

The background of the cover is a complex, white line drawing on a dark blue background. It features various architectural elements such as rooms, corridors, and structural beams, overlaid with a network of intersecting lines and circles, creating a technical and abstract aesthetic.

# CONSTITUTIONAL LAW AND PRECEDENT

INTERNATIONAL PERSPECTIVES  
ON CASE-BASED REASONING

Edited by  
Monika Florczak-Wątor



# Constitutional Law and Precedent

This collection examines case-based reasoning in constitutional adjudication; that is, how courts decide on constitutional cases by referring to their own prior case law and the case law of other national, foreign, and international courts. Argumentation based on judicial authority is now fundamental to the resolution of constitutional disputes. At the same time, it is the most common form of reasoning used by courts. This volume shows not only the strengths and weaknesses of such argumentation, but also its serious methodological shortcomings. The book is comparative in nature, with individual chapters examining similar problems that different courts have resolved in different ways. The research covers three types of courts; namely the civil law constitutional courts of Germany, Italy, Poland, Lithuania, and Hungary; the common law supreme courts of the United States, Canada, and Australia; and the European international courts represented by the European Court of Human Rights and the Court of Justice of the European Union. The authors are distinguished scholars from various countries who specialise in constitutional justice issues. This book will be of interest to legal theorists and practitioners, and will also be especially insightful for constitutional court judges.

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# Constitutional Law and Precedent

International Perspectives  
on Case-Based Reasoning

Edited by **Monika Florczak-Wątor**

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# Introduction

## On the methodology of the research on case-based reasoning in constitutional adjudication

*Monika Florczak-Wątor*

Constitutional adjudication is a phenomenon that has developed through case-based reasoning. Courts and tribunals, when ruling on constitutional matters, not only take into account the applicable domestic and foreign legal regulations, but also judicial decisions that develop and supplement them. An argument based on the court's own authority or on the authority of other courts, regardless of their national, foreign, or international character, is one of the most significant and persuasive modes of argumentation in current constitutional jurisprudence. Moreover, case-based reasoning enables courts to correct, supplement, and develop the law through its creative interpretation, frequently inspired by previous judicial decisions.<sup>1</sup> These latter judgments are sometimes regarded as binding precedents that determine the content of subsequent decisions in similar cases.<sup>2</sup> This applies not only to common law countries, but also to civil law jurisdictions that do not have a system of formally binding precedents. In constitutional adjudication, the proper use of the jurisprudential heritage of various courts and tribunals is one of the most challenging issues that has long been the subject of comparative research.<sup>3</sup>

The aim of the authors of this collection of studies was to examine—with regard to courts deciding on constitutional cases—the practice of using references to their own case law and the case law of other courts, as well as to determine the

1 For constitutional courts as law-makers, see Monika Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020); Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011).

2 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2011); Michael J. Gerhard, *The Power of Precedent* (Oxford University Press 2008); Ewoud Hondius (ed.), *Precedent and the Law* (Bruylant 2007).

3 See, among others, Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2014); D. Neil MacCormick, Robert S. Summers and Arthur L. Goodhart (eds.), *Interpreting Precedents: A Comparative Study* (Routledge 1997); Leszek Leszczyński, 'Implementing Prior Judicial Decisions as Precedents: The Context of Application and Justification' (2020) 33 *International Journal for the Semiotics of Law* 231; Jan Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedents' (2012) 8 *LSE Law Society and Economy Working Papers* 1–23.

significance of this type of argumentation in constitutional adjudication. The volume not only presents the results of this research with respect to selected national and international courts, but also includes a comparative chapter pointing out the similarities and differences in the application of jurisprudential argumentations in all the analysed jurisdictions.

Developing the research methodology for this study required an appropriate selection of courts and tribunals for a comparative analysis. The starting point of our research was the assumption that case-based reasoning is used by all courts and tribunals adjudicating constitutional cases, regardless of whether they are national or international jurisdictions, and regardless of whether these bodies operate in the common law or civil law system. We have adopted a broad understanding of the concept of a constitutional case adjudicated by such courts and tribunals, assuming that it is any case requiring adjudication on the basis of fundamental principles, standards, and values applicable in a given legal order, concerning issues of importance for the functioning of various entities within that legal order, such as individuals, public authorities, states, and international organisations. For this reason, the research not only covered courts functioning within national legal orders, but also international courts functioning within the European legal space. The power of the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) undoubtedly extends beyond the territorial boundaries of the Member States of the Council of Europe and the European Union. Thus, although these courts cannot be regarded as having a global character, they are good examples of international bodies that independently resolve disputes of a constitutional nature and that strongly influence the constitutional orders of States that are members of these international organisations. The choice of the two European courts for comparative studies was further justified by the fact that our research largely focuses on the jurisprudence of constitutional courts operating in the European legal space. For the latter, the ECtHR and the CJEU are the most suitable partners in judicial dialogue on human rights, democracy, and the rule of law.<sup>4</sup>

Undoubtedly, the main component of this research was the European constitutional courts, for which a comparative perspective was created by their counterparts—on the one hand, supreme courts functioning in common law countries, and on the other hand, the afore-mentioned European international courts. In creating the palette of constitutional courts included in the research, we were guided by the need to show their diversity and dissimilarity.<sup>5</sup> Therefore, we have chosen courts established in different historical periods; that is, both those created just after the Second World War and influenced by its events, as well as those established half a

4 Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press 2017); Martin Belov (ed.), *Judicial Dialogue* (Eleven International Publishing 2019).

5 For a typology of European constitutional courts' jurisdiction see, e.g., Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 7–8.

century later after the fall of communism and the rise of regimes based on democracy and the rule of law. In our research, we have included not only countries wherein the constitutional judiciary has a strong position in the system of State organs and real influence over the shape of the legal order, the situation of the individual, and the functioning of government, but also countries wherein the constitutional judiciary is currently experiencing a serious crisis associated with its subordination to illiberal governments, the loss of the attributes of independence and impartiality, the decline in its institutional authority, and widespread questioning of its legitimacy in the control of the constitutionality of the law. The research shows that the state of democracy and the rule of law in a country have a direct impact on the adjudicating activity of the constitutional courts upholding the supremacy of the constitution and the protection of individual rights, as well as on their case-based reasoning on constitutional issues.<sup>6</sup> The last criterion for selecting countries for comparative legal research was a geographical one. The volume therefore includes constitutional courts representing Western European countries (Germany and Italy), Central European countries belonging to the Visegrad Group (Poland and Hungary), Northern European countries that are part of the Baltic group (Latvia), and Southern European countries from the Balkans (Romania).

The comparative perspective for these European constitutional courts is, as already pointed out, constituted by supreme courts functioning in the common law system, in which the basic form of jurisprudence is argumentation based on precedents and case-based reasoning. We have chosen supreme courts from countries located on two different continents with different historical traditions functioning in differently shaped power structures. What they have in common is their judicial authority and the power to interpret the constitution and develop it creatively. Based on these criteria, we have selected three common law courts for comparative research: the Supreme Court of the United States of America, the Supreme Court of Canada, and the High Court of Australia.

The research of the case law of the aforementioned courts conducted by the contributors to this volume was mainly qualitative in nature. The quantitative research of self-references made by courts and their references to the case law of other national, foreign, and international courts was conducted to a limited extent and only by some authors. Carrying out comprehensive quantitative research would require a detailed analysis of very extensive case law material, which, in the case of the courts analysed, would be the result of their judicial activity spanning several decades, or even—as the example of the US Supreme Court shows—over two centuries. In the case of some of the courts analysed, such partial quantitative research of their case law has already been conducted by other scholars<sup>7</sup> and

6 See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 58–95; Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) 11 HJRL 417.

7 See, e.g., Jan Winczorek, 'Wzorce wykładni konstytucji w świetle analizy treści uzasadnień orzeczeń Trybunału Konstytucyjnego' in Tomasz Stawecki and Jan Winczorek (eds.), *Wykładnia konstytucji. Inspiracje, teorie, argumenty* (Wolters Kluwer 2014) 387n. This is an

the authors of the chapters concerning those courts included the results of such studies in their analyses.

The contributions presented in this volume determine not only the frequency with which individual courts refer to their own jurisprudence and to the jurisprudence of other national, foreign, and international courts, but also the manner in which citations are made, the motives for using references, and their importance in the overall court argumentation.

The research covers four types of judicial references applied by the courts and tribunals examined; namely, references to their own case law, references to the case law of other national courts, references to the case law of foreign courts ruling on constitutional issues, and references to the case law of international courts.

In order to ensure an equal scope of research and comparable criteria for the analysis of the case law of the aforementioned courts and tribunals, the editor of the book prepared questionnaires with detailed research questions for each category of court included in the study. The questionnaires consisted of four parts, the first of which concerned the position of the court within the judicial system of the state, the next two of which covered the role of self-references of the court and its references to the case law of national, foreign, and international courts, and the final part examined the methodological problems related to the application of case-based reasoning in constitutional adjudication. The questions from the first part concerned the position of the examined court in the structure of state bodies, its relations with other judicial authorities, and the binding effects of its decisions in the vertical and horizontal dimensions.<sup>8</sup> This part of the questionnaire ended with questions concerning the possibility of a court being able to deviate from the view expressed in its earlier decisions and the reasons given by that court for having to follow or overrule its own judgments. The next part of the questionnaire contained questions concerning the practice of the court referring by the court to its own case law, including the ways of quoting its own decisions, the reasons given by the court for the necessity of following its own settlements, and the significance of self-references for adjudications in constitutional cases. Further questions concerned the practice of courts referring to the case law of other courts, considering national, foreign, and international courts separately. For each category of courts, in addition to the aforementioned questions concerning the ways in which judgments are cited, the reasons for referring to them, and their significance for constitutional adjudications, questions were also asked about which courts are cited and how often, and if there are any particular reasons for references to those particular courts. The final section of the questionnaire was devoted to the methodology and included such questions

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empirical study involving the analysis of 150 selected judgments of the Polish Constitutional Tribunal issued in the period from 1986–2009.

<sup>8</sup> The vertical binding effects of a court ruling means, among other things, the obligation of other courts to apply the ruling to the matters decided, while the horizontal binding effect means the obligation of the court panels of judges to follow the opinion expressed in previous decisions of that court.

as whether the court has developed a consistent methodology for applying case-based reasoning and whether the court's awareness of the methodological problems associated with the use of this type of argument was evident from its case law.

The answers to these questions were included in the individual chapters; hence, the chapters, in some parts, have a similar structure and address comparable issues. However, it should be emphasised that the authors were asked to present the results of their research in a manner that they considered to be the most optimal from the point of view of the discussed issue and the specificity of the court in relation to which it was analysed. Therefore, the chapters do not have a uniform structure and the issues taken up by the authors are analysed to a different extent. The final chapter provides a comparative analysis and conclusions drawn from the research.

The book has been prepared as part of the research project entitled 'Specificity of Constitutional Courts Law-Making and its Limits' which was financed by the Polish National Science Centre (Decision No. 2015/18/E/HS5/00353).

I would like to take this opportunity to thank the authors of all the chapters for accepting the invitation to participate in the preparation of this book. They enthusiastically engaged in the research, which was a huge challenge due to the volume of the analysed case law material and the complexity of the legal problems that had to be considered. I hope that the research we have undertaken will be continued in the future and that the preliminary results of this research, which we present in this volume, will be an important reference point for further research addressing the issue of precedents and case-based reasoning in constitutional adjudications.

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**Part I**

**Supreme courts in the  
common law system**



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# 1 The Supreme Court of the United States

## Legitimate law-maker and constitutional interpreter<sup>1</sup>

*Paweł Laidler*

### Introductory remarks

One of the most famous justices in the Supreme Court's history, Robert H. Jackson, explained the character of the Court's decisions and the role of the justices by stating, "We are not final because we are infallible, but we are infallible only because we are final."<sup>2</sup> The issue of finality in the Court's jurisprudence has been discussed and researched for the last half-century, bringing several important conclusions as to the binding character of its precedents, and proving that the position of the judicial branch in the US legal system has been determined by both the theory of common law, and the active use of the power of judicial review.<sup>3</sup>

One of the foundations of the common law system, created in medieval England, is the law-making ability of judges. According to common law theory, while solving conflicts and deciding individual cases judges are able to establish general rules and principles which may be used in future cases. These rules, called precedents, may have a binding or persuasive character, depending on the scope of the similarity of two cases and the decision of a judge who applies the rule to the circumstances of the adjudicated case.<sup>4</sup> There is not much theory guiding the rule of precedent, except for the *stare decisis* doctrine, introduced for the first time in thirteenth-century England, which means the necessity to follow the

1 This article is the result of research conducted in the project "Constitutionalization of Politics as a Tool of the Checks and Balances System. A Comparative Analysis," funded by the Polish National Science Center (2018/31/B/HS5/02637). The background for this research was conducted by the author between 2008–2010 and presented in his book *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki*, published in 2011 by the Jagiellonian University Press.

2 Concurring opinion in *Brown v Allen* 344 U.S. 443 (1953).

3 Jeffrey A. Segal and Harold J. Spaeth, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (Cambridge University Press 2012); Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton University Press 2011); Paweł Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki* (Wydawnictwo Uniwersytetu Jagiellońskiego 2011).

4 Douglas E. Edlin, *Common Law Theory* (Cambridge University Press 2010).

earlier-established precedents in all future similar cases.<sup>5</sup> The rule of precedent and *stare decisis* doctrine lay at the foundations of the English legal system and were implemented in the North American colonies, leading to the reception of common law in the future territory of the United States. The colonists, and later the representatives of the states who established the new country, followed the principles of common law, approving the ability of judges to create legal norms and the courts to operate in a system based on precedent.<sup>6</sup> During the Philadelphia Convention which adopted the federal constitution, the Founding Fathers did not devote much time to the discussion concerning the structure and powers of the judicial branch, but they all agreed that there should be a strong central court functioning within the federal government according to the rules of the common law.<sup>7</sup>

The Supreme Court of the United States (SCOTUS) has existed since the beginning of American statehood, since it was introduced in the federal constitution. The provision vested “the judicial power of the United States” in “one Supreme Court” and in lower courts which were to be created by Congress.<sup>8</sup> The process of the establishment of three levels of federal judiciary began with the famous Judiciary Act of 1789 and was followed by numerous pieces of legislation expanding the number of federal district and circuit courts of appeals, which also determined their membership and defined their competences.<sup>9</sup> In this way, Congress exercised an indirect influence on the operation of the SCOTUS, which decided most of the cases based on appeals from lower courts. The impact of federal legislature on the judiciary resulted also from the Senate’s power to approve judicial appointments made by the President, as well as from the power to implement legislation setting the number of justices. Both branches, legislative and executive, were equipped by the supreme law of the land with strong checks on the functioning of the federal courts, including the SCOTUS. The Founding Fathers feared an accumulation of competences by any of the three branches of government; thus both the idea of the separation of powers, accompanied by the checks and balances system, became fundamental principles of American constitutionalism.<sup>10</sup>

In the initial phase of American statehood, the judicial branch did not exercise any serious checks on other branches of government; therefore, in 1803, the Court decided to equip itself with the power of judicial review, which opened the

5 Arthur R. Hogue, *Origins of the Common Law* (Indiana University Press 1966).

6 Frederick G. Kempin, Jr., *Historical Introduction to Anglo-American Law in a Nutshell* (West Academic Publishing 2007).

7 Christopher Collier, *Decision in Philadelphia: The Constitutional Convention of 1787* (Baltimore Books 2007).

8 Article Three, U.S. Constitution.

9 An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789). For analysis of further legislation see Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (Princeton University Press 2012).

10 Collier (n 7).

possibility of controlling the constitutionality of federal and state acts by judges, thus strengthening the position of the SCOTUS in relation to the President and Congress. Deciding the milestone case *Marbury v Madison*, Chief Justice John Marshall declared that it was “the province and duty of the judicial department to say what the law” was, naming “the government of the United States” as “the government of laws, and not of men”.<sup>11</sup> The power of judicial review, along with its ability to establish binding precedents, made the SCOTUS a potential key player in defining the character of constitutional provisions, including the powers of the executive and legislative branches, and the scope of the rights and freedoms of individuals. It became apparent over time that the justices used their powers to be actively involved not only in the process of determining legal issues, but also in shaping political and social relations.<sup>12</sup> This soon led to the judicialization of politics, marked by the involvement of judicial actors in political processes, which could be recently observed in the American context especially with respect to the Supreme Court.<sup>13</sup>

This chapter discusses the position of SCOTUS precedents in US legal and political system, including the hierarchy of sources of law, the relations between the Court and lower judicial institutions, and the impact of international and national courts on its adjudication. The significant position of the SCOTUS in the US legal system should be analyzed from various perspectives, both legal and political, with reference to the Court’s case law and individual opinions of the justices, additionally focusing on statistical data and various studies conducted in recent years, which may help us to understand the methodology of the Court’s decision-making process. It is crucial to assess how much the common law theory—*stare decisis* doctrine and the rule of precedent—has determined the functioning of the highest judicial tribunal in the US, making it one of the most active constitutional courts in the world.

## **The position of the Supreme Court in the U.S. legal system**

The US Supreme Court is the highest judicial institution in the American legal system, adjudicating in cases coming from the lower federal courts (mostly circuit courts of appeals) or the highest courts of each of the 50 states. The SCOTUS decides cases based mostly on the appellate jurisdiction, rarely exercising its power as a court of first and final resort (original jurisdiction). Since 1869,<sup>14</sup> the Court consists of a chief justice and eight associate justices who are appointed by the

11 5 U.S. 137 (1803).

12 Laidler (n 3).

13 On the concept of the judicialization of politics see Ran Hirschl, ‘The Judicialization of Politics’ in Keith E. Whittington, Daniel R. Kelemen and Gregory A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 1999).

14 An Act to Amend the Judicial System of the United States, 16 Stat. 44 (1869).

President, with the advice and consent of the Senate, and who enjoy life tenure.<sup>15</sup> The SCOTUS operates in annual terms, usually from October until June or July, providing written opinions in about 60–80 cases in each term. Justices have the discretionary power to determine in which cases the Court should issue a writ of certiorari, which means their approval to review the case. Analysis shows that the SCOTUS issues such a writ in less than 1% of cases every year, proving that unless a dispute raises serious constitutional issues, there is limited access to the highest judicial instance. The analysis of the procedure of issuing writs of certiorari in recent decades reveals that there is consistency in the types of cases which are approved by the Court. They include disputes which raise serious constitutional questions, especially when a lower court has imposed judicial review, conflicts between lower courts over statutory or constitutional interpretation, cases which raise concerns over the constitutionality of an important federal act, or when the Solicitor General has filed a motion for review of a case in which the US government has an interest.<sup>16</sup> Later, the justices hear oral arguments of the parties, and they discuss the case and present their arguments during conferences which end with a voting procedure. If all justices are present, five votes are necessary to reach the majority, and the Court's decision is later announced and published in one or more opinions,<sup>17</sup> becoming binding law.

Theoretically, the position of SCOTUS precedents in the US legal system stems from the place the Court occupies within the judicial branch. As the court of last resort, it has the ability not only to review cases coming from lower federal and state courts, but also to reverse the decisions of these courts. In order to overrule a lower court's precedent, five out of the nine justices need to agree upon the verdict in the case. And, by analogy, a precedent created by the SCOTUS has a direct binding effect on the lower court(s) from which the case was brought on appeal. However, in order to fully understand how the process operates and what is the real value of the Court's precedents, it is necessary to determine the character of the legal norms established by judges in the common law system. Contrary to their counterparts in the civil law system, common law judges not only adjudicate in disputes reaching verdicts which apply to the parties to the disputes, but they also have the ability to create rules of more general character which may be used in similar future cases. Establishing a precedent in a concrete case does not directly mean its application in all similar disputes, since the decision to apply a precedential rule is made by the judge adjudicating in the future dispute. Hypothetically it is possible that, despite obvious similarities of the facts and circumstances of two cases, a judge decides not to apply the precedent and creates a new rule. Therefore, the general character of the precedential norm

15 Articles Two and Three, U.S. Constitution.

16 Louis Fisher and Katy J. Harriger, *American Constitutional Law* (Carolina Academic Press 2019).

17 Each justice can write an opinion, and there are three basic types of opinions: majority, dissenting, and concurring.

depends on the activity undertaken by the judges who have the opportunity to apply it in the case they are settling. From that perspective, the precedent may be defined as an individual norm with a general character in the future, applying only to those cases which are determined by the court to be similar ones.<sup>18</sup> The aforementioned theoretical remarks should be analyzed in the context of the Supreme Court's functioning, especially with reference to the binding character of its precedents. There is no other judicial instance in the US having such a potential to determine the substance of other courts' decisions. The structure of the judiciary stemming from the principle of federalism and from Article Three of the Constitution determines the position of SCOTUS precedents, placing them at the top of the hierarchy of judicial norms established in the US. Still, there have been a small number of examples of the reluctance of lower courts, mostly at state level, to implement the rulings of the Court, especially when the precedents have raised controversial social concerns.

Undoubtedly, the most manifest example of criticism of SCOTUS precedent by state judges happened in the mid-twentieth century, in the times of desegregation, as an aftermath of both *Brown v Board of Education* decisions.<sup>19</sup> The general rule declared by the Court in 1954, and reaffirmed a year later, stated that the separate-but-equal doctrine, which led to racial segregation in public facilities, was unconstitutional, resulting in an order to impose desegregation policies in public schools. As a consequence, southern states' governors and school boards were forced to begin the process of opening their education facilities to representatives of racial minorities. Apart from the strong opposition from conservative politicians, including state governors and senators, and efforts of school boards to delay the Court orders, some judges of state courts made public statements trying to undermine the *Brown* precedent.<sup>20</sup> The reaction of the SCOTUS was immediate and unambiguous, because the justices not only strengthened the desegregation orders, but they also evoked the *Marbury* precedent, reaffirming that the Court was the final interpreter of the Constitution.<sup>21</sup> The new precedent did not ease all tensions—soon Presidents Dwight Eisenhower and John F. Kennedy became involved in enforcing the desegregation orders, and congressional legislation was necessary to fully implement the principles set by the Supreme Court.<sup>22</sup>

Similar—but to a smaller extent—resistance to the Court's precedent occurred in 2015, when the justices declared that limitations to same-sex marriage were unconstitutional, thus forcing all state jurisdictions to allow same-sex couples to enjoy such a right.<sup>23</sup> Apart from the opposition from conservative justices

18 Laidler (n 3).

19 *Brown I* 349 U.S. 294 (1954) and *Brown II* 349 U.S. 294 (1955).

20 Richard Kluger, *Simple Justice: The History of Brown v Board of Education and Black's America Struggle for Equality* (Vintage Books 2004).

21 *Cooper v Aaron* 358 U.S. 1 (1958).

22 Frances L. Baer, *Resistance to Public School Desegregation: Little Rock, Arkansas, and Beyond* (LFB Scholarly Publishing 2008).

23 *Obergefell v Hodges* 576 U.S. 644 (2015).

who wrote dissenting opinions, many Republican governors and state attorneys general from southern states criticized the Court's ruling, trying to limit its applicability in their respective jurisdictions. There were also individual statements made by conservative judges who saw obstacles in implementing the *Obergefell v Hodges* ruling, and some state supreme courts issued writs which suspended the enforcement of the precedent, though these efforts did not affect the final outcome of the case.<sup>24</sup> It is important to acknowledge that the SCOTUS did not reach a unanimous verdict, because the justices' vote was split by 5–4. Although it seems more likely that a narrow decision margin should raise concerns from lower court judges who are bound to apply the rule created by the SCOTUS, the example of unanimous *Brown* verdict shows an opposite tendency.

The opposition of states to federal laws and Supreme Court precedents has a long history and is deeply rooted in the conflicts which could be observed during the Philadelphia convention and which shaped the character of American constitutionalism. Prior to the most far-reaching opposition towards the superiority of federal law which led to the Civil War in the 1860s, from the early years of the Republic there were doctrines imposed by the states trying to reject the binding character of national legislation and jurisprudence, like the nullification announced by South Carolina in the early 1830s.<sup>25</sup> Strong criticism of SCOTUS decisions came at the same time from President Andrew Jackson, who refused to execute some of the rules created by the Court and became a staunch critic of the rulings produced by Chief Justice John Marshall.<sup>26</sup> A hundred years later, Franklin D. Roosevelt fought an open battle with justices who declared his New Deal programs unconstitutional, forcing the President to initiate legislation aimed at changing the Court's membership in order to appoint "proper" justices.<sup>27</sup> These examples partly explain the criticism of judicial decision-making, appearing from time to time at the federal and state levels of government, but the situation is different when lower court judges oppose precedents created by the justices. Although such situations are very rare, they show the scope of impact of the SCOTUS on important social and political matters.

