we know

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114 Ius est art boni et aequi.
immediately when we are lacking it. On a similar note, the Supreme Administrative Court stated that “A judge should not only have a brain, but also a heart.” Let us know case law, but let us not forget that a fundamental component of the finding of law is not a mechanical application of norms, and that Justice is not holding a law review, but rather, a balance…

115 Unfortunately, I have been unable to locate the link from which I have obtained the quote. In the event that I am wrong, I apologise to Professor Sokol and I claim responsibility for the quote myself.

116 Supreme Administrative Court, judgment of 11 December 2014, ref. no. 1 As 141/2014-26, paragraph 26.
4. Binding Effect of Decisions of the Supreme Court

PAVEL ŠÁMAL

4.1. Introduction

An integral aspect of the rule of law is the principle of legal certainty and the principle of protection of legitimate expectation in law, which arises from that. This includes, as a key attribute, above all, an assumption of effective protection of the rights of all subjects of law, identically in identical cases, and predictability of actions of the state and its bodies.

The binding effect of court decisions can be understood in terms of binding effect for the parties or participants in the proceedings for whom the decision becomes binding and enforceable once it takes legal effect, and in terms of its binding effect for lower courts in the judicial system of the given country. In my contribution, I will examine the latter form of binding effect, which involves, above all, courts being bound by an opinion of the court expressed by a superior court in its decision.

In the Czech Republic, as well as in other European countries, approaches to the binding effect of court decisions are not entirely uniform and settled. There are tensions, especially between bodies designed to protect constitutionality and general courts, and also between general courts of higher and lower instances, due to differing views as to the obligation to respect decisions of a superior court.

4.2. Theoretical models of the binding effect of court decisions

The term “binding effect” can be understood to mean different things: either a formal need to follow a certain source of legal regulations or, in a broader

117 The author wishes to thank Šárka Švábová, and advisor of the Analytical and Comparative Law Department of the Supreme Court of the Czech Republic in Brno, for gathering background documents and researching literature for this contribution. The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the authors. The contribution was written with the support of the Charles University Research Scheme Progres Q04 ‘Law in a Changing World’.

Part I: Theoretical Approaches to the Binding Effect of Judicial Decisions

sense, where the binding effect is not unconditional, but rather, entails an obligation to follow a certain source, except when it is necessary to depart from it due to the circumstances of the case.119

The concept of the binding effect of court decisions in Europe can be presented using two “basic” model systems of law. The first approach, found in common law countries, is based on the theory that all decisions of higher courts of a given country constitute binding precedents for all lower courts within a single court hierarchy. The second concept, of the binding effect of decisions in continental law, reflects the fact that decisions of superior courts have no normative effect, and if such decisions are accepted by lower courts, it only occurs because the parties themselves concur with the argumentation. In reality, neither model exists in such a pure (extreme) form.120 That is why in continental Europe many hybrid or mixed models are applied. This is typical for systems in the Germanic legal circle, which includes, aside from the Czech Republic, primarily Germany and Austria, but also Slovakia and, to a large degree, other countries where the Germanic approach has had an impact (cf. legal systems prevailing in Poland and Hungary).

The basis of common law lies in the principle of equity, according to which identical cases should be handled similarly, and the *stare decisis* principle ("staying with what has been decided").121 A court is obliged to follow a prior binding precedent, and it may only be departed from by a superior court within the same system of courts.122 The binding effect of a precedent in common law countries is not, however, limitless: the convention of distinguishing or narrowing the scope of the ratio decidendi, as the only binding part of the decision, are used in real life for deviating from its binding effect, as an opportunity for lower courts to get around the *stare decisis* principle in certain cases.123

Continental law operates with the principle of predictability of law and its effects.124 In it, emphasis is put on the strength of “established case law”, rather

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121 Ibid, p. 34.
124 According to the judgment of the Constitutional Court of 26 November 2002 file no. II. ÚS 296/01 (published under No. 145, in vol. 28 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic), predictability of the outcome of court decisions is one of the guarantees of legal certainty which provides for general confidence in the law. If a court interprets and applies a statutory provision which regulates its further procedural
than on the binding nature of individual institutions. By stable adjudication, the
general application of a decision to specific situations of a given type is recog-
nised, which increases the impact of a regulation that has been made complete
by a court.\textsuperscript{125} Supreme courts in legal systems of the Germanic type, which
include the Czech Republic, decide a relatively high number of cases, and the
approach of those courts combines elements that are retrospective (checking the
correctness of decisions of lower-level courts) and prospective (the main reason
is the creation of a new opinion of the court, and remediying an incorrect decision
is of secondary importance). The logic of the operation of the continental system
presumes that a qualified future normative effect is only linked to repeated de-
cisions of supreme court instances, in which they state their opinion on a given
issue of law. In this system, the “grand” or “extended” court chamber, whose
decisions resolve “disputes” between individual chambers of the given supreme
court, plays a decisive role, as its decisions are “precedentially” binding for all
chambers of such a supreme court instance, and they always involve not only
progress in the resolution of a specific legal issue, but in principle, a final “set-
tlement of case law”. In certain countries, a division or the Plenum of a supreme
court is able to adopt a unifying opinion, which ranks the highest among the
means available to supreme courts for unifying case law, both from the point
of view of its very concept (the possibility of addressing several legal issues in
their mutual context) and completeness and persuasiveness of argument, and in
terms of formal requirements (the consent of a majority of all members of the
division or Plenum is required for adopting a unifying opinion).

Also, the decisions of a Grand Chamber are usually explicitly superior (cf.
Section 20 (3) of Act No. 6/2002 Coll., on courts and judges, as amended –
hereinafter referred to as “AOCAJ”). Hence, judicial case law is factually cre-
ated in a continental law region, which is, due to its effects on law, granted
certain normative effects.\textsuperscript{126}
4.3. Binding effect of decisions in the Czech Republic

The fact that, in the Czech Republic or other continental legal systems, case law is not included among sources of law, does not mean that court decisions would not play a role in those countries. In the existing legal environment, there is no room for dwelling on the ideals of 19th century legal positivism. The approach prevailing in the present continental system is that the case law of higher courts serves primarily as a useful source of argumentation that a judge should take into account. If a judge distinguishes a case from the case law of a superior court, it does not automatically constitute a reason for striking the decision down, but such distinguishing must be supported with convincing reasons. Furthermore, the model used in the Czech Republic does not, as concerns the Supreme Court, correspond to the pure model of a continental supreme court, given that, as has already been stated above, we can identify in it the retrospective element typical of the continental system, as well as the prospective element present in the Anglo-American system.

Karolinum, 2002, pp. 94–95; this conclusion is generally recognised in the Czech Republic and it is becoming more entrenched as times goes on [cf. also GERLOCH, Aleš, TRYZNA, Jan. Několik úvah nad rolí nejvyšších soudů v podmínkách demokratického právního státu. In: ŠIMÍČEK, Vojtěch. (ed.) Role nejvyšších soudů v evropských ústavních systémech – čas pro změnu? Brno: International Institute of Political Science of Masaryk University, 2007, pp. 89 ff., where the authors state on pp. 92–93: “At present, one cannot doubt that the importance of conclusions of the court adopted by the highest courts in individual decisions often reach beyond the particular case. In particular, thanks to wide availability, individual decisions represent an authoritative source for learning about the law. It must be granted that it is no longer about authority based on the position of the court that rendered the decision. Present legal regulation supports the conclusion that individual decisions (or, more precisely, opinions of the court contained therein) are, to some extent, of a normative (quasi-precedential) nature.”].


129 12 Ibid, pp. 72–73 and in greater detail pp. 134–138 – “Decisions of supreme courts can include (a) retrospective elements, meaning a check of the “correctness” of decisions of lower courts; (b) prospective elements, where any remedy of an incorrect decision is secondary, the main reason for a decision of the supreme court being the creation of a new precedent, i.e., of a new opinion of the court, or a modification of an old opinion of the court. The prospective type of decision-making strives, above all, to create or complement a general legal regulation. It is thus “future-oriented”, its main objective is to unify case law or to create new case law. On the other hand, the retrospective type is “past-oriented”, aiming to check the correctness of decisions of lower courts in the case at hand. Unification of case law is not being undertaken systematically, rather, it is an auxiliary function of the operation of the model.” For details cf. BOBEK, Michal. Curia ex machina: o smyslu činnosti nejvyšších a ústavních soudů. Právní rozhledy, 2006, No. 22, Vol. 14, extraordinary supplement, pp. 2–3.
When examining the effects of the Supreme Court’s decisions in Czech law, we distinguish, above all, between the binding effect of the decision in the same matter, i.e., cassation binding effect, and a binding effect of a precedential nature, as relates to other similar cases.\textsuperscript{130}

\subsection*{4.3.1 Binding effect of cassation}

The binding effect of a decision in the same case is manifest, in particular, in a lower-level court being bound by the opinion of the superior court and in the obligation of the lower court to carry out actions and supplementation ordered by the higher court. The opinion of the court whereby the body is bound means the unifying opinion of the higher court expressed in its cassation decision, as concerns issues of interpretation and application of substantive and procedural law. In criminal proceedings, for example, an opinion of the court may concern the application of the Criminal Code, Code of Criminal Procedure, another act, or another legal regulation applicable in the criminal law sphere, such as Act No. 218/2003 Coll., on Judiciary in Cases Pertaining to Youth, Act No. 418/2011 Coll., on Criminal Liability of Legal Entities and on Related Proceedings, but also an opinion of the court pertaining to the interpretation and use of non-criminal regulations, even regulations of a lower legal effect, for example the Civil Code in connection with a decision on a right to damages or financial compensation for non-financial harm, or to the relinquishment of unjust enrichment, or Act No. 361/2000 Coll., on Road Traffic and on Amending Certain Acts, in connection with the criminal offence of serious bodily harm committed by negligence, pursuant to Section 145 (1) and (2) of the Criminal Code, committed in the course road traffic.\textsuperscript{131}

\textsuperscript{130}In addition to these two basic types of binding effect of court decisions typical for general courts, we cannot, as concerns the Czech legal environment, leave out the general binding effect of judgments of the Constitutional Court in matters pertaining to checks on constitutionality, which is specific for this court. The foundation for this can be found in Article 89 (2) of the Constitution, according to which enforceable decisions of the Constitutional Court are binding for all authorities and persons. The Constitutional Court consistently insists that in this regard, only its judgments, but not divisions are binding (cf. judgment of 13 November 2007, file no. IV. ÚS 301/05, published under No. 190 in vol. 47 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic, both in terms of the operative part and the principal reasons (tragende Gründe, ratio decidendi), both in terms of a binding effect \textit{inter partes} as well as \textit{erga omnes} (cf. RYCHETSKÝ, Pavel, LANGÁŠEK, Tomáš, HERC, Tomáš, MLSNA, Petr et al. Ústava České republiky. Ústavní zákon o bezpečnosti České republiky. Commentary. Prague: Wolters Kluwer, a. s., 2015, pp. 938–940.

Cassation binding effect is a traditional institute, tested in real life and used in many European countries. All major Czech procedural regimes, i.e., the Code of Civil Procedure, Code of Criminal Procedure, and Code of Administrative Procedure, explicitly regulate the binding nature of a cassation decision.

The binding of a lower-level court by the opinion of a superior court in the same case represents the implementation of the constitutional principle of a right to judicial protection and a fair process. In spite of this principle, which is, in principle, recognised in both theory and practice, lower courts in the Czech Republic have repeatedly attempted to violate it by submitting petitions to the Constitutional Court, asking that it would strike down the provisions of procedural codes embodying it. In its judgment of 11 January 2005, file No. Pl. ÚS 37/03 (published under No. 93/2005 Coll. and announced under No. 5 vol. 36 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic), the Constitutional Court dismissed the petition of the District Court in Ústí nad Orlicí for the striking down of Section 226 (1) of Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (hereinafter referred to as “CCP”). The District Court submitted the petition at the initiative of a plaintiff. That plaintiff, on the basis of a specific situation in adversarial proceedings heard by the District Court, claimed that “if the first-instance court proceeded in line with the said opinion (which is binding pursuant to Section 226 (1) CCP), then Article 6 (1) of the Convention would be breached, as it would not constitute a fair decision.” In its judgment, the Constitutional Court concluded that the provision contested “is not contrary to the constitutional order or an international treaty pursuant to Article 10 of the Constitution, within the meaning of Article 1 and Article 112 (1) of the Constitution.” In the conclusion cited, the Constitutional Court did not concur “… with the opinion of the petitioner that Section 226 (1) CCP should be struck down, as this provision is fully in line with the cassation principle governing appeals proceedings regulated in the Code of Civil Procedure. Should it be struck down, the appeals proceedings themselves would make no sense. This provision has been applied without problem since the creation of the Code of Civil Procedure. In this context, it must be noted that the cassation principle is a general principle of civil procedure that is used in many other European countries. It is a traditional institute which has been encountered in its contemporary form since the end of the 19th Century, and in this country, it has been applied roughly in its present model throughout the Twentieth Century. Another argument that can be added in favour of retaining the present wording of Section 226 (1) CCP, that the institute described therein is a traditional cornerstone of civil procedure that has been well tested by practice and never yet constitutionally contested. It flows from the above that the binding of a lower court by the opinion of a higher
court constitutes the implementation of the constitutional principle of judicial protection and fair process, and is its integral part, rather than an obstacle.”

The Constitutional Court arrived at a similar conclusion with respect to Section 246 (1) of the Code of Criminal Procedure, in its judgment of 26 January 2016, file No. Pl. ÚS 15/14 (announced under No. 71/2016 Coll.). In its petition that was delivered to the Constitutional Court on 24 June 2014, the District Court for Prague 8 sought the striking down of Section 264 (1) of the Code of Criminal Procedure, asserting that it violated the constitutional order, namely Article 82 (1) of the Constitution, which lays down the independence of judges in the exercise of their function. The petitioner based the criticism on the fact that “if a judge is to be independent, he must decide independently and should not be bound by opinions of the court with which he disagrees for a good reason, because he should only be bound by the law.” The petitioner pointed to the established practice of appeal courts, which frequently understand and apply the “opinion of the court” embodied in Section 264 (1) of the Code of Criminal Procedure too broadly, not only as issues of substantive and procedural law, but they also include under them questions pertaining to the taking of evidence and its evaluation, and ordering how first-instance courts are to evaluate individual pieces of evidence and what conclusions they are to arrive at on their basis, without the appeal court itself taking the evidence concerned. By proceeding thus, appeal courts substitute the decision-making authority of courts of first instance, whose work thus becomes entirely superfluous, and at the same time, they pose a threat to their independence, as “only an independent court that has taken the evidence should be entitled to review it and make conclusions on its basis, and its impartiality must not be threatened by forcing it to find the accused guilty or to acquit him when it has reviewed evidence in line with its internal conviction.” Furthermore, the petitioner stated the position that Section 264 (1) of the Code of Criminal Procedure has lost its purpose over time, given the radical change in the social, political, and legal environment, as compared to when the Code of Criminal Procedure was enacted – it has been in force since 1 January 1962. The Constitutional Court, in its judgment of 26 January 2016, file No. Pl. ÚS 15/14, pointed to, aside from the above-mentioned judgment of 11 January 2005, file No. Pl. ÚS 37/03, a decision of the Constitutional Court of 20 February 2001, file No. Pl. ÚS 41/2000 (U 7/21 SbNU 493), which is even closer thematically. By this decision, the Constitutional Court rejected as manifestly unfounded the petition of the Regional Court in Pilsen seeking the striking down of Section 270 (4), sentence two, of the Code of Criminal Procedure, as amended, which is specified with the words “and shall take procedural steps ordered by the Supreme Court”. Pointing to this decision, the Constitutional Court again inferred that “…the
contested provision is fully in line with the purpose of the Code of Criminal Procedure. Procedural rules are thus – at least in essence – identically embodied in all existing procedural rules, as, from the historical point of view, the outcome of a large volume of experience, and in their postulates, they present a unified and essentially also firm form of proceedings, which to a significant degree, but always distinctly, predetermines the legality of the effective decision. These arguments “can be fully applied to the petition at hand”. As in the previous two cases, the submission of the petition was motivated by a disagreement of a general court with a decision of the court hearing the (extraordinary) appeal. It was disagreement with the binding opinion of the courts and with their instruction for further actions to be taken in the proceedings. Given these conclusions, the Constitutional Court did not find Section 264 (1) of the Code of Criminal Procedure non-compliant “… with a constitutional act. Hence, in line with Section 70 (2) of the Act on the Constitutional Court, it dismissed the petition.”

The criminal justice system in the Czech Republic is based on the double-instance concept, with the appeal court being authorised to state an opinion of the court which is binding for the Court of First Instance, and it is also authorised to order the Court of First Instance to carry out actions and supplementation, which the lower court then must do (Section 264 (1) CCrP). A failure to respect the opinion of the court or instructions of an appeal court entails a violation of the said principle of double-instance judicial decision-making and, in effect, means that any such decisions suffer from a defect of a constitutional-law intensity.132

The principle that a lower-instance court is bound by the opinion of a superior court following the cassation of the first-instance decision in criminal matters has regularly been recognised in the procedural regulations of other democratic countries. As an example, let me cite Section 358 (1) of the German Code of Criminal Procedure (dStPO) or Section 293 (2) of the Austrian Code of Criminal Procedure (öStPO). Also the case law of foreign constitutional courts has approved this principle as constitutionally-compliant (e.g., decision of the German Federal Constitutional Court (BVerfGE 12, 67, 71).

The binding nature of an opinion of a superior court does not apply if the lower court discovers facts in the course of further proceedings, due to which the matter is sufficiently distinguished from the form in which it was first presented to the court of higher instance, on the basis of which the higher court arrived at its opinion. In this regard, decisions of the Supreme Court are most

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important in the system of general courts. In considering in which regard the opinion of the Supreme Court, acting in its usual capacity as the court hearing an extraordinary appeal, contained in a striking-down decision is binding for courts in subsequent proceedings, we must, among other things, take into account that it is always based on a certain factual foundation. If the set of facts on which the Supreme Court based its decision changes in subsequent proceedings, it is unquestionable that its binding opinion will only apply in those subsequent proceedings so long as the facts of the case have not, following the striking down of the decision of the appeal court, changed to such an extent that application of its opinion to its findings of facts and to the new conclusion as to the facts of the case is ruled out.\textsuperscript{133}

The opinion of the court is binding not only for the body which the Supreme Court, in the operative part of its judgment, ordered to decide on the matter, but, provided that the facts of the case have not changed, also for all other bodies taking part in any other stage of decision-making in the case (e.g., if the case was sent to the prosecutor, then the police authority to which the prosecutor returned the matter shall be bound by the opinion of the Supreme Court, as well as the district court that subsequently rules on the new action, and the regional court that may decide in the same matter on appeal, submitted for example by the accused).\textsuperscript{134}

Superior courts (including the Supreme Court) are also bound by their own opinions stated in cassation decisions, and cannot depart from them unless fundamental differences are discovered in the case.\textsuperscript{135} In this regard, we can also point to the decision of the Grand Chamber of the Criminal Division of the Supreme Court of 11 February 2004, file No. 15 Tdo 44/2004: “[…] a binding opinion of the Supreme Court, as a court hearing an extraordinary appeal within the meaning of Section 265s (1) of the Code of Criminal Procedure, is binding in the same case, not only for an authority involved in criminal proceedings to which the case was referred to by the court hearing the extraordinary appeal, for retrial, but also the court hearing the extraordinary appeal itself, i.e., any other chamber of the court hearing an extraordinary appeal (regardless of whether its members have changed in the meantime), if the case is again the subject of review in an extraordinary appeal procedure. Admitting the possibility that the Supreme Court, as the court hearing the extraordinary appeal, itself would not feel bound (provided the facts of the case and the legal

\textsuperscript{133} Judgment of the Supreme Court of 12 February 2004, file no. 21 Cdo 1681/2004.
\textsuperscript{134} Cf. accordingly the judgment of the Supreme Court of 10 March 1999, file no. 5 Tz 15/99, published under No. 40/2000 Collection of criminal decisions.
situation have not changed) by its own opinion that it had rendered in the same matter in its previous decision on an extraordinary appeal, and the respecting of which by lower courts is an expressis verbis statutory, or even constitutional obligation, would constitute a denial of the principles stated above applicable to review proceedings, and in effect be a breach of Article 95 (1) of the Constitution, which must undoubtedly be understood as applicable to decisions of the Supreme Court. Hence, proceeding in line with Section 20 (1) AOCAJ in this situation is unthinkable. In this regard, we must state that, even if Section 265s (1) of the Code of Criminal Procedure explicitly states that only the authority involved in criminal proceedings to which the case was referred for retrial is bound by the opinion of the Supreme Court, we cannot infer from this that the Supreme Court would not be bound by its own opinion. [...] constitutional and statutory principles on which the exercise of justice is based, even in the sphere of review of decisions in appeal or extraordinary proceedings, are incompatible with the idea that the reviewing body itself (in this case, the Supreme Court, as the court hearing the extraordinary appeal) could freely change its own binding opinions once already taken in the case at hand, and hence, change its decisions.\textsuperscript{136}

A change in legal qualification or interpretation within one court procedure is not commonplace and should not become a rule, if such action would constitute undue intervention in the legal position of the parties to such proceedings, or their legal certainty.\textsuperscript{137} Case law must, nevertheless, be subject to development, and it cannot be ruled out that it would be not only supplemented with new interpretations and conclusions, but also changed, even if the legal regulation concerned remains unchanged. A change in the decision-making practice of courts, in particular, if it concerns the practice of the court of highest instance, whose missions is to, among other things, unify the case law of lower courts, is, in its essence, an undesirable phenomenon, as such a change compromises the predictability of judicial decision-making.\textsuperscript{138}

\textsuperscript{136} In the sphere of constitutional justice, cf. judgment of the Constitutional Court of 2 April 1998, file no. III. ÚS 425/97, published under No. 42 in vol. 10 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic; see also judgment of the Constitutional Court of 20 March 2007, file no. Pl ÚS 4/06, published under No. 54 in vol. 44 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic.

\textsuperscript{137} Judgment of the Supreme Court of 6 October 2008, file no. 28 Cdo 727/2008.

\textsuperscript{138} Judgment of the Constitutional Court of 11 September 2009, file no. IV. ÚS 738/09, published under No. 201 in vol. 54 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic.
4. Binding Effect of Decisions of the Supreme Court

4.3.2 Normative (quasi-precedential) binding effect

Although judges’ main objective is to render a decision in a particular case, they also contribute to the creation of law, if the legal system does not sufficiently regulate an issue at hand. As a result, a decision on a particular issue can, de facto, serve as an *erga omnes* supplementation of law. A prior court decision, if supported with convincing rational arguments, in fact operates as a model for later decisions.139

Normative binding effect, i.e., a binding effect of a quasi-precedential nature, unlike a binding effect in a particular case, goes beyond an individual case and operates generally, serving as an interpretation of a principle or legal regulation that can be generalised and allow for various levels of intensity.140

The Supreme Court, as a superior judicial body, ensures uniformity and legality in decisions on matters that fall within its sphere of competence (in civil and criminal matters). In order to comply with the constitutional principle of predictability of court decisions and legitimate expectations of uniform decisions, lower courts are obliged to consistently reflect the Supreme Court’s case law in cases similar in terms of facts.141

Nevertheless, factual normative effects of the Supreme Court’s decisions in the legal system of the Czech Republic are weakened, in that the conclusions contained therein are not formally binding for lower courts. A lower court has the right not to respect established case law of the Supreme Court, and to initiate a change therein by distinguishing. But courts must not do so outside of the scope of a fair process. If a lower-instance court intends not to take opinions of the court of the Supreme Court into account, it is obliged to explain carefully in the rationale of its decision why it does not concur with those conclusions and why it considers it necessary to replace the Supreme Court’s conclusions with new opinions of the court. This means that there must be sufficiently strong reasons to justify not reflecting the Supreme Court’s case law, otherwise a groundless neglect of a decision of the Supreme Court by a lower level court could qualify as jurisdictional arbitrariness.142

Judges wishing to initiate a change in existing case law and to replace it with a new opinion of the court must, in particular, contend with factors that have an

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141 Judgment of the Supreme Court of 14 June 2012, file no. 30 Cdo 1042/2012.
142 Judgment of the Constitutional Court of 17 July 2007, file no. IV. ÚS 451/05, published under No. 112 in vol. 46 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic.
impact on the strength of an opinion of the court contained in existing case law. Above all, they should take into account the position of the court that issued the opinion of the court, in terms of the hierarchy of the judicial system. Furthermore, they should take heed of the fact that decisions of the Grand Chamber of the Supreme Court are of greater normative force than regular chamber decisions and evaluate whether the opinion of the court concerned constitutes a component of established case law. This also includes an evaluation of how old the decision is and of the era in which it was rendered. Even though, today, decisions of the Supreme Court are published electronically, their publication in official law reviews may indicate to judges that the Court considers the decision important and that there is overwhelming agreement as to it within the court.143

We can thus conclude by saying that, although the opinions of the court stated by the Supreme Court of the Czech Republic in other matters are not binding *ex lege*, one cannot neglect that, if an opinion of the court has been settled in case law in the resolution of a certain issue, it is, by the very nature of the matter, necessary for lower-level courts to reflect this shift in case law in their own decisions; and if they do not share the opinion of the court, to confront it with carefully laid out arguments and explain in a comprehensible way for which principal reasons it was not possible to concur with the said opinion, in a case with a basis similar in terms of facts or law.144

Thus, case law is not normatively irrelevant, because even though it may not be formally binding as a precedent, with a view to the approaches stated above, if a judge infers that case law should be applied, he must apply the opinion of the court expressed in settled case law or give convincing and appropriate arguments in his decision as to why he diverged from the case law or why that case law is incorrect.145 Hence, he has the “burden of argument”. In the Czech Republic, this approach to the normative effects of settled case law,

145 On this, the Supreme Administrative Court correctly stated in a decision of its grand chamber, 4 May 2010, file no. 4 Ads 77/2007 (published under No. 2112/2010 Coll. SAC – paragraph 37) that “a change in case law… is always appropriate if a court concludes that the interpretation hitherto used is not the right alternative, i.e., that the alternative is, for good reasons, less convincing than other interpretations that offer themselves, and even taking into account the value represented, in the given circumstances and with a view to the period for which the case law which is to be departed from has been applicable, by legal certainty and by the related interest in the stability of legal (and hence also social) relations, the existing interpretation cannot be convincingly upheld.” Further on this, in paragraph 52 it added that in the case at hand, the regional court has “…for rational reasons based on sound arguments, knowingly turned away from earlier conclusions of the Supreme Administrative Court, contributing to a turn-around in its case law by expressing its own distinguishing opinion.”
when a lower court is not unconditionally bound by it, is in line with case law of the Constitutional Court, which in its judgment of 21 November 1996, file No. IV. ÚS 200/96, in speaking about the premise that, in their decision-making, judges are only bound by law (in the sense of a strict and unexceptional binding effect) emphasised that “…in the event that it is taking case law into account in its decision-making, it should keep in mind that its settledness and validity are derived from development that reflects specific social and constitutional-law conditions. Furthermore, application of such case law must be compliant with international commitments accepted by the Czech Republic…”146. Hence, lower level courts are not unconditionally bound to respect case law; but settled case law has a relatively strong “discursive binding effect”, as it cannot be assumed that lower-level court judges would, among other things given their workload, initiate changes or shifts in case law willingly and often.

On the other hand, it was also the Constitutional Court that stated in its opinion, in its judgment of 25 November 1999, file No. III. ÚS 490/97, that neglecting an opinion on a legal problem explained by the Supreme Court, as the body explicitly authorised to unify decision-making practice, may bear “signs of jurisdictional arbitrariness”, and hence, it is unconstitutional for a lower court to diverge from settled decisions which have, furthermore, been shaped by repeated decisions or unifying opinions of the Supreme Court “…without sufficiently explaining the reasons due to which they depart from settled decisions…”147. Similarly, both Czech supreme courts have taken similar approaches to the normative effects of settled case law. For example, the Supreme Court, in its decision of 14 June 2012, file No. 30 Cdo 1042/2012, stated: “If the Supreme Court, as a supreme judicial body, is to ensure uniformity and legality of decision-making in all matters that fall within the powers of courts in civil court procedure, lower courts are obliged to fulfil the above-mentioned requirement of the constitutional principle of predictability of court decisions and of legitimate expectations of unified decision-making in cases that are similar in facts, by consistently reflecting the Supreme Court’s case law in their decisions. […] opinions of the court held by the Supreme Court in other cases are not binding (applicable) ex lege to cases with the same basis in terms of facts or law as that from which the decision comes, but at the same time, it cannot be neglected that if a certain opinion of the court has become settled in case law through courts’ decisions in the resolution of a certain issue, it is,

by the very nature of the matter, necessary for lower level courts to reflect this shift in case law in their decisions; and if they do not share that opinion of the court, to confront it with carefully laid out (critical) arguments, and to explain in a comprehensible way (in the rationale of its written decision) why, or for which principal reason(s), it was not possible to concur with the said decision in a case with a basis similar in terms of facts or law. A lower level court may only distinguish from case law if it confronts the conclusions reached in existing case law and explains the principal reason(s) that led it to diverge from existing case law; otherwise, an opinion of the court of a lower court is defective and cannot withstand review.”148

4.4. Impact of the Grand Chamber as the fundamental unifying body on the binding effect of court decisions

Unifying bodies – which, at the Supreme Court of the Czech Republic, are the Grand Chambers of the Civil and Commercial Division and of the Criminal Division – also have a fundamental impact on the normative force of case law of the highest courts. Aside from correcting decisions of lower-level courts, their opinions also play an important role in correcting decisions and being unconditionally binding for chambers of the Supreme Court, which in principle cannot depart from an earlier opinion expressed in the Court’s decision and are only able to initiate a change in case law through this unifying body.149

Pursuant to Section 20 (1) AOCAJ, if a chamber of the Supreme Court arrives, in the course of its decision-making, at an opinion of the court that differs from an opinion of the court expressed in a prior Supreme Court decision, it is to submit the matter to the Grand Chamber to decide. If the chamber of the Supreme Court does not do so, although it was obliged to proceed thus, and if it decides on the matter itself, this constitutes an application of state power in violation of Article 2 (3) of the Constitution and Article 2 (2) of the Charter, encumbering the proceedings with a defect consisting of an inappropriately staffed court, which on the constitutional level constitutes a breach of the right to lawful judge.150 This procedure is restricted by law, as concerns opinions of the court pertaining to procedural law: Section 20 (2) AOCAJ stipulates that

149 Ibid.
150 Judgment of the Constitutional Court of 11 September 2009, file no. IV. ÚS 738/09, published under No. 201 in vol. 54 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic.
paragraph (1) of Section 20 AOCAJ does not apply to such cases, unless the chamber has unanimously concluded that the procedural issue at hand is of fundamental legal importance. Furthermore, submission to the Grand Chamber of the Court is not required if a different opinion of the court has already been expressed in a unifying opinion of the Supreme Court taken pursuant to Section 14 (3) AOCAJ.

Hence, the law sets special and binding rules for the adoption of decisions of the Supreme Court in situations when they are to depart from existing case law. But even if no such procedures were laid down for such cases by positive law (as is the case of the decision-making practice of lower-level courts in relation to the Supreme Court), nothing would change the obligation of courts to resort to a change in case law only when necessary, when there are good grounds for violating the principle of predictability, and provided that thorough reasons are given for taking that route.151

In his article “On Grand Chambers of Superior Courts and Their Departure from Case Law”, Zdeněk Kühn considers the mechanisms of institutionalised change in the case law of superior courts to be one of the most important elements in the formation of the style of contemporary Czech case law. “Above all, the mechanism of institutionalised unification of case law reduces the possibility that judges at lower-level courts will not accept case law, if case law has already been unified by a Grand Chamber. […] From the purely formal point of view, the mechanism of an institutionalised change is also manifest at the superior court itself. A judge of a superior court cannot decide contrary to the Grand Chamber. The only option […] available to him is initiating further proceedings on the same or a similar legal issue. That does not mean, however, that once a Grand Chamber has rendered a decision, it could not change its opinion of the court by a subsequent decision in the future. Although such situations will be absolutely exceptional, one cannot rule out the possibility that a previous decision of the Grand Chamber failed to take note of an important argument or that social circumstances of relevance to the matter have changed.”152

The Supreme Court itself attributes fundamental importance to Grand Chambers: in a unifying opinion of its Plenum of 14 September 2011, file No. Plsn 1/2011, it granted them a de facto “position of quasi-superior courts”. In this unifying opinion, the Plenum of the Supreme Court also expressed the opinion that the Grand Chamber of the given division of the Supreme Court itself has the right and obligation to evaluate whether statutory conditions have been met for having the matter passed to it for deliberation and judgment. If the

151 Supra n 150.
conditions set out in Section 20 AOCAJ have not been met, and yet the matter has been passed to the Grand Chamber of the relevant division of the Supreme Court, the chamber shall decide to assign it to the relevant chamber for deliberation and judgment.\(^{153}\)

On the other hand, paragraph (2) of Section 20 AOCAJ gives rise to significant questions as to the use of case law unification through the Grand Chamber in procedural issues, as it restricts the use of the Grand Chamber in principle to substantive issues, and in the case of procedural issues, it requires the “chamber to unanimously conclude that the procedural issue at hand is of fundamental legal importance.” For that reason, it suffices for one of the judges of a three-member chamber to hold the position that such a procedural issue is not of fundamental importance, and, in spite of the opinion of the majority of the chamber, the matter will not be passed to the Grand Chamber, although there is discrepant case law of the Supreme Court at issue.

As has already been noted in the literature, there is also a certain discrepancy between the case law “force” of a procedural decision of the Grand Chamber and a non-procedural unifying opinion, although a procedural instrument should be used as the primary case law solution of major disputes concerning interpretation of law.\(^{154}\) On the other hand, there is also the opinion that a decision of a majority of all judges of the Criminal Division required for the adoption of a unifying opinion should be of higher “case law authority” than a decision of a majority of the Grand Chamber. This latter opinion is supported, above all, by the currently applicable text of the Act on Courts and Judges, according to which a case shall not be passed to the Grand Chamber, pursuant to Section 20 (1) and (2) AOCAJ, if a dissenting opinion has already been expressed in the Supreme Court’s unifying opinion rendered pursuant to Section 14 (3) AOCAJ (cf. Section 20 (3) AOCAJ), especially given that even the Grand Chamber may propose to the relevant division that it adopt a unifying opinion pursuant to Section 14 (3) AOCAJ.

\[4.5. \text{Impact of unifying opinions of the Supreme Court on decision-making practice}\]

Aside from exercising the authority of Grand Chambers, the President, a president of the Supreme Court division, or president of the Grand Chamber, may, in the interest of unified decision-making of courts and having evaluated

\(^{153}\) Supra n 152.

effective decisions of courts, propose that the relevant division adopt a unifying opinion (Section 21 (1) AOCAJ). If an issue that pertains to two or several divisions is concerned, or if the divisions’ opinions differ, the President may, in the interest of unified decision-making of courts and having evaluated effective decisions of courts, propose that a unifying opinion pursuant to Section 14 (3) be taken by the Supreme Court Plenum (Section 21 (2) AOCAJ). Pursuant to Section 14 (3) AOCAJ, the Supreme Court monitors and evaluates effective decisions of courts in civil proceedings and in criminal proceedings, and on their basis, in the interest of unified decision-making of courts, it adopts a unifying opinion with respect to the decision-making of courts in cases of a certain type. The unifying opinion of the Supreme Court rates the highest among all arguments that fall within the sphere of competence of the Supreme Court, given that a majority of all members of a given division or of the Supreme Court Plenum is required for its adoption.

On the basis of its statutory definition, a unifying opinion can be characterised as a relatively abstract interpretation of the law provided by a Supreme Court division or the Plenum, not linked to a specific case; although otherwise, it is based on prior effective decisions of courts in the given type of proceedings (civil or criminal). Hence, the fundamental difference of unifying opinions lies in that they do not constitute the formulation of an opinion of the court in a specific case that is being heard by the court, but a formulation of generalised conclusions pertaining to a certain legal issue, without a direct link to a specific case. This allows courts to express their opinions on hypothetical situations and to express their opinions in a complex manner, without having to limit themselves to the specific facts of a case. The issuing of unifying opinions is governed by certain rules arising from legal regulations. A primary condition for the issuing of a unifying opinion is that there are several effective decisions on the same matter, in which an identical legal issue was resolved differently by lower-level courts. This means that usually it does not concern discrepancies in the Supreme Court’s case law – there is another specific procedure (decision of the Grand Chamber) prescribed for their resolution – but addressing a situation of differing positions by subordinate courts in dealing with cases

156 The Court may express similar thoughts in a decision pertaining to an individual case, but it will only be an obiter dictum opinion which does not constitute a part of the principal ideas of the rationale, and according to the prevalent opinion, it is not binding for further decision-making, although it may be of some normative importance if it concerns certain important legal issues.
with identical facts. The outcome of unification by means of unifying opinions is a general resolution of a legal issue that goes beyond an individual legal case and serves as a guide for lower-level courts, as it indicates the direction in which subsequent case law of the highest courts would go in addressing the same legal issue.\footnote{158 BARÁKOVÁ, Martina. Stanoviska nejvyšších soudů: efektivní prostředek sjednocování judikatury nebo přežitek socialistické justice? Brno: MUNI Law Working Paper Series. MUNI Law Working Paper 2015.07, p. 2 Available at: https://www.law.muni.cz/dokumenty/33308.}

The fundamental imperative requiring the legal regulation of unifying opinions is the requirement of uniform case law, which can be inferred from the principles of a substantive rule of law that is embodied in Article 1 (1) of the Constitution of the Czech Republic\footnote{159 Ibid.} (cf. Also Article 92 of the Constitution). Case law of the Constitutional Court states: “Substantive rule of law is based on, among other things, the trust of citizens in law and the legal order. Such trust is conditioned on the stability of the legal order and a sufficient measure of legal certainty for citizens. Stability of the legal order and legal certainty are influenced not only by legislative activities of the state (drafting of laws), but also by the actions of state authorities applying the law, as it is only in the application and interpretation of legal norms that an awareness is created among the public as to what law is” (cf. judgment of 20 September 2006, file No. II. ÚS 566/05, announced under No. 170 in vol. 42 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic).

In other words, the stability of legal order and sufficient level of legal certainty of citizens is not influenced merely by legislation, but also by the process of the interpretation and application of law, which is executed primarily by courts. Unification of the case law of general courts has been entrusted by the Constitution to the Supreme Courts, which stand at the top of the judicial system (it can be inferred from the settled meaning of the term “highest” instance, in a certain system of state authorities), as is presumed by Article 91 (1) of the Constitution.\footnote{160 Cf. judgment of the Constitutional Court of 10 April 2014, file no. III. ÚS 3725/13 (bod 38), published under No. 55 in vol. 73 of the Collection of Judgments and Decisions of the Constitutional Court of the Czech Republic.}

A unifying opinion can be seen as something extra, on top of the unification of judicial practice through the Supreme Court’s decision-making, which takes place in the Grand Chamber. Unifying opinions enjoy a specific position in case law, as they – with a view to Section 20 (3) AOCAJ – significantly restrict the possibility of a change in case law in those issues with respect to which the Supreme Court has adopted a unifying opinion, as its existing opinion can only
be overturned by the issuance of a new unifying opinion; it is not possible to use the institute of passing the matter to the Grand Chamber.\footnote{161\textsuperscript{161} BARÁKOVÁ, Martina. Stanoviska nejvyšších soudů: efektivní prostředek sjednocování judikatury nebo přežitek socialistické justice? MUNI Law Working Paper Series. MUNI Law Working Paper 2015.07, p April Available at: https://www.law.muni.cz/dokumenty/33308.}

In the Czech Republic, unifying opinions of the highest courts\footnote{162\textsuperscript{162} The issuance of unifying opinions in proceedings before the Supreme Administrative Court is governed by Section 12 (2) of Act No. 150/2002 Coll., Code of Administrative Procedure, as amended (hereinafter referred to as “CAP”), according to which the Supreme Administrative Court is to monitor and evaluate effective decisions of courts in the administrative judicial system, and on their basis, and in the interest of unified decision-making of courts, it adopts unifying opinions with respect to the decisions of courts in matters of a certain type. Furthermore, pursuant to Section 12 (3) CAP, the Supreme Administrative Court may also adopt fundamental decisions of the grand chamber pursuant to Section 18 CAP, which constitute another instrument that serves to direct the practice of administrative authorities if a fault of an administrative authority was discovered in its decision of a specific case, which fault is not isolated, but rather, recurrent and has the nature of a systemic fault on the part of administrative authorities.} are undoubtedly a relatively controversial institute, in particular with a view to the history of their origin, given that, in Central Europe, these unifying opinions arrived with the ascent of the Soviet model of Communism and served, in that era, for “socialist application of socialist law”, and for the “directive steering of the work of courts by the highest courts”.\footnote{163\textsuperscript{163} In details, cf. BOBEK, Michal, KŮHN, Zdeněk et al. Judikatura a právní argumentace. 2nd edition. Prague: Auditorium, 2013, pp. 131–132.}

Another major problem is that, in the Czech legal environment, unifying opinions are adopted by judicial bodies, divisions, or plenaries of supreme courts that have many members, which, according to certain opinions, restricts due discourse required from the point of judicial argumentation. According to these opinions, it is not an activity typical of judicial power and rather, it approximates a discussion at a parliamentary assembly or at a judicial council. According to these opinions, “the fact that the institute of unifying opinions is seen as more or less given in Central European legal science, confirms paradoxes of systems which, on the one hand, criticise alleged judicial activism and oppose the recognition of an albeit limited binding nature of the opinions of the court of superior courts, and on the other hand accept, without problem, the specific institution of “meeting-based justice” that would, in most continental-law as well as Anglo-American-law countries, be deemed to constitute a major violation of the division of powers.”\footnote{164\textsuperscript{164} BOBEK, Michal, KŮHN, Zdeněk et al. Judikatura a právní argumentace. 2nd edition. Prague: Auditorium, 2013, pp. 133–134.}

Problematic also is that the adoption of a unifying opinion may be initiated by the Minister of Justice (cf. Section 123 (4) AOCAJ), although it does not

\footnotesize{\textsuperscript{162}} The issuance of unifying opinions in proceedings before the Supreme Administrative Court is governed by Section 12 (2) of Act No. 150/2002 Coll., Code of Administrative Procedure, as amended (hereinafter referred to as “CAP”), according to which the Supreme Administrative Court is to monitor and evaluate effective decisions of courts in the administrative judicial system, and on their basis, and in the interest of unified decision-making of courts, it adopts unifying opinions with respect to the decisions of courts in matters of a certain type. Furthermore, pursuant to Section 12 (3) CAP, the Supreme Administrative Court may also adopt fundamental decisions of the grand chamber pursuant to Section 18 CAP, which constitute another instrument that serves to direct the practice of administrative authorities if a fault of an administrative authority was discovered in its decision of a specific case, which fault is not isolated, but rather, recurrent and has the nature of a systemic fault on the part of administrative authorities.  
In real life, the person proposing that a unifying opinion be taken by the Civil and Commercial Division is nearly exclusively the president of the division, to whom petitions are addressed by individual chambers or judges. On the other hand, in the case of the Criminal Division, suggestions for the adoption of unifying opinions come not only from judges or chambers, but also from the outside, from lower-level courts and also from the Office of the Prosecutor General, whose suggestions have prevailed in recent years.

Unifying opinions constitute a non-procedural means of unifying court practice in cases of a certain type, on the basis of effective court decisions. In this regard, they undoubtedly contribute to the protection of individual rights, by ensuring uniformity in decision-making, thereby contributing the fulfilment of the principle of predictability of decision-making of public authorities, which is a fundamental attribute of the rule of law.

The role of the Supreme Court’s unifying opinions is especially significant in those cases in which an extraordinary appeal cannot be filed. In such situations, the Supreme Court may publish selected decisions of lower-level courts in the Collection of Court Decisions and Unifying Opinions, but it does not have any authority of its own that would give it the option to unify judicial practice by deciding on individual cases. Extraordinary appeals are relatively broadly excluded in private-law disputes, in particular in family-law matters, with the exception of matrimonial property rights, as well as in the case of minor actions, where the amount claimed does not reach a certain value specified by law, and in other situations specified, in particular, in Section 202 and Section 238 CCP, when an appeal or extraordinary appeal is not permissible. In criminal law, a similar obstacle can be found in the specification of grounds on which an extraordinary appeal is permitted, in Section 265b of the Code of Criminal Procedure, which essentially makes it impossible to unify case law in terms of the sentences imposed, but also to a significant degree in decision-making on remanding in custody, etc. In these cases, the role of unifying opinions is invaluable, as the Supreme Court cannot objectively influence the decision-making practice of subordinated courts through its own decisions.

An unquestionable advantage of unifying opinions is that they clearly outline a particular issue, usually by referring to prior conflicting decisions, and provide answers to contentious legal issues in the form of a highly professionally reasoned opinion of the Supreme Court.

Another argument that must be made in favour of the Supreme Court’s unifying opinions is that a draft is subjected to wide discussion, not only within the relevant division or Plenum of the Supreme Court and of lower-level courts (and in criminal proceedings also the office of the state prosecutor), which
submit their opinions on it to the Supreme Court, but also within a number of other institutions that comment on it (cf. Section 21 (3) AOCAJ). Aside from central executive bodies (e.g., Minister of Justice or Minister of the Interior), these include, in particular, academic and research institutions (Institute of State and Law of the Academy of Sciences of the Czech Republic, Institute for Criminology and Social Prevention, relevant departments of law schools), as well as the Czech Bar Association, the Ombudsman, and any other relevant persons, based on the nature of the particular issue. The opinions of these commentators are, in principle, always included in the rationale of the final unifying opinion, as are arguments contained in the original petition seeking the adoption of a unifying opinion, due to a discrepancy found in the decision-making practice of courts.

For all these reasons, unifying opinions are often considered “displays of Czech legal culture of the highest quality”, both in terms of arguments and of language, stemming from the authority of a division or the Plenum of the Supreme Court. One of the arguments used in the literature in support of unifying opinions of the Supreme Court is that they can be considered the outcome of a collective professional effort of a broad legal community, as the adoption of a unifying opinion is often the outcome of an extended discussion of a legal issue, which is sometimes carried on for generations.

In evaluating the importance of the issue of unifying opinions, it cannot be neglected that they offer an accessible and concise form of addressing fundamental problems with case law, for both a wide range of professionals and the general public. For professionals, it is certainly easier to learn about the opinion of the Supreme Court by reading its unifying opinion, without having to peruse and compare dozens or hundreds of its decisions, to evaluate extensive decision-making practice, and to extract individual legal issues from individual decisions.

4.6. Conclusion

Following a brief theoretical introduction, the contribution examines the general approach adopted in the Czech Republic with respect to the binding effect of court decisions. In this context, it discusses not only cassation binding binding
effect, but also the normative force of case law, especially that of the Supreme Court, in our legal environment. Following these basic premises, it examines the impact of decisions of all categories of Grand Chambers of the Supreme Court, and of the unifying opinions of divisions and the Plenum of the Supreme Court on the formation of case law. Furthermore, it strives to draw attention to certain problems related thereto, thereby contributing to a discussion about the role of the Supreme Court and the appropriateness of the use of the means described in unifying case law in civil and criminal matters, without having the ambition to provide an ultimate solution for these problems.
5. Position of the Binding Effect of Case Law in the Interpretative Methodology of Continental Law

JAN WINTR

5.1. Judges are bound by the law

In continental law, interpretation of law means primarily interpretation of normative legal acts or normative treaties. Normative legal acts, i.e., legal regulations, are the predominant source of continental law, the primary object of interpretation. Their interpretation is primary, whereas values, principles, opinions, doctrine, legal tradition, purpose of the law, case law, explanatory memoranda for draft legislation, historical circumstances in which an act was enacted (occasio legis), moral convictions of society, or economic and sociological findings constitute secondary objects of interpretation, which can be, and in certain cases must be, taken into account. This distinction between objects of interpretation is normatively set out in part one of Article 95 (1) of the Constitution of the Czech Republic, according to which a judge is, in his decision-making, bound by the law and international treaties which have been incorporated into the legal order. Similar provisions can be found in a number of other constitutions, such as Article 61 of the Danish Constitution, Article 101 of the Italian Constitution, Article 117 of the Spanish Constitution, Article 178 of the Polish Constitution, as well as Article 97 of the Basic Law of Germany (GG).
although the Basic Law, in its famous and unmistakable\textsuperscript{171} Article 20 (3) opens up room for broader consideration: “The legislative power is bound by the constitutional order, executive power and the judiciary by statute and law” (“… an Gesetz und Recht gebunden”).

If then, the primary object of interpretation of law is the text of a norm, it is evident, and the history of European legal thinking documents it, that the possibilities given to the interpreter in grappling with the normative contents of a legal regulation are limited, and that therefore the range of basic methods of interpretation will be narrow. I fully agree with German constitutional Judge Emeritus Winfried Hassemer: “We owe the core of legal methodology in a codified system to Friedrich Carl von Savigny. It was he who described four approaches, applicable to date, to understanding laws, but who also told us how to justify or criticise that understanding. This not only lends stability to those approaches, but also makes them necessarily sensible; they are nearly self-explanatory when they compel the judge to: decide according to the wording of the act; take heed of the systematic continuity within which the act operates; pursue the objective of the regulation that the lawmaker had before his eyes; and govern yourself according to the purpose the act has today.”\textsuperscript{172}

A fundamental question is how to place the binding effect of case law within this system that includes linguistic, systematic, historical, and teleological interpretation.