The Supreme Court has a potential to shape the direction of the judicial interpretation of the Constitution on a vast array of issues, from the institutional and systemic to the scope of the rights and freedoms of individuals. Historically, justices determined the meaning of all constitutional principles, such as the separation of powers, checks and balances, federalism, popular sovereignty, and due process of law; and the majority of constitutional provisions relating to the

24 William N. Eskridge and Christopher B. Riano, *Marriage Equality: From Outlaws to In-Laws* (Yale University Press 2020).

25 David F. Ericson, 'The Nullification Crisis, American Republicanism, and the Force Bill Debate' (1995) 61(2) *The Journal of Southern History* 249–270.

26 Keith E. Whittington, 'Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning' (2001) 33(3) *Polity* 365–395.

27 William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Harper Perennial 2009).

powers of the executive, legislative, and judicial branches, federal-state relations, and the scope of the guarantees listed in the Bill of Rights. In that process, the justices have imposed different means of interpretation, from originalism and textualism, doctrinal or systemic interpretation, to functionalism, which became the leading mode of reading the Constitution in recent decades.<sup>28</sup> From that perspective, the SCOTUS has played a leading role as constitutional interpreter, or, in other words, as constitutional law-maker, deciding on the proper understanding of certain clauses which affect the everyday life of Americans. In that respect we can observe both positive and negative law-making roles, since there have been periods in which the justices broadened the rights of the people, which led to bigger control of the powers of the government, or they expanded the competences of national and state authorities, thereby limiting the constitutional guarantees of US citizens.

Some of the Court's precedents have limited or expanded the powers of various government institutions, affecting the policies of presidents, congresses, and state authorities, as well as economic, social, and cultural institutions. SCOTUS case law concerning federal-state relations has determined the scope of intrusion of central government into local affairs, affecting the pace of economic growth and the role of federal and state institutions.<sup>29</sup> There have been precedents which followed the general direction of the national government's policies, usually during times of emergency, such as the World Wars, the Red Scare periods, the War on Terror, and, recently, the Covid-19 pandemic.<sup>30</sup> From that perspective, the Court may be called a "national-policy maker,"<sup>31</sup> serving as a supporter and legitimizer of governmental policies, some of which were controversial due to the limitations they set for such rights as freedom of speech, freedom of assembly, religious freedoms, or the procedural rights of the accused.<sup>32</sup> On the other hand, there have been circumstances in which the justices declared the acts of executive or legislative branches unconstitutional, such as during the 1930s conflict over New Deal legislation between conservative justices and President Roosevelt, or in the period of intensified expansion of the rights of individuals in the 1960s.<sup>33</sup>

28 Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* (The Belknap Press of Harvard University Press 2018); Michael J. Perry, *The Constitution in the Courts: Law or Politics?* (Oxford University Press 1994).

29 Fisher and Harriger (n 16).

30 Paweł Laidler, 'Secrecy Versus Transparency in the U.S. National Security Surveillance' in Lora A. Viola and Paweł Laidler (eds.), *Trust and Transparency in an Age of Surveillance* (Routledge 2021).

31 Robert Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) *Journal of Public Law* 6.

32 Richard Pacelle, *The Role of the Supreme Court in American Politics: The Least Dangerous Branch?* (Taylor and Francis 2019).

33 Leuchtenburg (n 27); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2000); Keith E. Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (University Press of Kansas 2019).

In these cases active judicial review affecting federal legislation resulted in Congress's efforts to overrule certain precedents created by the SCOTUS. In order to discuss that issue, we need to look at the position of the Court's precedents in the hierarchy of sources of law.

There is no doubt that Congress, of all the government branches, plays the main law-making role, since it was equipped by the Constitution with "all legislative powers."<sup>34</sup> Furthermore, acts of Congress have a high position in the hierarchy of sources of law, being located just below the Constitution, and at the same level as international treaties.<sup>35</sup> Considering that in some SCOTUS cases the justices undertake statutory interpretation, the position of such precedents must be at the same level as the position of acts of Congress, but if the Court is applying constitutional interpretation, explaining, defining, or modifying the meaning of certain constitutional clauses, the position of such precedents in the hierarchy should be higher than that of congressional legislation.<sup>36</sup> Such an argument, although controversial, can be defended by the results of analysis of congressional efforts to overrule constitutional precedents of the Supreme Court. Historically, there have been numerous cases in which members of Congress initiated legislation aiming at reversing SCOTUS precedents, but most of these efforts proved unsuccessful. When Congress used an ordinary legislative process as a tool to overrule the Court, the justices usually reacted by establishing a new precedent which limited the scope of the congressional act. For example, in the 1990s, the Religious Freedom Restoration Act, which was an effort to overrule a case concerning the free establishment clause,<sup>37</sup> was declared unconstitutional by the Court.<sup>38</sup> Similarly, after the controversial SCOTUS decision allowing the burning of the American flag as a form of the exercise of symbolic speech,<sup>39</sup> Congress quickly implemented the Flag Protection Act which, in turn, was declared unconstitutional by the Court.<sup>40</sup> These two examples do not set a principle, which makes it impossible for Congress to reverse SCOTUS precedents, but such situations have occurred rarely and the success of the legislative branch was dependent on the will of the justices. This does not mean that the Court could fully succeed in implementing its rulings without the support of Congress and the President, and there are studies showing the interdependence of the three branches of government in the process of constitutional law-making.<sup>41</sup> But even if we agree that there have been times when judicial restraint has prevailed over judicial activism, and that judicial review is not a process which can be undertaken freely and usually takes time, still

34 Article Two, U.S. Constitution.

35 Article Six, U.S. Constitution.

36 Laidler (n 3).

37 *Employment Division v Smith* 494 U.S. 872 (1990).

38 *City of Boerne v Flores* 521 U.S. 507 (1997).

39 *Texas v Johnson* 491 U.S. 397 (1989).

40 *United States v Eichman* 496 U.S. 310 (1990).

41 Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution* (University Press of Kansas 2019).

it is hardly possible for Congress to effectively use ordinary legislative process as a tool for diminishing the law-making ability of the Court.

A potentially different situation may be observed with regard to the process of implementing constitutional amendments which have the same position within the hierarchy of sources of law as the Constitution, having the potential to overrule all SCOTUS precedents. In the US constitutional system, an amendment may be initiated by Congress or by the convention of states;<sup>42</sup> but, historically, most such initiatives began in the federal legislative, some of which were clearly aimed at reversing politically controversial decisions of the Court. Statistics prove the small success rate of Congress, since there were only four SCOTUS precedents in history which became directly overruled by constitutional amendments: the Eleventh Amendment overruled *Chisholm v Georgia*,<sup>43</sup> the Thirteenth and Fourteenth Amendments reversed the infamous *Dred v Scott*<sup>44</sup> precedent; the Sixteenth Amendment overturned *Pollock v Farmers' Loan & Trust Co.*,<sup>45</sup> and the Twenty-Sixth Amendment reversed *Oregon v Mitchell*.<sup>46</sup> Accordingly, since 1803 the SCOTUS has declared more than 200 acts of Congress unconstitutional in part or in whole.<sup>47</sup> thus strengthening the argument about its significant position in the US legal system and the finality of its decisions.

### **SCOTUS and *stare decisis***

After discussing the position of SCOTUS precedents in the U.S. legal system with regard to lower federal and state courts, and in relation to the acts of Congress, we should analyze the Court's attitude towards the doctrinal foundations of *stare decisis*. Even if that doctrine seems a somewhat outdated in the twenty-first century, it still plays a significant role in the common law theory guaranteeing that established rules and principles will be applied in all similar cases, providing predictability, clarity, and continuity to the legal system.<sup>48</sup> American courts recognized the significance of *stare decisis* for the process of judicial decision-making from the beginning of the U.S. legal system, although the justices did not implement too-formalistic rules which would guide the process of the upholding of their prior decisions. As Justice Horace Lurton once stated, "The rule of *stare decisis* tends to uniformity and consistency of decision but it is not inflexible, and it is within the discretion of a court to follow or depart from its prior decisions."<sup>49</sup>

*Stare decisis* always played an important role in U.S. common law theory, but its interpretation by the justices, especially in the twentieth and twenty-first centuries,

42 Article Five, U.S. Constitution.

43 2 U.S. 419 (1793).

44 60 U.S. 393 (1857).

45 157 U.S. 429 (1895).

46 400 U.S. 112 (1970).

47 Whittington (n 33).

48 Edlin (n 4); see also *Payne v Tennessee* 501 U.S. 808 (1991).

49 *Hertz v Woodman* 218 U.S. 205 (1910).

has never forced the SCOTUS to follow its prior rulings unconditionally, defining circumstances in which adherence to a prior ruling was not demanded.<sup>50</sup> A reflection on the contemporary role of *stare decisis* can be found in the 2010 opinion of Chief Justice John Roberts, Jr., who stated that a precedent should be followed “unless the most convincing of reasons demonstrates that adherence to it puts [justices] on a course that is sure error.”<sup>51</sup> In a recent labor law dispute, the Court listed five factors which should be taken into consideration while deciding whether to apply *stare decisis* or overrule the binding precedent. Arguing that departures from the doctrine “are supposed to be exceptional” and demand “special justification,” Justice Samuel Alito declared that justices should consider “the quality of [case] reasoning, the workability of the rule it established, its consistency with other related decisions, development since the decision was handed down, and reliance on the decision.”<sup>52</sup>

Although these factors seem quite rational from the perspective of judicial reasoning, it is important to note that in U.S. history there have been several cases in which the justices decided to overrule, in full or in part, prior precedents of the Court. According to data provided by the Congressional Research Service<sup>53</sup> there have been 233 such cases, in which the Court overruled its prior decisions, although the departure from the earlier established precedent does not always seem obvious. If there is a similar case which overturns a former legal rule, it is reflected in the Court’s opinion, and the justices usually provide a legal justification for their decision. There are clear examples of disputes overruling former precedents which affected social and political relations in the U.S., such as the separate-but-equal doctrine cases (declared constitutional in *Plessy v Ferguson*<sup>54</sup> and overturned in *Brown v Board of Education*<sup>55</sup>), the right to privacy of homosexuals (neglected in *Bowers v Hardwick*<sup>56</sup> and declared constitutional in *Lawrence and Garner v Texas*<sup>57</sup>), or the right to counsel in criminal cases (limited in *Betts v Brady*<sup>58</sup> and overruled twenty years later in *Gideon v Wainwright*<sup>59</sup>).

50 Richard H. Fallon, Jr., ‘Stare Decisis and the Constitution: An Essay on Constitutional Methodology’ (2001) 76(2) *New York University Law Review* 570–597; Michael J. Gerhardt, ‘The Role of Precedent in Constitutional Decision-making and Theory’ (1991) 60(1) *George Washington Law Review* 68–159.

51 *Citizens United v Federal Election Commission* 558 U.S. 310 (2010). For more on *Citizens United* rationale see Mark Tushnet, *In the Balance: Law and Politics in the Roberts Court* (W.W. Norton and Company 2013) 247–280.

52 *Janus v American Federation of State, County, and Municipal Employees, Council 31, et al.* 575 U.S. 16–1466 (2018).

53 Brandon J. Murrill, ‘The Supreme Court’s Overruling of Constitutional Precedent’ (2018) *Congressional Research Service Report*, <https://sgp.fas.org/crs/misc/R45319.pdf> accessed on September 2021.

54 163 U.S. 537 (1896).

55 347 U.S. 483 (1954).

56 478 U.S. 186 (1986).

57 539 U.S. 558 (2003).

58 316 U.S. 455 (1942).

59 372 U.S. 335 (1963).

All three examples provide an important social and/or political context, which was taken into consideration by the justices in their decisions to overturn former precedents. In the *Brown* case it was the social pressure inspired by the civil rights movement, as well as the memorandum prepared by the presidential administration.<sup>60</sup> In the death penalty cases, and the right to attorney disputes, apart from legal reasoning the Court used the arguments relating to public opinion and pressures from certain institutions, including state governments.

The analysis of the use of *stare decisis* by the justices is not easy, especially in the cases in which the reasoning refers to former case law and the Court decides to modify already existing precedent. Such circumstances have happened quite often and the secret of judicial reasoning lies in the facts of the case, which usually are slightly different due to the circumstances which surround them. SCOTUS adjudication in disputes concerning the commerce clause shows that despite similar constitutional questions occurring in these cases in the early- and mid-twentieth century, the justices took into consideration different economic factors while shaping the scope of the commerce powers of Congress in that period.<sup>61</sup> Similarly, the changing social attitude towards the rights of the LGBT community encouraged the Court to change its position on the right to privacy of homosexual couples from the late 1960s to the early 2000s.<sup>62</sup> The problem with the proper determination of justices' attitudes towards *stare decisis* lies also in the scope of the use of former precedential rule by the Court. Adherence to earlier precedents does not always mean direct application of the whole past rule created by the SCOTUS, but also reference to doctrines, theories, or principles raised in the majority opinion.<sup>63</sup> In such a broader context, the justices will almost always refer to some important Court findings from a past case which they find valuable for the proper adjudication.

Analysis of the use of *stare decisis* by the SCOTUS in recent decades provides interesting observations that can lead to conclusions about the ideological factor which may be the main determinant of justices' attitudes towards prior precedents. Even if *stare decisis* seems theoretically closer to the modes of constitutional interpretation presented by conservative justices, many liberal judges also invoked the doctrine as a justification for their jurisprudence. There are several examples of disputes in which the liberal majority outvoted the conservative bloc of justices by referring to the principles of *stare decisis*, concerning such issues as the right to privacy, affirmative action, school prayer, or the rights of the accused in criminal cases. And, contrary to this, in the same cases conservative justices decided to support overruling prior precedents, neglecting the opportunity to use *stare decisis* as a justification to adhere to these rulings. The analysis of the Court's historical

60 Dudziak (n 33).

61 Fisher and Harriger (n 16).

62 David A. J. Richards, *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (University Press of Kansas 2005).

63 Thomas G. Hansford and James F. Spriggs, *The Politics of Precedent on the U.S. Supreme Court* (Princeton University Press 2008).

jurisprudence shows that even in the nineteenth and early twentieth centuries there were issues which clearly divided the justices, such as the scope of federal-state relations from the perspective of the commerce clause, when the conservatives supported states' rights and liberals opted for broader powers of the federal government.<sup>64</sup> In these cases, *stare decisis* was used consistently only to uphold existing precedents by one of the majorities in the Court, whereas the justices in minority voted to overrule the dominant interpretation of the commerce clause, forgetting about the necessity to follow the existing rule of precedent. Already during the first important Supreme Court era (1803–1835), justices were playing the roles of strategic actors who used the law to pursue their “personal policy preferences.”<sup>65</sup>

The adherence to *stare decisis* by the SCOTUS, even if supported by the statistics showing that the justices rarely overruled their own precedents, does not seem the most important determinant of judicial decision-making. In a study conducted in late 1990s, Spaeth and Segal proved that among the justices serving in the last three decades of the twentieth century, hardly any showed systemic consistency towards the use of the *stare decisis* doctrine.<sup>66</sup> The lack of consistency of certain members of the Court in the use of *stare decisis*, or, in other words, the consistency with which they present their attitude towards a concrete legal issue, strengthens the argument of the impact of ideology on the Court's jurisprudence. If there is an opportunity to expand the scope of the rights of individuals, liberal justices will promote such reasoning, putting *stare decisis* aside for the sake of a constitutional interpretation which broadens the meaning of the Bill of Rights. Their attitude in cases concerning the right to abortion, the right to die, or same-sex marriages serves as a perfect example of the rejection of *stare decisis*, whereas conservative justices presented opposite views, criticizing the unconstitutionality of established precedents as inconsistent with *stare decisis* doctrine. But if a similar case concerning the right to privacy reaches the SCOTUS, conservative justices forget about the necessity of following established precedential rule and try to overturn the constitutional reasoning towards the right to privacy set by liberal justices. Surprising or not, the proponents of the broader meaning of the Constitution appear in this context as defenders of *stare decisis*. The best example of this can be seen with reference to the right to abortion cases, *Roe v Wade*<sup>67</sup> and *Planned Parenthood v Casey*<sup>68</sup>. When the latter dispute ignited social and political debates over the scope of the constitutional right to privacy, the 5–4 majority announced adherence to former precedent despite staunch criticism from conservative lawyers and politicians.

64 Fisher and Harriger (n 16).

65 Jack Knight and Lee Epstein, ‘The Norm of Stare Decisis’ (1996) 40(4) *American Journal of Political Science* 1019.

66 Potter Stewart and Lewis H. Powell, Jr. See Jeffery A. Segal and Harold J. Spaeth, ‘The Influence of Stare Decisis on the Votes of United States Supreme Court Justices’ (1996) 40(4) *American Journal of Political Science* 971–1003.

67 410 U.S. 113 (1973).

68 505 U.S. 833 (1992).

Regardless of the historical meaning of *stare decisis*, it seems that contemporary justices treat the doctrine as a proper justification of adherence to former precedents in cases in which they believe the Court rulings should be affirmed. However, the growing political role of the SCOTUS, reflected in the polarization of the attitudes of justices towards important social issues and in the use of ideology as a legitimization of expanding or narrowing down constitutional interpretations, diminishes the role of *stare decisis* in the current jurisprudence of the Court. It seems more likely that justices will invoke the doctrine only if it serves the purpose of reaching the expected results in the case in which they adjudicate. One of the former associate justices, Lewis Powell, Jr., argued that adherence to precedent by the judges is not what they *have to* do but what they *should*, and any departure from the existing mode of adjudication needs proper justification.<sup>69</sup> Thirty years later, it seems that the SCOTUS does not even need such a justification to overturn its former precedents, especially when cases concern socially sensitive matters, despite efforts to limit judicial discretion in that respect. As Associate Justice William O. Douglas stated once, “So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history.”<sup>70</sup>

The last observation refers to the rules and procedures through which the justices decide to adjudicate in a dispute. As was mentioned before, it is a discretionary role of the Court’s members to decide if they are willing to review a case. The procedure provides for the so-called rule of four, which means the necessary support of at least four justices to issue a writ of certiorari in a concrete case.<sup>71</sup> It seems obvious that the first important decision concerning the legal dispute is being made in the process of acceptance or rejection of the case, thus affecting the future approach of the Court towards the issue at stake. A negative decision may be treated as either a lack of interest of the SCOTUS to adjudicate in a concrete matter, or acceptance of the justices of a decision made by the lower court. In that sense one can argue that *stare decisis* prevails in most of the instances, because the Court rejects around 99% of cases awaiting its review. Of course, there are various reasons for the reluctance of justices to adjudicate in a legal conflict, but the desegregation cases serve as a perfect example of the attitude of the SCOTUS towards existing case law and precedents. Since the 1920s, the National Association for the Advancement of Colored People (N.A.A.C.P.), supported in the following decades by the American Civil Liberties Union (A.C.L.U.), tried to bring test cases to the Supreme Court which would enable the justices to overrule the infamous separate-but-equal doctrine. Before the SCOTUS decided to adjudicate in disputes concerning racial segregation, it rejected several applications prepared

69 Lewis F. Powell, ‘Stare Decisis and Judicial Restraint’ (1990) *Washington and Lee Law Review* 47, 281–311.

70 William O. Douglas, ‘Stare Decisis’ (1949) 49(6) *Columbia Law Review* 737.

71 Saul Brenner and Joseph W. Whitmeyer, *Strategy on the U.S. Supreme Court* (Cambridge University Press 2009).

by these organizations supporting the existing rule created in *Plessy v Ferguson*.<sup>72</sup> There is no doubt that the discretionary power of the justices to decide which disputes are settled by the highest judicial instance in the U.S. may play a crucial role in determining the final outcome in these cases. *Stare decisis*, although rarely directly referred to by the justices, not only exists, but also affects their decision-making process, often serving as a secret legitimizer of ideological adjudication.

## References to international and national court decisions

While deciding cases of constitutional stature, the U.S. Supreme Court often refers to decisions of lower federal and state courts, whereas it rarely considers international court decisions as binding or even persuasive for its jurisprudence. There is no surprise in such an observation, considering, on the one hand, the position of the SCOTUS as the court of last resort from both federal and state courts, and, on the other, the limited influence of international legal norms on American judicial reasoning. The position of international or foreign law in the U.S. legal system has been researched from various perspectives, and most of the studies have shown the small impact of international courts and tribunals on SCOTUS decision-making.<sup>73</sup> Obviously, at the beginning of the Court's functioning the reference to English or British precedents was both understandable and necessary, since Americans were following the patterns of English common law, including legal definitions and principles of law. As a result, in the first two decades of U.S. statehood, the SCOTUS often based its legal reasoning on precedents of English courts, some of which dated back to the thirteenth century.<sup>74</sup> Today, such an approach is unnecessary and highly unlikely, considering the reluctance of American judges to follow the rulings of exterior courts.

According to the Constitution, international treaties are positioned high in the hierarchy of sources of law, just below the Constitution, and on the same level as the acts of Congress<sup>75</sup>. However, constitutional practice indicates a smaller impact of international legal norms on both the federal legislation and the Court's jurisprudence. Historically, there were certain initiatives in Congress which aimed at limiting the impact of international treaties on U.S. legislation, and, at the same time, the Court rarely took a position on the scope of government powers concerning foreign policy-related issues.<sup>76</sup> If the justices adjudicated in disputes

72 Kluger (n 20).

73 Lawrence A. Baum, *The Supreme Court* (Congressional Quarterly Press 2021); Stephen A. Simon, 'The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study' (2013) 1(2) *Journal of Law and Courts* 279–301; David L. Sloss, Michael D. Ramsey and William S. Dodge (eds.), *International Law in the U.S. Supreme Court* (Cambridge University Press 2011).

74 James Shevory, *John Marshall's Law: Interpretation, Ideology, and Interest* (Greenwood Press 1994).

75 Article Six, U.S. Constitution.

76 Laidler (n 3).

concerning the relations between international and domestic law, they usually focused on the scope of powers of the President and Congress with respect to foreign policy matters, supporting the growing impact of the executive in that respect, especially in national security matters.<sup>77</sup> Recently, however, the Court had an opportunity to discuss the character and applicability of international legal norms in the U.S. legal system. Controversies over the position of international law in U.S. the legal system were ignited after the SCOTUS decision in *Medellin v Texas*,<sup>78</sup> a 2008 case concerning the right to consul of a Mexican national who was found guilty of a murder in Texas and sentenced to death. Although the U.S. was the party of international agreements guaranteeing the right to consul in such circumstances, Medellin's right was rejected, and he was later found guilty by state courts. Because there were more foreign nationals who were tried by U.S. courts without exercising their right to consul, all of these cases were brought to the International Court of Justice, which declared in 2004 that the U.S. was bound by international agreements which provided the right to consul for foreign nationals,<sup>79</sup> As a consequence, Medellin's case was brought to the SCOTUS and the justices had an opportunity to express their reflection on the relation between international and domestic law. The conservative majority declared that not all international treaties were directly binding, and, therefore, that they needed congressional legislation in order to become a binding element of the U.S. legal system. Furthermore, the Court stated that decisions of the International Court of Justice do not have to be followed by American courts. Such an approach strengthened the arguments about the reluctance of U.S. judges to follow the rulings of international courts, even if the liberal dissenters in *Medellin* supported a broader impact of international jurisprudence.

On the other hand, international organizations have been active in recent decades as third parties filing *amicus curiae* briefs to the Supreme Court, arguing for one of the parties to a dispute, and often using international legal norms and principles as a basis for their argumentation. Sometimes international organizations have joined their U.S. counterparts in preparing a brief, thus legitimizing the legal argumentation based on international law. In 2006, the Center for Constitutional Rights was joined by Human Rights Watch and the International Federation of Human Rights as "friends of the Court" in *Hamdan v Rumsfeld*,<sup>80</sup> supporting the plaintiff, who was a Guantanamo prisoner, but the Court did not apply the reasoning used in the brief. However, two years later, in a case determining the scope of the constitutional rights of another Guantanamo detainee, organizations like Amnesty International, the International Law Association, and the International Federation for Human Rights filed an amicus brief which

77 Daniel Farber (ed.), *Security v. Liberty: Conflicts Between Civil Liberties and National Security in American History* (Russell Sage Foundation 2008).

78 552 U.S. 441 (2008).

79 *Mexico v United States of America* known as *Avena* I. C. J. Reports 2004, 12.

80 548 U.S. 557 (2006).

became part of the final argumentation of the justices, who expanded the protection of enemy combatants by the Constitution.<sup>81</sup>

Other examples show that the issues relating directly to American law, mostly with reference to the rights of individuals, are also attracting international organizations using *amicus curiae* as the easiest lobbying tool in the Supreme Court. In the twenty-first century, several human rights organizations were highly concerned about the scope of the rights of the accused, mainly referring to death penalty cases in which the SCOTUS reviewed the constitutional status of capital punishment. In *Atkins v Virginia*,<sup>82</sup> in which the Court limited the possibility to impose the death penalty on the accused, who suffered from mental illness, the liberal majority referred to “national consensus” and “international opinion” as being among the factors supporting their majority opinion. In another capital punishment case, *Roper v Simmons*,<sup>83</sup> which concerned the question of the constitutionality of the death penalty for minors, one of the briefs was filed by the European Union, strongly opposing the imposition of capital punishment for people under the age of 18. This time, liberal justices, supported by Associate Justice Anthony Kennedy, followed the argumentation presented in the brief and declared that executing minors constituted a cruel and unusual punishment. Apart from procedural rights cases, international organizations have also promoted international law as the basis for expansions of the rights of individuals in cases concerning the LGBT community<sup>84</sup> and affirmative action.<sup>85</sup> Especially, the first dispute, *Lawrence and Garner v Texas*, raised the concerns of civil and human rights organizations, which protested against the anti-LGBT sodomy laws existing in a few American states, including Texas. In the majority opinion signed by Associate Justice Kennedy, who joined the liberal justices, not only was the amicus brief authored by the European Union mentioned, but the Court also made direct reference to the decision of the European Court of Human Rights in *Dudgeon v United Kingdom*,<sup>86</sup> thus supporting the right to privacy of LGBT groups. By referring to the ECHR ruling, justices claimed that the ruling “[a]uthoritative in all countries that are members of the Council of Europe ... is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”<sup>87</sup> The *Lawrence* opinion remains the only SCOTUS decision in which the justices used a ruling of an international tribunal in order to strengthen the legitimization of the arguments presented in the majority opinion.

The U.S. Supreme Court rarely refers directly to the decisions or opinions of international courts and tribunals. The above-mentioned examples of the right to privacy and death penalty cases are exceptions, which may be more closely

81 *Boumediene v Bush* 553 U.S. 723 (2008).

82 536 U.S. 304 (2002).

83 543 U.S. 551 (2005).

84 *Lawrence and Garner v Texas* 539 U.S. 558 (2003).

85 *Grutter v Bollinger* 539 U.S. 306 (2003).

86 Appl. No. 7525/76, ECHR [1981].

87 539 U.S. 558 (2003).

understood by the arguments raised by the SCOTUS justices with regard to the role of international law. In 2005, two associate justices, Antonin Scalia and Stephen Breyer, discussed the role of international law in U.S. constitutional interpretation. While the conservative Associate Justice Scalia argued for a limited involvement of international jurisprudence on SCOTUS adjudication, opposing the possibility of citing foreign court rulings, the liberal Associate Justice Breyer supported a bigger influence of international law, stating that American judges should analyze foreign judges' approaches towards similar constitutional issues.<sup>88</sup> The debate shows that the ideological factor may play a crucial role in determining the opinions of justices on the relation between international and domestic law. While liberal judges usually support the necessity to expand the debate over American legal institutions and processes with reference to international legal norms and the voice of the international community, the conservatives hold the opposite view, arguing that application of international jurisprudence could be dangerous for the integrity and sovereignty of U.S. courts. This does not change the fact that direct reference in SCOTUS adjudications to the opinions of foreign judges is still exceptional and unlikely to be changed in the coming years, especially considering the dominant conservative ideology of the contemporary Court.

Quite contrary to this, the reference to opinions and arguments raised by lower federal and state courts seems one of the most common methods of the reasoning of justices. There are at least three reasons for which there is a direct citation of national courts' precedents or the arguments raised by judges of lower courts in their written opinions: the procedural, the historical, and the ideological. Firstly, justices are aware that their opinions are not only legally binding and thus important, but also that they are read and analyzed by social groups interested in the outcomes of SCOTUS decisions; therefore justices use lower courts' decisions in order to explain the procedure which took place before the dispute reached the Court. Usually, in the introductory part of the opinion there are direct references to the procedural history of the case providing information about the courts which adjudicated in the dispute and the decisions they reached. Additionally, when the Court makes a decision affirming or reversing that of the lower court, the justices often quote parts of the lower court's opinion in order to support or criticize it. Sometimes there are opinions in which justices repeatedly refer to the lower court's argumentation, especially when they are convinced about the necessity of upholding that court's decision.

Secondly, justices use national courts' opinions to shape the history of jurisprudence concerning the issue at stake, and such a reference has mainly historical purposes. There is hardly any written opinion of the Court which does not invoke historical precedents determining the scope of constitutional adjudication in the

88 Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3(4) *International Journal of Constitutional Law* 519–541.

matters reviewed. Regardless of the character of the case, whether it concerns institutional issues or the rights of the people, there is always a part of the opinion quoting former decisions related to these issues. Historical references have not only an informative role, but they also allow the tracing of the direction of judges' reasoning, which may be helpful in understanding the position the Court finally takes. Even if references to lower courts' historical decisions are less frequent than references to former SCOTUS precedents, justices are aware that state or federal judges' jurisprudence is an important legacy of the common law method of solving disputes.

Lastly, the analysis of references to national courts' decisions made by the SCOTUS brings a very strong argument for the existence of the ideological factor. In many of the twenty-first century Court's decisions in which justices invoked precedents and arguments raised by judges in lower courts, these cases served as a justification for the decision made by the author of the opinion, regardless of whether it was a majority or minority opinion. Liberal and conservative judges have used such arguments which supported their ideological attitude towards the adjudicated issue, but more rarely have they referred to such cases when they wanted to neglect their final outcome. The analysis of majority and dissenting opinions in the cases regarding affirmative action, LGBT rights, abortion, or freedom of religion that have been decided in the last two decades shows the adherence of their authors to lower courts' decisions, which were cited in order to present views opposite to those raised in these opinions.

Although lower courts' decisions play a significant role in the SCOTUS' adjudications—and one can always find a reference to such precedents—there is no doubt that the most common sources to which justices refer in their argumentation are former precedents of the Supreme Court. There was no single majority opinion of the Court in the twentieth and twenty-first centuries that did not refer to earlier SCOTUS jurisprudence, which serves both for historical and ideological reasons. Some opinions concerning issues which have been constantly adjudicated by justices are full of historical references to precedents which determined the character and scope of certain powers and rights throughout American history. The analysis of commerce clause cases decided in the late twentieth century,<sup>89</sup> disputes over the scope of freedom of speech,<sup>90</sup> or election campaign finance cases,<sup>91</sup> strengthens such an argument. Sometimes reference to historical precedents and argumentation made by former justices serves for the purpose of the dominant approach presented by the Court, as in *Gideon v Wainwright*,<sup>92</sup> in which the majority quoted all former SCOTUS decisions declaring the constitutionality of the right to counsel in criminal cases. However, they mainly focused on *Betts v Brady*,<sup>93</sup> showing “an abrupt break” the Court “made with its own

89 *United States v Lopez* 514 U.S. 549 (1995); *United States v Morrison* 529 U.S. 598 (2000).

90 *Texas v Johnson* 491 U.S. 397 (1989).

91 *Citizens United v Federal Election Commission* 558 U.S. 310 (2010).

92 372 U.S. 335 (1963).

93 316 U.S. 455 (1942).

well-considered precedents,” thus criticizing and overruling the precedent to assure the constitutional right to counsel of every accused person.

In most cases, the justices use the majority opinions of their predecessors, which results from their binding character and impact on the U.S. legal system. Occasionally, however, there are circumstances which encourage the Court to follow a dissenting opinion created decades earlier by a single justice who raised arguments supporting the new approach presented by the SCOTUS. Probably the most evident example of such a situation occurred in 1996, when the Court decided about the scope of LGBT rights in *Romer v Evans*,<sup>94</sup> basing its argumentation on a 100-year-old dissent written by John Marshall Harlan in *Plessy v Ferguson*.<sup>95</sup> The famous, but isolated, statement of Harlan that the Constitution “neither knows nor tolerates classes among citizens,” although made with reference to racial segregation issues, became the leading argument in the *Romer* precedent declaring the unconstitutionality of Colorado’s constitutional amendment limiting the rights of the homosexual community. The arguments used in dissents written by justices are more likely to be used by a future Court, provided there is a narrow margin verdict in the case and the society is polarized over the issue at stake.

There is at least one more reason for which the use of its own former decisions plays a significant role for the Court. From time to time, in disputes mainly concerning freedom of speech, freedom of religion, or commerce clause issues, justices establish constitutional “tests” which become the final outcome of the case, providing a binding rule in all similar cases in the future. A test determines the constitutionality of legislation, which is analyzed by the SCOTUS and usually consists of two or three principles which have to be fulfilled by the legislator in order to uphold or overrule a concrete piece of legislation. These principles are made on the basis of references to precedents or arguments raised in prior Court decisions on the same issue. Justices often quote full paragraphs or sentences from their predecessors’ opinions, setting the conditions which should be met by the legislation. There are various types of tests which can be applied by the justices in order to effectively solve a dispute: balancing tests taking into consideration opposing arguments, rational-basis tests searching for reasonableness of the law, purpose tests evaluating the intent of the framers of the legal norm, effect tests analyzing the practical consequences of legislation, and deliberation tests considering various factors determining the constitutionality of an act.<sup>96</sup> Tests have determined the Court’s rulings in cases concerning various constitutional issues, including freedom of religion (the Lemon test, established in *Lemon v Kurzman*<sup>97</sup>), the commerce clause (the Lopez test, created in *United States v Lopez*<sup>98</sup>), and freedom of expression (*Brandenburg v Ohio*<sup>99</sup>). In that sense, the

94 517 U.S. 620 (1996).

95 163 U.S. 537 (1896).

96 Richard H. Fallon, Jr., *Implementing the Constitution* (Harvard University Press 2001).

97 403 U.S. 602 (1971).

98 514 U.S. 549 (1995).

99 395 U.S. 444 (1969).

new rule created by the SCOTUS is a combination of its own earlier-established precedents, which proves that the Court's adjudication, typically for a common law jurisdiction, is extensively based on its own historical decisions.

### **Concluding remarks: let the end be legitimate**

This chapter tried to answer a few important questions regarding the SCOTUS' adjudications, such as the real position of the Court's precedents in U.S. legal system, the scope of adherence to its prior precedents, and the impact of national and international adjudication on justices' decision-making. All of these questions are fundamental to the character of the Court's jurisprudence and the functioning of the judicial branch, as well as theoretical and practical aspects of American common law. Analysis of the aforementioned issues demands a thorough research of SCOTUS decisions from the 1790s to contemporary times, which means more than 230 years of adjudication during which the Court has made thousands of decisions of constitutional stature. In order to reach the expected goals and define the real position of the SCOTUS and its precedents in the legal system, one would have to read and analyze the case law in which justices checked the constitutionality of federal and state acts, which exceeds the number of acts declared in whole or in part as unconstitutional, which is above 1,200. But even evaluation of the most significant precedents to have shaped social and political relations in the U.S. allows us to derive a few conclusions from such a study.

There is no doubt that the Supreme Court's precedents are an important source of law, both for lower federal and state judiciary, as well as for other branches of government. Even if there were examples in history of Congresses or Presidents limiting the binding character of SCOTUS rulings,<sup>100</sup> in most cases the Court confirmed the finality of its decisions. The significant position of its precedents does not mean that the justices are continuously overturning federal and state legislation, or modifying the meaning of the supreme law of the land. The unique character of this institution and its jurisprudence lies in its potential to determine almost all matters concerning legal, political, social, or economic relations which are written in, or which can be derived from, the Constitution. The use of judicial review, founded in the early years of American statehood and actively exercised since the 1920s, has resulted in strengthening the position of the SCOTUS relative to the other branches of government, especially in the process of constitutional adjudication, making the Court a serious and often final interpreter of what the law means.

There are definitely numerous factors determining justices' reasoning in constitutional cases, and the research results presented in this chapter are not exhaustive, especially in the context of the means of constitutional interpretation imposed by the Court in history. Still, it seems obvious that SCOTUS precedents play a significant role in constitutional law, both as the source of rulings which

100 Fisher (n 41).

explain the scope of governmental powers and the rights of the people, and as the body of common law responsible for understanding the character and principles of the American legal system. In constitutional cases the justices usually focus on the Court's own prior rulings, referring not only to the holding of the precedent, but also to the arguments raised by their predecessors. They often use national courts' decisions as a basis on which to inform, explain, and justify the conclusion they reach, whereas references to international law and international jurisprudence are still an exception, proving the atmosphere of distrust between American judges and their counterparts from international tribunals. Although in history there were decisions in which the justices quoted foreign law as one of the references in building their arguments, rarely have foreign legislation or foreign court decisions become an important source of reference in SCOTUS reasoning. The *Atkins*, *Roper*, and, especially, *Lawrence* precedents are definitely exceptions.

The justices enjoy discretionary power to choose the cases for review, and to decide about the direction of adjudication, but the analysis of the Court's adjudication in the twentieth and twenty-first centuries leaves no doubt as to the impact of ideology on justices' reasoning. Although the SCOTUS operates within strict procedures and the justices cannot act overzealously in the process of constitutional interpretation, the legal system provides for several opportunities to impose judicial review, which the Court often uses. Regardless of their attitude towards the *stare decisis* doctrine and towards prior precedents, or the mode of constitutional interpretation, in cases of social and political concern the justices usually decide on the basis of their ideology. A fundamental principle established by the SCOTUS in *McCulloch v Maryland*,<sup>101</sup> introducing a "legitimate end" to all rulings which are "within the letter and spirit of the constitution," determines the effectiveness and finality of the Court's rulings. If the justices say what the law is, and the only limitation on their interpretation is the Constitution, the meaning of which they determine, the position of SCOTUS precedents is by no means unique, even for a common law jurisdiction. Therefore, the Supreme Court, as a constitutional court, serves as an active and legitimate law-maker establishing binding precedents and determining the real character of the supreme law in the United States.

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# 2 The Supreme Court of Canada

The road to authority,  
legitimacy and independence

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## Introduction

The Supreme Court of Canada (the ‘Supreme Court’) now serves as the final court of appeal in the Canadian Judicial System. Since its creation, the Supreme Court has significantly assisted in transitioning Canada to a modern nation committed to the rule of law, constitutional order, individual liberties and respect of minorities. At the same time, and not surprisingly, there are many examples in which the Supreme Court reflected views of the early Western European colonists, who quickly became the majority population in the new colonies and the later Canadian state. The Supreme Court reflected the majority’s social and economic values and prejudices by upholding racist legislation, second-class status of women and Asian immigrants, and disrespecting the aboriginal and treaty rights of First Nations, Inuit and Metis peoples. All the members of the Supreme Court of Canada have been Caucasian until the latest appointment of the Honourable Mahmud Jamal, who was elevated from the Ontario Court of Appeal on July 1, 2021, which was Canada’s 154th birthday as a nation. Until Madam Justice Bertha Wilson was elevated from the Ontario Court of Appeal on March 4, 1982, the justices were all male. Three of the current nine members are women, since Justice Jamal replaced Justice Rosalie Abella on her 75th birthday. Honourable Justice Jamal is the first justice of colour on the Supreme Court of Canada.

The unusual and ambiguous history of the Supreme Court has led to a court of significant authority in judicial decision-making. This chapter will discuss the evolution of the Supreme Court dating from its birth in 1875. The constitutional structure of Canada has changed dramatically over the decades but especially so since the patriation of the Canadian Constitution from the United Kingdom through the British Parliament’s passing of the *Constitution Act, 1982*. This new constitutional enactment was drafted by Canadians, both political leaders and technicians, receiving broad popular support, although never put to a public referendum. It eliminated the need for future constitutional changes by the British Parliament through a domestic amending formula and expanding some powers for the provinces. Most importantly, it included the *Canadian Charter of Rights and Freedoms* (‘the *Charter*’) as a constitutionally entrenched modern-day *Bill of Rights*.

The *Charter* has had an incredibly profound impact upon the legal, political and social thinking of the vast majority of Canadians. The active use of the *Charter* by individuals, corporations, governments, charities and non-profit organisations to challenge federal, provincial, territorial and local government laws for alleged violations of human rights and civil liberties provisions of the *Charter* has brought the courts far more into the public eye than was the case before. This is particularly true of the Supreme Court, which sits only in the national capital in Ottawa, thereby leaving it largely physically invisible to the vast majority of Canadians living across our six time zones, although its hearings are televised nationally. The importance of *Charter* litigation, with frequent detailed media coverage, and the impact of the Supreme Court's judgments have dramatically raised the Court's profile. Increasing attention has grown respect for its skill among many Canadians but generated criticism by many others.

As discussed in this chapter, the abolition of appeals from the Supreme Court across the Atlantic to London, the growth of Canada's economic and international significance, and the country's involvement abroad have meant that the importance of our highest court has similarly expanded. After discussing its history, this chapter will delve deeper into the structure and composition of the Court as it has evolved over the years to its present standing, along with considering the impact of international and domestic laws in its judicial decision making.

## Historical development of the Supreme Court of Canada

Canada was created through French and English colonisation imposed upon pre-existing legal systems of many distinct indigenous nations. This process began in the seventeenth century, initially by French explorers followed by French settlers, fur traders, government representatives from Paris, and Roman Catholic clergy to proselytise among the indigenous peoples, which was the reason that the Pope allowed representatives of France to intrude upon lands exclusively given to Spain under the Papal Bull *Inter Caetera* of 1493.<sup>1</sup> The French were later joined by British subjects. Courts began to operate in the early eighteenth century in Nouveau France, followed by the British bringing its common law system to its colonies in Ontario and the Maritime provinces that were first transferred by France through the Treaty of Utrecht in 1713 and later increased by Nouveau France's transfer via the Treaty of Paris in 1763.<sup>2</sup> The *Quebec Act* of 1774 defined the colonial governmental powers for creating criminal, civil and ecclesiastical courts in Quebec, resembling British-style courts and provincial courts dating back to the French regime, and restored French civil law while retaining the recently imposed British criminal law based on the common law system.<sup>3</sup> Shortly afterwards,

1 'Inter Caetera: Division of the undiscovered world between Spain and Portugal' [www.papalencyclicals.net/Alex06/alex06inter.htm](http://www.papalencyclicals.net/Alex06/alex06inter.htm) accessed on 26 September 2021.

2 Daniel Marston, *The French-Indian War 1754–1760* (Osprey Publishing 2002).

3 14 Geo III c 83.

the *Constitution Act, 1791* created Upper and Lower Canada, dividing Quebec from Southern Ontario under separate colonial governments.<sup>4</sup> The American Revolution generated a significant population increase in the northern British colonies from the United States of America (the ‘United States’), as ‘United Empire Loyalists’ moved north to remain in British colonies.<sup>5</sup> Many had no choice, being driven from their homes and businesses seized by the Revolution’s winners. It also meant Great Britain would redirect future emigrants to its continuing colonies versus the United States.

The colonies of Nova Scotia, New Brunswick, and the Province of Canada (that split once again into separate jurisdictions of Ontario and Quebec) and Prince Edward Island, later joined by British Columbia, engaged in discussions about the possible creation of a new nation in the early 1860s.<sup>6</sup> Ultimately, only Nova Scotia, New Brunswick, Ontario and Quebec formed a confederation of semi-autonomous provinces as the Dominion of Canada with a national government and a founding constitution drafted locally but enacted as the *British North America Act, 1867*, by the British Parliament.<sup>7</sup> Heavily influenced by the American Civil War of 1861–65, believed to be the world’s bloodiest war in history at that time, the Canadians proposed that the new federal government would be allocated its own specific powers along with overarching authority ‘... to make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces...’<sup>8</sup> The colonies of British Columbia and Prince Edward Island joined in 1871 and 1873 respectively through separate Terms of Union applying to each.<sup>9</sup> Newfoundland only joined in 1949.<sup>10</sup> The remaining massive regions of modern Canada were transferred from Great Britain to Canada and subsequently subdivided by the national government over generations into the provinces of Manitoba (1870), Alberta and Saskatchewan (1905), as well as the Northwest Territories (1870), Yukon (1898) and Nunavut (1999).<sup>11</sup>

4 31 Geo III. c 31.

5 Peter C. Newman, *Hostages to Fortune: The United Empire Loyalists and the Making of Canada* (Touchstone 2016).

6 Donald Creighton, *The Road to Confederation* (Oxford University Press 1964; re-issued 2012).

7 *British North America Act, 1867* (renamed the *Constitution Act, 1867* (UK), 30 & 31 Vict c 3, in 1982, reprinted in RSC 1985, App II, No 5) [*British North America Act*].

8 *Ibid.*

9 Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May 1871, [www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t41.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t41.html) accessed on 26 September 2021; Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June 1873, [www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t61.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t61.html) accessed on 26 September 2021.

10 Department of Justice, ‘Terms of Union of Newfoundland with Canada’ [www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t212.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl1t212.html) accessed on 25 September 2021.

11 Government of Canada, ‘Provinces and Territories’ [www.canada.ca/en/intergovernmental-affairs/services/provinces-territories.html](http://www.canada.ca/en/intergovernmental-affairs/services/provinces-territories.html) accessed on 26 September 2021.

In 1721, the first Court of Judicature was established in Nova Scotia to administer English common law of England.<sup>12</sup> The proceedings were relatively informal, with lay citizens administering justice in the Court.<sup>13</sup> With the formation of Upper and Lower Canada in 1791 came several structural changes to the judicial system. Upon creation, each province possessed its own regional government and created its own judicial system. Upper Canada was divided into four districts, with Justices of the Peace holding criminal jurisdiction, a Court of Common Pleas with wide-ranging civil jurisdiction, and courts of Oyer and Terminer with jurisdiction over capital offences punishable by life imprisonment or death.<sup>14</sup> The vast majority of changes were experienced in the administration of civil matters. With the separation of what we now call Ontario and Quebec came a move away from the French Civil Code to the adoption of the English Common Law regime in Upper Canada, while Lower Canada stayed true to French civil law and British criminal law.<sup>15</sup> This somewhat hybrid system in Lower Canada still exists for Quebec today, since the *Criminal Code* is federal and reflects the British approach to judicial process and Crown prosecutorial independence, while non-criminal law in Quebec reflects more of the civilian approach dominant in continental Europe.

Due to rebellions in each colony, the Earl of Durham was sent to the colonies in 1838 to review the situation, and his report<sup>16</sup> recommended that Upper and Lower Canada be reunited once more, which was implemented through the *Act of Union* 1840, enacted by the British Parliament on 23 July 1840 and proclaimed in force on 10 February 1841.<sup>17</sup> The two separate parliaments were abolished and replaced by a single one with two houses (an upper Legislative Council and the Legislative Assembly as a lower house) with representatives from throughout both prior colonies. Rebellions were only one factor, since this helped solve Upper Canada's near bankruptcy while attempting to weaken French influence in the much more populous Lower Canada by giving an equal number of seats to each former colony.<sup>18</sup>

The *Judicature Act* of 1849<sup>19</sup> brought forth changes to the superior court system. The *Act* reduced the bench from five to three members, created a second superior common law court, named the Court of Common Pleas, and introduced oral pleadings and examinations of the parties to the Court of Chancery.<sup>20</sup> Genuine representative government also arrived in 1849, with the acceptance that the

12 Justice Chisholm, 'Our First Common Law Court' (1921) 1(1) Dalhousie LJ 17,17.

13 Ibid.

14 Paul Romney, 'Upper Canada (Ontario): The Administration of Justice, 1784–1850' (1995) 23 Manitoba LJ 183, 183–134.

15 F. P. Walton, 'The Legal System of Quebec' (1913) 13(3) Columbia LR 213, 213–214.

16 John Lambton, First Earl of Durham, *Report on the Affairs of British North America*, 1839.

17 *The British North America Act*, 1840 (3 & 4 Victoria, c. 35), also known more widely in Canada as the *Act of Union* 1840, which took effect on 10 February 1841.