\textbf{5.2. Judges are bound by case law}

Above all, it is evident that in continental law a judge is to some extent also bound by previous case law. The Czech legal order clearly lays down the principle of the cassation binding nature of case law. For example, if an appeal court overturns the decision of a first-instance court and returns it for retrial pursuant to Section 226 (1) of the Code of Civil Procedure, “the Court of First Instance is bound by the opinion of the court of the appeal court.” The same applies according to Section 264 (1) of the Code of Criminal Procedure in criminal proceedings. Pursuant to Article 89 (2) of the Constitution, according to which “enforceable decisions of the Constitutional Court shall be binding for all bodies and persons”, this cassation binding effect applies in relation to the

\textsuperscript{171} Cf. the so-called eternal clause in Article 79 (3) of the Basic Law: “A change in this Basic Law that pertains… to the principles set out in Articles 1 and 20 is impermissible.”

general court to which the case is returned after it has been struck down by the Constitutional Court.

According to the Constitutional Court, courts are obliged to take into account previous case law in similar cases in the future, which brings to mind the binding nature of precedents in Anglo-American legal culture. In its judgment III. ÚS 252/04, the Constitutional Court states: “…once given, an interpretation should be, unless sufficient relevant reasons that are based on rational and convincing arguments are subsequently found, which in their aggregate better conform to the legal order as a comprehensive unit, and which therefore support a change in case law, a springboard for decisions in subsequent cases of the same type, both from the point of view of the principles of legal certainty, predictability of the law, protection of justified confidence in law (justified legitimate expectations) and from the point of view of formal fairness (equality). One of the integral symbols of the rule of law is the principle of legal certainty and the principle of protection of justified confidence in the law, which flows from it and which, as a fundamental symbol and condition of the rule of law, implies, above all, efficient protection of the rights of all legal entities in identical cases in an identical manner, and the predictability of the actions of the state and its authorities.” This does not “imply a categorical impossibility of changing the interpretation or application of law, but a requirement that it be a change that is, with a view to specific circumstances… predictable, or that an unpredictable change in interpretation be, at the time it is made, supported with transparent rationale and based on acceptable rational and objective reasons that respond in a rational way to conclusion of the courts applied in previous decision-making practice with respect to the given legal issue…”

The Constitutional Court therefore considers a groundless departure from established case law to constitute a breach of the important legal principles of legal certainty and equality before the law. It repeated this in its judgment II. ÚS 566/05, adding: “These principles do not apply without exception, provided that there is a sufficiently legitimate reason for their restriction, i.e., a sufficiently legitimate reason for a change in the interpretation of a legal norm, and provided that the authority that is changing the interpretation has complied with procedural requirements set to that end. Only such well-supported circumstances permitting a change in interpretation, and transparently applied procedures, may justify an intervention in the legal certainty and equality of individuals.”

As concerns the obligation of general courts to follow the case law of the Constitutional Court in similar cases, the Constitutional Court states in judgment IV. ÚS 301/05: “In and of itself, the fact that the Supreme Administrative Court takes issue with the constitutional interpretation by the Constitutional Court… and fails to reflect the CC’s interpretation in the contested judgment cannot be automatically deemed to constitute refusal to respect the Constitutional Court or even a breach of Article 89 (2) of the Constitution. (…) It must, however, be added that competing considerations may only be offered in this manner once. As soon as the Constitutional Court has, following careful consideration, rejected a certain argument offered by a general court as a competing consideration, general courts may not bring that argument forward again; a fortiori, such a consideration would not constitute a justified reason for not granting protection of fundamental subjective rights to an individual.”

Zdeněk Kühn in the second edition of Judikatura a právní argumentace (Case Law and Legal Argumentation) cites another decision of the Constitutional Court, the Supreme Court and the Supreme Administrative Court, which considers a groundless departure from settled case law to be an expression of judicial arbitrariness (cf., in particular, judgment of the Supreme Court 30 Cdo 1042/2012174), and takes a very balanced position with respect to the issue of the normative force of case law in Czech law, rejecting both the precedential binding effect and normative irrelevance of the case law of higher courts.175 He is advancing the term “discursive binding effect”: if a judge chooses not to respect case law, he bears the burden of argument and risks that a higher court will not approve his opinion.

The legislator also embraced the discursive binding effect of case law in Section 13 of the New Civil Code: “A person claiming legal protection may reasonably expect that his legal case will be decided similarly as another case that has already been ruled on and that agrees, in terms of material characteristics, with his case; if a case has been decided differently, any person claiming legal protection shall be entitled to a convincing explanation of the reason for that departure.”

On the line between cassation and precedential (discursive) binding effects of case law is the procedural restriction on free interpretation of statutes by judges in the form of Grand Chambers. Pursuant to Section 20 (1) of Act

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174 We can read, for example: “Distinguishing – by a lower-level court – from case law is therefore only possible if the court confronts the published conclusion(s) and presents a principal reason(s) that has(have) led the court concerned to distinguish from existing case law; otherwise, the opinion of the court adopted by a lower-level court is defective and cannot stand under review.”

No. 6/2002 Coll., on Courts and Judges, a Supreme Court chamber, should it arrive, in the course of its decision-making, at an opinion that differs from an opinion expressed in an earlier decision of the Supreme Court, it shall pass the case to the Grand Chamber for it to decide. This means that the chamber itself cannot depart from existing case law. The same applies pursuant to Section 17 (1) of the Code of Administrative Procedure with respect to chambers of the Supreme Administrative Court and its grand chamber.

Czech legal science attributes a quasi-precedential meaning to case law, but it does not consider it to constitute a formal source of law.\(^{176}\)

In his book *Prečo zotrvať pri rozhodnutom* (Why Stay with What Has Already Been Ruled), Slovak legal theorist Marek Káčer relativizes the difference between a statute and precedent in continental law, and directly refers to case law as a source of law. In continental law, too, prior case law constitutes grounds for a court decision, i.e., it is, factually, a source of law, and on the other hand, in Anglo-American law, a statute takes precedence over a precedent.\(^ {177}\)

In my further exposition, I will operate on the basis of the assumption that case law does not constitute a formal source of law and that, hence, it makes sense to place argumentation by case law among the instruments for interpretation of the statute.

### 5.3. Position of the binding effect of case law in the interpretative methodology of continental law

If we want to include arguments in the form of case law in the linguistic, systematic, historical, or teleological category of interpretations, we have several options. In my book *Metody a zásady interpretace práva* (Methods and Principles of Interpretation of Law), I attempted to divide 49 interpretative principles into categories of linguistic, systematic, historical, or teleological interpretation;\(^ {178}\) I will now attempt to place case law arguments in that scheme. Five options have occurred to me.

I. Historical interpretation – the principle of historic effect. In the book I have quoted, I included case law arguments in the category of historical interpretation, and specifically, I referred to them as to the principle of historic

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effect. In the interpretation of case law of higher courts, its relevance does not flow solely from the strength of their persuasiveness. Case law is an institutional fact. As Section 13 of the New Civil Code instructs us, we should, as interpreters, take into account not only the text and purpose of the statute, but also, for reasons of protecting legal certainty and legitimate expectations, also the history of the operation of the legal rule concerned, and hence, not change its settled interpretation without strong arguments. Aside from this Section 13, the conclusion about the relevance of case law for interpretation can also be based on the argument of the legislator’s silence.

According to the Constitution, legislative power resides in Parliament, and if Parliament is dissatisfied with case law produced by courts, it can always intervene by amending a statute, thereby excluding the application of uncomfortable case law to future cases. Silence on the part of Parliament is hence indirect confirmation of the prevalent interpretation that has formed in the case law of higher courts, and, if relevant, also in the uniform opinion of doctrine.

Democratic legitimacy of statute arises not solely from the fact that it was enacted by a Parliament that had been democratically elected, but also from the assumption of the consent of Parliament in all subsequent terms, as a latter Parliament had the option to change the statute, but did not do so. It can, for example, happen that over the course of a statute’s life, its interpretation is significantly shifted by case law. If the legislator does not manifest an attempt to amend the statute, we can take it to mean that it agrees with the current judicial interpretation.

This principle of historic effect, if case law has been well established and is not limited to isolated decisions, is of a relatively great weight; it can be overturned especially by teleological arguments, but only if they are indeed convincing, as is required by Section 13 of the Civil Code.

II. Systematic interpretation – the principle of a non-contradictory legal order. In his review of my work on the methods and principles of interpretation of law, Vojtěch Šimíček suggested that established case law be included, rather, in the sphere of non-contradictory legal order. He pointed to related problems in terms of the non-contradictory nature of case law, when courts have to make the difficult choice as to which conflicting decision of a higher court to prefer. He illustrated the problem using the headnote of judgment of the SAC 2 Afs 37/2005: “If there are, at the time of a general court’s decision, several competing opinions of the Constitutional Court, with respect to which it cannot be clearly determined which is earlier and which is more recent, that which shall

179 Ibid, p. 118.
be determinative for the general court will be, with a view to all circumstances and on the basis of a rational analysis and consideration, the one considered to be the prevalent opinion in the Constitutional Court’s case law. The facts decisive for the evaluation shall include, but not be limited to, the number of decisions holding this or that opinion of the court, their form, the level to which arguments on the given legal issue have been elaborated, and also the level to which the resolution of the given legal issue constituted a principal reason for the decision or, on the other hand, supporting, supplementary or obiter dictum argumentation."

Two possibilities therefore offer themselves within the framework of the non-contradictory legal order principle – either, argumentation based on case law should be subsumed under the principle that no interpretation may lead to a conflict with other legal norms,\(^\text{181}\) or to formulate a new sub-principle for it.

The principle that no interpretation may lead to a conflict with other legal norms? If we subsume argumentation based on case law under the principle that no interpretation may lead to a conflict with other legal norms, we would presume that a decision is understood as a source of law in a manner similar to Marek Káčer’s thought. It is, however, questionable whether it is possible to place this rule based on case law alongside a rule arising from statute, and to treat discrepancies between two decisions or a decision and a statute the same as a discrepancy between two statutes.

The principle of discursive binding effect of case law? If we were, however, to formulate a brand-new sub-principle within the non-contradictory legal order principle, pertaining solely to case law, we could find good arguments for doing so. In any event, Vojtěch Šimiček is correct at least in saying that if we refuse to subsume an argument based on established case law under the category of historical interpretation, and if we want to place it under one of the classical methods of legal interpretation, systematic interpretation offers itself as the most appropriate category.

Just as the principle of a \textit{prima facie} literal text of the law is based on the fact that a judge is bound by the law pursuant to Article 95 (1) of the Constitution,\(^\text{182}\) the principle of discursive binding effect of case law is based on law – in the already mentioned Section 13 of the Civil Code as well as the above-mentioned provisions of procedural codes that require in specific procedural situations respect for case law, and, with a bit of extensive interpretation, also in the constitutional description of the Czech Republic as a state upholding the rule of law (Article 1 (1) of the Constitution).

\(^{181}\) Supra n 178, p. 72.

III. Systematic interpretation – the principle of a constitutionally-compliant interpretation. Another possibility of classification of the obligation to take heed of settled case law is under the principle of a constitutionally-compliant interpretation. It could be based on Article 95 (1) of the Constitution, according to which a judge is only bound by law. If the Constitutional Court infers the obligation of taking settled case law into account from the constitutional principles of equality and legal certainty (see above), we can say that only those, of all theoretically potential interpretations of a law that are in line with settled case law (or for which departure from settled case law is duly supported with reasons) constitute constitutionally-compliant interpretations of the law.

The systematic principle of constitutionally-compliant interpretation is, of course, very close to the teleological principle of interpreting in line with constitutional principles and values, in the spirit of shining constitutional principles and values throughout the legal order. The principle of interpreting in line with constitutional principles and values requires, rather, taking into account more abstract principles and values, which makes more sense with respect to very abstract principles of equality and legal certainty. The principle of a constitutionally-compliant interpretation does prohibit interpreting legal provisions such that they would be contrary to the Constitution, but we are not concerned here with a discrepancy with a specific provision of the Constitution.

IV. Teleological interpretation – a principle of interpretation in line with constitutional principles and values. Let us, then, consider classification under teleological interpretation. According to that principle, discursive binding effect of case law would arise from shining the principles of rule of law (Article 1 (1) of the Constitution) into the legal order, namely the principles of legal certainty (legitimate expectations based on settled case law) and fairness or equality (adjudicating identical cases identically). A weakness of this solution lies in the fact that preferring an interpretation based on case law does not constitute a typical shining of constitutional principles; it is far more a formal argument operating not with values but with specific institutional facts.

V. The rule of priority. The last method is to give up attempts to classify arguments based on case law under linguistic, systematic, historic or teleological interpretation and make do with the fact that the institutional position of settled case law is enhanced by that specific linguistic, systematic, historic, or teleological interpretation that is contained in the settled case law. If it is possible to depart from settled case law in cases when convincing reasons are provided, then the weight of the principle depends, in each specific case, on

183 Supra n 178, p. 63.
184 Supra n 178, p. 136.
how convincing the reasons are. And the reasons given for the quasi-precedent can only come from one of the other principles stated here. It will thus be about a conflict of these other principles, and the “discursive binding effect” of case law will be enhanced by those principles that have to this point prevailed in settled case law.

In order to protect values of legal certainty (legitimate expectations based on settled case law) and fairness or equality (adjudicating identical cases identically), this important discursive element of contemporary law must be respected; a judge should, *prima facie* prefer settled case law to his own teleological thoughts; he can only depart from them if he provides convincing reasons for doing so.¹⁸⁵

The question is whether this classification outside of the system of legal interpretation principles is required, given that this solution strongly resembles the formulation of a new principle of systematic interpretation, namely the principle of discursive binding effect of case law, as was suggested in Part Two of Section II. This formulation of the fiftieth interpretation principle seems to me to be the most acceptable solution, better than the original classification under historical interpretation.¹⁸⁶

### 5.4. Conclusion

We can conclude by saying that our effort to integrate arguments based on case law among traditional methods of legal interpretation is complicated by the fact that this argument had not been anticipated by continental law. The 1811 Austrian Civil Code, the ABGB, which applied in the Czech Republic through to 1950, still states in Section 12: “Decisions issued in individual cases and judgments rendered by courts in special legal disputes never enjoy the power of the law, cannot be related to other cases or to other persons.” The argument using settled case law is, however, based on the precedential understanding of law in the AngloAmerican legal culture, to which continental legal culture is approximating, and from modern discursive theory and hermeneutics. Discursive binding effect in Czech law is based on the constitutional value of legal certainty (legitimate expectations based on settled case law) and

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¹⁸⁵ Cf. rule of priority of P4 in Supra n 178, p. 206.

¹⁸⁶ In this case, instead of the principle of historic effect, which includes respect for case law, the narrower principles of the implicit consent of the silent lawgiver could be used, according to which it could be argued that the lawgiver silently approves the development of case law and doctrine, but only to the extent to which it can be assumed that it was aware of that development and wished to remain silent.
fairness or equality (adjudicating identical cases identically), the case law of the Constitutional Court, and on Section 13 of the New Civil Code.

If we do not grant precedents the binding effect of a formal source of law, or if we do not separate the constitutional obligation of a judge to be bound by a statute (which he is interpreting) from a judge being procedurally bound (as ordered by the Constitution or a statute) by the opinion of the court of another (or the same) court, we can hardly avoid the question of how to integrate arguments using discursively binding case law into the framework of methods of legal interpretation. This contribution aimed to answer that question.
Part II:

Binding Effect of Judicial Decisions in a Multilevel System

II.A.

The Concept of Binding Effect and Case Law of the ECtHR
6. Effet contraignant des décisions judiciaires:
Réflexions sur l’exécution des arrêts de la Cour

GUIDO RAIMONDI

C’est une joie pour moi de pouvoir contribuer à une publication qui se concentre sur l’un des thèmes les plus cruciaux d’aujourd’hui, à savoir l’exécution des jugements de la Cour européenne des droits de l’homme. On peut y voir un paradoxe dans la mesure où la Cour européenne des droits de l’homme ne joue pas, à proprement parler, de rôle dans l’exécution de ses propres arrêts.

Celle-ci se déroule sous le contrôle du Comité des Ministres du Conseil de l’Europe en application de l’article 46 de la Convention. Mais ce paradoxe n’est qu’apparent car, d’une part, l’exécution de nos arrêts est la clé de la réussite de tout notre système, d’autre part, la Cour est loin de rester en dehors de ce processus.

Cela fait maintenant près de soixante ans que les arrêts rendus par notre Cour influencent les juges et les législateurs de tous les États parties. Ils ont contribué à l’harmonisation des normes européennes dans le domaine des droits et des libertés. Notre Cour, grâce à sa jurisprudence, a joué un rôle majeur dans l’amélioration de la protection des droits de l’homme en Europe. Elle est maintenant universellement connue et reconnue.

Beaucoup d’éléments contribuent à rendre notre système unique, au premier rang desquelles le recours individuel ouvert à tous, sans condition de nationalité, de domicile ou de résidence.

Mais tout mécanisme, aussi parfait soit-il, se doit d’être effectif. C’est là que la question de la bonne exécution des arrêts intervient. On me demande souvent ce qui a contribué au succès du mécanisme de la Convention. Je crois, sincèrement, que l’une des réponses réside dans les changements provoqués par nos arrêts dans les États membres du Conseil de l’Europe et parfois même au-delà. Or, ne soyons pas naïfs, ces changements n’auraient pas pu intervenir sans un mécanisme de contrôle efficace comme celui qu’exerce le Comité des Ministres.

Sur le plan procédural, le système mis en place à Strasbourg a constitué, dès l’origine, une avancée majeure dans la protection internationale des droits de l’homme. Qui aurait pu penser, en effet, dans l’immédiat après-guerre, que des
citoyens pourraient, un jour, obtenir la condamnation d’un État par une juridiction internationale ? Ce qui nous semble aujourd’hui être une évidence était révolutionnaire il y a seulement soixante ans. Il en va de même du mécanisme de supervision des arrêts de la Cour. On aurait difficilement pu concevoir il y a soixante ans que tous les États européens seraient appelés à rendre des comptes à un organe international sur la manière dont ils exécutent une décision rendue par une juridiction internationale.

On a souvent comparé les mérites respectifs des différents systèmes de protection des droits de l’homme. Qu’il s’agisse de la Cour interaméricaine des droits de l’homme ou du système onusien, créé dans le cadre du Pacte international relatif aux droits civils et politiques, ils souffrent incontestablement de ne pas disposer, comme nous, d’un mécanisme chargé de veiller au respect de leurs décisions. Cela me permet donc de rendre hommage au rôle que joue le Comité des Ministres du Conseil de l’Europe dans le système de la Convention, un rôle que beaucoup ignorent.


2016 a vu un nouveau record d’affaires closes : plus de 2 000 affaires ont été closes soit 25 % de plus qu’en 2015. Le nombre d’affaires pendantes est descendu sous la barre des 10 000 pour la première fois depuis le début du processus d’Interlaken, en 2010, qui a marqué le début du processus de réforme du système de la Convention.

Dans la très grande majorité des affaires, je crois qu’on peut citer le chiffre de 95 %, les arrêts sont correctement exécutés. C’est d’autant plus remarquable que les affaires tranchées par la Cour portent souvent sur des questions extraordinaires complexes et délicates. Si, dans un grand nombre de cas, l’exécution de l’arrêt se limite à une réparation pécuniaire et ne soulève pas de difficultés particulières, nous sommes conscients que certaines décisions qui nécessitent, par exemple, des modifications législatives ou des changements jurisprudentiels ne sont pas faciles à mettre en œuvre. Cela suppose donc un dialogue constructif entre toutes les parties concernées afin qu’elles déploient les efforts nécessaires pour parvenir à une solution. En réalité, rien n’est possible en l’absence d’une volonté politique claire d’aboutir à un résultat. On a pu en observer des exemples dans les affaires éminemment complexes qui concernaient les pays de l’ex-Yougoslavie. Les États concernés ont réglé ou sont en train de régler des dettes économiques datant de l’ancien régime, des dettes impliquant parfois des sommes très considérables, par exemple des indemmites de guerre, des pensions de
retraite, ou encore des dettes liées à d'anciens comptes d'épargne en devises étrangères.

Si les chiffres qui figurent dans le 10ème rapport du Comité des Ministres sur l'exécution des arrêts la Cour témoignent de la réussite du système, il n’en demeure pas moins que, dans certaines affaires, l’exécution de notre arrêt, même de nombreuses années après son prononcé, n’est pas intervenue, ce qui est infiniment regrettable. Je sais que les arrêts non-exécutés correspondent à des situations très particulières : dissensions au sein d’un État membre au sujet des réformes exigées, problèmes structurels importants, difficultés liées à la notion de juridiction, par exemple en cas d’administration autoproclamée d’un territoire, etc. Même si ces arrêts non exécutés restent minoritaires, il faut bien comprendre que c’est toute la crédibilité du système qui est affectée du fait de cette non-exécution. Celle de l’organe de contrôle au premier chef, le Comité des Ministres, qui ne parvient pas à remplir sa mission, mais aussi celle de la Cour dont les arrêts risqueraient de rester lettre morte. C’est bien pour cela que je soulignais, au début de mon intervention, le caractère crucial de la question que nous traitons aujourd’hui. C’est aussi pour cela que l’article 46 donne au Comité des Ministres la possibilité, lorsqu’une Haute Partie contractante ne se conforme pas à un arrêt, de saisir la Cour du manquement par cette Partie à ses obligations. Jusqu’à présent, le Comité des Ministres n’a pas usé de cette faculté.

Alors, précisément, comment la Cour peut-elle agir ? De la même manière qu’il faut une volonté politique des États pour exécuter les arrêts, il faut une politique jurisprudentielle au sein de la Cour. Elle intervient de plusieurs façons. D’abord, et c’est évident, en rendant des arrêts aussi clairs que possible de façon à éviter toute incertitude ou ambiguïté quant à leur exécution. Mais cela ne suffit pas et nous sommes allés plus loin en créant la procédure dite de l’arrêt pilote.

Le dialogue entre la Cour et le Comité des Ministres a abouti à la sa Résolution (2004)3 sur les arrêts qui révèlent un problème structurel sous-jacent. La procédure de l’arrêt pilote est aujourd’hui bien connue, mais un bref rappel n’est pas inutile. De très nombreuses requêtes pendantes devant la Cour sont des « affaires répétitives » découlant d’un dysfonctionnement chronique au niveau interne. La Cour a donc élaboré la procédure en question pour se doter d’une méthode permettant d’identifier les problèmes structurels sous-jacents aux affaires répétitives, puis de demander aux États concernés de les traiter. Lorsque de nombreuses requêtes ayant la même origine sont introduites devant la Cour, celle-ci peut décider d’appliquer à l’une ou à plusieurs d’entre elles un traitement prioritaire selon la procédure de l’arrêt pilote. Dans le cadre de cette procédure, la Cour n’a pas seulement pour fonction de se prononcer sur la question de savoir s’il y a eu ou non violation de la Convention européenne des
droits de l’homme dans telle ou telle affaire, mais aussi d’identifier le problème systémique et de donner au gouvernement concerné des indications claires sur les mesures de redressement qu’il doit prendre pour y remédier.

L’une des caractéristiques fondamentales de cette procédure réside dans le fait qu’elle permet à la Cour d’ajourner – ou de « geler » – pendant un certain temps les affaires qui en relèvent, à condition que le gouvernement concerné prenne rapidement les mesures internes requises pour se conformer à l’arrêt. Toutefois, la Cour peut reprendre l’examen des affaires ajournées chaque fois que l’intérêt de la justice l’exige.

C’est dans l’affaire Broniowski c. Pologne187 du 22 juin 2004 que la Cour a, pour la première fois, adopté un arrêt pilote. Elle concernait la question des biens immobiliers situés au-delà de la rivière du Boug, ce qui touchait près de 80 000 personnes.

Depuis lors, la Cour a rendu 35 arrêts pilotes, concernant plusieurs dizaines de milliers de personnes. Les thèmes traités dans ces arrêts sont extrêmement variés : droit de propriété, conditions de détention, durée excessive de procédures internes, ou inexécution prolongée de décisions judiciaires. Ce qui est frappant, c’est de voir à quel point cette procédure a permis de remédier à des situations complexes, souvent bloquées depuis fort longtemps. Je n’ai pas la possibilité de détailler ici toutes les affaires pilotes qui ont donné lieu à une amélioration de la situation au plan interne. Je me limiterai donc à citer un seul exemple qui concerne mon propre pays, l’Italie. Il s’agit de l’arrêt pilote Torreggiani188 du 8 janvier 2013 qui avait trait à la surpopulation carcérale.

À la suite de cet arrêt pilote, l’Italie a adopté un certain nombre de mesures législatives visant à résoudre le problème structurel du surpeuplement carcéral : elle a réformé la loi en permettant aux personnes détenues de se plaindre devant une autorité judiciaire des conditions matérielles de détention et elle a instauré un recours compensatoire prévoyant une réparation pour les personnes ayant subi une détention contraire à la Convention. Depuis l’arrêt pilote, le nombre d’affaires soumises à notre Cour pour ce grief a considérablement diminué et plus de 3 500 requêtes introduites devant la Cour entre 2009 et 2014 ont pu être traitées et déclarées irrecevables à la suite des décisions adoptées dans le cadre de la procédure de l’arrêt pilote Torreggiani. Les mesures législatives adoptées ont joué un rôle clé dans la réduction de la surpopulation carcérale. En 2010, le nombre de personnes détenues était de 68 258. Au 30 novembre 2016, il était de 55 251. Au cours des cinq dernières années, le nombre de personnes

entrantes dans le système carcéral a diminué de manière significative (88 000 en 2009 contre un peu plus de 50 000 en 2014)

Dans le domaine pénitentiaire, des arrêts pilotes ont été rendus récemment concernant la Hongrie (arrêt Varga du 10 mars 2015\textsuperscript{189}) et la Roumanie (arrêt Rezmives du 25 avril 2017\textsuperscript{190}). C’était d’autant plus indispensable que ces deux pays ont connu, en 2016, une progression plus que considérable du nombre de leurs affaires. En effet, ce nombre a respectivement augmenté de 95 % pour la Hongrie et de 108 % pour la Roumanie en une année.

Dans les deux cas, ces affaires concernent essentiellement des questions relatives aux conditions de détention. Les autorités de ces deux pays ont d’ores et déjà annoncé que des plans d’action allaient être mis en œuvre pour remédier à cette situation structurelle.

Ces exemples démontrent, s’il en était besoin, le rôle efficace que la Cour peut jouer dans l’exécution de ses propres arrêts en apportant un remède à la situation concrète des personnes concernées. Parfois, et c’est un autre aspect de notre politique jurisprudentielle, la Cour ne rend pas un arrêt pilote, mais un arrêt qui comporte des indications pertinentes pour son exécution. La Cour apporte ainsi clairement son assistance au processus d’exécution. Par exemple, pour être concret, elle peut, dans une affaire de détention arbitraire, exiger la libération de la personne détenue ou bien inviter des États à créer des recours spécifiques lorsque de tels recours font défaut.

Un des aspects importants de l’exécution de nos arrêts, et qui dépasse le rôle assuré par le Comité des Ministres, concerne la réouverture des procédures internes à la suite d’un arrêt de la Cour. C’est sans doute l’aspect le plus abouti de la \textit{restitutio in integrum} puisque le requérant pourra obtenir un nouveau jugement de l’affaire comme si aucune violation n’était intervenue. Ces possibilités de réouverture existent dans un nombre croissant de pays et, désormais, aussi bien en matière civile qu’en matière pénale.

Je ne citerai pas tous les exemples permettant une telle réouverture, mais, puisque nous nous trouvons à Brno, je me limiterai à rappeler qu’en République tchèque, il n’y a pas d’appel possible à l’encontre des décisions de la Cour constitutionnelle, à l’exception du cas où une Cour internationale, telle que la Cour de Strasbourg, a constaté une violation d’une obligation internationale. Il est alors possible pour le requérant d’introduire une nouvelle requête devant la Cour constitutionnelle. Les arrêts de la Cour de Strasbourg constituent donc la

\begin{footnotesize}
\begin{enumerate}
\item[189] La Cour européenne des Droits de l’homme. Arrêt du 10 mars 2015, Varga et autres c. Hongrie, no. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, 64586/13.
\end{enumerate}
\end{footnotesize}
seule possibilité de procéder à un réexamen d’une affaire jugée à Brno par la Cour constitutionnelle de la République tchèque.

Avant de conclure, je voudrais profiter de la présence parmi nous d’un grand nombre de présidents de cours suprêmes pour évoquer le Protocole n° 16.

Ce Protocole, adopté en 2014, est destiné à mettre en place un dialogue nouveau entre les hautes juridictions nationales et notre Cour. Ce traité, déjà signé par 16 États et ratifié par 7, entrera en vigueur après dix ratifications, et il permettra aux hautes juridictions qui le souhaitent d’adresser à la Cour des demandes d’avis consultatifs sur des questions de principe relatives à l’interprétation ou à l’application des droits et libertés définis par la Convention.

Ces demandes interviendront dans le cadre d’affaires pendantes devant la juridiction nationale. L’avis consultatif rendu par notre Cour sera motivé mais non contraignant. Élément supplémentaire du dialogue judiciaire entre la Cour et les juridictions internes, il aura pour effet d’éclairer les Hautes Cours nationales sans pour autant les lier.

Je suis sincèrement convaincu que, lorsqu’elles feront le choix de statuer conformément à cet avis, leur autorité en sera renforcée pour le plus grand bénéfice de tous. Les affaires pourront ainsi être résolues au niveau national plutôt que d’être portées devant notre Cour, même si cette possibilité restera ouverte aux parties après la décision interne définitive. Ce protocole viendra institutionaliser un dialogue qui existe déjà depuis fort longtemps entre nous. Un dialogue qui a été renforcé par notre Réseau d’échange sur la jurisprudence, lequel connaît un grand succès puisque 54 cours en provenance de 32 États en font partie. Une fois le protocole n° 16 entré en vigueur, les questions les plus importantes qui nous sont soumises seront ainsi examinées dans un forum judiciaire élargi. Ce Protocole donnera, en quelque sorte, une base normative à notre dialogue, comblant ainsi une lacune du système. À terme, il favorisera également une bonne exécution des arrêts de la Cour.

Parvenir à une bonne exécution des arrêts de la Cour suppose de réunir la volonté de toutes les parties concernées. Cette fonction, historiquement dévolue au Comité des Ministres, lequel s’en acquitte parfaitement, est jouée également, quoique dans une moindre mesure, par la Cour, grâce aux nouveaux mécanismes qu’elle a mis en place, même si cela n’était pas prévu initialement par la Convention. Cependant, rien n’est possible sans la volonté politique claire des autorités nationales, y compris judiciaires, d’aboutir à un résultat. C’est pourquoi votre implication est primordiale et s’inscrit au cœur même du mécanisme d’exécution des arrêts de la Cour.
7. Response to Guido Raimondi’s Contribution

PAVEL RYCHETSKY

One does not get many opportunities to respond to the writing of figures as distinguished and widely recognised as President Raimondi. I have been given that honour and, what is more, before a very educated and highly esteemed audience.

It was very hard to find anything in the President’s contribution with which one could disagree at least in theory; however, I assume that President did not ask me to be a fellow contributor, simply for me to nod my head. So, I will offer, at least very briefly, several points that in my opinion resonate with the foregoing contribution.

I must note – following up on the President’s thoughts – that Europe has made unbelievable progress in the protection of human rights. Whereas a hundred years ago, individuals were only one of a mass, often subject to police and administrative arbitrariness, today, they are confident entities whose rights are defined in great detail, and protected, of which the individual is aware. More than that, they even take it for granted!

If we ask about from where that change stems, I personally see it on two different levels. The first is the post WWII accent that started to be placed on human dignity. On the same dignity that had been nearly forgotten during the craze of the Second World War. At the centre of attention were no longer nations and sovereignties, but individual people. Germany was the leader of the initiative to emphasise that accent, or, more precisely, Germany’s western part. And in 1951, it was Germany that gave us key inspiration – individual constitutional petitions – that is, constitutional protection for individuals. The new concept of judicial protection of human rights in Europe stands on the shoulders of Gustav Radbruch and his formula. For seventy years, we have understood, as Radbruch put it, that: “Law, including positive law, cannot be defined other than as an institution which purpose lies in serving justice.”

191 The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the author.
The second level is the activity of international judicial bodies that may, more or less effectively, force states to revise their approach and behaviour to their own citizens. As the President has written, it is unbelievable how little time was needed to enable a formerly defenceless individual to oppose his own state in an international forum. It is undisputable that today the most effective and most important international judicial body is the European Court of Human Rights.

It may seem from what I have previously said that there is some kind of competition or contest between the Strasbourg court and the Constitutional Court. That is, of course, absurd. We are not stallholders in a market to compete for customers. On the contrary, it is our shared interest that we have as few such “customers” as possible. Fewer petitions in Brno or in Strasbourg means more people happy with the justice they have been served. But the European Court of Human Rights can serve as a good example of how easy it is to become victim to one’s own success. Confidence in the effectiveness of the European system of protection was so high that the volume of petitions submitted to it started to paralyse the court. We, and I am now speaking for national constitutional courts, can only envy Strasbourg for how successfully it has been reforming its judicial system, thereby rapidly reducing the number of petitions that have not been handled. At the Czech Constitutional Court, we have noted some four thousand petitions for initiating proceedings for five years in a row, and it does not seem that this year is about to depart from that trend. Just like the European Court of Human Rights, we, too have become victims of our own success.

President Raimondi talked about enforcement of court decisions. I absolutely agree with him in that, on the international level, there are many systems independently co-existing alongside each other, and related thereto is the plurality of their human-rights catalogues. For the most part, however, the rights they protect overlap. The key difference lies in how the outcome of the decision-making process is subsequently handled. The International Covenant on Civil and Political Rights, or any other international human rights document, does not provide for strong and effective enforcement, and is therefore less attractive for its addressees. The mechanism of cooperation in the Council of Europe, where the European Court of Human Rights makes decisions and the Committee of Ministers ensures that the decisions are respected, has proven a successful solution, which — as the President stated here — may result in a change in national legal regulation and practice.

There is no executor appointed to enforce the decisions of the Czech Constitutional Court, which is why the Court must rely on Article 89 (2) of the Constitution, which stipulates that “enforceable decisions of the Constitutional Court are binding for all bodies and persons.” And although we do not have
any specific control mechanism on the national level to monitor how all bodies and persons respect binding decisions of the Constitutional Court, I must fully responsibly say that enforceable decisions of the Constitutional Court are being respected. This is not limited solely to the operative part of the decision, but also – and there is no question about that any more – the binding effect of the principal reasons of the decisions, which the Germans call “tragende Gründe”. The added value of our case law therefore does not lie in the (self-evident) binding effect *inter partes*, but in the society-wide respect for the case law as a source for interpreting constitutional as well as sub-constitutional law.

Decisions of the Constitutional Court often give rise to disputes, but these are substantive and legal arguments, not arguments about the binding effect of decisions. Why is that so? I think it is the synergy of three factors:

- A normative designation of the Constitutional Court as the supreme body of judicial power;
- The authority linked to its role as the “ultimate interpreter”; and, above all
- The persuasiveness and quality of its argumentation.

The European Court of Human Rights has made a mighty contribution to the last point. Especially in the era when the Czech constitutional justice system was in its infancy, it had to look for models, arguments, and reference criteria. A light that shone the way in our first years was the case law of the European Court of Human Rights. We never questioned the supreme interpretation function of the Strasbourg court in relation to the Convention, and, on the contrary, tried to transpose its interpretation of fundamental human rights to the Czech situation and carry its words to more ears.

I think that we have succeeded at that. Gradually, we have managed to introduce compensatory remedies for undue duration of court proceedings into the Czech legal order, tighten the definition of admissibility of constitutional petitions, as concerns extraordinary appeals or, as President Raimondi showed, using his homeland of Italy as an example, improve the situation in the hearing of cases pertaining to custody and to the conditions of serving in custody.

Thanks to the European Court of Human Rights, we in Europe are now seeing human rights and freedoms through different lenses. Thanks to which the family of European constitutional courts could gradually emancipate and start helping the Court in carrying its load.

Sometimes, it is an unbearable load, but there is nowhere to set it aside. This, too, is service to justice which we have undertaken!
8. “Preliminary Opinions” pursuant to Protocol No. 16 to the European Convention on Human Rights: Finally a Platform for an Effective Dialogue between the European Court of Human Rights and National Courts?

JIŘÍ KMEC

Protocol No. 16 to the Convention – opened for signature in October 2013 – provides for the possibility of the “highest courts and tribunals” of the States Parties to the Convention to obtain from the Court – under certain conditions – an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto (“the questions of conventionality”).

The Court has already been given the competence to issue advisory opinions in Protocol No. 2 to the Convention. However, this competence is of a very different nature, such opinions being requested by the Committee of Ministers of the Council of Europe and not being allowed to deal with questions relating to the interpretation or application of the rights and freedoms defined in the Convention. In nearly half a century since the protocol entered into force, it has not attracted more than three submitted requests and two delivered advisory opinions, both dealing with questions relating to the process of electing the judges of the Court.

The proposal to extend this narrow advisory competence of the Court was already discussed within the Council of Europe during the drafting of Protocol No. 2. According to the Explanatory Report to this Protocol, the Court itself presented two proposals in this regard, one of them being a proposal to be conferred “competence to give a prejudicial ruling, at the request of certain courts and tribunals, on any question of interpretation of the Convention which might arise before these courts or tribunals.”

In “modern” history, the idea was for the first time mentioned in the Report of the Group of Wise Persons, set up in 2005 to consider the issue of the long-term effectiveness of the control mechanism enshrined in the Convention.

193 Explanatory report to Protocol No. 2 to the Convention, p. 6. The second was the proposal to...
The Group of Wise Persons concluded that it would be useful to introduce such a system in order to foster dialogue between the European and national courts. The idea was maintained by High Level Conferences on the future of the Court held in Izmir (2011) and Brighton (2012) and ended with the opening of Protocol No. 16 in 2013.

The idea behind giving the Court this new advisory competence was two-fold: to further enhance the interaction between the Court and national courts and, in doing so, to reinforce the implementation of the Convention at the national level with the vision of helping to reduce the backlog of applications in stock in Strasbourg.

The objective of this presentation is to try to find out whether the mechanism of preliminary advisory opinions brought into the Convention system by its Protocol No. 16 could meet these expectations and become a platform for an effective dialogue between the European Court of Human Rights and national courts, beneficial for both of them.

* * *

Certainly, we cannot say that there have been no forums for the dialogue between the Court and its national counterparts or that they have not been speaking to each other either directly or through their decisions. On the contrary, every year, groups of national judges come to Strasbourg for study visits to meet and debate with the judges and members of its Registry, to assist to the Court’s hearings etc.; presidents of the Court have been used to paying visits to the highest national courts in different European countries or welcoming their representatives in the Human Rights Building; national judges from different countries have even come to Strasbourg for secondments, and they thus participate directly in the Court’s work; last but not least, in 2015, the Superior Courts Network was created by the Court to ensure the effective exchange of information, with the national superior courts, on Convention case law and related information, the first gathering of their (so called) focal points having taken place on 16 June 2017 in Strasbourg.

However, the advisory opinion mechanism envisaged by Protocol No. 16 is supposed to take the dialogue between European and national judges onto a different level. Through its advisory opinions – if requested from it by a national court – the European Court will become directly involved in determining

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195 Final Declaration, part D.
196 Brighton Declaration, § 12d).
a particular case before it would have been finally determined at the national level.

This is the reason why the title of this article speaks of preliminary opinions, making an allusion to the preliminary rulings procedure set out in Article 267 of the Treaty on the Functioning of the European Union.\textsuperscript{197} Still, the main difference between the two mechanisms of preliminary questions is that the Strasbourg system is designed to be strictly optional. It is optional in three key aspects:

\begin{itemize}
  \item Unlike other previous Protocols amending the control mechanism of the Convention, Protocol No. 16 need not be ratified by all current States Parties to the Convention;
  \item National highest courts will be in no way obliged to request advisory opinions from the Court;
  \item Advisory opinions will not be binding on national courts.
\end{itemize}

Even if not obliged to do so, we can imagine that the national courts could be motivated to take the opportunity and to address the European Court directly in at least three situations:

\begin{itemize}
  \item First, in order to ask the Court for a clarification of its case law;
  \item Second, in order to verify whether the national standard of human rights protection in a particular aspect is in conformity with the Convention;
  \item Third, in order to persuade the Court to change its case law.
\end{itemize}

Requests for advisory opinions give the national courts access to a live chat with the Court instead of being limited to an occasional exchange of ideas through their judgments.

Yet, the States Parties seem very reluctant to ratify Protocol No. 16, adopting largely a wait-and-see approach. For the time being, the Protocol has been signed by 18 and ratified only by seven States: Albania, Armenia, Finland, Georgia, Lithuania, San Marino and Slovenia. On the other side, Protocol No. 15 to the Convention, making several changes to the Convention in order to maintain the effectiveness of its control mechanism, which was opened for signature only some three months earlier, has been to date ratified in 33 countries. Nevertheless, ratification processes of Protocol No. 16 are said to be underway in at least five other countries (Estonia, France, Greece, the Netherlands and Norway). It is therefore possible that the threshold of ten ratifications necessary for Protocol No. 16 to enter into force will be reached very soon.

\textsuperscript{197} The question of whether a similar machinery should be introduced into the Strasbourg system was discussed at the Parliamentary Conference on Human Rights held in Vienna in October 1971 (see Report on theme No. 3: \textit{How can be existing protection of human rights be strengthened?}, part. I, § 2.B.) and on other occasions (see ROBERTSON, A. H. \textit{Human rights in Europe}. Second edition. Manchester: Manchester University Press, 1977, p. 226–233.)
At least one of the reasons behind this obvious hesitation of the vast majority of States to ratify the Protocol may be linked to their task to choose when ratifying Protocol No. 16, in accordance with its Articles 1 and 10, among their highest national courts and tribunals those which would be allowed to request advisory opinions from the Court. The Protocol is rather vague on this point, speaking only about “highest courts and tribunals”. The Explanatory Report specifies that the authors of the Protocol aimed at giving this privilege of addressing the Court not only to courts on the very top of the national judicial systems, but also to courts which, although inferior to the constitutional or supreme courts, are nevertheless of special relevance on account of being the highest for a particular category of cases.

Leaving aside San Marino which was not obliged to contemplate this question for very long as its judicial system is composed of only one (Single) court, from the remaining six States Parties to Protocol No. 16, five have chosen both their Constitutional and Supreme Courts (Albania, Armenia, Georgia, Lithuania, Slovenia). Finland indicated along with its Supreme and Supreme Administrative Courts also two of its special courts: the Labour Court and the Insurance Court. Exceptional is the declaration of Romania which was handed over already at the time of the signature of the Protocol and which contains, along with the Supreme and Constitutional Courts, also all 15 courts of appeal.

The fact that not necessarily only the courts of last instances could be allowed to request advisory opinions may create difficult constitutional challenges. The courts which are in general those who have the last word on national level before an application could be sent to Strasbourg (especially constitutional courts having jurisdiction over constitutional complaints against final decisions of the courts) may feel disturbed by the fact that the European Court would be called to advise an inferior court on questions of conventionality without this superior court itself having been given the possibility of answering these questions in the first place. Also, these highest, but still in a sense inferior, national courts may be tempted to circumvent their superior courts whenever they feel that the European Court’s advice could be more favourable to their own point of view.

Having this in mind, it might have been more appropriate to limit the privilege to request advisory opinions only to national courts against the decisions of which there is no other effective remedy on the national level, without requiring the States to undergo the exercise of choosing ex ante from national courts the interlocutors for the European Court.

This being said, one may wonder whether the mechanism of preliminary advisory opinions really is in conformity with the principle of subsidiarity on which the control system of the Convention is built. In this respect, we cannot however lose sight of the fact that this new mechanism is optional in its three
aspects, as already mentioned earlier, the national authorities remaining those who can decide to waive the principle of subsidiarity if they wish to.

On the other hand, although advisory opinions delivered by the Grand Chamber of the Court will not be binding, it is to be expected that, once requested, they will be largely followed by national courts. Because of their direct involvement in the proceedings, advisory opinions could be supposed to be accepted by national courts with less pain than it is the case when it comes to respect the Court’s judgments.

Moreover, although not binding on the national court that requested it, as expressly stipulated in Article 5 of Protocol No. 16, the advisory opinions will undoubtedly become part of the Court’s case law, and as such, they will acquire an undeniable interpretative authority. In other words, even if formally not binding inter partes, advisory opinions cannot lack their erga omnes effect of res interpretata.

Consequently, Article 5 of Protocol No. 16 says nothing more than that the disobedience will not be “punished” immediately, but it does not provide the State with any immunity against a future judgment of the Court finding a violation of the Convention in the same case, if subsequently brought to Strasbourg by the unsuccessful party to the national proceedings.

Conversely, should the Court’s advice on the question of conventionality offered by the national court be in the sense that the Convention does not prohibit particular interference into the right or freedom in question or does not impose a particular positive obligation on States Parties, such an advisory opinion could not be binding on national courts also because of the fact that this would run against Article 53 of the Convention which does not allow the Convention to be invoked in order to limit the higher standard of human rights protection attained on the national level.

Nevertheless, even if the national court abides by the advisory opinion, this does not mean that a subsequent individual application, if lodged, would be automatically bound to fail. A violation could still be found in cases where the advisory opinion is applied correctly as to the principles, but not correctly with respect to the particular circumstances of the case.

* * *

Let me now focus on the content of future advisory opinions. Article 1 § 2 of Protocol No. 16 specifies that an advisory opinion may be sought only in the context of a case pending before it. It can be deduced from that that national judges are not free to address the Court at will whenever a question of principle comes to their mind. Moreover, according to the Explanatory Report, the procedure is not intended to allow for abstract review of legislation which is not applicable in that pending case. However, it is not clear whether that means that
national (usually constitutional) courts would or would not be precluded from requesting advisory opinions in the context of the proceedings on an abstract review of the constitutionality of national legislation.

In this context, it is also of interest how the requests for an advisory opinion should be formulated. Will the national courts be allowed to seek only a sort of “guidance” on specific questions of conventionality so as to be given in response an exposé of applicable principles formulated in the Court’s case law? Or will they be allowed to ask the Court for a rather precise response on how to decide the case in hand? Certainly, Protocol No. 16 does not aim at transferring cases to Strasbourg and leaving it up to the Court to decide a civil or criminal case instead of national civil or criminal courts. Nonetheless, in case of requests for advisory opinions in the context of the proceedings on constitutional complaints submitted by individuals against the decisions of national courts in civil or criminal matters, the answer is not so obvious. In this type of proceedings, the task of the constitutional courts is very similar to that of the Court in Strasbourg, that is, to determine whether there has been a violation of a human right or a fundamental freedom. In a nutshell, would national constitutional courts be allowed to ask the Court: “Has there been – in your opinion, my learned and noble friend in Strasbourg – a violation of (let’s say) the freedom of expression in the case I have been approached with?”

In any case, the definition of questions on which advisory opinions may be given – “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto” – is clearly inspired by the condition under which a panel of five judges of the Grand Chamber of the Court should accept a referral of the case, following a judgment of the Chamber of seven judges, to the Grand Chamber (“if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance” – Article 43 § 2 of the Convention). As it will be again for the panel of the Grand Chamber (composed of the president of the Court and of two presidents of sections and two other judges designated by rotation) to decide whether to accept a request for an advisory opinion, we can assume that it may tend to apply the same criteria. In doing so, however, differences between both mechanisms, especially their different purposes, should be duly taken into account by the panel.

In this connection, we cannot but welcome the fact that the decisions of the panel refusing requests for advisory opinions will have to be reasoned (Article 2 § 1 of Protocol No. 16), which is not the case in the context of the request for referral to the Grand Chamber. This more courteous approach is fully appropriate and in line with the idea of dialogue between courts. This may also be an opportunity for the Strasbourg Court to borrow from its sister Court in
Luxembourg the notions of *acte clair* and *acte éclairé* as justifications for refusals to accept a request for an advisory opinion.

In that vein, questions regarding the language regime of the proceedings could be discussed as well. There is little doubt that the language of the proceedings will remain either French or English (the two official and working languages of the Court). Nonetheless, there may be many good reasons to let the national courts address the Court in the language of their own proceedings (at least in their initial requests for an advisory opinion) and perhaps even more reasons for the Court to consider whether it would not be conceivable to deliver its advisory opinions both in English or French and in the language of the respective national court.

In any case, the linguistic issues will be mainly up to the Court itself to provide for in its Rules (which I suppose are being drafted or even have already been drafted by the Standing Committee on the Rules of the Court), along with many other important questions, regarding for example the extent of involvement of the parties to the proceedings pending before the requesting national court, the relationship between requests for advisory opinions and individual applications already pending in Strasbourg, etc. In this regard, maybe the practice of the Court of Justice of the European Union in preliminary rulings procedure or that of other human rights courts having an advisory competence (such as the Inter-American Court of Human Rights or even African Court on Human and Peoples’ Rights) could be a source of inspiration for the European Court.

In this context, it could be useful (and this would be of no offence to national jurisdictions) to have a standard form for requests for advisory opinions, as is the case for individual applications. This could possibly help both sides: the national courts to meet the Court’s expectations regarding the content and structure of the request by other means than that of trial and error and the Court to speed up the treatment of the requests lodged with it.

Speaking of the treatment of the requests for advisory opinions, it is not – on the other hand – possible to turn a blind eye to one potential risk accompanying the endeavour of Protocol No. 16. While its objective is to ensure that more cases are dealt with satisfactorily at the national level, this objective would be achieved rather in the medium or even long run. In the short term, however, the new mechanism will generate an additional agenda for the – already overburdened – Court.

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As you may remember, since Protocol No. 11 entered into force in 1998, which provided for the reconstruction of the control system of the Convention by abolishing the former European Commission of Human Rights and instituting the new European Court of Human Rights as a permanent body, the burden of applications coming to Strasbourg, rising constantly nearly every year, became unbearable, reaching its peak in 2011 when the Court’s backlog exceeded 150,000 applications awaiting a decision. Thanks to reforms brought about by Protocol No. 14 and to internal measures taken by the Court (including its uncompromising manner of control of observance of all requirements for validly lodging an application since 2014, strictness bitterly experienced by many lawyers used to the Court’s and its Registry’s former applicant-friendly approach), the backlog dropped astoundingly to some 60,000 in 2015. Nevertheless, since then, the tendency has turned, and we are once again not far from the psychological threshold of 100,000 applications pending before any of the judicial formations of the Court.200

Moreover, the advisory opinions will be delivered by the Grand Chamber of 17 judges, and in last five years, when sitting as a Grand Chamber, the Court was not able to deliver more than 12 to 27 judgments a year. Should the advisory opinion mechanism become too popular too early amongst the highest national courts, this could have a disastrous effect on the Court’s capacities, not to mention the question of the length of proceedings both in Strasbourg and, by a ricochet effect, before the requesting national court.

Thus, it would be appropriate to give preference to requests for advisory opinions in cases of potential structural or systemic problems which may give rise to an important number of applications. When compared to the pilot-judgment procedure, the added value of the advisory opinions would be that the problem could be dealt with at the national level without invading the Court with thousands of similar applications which – even if “repatriated” back to the national level at the end of the day – still represent a certain burden for the Court’s capacities.

* * *

Let me conclude by saying that we cannot but hope that the advisory opinion mechanism will manage to fully deploy its undeniable potential and to prove its effectiveness before the case load of the Court once again threatens the very existence of the Court.

200 Precisely 93,200 pending applications as at 31 May 2017.

JÖRG POLAKIEWICZ

9.1. Introduction

The topic of this book, following a conference organised by the Supreme Court of the Czech Republic in June 2017, gave me the opportunity to revisit my doctoral thesis ‘The Obligations of States Arising from the Judgments of the European Court of Human Rights’, published in German 25 years ago. I would like to dedicate my paper to the supervisor of my thesis, Prof. Jochen Abraham Frowein.

When preparing my intervention and speaking in Brno, the seat of the Czech Supreme, Supreme Administrative and Constitutional Courts, it was rather natural to approach the topic of binding effects of ECHR decisions from the angle of domestic law. In other words, I would therefore like to revisit this motivation and examine what the obligations of national courts are when faced with ECHR judgments finding Convention violations.

When I wrote my thesis in Heidelberg, we lived in a different century, in a different Europe. From 1986 to 1990, the ECtHR had delivered an average of 26 judgments per year. Until 1 January 1990, altogether 235 judgments had been rendered. The ECtHR was fundamentally a court for Western Europe, though, as I wrote in the introduction to my thesis, it was clear that the
Convention’s scope of application would rapidly extend to the countries of Eastern and Central Europe.

Today, the Convention’s scope of application comprises the whole of Europe and the ECtHR delivers an average of more than 1,000 judgments per year. The issue of the binding force of ECHR judgments and their execution is more relevant than ever.

My thesis started from the premise that the Convention is based on the traditional dualist understanding of the effects of judgments of international tribunals. Such judgments were supposed to have a priori no direct effects on domestic law and national authorities unless the domestic law itself prescribes so, or at least permits national authorities to apply or to execute them. Indeed, unlike the EU Treaties\(^{204}\) or the American Convention on Human Rights\(^{205}\) the ECHR does not contain a provision which would confer an immediate legal effect upon the judgments of the Court in domestic law. As the Strasbourg Court itself has repeatedly held, it has no competence to annul, repeal or modify statutory provisions or individual decisions taken by administrative, judicial or other national authorities.\(^{206}\)

On the other hand, the Convention leaves no doubt about the binding force of ECHR judgments. Under article 46 (1) ECHR, the respondent state is under an obligation to comply with all the consequences of a judgment which, in the case of a judgment finding at least one violation, amounts to the finding of an internationally wrongful act. As I have examined in more detail in my thesis\(^{207}\) the Convention’s travaux préparatoires bear witness to the drafters’ intention that general principles of state responsibility should be applied in order to determine the obligations of a state which has been found in violation of the Convention.\(^{208}\)

My thesis argued that the respondent state is under an obligation (1) to discontinue the wrongful act, (2) to provide full reparation for all its consequences as far as this is possible under its domestic law and (3) to provide satisfaction including appropriate guarantees against repetition of the wrongful

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\(^{204}\) See articles 280 and 299 TFEU.

\(^{205}\) Article 68 (2): “That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.”


\(^{207}\) Verpflichtungen (Supra n 202), 10–17.

Part II: Binding Effect of Judicial Decisions in a Multilevel System

act. All these are, in the terminology of the International Law Commission “obligations of result”.

All this may sound quite theoretical. In my intervention I would like to demonstrate that these concepts acquire a very practical meaning when applied to concrete cases. The most fascinating part of my thesis was indeed the attempt to make the rather abstract concepts of international state responsibility operational for the daily practice of ordinary judges. The writing of a doctoral thesis stands – to paraphrase Karl Marx – in the same relation to the application of the law in concrete cases, as masturbation to sexual love.

9.2. Binding effect of ECtHR judgments and their enforceability in domestic law

The binding force of ECtHR judgments (‘res judicata’) has to be distinguished from their precedent value for similar cases, something which German-speaking scholars call ‘Orientierungswirkung’.

9.2.1. Binding force of ECtHR judgments and ‘res judicata’

Binding effect and ‘res judicata’ of ECtHR judgments follow from articles 44 and 46 (1) ECHR. As in national law, ‘res judicata’ effects are limited to the parties of the judgment, i.e. in individual applications which constitute the vast majority of cases, the applicant and the respondent state.

As to the binding force’s material scope, it is necessary to make a distinction. In addition to decisions on purely procedural grounds, the ECtHR delivers two types of judgments (see article 41 ECHR):

– Firstly, there are declaratory judgments as to whether a certain state action (or omission) constitutes a Convention violation.

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211 It was the first German judge at the ECtHR, Hermann Mosler, who coined the term ‘Orientierungswirkung’ at the 5th International Colloquy on the ECHR which was held in Frankfurt a. M. in 1980, see MAIER, Irene and SCHMUDE, Jürgen. Europäischer Menschenrechtsschutz – Schranken und Wirkungen, Muller, C.F. 1982, p. 366; GRABENWARTER, Christoph. Europäische Menschenrechtskonvention 4th edition, C. H. Beck, 2009), § 16 marginal note 9; see also RESS, Georg. Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit, ZaöRV, 2004, p. 621, 630 who speaks of an “quasi erga-omnes effect”.

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Secondly, under article 41 ECHR, the Court may award “just satisfaction” to the applicant. The latter usually takes the form of pecuniary compensation for material and moral damages as well as for costs and expenses incurred before the Convention institutions.

9.2.1.1. Obligations regarding the payment of just satisfaction

Contrary to the declaratory part of ECtHR judgments, the payment order is usually precise and unconditional. Though there may be delays in the actual payment, it usually does not raise particular problems.

There is a famous saying which holds that ‘hard cases make bad law’. Nevertheless, I cannot refrain from mentioning in this context the rather extraordinary case of Yukos. In a judgment of 20 September 2011, the ECtHR had found violations of article 6 (1) and (3) (b) ECHR in respect of the company’s tax-assessment proceedings as well as violations of article 1 of Protocol No. 1 in that (a) the assessment of the penalties relating to 2000 and the doubling of the penalties for 2001 had been unlawful and (b) the Russian authorities had failed to strike a fair balance in the enforcement proceedings between the legitimate aims sought and the measures employed. The ECtHR awarded a total of € 1,866,104,634. It should be noted that this is the highest amount ever awarded by the ECtHR, 21 times higher than in the case of Cyprus v Turkey (€ 90 Mio) and 68 times higher than in the case of Stan Greek Refineries (US$ 30,863,828.50).

In its judgment of 19 January 2017, the Russian Constitutional Court accepted arguments by the Ministry of Justice to the effect that the award of pecuniary damages for the recovery from Yukos of fines for 2000-2001 tax offences as well as the award of pecuniary damages for the disproportionate imposition of an enforcement surcharge of 7% had been based on an interpretation of the Convention which was contrary to the constitution. It concluded

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212 See Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 10th Annual Report of the Committee of Ministers* 2016, Council of Europe, 2017, p. 10: “There is also a decrease in the payment of just satisfaction within the deadlines (the percentage has gone from 71% in 2015 to 65% in 2016).”


215 European Court of Human Rights, Grant Chamber Judgment of 12 May 2014, *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001IV.

216 See Committee of Ministers, Final Resolution DH (97), 184 (20 March 1997).

that, under the constitution, it is impossible to execute the Yukos just satisfaction judgment.

In abstracto, the Russian Court acknowledged that nonexecution should be reserved for exceptional cases of a “collision” between the Russian constitution and the Convention which can arise “as result of an interpretation [made by the ECtHR] in violation of the general rule of treaty interpretation”, such as a wholly novel and unsustainable interpretation of the Convention, which departed from the ‘jus cogens’ principles of treaty interpretation, or was inconsistent with the Convention’s object and purpose. In concreto, however, the Court effectively reconsidered issues decided by the ECtHR in the Yukos merits judgment. Indeed, whatever one may think about the reasoning developed in this judgment or the pertinence of the findings, it is difficult to argue that they are not covered by the authority of ‘res judicata’. Under international law, this authority attaches not only to the dispositif but covers also elements of the reasoning, at least in so far as they have been determined “expressly or by necessary implication” in the judgment in question.

The Russian Constitutional Court concluded its judgment of 19 January 2017 on a conciliatory note. “Proceeding on the basis of the fundamental importance of the European system of protection of human rights and freedoms, part of which is constituted by European Court of Human Rights judgments”, it suggested as “a compromise for the sake of maintaining this system” that the Russian authorities might consider paying worthy former shareholders in Yukos unspecified compensations, provided that any such payment did not come from the Russian budget, or property or assets of the Russian Federation.

The Constitutional Court gave a particularly wide interpretation to the provisions of Law No 1-KFZ which restrict the constitutional control to the foundations of the Russian constitutional system or the content of constitutional rights. By accepting that constitutional rights of other individuals may be restricted by general acts of the state such as the payment of compensation out of the state budget, the Constitutional Court assimilates public interests

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221 In this context, the Court referred to its previous Judgment no. 21-P of 14 July 2015 on the relationship between the Russian constitution and the ECHR.

222 Article 104-3.
with the constitutional rights of the community, thus creating for itself an almost unlimited opportunity to examine whether ECtHR judgments are executable.\textsuperscript{223}

When reading the Yukos judgment of the Russian Constitutional Court, I was reminded of paragraph 13 of the English summary of my thesis: “The judgments in which the Court awards just satisfaction under Art.50 [now 41] ECHR constitute an unconditional obligation to pay the specified amount of money to the applicant.”\textsuperscript{224} I would argue that this summary still represents the general law, a point of view confirmed by the Committee of Ministers’ decisions adopted on 10 March 2017 in the context of the supervision of execution of the Yukos judgment\textsuperscript{225} and the opinion of the Venice Commission on the amendments to the Federal Constitutional Law on the Constitutional Court.\textsuperscript{226}

9.2.1.2. Obligations arising from the declaratory parts of ECtHR judgments

As to the obligations arising from the declaratory parts of ECtHR judgments, the ECtHR identified them for the first time explicitly in the case of Papamichalopolous v. Greece (1995):

“… a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”\textsuperscript{227}

\begin{itemize}
\item \textsuperscript{223} HARTWIG, Supra n 219, p. 22.
\item \textsuperscript{224} Verpflichtungen (Supra n 202), 366.
\item \textsuperscript{225} European Court of Human Rights, CM/Del/Dec(2017)1280/H46-26, Oao Neftyanaya Kompaniya Yukos v. Russian Federation (Application No. 14902/04).
\item \textsuperscript{226} Venice Commission, Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court adopted by the Venice Commission at its 107th Plenary Session, CDL-AD(2016)016-e para. 28.
\end{itemize}
The Court has repeated and developed these principles in numerous judgments, thereby largely confirming the ideas developed in my thesis. As indicated above, the resulting obligations are, at least in principle, “obligations of result”. States parties enjoy a certain freedom of choice or ‘margin of appreciation’ as to the means of fulfilling their obligations under article 46 (1) ECHR.

The binding force of declaratory judgments covers in most cases only the Convention violation found in a concrete case, i.e. the application of a law to the applicant and not the law as such. Only in inter-state applications may statutory provisions be challenged in abstracto (article 33 ECHR). In individual applications (article 34 ECHR), the ECtHR is seized of a concrete case. Though it is not prevented from reviewing the statutory provisions applied in the case in question, the judgment’s binding force will only extend to those provisions if the ECtHR examines their conformity in abstracto and declares them unequivocally to be in conflict with the Convention. This can occur where an in concreto application necessarily involves reaching a conclusion about a particular legislative provision, such as the blanket ban on prisoner voting found in section 3 of the UK’s Representation of the People Act 1983, which the ECtHR considered to be “a blunt instrument”, “indiscriminate” and “falling outside any acceptable margin of appreciation, however wide that margin might be.”

The obligations of cessation and reparation which follow from the finding of a violation are binding on all authorities of the respondent state. Within the

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230 European Court of Human Rights, Grant Chamber Judgment of 6 October 2005, Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, § 82, ECHR 2005IX.
ambit of their respective competences, national courts and administrative au-
thorities are required to provide redress for victims of on-going violations and,
as far as possible, reparation for past violations. A good example is the recent
Tagayeva judgment, where the ECtHR held that “the above found violations
should be addressed by variety of both individual and general measures con-
sisting of appropriate responses by the State institutions, aimed at drawing les-
tions from the past, raising awareness of the applicable legal and operational
standards and deterrent new violations of a similar nature.”

Already in 1985, a panel of the German Federal Constitutional Court had
held that, according to former articles 52 and 53 – now articles 44 and 46 (1)
ECHR, all German courts were under an obligation to respect the ‘res judicata’
of ECtHR judgments within their respective personal, material and temporal
limits. A full chamber of the Court reiterated these principles forcefully in its
Görgülü decision of 14 October 2004:

“If it is declared that there has been a violation of the Convention, the first con-
sequence is that the State party may no longer hold the view that its acts were in
compliance with the Convention ... In principle, the decision also obliges the State
party affected with regard to the matter in dispute to restore, if possible, the state of
affairs without the declared violation of the Convention (see Polakiewicz, loc. cit, pp. 97 ff.; on the possibility of attaining the goal of restitutio in integrum, see the
Recommendation of the Committee of Ministers of the Council of Europe No. R
(2000) 2 of 19 January 2000). If the violation that has been found is still continuing,
for example in the case of continued arrest in violation of Article 5 of the Conven-
tion or an encroachment upon private and family life in violation of Article 8 of the
Convention, the State party is under an obligation to end this state.”

The decision’s clarity regarding the obligations of domestic courts to re-
spect and implement the ‘res judicata’ of ECtHR judgments stands in contrast
to some passages which, albeit obiter dicta, formulate certain limits. These re-
ter to so-called “multipolar fundamental rights situations” and “national partial
systems of law shaped by a complex system of case law”. The Court mentioned
as examples German family law, the law concerning aliens, and also the law on
the protection of personality. It must be stressed that both ‘exceptions’ have so
far never prevented any German court from complying with a particular EC-
tHR judgment. The practical importance of these passages should therefore not

231 European Court of Human Rights, Judgment of 9 June 2015, Tagayeva and Others v. Russia, no. 26562/07, § 640.
233 Bundesverfassungsgericht, decision of 14.10.2004 (Görgülü), para. 38 et seq.; BVerfGE 111, 307, 319 et seq.
be exaggerated. The special case of ‘multipolar fundamental rights situations’ is a common feature also before supreme and constitutional courts which, like the ECtHR, usually are confronted in a particular case with only one applicant but still have to weigh the various subjective legal positions at stake.

However, I entirely subscribe to the idea forcefully expressed in this context by the German Federal Constitutional Court that ECtHR judgments should never be “schematically” applied by national judges. The Görgülü judgment is a perfect illustration of this point. The ECtHR finding that article 46 ECHR obligations would “[i]n the case at hand …mean[s] making it possible for the applicant to at least have access to his child”\textsuperscript{234} was in this generality misleading. As in all cases involving children, the best interests of the child, as well the complex emotional relations of the child and its foster or adoptive parents, call for a comprehensive evaluation of the situation not only from the perspective of the natural father and not only from a legal, but also from a psychological point of view. Such evaluations can only be done by the competent national authorities and their results will necessarily evolve over time.

Supreme and constitutional courts in the Netherlands,\textsuperscript{235} Spain\textsuperscript{236} and Switzerland\textsuperscript{237} have given similar decisions upholding and implementing the ‘res judicata’ of ECtHR judgments.

Immediate redress following an ECtHR judgment is required in the rare cases of violations which continue even after the delivery of the ECtHR judgment. In such cases article 41 ECHR which effectively shields the domestic legal order from direct effects resulting from ECtHR rulings cannot be invoked.\textsuperscript{238} States party to the Convention are under an obligation to stop violations which have been established with binding force, even where the national legislature or judiciary are responsible for the violations. Domestic rules as to the division of powers between constitutional authorities cannot be invoked in order to escape the international responsibility following from ECtHR judgments.\textsuperscript{239}

\textsuperscript{234} European Court of Human Rights, Judgment of 26 February 2004, Görgülü v. Germany, no. 74969/01, § 64.

\textsuperscript{235} Judgment of the Supreme Court (Hoge Raad) of 1 February 1991, NJCM. Bulletin 1991, 325; see Verpflichtungen (Supra n 202), at 236–237.

\textsuperscript{236} See the practice of Spanish courts following the Barberà judgment and especially the decision (Auto 312/90) of the Spanish Constitutional Court of 18. 7. 1990, summarised in Verpflichtungen (Supra n 202), at 88 et seq.


\textsuperscript{238} Verpflichtungen (Supra n 202), at 91–97; KLEIN, Eckart. “Should the binding effect of the judgments of the European Court of Human Rights be extended?” in MAHONEY, Paul and MATSCHER, Franz and PETZOLD, Herbert and WILDHABER, Luzius. (eds.) Protecting Human Rights: The European Perspective (Köln, Heymanns, 2000), 705 (708).

\textsuperscript{239} See, for a similar reasoning as far as Community law is concerned, Court of Justice of the European Communities, judgment of 5.3.1996, C46/93, C48/93, C46/93, C48/93 – Brasserie du
Even if only the legislator has the power to enact the required new legislation, national courts will act unlawfully if they continue to apply legislation which the ECtHR has held to be contrary to the ECHR, for example by sanctioning strike action by civil servants, by depriving prisoners of the right to vote or by continuing to discriminate children born out of wedlock.\(^{240}\)

There are of course, emblematic cases of non-implementation of judgments. I have already mentioned one of them, the series of judgments rendered by the ECtHR in relation to the ban on prisoner voting in the United Kingdom, which has been held to be in violation of article 3 of Protocol 1 to the ECHR.\(^{241}\) To date, no action has been taken to amend the relevant legislation. When they most recently considered the execution of these judgments, in December 2016, the Committee of Ministers underlined that the UK authorities should submit concrete proposals to comply with these judgments at the latest by 1 September 2017, together with an indicative timetable for their implementation.

The Ilgar Mammadov judgment\(^{242}\) is another paradigmatic case. The applicant had reported on his personal internet blog on riots in Ismayilli, a town in Azerbaijan, denouncing the authorities’ version of the riot. The Prosecutor General’s Office started criminal proceedings against him accusing him of illegal actions which were calculated to inflame the political situation in the country. In its judgment of 22 May 2014, the ECtHR found that there had indeed been violations of articles 5 (1) (c), 5 (4), 6 (2) ECHR. The Court also found that the actual purpose of the impugned measures was to punish the applicant for having criticised the government and therefore the detention was applied for purposes

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\(^{240}\) See FROWEIN, Jochen Abraham. Übernationale Menschenrechtsgewährleistungen, (supra n 203) marginal note 20: “A binding effect of the decisions of the Court may also arise for parallel cases. Where, for example, it results clearly from a judgment that a national law is incompatible with the Convention, the obligation under article 53 [now Article 46 (1)] ECHR presupposes that the existence of a conflict with the Convention is to be respected in future parallel cases. This is only the case if a decision [of the domestic court] does not give rise to a new Convention violation. Since article 53 ECHR also creates a legal obligation under German law, German courts are obliged to avoid Convention violations in parallel proceedings” [translation by the author]. See also WALTER, Christian. Der Internationale Menschenrechtsschutz zwischen Konstitutionalisierung und Fragmentierung, ZaöRV, No. 75, 2015, p. 754 (758–761).

\(^{241}\) European Court of Human Rights, Hirst v the United Kingdom (No. 2), cited above; European Court of Human Rights, Judgment of 23 November 2010, Greens and M.T. v. the United Kingdom, nos. 60041/08 and 60054/08, ECHR 2010; European Court of Human Rights, Judgment of 12 August 2014, Firth and Others v. the United Kingdom, nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09; European Court of Human Rights, Judgment of 10 February 2015, McHugh and others v the United Kingdom, no. 51987/08 and 1,014 others.

other than bringing him before a competent legal authority. It is one of the very few cases in which the ECtHR has found a violation of article 18 ECHR.\(^{243}\) The applicant was ultimately sentenced to seven years’ imprisonment.

The fact that Azerbaijan has so far failed to execute the judgment risks undermining the credibility of the whole ECHR system. The Committee of Ministers has so far adopted three interim resolutions\(^ {244}\) recalling that the obligation to abide by the judgments of the ECtHR is unconditional and insisting that the authorities “take all necessary measures to ensure without further delay Ilgar Mammadov’s release.”\(^ {245}\) In December 2016, it adopted a decision repeating that “the continuing arbitrary detention of Ilgar Mammadov constitutes a flagrant breach of the obligations under Article 46, paragraph 1, of the Convention”\(^ {246}\) and referred to the possibility of starting proceedings under article 46 (4) ECHR.

While member states implemented in 2016 a record high number of cases, there remain some ‘pockets of resistance’.\(^ {247}\) According to the 2016 annual report of the Committee of Ministers on the supervision of the execution of judgments and decisions of the Court, the number of leading cases pending before the Committee for more than five years has increased continuously.\(^ {248}\) The Committee of Ministers attributes implementation difficulties to “important and complex structural problems causing difficulties to identify necessary reforms”, the “absence of a common understanding as to the scope of the execution measures required”, “slow or blocked execution as a result of disagreement between national institutions, or among political parties, as regards the substance of the reform that is required and/or the procedure to be followed” and sometimes even a “refusal to adopt the individual measures required or to pay just satisfaction.”\(^ {249}\)

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\(^{245}\) Committee of Ministers. Interim Resolution of 8 June 2016, supra n 244.


\(^{248}\) Ibid, at 66.

\(^{249}\) Ibid, at 13.
As regards reparation, the Convention recognises that it will often be impossible for the respondent State to wipe out all the consequences of a judicial decision which has acquired the force of ‘res judicata’. In January 2000, the Committee of Ministers invited the parties to the Convention to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including re-opening of proceedings, in instances where the ECHR has found a violation of the Convention.250 Today, the vast majority of state parties have adopted special legislation which expressly allows for the possibility to re-open criminal proceedings in the wake of an adverse finding in Strasbourg. In addition to the proceedings which may be initiated by the applicant, in some countries the General Prosecutor’s Office may also start proceedings to annul convictions which are based on a violation or incorrect application of the law.

### 9.2.2. “Orientierungswirkung” (precedent value)

The ECHR has emphasised consistently that its “judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting States.”251 In other judgments, the Court stated that its previous case law had clarified the nature and extent of the parties’ obligations under the Convention.252

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250 Committee of Ministers, Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers on 19 January 2000, at the 694th meeting of Ministers’ Deputies.


It has been argued that the interpretation of a given article, developed by the ECtHR in a series of individual cases, transcends the particular facts of these cases and becomes an integral part of that provision, thus acquiring the same binding force as the provision in question. The Court itself seems to imply that any conditions developed in the case law stem from the Convention itself and should not be considered as judge-made law. The Czech Constitutional Court acknowledged that “[p]ublic authorities, and primarily the courts, are thus under an obligation to take into account the ECtHR’s jurisprudence in cases in which the Court ruled in the proceedings against the Czech Republic, as well as in cases concerning other States, provided that these cases might be relevant by their nature for the ECHR’s interpretation in the Czech context.”

Government experts had the opportunity to discuss the legal effects of interpretations given by the ECtHR during the drafting of Protocol No. 16 to the ECHR on advisory opinions. It was clear from the outset that advisory opinions should not be binding for the requesting court, a rule now enshrined in article 5 of Protocol No. 16. At the same time, it was acknowledged that interpretations of Convention provisions given by ECtHR in such opinions would “form part of the case law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.” The principles enunciated in advisory opinions will constitute a record of the interpretation of the Convention by the ECtHR at a specific point in time, arguably carrying particular weight due to the fact that they will systematically be given by the Grand Chamber. As one expert put it, they would be the ‘salmon of the salmon sandwich’.


255 The Constitutional Court of the Czech Republic, judgment of 15 November 2006, file no. I. ÚS 310/05. See also The Constitutional Court of the Czech Republic, judgment of 30 June 2015, file no. II. ÚS 1135/14.

256 Explanatory report § 27.
National judicial and administrative authorities are well advised to take the Strasbourg case law into account whenever applying the Convention. In the United Kingdom, Lord Bingham enunciated the so-called ‘mirror’ principle: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.” The Norwegian Supreme Court has developed a principle for interpretation of the ECHR which in essence provides that national courts shall apply the interpretative method of the ECtHR when dealing with ECHR provisions, bearing in mind that the ECtHR with its European overview is entrusted with the primary task of developing the Convention. Therefore, national courts should apply the ECHR’s principle of evolutive interpretation, but refrain from interpreting the Convention “too dynamically.” However, disregard of even a consistent pattern of interpretation given by the ECtHR will not constitute an independent violation of article 46 (1) ECHR.

The experience of the German Federal Constitutional Court is particularly rich. According to the Court, the Convention, which formally ranks as an ordinary statute under domestic law, serves as an ‘aid to interpretation’ (‘Auslegungshilfe’) of the constitution’s fundamental rights and the rule of law principles. The Federal Constitutional Court has even overruled its own case law in light of Strasbourg Court judgments. Notwithstanding its previous decision declaring the provisions on preventive detention constitutional – a situation which under German law normally acts as a procedural bar against the admissibility of new proceedings – the Constitutional Court accepted new constitutional complaints in light of the ECtHR judgment in M. v. Germany. It held that

“… the case law of the European Court of Human Rights has at all events a de facto function of orientation and guidance for the interpretation of the European Convention on Human Rights, even beyond the specific individual case in a decision … The effects in national law of the decisions of the European Court of Human Rights are therefore not restricted to a duty to take them into consideration, derived from Article 20 (3) of the Basic Law in conjunction with Article 59 (2) of the Basic Law and limited to the real-world fact situations on which the specific decisions are based, for against the background that the decisions

257 The Supreme Court of the United Kingdom, R (Ullah) v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323.
of international courts have at least a de facto effect as precedents, the Basic Law is intended, where possible, to avoid conflicts between the obligations of the Federal Republic of Germany under international law and national law.**260

The German Federal Constitutional Court will soon have an opportunity to revisit the relationship between the Convention and the constitution in a series of cases regarding the right to strike of German civil servants.261 The German Federal Administrative Court already held that the prohibition to take any strike action for civil servants whose duties are not genuinely public duties is contrary to the ECHR.262 In that context, it explicitly acknowledged that “[t]he statements made by the ECtHR on the meaning of article 11 (1) and (2) of the ECHR are relevant to the understanding of these rules, since the ECHR has the status of an authentic interpreter of the European Convention on Human Rights.”263 However, in contrast to the case of M. v. Germany, in this case the constitution itself appears to be in contrast with the Convention as interpreted by ECtHR.

The application of rights in concrete cases must take the national context into account, a point underlined by the Czech Constitutional Court in its judgment of 15 November 2006.264 Such application often requires a sometimes complex balancing exercise, between the rights of one individual and the interests of other individuals, groups or the general public. Fundamental rights are not easily quantifiable in terms of ‘maximum’ versus ‘minimum’ protection. As Ronald Dworkin observed pertinently “it is very difficult to think of liberty as a commodity.”265 A ‘race to the top’, seeking ever higher standards makes little sense in cases of competing human-rights interests which must be reconciled, such as freedom of expression versus privacy,266 the right to respect

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263 BVerwG, marginal note 45 [translation by the author].
264 Constitutional Court of the Czech Republic, judgment of 15 November 2006, file no. I. ÚS 310/05.
266 See European Court of Human Rights, Judgment of 24 June 2004, Von Hannover v. Germany, no. 59320/00, ECHR 2004VI; European Court of Human Rights, Grant Chamber Judgment of 7 February 2012, Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012; European Court of Human Rights, Judgment of 16 January 2014, Lillo-Stenberg and
the decision to become (or not to become) a parent, or the property rights of landlords and tenants.

National courts and tribunals are “by reason of their direct and continuous contact with the vital forces of their countries … in principle in a better position than the international judge to give an opinion on the exact content of Convention requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.” When it comes to the weighing of rights against each other and public interests, different solutions are tolerable in the context of different legal systems. It is for the ECtHR to make the subsidiarity principle live, while at the same ensuring that the solutions found at national level remain within the ‘priority principles’ contained in the Convention itself. As Jean-Marc Sauvé observed pertinently, this implies “laisser des marges d’appréciation aux États et à leurs juridictions et de faire preuve d’une certaine réserve dans l’identification des points de consensus entre les traditions constitutionnelles nationales. Cette « respiration » entre principes de primauté et de subsidiarité permettra de faire vivre le projet européen dans la durée.”

*Sæther v. Norway*, no. 13258/09, where the Court embraced a two-three dissent judgment of the Norwegian Supreme Court, pointing out in particular that “although opinions may differ on the outcome of a judgment, ‘where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case law, the Court would require strong reasons to substitute its view for that of the domestic courts’”.

267 See, European Court of Human Rights, Grant Chamber Judgment of 10 April 2007, *Evans v. the United Kingdom*, no. 6339/05, § 73, ECHR 2007I: “The dilemma central to the present case is that it involves a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person’s interest is entirely irreconcilable with the other’s, since if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J’s refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent. In the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated.”


270 SAUVÉ, Jean-Marc. L’étendue et les limites du pouvoir du juge. Colloque européen sur le juge et la politique, 31 October 2014: “… leaving a margin of appreciation to the states and their jurisdictions, and showing restraint in identifying points of consensus among national constitutional traditions. This balancing between the principles of primacy and subsidiarity will allow the European project to survive in the long term” (translation by the author).
9.3. Conclusion

The probably most innovative part of my 1992 thesis was the conclusion that only by incorporating the Convention into domestic law are national authorities enabled to provide immediate and effective redress for human rights violations found by the ECtHR. Today the Convention is indeed directly applicable in virtually all European states. The ECtHR sets legal standards which influence and shape domestic law and practice as never before. Issues of compliance have however not faded away.

Having given individuals the right to challenge decisions that interfere with their inalienable rights before a court that delivers legally binding judgments, which are then enforced collectively through the Committee of Ministers, is a major achievement of European integration. Especially at a time where the authority of international law is contested and politicians in some countries call for a withdrawal from the Convention, it is more important than ever before that national courts and tribunals uphold ECHR standards. As the Secretary General recalled in Brighton, “effective human rights protection begins and ends at home. The meaning of the Court was never to take responsibility from national courts.”

Being part of the Convention system should not be seen as a straight jacket, nor does it undermine the prerogatives of national parliaments. I cannot but concur with the statement made by the former US Legal Adviser, Professor Harold Koh, speaking at the İzmir conference on the future of the ECtHR:

“All courts face what some call ‘the counter majoritarian difficulty,’ because judicial protection of human rights necessarily challenges electoral majorities and tests governmental outcomes against constitutional standards. But never let it be said that your work is antidemocratic. To the contrary, your work reinforces democracy and promotes the rule of law by guaranteeing free elections, clearing political space for the freedoms of association, expression and religion, combating discrimination, and clearing the channels for political change.”

271 Verpflichtungen (supra n 202), at 368–369.
10. A Common Law Perspective on the Binding Effect of Judicial Decisions: Reasoning with Precedent in the United Kingdom Supreme Court

JAMES LEE

10.1. Introduction

“In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence, clarity and predictability.”

The binding effect of judicial decisions is an integral part of the common law tradition. This chapter addresses the common law approach, and I take as my main example the United Kingdom Supreme Court (‘UKSC’ hereafter), with some comparative reference where appropriate. I shall seek to illustrate how the UKSC, as a common law court of final appeal, regards the doctrine of precedent. To complement my previous work, I shall take examples from the last two years of the UKSC’s decisions: 2015/16 and 2016/17.

I shall in particular argue that the judicial architecture of the court affects the resolution of cases before it. In this respect, there are some important differences between common and civil law courts in terms of transparency and the dynamics of judicial decision making. The UKSC is also conscious of the

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274 Aspects of the themes developed in this paper were previously presented at a seminar at the Gilbert + Tobin Centre for Public Law at the University of New South Wales in August 2016 and the ‘Binding Effect of Judicial Decisions’ Conference in June 2017. I thank all those who attended those events, and I am especially grateful to Gabrielle Appleby, Andrew Burrows, Paul Daly, Brice Dickson, Rosalind Dixon, Simon Lee, Andrew Lynch, Hector MacQueen, Alan Paterson, Katarína Šipulová and George Williams for helpful comments on aspects of the project. All views, and any errors, are my own: james.lee@kcl.ac.uk.


276 By judicial architecture, I mean the adjudicative structures (which I use interchangeably with judicial architecture) and practices of the court, which are detailed in section 2.
different starting points which the Court of Justice of the European Union and the European Court of Human Rights adopt when engaging with their own jurisprudence. A given decision may have a binding effect in principle, but there is still the issue of the extent to which a subsequent judge or court considers themselves bound and how that ‘bindingness’ is enforced. The UKSC has a deep commitment to the doctrine of precedent: that is apparent in the quote from Lord Neuberger PSC above, speaking to the role of the UKSC at the apex of the UK judicial hierarchy. Even in the cases in which the Court has decided to exercise the power to depart from its own previous authority, it has done so on terms which re-emphasise the Justices’ general reluctance to do so. It is nevertheless necessary to consider whether this commitment is primarily rhetorical or also reflected in the reality of the Court’s decisions.

10.2. The UK Supreme Court’s adjudicative structures

In this section, I shall sketch the distinctive adjudicative structures of the UKSC, especially when compared with apex courts in civilian jurisdictions in Europe. Until 2009, the highest court for appeals in England and Wales, and almost all matters for the United Kingdom, was the Appellate Committee

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277 It is outside my remit to consider the position with respect to European Union Law, not least because the UK Supreme Court is not operating straightforwardly as an apex court within the judicial hierarchy but, on that relationship, see the leading case of R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport [2014] UKSC 3; [2014] 1 WLR 324; see further REED, Robert. EU Law and the Supreme Court. The Sir Thomas More Lecture, 12 November 2014, page 15, speaking of the “importance of maintaining a cooperative relationship with the Court of Justice” and the “reciprocal role of national apex courts in patrolling the limits of EU law”; and NEUBERGER, David. Has the identity of the English Common Law been eroded by EU Laws and the European Convention on Human Rights? Faculty of Law, National University of Singapore, 18 August 2016.

278 See ’The Influence of Other Courts?’ below.

of the House of Lords, formally a Committee of the Upper House of the UK Parliament. The Supreme Court was provided for by the Constitutional Reform Act 2005 (UK), Part 3.\(^{281}\) The first members of the Court were those serving as Lords of Appeal in Ordinary immediately before the inauguration of the Court.\(^{282}\)

The Act provides that the Court is to have the full-time equivalent of twelve serving Justices (the Court has not so far appointed a permanent judge to serve on a part-time basis). The Court however almost never sits with a full court (‘en banc’). It is required by s 42 of the 2005 Act to sit in panels of odd numbers, of at least three, not least to avoid the risk of an evenly split decision. In recent work, I have demonstrated that the Court sits in panels of five in around 80% of its cases.\(^{283}\) It may sit in panels of seven or nine in cases raising questions of especial importance.\(^{284}\) For the first time, the Court sat in a bench of all serving Justices, in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*,\(^{285}\) which concerned the UK Government’s ability to ‘trigger’ Article 50 with regard to notifying the EU of the UK’s intention to withdrawal. This is anomalous,\(^ {286}\) not least because at the time there were only eleven serving Justices. Usually, with twelve serving Justices, it would be impossible for the Court to sit *en banc*, since twelve is an even number. There are also considerations of practicality in the light of the court’s workload.\(^ {287}\) When the UKSC sits, it does not sit in formal chambers or divisions – panels are convened per case, and the assignment of panels seeks to achieve a balance of those with subject-specific expertise and those who can offer a generalist perspective.\(^ {288}\) The Court is also conscious of the

\(^{281}\) Constitutional Reform Act 2005 (UK), s. 23(1): “There is to be a Supreme Court of the United Kingdom”.

\(^{282}\) Constitutional Reform Act 2005 (UK), s. 24. Lord Neuberger, who was a serving Law Lord until 2009, became Master of the Rolls, the head of the Court of Appeal (Civil Division).


\(^{284}\) The full criteria which are relevant for deciding whether the UKSC will sit in a chamber of more than five Justices are published on the Court’s website: https://www.supremecourt.uk/procedures/chamber-numbers-criteria.html.

\(^{285}\) [2017] UKSC 5.

\(^{286}\) See LEE, Against All Odds (supra n 283).

\(^{287}\) Lord Neuberger, the former President of the Court, has estimated that the present practice allows the Court “to get through around twice as many cases as we otherwise would. And hearings with five judges are normally more manageable both for the judges and for the advocates.” NEUBERGER, David. ‘Twenty Years a Judge: Reflections and Refractions’. Neill Lecture 2017, Oxford Law Faculty, 10 February 2017, paragraph 30.

\(^{288}\) See NEUBERGER, David. ‘Twenty Years a Judge: Reflections and Refractions’. Neill Lecture 2017, Oxford Law Faculty, 10 February 2017, paragraph 30; and HALE, Brenda. ‘Judges,
benefits of avoiding the same judges always sitting together: Lord Neuberger has cited “intra-judicial collegiality” and the discouragement of entrenched views as examples.289

Another important feature of the UKSC is that it operates as a final court of appeal on virtually all matters of law within the United Kingdom: constitutional law, administrative law, private law, and (with the exception of appeals from Scotland) criminal law.290 Within the judicial hierarchy, UKSC precedents are binding on all lower courts.291

Finally, the Justices of the Supreme Court also have an important role as members of the Judicial Committee of the Privy Council (‘JCPC’),292 which is the final court of appeal from a variety of jurisdictions from certain countries in the Commonwealth, Crown dependencies, and British Overseas Territories. The JCPC sits in the same building as the Supreme Court, and the vast majority of cases are decided by Supreme Court Justices.293 Since JCPC decisions are from other jurisdictions, they are formally only persuasive as a matter of authority. The latest position on this aspect of the English doctrine of precedent294 is addressed below.

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289 NEUBERGER, David, ibid.


291 As reaffirmed by the United Kingdom Supreme Court in Willers v Joyce (No 2) [2016] UKSC 44, paragraph 4, Lord Neuberger PSC (see section 5 below).

292 In the first eight years of the Supreme Court, from October 2009 to August 2017, Privy Council decisions made up 37% of the Justices’ workload (in terms of total number of cases decided): See LEE, James. The United Kingdom Supreme Court: A Study in Judicial Reform. Supran 279, §4.02.


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10.2.1 Precedent and practice

When reasoning with precedent, the focus of the common lawyer is on the *ratio decidendi* (the reason for making the decision), which is the legal principle that may be derived from the case based on its material facts. Further observations which are not essential for the resolution of the case may be included (such as how the legal position might differ in other circumstances), as *obiter dicta*, but a subsequent court may decide not to follow such comments. If the facts of a case have relevant differences when compared with a previous case, then the earlier case may be ‘distinguished’, without affecting its authority. My focus here is on the practicalities of precedent in the UKSC, rather than a theoretical assessment. For the purposes of this essay, therefore, we shall assume that the case before the court directly engages the ratio of the relevant previous decision, and so the court must determine whether or not to follow the existing authority. In line with general UKSC practice, I here use ‘depart from’ to refer to a court holding that one of its own decisions was wrong, as opposed to ‘overruling’, which implies a lower court’s decision is being held to be wrong.

Until 1966, the House of Lords did not have formal power to depart from its own decisions: this meant that the law on a given point would remain static, unless Parliament intervened to change the law, or if the House (or lower courts) felt able to distinguish the relevant case law, or confine its scope to the specific facts of the earlier case. In 1966, the House issued that *Practice Statement (Judicial Precedent)*, which gave their Lordships the power to depart from their own decisions. The text is as follows:

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299 Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
Part II: Binding Effect of Judicial Decisions in a Multilevel System

“Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.”

The language is significant here: even as the House of Lords gave itself the power to depart from previous cases, it still contained a recommitment to the doctrine of precedent in general: the “indispensable foundation” for judicial decision-making, providing certainty and a “basis for orderly development of legal rules”. The criterion of “when it appears right to do so” is deliberately vague, but its framing within an articulation of the fundamentals of precedent represents a self-imposed limit on the exercise of this new power. In what follows below, I shall argue that we see that same pattern in more recent Supreme Court decisions.

The practice of both the House of Lords and now the UKSC has been to exercise the power to depart from its own previous case law “rarely and sparingly”. As Lord Bingham, the former Senior Law Lord put it, “[i]t has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors”. When the UKSC was inaugurated, there was no express mention of the position in respect of precedent. In a case towards the end of the UKSC’s first year, it was confirmed that both the Practice Statement, and the practice on the Practice Statement, have ‘as much effect’ in the Supreme Court as it had in the House of Lords. The approach has since been incorporated into

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302 United Kingdom Supreme Court. *Austin v. Mayor & Burgesses of the London Borough of Southwark* [2010] UKSC 28, paragraph 25, Lord Hope DPSC.
the Supreme Court Practice Directions.\(^ {303}\) In the next section, we shall see some of the themes that can be recognised as bearing on the Court’s exercise of its power to depart from prior authority.

### 10.3. Factors and Constraints

In this section, I examine various factors and constraints which bear on the question of whether the Supreme Court should depart from existing precedent: I shall use illustrative examples of recent cases, without purporting to be comprehensive. It will be seen that many of the themes on precedent seek to address challenges posed by the adjudicative structures of the Court. They are also open to interpretation in the circumstances of individual cases, as their application is necessarily contextual.

#### 10.3.1. More than a difference of opinion?

If [a] precedent is to operate as a constraint, then it must be that it is not enough for a judge simply to disagree with the reasoning or conclusion of a previous case: the precedent has weight and is reason to point it in the direction of consistency. Therefore we see the Supreme Court, in the line with previous practice, insist that it is not enough that the judge themselves would take a different view from their predecessors on the relevant point of law.\(^ {304}\) The question is how strong a constraint this is. Lord Bingham’s observation above noted that it is partly a generational concern, the law can remain consistent over time, and it should not be open to parties to raise old arguments based on nothing more than a feeling that the current serving Justices might be more amenable. But the Justices’ approach is both long term and short term. In *R v Taylor*,\(^ {305}\) a case concerning driving offences resulting in death, the Court was invited either to distinguish or depart from a case decided three years earlier.\(^ {306}\) Lord Sumption, for the Court, held that it was not possible to distinguish the previous case and that there were no relevant differences in terms of principle. Thus,

\(^ {303}\) United Kingdom Supreme Court Practice Directions 4.2.4. Appellants are required to indicate whether they intend to invite the court to depart from existing authority in their notice of appeal.

\(^ {304}\) "Justices may voice misgivings about the acceptability of the outcome they are adopting but nevertheless view themselves as constrained so to decide the case." DICKSON, Brice. *Human Rights and the United Kingdom Supreme Court*. Oxford: Oxford University Press, 2013, p.15.


“the only basis on which it could be right to depart from the decision now is that the court as presently constituted takes a different view. A mere difference of opinion can rarely justify departing from an earlier decision of this court.”

Lord Sumption says “rarely” rather than “never”, but the important point here is the reaffirmation that something more than a mere difference of opinion is generally required (and we shall see other such factors below). Similarly, Lord Bingham once observed that the House should not depart from a previous decision “given as recently as 4 years ago, even if a differently constituted committee were to conclude that a different solution should have been adopted.” The Justices of the Court recognise that they must usually follow prior decisions, even where they disagree with them. The constraint is particularly significant in the light of the Court’s practice of not sitting en banc: the risk of differently constituted panels reaching inconsistent decisions is appreciated, and the reluctance to accept such invitations to reconsider recent decisions. Seven Justices sat in Taylor, including the two Justices who had given the judgment of the court in the previous decision.

10.3.2. Relevant change in circumstances?

The UKSC is generally cautious with respect to precedent, but if there is to be a change in the law, then it is necessary to point to a change in circumstances which justify a change in the law. The mere passage of time is not enough, but over time problems with the existing law may be highlighted. A recent example of such a case is Knauer v Ministry of Justice: the case concerned the date at which damages for loss of dependency should be assessed in fatal accident cases. The judgment for the Court was given by the then President, Lord Neuberger, and the then Deputy President, Lady Hale (who succeeded Lord Neuberger as President). The Justices were unanimous that the law should be changed, so that calculation should be at the date of trial (rather than the date of death) and departed from two House of Lords authorities in so holding. This was on the basis of a change in circumstances, and major criticism of the old law: the application of the House of Lords authorities was “illogical and their application

309 Lords Hughes and Toulson.
310 See, for example, R v. Shivpuri [1987] AC 1, page 23, Lord Bridge: “The Practice Statement is an effective abandonment of our pretention to infallibility. If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better”.
also results in unfair outcomes" and the approach to calculation was “wholly unscientific”. In the intervening years, there had been an increase in the sophistication in the approach to calculating damages in personal injury cases: this is amounted to a ‘material change in the relevant legal landscape’. The inadequacy of the existing law was leading to courts trying to distinguish the cases in order to avoid their application, which their Lordships viewed as undermining certainty and consistency. In those circumstances, departing from the previous authorities would promote the qualities which the doctrine of precedent seeks to protect: it was “an overwhelming case for changing the law”.

We can note however that even in the act of departing from previous authority where there was an “overwhelming” case for doing so, the Court emphasised the conservatism of their general approach: ‘This Court should be very circumspect before accepting an invitation to invoke the 1966 Practice Statement’.

10.3.3. The Limits of judicial reform

Another factor in the analysis relates to the nature of the proposed change, and whether it is appropriate for the courts rather than the legislature to make certain major reforms to the law. In Knauer, the Court noted that the law on the relevant point had been made by judges and so should be corrected by them. But in other areas reform may be controversial, as going to the institutional competence of the courts. In a series of recent cases, culminating in the case of Patel v Mirza, the Supreme Court has been sharply divided over the proper approach to the defence of illegality in private law – where it is argued that

the claimant should not be able to bring their claim because it arises out of circumstances involving illegal conduct (in Patel it was a conspiracy to commit insider trading). The broad debate has been between those who favoured a strict rule-based application of relevant principles, and those who preferred a structured discretion. The relevant House of Lords authority, Tinsley v Milligan,\textsuperscript{321} was an application of the former approach.

Lord Toulson, giving the lead judgment for the majority, viewed it as a duty for judges in some situations to develop the law, referring to the “responsibility of the courts for dealing with defects in the common law”.\textsuperscript{322} Departing from a previous decision “is never a step taken lightly”,\textsuperscript{323} but the court should exercise the power here because Tinsley had been widely criticised and those criticisms were well-founded.\textsuperscript{324}

The minority sharply disagreed, both as to what the appropriate test should be and whether it was in any case appropriate for the Supreme Court to change the law. Lord Sumption took the view that the change was beyond the scope of legitimate judicial development of the law:

“We are entitled to change the law, but if we do that we should do it openly, acknowledging what we are doing and assessing the consequences, including the indirect consequences, so far as we can foresee them.”\textsuperscript{325}

The argument in Patel thus reveals that a further constraint on a judge who has been invited to depart from a precedent is consideration of whether reform of the law on the point is within the institutional competence of the court, although there is limited agreement on where the threshold lies.\textsuperscript{326}

10.3.4. Judicial numbers?

It was noted above that the UKSC has only ever sat with all serving Justices once, in the exceptional case of Miller. The Justices usually sit in panels of five,

but in around one in five cases, will sit in a panel of seven or nine: the criteria for enlarged panels expressly note that a consideration is whether the Court is being invited to depart from previous authority or resolve a conflict between previous decisions.\(^\text{327}\) They are only criteria, however: the Court has departed from previous case law when only a panel of five Justices sat.\(^\text{328}\) Importantly, as a matter of precedent, there is no difference in status or authority based on the size of the panel. A decision of the Supreme Court has the same formal status, whether it involved five, seven, nine or eleven Justices.