18 J. M. S. Careless, *The Union of the Canadas, 1841–1857: The Growth of Canadian Institutions* (Penguin House 1967).

19 *The Judicature Act*, Prov C 1849, 12 Victoria, cc. 63.

20 Ibid 64; Romney (n 14) 194.

largest elected party in the legislature should form the Cabinet under its leader, the de facto premier, with the Governor General becoming more of a figurehead and less of a ruler.

### *The Dominion of Canada: 1867–1949*

During the debates regarding the creation of a new nation by a Confederation of the colonies, politicians recognised the need for a central court of appeal to handle disputes between the provinces and the Parliament of Canada.<sup>21</sup> Despite the 1858 proposal for a Federal Court of Appeal and the Quebec (1864) and London (1866) conference resolutions calling for establishing a ‘General Court of Appeal,’ it was not until the *British North America Act, 1867* (the ‘BNA Act’), now known as the *Constitution Act, 1867*, when the Dominion of Canada was formally created as a largely independent nation.<sup>22</sup> Most notably, section 101 of the *BNA Act* provided the Parliament of Canada with a discretionary power to establish a ‘General Court of Appeal.’<sup>23</sup> Nonetheless, the authority to establish a general court of appeal came with several caveats and challenges. Firstly, all laws and courts in the Province of Canada, Nova Scotia or New Brunswick at the Union were subject to be replaced, abolished or altered by Parliament or the new provincial legislatures.<sup>24</sup> Secondly, while Section 101 provided this discretionary power, its silence on the practicalities of establishing a ‘General Court of Appeal’ led to implementation difficulties.<sup>25</sup>

By 1868, Sir John A. Macdonald, Canada’s first Prime Minister, appointed lawyer Samuel Henry Strong to draft a Bill for creating a higher appeal court, which was introduced in the Parliament of Canada in the following year.<sup>26</sup> The Bill drafted suggested a court of seven judges responsible for hearing criminal and civil appeals from across Canada.<sup>27</sup> In specific predetermined areas, the Court would be one of ‘exclusive original jurisdiction.’<sup>28</sup> The ambivalent attitude towards establishing a higher court of appeal created considerable internal debates, delaying its creation. Resistance grew from the Province of Ontario, which favoured a judicial system overseen by the Judicial Committee of the Privy Council in England (the ‘JCPC’), while the Province of Quebec was concerned to protect Quebec’s special status and its distinct civil law system.<sup>29</sup> Despite its

21 Frank Iacobucci, ‘The Supreme Court of Canada: Its History, Powers and Responsibilities’ (2002) 4 *The Journal of Appellate Practice and Process* 27, 28.

22 *British North America Act*; Charisma Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Hart Publishing 2019) 37.

23 *British North America Act*, s 10; Mathen (n 22) 41.

24 *Ibid* s 129; Mathen (n 22) 39.

25 Mathen (n 22) 41.

26 James G. Snell and Fredrick Vaughan, *The Supreme Court of Canada: History of the Institution* (Osgood Society 1985) 4.

27 Mathen (n 22) 41.

28 *Ibid*.

29 *Ibid*.

efforts, the Macdonald government could not reconcile the competing concerns before its 1873 electoral defeat.<sup>30</sup>

Prime Minister Alexander Mackenzie's government revived the long-standing debate in its 1875 Throne Speech, stating that a superior court is 'essential to our system of jurisprudence and the settlement of constitutional questions.'<sup>31</sup> On 8 April 1875, with the efforts of Sir John A. Macdonald, Téléspore Fournier, Alexander Mackenzie and Edward Blake, the *Supreme and Exchequer Courts Act* was passed, creating both courts.<sup>32</sup> Interestingly, Samuel Henry Strong was an original appointee to the Supreme Court on 30 September 1875, and later served as its third chief justice from 1892–1902. The Supreme Court was composed of one chief justice and five puisne justices, who were also permitted to serve as judges of the Exchequer Court and sit in appeal of their own judgments, until 1887.<sup>33</sup> The *Supreme and Exchequer Court Act* reconciled Quebec's concerns in two distinct ways: (1) by reserving two seats on the bench for Quebec appointees, and (2) by limiting the Court's jurisdiction in civil appeals from Quebec to a minimum dispute of \$2,000.<sup>34</sup>

The Supreme Court was inaugurated at a state dinner on 18 November 1875 and had drafted a set of rules of procedures by mid-January 1876.<sup>35</sup> By April, the Canadian Senate posed its first reference question to the Court in *Reference Re the Brothers of the Christian Schools in Canada*.<sup>36</sup> On 15 January 1877, the Supreme Court began regular sittings with *Kelly v Sullivan*, *The Queen v Taylor*, and *Church v Abell* at the forefront of its docket.<sup>37</sup>

### *Independence of the Court: 1875–1949*

From the Court's inception until 1949, the JCPC was the final court of appeal to settle all Canada's constitutional and civil legal issues, even though the United Kingdom had no written constitution of its own. While the *BNA Act*, as a written constitution, provided basic legal principles to guide Canada's judicial system, the JCPC gave shape to the structure and interpretation of the statute. Decisions of provincial courts of appeal could also formally bypass the Supreme Court and go straight to the JCPC.<sup>38</sup> Despite being named a court of highest

30 Iacobucci (n 21) 28.

31 John T. Saywell, *The Law Makers: Judicial Power and Shaping of Canadian Federalism* (University of Toronto Press 2002) 32.

32 *Supreme and Exchequer Court Act*, 1875 (Can), c 11.

33 Iacobucci (n 21) 28–29.

34 *Ibid* 29.

35 *Supreme and Exchequer Courts Act*, s 52.

36 Charles Feldman, 'Parliament and Supreme Court of Canada Reference Cases (Background Paper)' (Library of Parliament, Ottawa, Canada 2015), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2015-44-e.pdf> accessed on 21 September 2021.

37 1877 CanLII 31 (SCC), [1877] 1 SCR 3; 1877 CanLII 32 (SCC), [1877] 1 SCR 65; 1877 CanLII 33 (SCC), [1877] 1 SCR 442.

38 Iacobucci (n 21) 29.

appeal; the Court played a frequently subordinate role in judicial decision-making until the JCPC lost its jurisdiction.<sup>39</sup> This power imbalance was marked by several challenges.

The JCPC provided a contradictory perspective to that of the Supreme Court. While the latter favoured a strong central government in many of its decisions, perhaps due to its knowledge of the United States Civil War and the necessity for a strong central government in such a massive nation, the JCPC repeatedly interpreted the *BNA Act*, and especially its list of enumerated powers in section 92, to provide greater authority to the provinces.<sup>40</sup> The tension between the opposing perspectives played an extremely significant role in developing Federalism and the push for judicial, as well as more political, independence from the United Kingdom.

The abolition of criminal and civil appeals to the JCPC did not come unchallenged. Despite its original attempt to abolish criminal appeals in 1887,<sup>41</sup> it was not until the enactment of the *Statute of Westminster, 1931*, when Canada started to gain legal independence.<sup>42</sup> By 1933, all criminal appeals to the JCPC were abolished, by amending section 1024(4) of the *Criminal Code* declaring that no criminal appeal shall be brought from any court in Canada to Her Majesty in Council.<sup>43</sup> This initiative was itself challenged before the JCPC, on appeal directly from Quebec's Court of King's Bench in *British Coal Corporation v The King*,<sup>44</sup> which rejected it concluding that the *Statute of Westminster* abrogated the limits imposed through the *Colonial Laws Validity Act*<sup>45</sup> such that the Dominion of Canada was competent to make this change.<sup>46</sup>

It would be a further 16 years before civil appeals would be removed.<sup>47</sup> An initial effort to amend the *Supreme Court Act*<sup>48</sup> through a Bill in Parliament in 1940 was presented as a Reference to the Supreme Court itself after second Reading in the House of Commons. The Bill was held to be within the competence of the Parliament of Canada.<sup>49</sup> An appeal was filed to the JCPC through the *Attorney-General for Ontario v The Attorney-General for Canada* but was

39 Ibid.

40 Peter W. Hogg and Wade K. Write, 'Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism' (2005) 38(2), UBC LR 329, 339–340.

41 See *An Act to amend the law respecting Procedure in Criminal Cases*, SC 1886–87, c 50, am. 1888–89, c 43, s 1.

42 1931 (UK), 22 & 23 Geo.V, c 4.

43 Brought into force by *An Act to amend the Criminal Code*, SC 1932–33, c. 53, s.1024(4).

44 [1935] UKPC 33, [1935] AC 500 (6 June 1935), PC (on appeal from Quebec).

45 28 & 29 Vic C 63 (Imperial).

46 Brian Slattery, 'The Independence of Canada' (1983) 5 SCLR 369, 391.

47 This was achieved by amending s. 54 of the *Supreme Court Act* 1949, 13 Geo, VI.c. 37, s. 3.

48 *Supreme Court Act* 1927, RSC, c. 35.

49 *Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada, Entitled 'An Act to Amend the Supreme Court Act,'* [1940] SCR 49.

postponed until the end of World War II. The Privy Council concluded once again that the Canadian Parliament, after the *Statute of Westminster*, had authority to terminate appeals to the JCPC.<sup>50</sup> Although the Supreme Court gained its independence in 1949, the JCPC continued to hear 31 cases that predated the amendment to the *Supreme Court Act* to abolish appeals to the JCPC.<sup>51</sup> In 1958, the JCPC heard its last case, *Earl F. Wakefield Company v Oil City Petroleum (Leduc) Ltd. et al.*, in which the JCPC upheld the Supreme Court's decision and dismissed the case.<sup>52</sup> This meant that 884 cases had been appealed from Canadian appellate courts to the JCPC since 1867.<sup>53</sup>

Prior to 1949, most cases heard by the Supreme Court constituted private disputes relating to tort, contract or property claims,<sup>54</sup> although with many important federal-provincial jurisdictional battles. The abolition of appeals to the Privy Council resulted in a significant change in the power and nature of cases heard by the Supreme Court, because it began to see a rise in public law litigation and a drastic increase in criminal and tax-related matters.<sup>55</sup> From the 1950s to the 1970s, the Supreme Court saw a 50% increase of cases on its docket.<sup>56</sup> Without the guidance of the Privy Council, Justices of the Supreme Court of Canada were solely responsible for ensuring they had the adequate resources to act as Canada's final Court of Appeal.

## Constitutional reform: 1982

The entrenchment of the *Canadian Charter of Rights and Freedoms* ('the Charter')<sup>57</sup> into the *Constitution Act, 1982* marks a significant development in the Supreme Court's evolution. The need for change arose from Canada's desire to control amending its own Constitution. Prior to the 1982 changes, the *Constitution Act* was enacted by the British Parliament, and only it held the authority to amend Canada's Constitution. This meant that even if all ten provinces joined with the Government of Canada in proposing a minor or major change in Canada's own Constitution, it felt that it had to go on bended knee to obtain the United Kingdom Parliament's approval. In an effort to gain greater independence,

50 [1947] AC 127 (JCPC), [1947] UKPC 1.

51 Benoît Pelletier, 'The Abolition of Appeals to the Judicial Committee of the Privy Council in Canada and the Evolution of the Role of the Supreme Court of Canada' (2016) 4(1) *Caribbean Journal of International Relations & Diplomacy* 41, 56.

52 Renamed *Ponoka-Calmor Oils Ltd. et al. v Earl F. Wakefield Company et al.* (1959) 21 DLR (2d) 577 (JCPC); *Ibid* 56.

53 'List of Canadian Appeals to the Judicial Committee of the Privy Council' [https://en.wikipedia.org/wiki/List\\_of\\_Canadian\\_appeals\\_to\\_the\\_Judicial\\_Committee\\_of\\_the\\_Privy\\_Council](https://en.wikipedia.org/wiki/List_of_Canadian_appeals_to_the_Judicial_Committee_of_the_Privy_Council) accessed on 26 September 2021.

54 Pelletier (n 51) 58.

55 *Ibid* 57.

56 *Ibid* 58.

57 *Canadian Charter of Rights and Freedom*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*Canadian Charter of Rights and Freedom*).

the federal and provincial governments began intensive discussions on possible amending formulas as well as other changes to Canada's Constitution.

The Prime Minister at that time, Pierre Elliot Trudeau, had been a constitutional law professor and a social activist for decades. He had made efforts to reform the justice system, introduce greater human rights in Canada, extend stronger rights to immigrants, promote a more multicultural and multiracial nation, amongst many other initiatives. He felt we needed an entrenched Bill of Rights, since the *Canadian Bill of Rights* enacted by Parliament in 1960<sup>58</sup> was seen by the courts as merely an interpretive guide to be used in assessing other legislation and had been used only once to invalidate one minor section of the federal *Indian Act*<sup>59</sup> in *The Queen v Drybones*.<sup>60</sup> Thus, he launched a national campaign with the public and provincial governments to develop a constitutional and add an entrenched *Canadian Charter of Rights and Freedoms* that could be used by our courts to strike down federal or provincial legislation that was contrary to its provisions. It was rough going because there was lots of resistance from many Canadians, and many provincial premiers feared that federally appointed judges would seize upon such a constitutional foundation to strike down many of their existing laws.<sup>61</sup> After numerous compromises with premiers, he ultimately was successful in getting most of their support for the *Charter* as well as the rest of the package to proceed to England, but with the very vocal opposition of Québec Premier René Lévesque.

The *Constitution Act, 1982* varied from pre-existing constitutional legislation in several critical ways. First, it contains a special amending formula with provisions to enable amendments only affecting one province; those that require approval by two-thirds of provinces containing a majority of the population; and those requiring unanimous consent of the federal Parliament and all provincial legislatures.<sup>62</sup> A second completely different major component created the *Charter* that applied to all legislation adopted by the federal, provincial and territorial legislatures, although there is a limited provision that allows the federal or provincial governments to exempt some laws<sup>63</sup> by formally passing a resolution to do so.<sup>64</sup>

A third essential part of the *Constitution Act, 1982*, outside the *Charter*, is in Part II that recognises and affirms 'existing aboriginal and treaty rights for the aboriginal peoples of Canada' in s. 35(1) and then defines those peoples broadly in s. 35(2).<sup>65</sup> The first amendments to the *Constitution Act, 1982* were agreed upon by

58 *Canadian Bill of Rights*, SC 1960, c 44.

59 RSC 1985, c I-5.

60 1969 CanLII 1 (SCC), 1970 SCR 282.

61 David Close, 'Politics and Constitutional Reform in Canada: A Study in Political Opposition' (1985) 15 *Publius* 161.

62 *Constitution Act* 1982, Part V, ss. 38–48.

63 See, e.g., Jim Reynolds, *Aboriginal Peoples and the Law: A Critical Introduction* (UBC Press 2015); Thomas Isaac, *Aboriginal Law*, 5th ed. (Thomson Reuters 2016).

64 *Constitution Act* 1982, s 32.

65 *Ibid* s 35(1), 35(2).

all the First Ministers and national Aboriginal leaders at a mandatory First Ministers Conference required by s. 37 (1) of the *Constitution* to be convened by the Prime Minister within one year of the new *Constitution*'s proclamation. The agreed text from that meeting was then passed by all ten provincial legislatures and the Parliament of Canada so as to take effect in 1984. Section 35 has transformed the status of Indigenous rights over the past four decades with vast amounts of litigation and dozens of major decisions from the Supreme Court of Canada. These aboriginal and treaty rights issues have also profoundly affected the Court's workload.

The Court's growing jurisdiction from these constitutional changes drastically affected the level of public attention. The *Charter* guarantees Canadians the enjoyment of fundamental freedoms, the right to live and seek employment anywhere in Canada, the rights of life, liberty and personal security, equality rights, minority rights and other legal rights.<sup>66</sup> While these rights and freedoms exist, they are not absolute. The Supreme Court can use its powers under section 1 of the *Charter* to limit these rights to protect other rights and critical national values.<sup>67</sup> In other words, the Court may restrict any *Charter* rights if doing so is deemed 'reasonable' and 'demonstrably justified in a free and democratic society.'<sup>68</sup> This places a heavy onus on the Court because it must now balance often very strongly competing interests, not just among the parties in the appeal before the Court, but among large numbers of Canadians across the nation. Appreciating this fact, the Court has significantly increased its willingness to permit intervenors who will address critical issues in the appeal but from widely diverse vantage points to empower the justices to have as complete an understanding of the issues and the potential impacts of their decision as possible.

With the enactment of a new set of rights comes an increase in litigation. From 1982–1989, the Supreme Court decided on 104 *Charter* cases, representing approximately 12% of all cases heard.<sup>69</sup> One explanation for the growth is due to greater scrutiny of lawmakers' actions. Any act of Parliament or provincial legislature impacting a *Charter* right is subject to review, significantly increasing the Court's jurisdiction. Section 52(1) of the *Constitution Act, 1982* states that 'the Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.'<sup>70</sup> The provision expanded the judiciary's role by empowering them to invalidate legislation that is inconsistent with the *Charter* or other constitutional provisions.<sup>71</sup> Only two years later, the Supreme

66 Ibid s 32.

67 Ibid s 1.

68 Ibid.

69 F. L. Morton, Peter H. Russel and Michael J. Withey, 'The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis' (1992) 30(1) *Osgoode Hall LJ*, 4.

70 *Constitution Act 1982*, s 52(1).

71 Dominic DiFrusico, 'Partition, Politics and Power: The State of Balance Between the Supreme Court and Parliament after Thirty Years of the Charter' (2014) 8 *Journal of Parliamentary and Political Law* 29.

Court reviewed and invalidated a provision of the *Charter of the French Language*, RSQ 1977, c. C-11 on *Charter* grounds in *AG (Que) v Quebec Protestant School Boards*.<sup>72</sup> The nature of *Charter* rights inevitably required the Supreme Court to take a greater role in matters of public policy. The Supreme Court began engaging in discussions related to societal debates, greatly exemplified in *R v Morgentaler*,<sup>73</sup> regarding a woman's right to choose to have an abortion, along with many other hugely important issues, such as the right to medically assisted death.

## The structure and composition of the Court

At its inception, the Court was composed of a chief justice and five puisne justices as appointed by Her Majesty the Queen by Order-in-Council on the advice of the Federal Cabinet.<sup>74</sup> Judges appointed to the Supreme Court of Canada have previously served as a judge of one of the Superior Courts in any of the Provinces of Canada, or who have a minimum of ten years standing at the bar as either a Barrister or Advocate.<sup>75</sup> The *Supreme and Exchequer Courts Act* also required two Quebec appointees to sit on the bench.<sup>76</sup>

By 1927, the number of judges occupying the bench rose to seven to account for the recurring split decisions, and then to nine following the abolition of criminal and civil appeals to the JPCPC.<sup>77</sup> As it stands now, the *Supreme Court Act* stipulates that the Court must consist of 'a chief justice to be called the Chief Justice of Canada, and eight puisne judges' and all appointees shall hold office during good behaviour until the age of 75.<sup>78</sup> The previous requirement of two Quebec appointees has now increased to three to preserve Quebec's distinct legal traditions.<sup>79</sup> The remaining seats, by convention, consist of three judges from Ontario, two from the Western provinces, and one from the Atlantic provinces. Judges appointed to the Supreme Court until age 75, are still required to have at least ten years standing at the bar in any province in Canada.<sup>80</sup>

## Appointment process for Supreme Court of Canada Justices

From the beginning of the Supreme Court of Canada in 1875, the authority to appoint its chief justice and the other puisne justices was set out in section 4 of the founding legislation of the Court, the *Supreme and Exchequer Courts Act*, S.C.

72 1984 CanLII 32 (SCC), [1984] 2 SCR 66.

73 1988 CanLII 90 (SCC), [1988] 1 SCR 30.

74 Iacobucci (n 21) 28.

75 Ibid.

76 Ibid 29.

77 Mathen (n 22) 91.

78 RSC, 1985 c. s-26, s 4(1), 9(2).

79 Ibid s 6.

80 Ibid s 5.1.

1875. The section made clear that ‘Her Majesty may appoint, by letters patent, under the Great Seal of Canada, one person, who is, or has been, a Judge of one of the Superior Courts in any of the Provinces forming part of the Dominion of Canada, or who is a Barrister or Advocate of at least ten years’ standing in the bar of any of the said Provinces.’<sup>81</sup> Section 4 went on to specify that ‘two of whom at least shall be taken from among the Judges of the Superior Court or the Court of Queen’s Bench, or who are Barristers or Advocates of the Province of Quebec.’<sup>82</sup> The latter clause was to implement a political agreement reached with the government of Quebec to provide a sense of assurance that Quebec’s distinctness as a predominantly civil law jurisdiction and the dominance of the French language would be respected by this new national court.

The authority to make the appointments was subsequently transferred to ‘the Governor-in-Council by letters patent under the Great Seal.’<sup>83</sup> This institution consists of the Governor General of Canada, who is appointed directly by the King or Queen of Canada on the advice of the Prime Minister, who usually has obtained the views of federal Cabinet Ministers. The Governor General fulfils the domestic role of the current monarch of the United Kingdom, who may sit directly with the United Kingdom Cabinet or be briefed in person by the Prime Minister. Canada and most nations within the Commonwealth have a Governor General who is directly appointed by the reigning sovereign on the advice of the relevant Prime Minister.

This long-standing procedure of the Governor-in-Council making these appointments similarly applies to all other judicial appointments to the superior courts and courts of appeal in the provinces and territories, the Federal Court, Tax Court, and many federal administrative tribunals, as well as key public service posts. The *Constitution Act, 1867*, through s. 96 states, ‘The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.’<sup>84</sup> This restricts the provinces and territories to appointing judges to lower courts and their own administrative tribunals and statutory posts. This meant that the selection process was done entirely in secret.<sup>85</sup> It also meant the possibility that those selected would be close to the political party in power federally, such as former Members of Parliament or ministers, major financial donors, senior party officials, etc. Some particularly notorious appointments damaged the credibility of the process and the courts concerned in the eyes of the public.<sup>86</sup> As a result, in recent years, conscious efforts

81 *Supreme and Exchequer Courts Act*, SC 1875, c.11, s. 4.

82 *Ibid.*

83 *Ibid.*

84 *Constitution Act 1867*, s. 96.

85 Report of the Standing Committee on Justice and Human Rights, ‘The New Process for Judicial Appointments to the Supreme Court of Canada’ (42nd Parliament, 1st Session), 2 [www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP8776644/justrp09/justrp09-e.pdf](http://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP8776644/justrp09/justrp09-e.pdf) accessed on 26 September 2021.

86 *Ibid.*

have been made to ensure those selected clearly possessed strong reputations for excellence as judges or advocates beyond meeting the statutory criteria.<sup>87</sup> The first step was for the Prime Minister to consult with the Chief Justice of the Supreme Court about the preferred candidate or a short list of names. The House of Commons Justice Committee engaged in a public review of the process to select justices to the Supreme Court resulting in its report in May 2004.<sup>88</sup> Later, a committee of representatives from law societies and the Canadian Bar Association was created to comment upon the candidate list, which reflected part of the recommendations from the 2004 Standing Committee Report, although a Member of Parliament from each of the political parties was not included.<sup>89</sup> Subsequently, individuals were added to this committee to represent the broader public.

A brief experiment to bring the Prime Minister's preferred nominees before an ad hoc committee of Parliament was conducted for appointments in 2006 and 2011–13 involving five nominees, while it was not followed for four others in 2008, 2014 and 2015, even though it was the same Prime Minister who made all the final selections.