And yet there is evidence that the number of Justices is a relevant constraint on decision-making. This consideration seems to apply to what the court can do in the case before it: Lord Neuberger observed in *Keyu v Secretary of State for Foreign and Commonwealth Affairs*,\(^\text{329}\) that a broad change in the standard which the courts apply in judicial review cases “would not be appropriate for a five-Justice panel of this court” to consider; instead it would have to be argued before nine-Justices.\(^\text{330}\) It also applies to the standing of a particular decision, in that there will be greater practical weight given to an enlarged panel decision, whether by the Justices themselves, lower courts or indeed the parties to the case. What is more, in some cases wider political or tactical considerations will be engaged, such as the decision in *Miller*, in which the Court sat in a full bench of eleven “to ensure that there was public confidence in the legitimacy of the decision”,\(^\text{331}\) not least to avoid speculation over whether the outcome would have been different with a differently constituted panel.

This feature of the Court’s reasoning is the product of the court’s practice in sitting in panels of five in the vast majority of cases. But it also has the potential to reduce the standing of UKSC decisions with “only” five Justices. This is problematic for a Court which does not have formal Chambers, nor the ability to convene a Grand Chamber or sit on *en banc* (except where coincidentally it has an odd number of Justices). For that reason, I have argued that the practice should be reconsidered.\(^\text{332}\)

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\(^{327}\) See the criteria referred to at supra n 284.


\(^{332}\) See more fully, LEE, James. Against All Odds, supra n 283.
10.4. The Influence of other courts?

We have so far seen that the Justices of the Supreme Court commonly speak to the importance of the doctrine of precedent, even when departing from prior authority. In this penultimate section, I consider the influence of the jurisprudence of other courts on the UKSC’s decision-making: as a decision from a court in another jurisdiction may be offered as a reason for the UKSC to depart from prior authority. We shall see that in this context, the Court has also recently expressly and strongly reaffirmed general principles of precedent, in the case of *Willers v Joyce (No 2)*.

Cases from other jurisdictions may be cited in UK courts, but are only of persuasive authority, as such cases sit outside the judicial hierarchy. Nevertheless, the Justices have regularly encouraged engagement with comparative law, especially from other common law jurisdictions.

10.4.1. The Privy Council

*Willers v Joyce (No 2)* concerned the tort of malicious prosecution, and the main question for the UKSC was whether that tort extended to the prosecution of private law proceedings. There was a House of Lords authority which suggested that it did not, and more recent JCPC authority to the contrary. In *Willers v Joyce (No 1)*, a majority of the UKSC preferred the approach in the JCPC decision. In the companion judgment in *(No 2)*, Lord Neuberger authoritatively addressed the general question of the status of JCPC precedents.

As noted above, JCPC decisions have always only been persuasive in English courts, but there have been difficult questions where a recent JCPC decision seems to conflict with an earlier Court of Appeal or House of Lords/Supreme Court authority. Since it is almost always the same judges sitting on the JCPC as who sit in the Supreme Court, what is an English judge at first instance

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333 For example, United Kingdom Supreme Court. *The Commissioners for Her Majesty’s Revenue and Customs v: The Investment Trust Companies* [2017] UKSC 29, paragraph 40 Lord Reed.

334 For example, United Kingdom Supreme Court. *Starbucks (HK) Ltd v. British Sky Broadcasting Group plc* [2015] UKSC 31, paragraph 50 (Lord Neuberger PSC); *FHR European Ventures LLP & Ors v. Cedar Capital Partners LLC* [2014] UKSC 45, paragraph 45. (Lord Neuberger PSC); *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11 paragraphs 70 to 73 (Lord Kerr and Lord Reed JJSC).


to do when faced with that conflict? In *Willers v Joyce*, which concerned such a conflict, the Supreme Court reconfirmed the existing doctrine of precedent, but recognised a possible exception.

First, the UKSC reiterated the rule that English courts are bound by decisions of the English courts: “a judge should never follow a decision of the [Privy Council], if it is inconsistent with the decision of a court which is otherwise binding on him or her.” The Court rejected the idea that a lower court could prefer a Privy Council decision on the basis that it was thought to be a “foregone conclusion” that the Supreme Court would follow the JCPC. That reassertion of the existing norm is important as such an exception could be seen to swallow up the rule.

Second, however, that general rule is only absolute subject to a qualification that, continued Lord Neuberger,

“it seems to me to be not only convenient but also sensible that the JCPC, which normally consists of the same judges as the Supreme Court, should, when applying English law, be capable of departing from an earlier decision of the Supreme Court or House of Lords to the same extent and with the same effect as the Supreme Court.”

Where, thus, the JCPC is specifically speaking to a point of English Law and determines that an English authority should be departed from, the Court can do so, on the basis that it is usually the same Justices who would hear the appeal if the point had reached the Supreme Court. At the time of writing, over a year since the decision of the Supreme Court in *Willers (No 2)*, the JCPC has not yet formally exercised this newly conferred power. But the case stands as a further illustration of the ways in which the working practices, and history, of judges in the UK apex court bear on the doctrine of precedent.

### 10.4.2. The European Court of Human Rights

The relationship between the UK national courts and the supra-national courts is beyond the scope of this chapter. But in terms of precedent it is

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341 See supra n. 276 above for the position in respect of European Law.
relevant to mention briefly the approach of the UKSC to the European Court of Human Rights in Strasbourg, which is more fully considered in Professor Lustgarten’s chapter in this collection. Section 2 of the Human Rights Act 1998 (UK) imposes an obligation on the courts when interpreting convention rights to “take into account” any “judgment, decision, declaration or advisory opinion of the European Court of Human Rights”, “so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen”. The issue is what it means to take such jurisprudence into account: the framing of the section means that the UKSC is “not bound by” the judgments of the Strasbourg court, and they do not have to follow the Strasbourg jurisprudence “slavishly”. Nevertheless, the general practice is to give due weight to a number of decisions pointing in the same direction, or a considered decision of the Grand Chamber on a relevant point.

The Justices have on occasion shown themselves reluctant to second guess the Strasbourg Court. *Al-Waheed v Ministry of Defence* concerned the tension between United Nations Security Council Resolutions and the UK’s obligations under article 5(1) of the European Convention. The UKSC was invited to depart from its previous authority on article 5(1) in the light of intervening decisions of the Strasbourg Court. Lord Wilson said that it was no part of the function of this court to speculate upon the approach of another court, not even of the Grand Chamber of the Strasbourg court, to the issue presently raised before it.

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343 United Kingdom Supreme Court. *McCann v. The State Hospitals Board for Scotland (Scotland)* [2017] UKSC 31, paragraph 48. Lord Hodge. Since my focus here is on the UKSC’s reasoning with respect to precedents, I say nothing here of the United Kingdom’s obligations as a Member State as regards compliance with a specific judgment against it from the Strasbourg court.


The Justices have rather shown a preference for awaiting “clear and authoritative guidance from the Strasbourg court”\(^{350}\) before making a radical change in the law in the interpretation of Convention rights.\(^{351}\)

Lord Reed JSC has in particular emphasised the need for precision when engaging with Strasbourg jurisprudence. Lord Reed is the only member of the current UKSC to have served on the European Court of Human Rights, having been an ad hoc judge in Strasbourg in 1999. In *Kennedy v Charity Commission*,\(^{352}\) Lord Reed disparaged “the tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights”\(^{353}\) when dealing with domestic British litigation. Rather than “focus[ing] exclusively on the Convention rights”, his Lordship encouraged

“Greater focus in domestic litigation on the domestic legal position [, which] might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake.”\(^{354}\)

The UKSC therefore takes the view that the practice of the ECtHR is relevant to the way in which the court is obliged to take account of the Strasbourg jurisprudence,\(^{355}\) just as the Justices are conscious of their own decision-making being influenced by the adjudicative structures of their own Court.

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\(^{350}\) United Kingdom Supreme Court. *McDonald v. McDonald & Ors* [2016] UKSC 28, paragraph 40. Lord Neuberger and Lady Hale.


\(^{354}\) United Kingdom Supreme Court. *Kennedy v. Charity Commission* [2014] UKSC 20, paragraph 46. To similar effect, see United Kingdom Supreme Court. *Osborn v. The Parole Board* [2014] AC 1115, paras 56 and 57. Lord Reed. See also Judicial Committee of the Privy Council. *Lendore & Ors v. The Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2017] UKPC 25, paragraph 60. Lord Hughes:

“perhaps because of the enormous volume of its decisions and the differing composition of its chambers, as well as because it is evolutionary, the jurisprudence of the Strasbourg court may sometimes not be entirely consistent internally, which can require analysis by States which are parties to the ECHR.”

10.5. Conclusions

This contribution has demonstrated that there is a strong commitment to the doctrine of precedent on the part of the Justices of the UK Supreme Court. That commitment is both intellectual and rhetorical, and is born of the common law tradition. The hierarchical approach to the binding effect of judicial decisions in the United Kingdom has been emphatically reiterated by the Supreme Court on recent occasions. The juridical approach may be contrasted with the perspective of the civilian tradition, as demonstrated by other contributions to this collection. Although we can find plenty of observations about how precedent works differently in the different courts, if judges are searching for a principled answer, we may question how different the conclusions are. A further clear lesson from this essay is that judicial decision-making is contingent upon a court’s judicial architecture.

The doctrine of precedent both enables the flexibility and organic development of the common law, and constrains it. The factors and constraints identified here are significant but inherently malleable: we have seen that the Justices may not agree on the weight which each factor carries in any given case. But it is clear that a common regard for precedent must be, and is, taken seriously. In the UK Supreme Court and in the common law tradition, the binding effect of judicial decisions thus depends upon the self-restraint of the judges, individually and collectively, in seeking to maintain coherence.


357 Lord Sumption, who was in the minority in Patel v. Mirza [2016] UKSC 42, paragraph 226, criticised the majority’s willingness to develop the law, and he did so on the basis of his view of the nature of the common law:

“The common law is not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes. It is a body of instincts and principles which, barring some radical change in the values of our society, is developed organically, building on what was there before. It has a greater inherent flexibility and capacity to develop independently of legislation than codified systems do.”


358 On “disciplinary controls” within judicial methodology, see MANCE, Lord. The Role of Judges in a Representative Democracy. Lecture given during the Judicial Committee of the Privy Council’s Fourth Sitting in The Bahamas, 24 February 2017.

359 See LEE, James. Fidelity in interpretation. Supra n 280.
I have chosen to address the ‘implementation’ rather than ‘binding effect’ because ‘implementation’ more adequately describes what is a complex process. It is as much political as legal, and involves several institutions—legislature, political executive, and bureaucracy—as well as the courts. The pronouncement of the ECtHR (or ‘Strasbourg Court’) is one necessary, but not at all sufficient, step in the effective realisation of the human rights enshrined in the European Convention on Human Rights (ECHR). Indeed I would argue that in most instances—the exception being where the Court announces a new interpretation of a Convention right—an applicant’s success in Strasbourg is at best the correction of a failure: that of the authorities of their home State to honour their Convention rights. It is those authorities who have the primarily responsibility for making Convention rights real.

11.1. The UK and Strasbourg – Historical and constitutional overview

UK lawyers and diplomats played a major role in the drafting of the Convention in 1949-50. However their attitude was one of superiority, if not outright disdain; the expectation was that its guarantee of rights were necessary for foreigners who had succumbed to Fascism but added nothing to the UK, which could rely on the Good Old Common Law. For an excellent detailed account of the drafting of the Convention and the early years of its existence, see BATES, Ed. The Evolution of the European Convention on Human Rights. Oxford: OUP 2010, chapters. 1–5.

Two competing conceptions of the Convention’s purpose attended its creation—that of a pact against fascist and communist totalitarianism or ‘the embryo of a constitution of the new Europe’; the UK was, and has always been, firmly attached to the first and regarded the second as both inconceivable and unpalatable. Quite apart from its historical aversion to proclamations of rights (which Jeremy Bentham, speaking of the French Declaration of the Rights of Man famously derided as ‘nonsense upon
constitutional principles also relegated the Convention to a residual role. The common law is a dualist legal system, which requires that treaties be enacted by Parliament, i.e. put into the form of statute, before their provisions can be directly effective in the courts. Treaties remain binding on the UK as a matter of international law, and after a long and embarrassing list of defeats in Strasbourg, a debate arose during the 1990s about whether, notwithstanding the absence of any statute, the Convention might somehow be given greater effect by the UK courts. Even with the (very unusual) extra-curial participation of some Judges in this discussion, in the end very little change in legal principle was achieved.363

Given this limited role for courts, before an implementing statute was passed, the task of compliance with adverse Strasbourg judgments rested on Government and Parliament. Some judgements merely required change in administrative practice, but many required alteration of statute, and this generally occurred.364

Although by 1990 UK had more judgments against it than any other State Party, that was largely explained by:
i) the inability of the domestic courts to make a ruling based directly on the Convention;
ii) the existence of constitutional courts elsewhere (notably in West Germany) filtering out human rights claims on domestic law basis;
iii) the later acceptance of right of individual petition in other large states, especially France and Italy

However—prefiguring problems that have continued to recur—the UK’s highest court [formerly the House of Lords, since 2009 the Supreme Court] in rare instances either formally or informally made it clear to Strasbourg judges that they had misunderstood UK law and should alter their approach. An instance of this was when in Osman365 the ECtHR equated the ‘strike-out’ procedure used when English tort law did not recognise liability in particular circumstances [hence no ‘civil right’ existed], with an ‘immunity’; the latter would

363 This can be most readily appreciated by a comparison of the judgment of the English Court of Appeal in R. v. MOD (ex p. Smith), [1995] 2 W.L.R. 305 and that of the ECtHR in the applicants’ appeal, Smith and Grady v. UK, Case 33985/96, 27.9.99. The key differences, of transcendent importance, are in the standard and depth of review undertaken by the Court.

364 Key examples are the statutes enacted after the UK was found non-compliant with the Convention in the Sunday Times, Ser. A30, 26.4.79; Dudgeon, Ser. A59, 24.2.83 and Malone, Ser. A82, 2.8.84 cases.

be problematic under Art. 6.1. After informal remonstrances, in *Z v UK* the ECtHR recognised four years later that it had erred.

However, once the Convention became part of UK domestic law by virtue of the Human Rights Act 1998 [HRA], matters became more complex.

A) The UK courts had the wholly new task of interpreting statutes and/or developing common law in light of the ECHR. There is now a huge case law in which Convention claims have been raised, and the courts have had to apply it. How that is done depends on the terms of the HRA, notably s. 2 (1), requiring courts to ‘take into account’ ECtHR judgments. This language was carefully crafted to give the courts leeway to refuse to treat these judgments as binding precedent.

The HRA, very deliberately as a policy decision to maintain the paramount constitutional principle of parliamentary sovereignty, did not give the courts the power to invalidate legislation. It did, in s.4, give them the power of issuing a ‘declaration of incompatibility’—a ruling stating that a particular piece of primary legislation is incompatible with the Convention, but leaving it fully in force until Parliament acted to change the statute. However, s.3 requires the courts ‘so far as it is possible to do so’ to interpret all legislation so as to make it compatible with Convention rights. This has spawned lengthy judicial and academic debate about the limits of this so-called ‘interpretative obligation’—because if taken too far, it could involve a court in rewriting a statute. This in effect would constitute a greater judicial power than the Declaration created in s.4, which leaves the legal force of the offending statute unaltered.

A very interesting example of how the interpretative obligation may work can be seen in *R v. HM Coroner’s Court, ex p. Middleton*. The Court read a statute which required the Coroner to determine ‘how’ a person met his death to mean, in certain contentious situations, not just ‘by what means’ but also ‘in what circumstances’. This has increased the use of what are known as ‘narrative verdicts’ which have greatly enhanced the role of the jury in providing a factual account of the circumstances of the deaths. This has proved of great importance in cases of deaths in prison or in police custody, in which jury verdicts have criticised the conduct of named officials or of certain established

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367 Human Rights Act 1998, s. 2 (1). Alternatives such as ‘shall apply’ were deliberately not chosen.

368 This does not include legislation passed by the regional Parliaments in Scotland and Northern Ireland. These can be struck down if deemed incompatible with Convention rights.

practices and policies of the institution. The case has produced a significant change in a process of great importance to many people.\(^\text{370}\)

However, the problem remains of the extent to which the UK courts will follow Strasbourg rulings in the event of substantive disagreement. For some years, the matter seemed to have been settled by the following statement of Lord Bingham, the senior Law Lord, in a case called *Ullah*\(^\text{371}\):

In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court…. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law… The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less [para. 20, emphases added].

This mantra of ‘no more, but certainly no less’ left open the possibility of what became known as ‘judicial dialogue’: a reasoned disagreement with a Strasbourg judgement on a matter of English law\(^\text{372}\) offered by the UK Supreme Court, asking Strasbourg to think again. This occurs in the case of a Chamber judgement, and the Supreme Court response is offered in the expectation—or perhaps as a sort of nudge—that a Grand Chamber will reconsider this issue.

This is precisely what happened in relation to the narrow issue of whether a statement by someone not attested as a witness could be the evidentiary basis of conviction in a criminal trial. Earlier Strasbourg authority rejected that possibility where the evidence was the ‘sole or decisive’ material against the

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\(^{370}\) Another example of the impact of the Convention on the UK courts’ interpretation of domestic statutes is United Kingdom House of Lords, *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, interpreting ‘as his husband and wife’ to include homosexual relationships, long before the days of statutory recognition of civil partnerships and gay marriage. This interpretation was adopted to avoid discrimination under Art. 14 ECHR.


\(^{372}\) Theoretically the issue could arise with respect to Scottish law, but it has not: see especially Supreme Court of the United Kingdom, Judgment *Cadder v. HM Advocate*, [2010] UKSC 43. So far as I am aware, the issue has not arisen where the UK courts disagree with an EChHR judgment in a case coming from another state, and refused to follow that.
defendant.373 A Supreme Court panel of seven judges (five is the usual number) rejected that test, preferring the approach of several English statutory provisions, along with the common law. Seventy pages of closely reasoned analysis, written by the President of the Court on behalf of the entire panel (again, a somewhat unusual occurrence) explained the Court’s view.374

A case raising the issue, involving two applicants in significantly different factual circumstances, had been decided adversely to the UK by a single Chamber; the Government requested that the matter be heard by a Grand Chamber. This request was granted, and the Grand Chamber judgement almost unanimously overturned the Chamber’s ruling with respect to one applicant, but unanimously affirmed it with respect to the other.375 The UK Judge, Sir Nicholas Bratza, wrote a concurrence praising the result as ‘a good example of constructive dialogue between the national courts and the European Court on the interpretation of the Convention’. The two dissenters however (Judges Sajo and Karakas), described the result as ‘a matter of the gravest concern for the future of the protection of human rights in Europe’.

The resistance to following a judgment of a single Chamber (which of course will contain the UK Judge) with which the UK courts are in strong disagreement still persists. At present there is a running sore concerning the meaning of ‘civil right’ in Article 6.1. It is fair to say the UK courts have fallen into line, though most reluctantly, with the steady expansion of Strasbourg jurisprudence under Art. 6.1 to encompass various state social benefits. The most recent bone of contention is whether the statutory duty of local authorities to provide suitable accommodation to homeless persons [absent intentional homelessness] is a ‘civil right’ within the meaning of that Article. In 2010 a unanimous Supreme Court held that it is not. A Strasbourg Chamber rejected this view, though it found against the applicant on procedural grounds.376

The impact of this decision fell to be considered by the Supreme Court in a subsequent case in May 2017. The Court analysed the Chamber’s ruling and declared:

‘Our duty under the Human Rights Act 1998 section 2 is “take account of” the decision of the court. There appears to be no relevant Grand

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375 European Court of Human Rights, Grant Chamber Judgment of 15 December 2011m Al-Khawaja & Tahery v. UK, nos. 26766/05 and 22228/06.
Chamber decision on the issue, but we would normally follow a “clear and constant line” of chamber decisions…. However, it is apparent [in an earlier case] that [the Chamber] was consciously going beyond the scope of previous cases. In answer to Lord Hope’s concern that there was “no clearly defined stopping point” to the process of expansion [of Art 6.1 in relation to state benefits], its answer seems to have been that none was needed. That is a possible view, but one which should not readily be adopted without full consideration of its practical implications for the working of the domestic regime.

The scope and limits of the concept of a “civil right”, as applied to entitlements in the field of public welfare, raise important issues as to the interpretation of article 6, on which the views of the Chamber are unlikely to be the last word. In my view, this is a case in which, without disrespect to the Chamber, we should not regard its decision as a sufficient reason to depart from the fully considered and unanimous conclusion of [this] court [in 2010]. It is appropriate that we should await a full consideration by a Grand Chamber before considering whether (and if so how) to modify our own position.\(^{377}\)

There the matter now rests.

It would be an extremely valuable exercise to review whether, to what extent, and in what context(s) such disagreements have arisen in the courts of other Council of Europe States, and how those courts have addressed them—at any rate in states where the courts are genuinely independent of the political elites. That would shed light on the question whether the attitude of the UK Supreme Court is unusual, and more or less conscientious in its application of human rights rulings and principles than equivalent highest courts elsewhere.

B) Parliament, at the behest of the Government, has normally responded to adverse judgments by enacting legislation. There is a notable characteristic of at least some of the highest profile cases which the UK has lost in Strasbourg over the years. Under Art. 8.2, an ‘interference’ with private or family life must be ‘in accordance with the law’.\(^{378}\) According to the statistics on the Court’s website, the UK has lost 27 cases under Art. 8.2, whilst prevailing in only six. The common thread connecting many of them is that the challenged action lacked the qualities of clarity and certainty required by the concept of ‘law’. Surveillance

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\(^{378}\) Arts. 9.2, 10.2 and 11.2 contain analogous provisions phrased in terms of ‘prescribed by law’. The different in terminology does not seem to be of any significance. The number of UK cases under these provisions is notably fewer than under Art. 8, and I do not discuss them here.
activities, including collection of personal data, are particularly prominent examples. These activities were undertaken either purportedly under the Royal Prerogative or unpublished Ministerial ‘guidelines’. At least three statutes enacted after the judgements included provisions designed to remedy the defects (though in the latter two, other matters were covered as well).

The impugned practices followed a characteristic pattern of UK governance—a preference for reliance on executive discretion. Decades of ECHR influence has curbed this somewhat, bringing the UK style of governance closer to a post-Second World War Western European norm. However, it is worth querying whether the change of form has produced a significant change of substance. In many though not all respects, the resulting statutes merely expressed in statutory form the policies and practices that had previously been undertaken. There have been some changes, notably the creation of some form of institutionalised post-hoc review, but from the point of view of the protection of the rights of the people targeted for surveillance, the gains have been slight. The Rule of Law as an abstract principle has been vindicated; whether that helps individuals is a different matter entirely.

There have been very few instances indeed where the Government, with the support of Parliament, has simply dug in its heels and refused to comply. The one clear example—a running sore that has festered over more than a decade—is the problem of prisoner voting. In Hirst v. UK (No. 2) a Grand Chamber ruled that the absolute ban on prisoners voting in any election, regardless of the nature of their offence or the length of their detention, violated Art 3 of Protocol 1 ECHR. This ruling was made in 2005; by 2010 nothing had happened. A later case, from Scotland, reached the Court which expressed its dismay at the inaction. Rather than use the conventional pilot judgement procedure, the Fourth Chamber took the unusual step of requiring the UK government, within six months, to introduce amending legislation.


This is the residue of what centuries ago was the unrestricted power of the monarch. Most, but not all, of it has been superseded by legislation. The Executive, i.e. government Ministers, now exercises this power—in effect enabling the Government to act lawfully without need for legislative authority.


European Court of Human Rights, Judgment of 23 November 2010, Greens and MT v. UK, no. 60041/08.
The Government complied, but did not ‘whip’—i.e., impose Party discipline—on its supporters, and the Prime Minister, David Cameron, said the idea of prisoner voting made him ‘sick’. Similar illness seems to have afflicted most MPs, who voted down the proposed legislation by a margin of nearly 10 to 1.

There the matters rests, though very uneasily.

11.2. Conclusion (But what of the future?)

A recent empirical study of the implementation of ECtHR judgements involving Arts. 8-11 (and where applicable, taken with Art. 14), which took 31 May 2008 as its cut-off date, compared the records of nine States, including all the most populous West European ones. It concluded that the UK had the best record of compliance of all of them. The prisoner voting saga stands out as a strange and inexplicable exception to an otherwise generally positive record. It seems to reflect some deep-rooted, rather weird, moral equation of criminal punishment with the idea of the offender as outlaw. Possibly this is something peculiarly Anglo-Saxon. Many US states impose a life-long ban on anyone who has served a prison sentence—a practice that has nasty overtones and important political implications. (Canada formerly operated a much milder version, but even this was struck down by the Supreme Court, and no restriction is now in force).

Otherwise the UK’s implementation record has generally been good, although the practical measures have often been accompanied by howls of resentment from politicians, some of whom are clearly ‘playing to the gallery’ of tabloids hostile to human rights and apoplectic about anything ‘European’. There is a parallel history of UK compliance measures with EU legislation—undertaken at a high rate, accompanied by much verbal bluster of complaint. The tone of the latter probably contributed to the generalised popular resentment of the EU, leading to the Brexit result in the 2016 referendum. For several years, both in opposition and in government, the Conservative Party advocated


385 Commentators during the last two US presidential campaigns noted the hugely disproportionate impact of life-time voting bans on African-Americans—in turn arising primarily from the racism endemic to US criminal justice. Their exclusion, given that Afro-Americans have overwhelmingly supported Democratic candidates has demonstrably determined the results in many closely-contested campaign races, local and national.

386 Supreme Court of Canada, Judgment of 31 October 2002, Sauve v. Canada (Chief Electoral Officer) (No.2), (2002) SCR 68. The ban had only applied to prisoners serving sentences of two years or more.
withdrawal of the UK from the Convention machinery, to be accompanied by a vague commitment to a ‘British Bill of Rights’ of unspecified substance. However, the current Prime Minister has rejected this position at least until Brexit is achieved, and the UK will probably remain a reluctant but conscientious implementer of European human rights norms.
12. Jurisprudence des Cours Européennes et Rapports de Système entre Ordres Juridiques en Europe avec un Regard Particulier pour la France

JEAN PAUL JACQUÉ

La question des rapports entre ordres juridiques différents est loin de constituer un phénomène nouveau. Romano Santí l’avait mis en valeur en son temps ce qui a donné naissance à la théorie du pluralisme juridique laquelle connaît aujourd’hui un succès remarquable dans la doctrine. De tout temps, universitaires et praticiens se sont penchés sur les rapports entre droit international et droit interne ou entre droit fédéral et droit des États fédérés. En droit international, les débats entre monistes et dualistes ont contribué à structurer l’esprit de générations entières d’étudiants en droit même si la plupart des internationalistes savaient bien que ces oppositions étaient avant tout théoriques et que la nécessité de faire vivre le système conduisait à des aménagements pratiques.

Mais la période qui a suivi la seconde guerre mondiale a été marquée par la multiplication de systèmes, voire d’ordre juridiques nouveaux et juxtaposés. L’Organisation des Nations Unies et les institutions spécialisées, plus récemment, l’Organisation mondiale de commerce, structurent la société internationale au plan politique et économique. Dans le cadre européen, le système de protection des droits de l’homme mis en place par la Convention européenne des droits de l’homme et celui qui s’est développé au sein de l’Union européenne constituent des systèmes concurrents et potentiellement conflictuels. De même, l’apparition des juridictions pénales internationales a conduit à réfléchir sur leurs relations avec la Cour internationale de justice.

Dans ce contexte, toute l’ingénierie juridique forgée par le passé à propos de l’interprétation des traités ou des rapports entre traités successifs donne aujourd’hui des résultats aléatoires.

De plus en plus, les systèmes mis en place ne régissent plus seulement les rapports entre États, mais pénètrent à l’intérieur des ordres juridiques nationaux.

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et peuvent s’adresser directement aux particuliers. Les Etats qui sont les créateurs de ces systèmes auraient pu choisir d’instituer une hiérarchie entre les divers ordres juridiques ou au moins d’organiser leur compatibilité. Mais, le plus souvent, ils se sont abstenus de le faire laissant aux juridictions européennes et aux juges nationaux le soin d’arbitrer d’éventuels conflits sans souvent donner à ceux-ci de principes directeurs. Les différentes juridictions ont dû faire face à la situation avec les outils inadaptés du droit international et du droit constitutionnel. En outre, les potentialités de conflits se sont multipliées, accrues par le fait que la plupart de ces systèmes extérieurs constituent, selon la formule de Strasbourg, “des instruments vivants” qui évoluent à leur propre rythme. La conséquence de ce caractère évolutif est de multiplier les risques de divergences puisque, même si on s’efforce d’adopter des mesures compatibles avec les différents systèmes, ce que parait conforme aujourd’hui ne le sera peut-être plus demain.

La complexité dans l’aménagement des rapports de système qui en résulte nuit gravement à la sécurité juridique. Car, pour le particulier, l’essentiel est de vivre dans un ordre stable dans lequel les conséquences juridiques de ses actes soient prévisibles. Certes les différentes juridictions, nationales ou internationales, déploient, à travers un dialogue constructif, de louables efforts pour tenter de démêler l’écheveau des contradictions inhérentes aux rapports de système. Mais une personne physique et morale peut-elle analyser ces savantes réflexions pour savoir en temps utile à quelle instance sa requête doit être soumis et quelles seront les règles de fonds applicables ? L’incertitude quant au droit applicable et les coûts contentieux qu’elle engendre peuvent in fine conduire les opérateurs économiques à renoncer à investir ou à faire valoir leurs droits ou, au contraire à jouer sur les divergences pour échapper à tout contrôle.

Il est vrai qu’une vision fondée sur la hiérarchie, telle celle de la pyramide kelsenienne, ne permet pas aujourd’hui de rendre compte de la réalité si ce n’est au prix d’une analyse terriblement réductrice. Si les théories classiques peuvent conserver une certaine utilité dans l’étude des rapports entre normes à l’intérieur d’un même ordre juridique, elles restent désarmées face aux rapports complexes entre systèmes. La vision fondée sur le réseau, proposée François Ost389, est plus exacte, mais apporte-t-elle une réponse pratique aux difficultés auxquelles nous sommes confrontés ? Oui, sans doute, dans les rares cas, où les fondateurs de systèmes ont organisé les relations entre leur création et les autres ordres existants et où ces règles sont compatibles avec celles qui sont contenues dans les autres ordres. Non, lorsque faute de telles indications, ou en

cas d’incompatibilité entre celles-ci, on se trouve renvoyé à l’application des règles sur les traités successifs ou aux conceptions classiques sur les rapports entre droit interne et international.

Pour lever les doutes, le juge a fait son devoir au fil des affaires dont il a été saisi. Une suite d’interventions unilatérales en provenance de différents systèmes juridictionnels a tenté d’apporter des solutions. La survie du système doit beaucoup à la tolérance et à l’ouverture réciproque des juridictions nationales et européennes. Dans ce contexte, les difficultés dans les rapports entre systèmes ont affecté principalement le droit constitutionnel national, le droit de l’Union, la convention européenne des droits de l’homme et la Charte des Nations unies.

12.1. Des divergences fondamentales d’appréciation

Tout juge agit dans le cadre d’un ordre juridique dont les règles s’imposent à lui. Il ne saurait reconnaître la primauté à des normes issues d’un autre ordre à moins d’être habilité à le faire par son propre ordre juridique. Gardien de la primauté du droit, sa légitimité est fondée sur son ordre constitutionnel propre. Certes, dans ce cadre, il dispose d’une marge d’interprétation et rien ne lui interdit de s’inspirer de concepts tirés d’autres systèmes juridiques pour peu que ceux-ci soient compatibles avec la structure et les principes de son propre système. Mais il fera sien ces concepts tant qu’éléments d’interprétation de l’ordre juridique dont il est le gardien et non en qualité de règles issues d’un ordre étranger. L’indispensable fertilisation croisée des systèmes juridiques ne suprime pas les barrières entre ceux-ci. Elle peut cependant se révéler utile pour éviter les conflits.

Cependant, chaque juge apprécie la validité des normes en fonction de ses règles constitutionnelles. Il en résulte qu’il ne peut apprécier la validité de normes en provenance d’un autre ordre juridique. La Cour constitutionnelle allemande ne peut annuler une norme du droit de l’Union, elle peut tout au plus s’opposer à son application en Allemagne. De même, la Cour de justice peut estimer qu’une norme nationale viole le droit de l’Union, mais elle ne peut l’annuler. Tout au plus, elle indiquera au juge national qu’il ne peut l’appliquer,

390 La question est distincte de celle de la reprise de concepts tirés d’un autre système juridique. Cette convergence conceptuelle entre des juges de différents États n’altère en rien le caractère national de chaque système. Voir le discours de G. Zagrebelsky à l’occasion du cinquantième anniversaire de la Cour constitutionnelle italienne et plus particulièrement ses réflexions sur le «droit cosmopolite», <http://www.cortecostituzionale.it:ita:attivitacorte>. Ce dont il est question ici, c’est de position réciproque, hiérarchie ou non, de différents ordres juridiques.
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laissant à celui-ci le soin de décider de sa validité en fonction des règles nationales sur les rapports entre ordres juridiques. En cas de refus des autorités nationales, la solution se trouvera dans la mise en œuvre de la procédure de manquement. Le problème de l’incompatibilité entre des normes venues d’ordres juridiques différents ne se résout pas dans des appréciations de validité, mais dans l’inopposabilité des normes incompatibles.

12.1.1. La primauté vue de Luxembourg

L’affirmation de la primauté du droit de l’Union par la Cour de justice n’est dès lors guère surprenante. Chargé par l’article 220 CE, devenu l’article 19 du traité sur l’Union européenne, d’assurer «le respect du droit dans l’interprétation et l’application du traité», la Cour de justice ne pouvait se soustraire à cette exigence. Même dans le cadre du droit international général, le juge international ne saurait reconnaître d’autre principe que celui de la primauté du droit international sur le droit interne sous peine de nier toute valeur au droit international et au principe «pacta sunt servanda», qu’il est chargé de faire respecter.

La primauté n’est donc pas une caractéristique spécifique à l’ordre juridique de l’Union. Elle est le propre de tout ordre juridique qui, s’il n’affirme pas la primauté de ses normes, ne peut exister. La primauté est l’expression juridique de l’indépendance. Ceci n’implique pas un repli sur soi. Il est possible d’accueillir des normes venue d’un autre ordre juridique et même de leur accorder une certaine primauté, mais seulement sur la base d’une norme de sa propre «constitution». En imposant la primauté, le juge de l’Union ne fait rien d’autre que d’affirmer l’existence de l’ordre juridique auquel il appartient. Par contre, le particularisme de l’Union réside dans la manière dont s’articulent les relations entre cet ordre et l’ordre national. En droit international classique, la gestion de ces relations relève principalement du droit interne (moniste ou dualiste) tandis qu’ici elle est réglée par le droit de l’Union. Mettant en œuvre des rapports interétatiques, le droit international laisse aux États le soin de fixer les modalités d’application des règles internationales à la seule condition qu’ils en assurent l’application effective. En cas de violation, il appartiendra à l’État de réparer, la sanction pouvant éventuellement intervenir par le jeu de la réciprocité. Par contre, le droit de l’Union ne s’applique pas seulement aux rapports entre États membres, mais également dans les relations entre ceux-ci et particuliers, voire entre particuliers eux-mêmes\textsuperscript{391}. De ce fait, l’effet direct

\textsuperscript{391} Cette particularité se rencontre également dans les accords relatifs aux droits de l’homme, ce qui explique certaines de leurs spécificités, notamment l’existence d’un système de contrôle
vient compléter la primauté. Dès lors, les mécanismes classiques du droit international ne permettent pas de répondre aux objectifs du traité puisque, par la « bi-latéralisation » des rapports qu’il établirait, le jeu classique de la réciprocité-sanction porterait atteinte tant à l’unité du marché intérieur qu’aux droits que les particuliers tirent du traité392. C’est d’ailleurs pour cette raison que le traité établit un système centralisé de sanction.

Même si un tel système n’est pas fréquent dans la société internationale, il est loin d’être novateur puisque la Cour de justice ne peut annuler une législation nationale contraire au traité. Cependant, la Cour a su, par une utilisation habile des procédures offertes par le traité, arriver à un résultat équivalent. Certes la procédure de manquement qui devait être le moyen privilégié d’assurer le respect du droit de l’Union répond encore aux principes traditionnels dans la mesure où la constatation d’un manquement intervient au terme d’un processus qui implique les organes de l’État et se termine par un jugement déclaratoire. La mise en œuvre du jugement de manquement appartient aux autorités nationales sous peine de sanctions pécuniaires et de l’éventuelle mise en cause de la responsabilité de l’État à l’égard du particulier. Mais le schéma classique du droit international subsiste puisque l’ordre juridique national reste intangible, la réparation étant le seul remède. La novation vient de l’existence du système de renvoi préjudiciel. En effet, le recours préjudiciel en interprétation permet à la Cour de justice d’intervenir à titre préventif alors que la situation est encore sub judice au plan national. Le manquement éventuel n’est pas encore définitif et le juge national pourra y remédier en donnant suite à l’arrêt de la Cour. La mission d’appliquer la primauté est dans ce cas confiée au juge national qui devient le juge de droit commun du droit de l’Union. Cette solution limite la dramatisation des conflits puisque ceux-ci n’opposent pas un juge « étranger » aux autorités nationales, mais sont tranchés en dernier ressort par les autorités judiciaires nationales393. Encore faut-il que celles-ci acceptent cette mission et écartent l’application des mesures nationales contraires au propre qui exclut en principe le jeu de la réciprocité. Elle n’a pas été reconnue par la Cour de justice aux règles de l’OMC.

392 CJCE, arrêt du 9 mars 1978, Simmenthal, rec. 629.

393 En effet, les États membres ont, selon la Cour et en vertu du principe de coopération loyale consacré à l’article 10 (ex-5) du traité CE, l’obligation d’abroger la norme nationale incompatible avec le droit communautaire et, dans l’attente, de la laisser inappliquée (arrêt du 24 mars 1988, Commission c/ Italie, affaire 104/86, rec. 1799). Cette obligation s’impose à toutes les autorités nationales, y compris les autorités locales ou régionales (arrêt du 22 juin 1989, Fratelli Costanzo c/ Commune de Milano, affaire 103/88, rec. 1839), et tout particulièrement au juge national. Comme le note la Cour dans l’arrêt Simmenthal : « Le juge national chargé d’appliquer, dans le cadre de sa compétence, les dispositions du droit communautaire, a l’obligation d’assurer le plein effet de ces normes, en laissant au besoin inappliquée, de sa propre autorité, toute disposition contraire de la législation nationale, même postérieure, sans qu’il
La difficulté réside dans le fait que, dans la mesure où l’habilitation du juge national découle de la constitution, elle peut difficilement imposer à celui-ci d’écarter l’application d’une norme constitutionnelle contraire au droit de l’Union\textsuperscript{394}. Or, pour la Cour de justice, la primauté ne peut qu’être absolue et le droit constitutionnel national ne bénéficie pas d’une immunité particulière. Agir autrement permettrait aux États membres d’échapper à leurs obligations par une révision de la Constitution ou par une interprétation habile de celle-ci\textsuperscript{395}. Aussi, la jurisprudence de l’Union affirme-t-elle la primauté du droit de l’Union sur tout le droit interne quelle que soit sa nature\textsuperscript{396}. C’est ainsi que la primauté joue même en cas « d’invocations d’atteintes portées soit aux droits fondamentaux tels qu’ils sont formulés par la constitution d’un État membre soit aux principes d’une structure constitutionnelle nationale ». Cette solution de principe n’a jamais été remise en cause. Ainsi, la mission impartie à la Cour de Luxembourg par le traité impose à celle-ci de faire prévaloir le droit de l’Union sur toutes les règles nationales, fussent-elles constitutionnelles.


\begin{itemize}
\item[\textsuperscript{394}] Le vieux principe fédéral ‘Bundesrecht bricht Landesrecht’ ne trouve pas application dans ce cadre.
\item[\textsuperscript{395}] Ainsi, la France, condamnée à plusieurs reprises pour violation des règles communautaires sur l’ouverture des périodes de chasse pour plusieurs espèces, pourrait échapper à une nouvelle condamnation en fixant dans sa constitution les périodes de chasse. Il est vraisemblable que, dans ce cas précis, elle trouverait une majorité parlementaire en ce sens.
\end{itemize}

**12.1.2. Primauté et « contre limites » \(^\text{398}\) à l’aune des juridictions constitutionnelles nationales**

Cette vision de la primauté peut difficilement être acceptée par le juge national pour lequel la Constitution constitue la norme suprême dans son ordre juridique. À cet égard, la jurisprudence du Tribunal constitutionnel polonais paraît particulièrement représentative. Instance juridictionnelle suprême d’un État membre très sensible à la préservation d’une souveraineté récemment « recouverte », mais également très au fait de la jurisprudence des cours constitutionnelles des anciens États membres, il adopte sur les rapports entre droit de l’Union et constitution, une position de principe qui reflète, au moins sur un plan théorique, celle de nombreux États membres bien que certains d’entre eux aient fait preuve d’une grande souplesse dans l’application pratique. Dans son arrêt du 11 mai 2005 relatif à l’adhésion de la Pologne à l’Union européenne, il constate que l’adhésion est constitutionnellement fondée sur l’article 90, paragraphe 1, de la Constitution qui autorise « de céder en vertu d’un traité, à une organisation internationale ou à un organisme international les compétences de pouvoirs publics sur des questions concrètes ». En vertu de cette habilitation, coexistent sur le territoire polonais deux ordres juridiques autonomes soumis quant à leur validité à des juges distincts. Mais cette autonomie ne signifie pas une absence de rapports et n’exclut pas les conflits entre les normes créées au sein de chacun de ces ordres. Dans ce cas, la solution résulte de la primauté conférée au droit international, et en particulier au droit de l’Union, par la Constitution. Cependant, puisqu’elle est fondée sur la Constitution, cette primauté ne saurait jouer en cas de conflit entre le droit de l’Union et la Constitution. La primauté du droit de l’Union n’implique pas une primauté sur la Constitution. La Cour constitutionnelle reconnaît bien l’existence d’une obligation d’interpréter le droit national d’une manière favorable au droit de l’Union \(^\text{399}\), mais cette obligation trouve ses limites lorsque le conflit concerne

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\(^\text{397}\) Arrêt du 25 février 2013, affaire C-399/11.

\(^\text{398}\) L’expression « contre limite » est issue de la doctrine italienne et vise les limitations mises à la primauté en droit interne.

\(^\text{399}\) « Le principe de l’interprétation du droit national « favorable au droit européen » que le Tribunal constitutionnel a jusque-là formulé dans sa jurisprudence a ses limites. En aucun cas,
une disposition expresse de la Constitution. Dans ce cas, la Constitution fait obstacle à l’application du droit de l’Union. Il appartient alors au constituant de réviser la Constitution, voire au pouvoir politique d’engager une procédure de retrait de l’Union.

En Italie et en Allemagne, bien que l’on soit en présence de systèmes dualistes, la primauté est fondée sur la Constitution et elle est également limitée par cette dernière. Sur ces bases, pour la Cour constitutionnelle italienne, la question de la compatibilité du droit interne avec le droit de l’Union, n’est pas une question de constitutionnalité et il appartient au juge ordinaire d’appliquer le droit de l’Union et, en cas de doute sur son interprétation de saisir la Cour de justice des Communautés européennes. Cependant les juridictions allemande et italienne ont développé une théorie dite des « contre limites », afin de

il ne peut entraîner des résultats contraires à la teneur explicite des règles constitutionnelles et contraires au minimum des fonctions de garantie réalisées par la constitution. Notamment les règles de la constitution en matière de droits et libertés des individus déterminent un seuil minimum et infranchissable qui ne peut être diminué ni mis en question suite à l’introduction de réglementations communautaires. C’est pour cette raison que la Cour constitutionnelle polonaise a jugé contraire à la constitution la loi transposant le mandat d’arrêt européen en ce qu’elle acceptait la remise des nationaux polonais contrairement à la constitution qui interdit l’extradition des nationaux, contraignant ainsi la Pologne à réviser sa constitution., arrêt du 27 avril 2005.


401 Il n’est pas indispensable de revenir sur la jurisprudence développée par les deux juridictions constitutionnelles. Pour un examen approfondi, voir Louis et Ronse, précité, p. 371 et svtes.

402 Voir l’arrêt Granital du 8 juin 1984. La Cour constitutionnelle italienne a dû à cette occasion pousser jusqu’à l’extrême limite son interprétation de la constitution.

403 C’est toute la jurisprudence Solange de la Cour constitutionnelle allemande. Dans un premier temps, le Tribunal estimait qu’il pouvait contrôler la législation communautaire au regard des droits fondamentaux aussi longtemps que la Communauté ne disposerait pas d’un Parlement élu avec des pouvoirs législatifs et de contrôle et d’un catalogue de droits fondamentaux (Solange I, BVerfGE 37 du 29 mai 1974). Cette position devait évoluer en 1986, compte tenu de l’évolution de la Communauté elle-même, puisque le Tribunal estimait que le niveau de protection des droits fondamentaux dans la Communauté était suffisant et renonçait à exercer son contrôle aussi longtemps que ce niveau resterait garanti (Solange II, BVerfGE 73 du 22 octobre 1986). Dans son jugement rendu à propos du traité sur l’Union européenne, le Tribunal maintenait sa position, quoique de manière moins nette en ce qui concerne les droits fondamentaux, et ajoutait qu’il n’acceptait la primauté que pour autant que la Communauté agisse dans les limites de sa compétence, se réservant au-delà, d’exercer son contrôle (BVerfGE 89 du 12 octobre 1993). Le Tribunal maintenait donc en suspens une réserve relative aux droits fondamentaux et aux éventuels dépassements de compétence de la Communauté. Les doutes que pouvait susciter ce jugement en ce qui concerne les droits fondamentaux ont été levés dans un jugement du
préserver la suprématie des certaines règles constitutionnelles qui tiennent au respect des droits fondamentaux et à la structure constitutionnelle de l'État.404 Bien entendu, la primauté ne joue que dans le cadre des compétences transférées à l'Union. Un acte de l'Union adopté ultra vires ne saurait primer sur une règle de droit interne. Dans ce cas, la question de la compétence devrait être tranchée en premier lieu par la Cour de justice, juge de la validité du droit de l'Union, mais il n’est pas exclu que la décision de la Cour soit portée en dernier ressort devant le juge constitutionnel national. La Cour constitutionnelle allemande a joué le jeu de la question préjudicielle avant de statuer au fond dans l’affaire OMT405. Par contre, elle a écarté l’application du droit de l’Union sur le fondement du droit constitutionnel national dans un arrêt du 16 décembre 2015406.

Bien que fondées sur des motifs différents, les décisions française et espagnole illustrent bien l’attitude actuelle de juridictions qui ont approfondi progressivement leur réflexion sur les rapports entre droit de l’Union et droit constitutionnel. Dans sa décision du 10 juin 2004 rendue à propos de la loi pour la confiance dans l’économie numérique (décision n° 2004-496 DC), le Conseil constitutionnel confirme l’immunité juridictionnelle du droit dérivé407.

7 juin 2000, Bananes, dans lequel le Tribunal a précisé avec clarté la portée de la jurisprudence Solange II (BVerfGE, 2 BVL 1/97) : « … il est satisfait aux exigences constitutionnelles si la jurisprudence de la Cour de justice des CE garantit, en général, face à la puissance publique communautaire, une protection effective des droits fondamentaux qui doit être respectée pour l’essentiel de la même façon que la protection des droits fondamentaux dont le Grundgesetz fait un impératif… les recours constitutionnels et les renvois préjudiciels effectués par des juridictions continuent d’emblée d’être irrecevables, si leur motivation ne démontre pas que le développement du droit européen qui comprend la jurisprudence de la Cour de justice des CE, se situe en dessous du niveau requis de protection des droits fondamentaux fixé à la suite de la décision Solange II… ».

404 L’arrêt de la Cour constitutionnelle allemande sur le mandat d’arrêt européen (arrêt du 18 juillet 2005, 2 BvR 2236/04) dans lequel celle-ci déclare la loi allemande de mise en œuvre du mandat d’arrêt peut soulever certaines questions. Certes, la Cour prend soin de souligner le caractère particulier de la décision-cadre qui relève du troisième pilier et reproche au législateur de n'avoir pas usé des exceptions prévues par la décision-cadre ce qui implique que cette dernière n’est pas en elle-même contraire à la Loi fondamentale en ce qui concerne l’extradition des nationaux. La loi fondamentale n’interdisait pas l’extradition des nationaux, mais la subordonnait au respect de la règle de droit. La décision polonaise sur le même sujet est également intéressante puisque, même en utilisant les exceptions prévues par la décision-cadre, la loi polonaise enfreignait l’absolue prohibition constitutionnelle d’extradition des nationaux (arrêt du 27 avril 2005). La décision polonaise comporte d’ailleurs une interprétation légèrement distordue du droit communautaire. Voir KOMÁREK, J. European Constitutionalism and the European Arrest Warrant : Contrapunctual Principles in Disharmony. Jean Monnet Working Paper 10/05, NYU School of Law.

405 CJUE, 16 juin 2015, Gauweiler, C-62/14.


Dans cette affaire, les auteurs de la saisine invoquaient l’inconstitutionnalité de dispositions de la loi de transposition d’une directive de l’Union. Pour le Conseil, l’obligation de respecter le droit de l’Union découle de l’article 88-1 de la Constitution française sur la participation de la France à l’Union. En vertu de cette disposition constitutionnelle, le législateur doit respecter le droit de l’Union lorsqu’il transpose une directive. Il n’appartient donc pas au Conseil de se prononcer sur la constitutionnalité de la loi de transposition. Seul le juge de l’Union pourrait vérifier si la directive respecte les limites de la compétence de l’Union et les droits fondamentaux. Le juge constitutionnel français ne pourrait intervenir que dans deux cas. Tout d’abord, dans le cadre de sa marge d’appréciation, le législateur national peut aller au-delà de ce que lui impose la directive. Dans la mesure où il exerce alors un pouvoir propre qui n’est pas lié par le droit de l’Union, le contrôle de constitutionnalité s’exerce normalement. Ensuite, l’hypothèse d’une contrariété entre la directive et une disposition constitutionnelle expresse est réservée. En effet, la portée de l’habilitation tirée de l’article 88-1 doit être interprétée à la lumière des autres dispositions de la Constitution. Si ces dispositions n’ont pas été modifiées, c’est qu’elles devaient continuer à s’appliquer. Certes les hypothèses de conflits devraient être rares. D’éventuels conflits avec le principe de laïcité ou avec le principe d’égalité ont été évoqués, mais, compte tenu des compétences de l’Union, ils sont peu probables. L’évolution de la formulation de cette limite dans la décision sur la loi relative au droit d’auteur et aux droits voisins est particulièrement intéressante. En effet, le Conseil constitutionnel abandonne la référence aux “dispositions express” pour lui substituer celle de règle ou de principe “inhérent à l’identité constitutionnelle de la France”. Ce faisant, il aligne sa position sur celles des juges constitutionnels italien ou espagnol, mais surtout sur l’article I-5 de la constitution pour l’Europe, reprise à l’article 4, paragraphe 2, du traité sur l’Union européenne. Compte tenu des délais qui lui sont impartis pour rendre sa décision, le Conseil constitutionnel, ne peut que sanctionner les incompatibilités manifestes entre une loi et une directive de l’Union, aussi, pour le reste, renvoie-t-il au juge ordinaire qui dispose de la possibilité d’adresser une demande préjudicielle à la Cour de justice. Cette main tendue a été saisie par le Conseil d’État dans son arrêt d’Assemblée du 8 février 2007, Société Arcelor Atlantique et Lorraine. Saisi de la question de la conformité à la Constitution d’un décret de transposition d’une directive, le Conseil estime

408 Encore que s’il s’agit d’une mesure de mise en œuvre du droit communautaire, elle devra également être conforme à celui-ci.

d’abord devoir rechercher s’il existe une règle ou un principe général de droit de l’Union de nature à assurer le respect de la règle constitutionnelle et, en cas de doute de saisir la Cour. Ce n’est qu’en l’absence d’une règle ou d’un principe de droit de l’Union qu’il examinera la constitutionnalité de la mesure d’application. La portée de l’arrêt devrait être précisée par la jurisprudence ultérieure, car elle dépend beaucoup de l’appréciation par le Conseil d’Etat de ce qu’est une protection effective (équivalente ?) d’une règle constitutionnelle par le droit de l’Union de même que de la détermination des règles et principes constitutionnels auxquels le droit de l’Union n’offrirait aucune protection. Par contre, en l’absence d’une protection effective parce que le droit de l’Union ne contiendrait pas un principe équivalent aux principes constitutionnels nationaux ou parce qu’il lui donnerait une portée différente, le Conseil d’Etat appliquerait la Constitution. Malgré une volonté indéniable de coopération, le Conseil d’Etat français reste encore loin de la présomption “quasi irréfragable” qui résulte de la doctrine Solange après l’arrêt Bananes et reste plus proche de la jurisprudence Bosphorus de la Cour européenne des droits de l’homme410. En tout cas, s’agissant du Conseil constitutionnel, s’il s’efforce de donner toute sa place au droit de l’Union, il fonde bien entendu la primauté sur la constitution et plus particulièrement son article 88-I et non sur quelque vertu qui serait propre à l’ordre juridique de l’Union411.

A cet égard, l’analyse du Tribunal constitutionnel espagnol dans sa déclaration du 13 décembre 2004 rendue à propos de la constitution européenne témoigne d’une plus grande ouverture qui rejoint celle du juge allemand. Le droit de l’Union s’intègre dans le droit national en application de l’article 93 de la Constitution espagnole. Bien que cet article soit silencieux en ce qui concerne les «contre limites», les transferts de compétences à l’Union sont limités par le respect des structures constitutionnelles de base et des systèmes de valeurs et de principes fondamentaux consacrés dans la Constitution. Dans ces limites, la primauté du droit de l’Union ne porte pas atteinte à la suprématie

410 Le Commissaire du gouvernement Guyomar prend clairement position en ce sens : «nous récusons toute solution qui risquerait d’être regardée comme engageant, à l’échelon de la Communauté européenne, la guerre des juges». 

12. Jurisprudence des Cours Européennes et Rapports de Système entre

de la Constitution puisqu’elle est fondée sur celle-ci. Dès lors, dans le champ
de compétences propre à l’Union, le droit national ne trouve pas à s’appliquer
en vertu de la Constitution. Le principe de primauté constitue l’instrument qui
permet de choisir, entre deux normes également valides, la norme applicable
selon que l’on se situe ou non dans le champ des compétences de l’Union412.

Dans son arrêt du 30 juin 2009 sur le traité de Lisbonne, la Cour constitu-
tionnelle allemande confirme sa vision traditionnelle et l’explicite. L’inté-
gration européenne est possible tant que l’Union ne se voit pas accorder la
compétence de la compétence. A cette fin, elle ne dispose que de compétences
d’attribution et la Cour constitutionnelle peut exercer un contrôle en cas d’actes
pris en dehors de ces compétences (« ultra vires »). Enfin, l’Union doit respec-
ter l’identité constitutionnelle allemande telle qu’elle se traduit dans le noyau
dur de la constitution au sein duquel le principe de démocratie. Cela implique
un contrôle démocratique allemand sur certains aspects de l’intégration qui
touchent à l’identité allemande « L’unification de l’Europe sur la base d’une
union conventionnelle d’Etats souverains régie par des traités ne saurait cepen-
dant être réalisée de manière telle qu’il ne resterait plus dans les Etats membres
de marge d’action politique suffisante à l’égard de la vie économique, cultu-
relle et sociale. Ceci vaut notamment pour les matières qui marquent les condi-
tions de vie des citoyens, notamment leur espace privé – protégé par les droits
fondamentaux – de sécurité personnelle et sociale et dans lequel ils mènent
leur vie sous leur propre responsabilité. Ceci vaut également pour les décisions
politiques dont la prise nécessite de manière particulière la compréhension pré-
alable d’aspects culturels, historiques ou linguistiques particuliers et qui dans
un espace marqué par le régime parlementaire et par les partis politiques se
développent de manière discursive face au public politique. Font entre autres
partie des domaines essentiels d’action démocratique le régime de la nationali-
té, le monopole de la force civile et de la force militaire, les recettes et les dé-
penses, y compris le recours à l’emprunt, ainsi que les restrictions les plus im-
portantes dans le cadre de la réalisation des droits fondamentaux, notamment
en ce qui concerne les restrictions les plus intenses comme la privation de la

412 Nous avions tenté de soutenir cette vision, sans grand succès il est vrai, il y a bien des années,
voir notamment A propos de la guerre des juges, accords et désaccords entre le juge français
particulièrement p.29 ; Sur la déclaration du tribunal espagnol, voir DEL VALLE GALVEZ, A.
La déclaration du Tribunal Constitucional du 13 décembre 2004. Cahiers de droit européen,
2005, p. 705; BURGORGUE-LARSEN, L. La déclaration espagnole du 13 décembre 2004
(DTC n°1/24), « Un Solange II à l’espagnole», Cahiers du Conseil constitutionnel n°18; PA-
PADIMITRIOU, Th. Constitution européenne et constitutions nationales : l’habile conver-
gence des juges constitutionnels français et espagnol. Cahiers du Conseil constitutionnel
n° 18.
liberté prononcée par la justice pénale ou dans le cadre d’un internement. Font également partie de ces domaines matériels d’importance des questions culturelles comme l’utilisation de la langue, la réglementation relative à la famille et à l’éducation, le régime de la liberté d’opinion, de la liberté de la presse et de la liberté de réunion, ou encore l’approche relative aux convictions religieuses ou philosophiques». On notera l’ampleur des questions qui relèveraient de l’identité constitutionnelle nationale ce qui laisse une large pouvoir d’appréciation à la Cour constitutionnelle allemande.

Quel que puisse être le degré d’ouverture des juges constitutionnels des États membres à l’égard du droit de l’Union, leur mode de réflexion est identique. La primauté du droit de l’Union trouve sa source dans la constitution nationale. Elle ne saurait donc jouer contre certaines règles de celle-ci. Les variations portent sur les règles protégées, toutes les dispositions expresses ou les principes structurels et les droits fondamentaux. Mais en général, les contre-limites portent sur le respect des droits fondamentaux, des structures constitutionnelles nationales, de certaines règles constitutionnelles fondamentales, certains de ces éléments pouvant être compris dans le concept plus large d’identité constitutionnelle nationale. Bien entendu, comme le précisait, sans doute inutilement, la primauté ne joue que dans le champ des compétences de l’Union, c’est la question de l’ultra vires soulignée par la Cour constitutionnelle allemande413.

12.2. Les tentatives de conciliation par le dialogue des juges

L’étude de la jurisprudence de la Cour de justice et de celle des juridictions nationales révèle l’existence de présupposés théoriques antagonistes quant à la source de la primauté et le rang du droit constitutionnel national. Dans tous les États membres, il existe, pour reprendre la formule italienne, des «contre-limites»414. C’est sur l’étendue de celles-ci que des divergences entre cours nationales pourraient se faire jour. Il est vrai qu’importante dans l’abstrait, cette question l’est moins dans la réalité. En ce qui concerne les règles constitutionnelles auxquelles le droit de l’Union serait concrètement susceptible de porter

413 Si la Cour constitutionnelle allemande ne s’est jamais trouvée en situation de faire jouer la doctrine de l’ultra vires , ce n’est pas le cas de la Cour constitutionnelle tchèque qui a refusé sur cette base de donner suite à un arrêt en renvoi préjudiciel de la Cour de justice (31 janvier 2012, PL-US 5/12).

414 L’Estonie a intégré les contre limites dans sa constitution sous la forme d’une clause constitutionnelle défensive qui subordonne l’appartenance à l’Union aux principes fondamentaux de la Constitution de la république d’Estonie (amendement à la constitution du 14 septembre 2003, entré en vigueur de 14 décembre 2003, article 1).
atteinte, il est peu probable, compte tenu des compétences attribuées à l’Union qu’un conflit soit possible avec les dispositions constitutionnelles relatives à la structure institutionnelle des Etats. Le problème le plus préoccupant est celui d’un conflit qui porterait sur les droits fondamentaux au sens large, c’est-à-dire en incluant les garanties qui découlent de la citoyenneté.

L’opposition conceptuelle sur la primauté aurait pu générer de nombreux conflits. Or, jusqu’à présent, s’il y a eu quelques alertes, les conflits réels ont été rares. Cette coexistence des systèmes est due à la modération réciproque des acteurs. Comme le souligne à juste titre le juge Tizzano : «…tout le système tend à la recherche de points de convergence -et parfois même de compromis- entre les diverses instances juridictionnelles… Il est en fait vrai que chacune d’entre elles est liée à un principe identitaire ainsi qu’à une cohérence intrinsèque qui lui est propre; mais il est tout aussi vrai que jusqu’à présent, elles ont toutes fait preuve de grande sensibilité aux exigences globales du système et à son harmonie.» 415. Cependant, sans négliger le rôle primordial joué par la coopération entre juges, l’absence de conflits majeurs est également due à d’autres facteurs.

### 12.2.1. L’attitude conciliatrice prise tant par les autorités de l’Union que nationales

– Sur un plan national, la prévention des conflits naît avant tout des précautions prises avant la ratification des révisions successives des traités. La vérification par le juge constitutionnel, dans les Etats qui le permettent, de la compatibilité entre la constitution nationale et les traités ainsi que les révisions constitutionnelles afin de supprimer d’éventuelles incompatibilités permet d’éradiquer les causes de conflits. De son côté, le législateur de l’Union est très attentif aux arguments d’inconstitutionnalité qui sont soulevés par les Etats membres au cours du processus législatif. Alors qu’il pourrait se réfugier derrière la primauté du droit de l’Union et négliger de telles préoccupations, il s’efforce au contraire d’adopter une attitude conciliatrice. Certes, une approche *a priori* n’est pas une garantie absolue, car les interprétations des dispositions constitutionnelles peuvent évoluer. De plus, tout juriste sait que l’ingéniosité des avocats peut faire apparaître des conflits sur des questions qui semblaient à première vue anodines. En outre, les conflits ne naissent pas seulement à propos du droit primaire, mais aussi

Part II: Binding Effect of Judicial Decisions in a Multilevel System

du droit dérivé dont le contenu ne peut bien entendu pas être évalué au mo-
ment de la conclusion du traité.

– En second lieu, une communauté de valeurs s’est établie entre les Etats
membres et l’Union, ce qui limite les potentialités de conflits. Suite à la
jurisprudence de la Cour constitutionnelle allemande, le développement
de la protection des droits fondamentaux dans l’Union d’abord par la voie
jurisprudentielle, puis par leur insertion dans le traité et enfin par l’ado-
pption d’une Charte des droits fondamentaux, qui confirme l’existence d’un
consensus sur une liste de droits, ont consacré l’existence de valeurs parta-
gées. La Cour constitutionnelle allemande en a tiré les conséquences, dans
son arrêt Bananes, en limitant considérablement les possibilités de recours
fondé sur les droits fondamentaux. Il est vrai que l’évolution du droit de
l’Union initiée en ce domaine par la Cour de justice n’était pas gratuite. En
allant à la rencontre des préoccupations du juge constitutionnel allemand, la
Communauté préserverait la primauté du droit de l’Union et son application
uniforme.

– En troisième lieu, comme le note le juge Tizzano, la modération réciproque
des instances de l’Unions et nationales a joué un rôle essentiel. En effet, si
les juges nationaux ont posé des «contre limites» à la primauté, ils n’ont
jamais fait jouer celles-ci et ont su, comme les Cours allemande ou italienne
faire preuve de souplesse. Ainsi, la Cour constitutionnelle allemande a été
amenée à se prononcer sur une éventuelle action ultra vires de l’Union à
propos de la discrimination sur la base de l’âge. Dans son arrêt Mangold416,
la Cour de justice avait été amenée à imposer à l’Allemagne le respect d’une
directive anti-discrimination avant que le délai de transposition ne soit ex-
piré. Cette position fut justifiée par le fait que la directive ne faisait que
mettre en œuvre un principe général de non-discrimination lequel s’impo-
sait donc indépendamment de la transposition. Cette affaire avait provoqué
Allemagne de vives critiques en contre la Cour de justice dont on estimait
qu’elle avait excédé les compétences de l’Union en reconnaissant un prin-
cipe général du droit. La Cour constitutionnelle allemande a considéré qu’il
s’agissait en l’espèce d’une interprétation du droit de l’Union qui n’avait
pas pour effet d’étendre les compétences de l’Union, mais simplement de
soumettre le droit national tombant dans le champ d’application du droit de
l’Union au respect des principes généraux du droit. Ce faisant, elle adop-
tait une vision très restrictive de la contre-limite relative à l’ultra vires417.

417 Pour la Cour constitutionnelle, le contrôle de l’ultra vires ne peut intervenir que dans l’hy-
pothèse où les organes et institutions européens enfreignent les limites de leur compétence de
façon suffisamment caractérisée, ce qui serait le cas si la violation des compétences par les
Ceci n’empêche pas la Cour d’avertir préventivement l’Union de risques d’éventuels conflits comme elle l’avait à propos de la jurisprudence Akerberg Fransson qui, selon elle, pourrait constituer un cas d’ultra vires si elle était généralisée\footnote{418}. De toute façon, dans son arrêt sur le traité de Lisbonne, la Cour constitutionnelle allemande souligne qu’il ne lui appartient pas de se prononcer sur la légalité du droit de l’Union, mais le cas échéant de s’opposer à l’application de celui-ci, ce qu’elle ne ferait qu’après que la Cour de Luxembourg se soit prononcer sur ce point. On n’est donc jamais en présence d’un rapport de hiérarchie, mais de reconnaissance d’une norme dans un autre ordre juridique que celui dont elle est issue.

– De son côté, la Cour de justice de l’Union a adopté une attitude constructive. Ainsi, dans l’affaire Kreil qui mettait en cause une disposition constitutionnelle allemande prohibant l’emploi des femmes dans des unités militaires armées, elle a su observer une certaine réserve. Certes, elle a rappelé le principe de non-discrimination dans l’accès à l’emploi, mais s’est bien gardé d’envenimer la situation en évitant tout prononcé théorique sur un conflit éventuel entre une norme constitutionnelle nationale et le traité\footnote{419}. De leur côté, les autorités allemandes ont tiré les conséquences de l’arrêt dans l’ordre interne. Mais, plus encore, la Cour de justice a utilisé toutes les possibilités offertes par le droit de l’Union pour désamorcer d’éventuels conflits. Dans l’affaire Schmidberger, la Cour de justice devait se prononcer sur une mesure nationale autorisant une manifestation qui avait eu pour conséquence de porter atteinte à la libre circulation des marchandises sur l’autoroute du Brenner. L’affaire concernait donc un conflit entre la liberté de circulation, garantie par le traité, et le droit à la libre expression et à la manifestation, garanti, notamment, par la Constitution autrichienne, mais aussi par le droit de l’Union\footnote{420}. Ce conflit entre l’une des quatre libertés autorités de l’Union était manifeste et si l’acte attaqué provoquait une modification structurelle notable dans l’équilibre des compétences entre l’Union et les États membres, au détriment de ces derniers. Elle ajoute que le contrôle doit être exercé avec retenue et en tenant compte des méthodes d’interprétation du droit de l’Union. En tout état de cause, avant de se prononcer dans un tel cas, il conviendrait de saisir la Cour de justice de l’Union par la voie préjudicielle, Bundesverfassungsgericht (2. Senat), ordonnance du 06.07.10, 2 BvR 2661/06, Mangold-Urteil EuGH, Honeywell.

\footnote{418} “As part of a cooperative relationship, this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law’s constitutional order. The Senate acts on the assumption that the statements in the ECJ’s decision are based on the distinctive features of the law on value-added tax, and express no general view. The Senate’s decision on this issue was unanimous” 1 BVR 1215 07, 24 April 2013.

\footnote{419} CJEU, Arrêt du 11 janvier 2000, affaire C-285/98.

\footnote{420} Or le droit de l’Union impose le respect des droits fondamentaux garantis par l’article 6 TUE aussi bien aux autorités de l’Union qu’aux États membres dans le champ d’application du droit
fondamentales de l’Union et les droits fondamentaux a été résolu par une mise en balance des intérêts en présence en tenant compte du large pouvoir d’appréciation des autorités nationales. En l’espèce, la restriction aux échanges intracommunautaires n’était pas disproportionnée par rapport à l’objectif légitime de protection des droits fondamentaux. La Cour est allée plus loin encore à la rencontre des États membres dans l’affaire Omega qui mettait en cause le respect de la dignité humaine en Allemagne. La République fédérale estimait que l’organisation de jeux de tir au pistolet laser sur des êtres humains portait atteinte à la dignité humaine et était de ce fait contraire à l’ordre public. Le respect de la dignité humaine est protégé par le droit de l’Union, mais la conception extensive allemande de la dignité n’était pas partagée par les autres États membres lesquels ne voyaient aucun problème dans ce type de jeux. Dès lors, la Cour devait déterminer si une restriction à la libre prestation de services fondée sur une conception purement nationale d’un droit fondamental garanti par le droit de l’Union était admissible. Elle admet que la conception de l’ordre public peut varier d’un État à l’autre et que les États membres disposent en ce domaine d’une marge d’appréciation soumise à un contrôle de proportionnalité : «Il n’est pas indispensable…que la mesure restrictive édictée par les autorités d’un État membre corresponde à une conception partagée par l’ensemble des États membres en ce qui concerne les modalités de protection du droit fondamental…en cause». De la sorte, les interprétations nationales des droits fondamentaux peuvent être protégées. Alors justement que l’introduction

421 CJEU, Arrêt du 12 juin 2003, affaire C-112/00 ; on lira avec intérêt les conclusions de l’avocat général Jacobs qui souligne qu’il s’agit dans le cas présent de protéger un droit fondamental reconnu par le droit communautaire et qui doute qu’une telle protection puisse être accordée à n’importe quel droit fondamental garanti en droit national : « On peut toutefois imaginer un instant un ordre juridique (purement hypothétique) d’un État membre qui reconnaisse expressément le droit fondamental d’être protégé contre la concurrence déloyale d’autres firmes et, en particulier, de firmes établies à l’étranger ou une jurisprudence admettant un tel droit comme un aspect du droit fondamental de libre activité économique, ou le droit fondamental de libre propriété…On ne saurait donc exclure automatiquement qu’un État membre qui invoque la nécessité de protéger un droit reconnu comme fondamental par le droit national n’en poursuit pas moins un objectif qui doit être considéré comme illégitime au regard du droit communautaire. »

423 Fondement de la restriction sur la base de l’article 46 CE.
du droit de retrait de l’Union offre une sortie à des situations dans laquelle les contraintes de l’Union seraient perçues comme intolérables au regard de la souveraineté nationale.

12.2.2. Les avancées opérées par le traité de Lisbonne

Mais cette alchimie jurisprudentielle n’offre pas toujours la certitude juridique recherchée par le justiciable et il est essentiel que les rapports de système soient réglés par le constituant. En ce qui concerne les rapports de systèmes, le traité de Lisbonne tente de concilier l’approche de l’Union et l’approche nationale en inscrivant à l’article 4 TUE la «contre limite» fondée sur les structures politiques et constitutionnelles des États membres. L’Union doit respecter l’identité constitutionnelle des États membres. Est inscrite ainsi dans le traité une des limites à la primauté consacrée par plusieurs cours constitutionnelles nationales. La Cour fera usage de cette possibilité en considérant que le refus autrichien de permettre l’inscription des titres de noblesse dans les actes d’état-civil repose sur un élément de l’identité de la République autrichienne et constitue une traduction du principe d’égalité commun à l’Union et aux États membres. Mais le bien-fondé de l’invocation de cette identité est soumis au contrôle de la Cour afin d’éviter que l’application du droit de l’Union ne soit contrariée par des arguments fallacieux tirés de l’identité nationale. C’est ainsi qu’elle considérera que cet argument ne peut être utilisé par la Lettonie pour refuser l’application de l’accord-cadre sur le travail à temps partiel à des magistrats :

« il convient de constater que l’application, à l’égard des juges à temps partiel rémunérés sur la base d’honoraires journaliers, de la directive 97/81 et de l’accord-cadre sur le travail à temps partiel ne saurait avoir un effet sur l’identité nationale mais viserait uniquement à leur faire bénéficier du principe général d’égalité de traitement, qui constitue l’un des objectifs de ces textes, et ainsi à les protéger contre les discriminations à l’égard des travailleurs à temps partiel ».

Enfin, en ce qui concerne les droits de l’homme, l’octroi à la Charte des droits fondamentaux d’une valeur équivalente à celle des traités et l’adhésion

425 « L’Union respecte l’égalité des États membres devant la Constitution ainsi que leur identité nationale, inhérente à leurs structures fondamentales, politiques et constitutionnelles, y compris en ce qui concerne l’autonomie locale et régionale …». 
427 Alors justement que l’introduction du droit de retrait de l’Union offre une sortie à des situations dans laquelle les contraintes de l’Union seraient perçues comme intolérables au regard de la souveraineté nationale.
428 CJEU, Arrêt du 1er mars 2012, Dermod Patrick O’Brien, C-393.
à la Convention européenne des droits de l’homme constituent un socle fondamental ouvert à toute évolution qui s’appuierait sur les traditions constitutionnelles communes aux États membres. La limitation expresse par la Charte de son champ d’application au champ d’application du droit de l’Union et l’indication que la Charte ne crée pas de nouvelles compétences peut rassurer les États membres quant au maintien de leur système national de protection. Désormais, comme le constatait le Tribunal constitutionnel espagnol, toute violation des «contre-imites» constituera une violation du traité et sera sanctionnée au premier chef par la Cour de justice. Le caractère positif de ces aspects novateurs n’a malheureusement pas été perçu dans le débat référendaire français où certains ont mis l’accent sur le caractère prétendument destructeur de la primauté pour les États membres comme si, même dans le cadre du droit international, la France pouvait conclure un traité en prétendant se dégager des obligations qui la dérangent par simple modification de son droit national.

En conclusion, les solutions apportées ne remettent pas en cause les éléments essentiels de chacun des systèmes, mais constituent des aménagements pragmatiques afin de permettre la poursuite de l’intégration. Elles traduisent une acceptation par les gardiens de ces ordres de l’existence de l’autre, mais aussi l’existence d’instruments de pression pour contenir toute velléité d’empiètement. Du côté de l’Union, la remise en cause de la primauté, même fondée sur la constitution, par un juge national, outre le coût politique qu’elle pourrait avoir, déclencherait une procédure de manquement avec d’éventuelles incidences financières. Du côté national, toute atteinte à la constitution pourrait provoquer une remise en cause de la primauté et, par là même, de l’unité du marché intérieur.

Ces développements relatifs au droit de l’Union peuvent-ils être transposés à la Convention européenne des droits de l’homme et à la jurisprudence de la Cour européenne des droits de l’homme. Il convient de tenir compte de la spécificité des instruments en cause. La place de la Convention en droit interne dépend des dispositions constitutionnelles nationales et il n’existe pas de doctrine équivalente à celle de la primauté, même si les États ont l’obligation de respecter celle-ci. Les jugements de la Cour sont déclaratoires et laissent une place à leur mise en œuvre par les États. Le mécanisme du renvoi préjudiciel n’existera que sous une forme très atténuée et facultative après l’entrée en vigueur du protocole n°16 et pour les États qui auront ratifié celui-ci. La valeur accordée aux arrêts de la Cour tient beaucoup aux dispositions constitutionnelles nationales et à l’attitude des juridictions des États parties. Ce phénomène est illustré de manière radicale par l’article 104 § 3 amendant la constitution de la fédération de Russie qui permet d’écarter la mise en
œuvre des jugements non conformes à la constitution. De son côté, la Cour constitutionnelle italienne établit une distinction entre le droit de l’Union et la Convention. Si la constitution consacre le premier lequel n’est soumis à examen dans le cadre limité des « contre-limites » et notamment de l’identité nationale, il appartient à la Cour constitutionnelle d’apprécier les arrêts de la Cour européenne des droits de l’homme au regard de la constitution et éventuellement de s’opposer à une interprétation de la convention qui entrerait en conflit avec celle-ci.

Cependant, malgré ces différences de statut, les techniques pour assurer la cohabitation entre systèmes différents sont largement communes : -1) Au minimum, le juge a un devoir d’interprétation conforme et, à moins d’entrer en conflit avec une norme claire et précise de son ordre constitutionnel, doit interpréter sa constitution en conformité avec le droit de l’Union ou la Convention selon le cas. – 2) Lorsque ces systèmes ne sont pas hiérarchisés entre eux ou que la hiérarchie est refusée par une juridiction, la reconnaissance des normes d’un système dans l’autre est opérée grâce à la technique Solange. Les normes sont reconnues dès lorsqu’elles offrent une protection comparable (arrêt Bosphorus de la Cour EDH et arrêts successifs de la Cour constitutionnelle allemande sur le protection des droits fondamentaux dans le droit de l’Union).- 3) Lorsqu’existe une hiérarchie ou qu’un des juges prétend qu’une hiérarchie existe, en cas de conflit portant sur des éléments qui relèvent de ce qu’un des systèmes considère comme faisant partie de son identité propre, la solution du conflit est recherchée dans la reconnaissance d’une marge d’appréciation limitée par le recours à la proportionnalité (ou la nécessité dans une société démocratique). On en trouve une illustration dans l’arrêt Lautsi de la Cour EDH à propos du crucifix dans les écoles italiennes (18 mars 2011) ou dans les arrêts Omega ou Sayn-Wittgenstein de la Cour de Luxembourg.

429 Voir les arrêts Anchugov du 19 avril 2016 et Yukos du 19 janvier 2017 de la Cour constitutionnelle de la Fédération de Russie.
430 Voir à ce sujet l’intéressante ordonnance n°24 du 23 novembre 2016 de la Cour constitutionnelle dans l’affaire Taricco.
431 Les normes de la convention « tout en revêtant une grande pertinence, en ce qu’elles protègent et valorisent les droits et les libertés fondamentaux des personnes, sont toujours des normes internationales conventionnelles qui lient l’État, mais qui ne produisent pas d’effet direct dans le système interne », Arrêt n°348 § 3.3, voir Cour constitutionnelle, arrêt n° 348, Giur. cost., 2007, p. 3475 note C. Pinelli et A. Moscarini; arrêt n° 349, Giur. cost., 2007, p. 3535 note M. Cartabia et A. Guarrarotti.
432 Arrêts précisés.
12.3. L’autorité des arrêt de la Cour européenne des droits de l’homme : l’exemple de la France

Le cas français n’est pas isolé et les juridictions font face aux mêmes problèmes que leurs homologues dans d’autres États membres de l’Union et parties à la Convention européenne des droits de l’homme. Bien entendu, les spécificités du système français conduisent à placer leur intervention dans un contexte différent, notamment en ce qui concerne le contrôle de constitutionnalité qui se distingue nettement du contrôle de conventionnalité. Alors que le juge constitutionnel n’intervient qu’exceptionnellement, le juge ordinaire est pleinement responsable de l’application tant de la Convention que du droit de l’Union.

12.3.1. Le rôle limité du juge constitutionnel

Le juge constitutionnel joue pleinement son rôle lorsqu’il est saisi avant la ratification d’un accord international. Il vérifie alors la compatibilité de cet accord avec la constitution à la demande du président de la République, du premier ministre ou des présidents des assemblées. Dans ce cas, toute incompatibilité entraîne l’obligation de réviser la constitution avant de procéder à la ratification. Ce contrôle permet d’éviter certains conflits qui auraient pu survenir a posteriori, mais son efficacité reste limitée en raison du caractère dynamique du droit de l’Union ou de la jurisprudence de la Cour européenne des droits de l’homme. Dans des systèmes de « droit vivant », la majorité des conflits résulte des développements qui découlent de l’application ou de l’interprétation des traités en cause.

Pour le reste, dans le cadre de ce qui a été longtemps en France, la seule voie de contrôle, la vérification de la conformité des lois à la constitution avant leur promulgation, le juge constitutionnel français s’est toujours refusé à apprécier leur conventonalité. Son devoir est de faire respecter la constitution et les traités n’ont pas valeur constitutionnelle. En outre, sur un plan pratique, le contrôle à priori est enfermé dans un délai de quinze jours et ce délai ne permet pas un examen approfondi de la conformité des lois aux traités conclu par la France.


434 Il se tient à sa position adoptée en 1975 selon laquelle une loi contraire à un traité ne serait pas pour autant contraire à la constitution (décision n° 74–54 DC du 15 janvier 1975).
Cependant, il a fait une exception fondée sur une habilitation expresse de la constitution qui mentionne la participation de la France à l’Union européenne\footnote{Article 88-1 : «La République participe à l’Union européenne constituée d’États qui ont choisi librement d’exercer en commun certaines de leurs compétences en vertu du traité sur l’Union européenne et du traité sur le fonctionnement de l’Union européenne, tels qu’ils résultent du traité signé à Lisbonne le 13 décembre 2007».} et a accepté de contrôler la conformité des lois de transposition aux directives qu’elles mettent en œuvre. Mais c’est un contrôle limité aux dispositions manifestement incompatibles avec des dispositions précises et inconditionnelles de la directive. Dans ce cas, ces dispositions seront censurées à moins qu’elles ne soient contraires à un principe ou une règle inhérente à l’identité constitutionnelle de la France\footnote{Décision 2006-540 DC du 27 juillet 2006.}. En résumé, le Conseil constitutionnel accepte à titre exceptionnel de se pencher à l’occasion du contrôle d’une loi de transposition manifestement incompatible avec une directive sur la conformité de cette dernière à la constitution. Il ne sanctionnera qu’en cas de contrariété avec un principe constitutionnel propre à la France. Dans la mesure où il ne lui appartient pas de statuer sur la validité d’une directive, la conséquence de la sanction sera que la loi contraire à la directive ne sera pas déclarée inconstitutionnelle. Par contre, la Convention européenne des droits de l’homme ne bénéficie pas de ce statut et le contrôle de la conventionalité des lois relève dans cas du juge ordinaire.

S’agissant du contrôle qui s’exerce dans le cadre de la question prioritaire de constitutionnalité mise en place par la révision constitutionnelle de 2008, le Conseil constitutionnel est saisi par un juge ordinaire à la demande d’un requérant après un filtrage de la question par le Conseil d’État ou la Cour de cassation. Dans ce cadre, le juge constitutionnel ne s’estime pas non plus compétent pour se prononcer la question de la conventionalité qui doit être résolue par le juge ordinaire. Cette solution est conforme à la jurisprudence Melki\footnote{CJEU, Arrêt du 22 juin 2010, Aziz Melki (C-188/10) et Sélim Abdeli (C-189/10).} de la Cour de justice selon laquelle le contrôle de constitutionnalité ne peut empêcher le juge ordinaire de saisir à tout moment la Cour de justice de l’Union d’un renvoi préjudiciel. En effet, une norme peut être conforme à la constitution et contraire à la convention comme l’illustre la jurisprudence relative à la garde à vue après l’arrêt Salduz\footnote{Cour européenne des droits de l’homme.} de la Cour européenne des droits de l’homme du 27 novembre 2008. Pour le Conseil constitutionnel, le régime de la garde à vue était conforme à la constitution en ce qu’il limitait l’intervention d’un avocat à certaines infractions\footnote{Décision 2010-14/22 QPC.} tandis que pour la Cour de cassation, il était contraire à la convention\footnote{Décision 2010-14/22 QPC.}. La contradiction n’est apparente puisque le
Conseil constitutionnel et la Cour de cassation ne fondent pas leur contrôle sur les mêmes bases et que l’effet de leur décision n’est pas le même. La constatation de l’inconstitutionnalité fait disparaître la loi de l’ordre juridique tandis que la constatation de sa non conventionnalité la rend inapplicable au litige et, par suite, en raison de l’autorité jurisprudentielle qui s’attache à la décision de la Cour de cassation empêche son application. Le refus du juge constitutionnel français de contrôler, sauf exception, la conventionnalité, n’empêche donc pas le respect des obligations internationales de la France par le juge ordinaire.

Cette attitude réservée à l’égard du contrôle de conventionnalité n’exclut pas la prise en compte de la jurisprudence de la Cour européenne des droits de l’homme. Généralement, le Conseil ne fait pas directement référence à la Cour européenne des droits de l’homme, mais respect sa jurisprudence qu’il s’agisse de l’autorité relative voir interprétative de la chose jugée. Ce fut ainsi le cas à propos de l’effet rétroactif des validations législatives. Après les arrêts Raffineries grecques Stan et Stratis Andreadis et Zielinski, Pradal, Gonzales et autres de la Cour européenne des droits de l’homme, le Conseil a suivi la position de Strasbourg. De même, à propos du droit des associations étrangères d’ester en justice, le Conseil constitutionnel a estimé que ce droit ne pouvait être subordonné à une déclaration préalable de l’association auprès des autorités. Cette solution reflète sans le dire l’arrêt du 15 janvier 2009 de la Cour européenne des droits de l’homme, Ligue du monde islamique à la suite duquel la Cour de cassation avait modifié sa jurisprudence. Loin d’y voir un événement fortuit, il faut considérer que l’arrêt de la Cour européenne a été implicitement pris en compte comme un élément d’interprétation des droits garantis par la constitution ?

12.3.2. L’ouverture du juge ordinaire

Dans un premier temps, le juge ordinaire estimait que son mandat était de faire appliquer la loi le cas échéant au détriment de la disposition constitutionnelle relative à la primauté des engagements internationaux (article 55 de la constitution les traités régulièrement ratifiés ont une valeur supérieure à loi sous réserve de réciprocité). Selon le Conseil d’Etat, il revenait au juge constitutionnel

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441 Cour européenne des droits de l’homme.
442 Cour européenne des droits de l’homme.
445 Cour européenne des droits de l’homme.
d’assurer le respect de cette disposition lequel juge constitutionnel renvoyait la question au juge ordinaire. Ce jeu de ping-pong a pris fin en 1989 avec l’arrêt Nicolo du Conseil d’Etat du 20 octobre. La situation varie en droit selon qu’il s’agisse de la juridiction administrative et du juge judiciaire. En principe, le juge administratif ne reconnaît que l’autorité relative de la chose jugée446, mais, en ce qui concerne la jurisprudence de Strasbourg, le vice-président du Conseil d’Etat évoque « la force persuasive des arrêts de la Cour européenne des droits de l’homme ». Le juge judiciaire va plus loin en ce qui concerne l’autorité de la chose interprétée et, dans un arrêt du 15 avril 2011 à propos de la garde à vue, la Cour de cassation déclare : « Les Etats adhérents à cette Convention sont tenus de respecter les décisions de la Cour européenne des droits de l’homme sans attendre d’être attaqués devant elle ni d’avoir modifié leur législation ». S’agissant de l’autorité des arrêts qui constatent une violation par la France, la législation française prévoit en matière pénale, la possibilité d’un réexamen par une commission dès lors que la satisfaction équitable ne permet pas de corriger les effets dommageables de la condamnation du requérant. Cette procédure peut déboucher sur une révision du procès. Une telle possibilité n’existe pas pour le juge administratif qui, de manière prétorienne a ouvert une porte vers la révision. Celle-ci ne permet pas de remettre en cause une décision devenue définitive, mais, si tel n’est pas le cas, l’administration devra réexaminer la situation447 de telle sorte que l’exécution de l’arrêt sera assurée par la voie administrative.

Enfin, la voie de la responsabilité de l’Etat peut être engagée pour violation des obligations conventionnelles. En l’espèce était en cause une validation législative contraire à la jurisprudence de la Cour européenne des droits de l’homme. S’il existe en France une responsabilité de l’Etat du fait des lois, les conditions de mise en œuvre sont très strictes, aussi le Conseil d’Etat institue-t-il

446 La situation est différente s’agissant du droit de l’Union où l’autorité interprétative des arrêts rendus sur renvoi préjudiciel est reconnue.
447 Conseil d’Etat, 30 juillet 2014, Vernes : « Considérant que, lorsque la violation constatée par la Cour dans son arrêt concerne une sanction administrative devenue définitive, l’exécution de cet arrêt n’implique pas, en l’absence de procédure organisée à cette fin, que l’autorité administrative compétente réexamine la sanction ; qu’elle ne peut davantage avoir pour effet de priver les décisions juridictionnelles, au nombre desquelles figurent notamment celles qui réforment en tout ou en partie une sanction administrative dans le cadre d’un recours de pleine juridiction, de leur caractère exécutoire ; qu’en revanche, le constat par la Cour d’une méconnaissance des droits garantis par la convention constitue un élément nouveau qui doit être pris en considération par l’autorité investie du pouvoir de sanction ; qu’il incombe en conséquence à cette autorité, lorsqu’elle est saisie d’une demande en ce sens et que la sanction prononcée continue de produire des effets, d’appréhender si la poursuite de l’exécution de cette sanction méconnaît les exigences de la convention et, dans ce cas, d’y mettre fin, en tout ou en partie, eu égard aux intérêts dont elle a la charge, aux motifs de la sanction et à la gravité de ses effets ainsi qu’à la nature et à la gravité des manquements constatés par la Cour». 191
un régime spécifique pour violation des obligations internationales : « Considérant que la responsabilité de l’État du fait des lois est susceptible d’être engagée, d’une part, sur le fondement de l’égalité des citoyens devant les charges publiques, pour assurer la réparation de préjudices nés de l’adoption d’une loi à la condition que cette loi n’ait pas entendu exclure toute indemnisation et que le préjudice dont il est demandé réparation, revêtant un caractère grave et spécial, ne puisse, dès lors, être regardé comme une charge incombant normalement aux intéressés, d’autre part, en raison des obligations qui sont les siennes pour assurer le respect des conventions internationales par les autorités publiques, pour réparer l’ensemble des préjudices qui résultent de l’intervention d’une loi adoptée en méconnaissance des engagements internationaux de la France ».

Le Conseil D’Etat transpose ainsi la jurisprudence de la Cour de justice de l’Union relative à la responsabilité des États pour violation du droit de l’Union.

Si, de ce fait, la prise en compte de la jurisprudence de la Cour européenne des droits de l’homme est ainsi assurée, il reste une limite qui tient au cas où un arrêt irait à l’encontre de l’identité constitutionnelle de la France. Dans ce cas, l’application de l’arrêt deviendra impossible et l’autorité interprétative devrait être écartée. Dans ce cas, seule une révision constitutionnelle pourrait remédier à la situation. Les hypothèses de conflit sont rares, mais pas inexistantes. Le respect de la laïcité constitue un de ces domaines et, à cet égard, on peut comprendre la prudence de Strasbourg lorsque la Cour européenne des droits de l’homme doit traiter de cas français relatifs à la laïcité.

12.4. Conclusion

Après une période initiale de méfiance à l’égard du droit européen dans son ensemble, un certain équilibre s’est établi. Il a impliqué une définition du rôle respectif du juge constitutionnel et des juridictions ordinaires. Au fil du temps des solutions législatives ou prétoriennes ont dû être trouvées pour assurer le respect de la jurisprudence des Cours européennes. La coopération des juges s’est pérennisée et chacun connaît les contraintes de l’autre. Il reste à espérer qu’une large acceptation du protocole n°16 permettra d’approfondir le dialogue et d’éviter les difficultés qui résulteraient d’une condamnation de l’État. À cet égard, le fonctionnement du système de renvoi préjudiciel dans l’Union européenne constitue un précédent dont l’efficacité est certaine.

448 Conseil d’Etat 8 février 2007, Gardedieu.

MIKAEL RASK MADSEN

13.1. Introduction

Beginning in the late 1970s, European human rights started developing into a genuine body of law with real impact on the legal systems of the member states. In Denmark however, the effect was limited for the first many years. In fact, Denmark did not experience a single violation in Strasbourg for thirty-six years of operation of the European human rights system, from 1953 to 1988. As a consequence, European human rights law played in practice a very limited role in domestic Danish law and politics. Cases brought against Denmark were summarily dismissed, with only limited exceptions, for which no violations were found. Equally important, the Danish government concluded that very few legislative revisions were required to conform Danish and European human rights standards – with the exception of securing a minimum level of protection of the (negative) freedom of association within respect to “closed-shop” unions due to the Court’s ruling in Young, James and Webster v. United Kingdom (1981). The first adverse ruling against Denmark was only delivered in 1989 in the Hauschildt case concerning the perceived impartiality of single-judge provincial courts in criminal proceedings.

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450 Examples being the tree cases concerning restrictions on a child’s liberty (European Court of Human Rights. Nielsen v. Denmark. Plenum decision of the European Commission of Human Rights of 2 September 1959, no. 343/57), sexual education in primary schools (European Court of Human Rights, Judgment of 7 December 1976, Kjeldsen, Busk Madsen and Pedersen v. Denmark, no. 5095/71; 5920/72; 5926/72) and impartiality of judges in Greenland (European Court of Human Rights, Judgment of 22 February 1989, Barfod v. Denmark, no. 11508/85). In all three cases no violations were however found.

451 European Court of Human Rights, Judgment of 13 August 1981, no. 7601/76; 7806/77.

Part II: Binding Effect of Judicial Decisions in a Multilevel System


The European Convention on Human Rights (ECHR or Convention) arguably only started having a real impact on Danish law beginning in the 1990s. The decision to incorporate the Convention into domestic law in 1992 was of great significance in this regard.\footnote{Act no. 285 of 29 April 199. See also Betænkning 1220/1991.} And perhaps particularly because it occurred at the precise moment in time in which European human rights law – spurred by the Courts general increase in activities\footnote{For data on the evolution of case law of the Court, see for example MADSEN, Mikael Rask. The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash. \textit{Law & Contemporary Problems}, 2016, p. 79.} – started influencing a growing number of sub-fields of law: immigration law, procedural law, criminal law, etc.\footnote{See for example HALLIDAY, Simon, SCHMIDT, Patrick. (eds.) \textit{Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context}, Oxford: Hart, 2004.} The fact that Denmark started being at the receiving end of European human rights caused some consternation. It above all collided with entrenched ideas of Denmark – and Scandinavia more generally – as (natural) champions of both human rights and international law.\footnote{See for example BRYSK, Alison. \textit{Global Good Samaritans: Human Rights as Foreign Policy}, Oxford: Oxford University Press, 2009.} This ideational clash can be illustrated...
with a striking example from the broader field of international human rights. In 1992, when the incorporation Act came into force, Amnesty International (AI) also happened to publish its first serious critique of Denmark in its annual rapport. This had an immediate effect. But it was not the Copenhagen police under scrutiny in the report that suffered the most; it was AI: One fourth of AI’s members immediately left the organisation after the publication of the 1992 Report and it would take close to a decade for AI to regain its lost membership in Denmark.460

To make intelligible this transformation of the Danish reception of international human rights, and particularly the rulings of the ECtHR and its impact on the perceived bindingness of the ECHR, this paper proceeds in the following way. It first analyses the incorporation of the ECHR into Danish law and the underlying assumptions regarding the bindingness of the ECHR in domestic law. It secondly analyses the framework of interpretation that the Danish Supreme Court has developed since the Incorporation Act of 1992. It concludes with a discussion of this framework and how it increasingly seems inadequate both legally and politically.

13.2. Incorporating the ECHR

“Domesticating” European human rights in Denmark implied in practice taking international law down from its elevated position in terms of a universal commitment to peace and international cooperation, which had marked most 20th century Danish and Scandinavian legal internationalism, and instead bringing it into the everyday practice of law and politics. It also meant dealing with the practical legal consequences of a new Act that included protections normally found at a constitutional level but in this case provided in regular legislation. The starting point was a form of pragmatic dualism which however sat oddly with the fact that the incorporation Act was potentially a vehicle for opening up the gates, even flood gates according to some, for an ever-expanding Strasbourg case law. A leading constitutional scholar, Henrik Zahle, had at the point already introduced a new notion of practical monism (praktisk monism) as the appropriate way of understanding the role international law already in

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the 1980s started playing as a legal source of law in domestic legal systems.461 This, needless to say, triggered reactions from the more conventional legal milieus, deeply-seated in the tradition of dualism, sceptical of the constitutional validity of such a position and its implications.462 Two basic question seem to have steered these debate at the moment of incorporation and subsequently. First, what precisely was being implemented: was the package being implemented simply the Convention and Danish cases lost in Strasbourg or also the evolving acquis Strasbourgeois, that is, the entire case law of the ECtHR at the date of the incorporation Act or beyond? Was it in other words a vehicle for erga omnes effects of the Convention and the jurisprudence of the ECtHR thereby slipping through the armour of dualism. Secondly, debates in the early 1990s, as well as today, concerned what role the Danish courts should play in interpreting the Convention: should they follow the example of the ECtHR and go about it in a more expansive manner – or should they restrain themselves. Moreover and related, should Danish courts exercise an autonomous interpretation of the Convention – or should they simply follow guidelines from Strasbourg?

The Committee Report on the Incorporation Act makes some pertinent suggestions in these regards. Incorporation generally meant that the SCDK should follow the jurisprudence developed in Strasbourg. That was clearly the starting-point – a position also articulated by the SCDK itself.463 The Committee however repeatedly made the case that the courts should exercise restraint in adopting new interpretations that would have wide-ranging consequences. More precisely, the exercise of restraint would be relevant where consequences would impact society464 and the content of Danish law,465 but seemingly also where no particular interest warranted it.466 Restraint should thus be exercised in practically all cases. It is clear that the political ambition at the time was to make sure that Danish courts would not consider themselves in position to mimic the freedom of interpretation enjoyed by the ECtHR. Above all, it appears from the Committee’s Report, the division of labour, and thus power, between the legislature and the courts should not be changed via Strasbourg or the incorporation of the ECHR.