In 2016, the newly elected Prime Minister announced a new process for Supreme Court of Canada judicial appointments to improve the transparency, consistency and quality of the appointment process.<sup>90</sup> This included the development of an independent and non-partisan advisory board tasked with identifying qualified candidates. The board consists of seven members who must demonstrate integrity, impartiality and objectivity in the selection process.<sup>91</sup> Upon review of the candidates, the board must provide the Prime Minister with recommendations of three to five candidates for consideration.<sup>92</sup> Candidates must be functionally bilingual and meet the criteria established in the *Supreme Court Act*.<sup>93</sup> The Minister of Justice will then consult with the Chief Justice of Canada, provincial and territorial attorneys general, cabinet ministers, opposition Justice Critics, as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs on the shortlisted candidates. The Prime Minister will then choose a nominee based on the recommendation of the Minister of Justice.

To date, this process remains in place; however, the organisations that nominate members have been urged to be more cognisant of the very diverse nature of Canada. Once all members have been selected, their identity and expertise have

87 For a detailed discussion of this topic see C. Mathen and M. Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference* (University of British Columbia Press 2020).

88 Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 'Improving the Supreme Court of Canada Appointments Process,' May 2004.

89 *Ibid* 3.

90 *Ibid*.

91 *Ibid* 4.

92 *Ibid*.

93 *Ibid*.

been made public, and the media spotlight has been far more intense. The latest member of the Supreme Court, Honourable Justice Mahmud Jamal, was selected by this process.

### *Who are these Justices?*

With the appointment of Justice Jamal, Canada has now had 88 people appointed to its highest domestic court since its launch in 1875 to 2021. In these 146 years, there have been 79 men, 78 of whom are Caucasian, and 9 women, all of whom are Caucasian. One female was born in 1946 in a German refugee camp whose parents survived Nazi concentration camps, 1 in the United States, 7 in the United Kingdom and our latest born in Kenya. There have been 13 from the four Atlantic provinces, 8 from the Prairies, 2 from British Columbia, 23 from Ontario, 34 from Quebec and none from any of the three territories. Twenty justices were appointed directly from private practice. Seventeen came from practice via a court of appeal without trial experience. Fourteen came from a trial court without appellate expertise. The balance started in a trial court, were later elevated to a court of appeal and finally to the Supreme Court.<sup>94</sup>

## **The Court's jurisdiction**

### *Leave to appeal and appeals 'as of Right'*

To appeal a decision, whether provincial, territorial or from the Federal Court of Appeal to the Supreme Court, with few exceptions for particular criminal convictions, the applicant must apply to the Supreme Court for leave to appeal before the appeal itself is heard by the court. As Canada's highest court of appeal, the Supreme Court will only hear cases of national importance or ones involving unsettled areas of the law, such as where there are contradictory decisions from courts of appeal from different jurisdictions, raising new legal questions, or dealing with new untested but very important legislation. The *Supreme Court Act* takes this one step further, stating that leave is granted when:

The Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it and leave to appeal from that judgment is accordingly granted by the Supreme Court.<sup>95</sup>

94 'Current and Former Judges' [www.scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx](http://www.scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx). accessed on 25 September 2021. Further research was conducted on the professional background of each of the justices.

95 *Supreme Court Act*, RSC 1985, c. S-26 s 40(1).

Sopinka J. (as he then was) has provided greater insight into how to produce an application in favour of granting a leave to appeal. Notably, counsel should be aware of the difference between the issue, and the merits of the case.<sup>96</sup> Of great importance in an application for leave to appeal is a submission to the Court emphasising the true issue to be decided.<sup>97</sup> Further, if the issue has intra-provincial implications, or the issue exists in several provinces, the Court is more likely to grant leave to appeal. Leave to appeal is often granted by a panel of three judges of the Supreme Court; however, the Court is less likely to grant leave to appeal ‘in cases which are primarily factual in nature, or in which the result generated will be of interest primarily to the parties themselves and not of general application.’<sup>98</sup> If the Supreme Court declines to hear a case, the decision of the last court stands with no further right to appeal. If the Supreme Court grants a leave to appeal, then the Supreme Court has jurisdiction to render a new decision or uphold the lower court’s decision. Unlike references, the Supreme Court is not required to provide reasons for granting or denying leave to appeal, and applicants do not generally have an opportunity to provide oral submissions with their request for a leave.<sup>99</sup> The Court commonly receives roughly 600 requests for leave to appeal per year and may grant only 80.<sup>100</sup> The rationale behind withholding reasons is to maintain an ‘unfettered discretion’ as to when leave is granted.<sup>101</sup>

In certain circumstances, an applicant may have a right to an appeal. This is typically the case for criminal matters, since they frequently involve issues of public importance and decisions with a national impact.<sup>102</sup> Nonetheless, even a right to appeal doesn’t come without limitations. An automatic right for appeal exists when an acquittal has been set aside in a lower court or when there is a dissenting judge on a question of law from the provincial or territorial court of appeal.<sup>103</sup>

## Formal references to the Supreme Court

Over the last 150 years, the Supreme Court of Canada has played an essential role in contributing to the development of the law through its adjudicative function. Nevertheless, this is not the only role of the Court. When Parliament created the Supreme Court of Canada, it also conferred upon the Court the option to perform an advisory function in the form of a reference. Between 1867 and 1986,

96 John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (Butterworths 1993) 166–167.

97 *Ibid.*

98 *Ibid.* 167.

99 *Ibid.* 167–168.

100 ‘Important Information About Seeking Leave to Appeal to the Supreme Court of Canada,’ [www.scc-csc.ca/unrep-nonrep/app-dem/important-eng.aspx](http://www.scc-csc.ca/unrep-nonrep/app-dem/important-eng.aspx) accessed on 26 September 2021.

101 John Sopinka, ‘The Supreme Court of Canada’ in Brian A. Crane and Henry S. Brown (eds.), *Supreme Court of Canada Practice 1998* (Carswell 1998) 306, 308.

102 *R v Hinse*, 1995 CanLII 54 (SCC), [1995] 4 SCR 597, 11–12.

103 *Ibid.* 12–13.

91 of 352 decisions were in the form of a reference.<sup>104</sup> A reference allows the Supreme Court to hear questions and provide reasons even when there is no live case and no disputants.<sup>105</sup> While parties can present arguments to support their position, a reference may move forward without any oral or written submissions from the parties.<sup>106</sup> While the Supreme Court must issue a response to the questions posed, this is not a formal judgment or backed by the force of law. Nonetheless, references have contributed to the evolution of federalism, constitutional interpretation, *Charter* rights, secession and several other significant milestones in Canadian history.

The *Supreme and Exchequer Court Act, 1875* authorised the Governor in Council to ‘refer to the Supreme Court for hearing or consideration, any matters whatsoever as he may think fit.’<sup>107</sup> Courts were allowed to ‘examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons.’<sup>108</sup> One year later, the Supreme Court faced its first reference from the Senate, a jurisdictional matter between the provincial and federal government. While the Supreme Court decided to favour the provincial government, the Court did not justify its conclusion.<sup>109</sup> It was often the case that judges would respond without laying out the reasons and process for their decision.<sup>110</sup> References primarily responded to questions about the separation of powers and the limits on provincial and federal governments’ powers. Ultimately, Parliament’s frustration grew, since it was unable to discern the boundaries of its power without reasons by the Court.<sup>111</sup> As a result, in 1891, Parliament used its legislative authority to amend the *Supreme and Exchequer Court Act* to require explanations from judges when deciding a reference question.<sup>112</sup> Further amendments in 1906 expanded on these changes, requiring judges, amongst other things, to provide an opinion and reasons to all questions of law or fact posed in the reference.<sup>113</sup>

As the reference power became more established, the enumerated grounds expanded. One such change was the addition of references to reflect the changing nature of Canada’s Constitution. In 1929, the Supreme Court was asked by five women to define the word ‘person’ within the meaning of section 24 of the *BNA Act* ‘so as to be eligible or not for appointment to the Senate.’<sup>114</sup> The

104 Mathen (n 22) 5.

105 Feldman (n 36) 3.

106 Ibid 3.

107 *Supreme and Exchequer Court Act*, s 52.

108 Ibid s 51.

109 Feldman (n 36) 3.

110 Ibid.

111 Ibid.

112 *An Act respecting The Supreme and Exchequer Courts Act*, 54–55 Vict c 25, s 4; Ibid.

113 *An Act to amend The Supreme and Exchequer Courts Act*, 6 Edw VII c 50; Ibid.

114 *Reference re meaning of the word ‘Persons’ in s.24 of British North America Act*, [1928] SCR 276.

Supreme Court's interpretation was that 'person' in the *Act* was denoting only men.<sup>115</sup> Fortunately, the JCPC disagreed,<sup>116</sup> essentially moving women one step closer to becoming members of the Senate. Of equivalent significance is the 1998 *Reference Re Secession of Quebec*, in which the Supreme Court was asked by the Government of Canada to determine whether Quebec has the legal authority to secede from Canada unilaterally and what might any preconditions be, if any, such as to hold a public referendum.<sup>117</sup> The Province of Quebec had held two such referendums on this topic and lost both, with the second time being rather close. Part of the reference concerned the nature of the question asked and how clearly worded it must be. Reasons were delivered by a unanimous court that found Quebec had neither constitutional nor international grounds to secede unilaterally.<sup>118</sup> However, where most Quebecers voted 'yes' to an unambiguous question about secession, the Canadian Federal and Provincial governments would be obliged to negotiate constitutional changes with Quebec.<sup>119</sup>

While a reference does not have the force of law, the Supreme Court's decision-making process has played a significant role in Canada's legal history. In fact, the Supreme Court introduced the unwritten constitutional principles of Federalism, Democracy, Rule of Law and Protection of Minority Rights in their reasons for the *Reference Re Secession of Quebec*, which has contributed to the interpretation of the Constitution.<sup>120</sup> To date, the four unwritten principles remain a subject of debate at the Supreme Court.

Another aspect of the Supreme Court's workload regarding references does not come from the federal government. Every provincial government also has the power to refer one or more questions, or a draft Bill, to its Court of Appeal for guidance. The Court of Appeal is expected to deliver its decision with detailed reasons. Such a decision could be taken on appeal by the government to the Supreme Court of Canada to obtain its opinion as well.

## The decision-making process

The Supreme Court makes extensive use of its own prior judgments to resolve new disputes, since it prefers to sustain the existing law, unless changed circumstances warrant recasting prior caselaw or changing it more drastically. Depending upon the legal issue arising, the Supreme Court may engage in an exhaustive review of its own prior decisions and those from lower courts, it may refer to international law and Canada's international obligations or it may confirm that the significant changes in circumstance necessitate a new approach.

115 Ibid.

116 *Reference to Meaning of Word 'Persons' in Section 24 of British North America Act, 1867: Edwards v. A.G. of Canada*, [1930] AC 124, [1929] UKPC 86.

117 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

118 Ibid 153–156.

119 Ibid 103–105.

120 Ibid 32.

*Stare decisis*

In the Canadian Common Law system, judges must adhere to the doctrine of *stare decisis*, a Latin phrase meaning ‘to stand by decisions and not to disturb settled matters.’<sup>121</sup> Under the doctrine, prior decisions of higher courts, such as the Supreme Court, are binding on lower courts within the same jurisdiction.<sup>122</sup> With the abolition of the JCPC, the Supreme Court became the highest Court of Appeal in Canada, meaning that there are no courts of parallel or superior jurisdiction. As such, decisions of the Supreme Court are binding on all appellate courts, superior courts, federal courts and provincial courts. Furthermore, these courts are also bound to the decisions of the JCPC that the Supreme Court has not subsequently overruled.<sup>123</sup> The most often cited rationale behind the rigid approach of *stare decisis* is to maintain ‘consistency, certainty, predictability and sound judicial administration.’<sup>124</sup> However, other benefits such as administrative efficiency, judicial humility and judicial comity have also founded the existence of *stare decisis*.<sup>125</sup>

So, how does the Supreme Court of Canada interpret and adhere to its own prior decisions? While the Supreme Court and lower courts should follow decisions from the same level of Court, they are exempt from doing so if there is a compelling reason. The Supreme Court has on several occasions overruled its own decision, though the decision to do so is not taken lightly.<sup>126</sup> Overruling its own decisions became the topic of much debate with the enactment of the *Charter*, because cases were to be determined with the principles of the *Charter* in mind. Since the enactment of the *Charter*, a plethora of cases and academics have developed a set of factors to consider when determining whether to overturn precedent.<sup>127</sup> More recently, in *Canada v Craig*, the Supreme Court rearticulated the principles it will apply in determining whether or not to overrule its own decisions.<sup>128</sup> Ultimately, the ‘Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or

121 Justice Malcom Rowe and Leanne Katz, ‘A Practical Guide to Stare Decisis’ (2020) 41 Windsor Review of Legal and Social Issues 1, 1.

122 Ibid 6–7.

123 Ibid 12.

124 *David Polowin Real Estate Ltd v The Dominion of Canada General Insurance Co*, 2005 CanLII 21093 (ON CA).

125 Henry Paul Monaghan, ‘Stare Decisis and Constitutional Adjudication’ (1988) 4(88) Colum L Rev 723, 744–752; Jeremy Waldron, ‘Stare Decisis and the Rule of Law: A Layered Approach’ (2012) 1(111) Mich L Rev 1, 4; *Hansard Spruce Mills Limited (Re)*, 1954 CanLII 253 (BCSC), 592; Justice Rowe and Katz (n 121) 4.

126 *R. v Chaulk*, 1990 CanLII 34 (SCC), [1990] 3 SCR 1303, 1353; *R v B (K G)*, 1993 CanLII 116 (SCC), [1993] 1 SCR 740; *R v Robinson*, 1996 CanLII 233 (SCC), [1996] 1 SCR 683.

127 *R v Bernard*, 1988 CanLII 22 (SCC), [1988] 2 SCR 833, 850–61; *R. v Henry*, 2005 CanLII 76 (SCC), [2005] 3 SCR 609, 45–46.

128 2012 CanLII 43 (SCC), [2012] 2 SCR 489.

to correct the error.<sup>129</sup> Some relevant considerations that justify overturning its own precedent include a circumstance in which (1) the court has made an error, (2) there has been ‘significant judicial, academic, and other criticism,’ or (3) there is ‘unexpressed legislative intention under the guise of purposive interpretation.’<sup>130</sup> Ultimately, the Supreme Court’s ability to overrule its own decisions is in line with its early classification of the *Constitution* as a ‘living tree’.<sup>131</sup> In other words, the Supreme Court should interpret the *Constitution* in light of the present-day circumstance and take a practical rather than a historical approach in decision-making.<sup>132</sup>

### *Applying international law at the Supreme Court of Canada*

Judgments from final appellate courts in common law jurisdictions circulate quite widely among English-speaking nations, especially when dealing with challenging newer legal issues.

International law has often been used in Canadian courts as an interpretative tool. The Supreme Court determines when it is appropriate to compare domestic law to the international laws, customs and norms.<sup>133</sup> Counsel and provincial courts use the Supreme Court’s decisions to determine when international law plays a persuasive role in decision-making. The Supreme Court’s reference to international law is exemplified in the *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia* decision, in which the Court used international laws to invalidate government legislation.<sup>134</sup> By referring to the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Labour Organization’s (ILO’s) Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, the Supreme Court reversed a line of jurisprudence that it itself had developed.<sup>135</sup>

The Canadian courts, and especially the Supreme Court of Canada, generally do not defer to the government of the day on international legal questions that arise. The Supreme Court has effectively used judicial decisions by international tribunals in resolving international legal questions. This is exemplified in *Mugesera v Canada (Minister of Citizenship and Immigration)*<sup>136</sup> and *Office of the Children’s Lawyer v Balev*.<sup>137</sup> In the former case, the Minister of Citizenship and Immigration sought a deportation order for Leon Mugesera, a Rwandan

129 Ibid 27.

130 Ibid 28–31.

131 *Edwards v Attorney General of Canada*, [1930] AC 124, [1929] UKPC 86.

132 Ibid.

133 *R v Hape*, 2007 CanLII 26 (SCC), [2007] 2 SCR 292.

134 2007 CanLII SCC 27, [2007] 2 SCR 391.

135 Ibid 71.

136 2005 CanLII 40 (SCC), [2005] 2 SCR 100.

137 2018 CanLII 16 (SCC), [2018] 1 SCR 398.

national with permanent residency status in Canada, on the grounds of incitement to murder, genocide, hatred and commission of a crime against humanity.<sup>138</sup> Mugesera was ordered deported, and he challenged that order unsuccessfully at the Federal Court but later succeeded at the Federal Court of Appeal.<sup>139</sup> The Supreme Court ruled that Canada is bound to various conventions and treaties against genocide.<sup>140</sup> Canada is also bound to the underlying principles of the treaties that are binding in customary international law. Relying on the principles of *Baker*, the Court concluded that they must interpret domestic law in a manner that accords with principles of customary international law and Canada's treaty obligations.<sup>141</sup>

Judicial contribution to the reception of international law generally occurs in two ways: (1) through internationally conforming interpretations of domestic law, and (2) through the incorporation of rules of customary international law in the common law.<sup>142</sup> The Supreme Court seeks to identify rules of international law that are binding on the state and give effect to them in both these circumstances. In order to do this, the Supreme Court relies on subsidiary rules and practice. This includes taking judicial notice of international law and judicially reviewing executive actions in the international sphere. The Supreme Court has discussed the doctrine of adoption, which allows judges to adopt and base decisions on rules of customary international law, as long as there is no domestic legislation that conflicts with the customary rule.<sup>143</sup> The Courts have generally accepted the doctrine of adoption, including the decision in *The Ship 'North' v The King*, in which Davies J. wrote, 'The Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations... . The right of hot pursuit . . . being part of the law of nations was properly judicially taken notice of and acted upon by the learned judge in this prosecution.'<sup>144</sup> Further demonstrated in *Bouzari v Islamic Republic of Iran*, in which the Court stated that 'customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation.'<sup>145</sup> As the jurisprudence shows, recognition of international customary law in Canada is growing.

### *Canadian Charter and international law*

There is also a noteworthy interplay between the interpretation of the *Charter* and international law. Under section 1 of the *Charter*, the Supreme Court has the discretion to justify an infringement of a *Charter* right, if doing so is 'justified

138 Ibid.

139 Ibid 5–7.

140 Ibid 82.

141 Ibid.

142 *R v Hape* (n 133) 35–39.

143 *R v Hape* (n 133) 36.

144 1906 CanLII 80 (SCC), [1906] 37 SCR 385, 394.

145 2004 CanLII 871 (ON CA) leave to appeal refused, [2005] 1 SCR vi.

in a free and democratic society.<sup>146</sup> The Supreme Court has occasionally looked to international law during the section 1 justification stage of *Charter* review to determine whether a rights-limiting provision can be demonstrably justified.<sup>147</sup> In *Slaight Communications Inc v Davidson*, the Supreme Court was presented with an issue on whether s.61.5(9) of the *Canada Labour Code* authorises an adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee.<sup>148</sup> Specifically, the Court was presented with a constitutional issue on whether the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s.2(b) of the *Charter*, and if so, whether the infringement is justified by s. 1 of the *Charter*.<sup>149</sup> Applying the *Oakes*<sup>150</sup> test for a section 1 analysis, the Supreme Court determined that the test upholds the underlying value of a free and democratic society in line with international law obligations in the *International Covenant on Economic, Social and Cultural Rights*.<sup>151</sup> This case demonstrates that various sources of international human rights law are relevant and persuasive for interpreting the *Charter*.

### *International courts*

While Supreme Court decisions cannot be appealed to international courts, international law often requires the exhaustion of domestic remedies before seeking international remedies.<sup>152</sup> The rule's rationale is to ensure the domestic country has the opportunity to address the wrong before the issue is brought forward to an international court, tribunal or committee.<sup>153</sup> Exhausting domestic remedies means either the Supreme Court has refused leave to appeal or it has dismissed the case. Only once this has occurred can a party seek an international remedy. Nonetheless, the international tribunal's decision is not binding on the Supreme Court.

### *Supreme Court decisions and their interplay with foreign judgments*

The Supreme Court sparsely looks to foreign judgments as persuasive authority. Research shows that between 2000 and 2016, approximately 12 Canadian cases

146 *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.

147 *Slaight Communications Inc v Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038.

148 *Ibid* 1047–1048.

149 *Ibid*.

150 *R. v Oakes* (n 146).

151 *Slaight Communications Inc v Davidson* (n 147) [1056]–[1057].

152 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford Scholarly Authorities on International Law 2013).

153 *Ibid*.

were cited in its judgments to only one foreign judgment.<sup>154</sup> In specific circumstances, the Court may recognise a foreign judgment as effective and legitimate in Canada. In other circumstances, the Court uses foreign judgments to guide its decision-making. For example, in *Canadian Council of Churches v Canada*, the Supreme Court was asked to determine whether the Council had standing to challenge portions of the *Immigration Act, 1976* as violating the *Canadian Charter of Rights and Freedoms*.<sup>155</sup> In reaching its conclusion, the Court referred to precedent in the United States and policies and regulations in Australia to better inform the decision-making process.<sup>156</sup> While foreign jurisprudence in this instance wasn't adopted as binding authority, the Court used the legal history of foreign countries to develop law relevant to Canada.

The use of American jurisprudence in Canada has grown considerably over time. The growth can be attributed to several reasons, including the shared common law systems.<sup>157</sup> Additionally, the United States often had experience in legal issues that had not yet existed in Canada. The use of American jurisprudence and legal theories became exceptionally important with the enactment of the *Charter*.<sup>158</sup> In fact, in one of the first *Charter* cases, the Supreme Court stated, 'the courts in the United States have had almost two hundred years' experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.'<sup>159</sup> American jurisprudence has also assisted in developing the freedom of expression rights expressed in section 2(b) of the *Charter*.<sup>160</sup> Nonetheless, the Supreme Court has acknowledged that there are vast political and social differences between the two nations, which must be considered in judicial decision-making. Notably, in *R v Keegstra*,<sup>161</sup> Dickson C.J. stated, 'I am unwilling to embrace various categorizations and guiding rules generated by American law without careful consideration of their appropriateness to Canadian constitutional theory.'<sup>162</sup> The use of foreign judgments in judicial decision-making serves as a useful interpretive tool but remains only persuasive and not binding in Canada.

American jurisprudence is not the only foreign policy or precedent that the Supreme Court has incorporated when delivering its reasons. In *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court articulated a duty to consult based on the Canadian Constitution but quoted New Zealand policies on

154 Klodian Rado, 'The Use of Non-Domestic Legal Sources in Supreme Court of Canada Judgments: Is This the *Judicial Slowbalization* of the Court?' (2020) 16(1) Utrecht LR 57.

155 1992 CanLII 116 (SCC), [1992] 1 SCR 236.

156 Ibid 244–248.

157 Gerard V. La Forest, 'The Use of American Precedents in Canadian Courts' (1994) 46(2) Maine LR 211, 212.

158 Ibid 213.

159 *Law Society of Upper Canada v Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 SCR 357, 367.

160 La Forest (n 157) 215.

161 *R v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697.

162 Ibid 740–741.

the duty to consult and meaningful consultation as guidance for the Crown.<sup>163</sup> Similarly, our Supreme Court, in addressing aboriginal title again in *Delgamuukw v B.C.*,<sup>164</sup> relied heavily on the Australian High Court's decision in *Mabo v Queensland (No. 2)*,<sup>165</sup> which itself was influenced by *Calder v A-G B.C.*<sup>166</sup>

## Conclusion

This chapter described the evolution of the Supreme Court of Canada from a court of subordinate jurisdiction to becoming the highest court of appeal in Canada. Since its inception, the Supreme Court has worked diligently to establish its independence. Before 1949, independence meant abolishing appeals to the JCPC and creating a judicial system separate from the control of the British Parliament. Now, independence means ensuring the three branches of government—the judiciary, the executive and the legislative—remain distinct from one another, creating an effective checks and balances system. This is why the Chief Justice of Canada signed the ‘Accord to strengthen the independence of the Supreme Court of Canada’ in 2019; to assert the Supreme Court’s independence from the other branches and maintain equilibrium.<sup>167</sup>

The Supreme Court has grown considerably throughout the years in both an advisory and adjudicatory role. In 2020, the Court received 471 applications for leave, received 25 notices of appeal as of right, granted 28 applications for leave, heard 41 appeals and issued 45 decisions.<sup>168</sup> While most decisions fall within the realm of criminal law, 20% are related to *Charter* litigation (civil and criminal), and 9% are constitutional questions of law.<sup>169</sup>

Social, political and economic pressures have and continue to shape judicial decision-making. As the Court has previously stated, the Constitution must be interpreted as a ‘living tree,’ considering relevant present-day factors and best practices.<sup>170</sup> It is for this reason that the Supreme Court is a member of several international court organisations, including the World Conference on Constitutional Justice, the Asia-Pacific Judicial Colloquium, L’Association des cours constitutionnelles francophones (Association of Francophone Constitutional Courts), L’Association des hautes juridictions de cassation des pays ayant en partage l’usage du français (the Association of Supreme Courts of Cassation of French-Speaking Countries) and the International Association of Supreme

163 *Haida Nation v British Columbia (Minister of Forests)*, 2004 CanLII 73 (SCC), [2004] 3 SCR 511, 46–47.