462 In some decisions from 1985 to 1987, the Supreme Court had indicated that Danish law in these cases was in accordance with international obligations UfR 1985.1080 H, UfR 1986.871 H, UfR 1986.898 H and UfR 1987.440 H.
463 For example UfR 1990 13 H.
It should be underlined that the notion of self-restraint advocated with regard to the ECHR was – and is – in line with the general restraint exercised by Danish courts with regard to constitutional matters. The Danish Supreme Court (SCDK) has only once found legislation to violate the Constitution, namely in a case where the legislature passed judgment on a concrete conflict between 32 schools and the Ministry of Education where the latter had passed legislation putting an end to the claims of the schools. This was in 1999 and thus after the Incorporation Act. Before the Incorporation Act, the SCDK had in some early case law from the field of property rights applied a high threshold of clarity as a requirement to consider legislation unconstitutional. There was little doubt that constitutional review existed in Danish law, but mainly at a principled level at the time of the Incorporation Act. This seems to have spilled over into the understanding of the ECHR in Danish law.

13.3. European Human Rights: The SCDK’s framework of interpretation

Interestingly, if we put aside the academic debates and semi-political reports related to the Incorporation Act and instead take an empirical look at the practices developed by the SCDK since the Incorporation Act, a relatively clear framework can be identified. The case law of the SCDK suggests that the court has developed a particular framework for dealing with the ECHR and the ECtHR with the following characteristics with regard to respectively politics and law. As concerns politics, the SCDK maintains that the Danish Constitution has primacy over the Convention. This has the important effect that it reserves a space of political manoeuvring for Parliament the outcomes of which the SCDK will respect. Secondly, the SCDK observe a kind of practical monism, but with an important exception with regard to Parliament’s space of manoeuvring. It generally gives the case law of ECtHR erga omnes effect, but because it reserves a political space for Parliament, it is willing to follow guidelines from Parliament in terms of deviating from ECtHR practices. Explicit attempts at violations will be followed, but there are in practice no examples of this in the existing case law.

More practically relevant are instances of legislation that is in a grey zone of possibly violating the Convention, which are perhaps best described as a form of “containment policy” where Parliament seeks to go to the limits of the ECtHR case law or possibly beyond. This has increasingly become the case with regard to immigration law and notably in the context of expulsion cases related

467 U 1999.841 H.
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to ECHR Art. 8. In this area of law, political pressures have been high in the past two decades and legislation has been accompanied by strong political signals to tighten the regulation. In principle, the SCDK is also willing to follow these more subtle commands from Parliament, but in practice the signals are hazy. Although Parliament – or sometimes only the Government – signals the wish to go in certain directions, they typically do not state they will violate international human rights obligations when doing so. They simply state, in carefully crafted language, that they seek to use more fully the space of manoeuvring allowed within existing international human rights obligations and to test the boundaries of those obligations. In Danish, the term “procesrisiko” is often used in this regard, meaning Parliament is willing to run the risk of being overruled in Strasbourg.

As it is apparent from this outline, in its political interface the SCDK generally respects a version of the doctrine of the supremacy of parliament which it grounds in the primacy of the Danish Constitution over the ECHR. In practice however, the legal interface between the SCDK and the ECtHR modifies the effect of this doctrine. As already noted, the SCDK accepts erga omnes effects of the Strasbourg jurisprudence. But more decisively, the SCDK has thus far sought a restrained role as interpreter of the Convention and the case law of the ECtHR. In for example Art 8 cases concerning expulsion, the SCDK has at least in one instance operated with a notion of security margin (sikkerhedsmargin) which had the practical effect that the protection standards became arguably higher in Denmark than what is found in the case law of the ECtHR. This is however not a general trend and it seems to have been left behind now. More consequential is the fact that the SCDK generally refrains from autonomous interpretation of the Convention, which has been criticized in the literature. The absence – or limited use – of autonomous interpretation certainly creates a situation in which the role of the SCDK is relatively limited.

In sum, the SCDK is situated at the crossroads of the supremacy of Parliament and erga omnes effects. When these two interfaces with law and politics are combined, it becomes clear that the SCDK seeks a position of respecting both international commitments and the directions from Parliament. This seems a well-chosen pragmatic position considering the constitutional framework in which the court operates. But it has also shown to have negative effects, both within the SCDK and in domestic political quarters. The next section addresses these two issues as they are likely to determine the future orientation of the SCDK.

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468 See for example the judgment in U2002.736H
469 Ibid.
13.4. Discussion: Negative consequences of the approach of the SCDK

With regard to the political level, the restrained role developed by the SCDK effectively stops Parliament from testing out the limits of European human rights law as the SCDK is likely to introduce such a wide security margin that cases will in fact not go to Strasbourg. This unwillingness to interpret the Convention autonomously in light of domestic legal and political conditions has in recent years been much criticized. Arguably, the court’s restrained and reluctant position hinders a bottom-up dynamic evolution of the Convention both from legal and political milieus. In the current evolution of the Convention system – “the age of subsidiarity” according to one sitting ECtHR judge – this is arguable also increasingly problematic. Following the 2012 Brighton Declaration, the role allocated domestic institutions, and notably national apex courts, is a more active position in realising the Convention. Put differently, does the “good pupil” approach developed by the SCDK over the past more than two decades live up to the criteria of interaction stipulated in the Brighton Declaration and now gradually being implemented in the case law, notably in terms of a more procedural approach in Strasbourg?

The established position of the SCDK in European human rights does however not only cause problems with regard to the political environments and the possibility of bottom-up dynamic interpretation of the Convention. It is well-known that the SCDK in recent years also has been at unease with its own role in the broader system of European human rights. In the age of subsidiarity and increased judicial dialogue, the developed approach of “over-implementing” European standards via lack of autonomous interpretation does not create a balanced interface and dialogue between the SCDK and the ECtHR. In fact,

471 Again this is mainly found in response to expulsion cases where the SCDK has in numerous cases argued that expulsion cannot take place due to Art. 8 jurisprudence. Critics have argued that the SCDK simply does not use fully its powers to challenge the system bottom up. See for example Jonas Christoffersen in https://www.b.dk/politiko/danmark-kan-udfordre-konvention-for-at-faa-udvist-flere.
474 The most direct statement of this unease is found in an essay by the former President of the SCDK: DAHL, Børge, JENSEN, Michael, H. and MøRUP, Søren Højgaard and DAHL, Børge. (eds.) Festskrift til Jens Peter Christensen. Copenhagen: DJØF, 2016.
it results in a very conventional legal institutional hierarchy – not the kind of network of courts for example promoted by Koen Lenaerts with regard to the Court of Justice of the European Union (CJEU) and the courts of the EU member states.\textsuperscript{475} What can be observed in statements by current and former SCDK judges is in fact a growing frustration which is often articulated in a critique of European legal micro management and lack of mutual trust. According to one former SCDK judge, there is even a risk of the SCDK itself losing public trust due to its strict adherence to ECtHR case law as it appears as being overrun by the ECtHR.\textsuperscript{476} Paradoxically, the SCDK’s own over-implementation strategy is in part, perhaps even large part, to blame for la misère.

While the critique has been simmering for some time, some recent developments might however indicate that changes are under way. On December 6, 2016, the SCDK took the European legal community by surprise. In its decision in the \textit{Ajos} case\textsuperscript{477} the SCDK disregarded the guidelines of the Court of Justice of the European Union (CJEU), set out in a preliminary ruling earlier in the year.\textsuperscript{478} Even more striking, the SCDK used the occasion to set new limits to applicability of the CJEU’s rulings in Denmark. It did so in two steps: first, the SCDK delimited the legal competences of the institutions of the European Union (EU) through an interpretation of the Danish Accession Act. Second, the SCDK delimited its own power within the Danish Constitution. With regard to the first point it then concluded that judge-made principles of EU law developed after the latest amendments of the Accession Act, like the general principle of non-discrimination on grounds of age, were not binding. This conclusion was consequential since the case at hand concerned such a principle developed by the CJEU after an amendment. With regard to the second step, the SCDK argued that it would in fact exceed its own judicial mandate within the Danish constitutional framework if it were to give EU law effect either by interpreting national law, which violated the principle in question, in conformity with EU-law, or by giving direct effect to an EU directive in a dispute between private parties when parliament, in its implementation act, had considered that the directive is compatible with existing legal regulation and court practice in Denmark.\textsuperscript{479}


\textsuperscript{476} DAHL, Børge, JENSEN, Michael, H. and MoRUP, Søren Højgaard and DAHL, Børge. (eds.) \textit{Festskrift til Jens Peter Christensen}. Copenhagen: DJØF, 2016.

\textsuperscript{477} The Supreme Court of Denmark, Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A.

\textsuperscript{478} The Court of Justice of the European Union. Judgment of 19 April 2016, C-441/14 Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen, ECLI:EU:C:2016:278.

\textsuperscript{479} See Act of Parliament no. 253 of 7. April, 2004. The Act has subsequently been amended a number of times.
This is of course EU law and concerns in part some of the particular problems related to conferred powers in that regard.\textsuperscript{480} The interesting question for the purpose of this study is however whether it is indicative of a general turn in terms of a new more robust line towards European law, including European human rights law. Currently, a politically very contentious area right now is the regulation of Exceptional Leave to Remain. It is a good example of the inherent tension of the framework developed by the SCDK in its interaction with Parliament and the ECtHR. So far, the SCDK has generally stuck to ECtHR case law, but it has interestingly not stopped the government – and Parliament – from continuously introducing new and more stringent regulation.\textsuperscript{481} A closer look at the SCDK case law and its evolution over the past decade in this area does in fact suggest that the SCDK has itself incrementally incorporated a more tough line. That said, it would be to stretch the facts to argue that the SCDK is defying the ECtHR – but it is certainly revising the way it interprets the case law. It will be very interesting to observe how the SCDK is going to more precisely develop its new stance in years to come and still accept the directions from Parliament and the ECtHR.

13.5. Conclusion

To fully understand the current frictions in the system, it is important to keep in mind the temporal dimension of the evolution of the relationship between the SCDK and the ECHR system. Originally, the context of the position was very different: fewer cases and a general perception of the ECHR and ECtHR as an export business. But by the increase in the caseload – both in general and with regard to Denmark – the perception of the Strasbourg system has fundamentally changed. It is no longer a distant phenomenon which can be treated as yet another international law project realising Danish small state interest.\textsuperscript{482} In practice, however, the original framework of integration with the ECHR and ECtHR has had a certain “stickiness” – to use the notion from

\textsuperscript{480} For a critical analysis of the Ajos case, see MADSEN, Mikael Rask and OLSEN, Henrik Palmer and SADL, Urska. forthcoming 2017. Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court’s Decision in the Ajos Case and the National Limits of Judicial Cooperation. \textit{European Law Journal}.

\textsuperscript{481} See 2017.1228 H. The case is analysed in-depth in KESSING, Peter Vedel and RYTTER, Jens Elo. forthcoming 2017. Tålt ophold – menneskeretlig status efter endnu en højesteretssdom og nye stramninger. \textit{EU- og menneskeret}.

\textsuperscript{482} On the notion of small state strategies, see for example INGEBRITSEN, Christine, and NEUMANN, Iver and GSTOHL, Sieglinde and BEYER, Jessica. (eds.) \textit{Small States in International Relations}, Seattle: University of Washington Press, 2006.
historical institutionalism. It increasingly appears that this framework of integration is both politically and legally inadequate in light of new political pressures and the agreed roadmap of European human rights found in the Brighton Declaration. In my view, what is needed is not rebellious judgments as the cited *Ajos* judgment, but rather a need to carefully reflect on what it means to be a national supreme court in a landscape of European human rights that attaches more importance to subsidiarity and, thus, puts more responsibility on the shoulders of national supreme court judges. Thus far, the case law from the SCDK does not suggest that this new reality has been incorporated in a general framework. Rather the SCDK is stuck in its own model of interpretation which creates increased pressures both from domestic politics and the ECtHR. This is however not viable in the long run. The key challenge of contemporary European Human rights in Denmark as elsewhere is to find a way of both striking a balancing between law and politics, and to articulate a contemporary notion of subsidiarity. But for that to work, it is indispensable, that the interaction, the communication, between the national and European levels is improved – otherwise Europe post-Brighton risk fragmenting.
II.B.

The Concept of the Binding Effect and Enforcement through the Prism of the Luxembourg EU Court of Justice
In the following contribution, I would like to share with you some thoughts on transparency in the particular context of the dialogue that takes place between the Court of Justice of the European Union (EU) and the national courts of the Member States.

With regard to judicial transparency, it is interesting to note that there is a somewhat interdependent relationship between communication and trust, since without communication there is no trust and without trust there is no communication.

When preparing this contribution, I decided to explore the way in which that interdependence between communication and trust applies to the dialogue between judiciaries in the European legal space.

According to Jürgen Habermas, the world-renowned German philosopher, communication is the use of language as a means of achieving mutual understanding between the members of a society. For this reason, Habermas considers communicative action as being of primary importance for social integration. For that social integration to be successful, communicative actions require the institutional framework of laws.

That is why, in a democratic society governed by the rule of law, of which the principle of separation of powers is an indispensable component, it is the legitimate business of the legislator to decide which social norms are to be transformed into legal norms, and it is the exclusive province of the courts to say what those legal norms are.

Accordingly, Habermas defines law as a means of “generalizing behavioural expectations (...), such that (...) conflicts can be decided in a binding manner according to the binary code of legal/illegal.”

Thus, where the consequences that flow from breaching the law, as applied and interpreted by the courts, are predictable, the trust that the people have in

483 All opinions expressed herein are personal to the author.
485 Ibid, p. 25.
486 Ibid, p. 25.
the legislator is enhanced and, in turn, so is the trust that the legislator has in the law as interpreted by the courts, thereby improving the level of communication within society as a whole.

I agree with Professor Habermas that the predictability of the law, as interpreted by the judiciary, is of paramount importance for communicating a clear message as to what the law allows, and does not allow, one to do. In a system with different levels of governance such as the European Union legal order, the same is even more true.

The purpose of this contribution is thus to illustrate this point by looking at the way in which the preliminary ruling procedure contributes to enhancing the level of communication within the sphere of EU law. I will also explain that the Court of Justice’s efforts to become a ‘good communicator’ of what the law of the EU is about go beyond simply ensuring the proper functioning of that procedure.

As you all know, the European Union is a ‘Union of values’ where all Member States are expected to share the same degree of commitment to respecting the rule of law, human rights, freedom, democracy and equality.

Respect for the rule of law forms part and parcel of those founding values. The European Union is thus a ‘Union of law’. This means, in essence, that each and every Member State is bound by ‘the rules of the game’ as provided for by the Treaties.

From a functional perspective, ‘the rules of the game’ that are set out in the Treaties and in the Charter of Fundamental Rights of the European Union are called upon, just like national constitutions, to fulfil three basic functions: First, by laying down a catalogue of fundamental rights, including political rights, the Charter serves to protect a sphere of individual self-determination which public authorities are bound to respect. Second, the EU Treaties allocate power between the EU and the Member States as well as between the different EU institutions. Third, the Treaties help to preserve the autonomy of the EU legal order by determining the way in which the EU is to interact with the wider world. Accordingly, the EU Treaties draw the dividing line between the EU legal order and public international law.

Most importantly, when fulfilling those three ‘constitutional’ functions, the EU legal order is bound to respect the values of democracy, respect for the rule of law and fundamental rights on which the EU is founded. Those values are in keeping with the constitutions of the Member States and, just as happens at national level, they are interdependent at EU level: there can be no democracy without the rule of law and fundamental rights; there can be no rule of law without fundamental rights and democracy, and there can be no respect for fundamental rights without democracy and the rule of law.
In this regard, it is important to note that the EU understood as a ‘Union of Law’ has established a system of fundamental rights protection that influences and is influenced by both national and international law. Just as the Court of Justice looks to the common constitutional traditions of the Member States and the case law of the European Court of Human Rights (ECtHR) in Strasbourg when interpreting the Charter of Fundamental Rights of the European Union, the national courts have also drawn inspiration from the case law of the Court of Justice when interpreting national constitutions and the European Convention on Human Rights (ECHR).

Given that the common mission of national courts, the ECtHR and the Court of Justice is, first and foremost, to serve the individual by providing him or her with effective judicial protection, they work together so as to ensure that all of the different systems of fundamental rights protection that occupy the European legal space are in harmony with one another.

In that regard, the EU is bound by the principle of conferral. The EU institutions, including the Court of Justice, may act only within the limits of the competences that the Member States have conferred upon them in the Treaties. As the Court of Justice ruled in the landmark Van Gend & Loos judgment, rights that EU law confers on individuals are not only protected by the Court of Justice when the Commission brings an enforcement action against a defaulting Member State, but also by the national courts when individuals bring an action seeking to protect those rights. When granting judicial protection, those courts may seek the assistance of the Court of Justice regarding the interpretation of EU law. That system of ‘dual vigilance’ means, in essence, that judicial power in the EU is not vested exclusively in the EU courts, but is rather shared between those courts and national courts. Consequently, judges, both at national and EU level, are called upon to play a pivotal role in preserving the rule of law within the EU. As a matter of fact, national judges are, as is said in French, «les juges de droit commun de l’Union », an expression that may be translated into English as ‘the courts of general jurisdiction for EU law’.

Thus, whilst it is for the Court of Justice to say what the law of the EU is, it is for national courts to apply that law to the cases that come before them. This means that the Court of Justice and national courts are called upon to cooperate transparently, principally by means of the cooperative preliminary ruling mechanism. Hence, when ensuring the uniform interpretation of EU law, the Court of Justice does not seek to impose its authority on national courts by coercion, but rather to convince them by the force of the legal reasoning

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contained in its judgments. This shows that the relationship between the Court of Justice and national courts is based not on hierarchy but on cooperation and mutual trust.

The preliminary ruling procedure, provided for in the Treaties[^490], is one of the most fundamental mechanisms of EU law. As the Court of Justice ruled in its Opinion 2/13, and I quote, “the [EU] judicial system (...) has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law”[^491].

Prior to that, in the *Rheinmühlen* case that was decided in 1974, the Court of Justice held that the preliminary ruling procedure not only aims “to avoid divergences in the interpretation of [EU] law which the national courts have to apply” but also that it tends to give EU law “its full effect within the framework of the judicial systems of the Member States.”[^491]

Thus, the preliminary ruling procedure aims to ensure the uniform interpretation and application of that law within the European Union, by giving the courts and tribunals of the Member States a means of bringing before the Court of Justice questions concerning the interpretation of EU law or, as the case may be, the validity of acts adopted by the institutions, bodies, offices and agencies of the Union. In so doing, that procedure serves to increase the predictability of EU law.

In this respect, referring to the collection’s topic of the binding effect of judicial decisions, it is of pivotal importance to recall the Court’s judgment in *Milch-, Fett- und Eierkontor/Hauptzollamt Saarbrücken*, where it held that a decision given under the preliminary ruling procedure is binding on the referring court hearing the case in which the decision is given[^492]. Thus, the judgment in which the Court of Justice rendered a preliminary ruling is binding for the purposes of the decision to be given in the main proceedings[^493]. As a result, the referring court is not allowed to deviate from the Court’s legal reasoning.

Moreover, any court is bound by the interpretation given by the Court of Justice. It is indeed generally accepted that the preliminary rulings of the Court of Justice have an effect *erga omnes*. The purpose for which the preliminary ruling procedure exists, which is to secure uniformity in the application of

[^490]: Article 19 (3) b) TEU and Article 267 TFEU.
European Union law throughout the Member States would indeed be defeated if it were to be considered that a preliminary ruling only had *inter partes* effects.

The Court of Justice explicitly ruled that the judgments given under the preliminary ruling procedure are binding *erga omnes* when the Court declares an act of one of the EU institutions or bodies to be void, given the particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of EU law. The Court indeed held that “[i]t follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the [EU] law applicable.”

Therefore, although a judgment of the Court given under Article 267 TFEU declaring an act of an institution to be void is directly addressed only to the national court which brought the matter before the Court of Justice, legal certainty requires any other national court to regard that act as void for the purposes of any judgment which it has to give.

In order for the preliminary ruling procedure to ensure successfully the communication between judiciaries, there must be a culture of mutual trust between the Court of Justice and national courts. It is that mutual trust that facilitates the mechanism’s two-fold communicative purpose: on the one hand, the Court of Justice must trust national courts in their assessment of the need to make a reference as well as in their understanding of the factual and legal background of the case at hand. The Court of Justice must also trust national courts to be willing and able to ensure the consistency of their own domestic law with EU law. On the other hand, national courts must trust the Court of Justice to deliver, within a reasonable time, well-reasoned judgments that genuinely assist them in solving the case at hand.

Needless to say, respect for the rule of law within the EU presupposes that both the Court of Justice and national courts act with full independence when interpreting and applying the law of the EU, without heed to any political considerations that may militate in favour of a particular solution. Indeed, only a court that is genuinely independent may have recourse to the preliminary ruling procedure in order to engage in a dialogue with the Court of Justice. This is essential as it ensures that the communication between national courts and the Court of Justice is free from any political interference that might jeopardise the trust on which their dialogue is based.

In this respect, national courts must be free from any hindrance that might limit their capacity to engage in a direct dialogue with the Court of Justice. For

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495 Ibid, para 13.
example, in *Ognyanov*, the Court was asked to examine a Bulgarian provision that obliged the referring court to disqualify itself from a pending case, on the ground that it set out, in its request for a preliminary ruling, the factual and legal context of that case. The rationale underpinning that provision was that the referring court was expressing a provisional opinion on questions of fact and law before deliberations had begun, which entailed not only that the judge was removed from the case and his final judgment set aside, but also that an action for damages could be brought against him for compensation in respect of a disciplinary offence.

In its judgment, the Court of Justice ruled that such a provision constituted an obstacle to the proper functioning of the preliminary reference procedure. How could the Court provide a useful answer to the referring court without knowing the factual and legal background of the case in the main proceedings? In that regard, it held that the presentation of the relevant factual and legal context of the main proceedings by the referring court is a response to the requirement of cooperation that is inherent in the preliminary reference mechanism and cannot, in itself, be a breach of either the right to a fair trial or the right to the presumption of innocence guaranteed by the Charter of Fundamental Rights. Furthermore, it recalled that the choice of the most appropriate time to refer a question for a preliminary ruling lies within the exclusive jurisdiction of the referring court. Accordingly, whilst the referring court is to give full effect to the interpretation of EU law provided by the Court of Justice, no provision of EU law prohibits the referring court from altering, after the delivery of the preliminary ruling, its findings in respect of the relevant factual and legal context. Thus, by virtue of EU law, the referring court was both empowered and required to set aside that conflicting provision of Bulgarian law.

In this vein, it is essential for the preliminary ruling procedure to operate as an effective and transparent mechanism that the national court’s order for reference should comply with a series of requirements whose aim is to ensure that the Court of Justice fully understands the questions referred to it by that court, as well the factual background and the national law applicable to the case at hand. To that end, the Court of Justice has reviewed its “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings”. In substance, those recommendations, which are published in the *Official Journal of the European Union* as well as on the website of the Court of Justice, intend to provide national courts and tribunals with all the practical guidance they need in order for the preliminary ruling procedure to

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fulfil its full potential. They are one of the principal tools through which the Court of Justice seeks to put into practice the principle of transparency in its relations with national referring courts.

For example, those recommendations list the essential elements with which an order for reference must comply as provided for by Article 94 of the Court of Justice’s Rules of Procedure, and also indicate the appropriate stage at which a national court should make a reference.

More specifically, the recommendations state that the lodging of a request for a preliminary ruling requires the national court to stay proceedings until the Court of Justice has given its ruling. Since the preliminary ruling procedure is predicated on the stay of national proceedings, it is incumbent upon the referring court to inform the Court of Justice of any procedural matters that may arise after the making of the reference and that may affect the proceedings before the Court of Justice. In particular, it is essential that any discontinuance or withdrawal, amicable settlement or any other event leading to the termination of the national proceedings should be communicated by the referring court immediately. In the same way, the referring court is asked to inform the Court of Justice about appeals brought against the order for reference and, where appropriate, about the outcome of such appeal proceedings.

A referring court should also be aware that the withdrawal of a request for a preliminary ruling may adversely affect the management of similar cases brought by the same court or by other courts. This might happen for instance when the withdrawn case had been selected by the Court of Justice as a pilot case. That is why, where the outcome of a number of cases pending before the referring court depends on the same reply to be given by the Court, it may be appropriate for that court to join those cases either in its request for a preliminary ruling or before making that request. The discontinuance of one case before the referring court will then not lead to the withdrawal of the preliminary procedure.

Moreover, trust-enhancing communication between the Court of Justice and the referring court also requires that the fundamental right to privacy of the persons mentioned in the order for reference is respected. To that end, the recommendations encourage national courts to examine, when drafting that order, whether it is appropriate, or indeed necessary, to anonymise the names of the persons concerned or to protect other personal data. This is the case, for example, where minor children are involved or where a person is affected by particular personal circumstances that are relevant to the case and yet private, such as an illness.

It is true that the national court and the parties to the main proceedings may, after the order for reference is lodged, ask the Court of Justice to anonymise the
names of the persons concerned. It is also true that the Court of Justice may do so on its own motion. However, the national court inevitably knows the factual context of the case before it better than we do and I therefore believe that it is preferable for that court to examine, at the outset, whether anonymising the names of the persons mentioned or omitting any other personal data in the order for reference is appropriate, in the light of the fundamental right to privacy.

This is because Article 23 of the Statute of the Court of Justice states that all orders for reference are notified to the Member States in their respective official languages so that they are able to submit observations on the case if they wish to do so. In that regard, national courts should bear in mind that some Member States already publish orders for reference on their Ministries’ websites shortly after they receive them. For the purposes of protecting the right to privacy effectively, a request made to the Court of Justice by a national court or by a party in the case at hand to anonymise a name or any other personal data may arrive too late, given that those Ministries’ websites may already have made the order in question public.

Moreover, it is worth noting that the Court of Justice is currently in the process of setting up a network with the constitutional and supreme courts of the Member States: the European Union Judicial Network. Within that network, the references for a preliminary ruling from the national courts – both the original and the translations into all the official languages of the EU – will be made available. A search engine will allow the participating courts to verify quickly whether a certain question of interpretation or of validity of EU law is already pending before the Court of Justice. Furthermore the Court of Justice will make available its internal research notes on comparative law and hopes that the constitutional and supreme courts of the Member States will also distribute within the Network their own research notes on national and comparative law.

Transparency in its relations with national courts in general is also one of the main reasons why the Court of Justice makes publicly available a significant amount of information regarding its case law on its website: the Court of Justice’s case law is available online on the CVRIA website in all official languages of the European Union. That website also contains a search engine and a digest of the case law – a systematic collection of the summaries of judgments and orders of the Court of Justice and the General Court. In addition, a list of case notes written by academics from all over Europe and beyond may also be found on the Court’s website. One of the Court of Justice’s objectives in making available this collection of materials is to improve national courts’ knowledge of EU law. Such knowledge gives rise to a virtuous circle. Better knowledge of EU law among national judiciaries enhances the effectiveness of communications between national courts and the Court of Justice,
thus promoting efficient use of the preliminary ruling procedure. The case law produced is then published in all the official languages, thereby perpetuating the cycle of communication, learning, dialogue, reciprocal trust and further communication.

The Court of Justice also seeks to bring EU law closer to European citizens, many of whom are non-lawyers. That is why those cases in which the general public may have a particular interest are summarised in press releases. To the extent possible, the language used in the press release is simplified so as to make it easier for the general public, and the journalists who act as intermediaries in reporting our rulings to the public, to understand what the Court of justice has actually decided. Again, press releases are often published in more than one language so as to make the Court’s case law accessible to a wider audience.

As is the case in many national courts, public access to documents that relate to the Court of Justice’s judicial activities is excluded. It is true that under Article 15 TFEU, the public must have access to the documents of the EU institutions, bodies, offices and agencies, the aim being ‘to promote good governance and ensure the participation of civil society’ (Article 15 (1) TFEU). However, under the same Article, the Court of Justice is subject to this transparency obligation only when exercising its administrative tasks (Article 15 (3) TFEU). The reason for the exclusion of judicial documents lies in the fact that compliance with the principles of equality of arms and the sound administration of justice militate in favour of protecting court proceedings against any form of external interference.

But is this justification still valid if the Court proceedings are no longer pending, i.e. when the Court has already given judgment in the case? The Court of Justice is currently examining that question in the Breyer case which concerns the refusal of the Commission to give Mr Breyer access to the written submissions made by Austria in the context of an already closed infringement action.498

My eminent Czech colleague, Advocate General Michal Bobek, has given an opinion in this case.499 In contrast to internal judicial documents, such as the preliminary report of the reporting judge and the notes for deliberation which cannot be concerned by openness, Advocate General Bobek considers that external judicial documents, such as pleadings submitted by the parties, should, in principle, be accessible.500 The Court of Justice delivered its judgment in this case on 18 July 2017.

500 Ibid, para. 127.
It should however be stressed that there is always full openness in the dialogue with the national referring court. A referring court will receive a copy of all the documents submitted in its case before the Court of Justice.

Finally, the Court also believes that it is important for all EU citizens to feel that the Court of Justice is their Court and that it is open to all. It therefore welcomes thousands of visitors each year: judges, lawyers, and academics as well as students, journalists and pensioners. And for those who do not have the means or the time to come to Luxembourg, the Court of Justice is seeking to make the best possible use of all available new technologies in order to make sure that that message of openness and inclusion becomes a living truth for all EU citizens.
15. The Court of Justice and National Courts: a Transparent Dialogue – Reaction

CATHERINE BARNARD

15.1. Introduction

It is an honour and a privilege to respond to the insightful and constructive comments of the President of the Court of Justice. His argument is clear, simple and important. National courts and the Court of Justice must trust each other. The Article 267 reference procedure is an important means for developing that trust; the resulting judgments are the product of that trust.

I would like to make four observations in response to the President’s remarks under the following headings:

- Constructive dialogue
- Destructive dialogue
- Hesitant dialogue, and
- The end of the dialogue

15.2. Constructive dialogue

When the Article 267 reference procedure works well there is a fruitful and constructive dialogue between national courts and the Court of Justice. If all goes to plan, the national courts frame their questions clearly; the Court of Justice answers those questions with equal clarity, informed by transnational legal arguments and careful comparative research; and then the national courts apply those rulings to the facts of the case. The parties now have an answer to their question. EU Law develops a step further: think *Bosman*,[^501] *P v S*,[^502] *Martinez Sala*.[^503]

In other cases it has been the Court of Justice which has learned from the national courts. Take the example of the evolution of the concepts of indirect discrimination on the grounds of sex. In answer to an early reference from the

UK in the case of *Jenkins v Kingsgate*, the Court of Justice insisted that indirect discrimination had to be intentional before it was unlawful. However, UK law had been clear on the point: the question of intention was not relevant to establishing indirect discrimination. The addition of a requirement of intention would have stymied the progressive understanding and utility of the concept of indirect discrimination. The British courts therefore applied UK law in preference to the Court of Justice ruling. The Court of Justice listened and learned. By the time of *Bilka-Kaufhaus* the Court had abandoned the requirement of intention as a condition for establishing unlawful indirect discrimination. This communication helped create trust: the British courts felt they were being listened to and the jurisprudence of the Court of Justice was enhanced. A win-win.

And when the Court of Justice hands down decisions of importance, it is now much better at communicating them: as the President said, see the curia website, the press releases. The Court is even on twitter. But it could do more to make sure its judgments are heard and understood as widely as possible. The UK Supreme Court has made significant advances in this respect. Not only is it on twitter but it has its own blog service. It televises important cases and it livestreams the hearings. There was meticulous planning for the public coverage of the legal arguments and judgment in *Miller*, the important constitutional case considering whether an Act of Parliament was needed before Article 50 could be triggered. And this transparency gave greater legitimacy to the Supreme Court. Justice was not only being done but also being seen to be done. It was also a direct riposte to the *Daily Mail*, which had earlier described the High Court judges as the enemy of the people. The people could see for themselves whether the Justices were really enemies or merely serious men and women trying to decide difficult matters.

One further point: the ECJ is still not good in distinguishing itself from the Court of Human Rights. Those in Kirchberg know the difference only too well. Those living and working in Koblenz and Krakow might be less clear.

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506 https://curia.europa.eu/
508 @EUCourtPress
509 https://www.supremecourt.uk/
UK this public confusion has been very damaging. One well-known journalist tweeted recently:\(^\text{511}\)

“Don’t care whether Brexit is poached or boiled. We are NOT staying under jurisdiction of ECJ which stops us kicking out jihadists.”

There has clearly been a failure of communication.

**15.3. Destructive dialogue**

In case I was suggesting that everything in the garden is rosy, let me now delve into some darker corners. The Court of Justice does not get it right all the time. As Koen Lenaerts rightly pointed out in his contribution, the legitimacy of CJEU decisions comes from delivering ‘well-reasoned judgments’ that genuinely assist national courts ‘in solving the case at hand’. In the past, some decisions have not satisfied these aspirations, including in some of the best known cases.

Take the momentous decision in *Keck*\(^\text{512}\) which carved out certain types of national legislation from the scrutiny of the CJEU: an important point. Yet the judgment was drafted in such opaque terms. For example, the Court said:

- “Contrary to what has previously been decided” – but then gave no indication of which cases have been overturned;
- “Certain selling arrangements do not breach Article 34” – but did not define the phrase ‘selling arrangements’?

Later attempts at clarification have only added new layers of obfuscation – good news for academics and writers of textbooks, perhaps, but not for the market trader trying to work out what to do when faced with a plethora of national rules.

*Viking*\(^\text{513}\) is another example, the (in)famous case on strike action. In essence, the Court of Justice applied the full force of its market access case law to a strike which was taking place in Finland in accordance with the provisions of Finnish Constitutional law. While views may be divided on the merits of the Court’s intervention in this sensitive area, most people recognise that the Court’s incautious use of the language of proportionality in the case has made

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strike action very difficult indeed, thus undermining the professed benefit of the judgment, namely the first recognition of the right to strike as a fundamental right. The judgment has created difficulties in a number of Member States, especially the UK. It is one of the reasons why British trade unions could not come out fully behind the Remain campaign in the UK’s referendum. It also created mistrust: can the Court protect social rights against the full force of the single market?

Recently the Court of Appeal of England and Wales in *Govia*\(^{514}\) did its level best to circumvent *Viking* by cherry-picking other rules of EU law to undermine the force of the *Viking* judgment. The strike was allowed. But the reputational damage of the Court’s ruling has been done.

### 15.4. Hesitant dialogue

Of course there are good reasons why the Court of Justice does not offer the most perfect, polished judgments. Operating in 23 languages, working in French, delivering only a single judgment, no dissents – and all under considerable time pressure; the arguments are well rehearsed. But it does mean that national courts which have received an answer they do not understand or which goes against national constitutional traditions become wary about making references. There is inevitably a trade-off between, on the one hand, doing the right thing and making a reference and, on the other, the delay in the litigation, the added costs and the chance of getting an answer which is not very useful. Some courts are very reluctant to make references, especially the Supreme Administrative courts where the relationship has been described as one of “living apart together than to a happy marriage between equal partners”. This of course undermines the system. In some cases they refuse to follow the Court of Justice at all.

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Yet for all the criticisms of the preliminary reference procedure, at least it is there, and it works. B+, even A-.

This brings me to my fourth and final point – and, as a British person, one I must make, and that is the end of the dialogue.

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\(^{514}\) Court of Appeal, *Govia v. The Associated Society of Locomotive Engineers* [2016] EWCA (Civ) 1309.
15.5. The end of the dialogue

In little more than 18 months, the UK will be leaving the EU.\textsuperscript{515} There is a chance that the UK will crash out of the talks without a deal. Even with a deal, it is most unlikely that the UK will remain subject to the jurisdiction of the Court of Justice (although there is some concession on citizens’ rights\textsuperscript{516}). This is one of the Prime Minister’s so-called red lines (although quite why she sees so red over the ECJ it is not so clear (has SHE – and her advisors – muddled up the Court of Justice and the Court of Human Rights?))

So British citizens and British businesses will lose access to the Court of Justice and the independent and authoritative view of EU law. It is by no means clear what alternatives may be offered. The importance of having some judicial body to adjudicate on disputes is only recently becoming clear.

And yet, and yet, the Swiss experience is instructive. To avoid divergence with the acquis, Swiss courts apply the aquis pretty faithfully – but without the benefit of a Swiss input – no Swiss judge, no Swiss Advocate General and no strong (common law) voice before the Court.

The dialogue will become a monologue. And the best communication, I would venture to suggest, always involves both talking and listening.

\textsuperscript{515} Respective contribution draws on an oral intervention delivered at the end of June 2017.

\textsuperscript{516} PEERS, Steve <https://twitter.com/JenniferMerode/status/916698299108855808?t=1&cn=Z-mxleGlibGVfcmVjcw%3D%3D&refs=src=1n1i1d=8cda67e7aa8c46ba8b3b046f30262d4d&uid=321256898&n mid=244+272699400>.
The binding effect of decisions of the Court of Justice rendered in the course of the preliminary ruling procedure offers a fascinating example of the functioning of the composite system of European Union law. If we ask who is bound and by what in the preliminary ruling procedure, the answer can differ significantly depending on one’s point of view (who is responding) and the type of response (how he is responding – whether normatively, or pragmatically).

A complete response that would be relevant for national judges will thus comprise two or more layers. The first layer is the normative approach of European Union law: what does EU law and the Court of Justice itself say about the binding effect of its decisions? The second layer is the normative approach of national (constitutional) law: how decisions of the Court of Justice on preliminary references are perceived, and how they are admitted into the national constitutional system by the law of the given Member State, that is, above all, by the case law of its supreme courts? What characteristics or limits are attributed to them? A functional, practical level is linked to this dual normative response: how do one or both systems actually behave compared to what they say they do? Last but not least, beyond the framework of, or in parallel to, major constitutional principles or declarations, whether made on the Union or national levels, what is the everyday reality of the work of the courts of the given Member State?

Metaphorically speaking, each of these layers represents a sort of a transparency sheet in an overhead projector. An one-off glance at one single sheet will never give the full picture: that can only be achieved if all transparency sheets overlap. True, putting this many layers on top of one another may mean a compromise in terms of sharpness. Some parts of the image may not be fully lit. But the image will be complete.

This contribution will focus on the first of these transparency sheets: the binding effect of decisions of the Court of Justice rendered in the preliminary ruling procedure.
ruling procedure for courts of Member States, from the point of view of the Court of Justice and the system of European Union law. In the second part, it will briefly touch the second transparency sheet: that is, what the supreme courts of Member States, and in particular Czech courts, have to say in their case law about the binding effect of the case law of the Court of Justice. The third transparency sheet, capturing actual judicial practice, is fascinating and interesting. Unfortunately, it is also beyond the scope of this brief contribution.

16.1. Two terminological notes

To begin, two terminological notes must be made. First, a frequent problem in discussions about the “(non)binding effect” of case law in the Czech environment, as well as in discourse as to whether there is (already?) precedent-based law in the Czech legal order and whether precedents can be viewed as a source of law, is the considerable lack of clarity of terms.

Since the 1990s, there have been (often passionate) debates as to the interpretation of Article 89 (2) of the Constitution: “enforceable decisions of the Constitutional Court are binding for all bodies and persons.” Far less attention is paid to the question of what this “binding effect” or “precedent-value”, should it be granted, would actually mean in a specific case. The unspoken premise, especially among those denying that case law has normative relevance, was a somewhat exaggerated idea, to the point of caricature, of the binding effect of a precedent. In a sort of bipolar vision that reduces the binding effect of case law to be either “absolutely binding” or “absolutely irrelevant”, the binding effect of case law is being linked to a categorical obligation to automatically follow everything that is stated in a decision. This concept essentially puts an equation mark between a court decision and a legal regulation.

It must, nevertheless, be emphasised that this is not how English precedents work, either; although their normative (precedent) value can be, by comparison, viewed as the strongest ones. And it is definitely not how the case law of supreme courts in the (western) continental legal tradition works. Essentially, the “binding effect” of case law in these continental systems means an obligation to provide due argumentation with respect to it. If a previous decision

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of a supreme court applies to a new case that is being heard by a court, and is therefore central to the decision in the case, the judge should take it into account in the reasoning of his decision. If he does not do so, but his decision is in line with the case law concerned, and, above all, also with applicable legislation which is being interpreted by the case law at hand, his decision can stand from the substantive point of view, even though it does not cite the case law. The entire process is then understandably formed and corrected through standard work with case law, its interpretation, distinguishing, or narrowing, analogy, and so on, depending on the facts of the case.

Essentially, this (continental) concept of binding effect entails a sort of obligation to take the case law into account in good faith, an obligation to deal with it in one’s reasoning. It does not constitute an obligation to blindly follow it. Nor does it imply inalterability. On the contrary, it permits a justifiable discussion which may, ultimately, result in a change in the approach of the supreme court concerned. By rejecting the bipolar understanding of the role of case law, this concept of the binding effect category implies a scale. The scale is related to the term persuasiveness: not all decisions, even those of a superior court, have the same meaning and the same weight.

Secondly, being bound by what, exactly? By a decision or by case law? This distinction requires a second round of definition of terms. We talk about the binding effect of a decision in the context of a specific case. A specific decision (judgment or order) which has taken legal effect is binding in the sense of enforceability and, with exceptions, also in the sense of its inalterability. Hence, it enjoys the authority of an effectively decided matter (res judicata). On the other hand, the binding effect of decisions (plural), for which the term case law is used hereinafter, refers to being bound not only by a specific decision, but by a specific opinion of the court taken in a previously decided case or a series of cases. Being bound by case law is linked to a principle known as following what has been decided (stare decisis).

Being bound by one of the categories, or the inalterability of that category, need not necessarily have any impact on the other category. This fact is evident in the case of a change in a decision vs. a change in case law. A change of a decision means that a certain order or judgment in a specific case is changed. This does not, however, necessarily result in a change to the case law to which the decision contributed, provided it was not the only decision in which a certain opinion of the court was expressed. On the other hand, a change or overturning of case law, that is, a certain approach to the interpretation of a certain substantive issue, will have no impact on earlier effective (and by them hopefully already enforced) decisions in which the given opinion of the court had been held.
This is how the binding effect of case law is understood in the test that follows: as an obligation to appropriately deal in argumentation with an opinion of the court that has been expressed by an authorised judicial body in a relevant manner and that applies to the substance of the new case at hand.

### 16.2. The Union’s point of view

Treaties are silent on the binding nature of decisions of the Court of Justice rendered within the preliminary ruling procedure. Case law of the Court of Justice concerning the binding nature of its own decisions could be characterised as minimalist, limited to the practical problem arising in the particular case, due to which the case law is in fact scant.

The consequence of this cautiousness is rather ironic. After the nearly sixty years in which the preliminary ruling procedure has existed, it can be said with certainty that “the national court to which a judgment is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court’s judgment likewise binds other national courts before which the same problem is raised.” In other words, decisions of the Court of Justice are binding in the proceedings in which the question referred for a preliminary ruling was raised (binding effect *inter partes*), as well as in other proceedings that examine or will examine the same legal issue (binding effect *erga omnes*). Nevertheless, the only source that clearly states this fact, and from which the quote above has been taken, is not the Court of Justice’s case law, but its website (which is purely informational and naturally not binding).

The importance and role that that case law of the Court of Justice plays within the European Union legal order can hardly be overstated. It will not be undue exaggeration to say that without it, there is no EU law, at least in a number of areas. In European Union law, more than in a number of national legal orders, there is a significant difference between legislation (founding treaties and legislation of Union bodies) and judge-made law, which only exists in decisions of the Court of Justice.

Let us take the example of an unimplemented directive: let us presume a situation when a Member State fails to implement in a timely fashion a directive

521 Article 266 TFEU only stipulates that, with a view to a decision of the Court of Justice rendered on the basis of an action for annulment or action for failure to act that: “The institution or another entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.”

from which an individual (i.e., a natural or a legal person) could benefit in some way. What can this person do? On the basis of “written” law, i.e., without the use of legal rules formed by the case law of the Court of Justice, there would be only one option: to beg the Commission to initiate proceedings against the given Member State concerning a breach of the Treaty pursuant to Article 258 TFEU. If, several years later, the Member State were indeed found guilty of a breach of the Treaty, nothing would change in the legal situation of the individual: the judgment of the Court of Justice would only note that Member State X has breached its obligation arising from the Treaty.

Now let us compare this situation to what an individual can do (exclusively) on the basis of the case law of the Court of Justice: above all, due to the direct effect of directives and once the implementation period for the particular directive has expired, an individual may claim his rights directly flowing from the directive before the courts of the Member State concerned. Directly effective rights shall take priority over the application of national legislation. If the provisions of the given directive do not enjoy direct effect, the directive concerned can be used as an argument for an indirect effect, i.e., the existence of an obligation of conform interpretation of national legal provisions by a court of the Member State, if there is such a provision. If this is of no avail, either, he can sue the Member State for damages. All actions of an individual before the court of the Member State are underpinned by the principle of primacy of EU law mentioned above and the requirement of effective protection of an


524 Which is not at all guaranteed, as the Commission proceeds diplomatically in the proceedings and is prepared to settle if the remedy of the shortcomings is ensured.


528 Court of Justice of the European Union, judgment of the Court of Justice of 15 July 1964, Costa, 6/64, EU:C:1964:66.
individual’s Union rights. Nevertheless, all of the procedural instruments described in this paragraph are products of the Court of Justice’s case law.

In its case law to date, the Court of Justice has only confirmed that the specific national court which referred an issue to the Court of Justice for a preliminary ruling is bound by the specific decision of the Court of Justice in the given case. In this case, it is only an *inter partes* type of binding effect – within the specific proceedings – which flows from the very nature of the preliminary ruling procedure: the specific court of the Member State which referred the issue is then bound by the response of the Court of Justice in subsequent proceedings.

Beyond the scope of a specific case, the Court of Justice has only confirmed in its case law the binding effect of its decisions pertaining to the validity of the Union’s measure and essentially only indirectly. In a preliminary ruling procedure, a national court may not only inquire about an interpretation of European Union law, but also question the validity of an EU law measure. If it does so and if the Court of Justice declares the act of European Union law invalid, then, as the Court of Justice noted in its decision in the ICC case: “[…] although a judgment of the Court given under Article 177 [today Article 267 TFEU – author’s note], declaring an act of an institution to be void […] is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give.”

Nevertheless, the Court of Justice has yet to explicitly confirm the general binding effect of its decisions pertaining to the interpretation of European Union law, which in reality means most judgments issued in the course of preliminary ruling procedures. The binding nature of the case law of the Court of Justice rendered in a preliminary ruling procedure for national courts dealing with the same legal issue can, however, be inferred using two methods: firstly, systemically, and secondly, pragmatically.

There are two types of systemic reasons for the binding effect of case law: those inherent in any system of law and those proper to the legal order of the Union. General reasons for the binding effect of decisions of the Court of Justice for national courts are the same as those reasons for which national judicial

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systems attribute normative relevance to the case law of their own superior courts. It can be inferred from general principles, such as equality before the law, predictability of court decisions, legitimate expectations of subjects of regulation, etc.\textsuperscript{532}

On the general, systemic level, these reasons are supplemented with arguments specific to the European Union’s legal order: for what purpose and why was the Court of Justice established, and what is its role, and why the preliminary ruling procedure mechanism was set up by the Treaties? It was probably not in order for the Court of Justice to issue non-binding consultations. Logically, some sort of normative relevance of the Court of Justice’s decisions should be characteristic for the system.\textsuperscript{533}

Beyond systemic arguments, there are also \textit{pragmatic}, almost down-to-earth reasons. The fact that the case law of the Court of Justice is indeed binding for national courts can also be inferred indirectly, and somewhat unpoetically, from a series of sanctions that may follow if a national court does not follow the case law of the Court of Justice.

There are two groups of sanctions for not respecting the case law of the Court of Justice: those set by the Member State itself, and those set by the EU law. The first group includes a common national system of checks on the correctness of judicial decision-making. Given that European Union law has become a component of the Czech legal order, incorrect application of EU law means, in effect, that the court’s decision was not in line with the law or even unconstitutional. For that reason, incorrect application of EU law may be the subject of regular and extraordinary appeals, in the same way as the incorrect application of Czech laws and other legal acts.\textsuperscript{534}

And finally, the Court of Justice’s case law also has, over time, articulated or confirmed many adverse consequences that a failure to respect the Court’s case law may have with respect to the national decision or the Member State as such. Let us mention five of those for illustration:

1/ The possibility of initiating proceedings for a breach of the Treaty against the Member State whose court, deciding as the court of last instance, incorrectly applied previous case law of the Court of Justice, without deeming it necessary to raise a preliminary reference;\textsuperscript{535}

\textsuperscript{532} For more see BOBEK and KÜHN, supra n 518, p. 23–36.


\textsuperscript{535} Court of Justice of the European Union, judgment of the Court of Justice of 12 November 2009, \textit{Commission v. Spain}, C154/08, EU:C:2009:695, as well as: Court of Justice of the
2/ The possibility to re-open the proceedings before an administrative authority, if a national court, deciding as the court of last instance, failed to respect the Court of Justice’s case law or failed to refer a question to the Court of Justice in a preliminary ruling procedure;  

3/ Compensation for damage caused to an individual due to a failure to respect the Court of Justice’s case law and/or a failure of the court deciding as the court of last instance to raise a preliminary reference;  

4/ A lower court of a Member State is not bound by an opinion of the court of a higher court if that opinion runs contrary to prior case law of the Court of Justice;  

5/ And finally, if a preliminary reference submitted to the Court of Justice raises a question that has already been adjudicated, the Court of Justice shall not decide by judgment, but rather, shall only refer to existing case law by a reasoned order.  

To sum it all up, decisions of the Court of Justice are probably the closest to actual “precedents” in the contemporary Czech legal system, although only de facto and in a somewhat concealed manner. Even an individual decision of the Court of Justice, if it applies to a new case heard before a court, is binding for any court in any Member State. In this regard, one can but agree with the conclusions drawn some time ago by Lord Slynn: “The Court may never refer to stare decisis or the doctrine of precedent, or be strictly bound by its own decisions, yet in general it clearly does follow them. […] There are passages in the judgments where the weight and number of the previous decisions seem almost to be felt to be such as to make them binding in fact, if not in theory.” Or perhaps in the words of another classic, this time a Czech one: “We can carry on disputing it, we can disagree with it, but that is about all that can be done against it.”

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539 Article 99 of the Rules of Procedure of the Court of Justice.


541 Jára Cimrman ležící, spící (director L. Smoljak, Czechoslovakia 1983).
In conclusion, it is apt to emphasise, returning to the concept of binding effect outlined above, that the binding effect of case law, just like that of the case law of the Court of Justice, does not constitute a blind obligation to follow, but an obligation to deal with the relevant case law in one’s reasoning. The preliminary ruling procedure system is, perhaps more so than the hierarchical system of national judicial systems, based on dialogue. That means, among other things, the possibility to ask again, and also the possibility of expressing qualified disagreement. In that case, however, the national court that is again asking about a matter once adjudicated, must explain in detail and convincingly why the Court of Justice should undertake to revisit its case law.

16.3. The national point of view

The fact that the Court of Justice has never generally set down the binding effect of its decisions for national courts may, on the one hand, be seen as a shortcoming or gap. But it can just as well be seen as a reasonable and diplomatic restraint that is not harmful at the final stage of acceptance of the binding effect of the Court’s case law by national courts. On the contrary, it leaves room for a kind of organic assimilation: courts of Member States then usually start to work with the Court’s case law as they would with the case law of their own supreme or constitutional court.

There are advantages and disadvantages to such an approach. The advantages undoubtedly include simplicity of approach. Judges of a Member State simply extend the procedures with which they are familiar to the case law of the Court of Justice. They do not need to reinvent the wheel, to learn new things. This sort of integration is easy.

Disadvantages and pitfalls may be of three types. First, there will necessarily be differences between Member States. A Czech judge will, by definition, understand the case law of the Czech Supreme Court differently to his Greek, Finnish, or Irish colleagues and work differently with the case law of the superior courts of their particular countries. Second, the extension of national customs also means an extension of bad national habits. In the Czech context, we can definitely mention the issue of headnotes and their elevation to the level of legal provisions, casuistic positivism in approaching case law, interpolation out of context, and various case law collages, as well as vagueness in references.

543 For more see BOBEK and KÜHN, supra n 518, p. 185–196.
Third, a similar type of assimilation will also result in a sub-conscious or explicit effect of comparison: a national judge will expect to some extent that the “output” of the Court of Justice will be similar to the output of the superior national court. If it is not the case, a comparison is likely to be made. In exceptional cases, this comparison may operate to emphasise the virtues of the style of the rationale and comprehensibility of the decision of the Court of Justice.544 More frequently, however, this will involve situations in which the style of the Court of Justice’s decision-making will be criticised for not having certain features that can be found in the decisions and decision-making of superior courts of the given Member State.545

On the normative level, the national effects of the case law of the Court of Justice within a Member State are sometimes (usually marginally) mentioned in a constitutional analysis of the greater issue of the effects and operation of European Union law on the national level in general. From the point of view of national law, the Court’s case law is usually classified as a secondary act of law, i.e., law created and issued by bodies of the Union. By joining the EU, an EU Member State agrees to adhere to a whole “package” of commitments related to membership, including adherence to primary law (Union treaties) and secondary law (acts of Union institutions). Debates about the binding effect of European Union law on the national level usually focus on the method of transferring national powers to the Union (in the Czech context, it is a debate on Article 10 vs. Article 10a of the Constitution, potentially in conjunction with Article 1 (2) of the Constitution, and its limits (in the Czech context, this means “material particulars of substantive rule of law” as the limits on the potential transfer).

How and to what extent the case law of the Court of Justice actually binds the courts of any given Member State is usually not the subject of separate analyses. In this regard, national constitutional or supreme courts usually point to the fact that European Union law determines its national effects itself. If it


545 In this context, we can mention the example of English courts and authors from the common law tradition who complain of a lack of openness and discursiveness in the case law of the Court of Justice, whereby the Court would not only communicate the outcome of its thoughts, but elucidate in detail how it arrived at it, and also which routes it did not take. That is why authors from that tradition prefer opinions of Advocates General, as they usually better comply with the method of giving rationale, to which they are accustomed. For an expression of this cultural preference, see e.g., judgment of the Supreme Court of the United Kingdom of 22 January 2014 in case HS2 Action Alliance Limited [2014] UKSC 3, paragraphs 175–189.
remains within the framework of the powers entrusted to the Union, such effects should also be granted nationally.546

Such a renvoi to European Union law, which itself determines how it will operate within the framework of legal orders of individual Member States, has, nevertheless, only partial informative value as concerns the binding effect of the case law of the Court of Justice. Naturally, it applies to fundamental principles of national application of EU law, such as direct effect, priority of EU law, etc. But as has been said above, there is no case law of the Court of Justice examining its binding effect in detail. On the general level, the Court of Justice has never said that its decisions should be binding generally.

It seems that both civil and criminal Czech courts as well as administrative courts generally accept the binding effect of the case law of the Court of Justice without feeling the need to carry on legal-theory debates on the matter. A parallel to the effects of judgements of the Constitutional Court has been generally made concerning the binding effect. If there are any discussions about the consequences of such binding effect, they are specific issues, such as about the extent to which a national judge is obliged to know this case law and take it into account, even without a motion from the parties to the proceedings, or about the issue of its temporal effects.547

The fact that the binding effect of the case law of the Court of Justice is not usually openly questioned548 does not, however, say much about how it is actually reflected and applied by national courts. This takes us to the last transparency that we mentioned earlier: the everyday reality at (primarily lower) national courts, which remains terra incognita. In many Member States,549

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546 Cf. e.g., judgment in Sugar quotas III (Constitutional Court, judgment of 8 March 2006, file no. Pl. ÚS 50/04 (N 50/40 SbNU 443; No. 154/2006 Coll.), in which the Constitutional Court noted that one of the manifestations of a restriction on the powers of national authorities in favour of Union authorities is the restriction of Member States’ freedom to determine the national effects of community law.

547 See e.g., Supreme Administrative Court, judgment of 18 June 2009, ref. no. 8 As 33/2009-56, No. 1908/2009 Coll. SAC or judgment of 18 June 2008, ref. no. 1 As 21/2008-109, No. 1678/2008 Coll. SAC.

548 It is probably open to debate where, a few years after it was rendered, we should place the CC’s judgment of 31 January 2012 Pl. ÚS 5/12 (N 24/64 SbNU 237). The contribution of BOBEK, Michal. “Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Judgments Procedure”. Vol. 10, No. 54 EUConst 2014 argued that the importance of the judgment should not be overrated in the long-term. It is surprising that the database of judgments of the Constitutional Court (NALUS) seems to be of a similar opinion, because in the result of a search for this judgment, the section “importance” only shows decision no. 2, but not 1 (which is surprising for such a fundamental plenum judgment of the Constitutional Court which spoke quite forcefully about the relationship of Union law to national law).

just as in the Czech Republic, there are studies of the approach of superior national courts, typically constitutional courts, and their “grands arrêts” that speak primarily of relations between Union and national law, constitutional foundations, and limits on European integration. Our awareness of the actual life of European Union law and the (not) taking of the judgments of the Court of Justice into account by general national courts unfortunately remains scarce or non-existent.

16.4. Conclusion

The elegance and uniqueness of the Union’s judiciary, just like the Union itself, lie in their high level of functionality, although certain fundamental constitutional issues that we see as key in national legal orders have not been conclusively resolved. Without having to have it laid down explicitly, as to who has the last word, who has a larger stamp, or why and how decisions of the Court of Justice must be systemically binding for courts of Member States, the entire system has been working – at least to the extent of what we know, with a view to the third transparency sheet mentioned above – surprisingly well for over sixty years.

Each transparency sheet in the overhead projector can have slightly different marker on it. It has been, and it will continue to always be necessary for each transparency sheet to understand that they go with the same overhead project. For the future, we can but wish for reliable and comprehensible transparencies, strong lamps, and an absence of outages (of power and other things, as well). The user of a projector is usually not interested in hearing which transparency sheet has a problem or which lamp has failed: he is simply and understandably bothered that the equipment does not project any light.


551 The more valuable is the insight brought with respect to the Czech Republic by BONČKOVA, Helena and ŽONDRA, Milan. Souhrnná zpráva o rozhodovací praxi českých civilních soudů v případech s evropským prvkem (2004–2008). Brno: Supreme Court, 2010.
17. Two Aspects of the Binding Effect of Decisions of Union Courts, in Particular the General Court of the CJEU

IRENA PELIKÁNOVÁ

EU law is a legal order which boasts a number of specific traits not found in legal systems of its Member States. These traits are at the root of peculiarities in the operation of the Court of Justice of the EU. This contribution focuses on the issue of the binding effect of judgments in direct actions as related to the addressees of the decision, the concept of legal effect in Union case law, and also the understanding of the binding effect of judgments within the Union court system.

By binding effect of court decisions, in this article I mean their law-forming effects in relation to their addressees and any other persons. I will restrict myself to examining what is known as direct action. The term direct action has been established differently in different contexts. In EU law, direct actions include, in particular, actions for annulment, actions pursuant to the jurisdiction clause, and actions for damages. The term does not include preliminary references, which may serve as a negative definition of direct actions.

When considering the binding effect of court decisions, we examine their impact on the subjective rights and obligations of persons. In this regard, we must also take into account its relation to the term legal effect and obstacles in terms of matters already dealt with by an effective decision (res iudicata).

By binding effect in the second sense, I understand effects of a decision with respect to objective law. I mean the impact of the decision on the articulation of legal rules and, consequently, on the decision-making of other courts in more or less similar cases, i.e., the formation of a legal basis for further case law. I refer to this type of binding effect as inward binding effect, operating inside the judicial system, although there is no doubt that this “binding effect” is incomplete in European Union law. It has to do with a court being bound by its own case law or by the case law of a higher court. In the Union context, there is some overlap between the two, given the relatively loose concept of the scope of legal effect of a decision. Below, I will treat both aspects with a view to the specific issue of the decision-making of the Court of Justice of the EU.

552 The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the author.
17.1. Outward binding effect of the decisions of the Court of Justice of the EU and formulation of the operative part of a decision

17.1.1. Direct action

17.1.1.1. Judgments taken pursuant to Article 266 TFEU

A decision of the General Court and of the Court of Justice (hereinafter referred to as CJ) on a direct action binds the addressees of the operative part of the decision (the parties to the dispute), that is, natural persons or legal entities on the one hand and European institutions on the other. An issue that I will leave aside in this paper is the binding effect of decisions with respect to Member States.

The binding effect of a judgment in relation to European institutions is regulated by Article 266 (1) TFEU: “The institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.”

This Article, which only applies to judgments whereby the challenged act has been declared void, or whose failure to act has been declared contrary to the law (Articles 263 and 265 TFEU), does not apply to actions submitted under Article 272 (jurisdiction clause) or to actions for compensation for damages (Article 268). It does not state that the judgment changes the legal position of the addressee, that he acquired new rights or obligations, or that his existing rights or obligations have changed or ceased, but on the basis of this (implicit) consequence, it proceeds to impose an obligation to carry out the judgment on the institution which did not succeed in the matter. It could be said that this is an “asymmetrical” provision, as it in no way deals with a situation in which the other party, an individual or legal entity, fails to succeed in the matter. This, too, points to the fact that this regulation is to serve as protection for those entities. Article 266 TFEU obliges the addressee – an institution – to conform to the judgment and to actively behave in line with it. It does not mean execution of the decision in terms of enforcement – this consequence is governed by Articles 280553 and 299 TFEU.

Article 266 (1) has, however, serious procedural consequences for the court as well as for the parties to the dispute. Case law uses this article as the basis

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553 Article 280 TFEU states: “The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.”
of the rule that, in the operative part of its decision, the CJ cannot formulate a specific order for an EU institution. This is related to a procedural aspect that the petitioners often do not realise – that is, that a petition asking the court to order a European institution to do something is inadmissible. If the petition is formulated such that it only contains the requirement that a European institution be ordered to do something, such an omission may render the entire action inadmissible. If such a request is only one of the points of the petition, only that point will be inadmissible. For the court, the consequence of the regulation is a significant restriction on how it can formulate the operative part of its decision, because in that decision an action may only be dismissed or the challenged act struck down in full or in part.

Hence, it follows from Article 266 TFEU that every European institution is obliged to derive the requisite consequences from a decision itself. Such consequences may, however, be more far-reaching that would concern the specific case in a narrow sense, as case law confirms. An institution will, on the one hand, consider how to replace the defective act pertaining to a specific person, and on the other, it will examine whether the judgment has any impact on other acts, either those that have already been adopted or those that will be adopted in the future. In this sense, the issue of the binding effect of judgments comes close to the issue of binding effect in the other sense examined herein.

An essential component of this concept is case law stating that (unlike in Czech law554), legal effect is assumed not only by the operative part of a judgment, but also by the grounds of the judgment555. The operative part is clearly limited to the subject of the dispute – for example, it annuls the contested act, whereas the grounds given for the judgment may be interpreted in a broader sense. For example, the contested act is annulled, because in drafting it, the institution breached the right of defense to the addressee. It follows that any other act of the institution could be annulled for the same reason, which is why the institution is required to modify its internal procedures and generally to make it possible for the addressee of the decision being drafted, to state its positions.

The scope of the binding effect of a judgment has not escaped attention in case law. The broad concept of legal effect, as well as the text of Article 266 TFEU, leaves the institution relatively wide discretion. An administrative authority must choose the measures whereby it will execute the annulling judgment. The grounds allow the Court to identify those provisions of the annulled decisions which run contrary to the law and identify wherein lies their

555 Court of Justice of the European Union, judgment of the General Court of 5 September 2014, T-471/11, Odile Jacob, paragraph 56 and case law cited herein.
unlawfulness. The CJ also emphasizes the principle of institutional balance, which prevents it from assuming the role of a lawgiver. An excessively loose concept of the scope of the grounds of a judgment could violate that principle. Hence, legal effect only applies to those legal and factual elements that were subject to decision in the operative part of the judgment, i.e., it does not include the obiter dictum.

The drawing of consequences is not always simple and clear. Quite often, for example, the Commission adopts a new decision after the General Court has annulled its decision, without waiting for an appeal to be submitted or ruled on. At other times, the Commission revokes other decisions that suffer from the same defect as the annulled decision.

In exceptional cases, the newly adopted decision may have a retroactive effect. Two conditions must be met – it must be required for attaining the objective pursued by the decision and the legitimate expectations of the parties must be sufficiently respected. In the case at hand, the Commission adopted a new decision effective as at the date of the adoption of the previous (annulled) decision following the annulment of its decision by the General Court. On appeal, the CJ confirmed the affirming decision of the General Court pertaining to this method of execution of the judgment.

17.1.1.2. Scope of the binding effect of a judgment and legal effect

A newly adopted administrative act must be based on the actual legislation at the time of the enactment of the previous act, but the reasons for adopting the decision may differ. When issuing a new act, the administrative authority must therefore again review all the circumstances of the case. The authority that adopted the annulled act may adopt a new decision. A judgment may not result solely in the adoption of a new act, but also of another measure, for example, compensation for damages (Asteris, McBride).

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558 Court of Justice of the European Union, judgment of the Court of Justice of 28 January 2016, C-514/14, Editions Odile Jacob, paragraph 50.

559 Court of Justice of the European Union, judgment of the General Court of 5 September 2014, T-471/11, Odile Jacob, paragraph 125; judgment of the Court of Justice of 6 March 2003, C-41/00 P, Interporc/Commission, paragraphs 28 to 32.
In the *Asteris* decision, the Hellenic Republic did not seek issuance of a new decision in the place of the annulled one. The decision was indeed issued and was not questioned in any way, but the petitioner demanded that the Commission take the judgment into account in the modification of other acts (prior and newer regulations) that were not annulled or contested by the action (paragraphs 22 and 23). In this regard, the action was one challenging the Commission’s inactivity. The CJ agreed with the petitioner and declared the obligation of the Commission to remedy, in executing the judgment, the unlawful state, both in relation to newer acts, but also in relation to older ones (paragraph 29, 30).

A related issue was addressed in the recent *McBride* case\(^{560}\). In paragraph 38 of the decision, the CJ states that a judgment annulling an administrative act cannot constitute the basis of competence for an authority, if that basis has, in the meantime, been repealed, and not substituted. It rejected a broad interpretation of the *Asteris* decision, from which it flows that after the annulment, the Commission must adopt a new regulation remedying the illegality found, but also eliminate that illegality for the future. According to the CJ, in *Asteris*, the Court did not rule on the issue of the legal basis giving the Commission competence to decide. It thereby made the Asteris decision more specific, by stating that Article 266 TFEU is not a provision giving rise to the competence of the Commission to adopt decisions that would exist autonomously and independently of the legislative embodiment of the authority to issue an administrative decision. If the Commission has lost that competence in the meantime, it cannot adopt a new act to execute the judgment (*McBride*, paragraphs 38 to 41), and a judge cannot establish that competence by a judgment, either.

The term legal effect is traditionally understood in two ways: as the impossibility to challenge a decision with appeal (formal) and, at the same time, the ability of a judgment to cause legal effects in the sphere of the persons to which it is addressed (substantive). In this country, we sometimes encounter the adjectives absolute or relative legal effect. According to this concept, relative legal effect is legal effect in relation to a specific party with respect to which the period for lodging an appeal has expired, and absolute legal effect is if that period has expired for everyone, including the last party.\(^{561}\) The concept in European Union law is different. In Czech law, the obstacle of a *rei judicatae*

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\(^{560}\) Court of Justice of the European Union, judgment of the Court of Justice of 14 June 2016, C-361/14, *Mc Bride*, paragraphs 38 to 41.

is linked to an identical subject-matter and identical parties to the proceedings. The Union’s approach is far more flexible, although it is seemingly quite similar to ours, also requiring agreement in terms of the subject-matter, parties, and arguments.

The Judgment in case P&O European Ferries\textsuperscript{562} defines a broad understanding of the effects of a court decision, using the term “absolute effect”.

The issue addressed in the judgment pertained to the relationship to the judgment in BAI/Commission\textsuperscript{563}, whereby the former Court of First Instance annulled the Commission’s decisions stating that performance for the benefit of European Ferries did not constitute State aid. On the basis of that judgment, which was not appealed and became effective, the Commission adopted a new decision, according to which it constituted State aid incompatible with the common market. The decision was challenged by an action\textsuperscript{564} (T-116/01) filed by Diputación (one of the providers of aid) and by P&O (a beneficiary receiving the aid). Hence, the contested decision was not identical to that which was the subject in BAI, and indeed resulted in the opposite conclusion. In new proceedings (P&O European Ferries), the Commission challenged as inadmissible plea in law aimed against the qualification of state aid, due to an obstacle of a matter already judged (force of res judicata) by the BAI judgment. As we can see, the situation is rather complex, because the contested act is not identical, but it pertains to the same aid on which the Court had already ruled. A fundamental issue would arise if we launched into a new examination of the issue, with the potential of reaching the opposite outcome.

The Court of First Instance dismissed the objection of the inadmissibility of the plea in law of a breach of the former Article 87 (1) EC, due to the BAI judgment being effective, stating as the grounds that the conditions required by case law for the occurrence of the obstacle of res judicata (paragraphs 79 to 81) have not been met.

The judgment was appealed by both applicants. The CJ\textsuperscript{565} The CJ dismissed the appeals, but assessed the issue of legal effect differently.

\textsuperscript{562} Court of Justice of the European Union, judgment of the Court of Justice of 1 June 2006, C442/03 P et C471/03, P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya/Commission, paragraphs 43, 44 and 47 case law cited therein

\textsuperscript{563} Court of Justice of the European Union, judgment of the General Court of 28 January 1999, T-14/96, BAI/Commission.

\textsuperscript{564} Court of Justice of the European Union, judgment of the General Court of 5 August 2003, T-116/01.

\textsuperscript{565} Court of Justice of the European Union, judgment of the Court of Justice of 1 June 2006, joined proceedings C442/03 P et C471/03, P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya/Commission.
The Court of First Instance used as argument an obstacle of res judicata: “It is well-established case-law that the force of res judicata attaching to a judgment can constitute a bar to the admissibility of an action if the action which gave rise to the judgment in question was between the same parties, had the same subject-matter and was founded on the same grounds.”\textsuperscript{566}

Advocate General Tizzano attempted to explain the problem in his Opinion. He admitted that the case law indeed existed and applied. Let us add that this is not in contravention of our concept of identical matters and of \textit{rei judicatae}, although we do not mention the third conditions, of matters being based on the same grounds. For the second time, we have encountered a different evaluation of the importance of grounds in European Union law, which clearly grants them far greater weight than Czech law. Advocate General Tizzano also admits that, in the dispute at hand, the parties are different than those in the BAI case, and also the act contested is not identical (paragraph 62 of the Opinion). In spite of recognizing that the bodies appearing in the two proceedings are different, he relativizes that difference without a deeper analysis, because in the first proceedings (\textit{BAI}) it was the Spanish state that defended public interests as an intervener supporting the Commission, and in the other proceedings Diputación also defended public interests (paragraph 69). Then he switches to the second condition, that the subject of the proceedings being identical. He interprets the term “same subject-matter” (paragraph 71) not as consisting of the petitions being formally identical, but as the points of law being identical. In his argument, he uses case law that states that it is not only the operative part of the judgment that is binding, but also the grounds for the judgment. Furthermore, he states that after the BAI judgment, the Commission initiated formal proceedings on aid, taking into account new facts submitted by the parties. Hence, the Court of First Instance correctly reviewed the new decision (paragraph 78 of the Opinion), and correctly recognized the argument as admissible.

In this part of the Opinion, we can see a certain intermingling of the term subject matter of proceedings, seen as the determination of the contested act, and the issue of grounds. The Advocate General explicitly invokes case law, ruling not only on the binding force of the operative part of the judgment, but also of the grounds, thereby combining both issues. However this means that the Advocate General in this case did not consider the BAI judgment constituted an obstacle to the admissibility of a new application due to the fact that it had

\textsuperscript{566} Judgement of the Court of first Instance, P & O European Ferries (Vizcaya) SA, in joined cases T-116/01 and T-118/01, paragraph 77 and quoted jurisprudence: Judgments of the Court of Justice of 19 September 1985, \textit{Hoogovens Groep}, joined cases 172/83 and 226/83, Recueil, p. 2831, paragraph 9, and of 22 September 1988, \textit{France/Parliament}, joined cases 358/85 and 51/86, Recueil, p. 4821, paragraph 12.
already taken legal effect. He found the Court of First Instance was correct on the need to review new facts, which would presume the adoption of a new decision, and by the requirement of not denying legal protection (paragraphs 76 to 78 of the opinion).

In the judgment, however, the CJ spoke clearly and, in particular in paragraph 40, departed from the Opinion of its Advocate General, when it stated that the Court of First Instance mistook the scope of the force of res judicata in the BAI/Commission judgment. Paragraph 50 of the judgment states that the Court of First Instance “could not re-examine the pleas alleging that the aid at issue did not amount to State aid”, and in this regard, breached the absolute effect of its previous judgment. In paragraph 41, it constructs the term absolute effect, which is related not only to a broadly conceived agreement in the subject-matter, but also in relation to the entities concerned:

“… the BAI v Commission judgment did not only have relative authority preventing merely new actions from being brought with the same subject-matter, between the same parties and based on the same grounds. That judgment was invested with the force of res judicata with absolute effect and prevented legal questions which it had already settled from being referred to the Court of First Instance for re-examination.” In paragraph 43, the Court of Justice carries on: “That annulment led retroactively to the disappearance of the decision of 7 June 1995 with regard to all persons. An annulling judgment of that nature thus has authority erga omnes, which gives it the force of res judicata with absolute effect.”

Absolute effect is, according to the CJ, a matter of public order and may be reviewed ex officio. Hence, the General Court had committed a legal error, which does not, however, concern the operative part of the judgment. The relevant arguments should not have been examined due to their inadmissibility.

The theory of absolute effect is applied to other areas of the jurisdiction of Union courts. As an example, we can give the issue of the freezing of funds of certain persons on the basis of a Council decision. Paragraphs 44 to 53 of the judgment in Ocean Capital pertaining to the deletion of the entry from the list of entities subject to restrictive measures apply the judgment in P&O European Ferries. The theory of absolute effect is used here in a situation when IRISL subsidiaries are the applicants, seeking the deletion of the entry of IRISL from

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567 Court of Justice of the European Union, judgment of the General Court of 22 January 2015, T-420/11 and 56/12, Ocean Capital, paragraphs 44 to 53.
the list of entities frozen by the judgment IRISL/Council\textsuperscript{568}. The General Court notes that the decision is fully effective and the issue of the entry of IRISL cannot be re-examined by the court. At the same time, it also states that the legality of those decisions which had not been questioned by the judgment, as it was not contested by the applicants due to an absence of an adaptation of their claims, can be subject to examination. The General Court continues by saying that that these decisions not previously contested retained the entry of IRISL subject to the same circumstances as those examined by judgment T-489/10. On the basis of that consideration, it concludes that the reasons for judgment T-489/10 must be related to these uncontroverted decisions and that an action seeking their annulment is therefore admissible. IRISL could not be registered due to reasons which the court declared unlawful, and the entry of subsidiaries which were only entered due to being controlled by IRISL, is unlawful (paragraph 66 of the Ocean Capital judgment).

In this case, the General Court again applied the doctrine of absolute legal effect in a situation very different from that in P\&O European Ferries.

A similar situation may be repeated in T-332/15 Ocean Capital Administration and others, where only companies controlled by IRISL, and entered solely due to being controlled by IRISL, submit the action, where the entry of IRISL was confirmed by a judgment in joined cases T-14/14 and T-87/14. Given that the decision has been appealed (C-225/17), case T-332/15 cannot be decided until the CJ decides.

Case law has, however, to some extent drawn a certain boundary around the term absolute legal effect. In Commission v. AssiDomän Kraft Products and others,\textsuperscript{569} the Commission objected that the Court of First Instance took too broad a view of the binding effect of a judgment when it asked the Commission to re-examine its decision and return fines, even to those Swedish companies that did not challenge the administrative decision on imposing a sanction for acting as a cartel, which was annulled by the CJ, by an application. The CJ accepted the argument. The Court of First Instance based its decision on the Asteris judgment, arguing also by the principle of equality. Although both levels of Union courts argued that they characterize their decision to impose a fine for acting as a cartel as a bundle of individual decisions pertaining to their respective addressees, the outcomes of their argumentation are not identical. According to the Court of First Instance, the Commission should have re-examined its decision in the light of the annulling judgment; according to the CJ, the list of entities frozen by the judgment IRISL/Council\textsuperscript{568}. The General Court notes that the decision is fully effective and the issue of the entry of IRISL cannot be re-examined by the court. At the same time, it also states that the legality of those decisions which had not been questioned by the judgment, as it was not contested by the applicants due to an absence of an adaptation of their claims, can be subject to examination. The General Court continues by saying that that these decisions not previously contested retained the entry of IRISL subject to the same circumstances as those examined by judgment T-489/10. On the basis of that consideration, it concludes that the reasons for judgment T-489/10 must be related to these uncontroverted decisions and that an action seeking their annulment is therefore admissible. IRISL could not be registered due to reasons which the court declared unlawful, and the entry of subsidiaries which were only entered due to being controlled by IRISL, is unlawful (paragraph 66 of the Ocean Capital judgment).

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In this case, the General Court again applied the doctrine of absolute legal effect in a situation very different from that in P\&O European Ferries.

A similar situation may be repeated in T-332/15 Ocean Capital Administration and others, where only companies controlled by IRISL, and entered solely due to being controlled by IRISL, submit the action, where the entry of IRISL was confirmed by a judgment in joined cases T-14/14 and T-87/14. Given that the decision has been appealed (C-225/17), case T-332/15 cannot be decided until the CJ decides.

Case law has, however, to some extent drawn a certain boundary around the term absolute legal effect. In Commission v. AssiDomän Kraft Products and others,\textsuperscript{569} the Commission objected that the Court of First Instance took too broad a view of the binding effect of a judgment when it asked the Commission to re-examine its decision and return fines, even to those Swedish companies that did not challenge the administrative decision on imposing a sanction for acting as a cartel, which was annulled by the CJ, by an application. The CJ accepted the argument. The Court of First Instance based its decision on the Asteris judgment, arguing also by the principle of equality. Although both levels of Union courts argued that they characterize their decision to impose a fine for acting as a cartel as a bundle of individual decisions pertaining to their respective addressees, the outcomes of their argumentation are not identical. According to the Court of First Instance, the Commission should have re-examined its decision in the light of the annulling judgment; according to the CJ,
it did not have that obligation. The CJ argues that, in the event of the annulment of an administrative decision, the judgment is only effective with respect to those companies that contested the administrative decision. It places the greatest emphasis on the fact that with respect to those companies, the deadline for the submission of an action has passed in vain, and in the interest of legal certainty, they have lost the opportunity to seek a change in the decision in relation to them. In its judgment, the CJ strives to distinguish situations it addressed in certain of its other decisions, in particular in *Asteris* and *S.N.U.P.A.T.*570, thereby defending this solution. Hence, the doctrine of absolute legal effect with an *erga omnes* effect was not applied here.

The Advocate General analysed the case in greater depth. In particular, he examined the question as to whether the Commission had the right, or even the obligation, to change the decision vis-à-vis those companies. He is, above all, opposed to the automatic conclusion that the General Court infers from the principle of equality and good governance, according to which the Commission itself should have applied the decision even to those companies that did not sue. According to the Advocate General, it is necessary for the Commission to have certain room for consideration and to be able to balance all interests in the specific case (paragraph 46) on the basis of equity. The Advocate General links the granting of that space not only to the right, but also to the obligation to review the act whose legality may come to question. He does not view the application of Swedish companies for a refund of the fine as an inadmissible petition seeking the Court to order the Commission to do something, but he proposes that that point of the petition be interpreted as an application for the annulment of the decision (paragraphs 47 and 48 of the opinion). His conclusion is, however, that the defect in the decision annulled by the court was not so fundamental as to amount to intolerable injustice, which even the plaintiffs did not give reasons so fundamental that it would be necessary to conclude that the Commission is obliged to annul a decision rendered 12 years before. The flexibility of the concept of legal effect stands out very clearly in these contemplations.

The problem recurred in a slightly different context in a recent decision on an airline cartel, where the General Court annulled the Commission’s decision, due to a contradiction between the grounds and the operative part of the decision571. One of the plaintiffs was British Airways (BA), which did not, however, seek full annulment of the decision. The General Court, for

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a non ultra petita reason, annulled the Commission’s decision in full only in relation to other plaintiffs, but not in relation to BA, where it declared the annulment as partial. BA claimed in an appeal that the Commission’s decision also be annulled in full with respect to BA, as well. It argues that if the Court can, ex officio, rule on defects in grounds (for being contradictory to the operative part of the decision), it must also have the possibility to decide beyond the scope of the application petition. The Advocate General did not accept that argument and was in favour of confirming the decision of the General Court, referring, in particular, to AssiDomän, i.e., in the interest of maintaining legal certainty. Finally, also the Court of Justice dismissed the appeal.

This most recent case goes beyond the scope of the theme of this article, although the argument was found in a decision which fully falls within our topic. In the BA case, we move from the issue of the binding effect of a court decision to the issue of the extent of judicial oversight in relation to the principle that the parties delimit the subject matter of the proceedings, and the principle that the court will only take into account what the parties submit to it. This therefore takes us from the parties being bound by the court’s decision to the court being bound by the will of the parties.

In its judgment in Tomkins, the CJ confirmed the judgment of the General Court. The Commission imposed a solidary fine on the parent company Tomkins and its subsidiary company Pegler, for acting as a cartel. Both companies sued the Commission, each in a separate action. The Pegler action was decided by the General Court by annulling a part of the Commission’s decision. Tomkins argued in its action that the fine had only been imposed on it due to the conduct of its subsidiary. The General Court decided that given that the two companies constitute a single enterprise, and that the fine had indeed been imposed solely for Pegler’s conduct, the liability of Tomkins cannot be more extensive, and therefore it is necessary to annul the decision with respect to it to the same extent as Pegler. Unlike in Assi Domän, the Court argued that in this case both companies sued, albeit by different actions. That is why it is possible to relate the consequences of the Pegler decision to Tomkins, as well.

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573 Court of Justice of the European Union, judgment of the Court of Justice of 22 January 2013, C-286/11, Tomkins, paragraphs 5 to 9, 43; judgment of the General Court of 24 March 2011, T-386/06, Pegler, contested decision of the Grand Chamber of 24 March 2011, T-382/06, Tomkins, especially paragraphs 42–44.
17.1.1.3. Sub-conclusion

To the extent to which we have examined the concept of legal effect in European Union law, we can conclude that this concept differs significantly from the concept common in Czech law, although its administrative branch of the judiciary will probably soon approximate the Union’s solutions. According to this case law, a judgment rendered by a Union court is binding both by its operative part and by its grounds. The logical conclusion arising from this is that a decision may have a binding effect with respect to acts other than those that were the subject of the proceedings, provided that they suffer from the same defects and that the Union authority concerned is obliged to remedy the unlawfulness from which they suffer. In subsequent proceedings, a court must not examine the same issues as are dealt with in a previous effective judgment. This applies even in cases when the parties to the dispute are different and even when the act contested is different (in particular in State aid). Legal effect thus applies primarily in relation to points of law which have been decided.

A concept of absolute legal effect *erga omnes*, on the other hand, is not absolutely without boundaries. If, in the meantime, a European institution has lost its competence to issue in a specific case an act similar to that which was the subject of annulment by the judgment, it cannot base its competence to issue a new act solely on that judgment. If a contested decision is by nature a bundle of individual decisions (in particular in cartel proceedings), this doctrine cannot go so far that even companies that did not contest the decision benefit from a judgment pertaining to a single company with respect to which the decision was annulled, thereby circumventing provisions setting deadlines for submitting actions. The principle of legal certainty must prevail in such cases. Relations between court decisions are, however, taken into account in further proceedings; so in the Tomkins case, where the substantive liability of both companies are linked, the judgment pertaining to one of them leads to an annulment in part with respect to the other, provided it is evident that a timely submission of an action by each of the companies precludes the argument concerning an attempt to overcome missed deadline.

17.1.2. Decisions pursuant to Article 272 TFEU

According to Article 272 TFEU, Union judges may work as judges in contractual matters: “The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed
by public or private law.” As already stated, Article 266 (1) TFEU cannot be
applied to such decisions, because here the Court is not deciding about de-
claring an act invalid or about an unlawful failure of an institution to act. In
these cases, the operative part of the judgment is formulated differently and in
addition to a declaration about the existence of rights or obligations, it can also
contain an order for one of the parties to behave in certain way (to pay a cer-
tain amount to the other party). Such a decision will be undoubtedly binding
for the parties to the dispute, as would any other decision of a civil judge. Its
implementation can thus take place by ordinary way of judicial enforcement by
a national court (Articles 280 and 299 TFEU), where the judgment constitutes
an enforcement order. Enforcement will be governed by the procedural regula-
tions of the Member State in whose territory it is being carried out. Legal effect
will entail a binding effect for the parties, and the question is to what extent
the above-mentioned case law on absolute effect would apply here. Probably,
nothing more than the concept of limited binding effect of case law operating
within the judicial system can be applied here (ad II).

In this context, a decision may be made about a contractual obligation to
compensate damages.

Far more complex are questions of admissibility of actions if the plaintiff
is suing according to Article 263 TFEU, even though the legal foundation is
a contract concluded with the Commission. Quite often, however, the Commis-
sion decides on contractual issues based on Article 299 TFEU, and the question
is whether that article constitutes sufficient foundation to give it jurisdiction
to issue such an administrative decision (cf. decision in ADR center T-644/14,
delivered on 20 July 2017, appeal introduced as C-584/17).

17.2. Binding effect of decisions within the judicial system

The reform of the General Court of the EU, consisting of doubling the num-
ber of judges, the first stage of which took place in 2016 and which is to be
completed by 2019, has underscored the importance of unified case law of the
Chamber. It can be assumed that the functioning of the usual mechanism of
unification of case law through a pyramid-based and hierarchically organized
system of judicial bodies at Union level will be significantly weakened by the
reform. A system that usually functions in Member States unifies case law by
means of appeal, initiating decisions of superior courts that bind lower courts
within the court system. Higher or supreme courts constitute narrower bod-
ies, which usually have an internal structure, and which have an easier time
achieving uniformity in addressing identical issues. This route will probably
not be sufficiently efficient in the structure of Union courts, where the first level comprises a body with an exceptional number of members, corrected, on the other hand, by a relatively narrow body, which is, furthermore, vested with many other competences (in particular, deciding on preliminary references) and which can therefore, for that very reason, be expected to filter appeals.

In addition, an internal structure based on specialization entails a significant problem for an international court. Its jurisdiction is variable, and it is difficult to systematically divide it into stable divisions handling the same volume of workload. Another obstacle to a fixed specialization is the emphasis on an equal position of judges, as it could disrupt the balance between judges from various Member States. The advantage of having a broader profile of judges is pointed out, as they are able to hear cases from the entire context of European Union law, thereby preventing fragmentation of terminology among individual divisions.

That is why a solution is increasingly sought in an effort to unify the case law of the General Court itself, which is now comprised of 45 judges in 18 chambers of three judges, or in nine chambers of five judges, if required. Here, we encounter a fundamental conflict between an independent position of a judge and each chamber and the need to achieve unified case law. The question as to the extent to which a judge is bound by the case law of his own court is still pressing. The problem occurs on two levels:

1. Parallel decision-making on similar issues in several chambers (including the related problem of the importance of narrower and broader chambers for the binding effect of case law).
2. Respecting existing (older) case law of the General Court (including decisions contested by appeal which have not yet been ruled on).

**17.2.1. Parallel decisions on identical issues in several chambers**

The main problem in parallel decision-making on identical issues lies in identifying that such a situation has occurred. The General Court, aware of the problem, has decided on a special task for its Vice-President, whose main mission is now to work towards unifying case law. The Vice-President naturally has no formal jurisdiction to intervene in the decision-making of chambers and can, therefore, only identify problems, inform judges, and work informally to prevent non-uniform decisions. Furthermore, he must be very careful to make sure that his work is not viewed as putting pressure on independent judges in any given chamber, not mentioning his natural handicap, which lies in the fact that as a non-member of the chamber deciding, he cannot examine
the issue at hand as thoroughly as the judge – rapporteur and the assessors. In spite of that, his work is not insignificant, because we know that we encounter decisions (although fortunately very rarely), where a certain legal issue to which another chamber paid attention had been neglected. If the situation occurs that several chambers are deciding on the same point of law, there is no instrument for preventing divergent decisions, aside from self-discipline of the judges or certain partial specialization by way of assigning cases on the basis of their substantive relations. But it does occur that a substantive relation may not be evident or identified when a matter is being assigned. Let us add that a discrepancy can easily occur even within one chamber – there, the solution is in the form of a rule of vote by a majority, which will not be in any way evident externally. A compromise solution is usually not ideal, but it cannot be prevented. Often, it is manifest in a poorer or reduced statement of grounds.

Another problem may occur when a chamber deciding in parallel proposes passing the matter to a broader chamber (most often a chamber of five judges). This can only be positive if the other narrower chambers, deciding in parallel, wait for the decision of the broader chamber, and then follow its decision. If they do not do so, the existence of different decisions will be adverse, regardless of the fact that in one case, it was a chamber of three and in the other a chamber of five judges deciding. The existence of diverging decisions reduces legal certainty and predictability of decisions. A situation when the outcome of court proceedings should be foreseen differently, depending on which judge the matter is assigned to cannot be considered acceptable.

17.2.2. Respecting the case law of the same court and of a higher court

There is no question that the case law of the CJ is binding for the General Court. The General Court uses argumentation and opinions of Advocates General quite frequently if they have not been rejected by the CJ. There have, unfortunately, also been cases when certain case law of the Court of Justice is not respected by the General Court. This may be unintentional, if the General Court does not discover it. But it cannot be ruled out that in certain cases the General Court wants to avoid such case law, looking for any differences in the situation or in the points of law addressed by the CJ as compared to the case before the General Court itself. This is a way of interpretation that can only be resolved by a new confirming decision of the CJ.

The General Court feels bound by its own case law, but it has taken a careful position towards decisions which have been appealed, until such time as
the CJ renders a decision. If a decision of the General Court is annulled, and provided there is a paucity of other case law, we consider it possible to use parts of an annulled decision if they were not contested by the appeal or if the CJ has confirmed them either implicitly or explicitly.

More complicated is a situation when there are several different lines of case law, whether at the level of the CJ or the General Court.

In certain cases, the General Court points to the lack of uniformity, but there have also been cases when it only sticks to one line without mentioning any other. The earlier approach is certainly more correct, but it entails the need to provide argumentation as to why a specific line has been chosen. If the parties do not mention certain case law, it definitely does not prevent the Court from relying on it. Case law is law known to the Court. It is, however, necessary, due to the right to defense, that any case law that is applied be discussed by the parties, giving the parties an opportunity to state their opinion on its application. If the General Court applies certain case law, it is not necessary on the other hand to impose the obligation on it to map out all streams in case law that have ever occurred, if we are not to unduly burden and prolong the proceedings.

In exceptional situations, Union courts admit the possibility of a deliberate departure from case law ("revirement"). This is made possible by the doctrine according to which Union decisions do not formally have the nature of a precedent. A change is, however, tied to strict conditions that consist, above all, of the requirement of sufficient argumentation. Usually, a grand chamber will decide on such a change. The rationale may consist of a change in the factual situation, a change in legislation, but also a recognition of an error in the court’s earlier approach. It is unquestionable that every such movement reduces legal certainty and is therefore deemed to be something undesirable. From the formal legal point of view, however, it is not ruled out, and it would be difficult to exclude it altogether, just as a change in legislation is not ruled out.

A relatively rare case of such a change in case law by the CJ is the issue of respecting a reasonable duration of court proceedings and the impact of a breach of that period in terms of the size of the fine imposed (and contested). In the Baustahlgewerbe case (C-185/95 P of 17 December 1998), the CJ confirmed the decision of the General Court stating that a fine can be reduced due to a breach of a reasonable period. In its Gascogne decision (C-58/12 P of 26 November 2013), the Court departed from its earlier approach and ruled that the breach has no impact on the legality of the fine and that a right to compensation for damages must be claimed (paragraph 80 ff.).

An analysis of the applicability of the judgments of the CJ, or the importance of the opinion of the Advocate General, has always entailed certain room for considering whether the General Court is or is not bound (e.g., the issue in Lito
Maieftiko – a case pertaining to a debit note (“note de debit”), and the applicability of the judgment to a Commission decision which is not formally labelled as a debit note\textsuperscript{574}). We can encounter opinions stating that a judgment is binding and applicable as the basis for future decisions only if all circumstances of the case are entirely identical. Practice, however, goes much further, and I hold that if the context of the decision is respected, it corresponds to the position of the General Court as a court with a broad jurisdiction without a fixed specialization. It is certainly an advantage for judges with a broad profile that they are able to understand a broader context and the coherence of case law. Hence, we can find citations of case law supplemented with the expressions “by way of analogy” or “in the sense of”, whereby the General Court shows that the foundation in case law is somewhat remote from the matter at hand. This broader concept of binding effect is based on an understanding of the broader context of the decision we are about to apply. An advantage of this context-based and broader view is the possibility of achieving unified terminology. Even in European Union law there are many terms that are used in various contexts and in various disciplines. Cohesiveness of terms allows for the unification of EU law. If this global and uniform view is not attained, it has adverse consequences for the entire system of European Union law, which is fragmented into incongruous spheres that are getting farther and farther from one another.

For example, the term enterprise should be understood identically in cartel law, in State aid law, as well as for example in trademark law. The term jurisdiction clause must be understood identically regardless of the differences between individual cases. The requirement of providing due grounds for an administrative act must be made in all segments of European Union law, unless a sufficiently well-supported exception is concerned. General terms, such as a contestable act, reasonable period, legal interest, damage, non-financial harm, loss of opportunity, causal connection, etc. must be defined uniformly to the greatest extent possible. Certain discrepancies can probably not be avoided in certain extraordinary cases. In national law, fragmentation of terminology is prevented by a codification of legal disciplines and legislative concepts running across the entire legal system, developed doctrine, and detailed instruction at law schools. European Union law is very different in this regard, given that a significant part of it is fully dependent on case law.

\textsuperscript{574} Court of Justice of the European Union, judgment of the Court of Justice of 9 September 2015, C-506/13, Lito Maieftiko, whereby the Court of Justice confirmed the decision of the Grand Chamber that the Commission cannot send a debit note to the other contractual party as an enforceable title pursuant to Article 299 TFEU, as in contractual matters, it is not authorised to issue unilateral acts. The Grand Chamber does not apply the judgment to other documents issued by the Commission for the same reason, but which are formally designated as decisions.
In this context, another important aspect of work with case law must be pointed out: decision-making on the first or second level has an impact on the nature and contents of a decision. The General Court must go into significant depth in each matter, examining all facts of the case (at this point, we will disregard the scope of its review, which is different in terms of the review of legality (administrative judge) or of decisions about contractual matters pursuant to Article 272 TFEU (contractual judge)), and it differs also within the scope of the review of legality depending on whether the institution that is making the decision (most frequently the Commission) has room for free discretion or not. In the earlier case, the scope of judicial review is narrower than in the latter.

In deciding on appeals, the CJ focuses solely on points of law, thereby somewhat extending the scope of application of its judgments. The General Court should take this into account when interpreting judgments of the CJ. It seems that the *Lito Maijščiko* case is a good example in this regard.

Situations when the decision of the General Court departs from existing case law, if it has not been contested by an appeal, are very difficult to resolve. The decision in *Audi/OHMI*575 (T-16/02, paragraphs 97 to 98) expresses the idea that, in the event of insufficient grounds, an action may be dismissed and the OHMI’s decision upheld, as long as it is evident that a new decision would be identical to the contested decision, because judicial review has confirmed the correctness of this (administrative) decision. The argumentation used in that case is contradictory, as the lack of grounds constitutes, in line with settled case law, an obstacle to judicial review. If review was nevertheless successfully undertaken, a court can hardly note that there were insufficient grounds. The court itself has “added” the non-existent grounds, which would not be admitted in a review of legality. But no appeal was lodged, and the judgment of the General Court has become a component of case law. Should it be applied in subsequent decision-making practice? Should it be subjected to critical review by newer case law if the decision is effective?

Case law permits the substitution of grounds on an exceptional basis, but only at the second level of judicial decision-making (e.g., decision of 26 March 2009 *Selex sistemi integrati* C113/07, paragraph 81576), where the operative

575 Office for Harmonisation in the Internal Market, which was renamed European Union Intellectual Property Office (EUIPO).

576 The paragraph reads: “However, it must be borne in mind that, if the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed (see judgments of 9 June 1992, *Lestelle v. Commission*, C30/91 P, Recueil, p. I3755, paragraph 28; of 13 July 2000, *Salzgitter v. Commission*, C210/98 P, Recueil, p. I5843, paragraph 58, as well as of 10 December 2002, *Commission v. Camar and Tico*, C312/00 P, Recueil, p. I11355, paragraph 57).”
part of the contested decision was found correct, but the reviewing court re-
placed the erroneous grounds with different grounds. In the Audi case, how-
ever, it was not true substitution (which is possible if the operative part of the 
judgment can be confirmed), but an addition of new grounds.

17.3. Conclusion

The reflections elaborated above lead us to the conclusion that both issues 
of the binding effect of court decisions with respect to their addressees, as 
well as issues of internal binding effect of case law within a court system, still 
entail many complicated points in the Union judicial system, many of which 
are caused by the peculiarities of European Union law as a law standing on the 
border between international law and the law of a federal unit, and on the other 
hand by the peculiarities of the Union judicial system, which is historically 
conditioned (by conditions set for a far smaller grouping of well-integrated 
countries) and which must be, from today’s point of view, considered to be an 
indefinite system which needs to develop towards greater effectiveness. It is, 
however, unquestionable that the same issues can be encountered in the judicial 
systems of individual Member States. A dialogue between Union and national 
judges is therefore very important, among other things, in connection with pre-
liminary reference addressed to the CJ.
18. Realism About European Legal Integration: Outline of a Soft Legal Realist Approach

ARTHUR DYEVRE

18.1. Introduction

Legal actors, it is a truism, have played a major role in European integration. This holds, of course, for the Court of Justice of the European Union (CJEU), which went well beyond the mandate that the Treaty drafts had envisioned for the supranational institution they created. But domestic courts, too, have been central to this well-known story. By referring questions to the Court of Justice via the preliminary ruling procedure and by enforcing its doctrinal determinations, national courts have made the constitutionalisation, expansion and consolidation of EU law possible. What is more, the tensions that have flared up from time to time between the CJEU and some of its more powerful domestic interlocutors like the German Federal Constitutional Court have also contributed to define the limits of European law. Not surprisingly, the emergence of this new, multi-level but also hierarchical legal order has spawned an enormous scholarly literature, which is impossible to survey. The fact that scholars not just from law but several other disciplines, including political science and history, started engaging with the topic though, has raised an important methodological point.\footnote{De BÚRCA, Gráinne. Rethinking law in neofunctionalist theory, Journal of European Public Policy, No. 12, 2005, pp. 310–326.} How should we study judicial decision making in the context of European integration? What is the influence of legal and non-legal factors in determining judicial decision making?