164 [1997] 3 SCR 1010.

165 *Mabo v Queensland (No. 2)*, [1992] HCA 23.

166 [1973] SCR 313.

167 Supreme Court of Canada, ‘2020 Year in Review: Supreme Court of Canada’ [www.scc-csc.ca/review-revue/2020/yr-ra2020-eng.pdf](http://www.scc-csc.ca/review-revue/2020/yr-ra2020-eng.pdf) accessed on 26 September 2021.

168 *Ibid* 16.

169 *Ibid* 22.

170 *R v Hinse* (n 102) 11–12.

Administrative Jurisdictions.<sup>171</sup> Despite the Supreme Court's involvement in global organisations, international law and foreign judgments are incorporated into Canadian jurisprudence with caution and as a persuasive rather than binding authority.

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171 Supreme Court of Canada (n 167) 13.

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# 3 Precedents and case-based reasoning in the case law of the High Court of Australia<sup>1</sup>

*Selena Bateman and Adrienne Stone*

## Introduction

The High Court of Australia is at the apex of the Australian court system. Established in 1901 upon the federation of the Australian colonies, the Constitution preserved the pre-existing colonial courts as courts of the new Australian States<sup>2</sup> and established the High Court to serve as a final court of appeal from all other Australian courts.<sup>3</sup> The High Court has jurisdiction to hear appeals from all State, territory and federal courts on matters of State and federal law including the common law. Its constitutional jurisdiction therefore includes both original and appellate jurisdiction.

The Court's decisions are binding on all lower courts, both federal and State, in the hierarchy as part of the doctrine of precedent which is a critical feature of the common law. The Court itself, as a matter of long-established practice, generally follows its previous decisions. While it is not bound to do so, it only overrules its previous authority by reference to considerations that seek to prioritise stability and certainty in the law. The Court's approach to adjudication generally, and constitutional adjudication particularly, is very much shaped by its position in the Australian court hierarchy mandated by the Australian Constitution and by the continuing influence of both the British model of constitutionalism and the Constitution of the United States.<sup>4</sup>

Because of its position, the Court is never required to apply lower court decisions. However, it regularly refers to the decisions of lower courts in the Australian judicial hierarchy. While lower courts also have jurisdiction to determine constitutional issues, in many cases novel constitutional issues will be initiated in the High Court.

While it is impossible to survey comprehensively the Court's constitutional jurisprudence, this chapter will examine the Court's approach to the decisions of international courts and the decisions of other supreme courts through the

1 Work on this chapter has been generously supported by the Australian Research Council pursuant to Adrienne Stone's Australian Laureate Fellowship.

2 *Constitution of the Commonwealth of Australia (1901)* s 106.

3 *Ibid* s 71.

4 Cheryl Saunders and Adrienne Stone, 'The High Court of Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017).

prism of one significant area of Australian constitutional law, the law of Chapter III of the Constitution, which governs the Australian judiciary. The provisions of Chapter III were inspired by, and in many ways closely replicate, the text and structure of Article III of the United States Constitution. Chapter III establishes the federal judiciary, with the High Court at the apex, and defines the Court's power. Critically, Chapter III has been held to entrench a strict separation of judicial power from legislative and executive power at a federal level.

Chapter III jurisprudence has been a very important source of the development of rights protections in Australia. The Australian Constitution is highly unusual for its sparsity of rights protection.<sup>5</sup> In the absence of a federal charter of rights, Chapter III jurisprudence has been pivotal to the development of rights protections in Australian law, including elements of substantive and procedural due process. Legal issues involving fundamental rights that in other jurisdictions are ordinarily litigated by reference to constitutional or legislative rights frameworks are instead often ventilated in Chapter III cases. This case study will survey the variety of ways the Court uses decisions of United States and United Kingdom courts in some key Chapter III cases decided by the Court over the last 30 years.

## The role of precedent in the High Court of Australia

### *The fundamentals of the Australian common law system*

To understand the High Court's approach to constitutional adjudication, it is necessary to understand some features of the Australian common law system. A key feature of that system is the doctrine of precedent: the rule that a lower court is required to take account of, and follow, the decisions of all courts higher than it in the hierarchy.<sup>6</sup>

As former Chief Justice of the High Court Sir Anthony Mason has said of the doctrine:<sup>7</sup>

[m]ore than anything else the doctrine of precedent makes the common law continuous, consistent and predictable. And it gives legal reasoning, that is, common law legal reasoning, its distinctive quality, a quality that differentiates legal reasoning from other forms of reasoning.

In the context of the Australian judiciary, the doctrine of precedent requires all other courts to follow the High Court's decisions on all matters of law, including on all matters of constitutional law.

5 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.

6 R. Cross, *Precedent in English Law*, 3rd ed. (Clarendon 1977) 6.

7 Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93 at 93.

A closely related common law doctrine is that of *stare decisis* which either requires a superior court to apply its earlier decisions, or less strictly, that it ought not generally depart from them. As will be outlined, the High Court has never regarded itself as unable to depart from its earlier decisions but does so cautiously.

### *The position of the High Court*

The High Court's position at the apex of the Australian judiciary is expressly mandated by Chapter III (sections 71–80) of the Constitution, titled 'The Judicature', which confers the Court with original jurisdiction in defined subject matters, including any matter arising under the Constitution or involving its interpretation.<sup>8</sup> Chapter III also confers appellate jurisdiction on the Court to hear and determine appeals from all 'judgments, decrees, orders and sentences' of any other federal court, or court exercising federal jurisdiction, or the Supreme Court of any State.<sup>9</sup>

From enactment in 1900, the Australian Constitution included a provision (s 74) that allowed for appeals from the High Court to the Judicial Committee of Privy Council ('Privy Council') in the United Kingdom. In addition, the Constitution also allowed for appeal from a State Supreme Court to the Privy Council directly.<sup>10</sup> Historically, the only limitation on this appeal avenue was that no appeal was permitted from the High Court to the Privy Council on what are known as 'inter se' questions, which are any disputes that involved the Commonwealth on the one hand and a State on the other, or a dispute between two or more States. In effect, this made the High Court effectively the final court on all constitutional matters.<sup>11</sup> The Court's reasoning on this issue, only six years after Australia's federation, while the nation was yet to achieve full independence from the United Kingdom, shows its early commitment to shaping uniquely Australian constitutional dynamics. The Court held that the resolution of these disputes required:<sup>12</sup>

an Australian Court, immediately available, constant in its composition, well versed in Australian history and conditions, Australian in its sympathies, and whose judgments, rendered as the occasion arose, would form a working code for the guidance of the Commonwealth [of Australia].

8 *Australian Constitution* s 75 confers original jurisdiction in relation to enumerated subject matters directly on the Court. Section 76 empowers Parliament to confer additional original jurisdiction on the Court including in constitutional matters (s 76(i)).

9 *Australian Constitution* s 73.

10 *Ibid* s 74.

11 The Court has only granted a certificate permitting the Privy Council to hear an appeal on an inter se question once in 1913 (*Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644, 645 (PC)).

12 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1117–8 (Griffiths CJ, Barton and O'Connor JJ).

The Privy Council remained the final court of appeal on all non-inter se questions formally until 1986 when the passage of reciprocal legislation by the United Kingdom and Australian Parliaments finally removed the authoritative force of English courts in Australia.<sup>13</sup> This legislation was the last in a long series of judicial and legislative developments over the course of the twentieth century that severed the formal constitutional links between the United Kingdom and Australia.<sup>14</sup> Section 74 remains in the Constitution (it could only be removed in accordance with the referendum mechanism)<sup>15</sup> but it is a ‘vestigial remnant’ of the former hierarchical connection between Australian courts and the Privy Council and there is no possibility of the Court using the mechanism to permit an appeal to the Privy Council.<sup>16</sup>

***Other components of the Australian judicial system—federal, state and territory courts***

The High Court is the only federal court established by the Constitution, but the document enables federal Parliament to create lower federal courts by legislation.<sup>17</sup> Currently, the other courts in the federal court hierarchy are the Federal Circuit and Family Court of Australia<sup>18</sup> and the Federal Court of Australia.<sup>19</sup>

The courts of each of the Australian colonies were preserved by the Constitution and became the courts of the State.<sup>20</sup> In an arrangement described as the ‘autochthonous expedient’ Chapter III of the Australian Constitution enables federal Parliament to confer federal jurisdiction on State courts.<sup>21</sup> In addition, Australia’s two self-governing territories have their own court systems.<sup>22</sup>

By virtue of constitutional arrangements and federal legislation, all federal, State and territory courts have original jurisdiction to determine constitutional

13 Appeals from the High Court to the Privy Council were formally abolished in 1975 (*Privy Council (Appeals from the High Court) Act 1975* (Cth)); and appeals from all Australian States to the Privy Council were abolished in 1986 (*Australia Request Act 1985; Australia (Request and Consent) Act 1985* (Cth); *Australia Act 1986* (UK)).

14 *Sue v Hill* (1999) 199 CLR 462, 490–3 (Gleeson CJ, Gummow and Hayne JJ). See also Anthony Mason, ‘Fullagar Lecture: Future Directions in Australian Law’ (1987) *Monash University Law Review* 150, 150.

15 *Australian Constitution*, s 128.

16 *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 461 (Gibbs CJ, Mason, Wilson Brennan, Deane and Dawson JJ).

17 *Australian Constitution*, s 71.

18 A newly established court that merged the jurisdictions of the Federal Circuit Court and the Family Court of Australia: *Federal Circuit and Family Court of Australia Act 2021* (Cth) into one court with separate divisions.

19 *Federal Court of Australia Act 1977* (Cth).

20 *Australian Constitution*, s 106.

21 *Ibid* s 77(iii).

22 The Australian Capital Territory and the Northern Territory. Australia also has a number of external non-self-governing territories.

issues.<sup>23</sup> That is, constitutional review in Australia is diffuse and not the sole preserve of the High Court. In practice, however, many litigants commence proceedings raising novel constitutional issues in the Court's original jurisdiction rather than litigate in lower courts. Alternatively, the Court has the ability to remove proceedings from a lower court into its docket. In practice, it has meant that many constitutional disputes are heard by the High Court sitting in its original jurisdiction rather than on appeal.<sup>24</sup>

### *The role of High Court precedents and their binding effect*

The High Court is the final arbiter on all issues of law including all constitutional questions within the Australian judiciary. As such, and by virtue of the doctrine of precedent, all other Australian courts are obliged to follow the decisions of the High Court. The 'vertical' binding effect of High Court decisions is therefore complete. Turning to the 'horizontal' binding effect, the position is somewhat more nuanced. While the Court is not strictly bound to follow its earlier decisions, it is very reluctant to depart from earlier authority<sup>25</sup> given the obvious importance of consistency and continuity.<sup>26</sup>

The Court has developed four criteria that govern whether an earlier decision should be re-opened and overruled:<sup>27</sup>

- Firstly, whether the earlier decision rests upon a principle carefully working out in a series of significant cases
- Secondly, whether there were differences in the reasoning in the justices constituting the majority in the earlier decision
- Thirdly, whether the earlier decision has achieved no useful result but has instead led to considerable inconvenience
- Fourthly, the earlier decision has not been independently acted on in a way that militates against reconsideration.

23 Typically, federal legislation confers jurisdiction that mirrors the High Court's original jurisdiction to hear constitutional matters on other Australian courts. For example, the provision that confers federal jurisdiction on State courts within the limits of their jurisdiction: *Judiciary Act* 1903 (Cth), s 39.

24 *Judiciary Act* 1903 (Cth), ss 40–44(1). Both the removal and remittal powers were modelled on United States precedent: *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, [44].

25 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Plaintiff M76 v Commonwealth* (2013) 251 CLR 322, 382 [192] (Kiefel and Keane JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

26 *Private R v Coven* (2020) 94 ALJR 849, [122] (Edelman J).

27 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); *Plaintiff M76 v Commonwealth* (2013) 251 CLR 322, 382 [192] (Kiefel and Keane JJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

This list of criteria is not necessarily closed<sup>28</sup> and the criteria have been applied in both constitutional and non-constitutional cases.<sup>29</sup>

However, there have been statements made by individual justices to suggest that in constitutional cases the Court should be more ready to depart from earlier precedents.<sup>30</sup> Unlike the Court's decisions on the common law or interpreting ordinary legislation, Parliament cannot correct errors in constitutional interpretation. Therefore, some justices have taken the view that when the Court considers an earlier *constitutional* precedent to be wrong, the Court's duty and fidelity should be first and foremost to the Constitution. Early in the Court's history, Justice Isaacs put this view succinctly: '[i]t is not, in my opinion, better that the Court be persistently wrong than that it should be ultimately right.'<sup>31</sup> However, this approach does not usually prevail. In most cases, the Court does not treat constitutional precedent differently but applies the general principles set out earlier. This approach reflects the view that:<sup>32</sup>

[n]o Justice is entitled to ignore the decisions and reasoning of [his or her] predecessors, and to arrive at [his or her] own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court ... It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to [his or her] own opinions in preference to an earlier decision of the Court.

## The High Court's approach to judgment writing and to national judicial decisions

### *The High Court's approach to its own judgments*

Since its establishment, the High Court's practice has been to produce *seriatim* opinions. In constitutional cases, very often there is no single majority judgment; rather, constitutional principles pronounced by the Court will be developed

28 *Eso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49, [164] (Callinan J).

29 Some examples of the Court applying the criteria in constitutional cases are: *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ); *Minogue v Victoria* (2019) 93 ALJR 1031, [24] (Edelman J).

30 For example, *Australian Agricultural Co v Federated Engine-Drivers and Firemans Association of Australasia* (1913) 17 CLR 261, 278 (Isaacs J); *Damajanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ); *Buck v Bavone* (1976) 135 CLR 110, 137 (Murphy J); *Queensland v Commonwealth* (1977) 139 CLR 585, 593 (Barwick CJ), 610 (Murphy J); *Stevens v Head* (1992) 176 CLR 433, 464–65 (Gaudron J).

31 *Australian Agricultural Co. v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278.

32 *Queensland v The Commonwealth* (1977) 139 CLR 585, 599 (Gibbs J).

across several judgments within the one decision. This convention has inevitably led to a wide variety of judgment styles and approaches to constitutional adjudication over the Court's history, making it practically impossible, and well beyond the scope of this chapter, to map precisely the Court's approach to judgment writing.<sup>33</sup> This feature of the High Court's jurisprudence also often makes it more challenging to ascertain the *ratio decidendi* for which a case stands.

Consistent with the common law method of adjudication, the Court has a wide discretion as to how to refer to its earlier decisions and a review of any of the Court's constitutional decisions will demonstrate the variety of ways the Court draws upon earlier authority to decide the case before it. It is common to see references to a single past case as authority for a proposition and references to lines of precedent that establish a proposition overtime. Equally, reasoning may focus on the general rules and principles of previous cases, or it may focus on the particularities of a previous cases. The justices often refer to precise passages (which may be quoted) but also frequently provide their own exposition of the case law. Judicial reasoning will encompass discussion of majority decisions, concurrences and dissents, as is appropriate to the argument being developed. The justices have such a wide degree of freedom accorded to judges on these matters that it is impossible to identify a general practice and much depends on the precise argument being put by the parties in the proceeding and how the individual justice, or group of justices if writing jointly, choose to resolve the case.

Consistently with the common law method, the purpose to which the references to past cases may be put are equally diverse. They include reconstructing principles of law, identifying principles or practices of interpretation, demonstrating that a challenged law is problematic or, alternatively demonstrating that a legal issue has already been decided in a previous case, and consequently, that a law is valid. In the common law tradition, all these methods are available and which method is employed will depend on context and individual judicial preference.

Noting these important caveats, the High Court's legal reasoning is typical of other apex courts in common law countries: there is a heavy reliance on showing consistency with past decisions of the Court and demonstrating the coherence of the law overall. In doing so, there is prominent use of analogy to develop and apply legal principles to the facts of the case.<sup>34</sup>

33 Then Chief Justice Sir Anthony Mason commented that this aspect of the Anglo-Australian judicial tradition has led to greater fragmentation of opinion than in other constitutional courts in the common law world: Mason (n 7) 93, 102. But for an analysis of judicial reasoning in 40 major constitutional decisions, see Cheryl Saunders and Adrienne Stone, 'Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017).

34 Mason (n 7) 93 at 93. See also *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 481 (Brennan J); Cheryl Saunders and Adrienne Stone, 'Australia' in Andras Jakab et al. (eds.), *Constitutional Reasoning* (Cambridge University Press 2017); Adrienne Stone, 'Judicial Reasoning' in *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2018) 479.

*The High Court's references to decisions of inferior Australian courts*

As explained above, the Court is at the apex of the court hierarchy; it hears and determines appeals from lower federal, State and territory courts. This feature of the Australian legal system means that the Court regularly refers to lower courts' decisions in the process of determining the cases before it.

In terms of raw numbers, a statistical analysis conducted in 2001 using five randomly selected sample years of the citation practice of the High Court (1920, 1940, 1960, 1980 and 1996) showed that the Court regularly referenced (cited) lower federal and state courts.<sup>35</sup> This kind of statistical analysis is a relatively blunt instrument. As the study noted, these statistics do not reveal whether decisions of these lower courts were cited because the Court considered them to be persuasive, or only to distinguish or reject them.<sup>36</sup> Nor does this analysis show whether there is a distinctive pattern of citation of lower courts in constitutional cases. But, consistent with the Court's apex position and the common law method, the Court will consider and apply its own decisions and give much greater persuasive weight to its previous statements on matters of constitutional principle rather than to the reasoning of lower courts. References to prior decisions of the High Court are therefore certain to be more frequent, at least when the Court is analysing precedent to establish the content of the law.

However, another key task of the High Court is to ensure the uniformity of Australian law.<sup>37</sup> That means that the Constitution must be given a single consistent interpretation in Australian law and if there are inconsistencies as between decisions of inferior courts (for instance, if courts of different states have given inconsistent interpretations), the High Court must resolve them. Indeed, there is no appeal to the High Court as of right; rather the High Court must agree to hear an appeal.<sup>38</sup> Resolution of an inconsistency between lower courts' decisions is one ground on which the High Court may do so.<sup>39</sup> An important reason that the High Court may refer to the decisions of lower courts, therefore, is to identify and resolve divergent approaches.

35 Russell Smyth, 'Citations by Court' in *The Oxford Companion to the High Court of Australia* (Oxford University Press), [www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-59](http://www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-59) accessed on 28 June 2021.

36 *Ibid.*

37 In contradistinction to the United States, where the common law may vary from state to state, the High Court has held that in Australia, there is a single, uniform common law. Compare *Erie Railroad Co v Tompkins* 304 U.S. 64 (1938) and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (the Court); *Lipobar v The Queen* (1999) 200 CLR 485, 505–508 [43]–[53] (Gaudron, Gummow and Hayne JJ).

38 Through the 'special leave' procedure in accordance with criteria specified under federal law: *Judiciary Act* 1903 (Cth), s 35A.

39 *Judiciary Act* 1903 (Cth), s 35A(ii).

## The High Court's use of the decisions of foreign and international courts

### Introduction

Unlike many constitutional or apex courts, there is no supra-national court that the High Court is bound by, or required to have regard to, in determining the law. Additionally, Australian law remains 'dualist' in its reception of international law. That is, the principles of international law are not automatically absorbed into domestic law; they must be transformed as legal norms applicable to domestic legal rights and interests through the enactment of legislation.<sup>40</sup>

These principles do not mean, however, that the law developed by foreign courts has no effect on the High Court's constitutional jurisprudence. On the contrary, the Court regularly looks to the decisions of other jurisdictions when determining constitutional cases and draws no principled distinction between them.

In terms of the raw figures, the High Court regularly cites cases from the superior courts of other common law countries, most usually the UK, the US, Canada and New Zealand.<sup>41</sup> Less frequently the Court cites cases from civil law countries.<sup>42</sup> It also cites cases from international courts, like the European Court of Justice and the European Court of Human Rights.<sup>43</sup>

A quantitative study of the number of times the Court cites foreign and international courts in its constitutional jurisprudence, however, would not be illuminating without careful qualitative evaluation.<sup>44</sup> The nature of the

40 *Koowarta v Bjelke-Petersen* (1983) 153 CLR 168, 224–25 (Mason J).

41 B. Topperwien, *Foreign Precedents. In the Oxford Companion to the High Court of Australia* (Oxford University Press 2001), [www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-160](http://www.oxfordreference.com/view/10.1093/acref/9780195540222.001.0001/acref-9780195540222-e-160) accessed on 29 June 2021; Paul E. von Nessen, 'The Use of American Precedents by The High Court of Australia 1901–1987' (1992) 14 *Adelaide Law Review* 181.

42 Topperwien (n 41). In recent years, in cases concerning the constitutional implied freedom of political communication, the High Court has frequently discussed the development of principles of proportionality drawn from German constitutional law developed by the German Federal Constitutional Court. A majority of the Court applies a similar structured proportionality test as a tool of analysis to test the validity of Australian laws that are said to infringe this constitutional limitation: e.g., *McCloy v New South Wales* (2015) 257 CLR 178, [67]–[77] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, [104] (Kiefel CJ, Bell and Keane JJ), [157]–[160] (Gageler J); *Clubb v Edwards* (2019) 267 CLR 171, [391]–[392] (Gordon J), [494], [502] (Edelman J).

43 For example, *Al-Kateb v Godwin* (2004) 219 CLR 562, [72] (Kirby J); *Leask v The Commonwealth* (1996) 187 CLR 579, 594–95 (Brennan J), 600–601 (Dawson J), 615 (Toohey J); *Nationwide News* (1992) 177 CLR 1, 47 (Brennan J), *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 130 (Mason CJ, Toohey and Gaudron JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 141 (Kiefel J); *Clubb v Edwards* (2019) 267 CLR 171, [205] (Gageler J).

44 One quantitative study over the period 2000–2008 identified 193 constitutional cases in 99 of which, representing 51.30%, foreign precedents were cited. Cheryl Saunders and

common law method, the large variation in judicial writing approaches and constitutional methods in High Court justices over the last 121 years and the Court's practice of writing long *seriatim* judgments would, in any event, make it a Herculean task.

Therefore, this chapter will focus on a small set of cases and key principles arising from one aspect of the Court's constitutional jurisprudence—the law of Chapter III of the Constitution—in order to make some necessarily general observations as to how and when the Court uses comparative sources of law in this area of Australian constitutional law.

The Chapter III case law has been selected for three reasons. Firstly, it is a vibrant and critical area of Australian constitutional law. The provisions of Chapter III are the foundations of the Australian judiciary, and in the absence of a federal rights framework, Chapter III has provided the Court with a platform for the cautious development of principles that protect certain rights.<sup>45</sup> Secondly, the text and structure of Chapter III are heavily influenced by Article III of the United States Constitution, and so it is an area of Australian constitutional law that has long been ripe for comparative analysis. Thirdly, over the last 30 years, Chapter III cases have required the Court to grapple with human rights issues that have been the subject of cases in comparative jurisdictions, including jurisdictions influenced by international courts and human rights law. Consequently, it is instructive to examine some of the ways the Court has dealt with the law pronounced by foreign legal systems when addressing these issues in the Australian constitutional context.

### *The fundamentals of Chapter III*

The drafting of the Australian Constitution was heavily influenced by the constitutional models of the United Kingdom and the United States. From the United Kingdom, and the Australian colonies, the framers imported the principle of responsible government and model of parliamentary supremacy. From the United States, as well as other countries with written constitutions like Canada and Switzerland, they imported an entrenched written Constitution as well as federalism and the principle of the separation of powers.<sup>46</sup>

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Adrienne Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method' (with Cheryl Saunders) in Tania Groppi and Marie-Claire Ponthereau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

45 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 33–34.

46 See S. Gageler and W. Bateman, 'Comparative Constitutional Law' in C. Saunders and A. Stone (eds.), *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2020), quoting the Preamble to the Australian Constitution, 265. See generally John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths 2002) 667; Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press 1987) 4.

Thus, since its establishment, the High Court has often had regard to foreign jurisdictions in developing its constitutional principles, expressly cognisant of the fact that the Australian Constitution represents a deliberate fusion of ideas from several jurisdictions—most prominently the United Kingdom and the United States. The following section will focus on some key Chapter III cases decided over the last 30 years and, in particular, the way the Court has used the case law of the United States and the United Kingdom.

*The High Court's use of United States precedents: a case study of the use of *Mistretta v United States**

Chapter III of the Constitution was very closely modelled on Article III of the United States Constitution in both its text and structure.<sup>47</sup> Like Article III, Chapter III establishes the judicial branch of government, separate from the Legislature and the Executive (governed by Chapters I and II respectively); it creates a federal supreme court (the High Court of Australia) and delineates the exercise of judicial power in federal courts. It also borrows many of the heads of federal jurisdiction from Article III. There are two significant points of divergence: firstly, Chapter III allows the federal Parliament to invest State courts with federal jurisdiction, and secondly, it confers on the High Court a general appellate jurisdiction from state as well as federal courts.<sup>48</sup>

Given the influence of Article III on the drafting of Chapter III, the High Court has frequently drawn on United States judicial decisions and constitutional law principles.<sup>49</sup> A clear, and somewhat controversial, instance is the repeated use of a decision of the United States Supreme Court—*Mistretta v United States*<sup>50</sup> (*Mistretta*)—in the development of two related lines of authority spanning almost three decades.<sup>51</sup> In *Mistretta*, the Supreme Court had to determine whether the Sentencing Commission—an independent body created by Congress partly composed of federal judges to promulgate strict sentencing guidelines for federal criminal offences—was invalid because it violated Article III. Relevantly, the Supreme Court held that the separation of powers doctrine did not prohibit federal judges from engaging in all extrajudicial activities, and that the specific functions conferred on federal judges on the Commission did not undermine

47 For a detailed analysis of the similarities and differences between the two and the drafting history of Chapter III see James Stellios, *The Federal Judicature: Chapter III of the Constitution*, 2nd ed. (Lexis Nexis 2020), Chapter 3. See also, *The Queen v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at 297.

48 Australian Constitution, sections 73 and 77(iii).

49 Another instance, not covered in this chapter, is the reliance on United States constitutional law in the seminal Ch III case of *The Queen v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

50 488 US 361 (1989).

51 *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Vella v Commissioner of Police* (2019) 90 ALJR 89.

the integrity of the judiciary, nor were they incompatible with their judicial functions.<sup>52</sup> Despite concluding that the extrajudicial service of the Commission's federal judges was constitutionally valid, the Supreme Court said:<sup>53</sup>

This is not to suggest, of course, that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.

One justification the Supreme Court gave for this constitutional principle was that:<sup>54</sup>

[t]he legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action.

Five years after the Supreme Court decided *Mistretta*, four Justices of the High Court picked up these passages from *Mistretta* and referred to them by way of analogy in the decision of *Grollo v Palmer*.<sup>55</sup> Their Honours observed that the Supreme Court's reasoning in *Mistretta* was consistent with the constitutional restriction in Chapter III preventing federal judges from performing functions that were incompatible with their role. But their Honours held that the legislation (which empowered a federal judge to issue a particular kind of warrant) did not infringe the incompatibility principle and was therefore valid.<sup>56</sup>

A year later this reasoning was again endorsed and applied by a majority of the Court in two significant Chapter III cases delivered on the same day to invalidate a federal law and a State law: *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*<sup>57</sup> (*Wilson*) and *Kable v Director of Public Prosecution (NSW)*<sup>58</sup> (*Kable*).

52 *Mistretta*, 488 US 361 (1989), 381, 390–394, 397, 404. *Mistretta* is one case in a long line of Supreme Court authority considering the extent to which extrajudicial activities may be incompatible with their Article III judicial functions. See for example *Commodity Futures Trading Commission v Schor* (1986) 478 US 478 U.S. 833.

53 *Mistretta*, 488 US 361 (1989), 381.

54 *Ibid* 407 (emphasis added).

55 (1995) 184 CLR 348, 365–66 (Brennan CJ, Deane, Dawson and Toohey JJ).

56 (1995) 184 CLR 348, 369.

57 (1996) 189 CLR 1.

58 *Ibid* 51.

The issue for the Court in *Wilson* was whether a federal judge could be conferred with a non-judicial power to exercise in his or her personal (not judicial) capacity to conduct an inquiry giving rise to a report to a federal Minister. The plurality's reasons quoted the passages extracted earlier from *Mistretta* and declared that 'the passages from *Mistretta* are equally relevant to the interpretation of Ch III of the Constitution of this country.'<sup>59</sup> The plurality went on to say that the strict separation of judicial power from the other functions of government advances two constitutional objectives 'the guarantee of liberty' and 'the independence of Ch III judges.'<sup>60</sup> While the Court expressly drew on the reasoning in *Mistretta* to articulate why the incompatibility doctrine limited the conferral of extrajudicial functions on federal judges in *Wilson*, the Court was also building on its own earlier decisions, including *Grollo v Palmer*, that had established there were limits on the types of functions that the *Commonwealth* Parliament could confer on *federal* judges consistent with the Constitution.<sup>61</sup> The argument advanced in *Kable*, on the other hand, was entirely novel. In that case, a majority of the Court held for the first time that a *State* Parliament could not confer a power on a *State* court<sup>62</sup> that undermined the institutional integrity of that court because of Chapter III of the Constitution.<sup>63</sup> The appellant successfully argued that conferring such a power was contrary to the integrated judicial system under Chapter III of the Constitution and was therefore invalid. In advancing this argument the applicant expressly relied on the reasoning in *Mistretta* by way of analogy.<sup>64</sup>

All justices in the majority in *Kable* either applied the reasoning,<sup>65</sup> or more specifically the 'cloaking' metaphor, from *Mistretta* in their judgments.<sup>66</sup> Two of the justices, Justices Gaudron and McHugh, did this quite obliquely by referencing key passages from *Wilson* and the earlier decision in *Grollo* that imported the *Mistretta* reasoning.<sup>67</sup> By contrast, Justice Gummow's judgment contained several references to United States authority (both Supreme Court and lower federal courts) and expressly applied the incompatibility doctrine developed in American constitutional law to the Australian context.<sup>68</sup> From a comparative perspective, a remarkable feature of this reasoning is that it takes an American constitutional

59 (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

60 (1996) 189 CLR 1, 11.

61 See also *Hinton v Wells* (1985) 157 CLR 57.

62 Strictly, in the case of *Kable*, a state court exercising federal jurisdiction: (1996) 189 CLR 51, 94.

63 *Kable* (1996) 189 CLR 51, 94 (Toohey J), 104 (Gaudron J), 114 (McHugh J), 127–8 (Gummow J).

64 *Kable* (1996) 189 CLR 51 at 133.

65 *Kable* (1996) 189 CLR 51 at 107–8 (Gaudron J); 116, 122 (McHugh J); 133–34 (Gummow J). See also Toohey J. at 96 although note his Honour's reasoning differed from the other majority justices since he found the State legislation was invalid on the ground that the court was exercising federal, not State, jurisdiction.

66 *Kable* (1996) 189 CLR 51 at 133–34 (Gummow J).

67 *Kable* (1996) 189 CLR 51, 103–4, 116.

68 *Kable* (1996) 189 CLR 51 at 132–34 (Gummow). See especially *fn*s 260–265.

doctrine rooted in the text and structure of Article III applicable to *federal* judges performing functions under *federal* law and applies it to develop an Australian constitutional doctrine sourced in Chapter III that applies to Australian *State* judges performing functions under *State* law.

*Kable* was a watershed in Australian constitutional law, establishing that Chapter III of the Constitution prohibits State Parliaments from conferring a power on a State court that is incompatible with their essential characteristics. The principle has been further developed, refined and applied by the Court in a long line of cases.<sup>69</sup> Justice Gummow, in the next *Kable* principle case that came before the High Court, *Fardon v Attorney-General (Qld)* further embedded the *Mistretta* metaphor in Australian constitutional law by outlining the relevance of *Mistretta* to the majority's reasoning in *Kable*.<sup>70</sup> More recently, in *Vella v Commissioner of Police (NSW) (Vella)*, Justice Gageler described the Court's reasoning in *Wilson* and *Kable* as an 'appropriation and application' of the *Mistretta* metaphor.<sup>71</sup>

However, despite the willingness evident by some members of the Court in *Fardon* and *Vella* to appropriate and apply the Supreme Court's decision in *Mistretta*, other members of the Court have expressed discontent at the continued reliance on the *Mistretta* metaphor. In *Pollentine v Bleijie*,<sup>72</sup> six justices said that the use of the cloaking metaphor in that case 'was wholly inapplicable' and that 'even if the metaphor could be applied... (and it cannot), its use could be no substitute for consideration of the principles of repugnancy and incompatibility.'<sup>73</sup> In *Kuczborski v Queensland*, Justice Hayne, writing separately, set out the *Kable* principle and noted that:<sup>74</sup>

In *Fardon*, Gummow J referred to a metaphor adopted by the Supreme Court of the United States in *Mistretta v United States*: that the reputation of the judicial branch of government may not be borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action. As the plurality recently said in *Pollentine v Bleijie*, the use of that metaphor can "be no substitute for consideration of the principles of repugnancy and incompatibility". Conclusions cannot and must not be formed by reference only to particular verbal formulae.

69 Interestingly, as Gageler and Bateman note, the *Kable* principle has been developed in more recent cases by drawing on Canadian and European cases that focus on maintaining the 'essential characteristics' of a 'court': *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ), 172 [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Wainobu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J). See Gageler and Bateman (n 46), Chapter 11, 11.

70 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 615.

71 *Vella* (2019) 93 ALJR 1236, [144] noting his Honour was in dissent in the outcome.

72 (2013) 253 CLR 629.

73 *Pollentine v Bleijie* (2013) 253 CLR 629, 651 [49] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

74 (2014) 254 CLR 51, 89 [105] (citations omitted).

These contrasting views likely reflect different attitudes among the judges to the use of foreign law in this area of constitutional law. However, the trend in cases decided by the High Court concerning the *Kable* principle appears to be moving away from express reliance on *Mistretta*. The statements in the more recent cases, which have emphasised the ‘essential’ principles and doctrines of Chapter III as developed in a line of High Court decisions, demonstrate a desire to develop a uniquely *Australian* concept of Chapter III.

### *The Court’s use of United Kingdom decisions*

The Court’s use of United Kingdom decisions in several Chapter III cases provides an additional and interesting case study. Although the strong historical connection between the constitutional frameworks of Australia and the United Kingdom has always been recognised by the Court, these textual and structural connections are much weaker in the context of Chapter III. In addition, the United Kingdom and Australia have diverged over more recent decades in light of the role of the European Court of Human Rights and the enactment of the *Human Rights Act 1998* (UK) (HRA).<sup>75</sup> These differences have given rise to some interesting exchanges between Australian and United Kingdom courts that aptly demonstrate a range of approaches to the use of foreign decisions in Australian constitutional law.

#### *A case study of Momcilovic v The Queen*

One such instance arises from the adoption in the Australian State of Victoria of the *Charter of Human Rights and Responsibility 2006* (Vic) (the *Charter*), which, like the *Human Rights Act* (UK) on which it was partly modelled, imposed a non-binding human rights framework premised on a ‘weak form’ model of human rights protection.<sup>76</sup> Under both the HRA and the *Charter*, courts are given the power to make non-binding ‘declarations’ that a law was inconsistent with human rights (the declaration power).<sup>77</sup> In addition, both Acts impose a requirement that other laws be interpreted to be compatible with human rights (the interpretive mandate).<sup>78</sup> Under these regimes, courts are not, however, given the power to disapply or rule invalid a law contravening human rights.

75 Adrienne Stone, ‘Review Essay: Constitutional Orthodoxy in Australia and the United Kingdom: The Deepening Divide’ (2015) 38 *Melbourne University Law Review* 836.

76 Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 *American Journal of Comparative Law* 707, 736–737.

77 *Human Rights Act 1998* (UK), s 4; *Charter of Human Rights and Responsibility 2006* (Vic), s 36(2).

78 Section 3(1) of the *HRA* provides that: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ Section 32(1) of the *Charter* provides that: ‘So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a

In *Momcilovic v The Queen (Momcilovic)*,<sup>79</sup> the High Court considered several constitutional law issues raised by the Victorian *Charter*. For our purposes it is useful to focus on two questions: firstly, whether the declaration power contravened the *Kable* principle because a ‘non-binding’ declaration power was incompatible with the ‘institutional integrity’ of the State court;<sup>80</sup> and secondly, the question of whether the interpretive mandate authorised ‘remedial interpretation’ of the kind that the House of Lords had held were authorised by the equivalent provision in the HRA.<sup>81</sup> Pursuant to remedial interpretations, statutes can be read as consistent with human rights even when there is no ambiguity in meaning.

The *Kable* challenge to the declarations power was narrowly rejected by the High Court.<sup>82</sup> But the Court’s treatment of the question nonetheless reveals a very distinct approach to the interpretation of the declaration power. Specifically, the Court found that such powers were ‘non-judicial’ and, therefore, although such a power could be exercised by a *State* court, an equivalent power could not be conferred on an Australian federal court because there is a strict separation of judicial from non-judicial powers at the federal level mandated by Chapter III. This distinctive position makes it impossible for the Australian Parliament validly to enact an Australian equivalent of the HRA.

The Court’s approach to the interpretive mandate is also somewhat distinctive. On the precise question at issue, the Court held that, as a matter of statutory construction, the interpretive mandate did not authorise ‘remedial’ interpretation.<sup>83</sup> There is a distinct possibility, moreover, that had the Court found that if remedial interpretations were permitted, it would also have found the mandate to be constitutionally invalid.<sup>84</sup> The distinctiveness of the Court’s approach to the *Charter* is, at first glance, somewhat surprising. The High Court’s reasoning is driven by a conception of what is intrinsic to the nature of a court and the exercise of judicial power. But the concept of judicial power draws in part on traditional

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way that is compatible with human rights’ (noting the slightly different wording of the two provisions).

79 (2011) 245 CLR 1.

80 The Court had to determine whether the declaration had been validly made by the Victorian Court of Appeal and in that context considered whether the non-binding declaration was, in effect, ‘advice’ to the Attorney-General and that courts could not, consistent with their institutional integrity, perform this advisory role: (2011) 245 CLR 1, 93 [174], 241 [661].

81 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 577 [50].

82 (2011) 245 CLR 1, 67 [91]–[92] (French CJ (with Bell J agreeing at 241 [661]), 229 [605] (Crennan and Kiefel JJ)). A majority of the Court found that a court exercising federal jurisdiction could not make a declaration of incompatibility consistent with Chapter III, making it constitutionally impossible for the federal Parliament to enact a similar model.

83 (2011) 245 CLR 1, 47–8 [46], 55 [62] (French CJ), 83–87 [146], [170]–[171] (Gummow J), 123 [280] (Hayne J), 210 [544]–[545] (Crennan and Kiefel JJ), 250 [684] (Bell J).

84 Indeed, the only judge who found that s 32 authorised a remedial interpretation—Heydon J.—also found that s 32 was invalid for contravening the requirements of Chapter III. *Momcilovic* (2012) 245 CLR 1, 183–4 [454] and concerns along these lines may underlie other judges’ reasons as well.

understandings of the role of courts<sup>85</sup> and on such questions the Australian and United Kingdom courts might be expected, by virtue of their common heritage, to hold similar views.<sup>86</sup>

There is revealing commentary on other aspects of the ‘interpretive’ mandate that gives some insight to the judicial mindset. The relevant provision of the *Charter*—s 32—included a requirement that ‘International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.’<sup>87</sup> The Court gave this provision a cautious reading. Chief Justice French’s observations are illustrative in this regard; his Honour noted that this provision<sup>88</sup>

does not authorise a court to do anything which it cannot already do. The use of comparative materials in judicial decision-making in Australia is not novel. Courts may, without express statutory authority, refer to the judgments of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision. If such a judgment concerns a term identical to or substantially the same as that in the statutory provision being interpreted, then its potential logical or analogical relevance is apparent.

His Honour went on to say:<sup>89</sup>

Nevertheless, international and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them. What McHugh J said in *Theophanous v Herald & Weekly Times Ltd* is applicable in this context:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscience advertence, by reason of their common language or culture.

Despite our common legal heritage, that general proposition is relevant today in reading decisions of the courts of the United Kingdom, especially in

85 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 307.

86 The relevance of the historical functions of courts is relevant to the determination of the nature of judicial power. See, e.g., *Pasini v United Mexican States* (2002) 209 CLR 246 (on the ‘chameleon power’); *Thomas v Mowbray* (2007) 233 CLR 307, 357 [120]–[121] (on the use of historical analogy to characterise a novel statutory power as judicial). See also Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia*, 4th ed. (LexisNexis Butterworths 2018) 551.

87 Section 32(2).

88 (2011) 245 CLR 1, 36–7 [18] (citation omitted).

89 (2011) 245 CLR 1, 37–8 [19] (French CJ) (citations omitted).

relation to the *Human Rights Act 1998* (UK) (“the HRA”). It is appropriate to take heed not only of Lord Bingham of Cornhill’s remark about the need for caution “in considering different enactments decided under different constitutional arrangements”, but also his observation that “the United Kingdom courts must take their lead from Strasbourg.”

The High Court, in *Momcilovic*, clearly regarded the HRA, together with the supra-national structures provided for by the European Convention on Human Rights and its enforcement by the European Court of Human Rights, as a critical point of divergence between the two systems. The Court did not hesitate to forge its own path with respect to human rights protection. Justice Gummow explained his view of the divergence:<sup>90</sup>

The system of federal government in Australia is constructed upon the recognition that there rests upon the judicature ‘the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised’ Judicial review of both the validity of legislation and the lawfulness of administrative action is thus an accepted part of the Australian legal landscape. By contrast, in the United Kingdom, ... Diceyan notions of parliamentary sovereignty remain influential. Those notions appear to be treated as compatible with the existence of European structures of law-making and adjudication and with the application of the [Human Rights Act 1998 (UK)] as some superior form of law alongside the application of the European Convention by the European Court of Human Rights. In *Jackson v Attorney-General* [[2006] 1 AC 262 at 318], Baroness Hale of Richmond, whilst acknowledging that ‘Scotland may have taken a different view’, observed that ‘[t]he concept of parliamentary sovereignty’, which since the seventeenth century ‘has been fundamental to the constitution of England and Wales’, means that ‘Parliament can do anything’.

Comparing the reception of *Mistretta* with the reception of the case law surrounding the HRA might give rise to an impression of inconsistency. Or it might suggest that in the realm of Chapter III, because of the constitutional text and structure, the Court is more receptive to United States authority than to authority from the United Kingdom. However, the picture is considerably more nuanced. What is interesting to observe from these Chapter III case studies is the High Court’s desire to develop and strengthen the Australian judicial system, and it appears to be very often through that lens that the Court makes use of foreign judgments. Thus, in cases in which the institutional role of the High Court specifically, or the powers of Australian courts generally, are under scrutiny, the Court may be more likely to tread cautiously when asked to embrace the approach of a foreign court. In *Momcilovic*, the Court was very reluctant to

90 (2011) 245 CLR 1 at 89–90 [156]–[157] (footnote omitted).

develop Australian interpretative principles in accordance with the UK courts, partly because this appears to have been perceived by the Court as a marked departure from traditional understandings of judicial power and the proper role of a court in Australia's constitutional system.<sup>91</sup> By contrast, the central purpose of the *Kable* principle, consistent with the Supreme Court's articulation of the incompatibility doctrine in *Mistretta*, is to protect and further entrench the institutional integrity of Australian courts from impermissible intrusion from the other branches of government. And the general trend in the early development of that principle was to draw upon the Supreme Court's decision to bolster the Australian approach.

*A contrasting case study of Vella v Commissioner of Police (NSW)*

At the risk of further muddying the waters, however, absent the special circumstances of the HRA, the Court does not always take such a cautious approach to the use of United Kingdom decisions in Chapter III cases. The recent case of *Vella* presents a contrasting case study.

In *Vella*, the Court had to determine the validity of a State legislative scheme that empowered a State court to make 'prevention orders' to restrain the liberty of a person without proof of the commission of a crime.<sup>92</sup> In other jurisdictions such a law may be challenged on the basis that it infringes fundamental rights to liberty, freedom of movement and association. In the High Court, absent a legislative or constitutional rights protection instrument, Mr. Vella argued that the law infringed the *Kable* principle because the power to make the preventative orders was not judicial. Critical to the constitutional challenge was an anterior question of statutory construction: whether or not the statute required the relevant court to make preventative orders that were proportionate to the nature of the potential offending. To determine this question, a majority of the Court considered and applied the Court of Appeal of England and Wales' interpretation of statutory language under a United Kingdom statute with similar wording in *R v Hancox*.<sup>93</sup>

In doing so, the majority relied upon a presumption of statutory interpretation according to which, once a form of words is given an authoritative interpretation, later uses of those words in subsequent statutes are given the same meaning.<sup>94</sup> This presumption had previously been applied, albeit infrequently, in Australia in much earlier High Court cases to assist in construing statutory language by reference to decisions of United Kingdom courts, long before the cleavage of

91 Sir Anthony Mason, 'Statutory Interpretive Techniques Under the Charter—Section 32' (2014) *Judicial College of Victoria Online Journal* 69 at 76.

92 *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), ss 5 and 6.

93 *R v Hancox* [2010] 1 WLR 1434.

94 *Vella* (2019) 93 ALJR 1236, [19]–[20] (Kiefel CJ), [44], [52] (Bell, Keane, Nettle and Edelman JJ). *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306, 315; *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1, 6 (Kitto J).

Australian and English political and constitutional links. In those cases in which courts in the United Kingdom had given words a particular construction, later Australian laws using the same words were taken to have the same meaning.<sup>95</sup>

Relying on this presumption, a majority of the High Court in *Vella* adopted an interpretation given by the Court of Appeal of England and Wales even though that interpretation was influenced by the European Convention on Human Rights, which has no Australian equivalent.<sup>96</sup> For the majority, this was not an obstacle for applying the presumption and the Court of Appeal's reasoning.<sup>97</sup>

The effect of the majority's reasoning in *Vella* was that the law survived the constitutional challenge.

## Conclusion

This chapter has told a rather complex story regarding the decisions of foreign and international courts in the High Court of Australia. The task of identifying a principled basis for this apparently divergent practice is made somewhat more difficult by the High Court's own silence on the issue. While the High Court regularly uses comparative law in constitutional adjudication as others have noted, close analyses of its use are relatively rare,<sup>98</sup> and generally speaking, the topic does not provoke robust debates of the kind seen in other jurisdictions.<sup>99</sup> The High Court's relative lack of reflection on the question may

95 *National Photograph Co of Australia Ltd v Mench* (1908) 7 CLR 481, 529 (O'Connor J); *Townsville Harbour Board v Scottish Shire Line Ltd* (1914) 18 CLR 306 at 315 (Griffith CJ), 321 (Isaacs J).

96 *R v Hancox* [2010] 1 WLR 1434, 1437 [10].

97 *Vella* (2019) 269 CLR 219, 233–234 [19] (Kiefel CJ), 244–245 [52] (Bell, Keane, Nettle and Edelman JJ).

98 Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 *The University of Queensland Law Journal* 318 at 318. Although, as Aroney notes, a number of general comparisons have been undertaken between the constitutions and constitutional law of Australia and other countries have been undertaken. See, for example, Owen Dixon, 'Two Constitutions Compared' in *Jesting Pilate and Other Papers and Addresses* (Law Book Co of Australasia 1965); P. H. Lane, *The Australian Federal System with United States Analogues* (The Law Book Company Ltd. 1972); Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1; Christopher Gilbert, *Australian and Canadian Federalism 1867–1984: A Study of Judicial Techniques* (Melbourne University Press 1986); William Rich, 'Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia' (1993) 21 *Federal Law Review* 202; Adrienne Stone, 'Comparativism in Constitutional Interpretation' (2009) *New Zealand Law Review* 45.