This contribution considers two related questions: (1) what is a legal realist approach to European Union law and the European legal order? and (2) to what extent does such an approach differ from existing, mainstream, non-realist accounts of adjudication in the European multi-level legal order? I examine these questions from the perspective of what I characterise as “Soft Legal Realism”, which I identify with my own research on judicial behaviour as well as with the work of scholars such as Matthew Stephenson, Frederick Schauer, Jeffrey Lax and Lewis Kornhauser (who may not necessarily claim the label).
While sharing with older and more recent brands of legal realism a focus on what judges do, as opposed to what judges ought to do, Soft Legal Realism offers a more moderate account of adjudication. One that neither assumes the complete indeterminacy of legal rules, nor the existence of a single right answer in all and every case, but views law as one potential constraint among the many factors shaping judicial behaviour. After showing how this understanding of the legal realist paradigm has informed my own attempt to develop a general theory of judicial behaviour, I present a brief outline of a theory of adjudication in the EU multi-level, non-hierarchical legal system which I contrast with the dominant legal discourse on legal integration. My account of legal integration can be characterised as “political” as it sees adjudication as being fundamentally about the “authoritative allocation of values” – to borrow Easton’s classical definition of politics. This leads me to recast the two dominant paradigms of the legal integration literature – judicial dialogue and constitutional pluralism – in terms directly borrowed from the political economy and international relations literature. Where others see judicial dialogue at work, I see judicial bargaining and signalling. Where others talk of “constitutional pluralism”, I see power equilibria in which the threat of mutual assured destruction prevents one court from imposing its constitutional vision on the other. I also underline the importance of the broader political environment in which judges operate and point to important differences between the European Court and national courts in that regard. At the same time, though, I take it that paper rules do matter. But the argument I set forth here is that, just as lower and higher courts differ in their incentive structure and institutional constraints, the weight of legal and doctrinal factors varies a great deal across courts and judges.

18.2. Soft legal realism and other brands of legal realism

Theories of adjudication – theories of how judges make decisions – may diverge along many different dimensions. One possible, seemingly obvious, distinction is between normative and positive theories of adjudications. In short, normative theories are theories of how judges ought to decide cases, whereas positive theories purport to describe how judges actually decide cases. This

578 It is this more moderate account of adjudication and of the role of legal rules in judicial decision making that warrants using the adjective “nuanced”. I should specify that by using this terminology I do not mean to make an argumentum ad odium implying that other theories can be dismissed as “unnuanced” without further ado.

distinction would seem to be straightforward enough. Yet, not only does positivism mean different things to different people, but some legal philosophers – chief among them Ronald Dworkin and Robert Alexy – reject the distinction altogether, arguing that law is inseparable from morality and that any meaningful account of what the law is presupposes an account of what the law ought to be.\textsuperscript{580} Even for those who believe in the possibility of separating normative statements from descriptive statements about the law, it may appear at times that most theories, even those coming under the label of “legal positivism”, can be cast in normative as well as descriptive terms.

Another dimension along which theories of adjudication may diverge concerns the extent to which they assume legal rules to be determinate. At one end of the spectrum are the theories that claim that the law always provide judges with a single right answer to the case at hand. At the other end are the theories that see the law as completely indeterminate. Those who subscribe to this form of rule-scepticism do not just reject the view that there is a single right answer in every case. Rather, they claim there is no right answer at all: legal provisions and statements of legal doctrines have no objective meaning and thus cannot guide judges in reaching decisions in any way whatsoever. Note, though, that divergence regarding the determinacy of legal rules may itself correspond to, and often result from distinct understandings of what counts as a legal rule (e.g. depending on whether moral criteria are included in the criteria for identifying legal rules). The difficulty involved in constructing a plausible classification of theories of adjudication is further compounded by the fact that it is often unclear whether a theory only addresses the context of justification (the reasons that can be adduced to justify the use of coercive power by judges) or is also meant to describe the context of discovery (the causal motives driving judicial behaviour).\textsuperscript{581}


\textsuperscript{581} This points to the fact that these theories rest on distinct – and in part irreconcilable – ontological and epistemological foundations. For an attempt to bring together several distinct theoretical approaches to adjudication within a common meta-theoretical framework, see DYEVRE, Arthur. Making Sense of Judicial Lawmaking: a Theory of Theories of Adjudication (Working Paper, 2008), available at <http://cadmus.eui.eu/handle/1814/8510>.
Figure 1 is a tentative classification, whose purpose should be seen as being primarily heuristic (what matters is the relative, rather than the absolute, position of the theory). Now, common to all legal realist theories is the thesis that the existence and content of law ultimately depend on social facts and not on the moral or ethical soundness of legal commands. As John Austin put it: “The existence of law is one thing; its merit and demerit another.” Legal realists share this firm commitment to the Social Fact Thesis with other theorists, such as H.L.A. Hart, Hans Kelsen and even Paul Laband. (Some Enlightenment thinkers, like Beccaria and Montesquieu, may have subscribed to the same view, but this is hard to establish with full certainty because they did not develop a fully-fledged theory of the sources of law.) This full commitment to positivism is what sets this strain of theories apart from natural law theories of the kind propounded by Ronald Dworkin and Robert Alexy. Legal realism, though, diverges from other positivistic approaches to the study of law in at least three ways.

First, legal realists typically lay a stronger emphasis on the indeterminacy of legal rules. As we are going to see, there is some disagreement among legal realists in that respect. Still, there can be no dispute that realists of all stripes repudiate the crude formalism advocated by the likes of Paul Laband, who depicted judging as an exercise in deductive logic, whereby positive legal rules are mechanically applied to the facts of the case to yield the outcome of

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the judicial process. Second, legal realists share a focus on judicial decision making. Equating law with adjudication, they aspire to develop theories of judging – not, like Kelsen and Hart, theories of the legal system. Third, in looking at judging, the realists tend to focus on the context of discovery rather than the context of justification. They tend to explain judicial outcomes in causal terms, being interested in the motives driving the judges’ behaviour rather than the cogency or legitimacy of the reasons set forth to justify it. This, too, distinguishes legal realism from the research programme articulated by Hart and Kelsen, who did not see law, nor judging, through the prism of causality, but instead, as a system of rules which was to be studied employing the analytical-conceptual methodology of analytical philosophy. Kelsen himself explicitly said that his approach was about “imputability” (Zurechnung) not causality.

So much for where the legal realist movement stands in regards to legal theory and the philosophy of law. But how does the Soft Legal Realism advocated here relate to other strains of legal realism? As I see it, Soft Legal Realism is closer to American Legal Realism than to the French or Scandinavian variety. Scandinavian Legal Realism, as exemplified in the work of Axel Hägerström, was influenced by logical positivism and the philosophical ideas propagated by the Vienna Circle. As Rudolf Carnap, Moritz Schlick, A.J. Ayer and their fellow logical positivists, Hägerström subscribed to verificationism – the philosophical doctrine asserting that a proposition is cognitively meaningful only if there is a procedure to conclusively determine its truth. Verificationism entailed that normative statements, because they cannot be verified, are meaningless. This


584 See DYEVRE, Arthur. Legal Positivism and Evolutionary Psychology: Can Legal Positivists Learn Something from Darwin? Studies in the Philosophy of Law, no. 103, 2010. While frequently used as synonymous in everyday language and in much of legal scholarship, the expressions “legal system” and “court system” serve to refer to distinct objects in the work of the two legal theorists. Most obviously so in Kelsen’s theory, where Western-style courts may be viewed as a contingent, rather than as a necessary, element of a legal system (a legal system may thus exist without something possessing the characteristics of a court of law in the Western legal tradition).

585 It must be conceded, though, that many realists seemed happy enough devoting their time to debunking formalism in all its forms rather than to the development of a substantive theory of judicial behaviour.


led Hägerström and his disciples to the conclusion that legal rules, inasmuch as they have the nature of normative propositions, are completely indeterminate and cannot guide judicial decision making in any way whatsoever. Though it does not explicitly profess a commitment to the doctrine of verificationism, French Legal Realism seems to embrace a similarly radical form of rule-scepticism. Of legal texts, its leading proponent, Michel Troper, says that they contain “no meaning to uncover.” Like Scandinavian Legal Realists, he appears to deny that legal rules may guide or constrain judges.

Unlike their French and Scandinavian fellow legal theorists, American Legal Realists – apart perhaps from the more idiosyncratic Jerome Frank – were not radical rule-skeptics. Instead, they believed that legal reasoning may often be determinate but not in the cases that reach the stage of appellate review, where it will usually fail to yield a unique outcome. They observed that adjudication makes legal rules appear more indeterminate than they really are because clear cases are settled outside the court system. In short, litigation is driven by indeterminacy, with the result that more indeterminate rules will give rise to more litigation and are likely to be the most litigated precisely in those situations where they appear most indeterminate.

Figure 2 captures this idea by representing the proportion of indeterminate cases as a (Gompertz-like) function of the stage reached in the litigation process. As one progresses through the different stages of the litigation process, the absolute number of cases typically goes down, but the proportion of indeterminate cases goes up. At the stage of constitutional or supreme court review, few, if any, determinate cases are left.

589 See BJARUP, Jes. The Philosophy of Scandinavian Legal Realism, Vol. 18, No. 1, 2005; LEITER, Brian. Naturalism in Legal Philosophy, *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta, Fall 2012, ed. 2012. The Danish legal realist, Alf Ross, had similar views about the semantics of legal propositions. To be meaningful (i.e. to have truth values) within his own approach, a legal provision had to have a naturalistically acceptable reduction, see ROSS, Alf. *On Law And Justice*. Berkeley: University of California Press 1959. This involved reinterpreting statements such as “X is valid law” as asserting that judges will act in accordance with X and, in so acting, will feel bound by X, see Leiter, supra.


This analysis entails that, inasmuch as legal rules may be a source of constraints for the courts, they will not affect all the courts to the same extent. While affecting case disposition on the top courts only in rare situations,\textsuperscript{594} statutory provisions, doctrines and precedents are likely to constitute a more significant source of constraints for first instance courts. But Soft Legal Realism sees the relationship between rules and judicial behaviour as more complex than simply a matter of the law “running out” in the legal disputes that do make it to the courts. First, for most courts (though especially high courts), care must be taken to distinguish between opinion and case disposition. As Charles Cameron and Lewis Kornhauser have noted,\textsuperscript{595} opinion and case disposition correspond to two distinct dimensions of judicial decision making. Indeed, while case disposition is essentially about dispute resolution (except perhaps in the context of abstract review by constitutional courts of the Kelsenian type), judicial opinions serve to articulate policy statements – they are the judges’ main instrument for policy making. This is important because the extent to which pre-existing legal rules constitute an effective constraint on judicial-decision is likely to vary depending on the dimension under consideration: e.g. a statutory rule may not point to a unique case disposition in the dispute at hand, but nonetheless restrict

\textsuperscript{594} One such occasion may be when one litigant, despite being certain she will ultimately lose, wants to continue litigating for dilatory reasons. Even in clear cases, companies falling foul of EU competition rules are likely to appeal an adverse Commission decision before the General Court and, subsequently, the Court of Justice, if only as a way of delaying payment of a hefty fine.

the set of policies the court can plausibly present as an “interpretation” of the rule. Moreover, a distinguishing feature of adjudication is that policy making takes place within the context of and simultaneously with dispute resolution. Depending on the policy issue, the parties and the place of the court in the judicial hierarchy, the judges may care more about one dimension than the other. At the bottom of the heap, first instance courts typically concentrate on dispute resolution. Dealing with a large workload, they must dispose of the incoming cases in quick fashion in order to avoid accumulating backlogs. Not only does the caseload leave lower courts judges little time to think, let alone write, about policy issues. But the room for policy innovation is itself constrained by the higher courts’ oversight. To avoid reversal by the higher courts, first instance judges must, in principle, comply with the higher courts’ policy determinations. As we shall see later though, legal integration may result in a weakening of the hierarchical structure of domestic judiciaries, thus giving lower courts more latitude to deviate from the higher courts’ preferred policies.

In contrast to their colleagues at the lower echelons of the domestic judiciary, high court judges tend to focus on policy making rather than on dispute resolution. There are exceptions, of course. In *Bush v. Gore*,596 for example, the Justices on the US Supreme Court probably cared more about the parties to the electoral dispute than about the general policy issues raised by the case (among which were the circumstances under which a recount should be constitutionally permitted and whether federal courts had jurisdiction in the matter). But, generally speaking, dispute resolution and individual justice take a backseat in high court adjudication. The centrality of policy making and opinion writing means litigants are essentially treated as a vehicle to bring cases which will then allow the judges to make policies on issues deemed worthy of the court’s attention and resources.597 Yet, while of lesser importance, the dispute resolution dimension does not entirely leave the picture. The two dimensions remain connected in a manner that creates constraints for judges. This is because a judicial

596 U.S. Supreme Court, decision of 8 December 2000, No. 531 U.S. 98 (2000) (*per curiam*).
597 To bolster their positive agenda control and ensure they get a chance to say something on the key issue of the day, judges may design doctrines that make litigation more attractive and use their powers to reduce litigation costs for repeated players who bring “interesting” cases but are unlikely to win on the merits. A paradigm example of the latter is the award of a “repeated litigant” bonus by the German Federal Constitutional Court to five German academics along with Euro sceptic Christian Democratic MP Peter Gauweiler on the grounds that their repeated (but unsuccessful) attempts to challenge acts intended to deepen European integration (Lisbon Treaty, European Financial Stability Facility, European Stability Mechanism...) had “contributed to the clarification of a question of fundamental significance”, see German Federal Constitutional Court, Decision of 12 December 2011, 2 BvR 1099/10, http://www.bverfg.de/entscheidungen/rs20111214_2bvr098710.html (accessed 13 December 2012).
opinion, even by a top court, is generally expected to bear some relevance to and be consistent with the direction of the case disposition.\textsuperscript{598}

Holding legal rules constant, their effect on judicial behaviour may vary not only across courts but also from one judge to the next within the same judicial body. Smarter judges may more easily find a path around the black letter law. Persuasive arguments, especially when intended to justify an outcome that appears to contradict the plain meaning of a legal provision, are often difficult to construct. So crafting clever, rhetorically effective arguments might come easier to the smart, verbally agile judge than to her less brilliant or lazier colleagues. American Legal Realists observed that the desire to economize limited intellectual resources may often shape the outcome of legal cases. “Judges“, said an influential American Realist, “are people and the economizing of mental effort is a characteristic of people, even if censorious persons call it by a less fine name.”\textsuperscript{599} In an attempt to integrate the insights of American Legal Realism into a rational-choice approach to judicial behaviour, Matthew Stephenson suggests modelling the influence of rules on judging in the following way. A judge cares about two things: 1) the practical outcome of the judicial process (policy and case disposition), and 2) the costs associated with crafting a persuasive argument to justify this outcome.\textsuperscript{600} Weighing these two considerations, the judge will choose his most-favoured outcome if the cost of writing a persuasive opinion is relatively low. Sometimes, though, the judge may discover that the opinion justifying her preferred outcome just “won’t write”. The reason might be that she is not creative enough to find a persuasive argument; or the issue might be too complex; or – as is likely to be the case for lower court judges – her heavy caseload may simply not leave her enough time to think of an appropriate justification for her preferred outcome.\textsuperscript{601}

18.3. Elements of a general theory of judicial behaviour

Rich and insightful though it certainly was, the picture of adjudication offered by American Legal Realists was still very partial. American Legal Realists did not develop formal models of the judicial process, nor conduct large-scale quantitative analyses of judicial outcomes. In fact, much of what they


\textsuperscript{601} Ibid at 201.
said about judicial decision making was based on anecdotal evidence and phenomenological, first-person accounts of the judicial process. As a result of the theoretical and methodological limitations of their research, they overlooked the role played by institutional variables and by non-judicial institutions – notably legislators and public opinion – in modulating the behaviour of judges.

Soft Legal Realism sees itself as part of a broader research programme which uses the full panoply of formal and empirical methods of modern social science to assess the impact on judicial outcomes of a wide range variables, including: attitudes (the judges’ personal preferences); institutional internal constraints (rules governing case selection, opinion assignment...); as well as institutional external factors (other courts, legislators, public opinion...).

**Table 1. Determinants of Judicial Behaviour (Dyevre 2010)**

<table>
<thead>
<tr>
<th>Level of Analysis</th>
<th>Explanatory Variables</th>
</tr>
</thead>
<tbody>
<tr>
<td>Macro-Level</td>
<td>Political fragmentation, public support</td>
</tr>
<tr>
<td>Meso-Level</td>
<td>Position in judicial hierarchy, power to review legislative acts, access rules, discretion over case selection, term renewability, term duration, separate opinions, opinion assignment rules, etc.</td>
</tr>
<tr>
<td>Micro-Level</td>
<td>Policy and case-outcome preferences of individual judge</td>
</tr>
</tbody>
</table>

What Table 1 says is that each judge taken individually has preferences over policies and case disposition. Yet, in trying to maximise these preferences, judges face meso-level constraints which result not only from the court’s position in the judicial hierarchy, but also from the court’s collegial structure as well as from rules governing case selection, term duration, etc. Judicial power is in turn determined by levels of public support and levels of political fragmentation – both macro-determinants of judicial behaviour. More political fragmentation means there are more veto-points in the political system, making it harder for legislators to override judicial interpretations of constitutional and statutory acts. A lower level of political fragmentation, though, may be offset by a high level of public support for the judicial branch, making politicians less willing to confront judges popularly seen as the ultimate

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603 Except in instances of single-judge chambers (usually for cases of lesser importance), a judge, in order to weigh successfully on the court’s effective decision, must agree with sufficiently many colleagues so as to form a winning coalition.

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guardians of the rule of law. Table 1 is not just a typology or laundry list of factors thought to affect adjudication. It is a general theory of judicial behaviour which purports to explain how lower-level determinants are nested within higher-level ones. The theory asserts that lower-level variables affect judicial outcomes only when higher-level variables take a certain value or remain below or above a specific threshold. For example, variations in the judges’ ideological outlook – a micro-level determinant – will have little effect on judicial outcomes when and where political fragmentation and public support for the courts – both macro-level determinants – are low. As we shall see, this suggests, as far legal integration in the Europe Union is concerned, that if both the public and government parties are strongly pro-integration, whether domestic judges are Europhiles or Eurosceptics should have little impact on the courts’ position regarding integration. This is because courts in this kind of situation will have scant latitude to depart from pro-integration policies anyway. In my more recent research, I have tried to bring this theoretical framework to bear on an analysis inter-judicial interactions, examining both the relations among domestic courts and between domestic high courts and the European Court of Justice.

18.4. Soft legal realism and EU law scholarship: realism vs. formalism?

How does the dominant legal discourse on legal integration compare to this realist approach? Obviously, the reception of the doctrines of supremacy and direct effect by domestic courts, the use of the preliminary ruling mechanism by domestic judicial actors, the friction generated by the CJEU-led constitutionalisation of European law and the hints of defiance regularly voiced by national judges are all prominent themes in the legal literature on judicial integration in Europe. But a perusal of the leading periodicals and textbooks devoted to European Union law will not reveal a common framework that easily lends itself to a classification in the terms of the theories described above. Apart perhaps from a handful of (largely American) scholars with one foot (if not two) in political science – J.H.H. Weiler, Alec Stone Sweet and Karen Alter are some of

605 James L. Gibson et al., On the Legitimacy of National High Courts, 92 The American Political Science Review 343 (1998); Georg Vanberg, The Politics of Constitutional Review in Germany (2005); Dyevre, Unifying the Field of Comparative Judicial Politics, supra n 602.
the names that spring to mind – it is clear that the dominant scholarly discourse does not embrace legal realism in any of its forms. Yet the dominant strain of EU law scholarship cannot be accurately described as “formalist” either. To be sure, most articles published in the Common Market Law Review or in national journals such as the Revue Trimestrielle de Droit Européen are clearly doctrinal in outlook. In recent years, some authors have sought to reassert the “legal model” and challenged political science narratives depicting the Court of Justice as a strategic, political actor. But it would be a stretch to claim this scholarship is committed to something resembling a formalist theory of adjudication. Rather, as is true of the legal academy in general (at least in Europe), EU law scholars tend to comment on legal developments without feeling the need to ground their analysis in explicit theoretical assumptions. What they write is typically a blend of the descriptive and the normative. Descriptive statements of what the law is are thus closely interwoven with the author’s normative philosophy as to how the law ought to develop. Undeniably, EU law scholarship has grown enormously both in quantity and diversity over the past two decades and especially since the ratification of the Maastricht Treaty. As a result, the ethos of “praise and admiration” that prevailed until the 1980s has given way to a more critical tone and authors who question the overall posture of the Court of Justice are less likely to be marginalized as Hjalte Rasmussen arguably was when his On Law and Policy in the European Court of Justice first appeared in print. But, though EU law academics have become less deferential towards the judges and more assertive in their normative prescriptions, discussions of the judges’ preferences and incentive structure still rarely feature in their writings. Yet this does not entail that mainstream scholarship is entirely given over to doctrines, precedents and legal rules. In fact, some of the notions most frequently invoked in the EU law literature seem hard, not to say impossible, to pin down in purely legal terms. This holds most evidently for “judicial dialogue”, but also, I would argue, for “constitutional pluralism”. As is common in legal scholarship, these expressions have both a normative and a descriptive content. Their normative content is perhaps more straightforward. Both concepts are used to suggest a certain understanding of how legal


integration ought to proceed. In brief, national and supranational courts should speak and listen to each other while attending to the fact that they have distinct constitutional loyalties. At the same time, though, these concepts are used in a way that suggests both judicial dialogue and constitutional pluralism are already a reality in the European Union. Since “judicial dialogue” and “constitutional pluralism” cannot really be taken to refer to specific legal norms or doctrines, it seems reasonable to interpret them as describing real-world, social behaviour (interactions among judges in the case of judicial dialogue) or a specific political arrangement (constitutional pluralism).

These two notions, however, are generally deployed in a way that, I would contend, is quintessentially “legal” but, at the same time, antithetical to the realistic tradition. As used in mainstream EU law scholarship, judicial dialogue and constitutional pluralism are more aptly characterised as “catchphrases” than as “theories”. They would seem to capture some of our intuitions about legal integration, but without really articulating them as empirical, falsifiable propositions. Meanwhile, their positive connotation renders the task difficult for those who might otherwise dismiss them as inaccurate or as epitomizing the kind of sloppy thinking about European integration one should better avoid. For who wants to be seen as opposing “pluralism” and “dialogue”? On the face of it, it would seem that only the crypto-fascist and the totalitarian-minded could object to dialogue and pluralism. If one conceives of legal scholarship as being essentially an exercise in persuasion – as a form of political communication, whose political effectiveness nonetheless crucially turns on its ability to appear apolitical – such vagueness and open partiality are not deficiencies. On the contrary, flexibility (the finer name for vagueness) along with the ability to conjure up positive ideas and associations are


611 True, the preliminary ruling mechanism (Article 267 TFEU) and the reference to the “constitutional traditions common to the Member States” (Article 6(3) TEU) can be viewed as mandating some form of judicial dialogue while requiring that EU institutions recognize the Member States’ shared constitutional traditions. But I do not think that exponents of judicial dialogue and constitutional pluralism are ready to reduce them to these two provisions.
the defining qualities of an effective rhetorical phraseology. This way of doing things sits well with the rhetorical tradition in legal scholarship – law as the art of persuasion – which can be traced back to the work of Cicero and has been, in varying ways, carried on by scholars such as Chaïm Perelman or even Ronald Dworkin – who, in many respects, can be regarded as our modern Cicero.

If one conceives of legal scholarship in more analytical, more scientific terms, however, lack of precision and neutrality are not exactly desirable properties in a concept; quite the opposite. Reliance on a vague terminology that, in addition, suggests partiality is more likely to hinder than to stimulate the normal process of scientific scrutiny and constructive criticism. This can only affect the accumulation of knowledge – the hallmark of good, successful scientific research – on legal integration or any other matter, in detrimental fashion.

Soft Legal Realism is resolutely committed to a nomothetic, theory-grounded, empirical approach to judicial behaviour. While such a commitment does not necessarily entail discarding dialogue and pluralism as empty concepts, it does imply that, to the extent we want to make them part of a fruitful research programme, they should be operationalised within a well-specified, empirically relevant theoretical framework.

612 See PERELMAN, Chaim and OLBRECHTS-TYTECA, L. The New Rhetoric: A Treatise on Argumentation. The University of Notre Dame Press, 1969. Perelman’s work, though, was not itself an exercise in rhetorical argumentation. Rather, it was an attempt to account for the real-world argumentative practices of lawyers and judges. A similar approach is exemplified by Stephen Toulmin’s research on practical argumentation, see TOULMIN, Stephen Edelston. The Uses of Argument. Cambridge: Cambridge University Press 1958.

613 Many, jurists and non-jurists alike, may have experienced Dworkin’s writings and public speeches as embodying all the characteristics Cicero regarded as essential to successful oratory. In that sense and as the great Roman master put it, Dworkin’s sleek prose and well-polished oratory would seem to achieve to “instruct, delight and move the minds of his audience” as great orators do.

614 I realise that in contrasting rhetorical and analytical discourse I should warn against the temptation to construe the distinction as a discrete, dichotomous one. All scientists – whether in physics or sociology – hope to persuade their peers and the broader public that their hypotheses and theories are true and, in that sense, scientific discourse always aims at persuasion. More generally, rhetorical effectiveness is not necessarily incompatible with analytical rigour. In some situations (e.g. in defending a thesis before a group of mathematicians), an analytical, formal argument is likely to be the most, or even the only, effective rhetoric – that is, the only realistic way to achieve persuasion. Occasionally, too, legal discourse may have to espouse more analytical forms of argumentation to elicit acceptance. But what characterises the legal and political fields is that the constraints to do so are much less stringent. Much like political discourse (which in democratic regimes typically aims at persuading voters), legal discourse (both in judicial reasoning and legal scholarship) is more tolerant of (non-analytical) argument forms that are generally rejected in scientific discourse.
18.5. Law and Politics in the European Union: Outline of a legal realist account of legal integration in the EU

Figure 3 shows a simplified representation of the EU legal order. The arrows indicate the direction of the causal nexus (with non-continuous arrows denoting a mediating effect on other causal relations). It bears emphasis that this does not claim to be more than a stylised account of the operations of the EU legal order. Note, in particular, that the strength of the causal relationships depicted may vary widely across policy area, across time, and, at the domestic level, across member states.

Figure 3. Judicial Behaviour in the EU Multi-Level Legal System

Even so, the graph helps shed light on several aspects of the EU unique legal system which I would now like to comment in more detail.

18.5.1. Courts and their broader political environment

Courts, domestic as well as supranational, are embedded in their broader political environment. The Court of Justice and other EU courts (the General Court and the less prominent Civil Service Tribunal) operate within the EU’s
broader institutional setting. Similarly, decision making on domestic courts is itself constrained by the domestic political system. The constraints arising from the position of non-judicial actors, though, seem to be more pronounced for domestic than for supranational courts. This is because the EU policy making process has many veto points, which makes it hard to overturn the determinations made by the judges.\textsuperscript{615} Figure 4 illustrates this point for the “ordinary legislative procedure” (codecision). In order to override the interpretation placed on a directive by an CJEU ruling, the European Commission must first make a proposal. Then the European Parliament must either agree or fail to act. Finally, the proposal must be approved by qualified majority (QM) in the Council.\textsuperscript{616} In principle, any institution involved in the legislative process has the ability to kill the proposed override bill. If the Commission does not put out a proposal,\textsuperscript{617} the Court of Justice’s interpretation is left untouched. The same happens if the median MEP rejects the proposal made by the Commission. \textit{Ditto}, if the Council veto pivot – to wit, the Member State government casting the swing vote and determining whether or not there is a qualified majority to support the bill – rejects the proposal.


\textsuperscript{616} Article 294 TFEU.

\textsuperscript{617} Here I conceptualize the European Commission as a unitary actor. This is, evidently, a simplification. But we still know relatively little about the Commission’s internal decision making process. Because we do not have a clear picture of the leverage the President has over the college of Commissioners and how this influence the choice of proposals, an application of the Median Voter Theorem (whereby the median Commissioner decides which policy proposal becomes the Commission’s legislative proposal) does not seem warranted. For more on the Commission decision making process, see EGEBERG, Morten. Executive Politics as Usual: Role Behaviour and Conflict Dimensions in the College of European Commissioners. \textit{Journal of European Public Policy}, Vol. 13, 1, 2006; WONKA, Arndt. Decision-making Dynamics in the European Commission: Partisan, National or Sectoral?, \textit{Journal of European Public Policy}, Vol. 15, 2008, p. 1145; CHRISTIANSEN, Thomas Tensions of European Governance: Politicized Bureaucracy and Multiple Accountability in the European Commission. \textit{Journal of European Public Policy}, Vol. 4, 1997, p. 73.
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Figure 4. The Court of Justice and the Ordinary Legislative Procedure

In other words, it is sufficient that just one of these actors prefers the European Court’s interpretation to the proposed override directive to effectively protect the judges’ determinations. A prime example of this is provided by the Court’s definition of working hours in labour law. In its SIMAP\textsuperscript{618} and Jaeger\textsuperscript{619} rulings, the CJEU had held that under the 1993 Working Time Directive on-call duties should count as working hours for the purpose of work and rest calculation whenever employees are required to be present on site. The impact on the health care sector in Member States where medical staff and junior doctors were traditionally required to be resident on site while on call duty proved to be considerable.\textsuperscript{620} So much so that when the Commission made a proposal for a new working time directive the Council insisted on having the definition of working hours revised so as to exclude on-call duties. This was clearly an attempt to reverse the Court’s jurisprudence. The Council and national governments, however, could not bring the European Parliament round to support their override attempt. In April 2009, after years of negotiations, MEPs rejected the redefinition of working hours and, with it, the new directive.\textsuperscript{621} According to the Parliament, on-call time must remain working time in accordance with

\begin{footnotesize}
\textsuperscript{619} Court of Justice of the European Union, Judgment of 9 September 2003, Case C-151/02, \textit{Landeshauptstadt Kiel v. Norbert Jaeger}.
\end{footnotesize}
the jurisprudence of the CJEU. In other words, the Court’s case law was left undisturbed because MEPs in their majority preferred it to the proposal backed by the Council.

For judicial interpretations of Treaty provisions, the hurdles that an override attempt must overcome are even higher. Mark Pollack has compared Treaty revision as a means to rein in the Court of Justice to the nuclear option, “exceedingly effective, but difficult to use.” This implies that when faced with a real override threat, the Court of Justice may shift to a Treaty mode of legal argumentation.

At domestic level, on the other hand, the political system tends to exhibit less veto points. The partisan landscape is typically less fragmented, while partisan organisations are generally more cohesive and more disciplined than at supranational level. Because ordinary citizens are more likely to be aware of the decisions issued by national judicial bodies than of those rendered by supranational tribunals (whose existence they often ignore), public opinion also becomes a factor that judges must reckon with. For these reasons, public attitudes towards European integration along with the position of government parties regarding EU membership may restrict to a considerable degree the autonomy enjoyed by the judiciary in defining its own position in the legal integration process. Suppose, for instance, that Belgian courts decided to oppose the doctrines of supremacy and direct effect by giving priority to national

623 Note that quantitative studies have shown that the position of the Commission is a strong predictor of the direction of the Court of Justice case disposition, especially in infringements proceedings, see Alec Stone Sweet, The Judicial Construction of Europe (2004). Interpreted as evidence of ideological convergence (rather than as a judicial stratagem designed to encourage the Commission to bring more cases), this fact would suggest that many attempts to override the Court are nipped in the bud, as it were, because the Commission is able to prevent override proposals from being made in the first place through its agenda-setting monopoly.
legislation and leaving EU rules unapplied. Since the 1980s, at the very least, the two doctrines are viewed as an integral part of the *acquis communautaire* and, by the same token, of membership in the supranational club. So, in the context of government parties and the public remaining favourable to EU membership, the move would render the courts vulnerable to the charge that their jurisprudence constitutes an illegitimate obstacle to normal EU membership. As a result, the courts would be exposed to institutional reprisals in the form of jurisdiction-stripping or similarly damaging measures.626 Anticipating a potential political backlash, even the most die-hard Eurosceptic judges are thus likely to refrain from overtly opposing elements of the *acquis communautaire*.627

18.5.2. Differentiated judicial incentives and constraints

Domestic courts have diverging incentives and constraints. Consistent with the Court Competition628 and Judicial Empowerment629 theories, domestic courts are presumed to differ in their incentives and institutional constraints, depending on their formal powers and position in the domestic judicial hierarchy. Lower courts may have more to gain and less to lose, whereas constitutional courts are bound to emerge from the legal integration process as net institutional losers. If a court already holds the power to disapply legislative enactments under domestic law, as constitutional courts do by definition, EU law and its *Simmenthal* doctrine does not promise any extra power. On the contrary, by empowering ordinary courts, EU law may pose a threat to the constitutional court’s authority over the domestic judiciary while undercutting the monopoly it normally enjoys over the review of legislative acts. Lower courts may also invoke EU law or send a reference for a preliminary ruling to Luxembourg to circumvent or even displace a well-established case law of the supreme or


627 The ongoing Euro-crisis could well change this, at least in some Member States. Either because public opposition to membership came to reach such levels that existing parties would no longer be in position to support integration (possibly the UK situation) or because widespread discontent fuelled the emergence of new, anti-EU government parties (some signs of this in Greece and Italy), with the effect of displacing partisan consensus on EU membership, Eurosceptic judges might feel safe enough to ignore the Court of Justice and with it the primacy of EU law. Here lies perhaps the biggest threat to the integrity of the EU legal order as we know it.


constitutional court. The tug of war between constitutional and supreme court judges in France\textsuperscript{630} and the Czech Republic\textsuperscript{631} illustrates the extent to which the influence of EU law and the Court of Justice may disrupt the normal, hierarchical configuration of domestic judicial politics.

Variation in workload is another important factor to consider, as it may in part offset the incentives a court may otherwise have to support legal integration. Courts do not have infinite resources. So the effort a judge can and will be willing to devote to a single case crucially depends on the size of her caseload. A large caseload means that, other things held equal, a judge will look for the most time-effective way of disposing of her caseload, so as to be home at weekends.\textsuperscript{632} This tends to make solutions based on more complex or simply less familiar doctrinal constructions less attractive. No time for strategic and doctrinal niceties! As far as first instance and appellate courts are concerned, this potentially constitutes a huge disincentive to rely on EU law. Sending a reference to Luxembourg will usually delay the resolution of a case by more than a year. More importantly, though, EU law remains a much less well-known body of legal rules than those found in the national statute book and case law reports of domestic courts.\textsuperscript{633} Repeat-players – corporations, NGOs and pressure groups – that directly benefit from cross-border trade or specific EU policies (gender equality, environmental protection...) may make it more difficult for the judges to ignore EU law while lowering the costs of invoking it by providing the court with ready-made doctrinal arguments.\textsuperscript{634} But, overall, we should expect a general reluctance to rely on EU law on the part of first instance and appellate


\textsuperscript{632} Judges in that situations may thus be seen as leisure-time maximizers.


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courts.\textsuperscript{635} \textit{Ceteris paribus}, judges on these courts are more likely to invoke EU law when it furnishes simple, quick and persuasive solutions to a large set of cases – whether about common customs tariff classification, the trans-border enforcement of civil claims, fishing quotas or shareholders disputes. Less frequent, more sophisticated use of EU law, meanwhile, is likely to emanate from judges who are, in one respect or another, outliers: judges who have a special, personal interest in EU law; judges who are unusually knowledgeable about the law\textsuperscript{636}; judges who strive for perfection or originality; judges who want to impress friends in the legal academy, etc. These judicial outliers may even be willing to stay their proceedings and wait the extra months required to obtain a preliminary ruling from the Court of Justice. The questions they submit to the CJEU are also likely to be of the more complex kind – that is, hard rather than easy cases.\textsuperscript{637}

18.5.3. Bi-directional causality

Inter-judicial relations in the EU multi-level court system are usually a two-way street. Figure 3 shows most causal arrows among judicial actors as bidirectional. This reflects the view that interacting courts are able, in varying degrees, to influence each other. Obviously, because of direct effect and supremacy, domestic courts are, in principle, bound by CJEU rulings. But national courts can also exert influence on the Luxembourg Court. First, domestic courts may use the preliminary ruling mechanism in strategic fashion, wording their references in ways that guide the CJEU towards their preferred answer.\textsuperscript{638} “A wise man’s


\textsuperscript{636} There is some indication that higher self-reported knowledge of national law correlates with higher awareness of EU law, see JAREMBA, Urszula et al., Generation Effects on the Approach of National Judges to EU Law: Myth or Reality? In: De WITTE, Bruno et al. \textit{National Courts vis-à-vis EU Law: New Issues, Theories and Methods}.

\textsuperscript{637} This is one reason why we should not assume that cases brought before the CJEU through the preliminary ruling mechanism are representative of the broader population of EU law cases dealt with by first instance and appellate domestic courts. Precisely because the European Court operates in the most indeterminate corner of EU law, the criticism levelled at the Luxembourg judges that their approach to case resolution sets the bar too high for the domestic courts in charge of the day-to-day application of EU law appears to miss the point. In the division of judicial labour, providing guidance to lower courts in simple cases is pointedly not the job of a supreme court.

\textsuperscript{638} NYIKOS, Stacy A. The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Desistment, \textit{European Union Politics}, No. 4,
“Realism About European Legal Integration: Outline of a Soft Legal Realist Approach

The adage goes, “contains half the answer.” More generally, the court system comprising national and supranational courts forms a non-hierarchical court system insofar as courts at the upper echelon (CJEU and General Court) do not have the power to reverse the decisions of courts at the lower level. Hence judicial cooperation between the two levels appears crucial to the effectiveness of EU law. This suggests that the CJEU has a strong incentive to avoid conflicts with domestic judicial actors. Because, as seen above, constitutional courts are structural losers of integration, they are the supranational courts’ most problematic interlocutors. A recent paper of mine draws on game theory to discuss several puzzles arising from what has been called the “jurisprudence of constitutional conflict”639: (a) the capacity of the Member States’ top courts to influence the Court of Justice and possible disparities among them in that respect, (b) the effectiveness of domestic non-compliance threats, and (c) the extent to which actual instances of domestic judicial defiance pose a systemic threat to the existence of the EU legal order.640 The game-theoretic analysis demonstrates that many of these puzzles can be analysed using a simple Hawk-Dove game, thereby suggesting interesting parallels with conflict situations in international relations.

Because their decisions do not all pose the same systemic threat to the Luxembourg Court’s authority, domestic high courts vary widely in their capacity to exert influence on the Court of Justice’s jurisprudence. Apart from the German Federal Constitutional Court (GFCC), few domestic courts can make a credible claim to superpower status, although judicial “satellites”, as it were, may benefit from the Karlsruhe Court’s nuclear umbrella. Lesser judicial powers may discover that an all-out war with the Court of Justice may be considerably more damaging for them than for the judges in Luxembourg. This indicates that the Czech Constitutional Court decision of January 2012,641 which declared the CJEU _Landtová_ ruling _ultra vires_, is likely to remain an isolated accident. Realising they have little leverage on the European Court, some constitutional courts may conclude they should simply try to make the best out of the prevailing power configuration and use EU law to pursue their


642 Court of Justice of the European Union (Fourth Chamber), Judgment of 22 June 2011, _Landtová_, Case C-399/09.
own ends – as the saying goes “if you can’t beat them, join them.” The newly-found enthusiasm of the Spanish and Italian constitutional courts for the preliminary ruling mechanism may in large part result from similar thinking.643

Not least paradoxical about the jurisprudence of constitutional conflict is that the huge costs an escalated constitutional crisis would trigger make an all-out judicial war between the CJEU and the GFCC virtually impossible. In jurisdictional disputes both courts are better off striking a compromise with the other side. Very much like superpowers during the Cold War, mutual assured destruction ensures that cooperation or, at least, pacific coexistence will prevail. The pluralist turn in EU law scholarship – which seems to have begun with the GFCC’s Maastricht ruling644 – is, I believe, largely a consequence of the increasing awareness that this power structure will not be swept away by the centripetal pull of integration but is there to stay as an enduring feature of the European project. Constitutional pluralism, in other words, is the rhetoric that serves to acknowledge and, by the same token, legitimate this state of affairs.

Using an iterated Hawk-Dove model we can also aid in reinterpreting the notion of judicial dialogue in the context of CJEU-GFCC relations.645 The two courts interact in iterative fashion but have incomplete information about the other court’s preferences. Yet the GFCC has the possibility to communicate, sincerely or insincerely, the intensity of its preferences on the issue at hand. One of the model’s possible equilibria is an issue-trading equilibrium – called, in reference to the Cold War, a “coexistence” or from the GFCC’s viewpoint, a “containment” equilibrium. In this equilibrium, the Court of Justice and the GFCC trade issues depending on the importance they attach to them. To oversimplify, when the issue is dear to the Court of Justice, the Court of Justice gets its way. When it is important to the GFCC, the German Court gets its way, and so on. Thus the model suggests that the use of non-compliance threats by the GFCC is more aptly analysed as “judicial signalling” than as “dialogue”. In the coexistence equilibrium, as long as no court is caught lying, the domestic high court has an incentive to tell the truth about its preferences, which, in turn, gives the Court of Justice a reason to believe what the domestic judges say. Domestic judicial signalling in the form of threats to disapply EU acts is thus shown to be an effective way to extract concessions from the CJEU while


644 CRUZ, supra n 609.

avoiding an escalated judicial war. This demonstrates that, contrary to what has been said with respect to the GFCC in the legal literature, a domestic court need not “bite” in order for its “barking” to be effective.

18.6. Conclusion

This contribution is not meant to provide more than the outline of a soft legal realist account of legal integration in the European Union. Many questions, such as the influence of legal scholarship on adjudication; empirical methods or the extent to which courts can be treated as unitary actors, would deserve a full discussion. As presented here, the theory itself is still underspecified and much remains to be done to document it empirically. So those who want to join the research programme of Soft Legal Realism appear to have their work cut out for the next few years. This, however, I would regard as an exciting prospect.

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647 DYEVRE, Arthur. Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations, supra n 605.
Conclusion

KATARÍNA ŠIPULOVÁ AND ALEŠ PAVEL

As previously noted, the idea to put together the publication “Binding Effect of Court Decisions – National and International Views” arose in connection with the international conference held by the Supreme Court of the Czech Republic on the occasion of the presidency of the Czech Republic in the Council of Europe. The choice of the topic was not random; quite the opposite, it responded to one of the most pressing topics that resonates throughout legal practice as well as the academic sphere.

The acceptance of the binding effect of court decisions can be seen as a fundamental prerequisite of a state that recognises the rule of law. The rule of law is integrally tied to the actual functioning and execution of state power, and, in particular, to its impact on the position and protection of the autonomous space of every individual.

Hence, the binding effect is not merely an interesting theoretical concept, but also a practical issue that has an impact on legal certainty, predictability of court decisions, and clarity of the rules that influence the position of an individual and guarantee effective exercise and protection of her fundamental rights and freedoms.

Binding effect and the form of communication between courts from various jurisdictions and systems also has an impact on the effectiveness and speed with which the justice is carried out. Pluralisation of legal systems and constant interaction between courts of different jurisdictions, whether across states or in the mingling of international and national judicial environments, have heightened the urgency with which the issue must be pursued. The work of two European courts, the ECtHR and the CJEU, has significantly changed the original continental legal doctrine and views on the function and position of court decisions among other sources of law. With the development of the principles of direct effect and priority of EU law, and international norms guaranteeing human rights, certain elements of the precedential culture have penetrated the Czech (and other continental) legal system(s), and those elements have also permeated the work of constitutional and supreme courts.

This development has brought several challenges addressed by the authors of respective chapters of this publication.

649 The original Czech text of the contribution was translated into English by the editors of the monography. The translation was not further revised by the authors.
Con
clusion

First: the permeation of precedential legal elements into the continental legal system posed a challenge in terms of looking for appropriate methods of interpretation and work with the case law. It is, however, becoming evident that courts across Europe have successfully accepted the stronger position of the case law of supreme, constitutional or international courts. Moreover, interpretative methods characteristic for continental legal systems seem to have successfully implemented on international decisions. References to the ECtHR and the CJEU, apex courts, and to institutes, principles, and tests they had developed has, furthermore, contributed to an increase in the quality, depth, and level of detail of the reasoning of the decisions of many national courts. The objective of this process should, naturally, be to produce decisions with the best possible reasoning that will be comprehensible both for the parties to the proceedings (and, in particular, individuals) as well as for other actors who are to apply them. Nevertheless, the convincing evidence has thus far been lacking. The question whether court decisions are convincing and accepted by society opens up an interesting field for the future (and undoubtedly necessary) research.

Another major challenge was enhancing awareness and knowledge of the case law of both European courts among national judges. The communication, use, and the respect for case law by national courts are crucial for the ECtHR and the CJEU in two ways: first, in ensuring their social legitimacy and the confidence of public and second, enhancing the effectiveness and efficiency of fundamental rights protection.

The recognition of ECtHR decisions is a key towards a functioning system of human rights protection in Europe. Regardless of the position of the Convention from the point of view of international law and individual constitutional systems, it is the national bodies and, primarily national courts, who put the standards derived in ECtHR case law into practice.

In the strict sense of the word, a general binding effect of CJEU case law is not explicitly laid down in European Union law. The system functions on the basis of an “tacit agreement” confirmed in the CJEU case law. The CJEU’s approach is mostly pragmatic, building on the nature of the preliminary ruling procedure itself. As long as national courts respect CJEU’s case law interpreting primary or secondary EU law, it is not important for the Court of Justice which concept, principle, or rule can be applied to this latently functioning relationship from the point of view of a national judge. Increasingly, the issue of the general binding effect of case law in the preliminary ruling procedure arises. Pursuant to Article 267 TFEU, the purpose of the proceedings is to ensure unified interpretation and application of European Union law. This objective could hardly be achieved, were the CJEU to interpret the very same law again and again in each individual case. Given that the EU legal act which is being
interpreted is binding *erga omnes*, its interpretation is binding with the same effects. The task of the CJEU in these proceedings is to provide interpretation of the law, rather than to resolve a specific dispute. That remains within the competences of national judges. And because the CJEU provides a decisive interpretation of applicable law in its decisions, it is obvious that its decisions should be applied to future cases. This sort of division of authority directly supports a general binding effect: the importance of a general interpretation prevails over the importance of an individual case.

A dialogue between international and national courts, as well as between functionally subordinated courts in individual jurisdictions, constitutes a necessary part of a successful exercise, understanding, and acceptance of the decision-making activities of both European courts.

The outcomes are on the positive side; although, as was said several times, we still do not have enough empirical data on the behaviour of national courts.

Furthermore, although Member States’ courts accept and reflect most of the ECtHR and CJEU case law without major problems, and although they have adopted many principles (such as the proportionality test employed by the ECtHR), there have been examples when courts relativize the ECtHR’s case law in particularly sensitive social and political issues. This publication, among other things, strove to show under what circumstances and why the ECtHR’s case law is accepted to a greater or lesser extent. Most authors agree that only a truly transparent dialogue, open communication, learning and understanding for each other’s ideas may contribute to facilitating enforcement and mutual respect across courts of various jurisdictions.

It cannot be overlooked that both European courts have recently taken many steps to enhance transparency and cooperation with national courts. In the European Union, an example of these activities is the establishment of the Judicial Network of the European Union, which objective is to deepen the dialogue between the CJEU and participating courts through the preliminary ruling procedure, improve the efficiency of dissemination of national decisions which are of importance to the Union in order to ensure cohesion and application of European Union law, and to enhance mutual knowledge of law and legal systems of Member States from the comparative point of view. The CJEU offers superior national courts an opportunity to look at its analytical work by making available its research and documents drafted for the purpose of the decision-making of the Union court. The Superior Courts Network was created at the ECtHR, emphasising shared responsibility of states in the implementation of rights guaranteed by the Convention. The Network was established as a forum for conducting a dialogue between the ECtHR and national courts. Accordingly, both presidents of the European courts, Koen Lenaerts and Guido Raimondi,
emphasised in their contributions the need to deepen the dialogue in order to achieve greater understanding and respect for individual legal systems. As was said in the introduction to this publication, the multiple layers in which judicial power operates in the European judicial realm requires a certain form of dialogue, two-way communication, as a condition for ensuring balance, effectiveness, and responsibility of the system. It is evident that enhanced transparency of the activities of both European and national courts and the possibility to learn about one another’s decision-making, constitute necessary prerequisites for the success of any such plan. Herein then lies the notional gauntlet that has been thrown, both to supreme courts and their analytical work and to academics studying judicial decision-making and the implementation or application of European and European Union law.

Furthermore, the publication has shown that the functioning of both European courts as well as constitutional and supreme courts has undoubtedly disrupted existing concepts and theoretical approaches to the binding effect of court decisions inherent to continental legal system, which are relatively rigid in this regard. Nevertheless, it seems that this disruption was not destructive for renewed continental law, but quite the contrary, that European legal systems are gradually transforming and expanding the range of interpretative instruments they use.
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