99 That is not to say that over the Court's history there have been no debates about comparative constitutional adjudication. Certain comparative methods have provoked robust debate amongst the justices of the Court and within Australian constitutional law scholarship. See the reasons of Justice McHugh and Justice Kirby in *Al-Kateb v Godwin* (2004) 219 CLR 562. See also Adrienne Stone, 'Comparativism in Constitutional Interpretation' (2009) *New Zealand Law Review* 45, 49–52.

simply be a habit of the common law mind. Applying the Australian common law method of adjudication, the Court has always made use of various sources, including foreign sources, as part of the ordinary way it goes about its work.<sup>100</sup> In a similar vein, writing extra-curially while Chief Justice of the High Court, Sir Anthony Mason has written that the nature of the Australian common law system and the non-binding nature of all foreign courts gives the High Court a ‘freedom of choice’ to consider *how* a particular problem should be resolved.<sup>101</sup> This freedom allows each individual justice to consider, cite, apply and reject the decisions of foreign and international courts when crafting Australian constitutional law.

Such an individualised practice makes it very difficult to reach any generally applicable conclusions about the way the Court uses foreign sources of law. The overview of a handful of prominent Chapter III cases demonstrates some cross-cutting currents. Where there is a close alignment between the Australian Constitution and another constitution (as in the connection between Chapter III and Article III), the Court has generally been more willing to embrace the law developed by foreign courts. But equally in some areas of Australian constitutional law, courts have focused on the development of an Australian constitutional law that conforms with Australia’s unique constitutional context.

The use of any foreign source by the High Court will necessarily depend upon the issues raised in the case and, to a degree, the methodological preferences of the justices deciding it. It is also important to recall that when the High Court can have regard to its own precedents, it will do so. The Court’s judgments heavily rely on and apply the holding of the Court’s previous decisions and give persuasive weight to its dicta. The resort to foreign law in constitutional adjudication is largely at the margins and the Court, most especially in the context of Chapter III, has developed a uniquely Australian constitutional law.

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100 Gageler and Bateman (n 46), Chapter 11. See also C. Saunders, ‘Judicial Engagement with Comparative Law’ in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 571.

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**Part II**

**Constitutional courts in  
the civil law system**



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# 4 The role of precedents and case law in the jurisprudence of the German Federal Constitutional Court

*Ruth Weber and Laura Wittmann*

## Introduction

The German Federal Constitutional Court plays a prominent role in the legal system of the Federal Republic of Germany. In the Court's seventy years of constitutional adjudication, it has dealt with an enormous variety of societal questions with far-reaching effects on the structure of the German legal and political system. Examining the role of case law in its jurisprudence is especially interesting: although unlike in common law systems, precedents have no legally binding effect in German law in general, the decisions of the Court<sup>1</sup>—in contrast to all other national courts—have a binding effect *erga omnes*.<sup>2</sup> However, the case law bears a much broader significance for constitutional practice. In its decisions, the Federal Constitutional Court usually elaborates on the meaning of constitutional provisions in an abstract fashion, which plays a crucial role in the adjudication and reception of constitutional law. Thus, its precedents have an inestimable significance that is widely acknowledged.<sup>3</sup>

1 Where available on the Federal Constitutional Court's website, we used the official English translations of its decisions. If not available, our translations were oriented on the translations from Christian Bumke and Andreas Voßkuhle, 'German Constitutional Law' (Oxford University Press 2019). For English translations of the Basic Law and the FCCA, see [www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) and [www.gesetze-im-internet.de/englisch\\_bverfgg/index.html](http://www.gesetze-im-internet.de/englisch_bverfgg/index.html) accessed on 20 June 2021.

2 S 31(1) FCCA; also see section 1.2 of this chapter.

3 See, e.g., von Ungern-Sternberg, 'Normative Wirkungen von Präjudizien nach der Rechtsprechung des Bundesverfassungsgerichts' (2013) 138 AöR 1. On the role of precedents within the German legal system in general, see, e.g., Ralf Dreier and Robert Alexy, 'Precedent in the Federal Republic of Germany' in Neil MacCormick and Robert S. Summers (eds.), *Interpreting Precedents* (Taylor & Francis 2016) 17, 27; Thomas Lundmark, *Charting the Divide Between Common and Civil Law* (Oxford University Press 2012) 362; Karl Engisch, *Einführung in das juristische Denken*, 12th ed. (Verlag W. Kohlhammer 2018) 254–256, see n 3; Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd ed. (Springer 1995) 252 ff, 255; critically, see Johann Braun, *Einführung in die Rechtswissenschaft*, 4th ed. (Mohr Siebeck 2011) 383–386; for a comparison of the role of precedents in German law and in common law, see James Fowkes, 'Something in Common: A Perspective on Precedent in Germany' (2020) 68 JÖR 147; Brun-Otto Bryde, 'Vom richtigen Umgang mit Richterrecht' (2020) 68 JÖR 201, 202.

Our approach to analysing the role of precedents and case-based reasoning regarding the Federal Constitutional Court distinguishes between the binding effect of its decisions shaped by procedural law, while also considering the broader institutional and legal framework (section 1), and the citation practice of the Court itself, thus differentiating between different sources<sup>4</sup> (sections 2 to 5).

With respect to the latter, we will first discuss references to its own decisions and its standard-setting technique while also examining the overall influence of self-references on the Federal Constitutional Court's decision-making (section 2). Furthermore, we will analyse the importance of references to the decisions of other national courts within the German legal system to provide an insight into the 'ongoing dialogue'<sup>5</sup> between the Federal Constitutional Court and the specialised courts (section 3). Looking beyond the mere national legal realm, we will approach the question of how the Federal Constitutional Court deals with the case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) (section 4). Finally, we will study the importance of foreign court decisions in the Federal Constitutional Court's practice against the backdrop of the discussion on comparative legal reasoning in court decisions (section 5).

We will analyse the practice of the Court by examining both selected examples of the Federal Constitutional Court's case law as well as its discussion in legal scholarship. Usually, the various topics discussed in the different parts of this chapter are dealt with discretely. Therefore, each section intends to connect different types of case law with their varying implications and shed light on the Federal Constitutional Court's use of case law in general.

## 1. The position of the Federal Constitutional Court within the judicial system of the Federal Republic of Germany

Before going into detail regarding the different types of references in Federal Constitutional Court decisions, we will outline the Court's role as part of the

4 A categorisation of these various sources is rarely discussed. Angelika Nußberger proposed a division into three categories, i.e., internal legal sources (e.g., statutes, case law or legal scholarship from one's own legal system), external legal sources (e.g., law of the European Union and international law) and non-systemic sources (e.g., foreign case law, general political or philosophical citations)' see Angelika Nußberger, 'Wer zitiert wen?—Zur Funktion von Zitaten bei der Herausbildung gemeineuropäischen Verfassungsrechts' (2006) 61 *Juristenzeitung* 763.

5 *Ständiger Dialog mit der Fachgerichtsbarkeit*. See Matthias Jestaedt, 'Autorität und Zitat: Anmerkungen zur Zitierpraxis des Bundesverfassungsgerichts' in Steffen Detterbeck, Jochen Rozek and Christian von Coelln (eds.), *Recht als Medium der Staatlichkeit: Festschrift für Herbert Bethge zum 70. Geburtstag* (Duncker & Humblot 2009) 513, 517.

judicial power and as a constitutional body, taking into account the relevant requirements of constitutional procedural law (section 1.1) and discussing the binding effect of its decisions (section 1.2).

### *1.1 The Federal Constitutional Court as part of judicial power*

The Basic Law mentions the Federal Constitutional Court in the section on jurisdiction.<sup>6</sup> According to Article 92 of the Basic Law, judicial power shall be exercised by the Federal Constitutional Court, the federal courts<sup>7</sup> and the courts of the *Länder*. This clearly shows the Court's foreseen constitutional role as part of judicial power. However, it is noteworthy that the Court is also considered a constitutional organ. Since this is not stated explicitly in the Basic Law, the Federal Constitutional Court declared its status at the very beginning of its existence, in 1952, in its so-called status memorandum (*Status-Denkschrift*)<sup>8</sup>, emphasising, in particular, its position as being on an equal basis with the other constitutional bodies.

The procedural and material competences of the Court are defined in Article 93 of the Basic Law, of which paragraph 1 lists different types of proceedings admissible before the Court.<sup>9</sup> The standard of review in all these proceedings is solely the Basic Law. Therefore, the Court is a specialised constitutional court and not a supreme court like the US Supreme Court, for example.

In addition to the Court's direct connection with other courts through procedural law,<sup>10</sup> its role in the entire legal system is of utmost importance: the Court was founded as a new institution in the Federal Republic after the totalitarian Nazi regime fell.<sup>11</sup> From the 1950s onwards, it shaped an impactful jurisprudence by understanding the scope of constitutional law as broad.<sup>12</sup> Although the

6 Arts 92 to 104 of the Basic Law.

7 Art 95(1) of the Basic Law moreover provides for the constitutional basis of the five different highest courts; more specifically, the high courts of ordinary, administrative, financial, labour and social jurisdiction.

8 Gerhard Leibholz, Status Memorandum of the Federal Constitutional Court of 27 June 1952: 'As guardian of the Constitution, the Federal Constitutional Court is a constitutional organ and, for that purpose, vested with supreme authority'; Konstantin Chatzathanasiou, 'Die Status-Denkschrift des Bundesverfassungsgerichts als informaler Beitrag zur Entstehung der Verfassungsordnung' (2020) 11 RW 145.

9 The Basic Law lists further proceedings in arts. 99, 100, 115g and 115h.

10 See section 3.

11 For the historical setting, see Ruth Weber, 'Law-Making Activity of the German FCC' in Monika Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 28 ff.

12 One important step of its jurisprudence was the introduction of the indirect third-party effect of fundamental rights allowing their application in proceedings between private individuals; see BVerfGE 7, 198—Lüth. On important stages of the law-making activity in the Federal Constitutional Court's case law, see Weber (n 11) 31 ff.

Court is not an ‘all-powerful appeals authority’<sup>13</sup> (*Superrevisionsinstanz*), it has assumed the role of a ‘citizens’ court’.<sup>14</sup> This is clearly demonstrated by the fact that around 6,000 cases are brought before it every year.<sup>15</sup>

According to procedural law, the Court cannot decide freely on the admission of complaints, as is the case in other countries, such as the USA. In order to still be able to work despite its high caseload, court organisation, on the one hand, plays a crucial role, particularly the division of judges into senates and chambers. On the other hand, the problem is resolved by a rather strict interpretation of admissibility criteria, especially concerning constitutional complaints.

### *1.2 The binding effect of Federal Constitutional Court decisions*

Section 31 of the *Act on the Federal Constitutional Court* (FCCA) constitutes the central norm for the general vertical binding effect of the Federal Constitutional Court’s decisions. Its paragraph 1 stipulates that the decisions of the Federal Constitutional Court shall be binding upon the constitutional organs of the Federation and of the *Länder*, as well as on all courts and those with public authority. According to the jurisprudence of the Court, this binding effect is not limited to the operative part<sup>16</sup> but includes the supporting reasons (*tragende Gründe*) of the decision.<sup>17</sup> The binding effect is, thus, far-reaching. A disregard of Federal Constitutional Court decisions by lower courts may constitute a violation of the principle of the rule of law (Article 20 Paragraph 3) or of the right to be heard (Article 19 Paragraph 4 GG).<sup>18</sup> According to Section 31(2) of the FCCA, decisions of the Federal Constitutional Court shall have the force of law in enumerated cases involving the control of norms; also, constitutional complaints fall within the scope of said provision if the Court declares a law to

13 Andreas Voßkuhle, ‘Constitutional Court: The Dilemma of Law and Politics’ (2019) 64 *Osteuropa-Recht* 481.

14 Jutta Limbach, ‘Wirkungen der Rechtsprechung des Bundesverfassungsgerichts’ in Peter Hanau, Friedrich Heither and Jürgen Kühling (eds.), *Richterliches Arbeitsrecht* (CH Beck 1999) 344 (‘Bürgergericht’).

15 In 2020, the number of new cases in the Register of Proceedings rose by 5,529, see the Federal Constitutional Court’s *Annual Report* (2020) 42.

16 On the general structure of Federal Constitutional Court decisions, see Weber (n 11) 42 ff.

17 See BVerfGE 1, 14 (37). For a systematic explanation of the reasons in favour of this interpretation, see von Ungern-Sternberg (n 3) 16 ff. For a more critical point of view, see Christoph Möllers, ‘Legality, Legitimacy, and Legitimation of the Federal Constitutional Court’ in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds.), *The German Federal Constitutional Court: The Court Without Limits* (Oxford University Press 2011) 131, 181. For different opinions on the extent of the binding effect, see Mehrdad Payandeh, *Judikative Rechtserzeugung: Theorie, Dogmatik und Methodik der Wirkungen von Präjudizien* (Mohr Siebeck 2017) 390 ff.

18 BVerfGE 40, 88 (93 ff); 115, 97 (108). Critically, especially in view of a chamber decision invoking art 2 para 1 of the Basic Law, see von Ungern-Sternberg (n 3) 1, 18 ff.

be compatible or incompatible with the Basic Law, or if it voids a law. In these cases, the operative part of the decision shall be published in the *Federal Law Gazette*.<sup>19</sup>

As far as the horizontal binding effect of decisions is concerned, it is first necessary to recall the different divisions in which the Federal Constitutional Court can decide, namely the plenary, senates and chambers. Primarily, the 16 judges are divided into two senates. If a senate intends to deviate on a point of law from the legal view expressed in a decision by the other senate, the matter shall be decided by the plenary of the Federal Constitutional Court according to Section 16 of the FCCA. Such plenary decisions are extremely rare; to date, there have only been a handful in total.<sup>20</sup> However, in several decisions, the Court explicitly explains why a plenary decision was not necessary.<sup>21</sup> The case law decided by the chambers, consisting of three judges each, plays a subordinate role regarding the binding effect, because they are only allowed to grant the constitutional complaint if the constitutional issue determining the outcome of the case has already been decided by the Federal Constitutional Court.<sup>22</sup> Although the Federal Constitutional Court itself is generally not bound by its own case law, self-references play an important role within the Court's jurisprudence—which shall be discussed in detail in the next section.

## **2. Self-references in Federal Constitutional Court adjudication**

Self-references are a crucial part of Federal Constitutional Court decisions. Although a self-binding of the Court to its own jurisprudence is generally rejected (section 2.1), empirical studies show the ubiquity and importance of precedents within the Federal Constitutional Court's case law (section 2.2). Moreover, the Court's manner of citing is closely linked to its own particular style, a type of deductive reasoning that is often referred to as 'standard setting' (section 2.3).

### ***2.1 The binding effect and self-references***

In principle, the binding effect according to Section 31(1) of the FCCA does not extend to the Court itself.<sup>23</sup> Furthermore, Section 31(2) of the FCCA—while providing that the decisions of the Court have the force of law in cases involving norm controls—does not refer to the Court's reasoning, but only to the

19 For details, see Klaus Schlaich and Stefan Koriath, *Das Bundesverfassungsgericht* (CH Beck 2018) paras 495 ff.

20 The most recent one is the decision on the constitutionality of the Aviation Security Act of 2012, see BVerfGE 132, 1—Domestic Deployment of Armed Forces.

21 For a recent example, see BVerfGE 152, 216—Right to Be Forgotten II, paras 85 ff.

22 This is not the only condition, see § 93c FCCA.

23 See Schlaich and Koriath (n 19) para 482; Payandeh (n 17) 390.

declaration on the constitutionality of the concrete norm under review.<sup>24</sup> Accordingly, the Court has repeatedly ruled that a ‘binding effect does not exist for the Federal Constitutional Court itself’ and has specified that the ‘Court may abandon its legal opinions expressed in an earlier decision, even to the extent that they were fundamental to the decision at that time’.<sup>25</sup>

Although the Court, consequently, has no explicit way of distinguishing or overruling, it has decided on the possibility of deviating from prior case law regarding the specialised courts.<sup>26</sup> The Court examined if setting aside established precedents constitutes arbitrariness (i.e., an infringement of equality) or if it violates the frustration of legitimate expectation (*Vertrauensschutz*) anchored in the rule of law.<sup>27</sup> Although these cases concern the specialised courts, they may nevertheless shed light on the Court’s practice of adhering to its own case law.

When taking a closer look at the Court’s case law, it must be noted that deviations rarely occur.<sup>28</sup> Three main Court strategies on deviating from previous decisions can be distinguished:<sup>29</sup> first of all, it can completely abandon a former line of jurisprudence, that is, give up the previous rule;<sup>30</sup> secondly, it can establish an exception to prior case law, but maintain the previous rule in general; and lastly, the Court can select from several available precedents by taking advantage of the growing complexity of existing case law.

The legal implications of precedents are subject to an ongoing scholarly debate. Following the cited opinion of the Court, most reject a legally binding effect and describe how the Court nevertheless mostly adheres to its own case law.<sup>31</sup> Some argue for a general normative binding effect,<sup>32</sup> while others assume a legal obligation to justify deviations from previous case law derived from the principle of the

24 See Payandeh (n 17) 387.

25 BVerfGE 4, 31 (38); see also BVerfGE 20, 56 (87)—Party Financing I; 77, 84 (104)—Temporary Employment; 82, 198 (205); 104, 151 (197)—NATO Strategy.

26 See also Payandeh (n 17) 310, 436.

27 Concerning deviation and arbitrariness, see BVerfGE 18, 224 (240–241); concerning the frustration of legitimate expectation and the rule of law, see BVerfGE 84, 212 (227)—Lock-out; see also von Ungern-Sternberg (n 3) 59.

28 von Ungern-Sternberg (n 3) 3.

29 See Anna-Bettina Kaiser, ‘Herstellung und Darstellung von Entscheidungen des Bundesverfassungsgerichts’ in Johannes Masing, Matthias Jestaedt, Olivier Jouanjan and David Capitani (eds.), *Entscheidungen und Entscheidungsprozesse der Rechtsprechung* (Mohr Siebeck 2020) 8–9; on distinguishing, explaining, modifying and overruling in German jurisprudence in general, see also Dreier and Alexy (n 3) 54–59.

30 See, e.g., BVerfGE 144, 20 (225)—Prohibition of NPD II.

31 Payandeh (n 17) 445; Michael Sachs, ‘Art. 20’ in Michael Sachs (ed.), *Grundgesetz*, 5th ed. (CH Beck 2009) para 107; Karl-Peter Sommermann, ‘Art. 20 Abs. 3’ in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds.), *Kommentar zum Grundgesetz*, 6th ed. (CH Beck 2010) para 286; Hans D. Jarass, ‘Art. 20’ in Hans D. Jarass and Bodo Pieroth (eds.), *Grundgesetz-Kommentar*, 11th ed. (CH Beck 2011) para 53.

32 E.g., von Ungern-Sternberg (n 3) 1, 53.

rule of law.<sup>33</sup> Since the different approaches have not (yet) had any effect on the Court's practice, the discussion remains rather theoretical. One way or another, the Court can be described as constrained *de facto*: on the one hand, because of the (very broad) limits set by the Court invoking the principle of equality and of the rule of law; on the other hand, a *de facto* binding effect stems from its tendency to adhere to previous jurisprudence and, thus, show coherence through its standard-setting technique.<sup>34</sup>

## 2.2 The quantity of self-references

The Court pursues 'a style of reasoning where it basically cites only its own precedents'.<sup>35</sup> Since 2001, it has referred to an average of 45 precedents per decision.<sup>36</sup> There are only very few decisions that do not refer to precedents at all. A recent study by Ighreiz et al. using network analysis concludes that, out of 3,216 decisions, 3,029 (94.2%) cite prior ones. If one looks at how many of the decisions are cited themselves, the percentage is lower, but nevertheless remains high (2,921 = 90.8%).<sup>37</sup>

As an empirical study by Coupette shows, many decisions are rarely cited or refer little to other decisions, whereas a few decisions are often cited or cite extensively.<sup>38</sup> In a similar vein, Schaller observes that there is wide variation in citation practice between the volumes of the Court's official reports, which in turn can be attributed to certain landmark decisions<sup>39</sup> that cite a particularly large number of precedents.<sup>40</sup> This suggests that the need for justification for some decisions is higher, resulting in more citations of precedents. With respect to some of the most frequently cited decisions, it can be said that they are decisions of high

33 See, e.g., Payandeh (n 17) 446.

34 See section 2.3; on coherence, see Jestaedt (n 5) 513, 530.

35 Brun-Otto Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue' (2005) 80 *TuLRev* 203, 206; see Dreier and Alexy (n 3) 23.

36 Stefan Martini, *Vergleichende Verfassungsrechtsprechung: Praxis, Viabilität und Begründung rechtsvergleichender Argumentation durch Verfassungsgerichte* (Duncker & Humblot 2018) 90.

37 Ali Ighreiz, Christoph Möllers, Louis Rolfes, Anna Shadrova and Alexander Tischbirek, 'Karlsruher Kanones? Selbst- und Fremdkanonisierung der Rechtsprechung des Bundesverfassungsgerichts' (2020) 145 (4) *AöR* 537.

38 Corinna Coupette, *Juristische Netzwerkforschung* (Mohr Siebeck 2019) 263. Widely known decisions like BVerfGE 7, 377—Pharmacy Decision, BVerfGE 35, 79 and BVerfGE 7, 198—Lüth are among those that appear centrally in network analysis. See Ighreiz, Möllers, Rolfes, Shadrova and Tischbirek (n 37) 564.

39 For the terminology used in German law, see Nele Yang, *Die Leitentscheidung* (Springer 2018).

40 Steven Schaller, 'Präjudizien als selbstreferenzielle Geltungsressource des Bundesverfassungsgerichts' in Hans Vorländer (ed.), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (Springer VS 2006) 209.

societal and/or legal importance.<sup>41</sup> However, the fact that some of the decisions are cited so frequently may also be due to the circumstance that they summarise previous constitutional jurisprudence in a quotable manner.<sup>42</sup> The citation practice of the Court is therefore described as one of self-canonisation.<sup>43</sup>

It is widely assumed that the use of precedents increases over time. The most recent study concludes that the number of cases cited in the decisions increased over the years until around the 1980s, but stagnated during the 1990s, rising again since the beginning of the twenty-first century.<sup>44</sup> The general increase in citations could be explained by the fact that the sheer number of precedents relevant for decision-making is constantly growing. The strong increase in citations from 2000 onwards could be partly attributed to the increasing use of digital research possibilities.<sup>45</sup>

Moreover, the Court does not usually refer to previous separate opinions (*Sondervoten*).<sup>46</sup> This is probably due to the fact that these are rare, since the Court normally strives for consensus—the agreement of all judges is always at least attempted.<sup>47</sup> In addition, the possibility of separate opinions was only introduced in the 1970s. Another reason might be that separate opinions do not support the final decision of the Court and therefore are less likely to be considered in subsequent decisions.

### 2.3 *Standard setting*

The Court refers to precedents without addressing the substance or the underlying facts of former cases, but rather it quotes the abstract standards found therein, regardless of the context of the case.<sup>48</sup> Thus, the manner of quoting precedents is often described as one of decontextualisation.<sup>49</sup> The Court's way of decontextualising also becomes evident in the manner in which the decisions are cited; instead of citing names or dates of cases, precedents are cited by volume and page number in the Court's official reports.<sup>50</sup> Often, the Court cites not only one prior

41 In detail see Ighreiz, Möllers, Rolfes, Shadrova and Tischbirek (n 37) 574–580.

42 Ibid 603.

43 Ibid 584.

44 Ibid 567, 570.

45 Ibid 573.

46 However, exceptions exist: in its famous 'Esra' decision, a case concerning the prohibition of a novel due to violations of the right to privacy, the majority refers to the separate opinions in the 'Mephisto' case relating to the same problem: BVerfGE 119, 1 (22, 27, 28)—Esra.

47 See Uwe Kranenpohl, 'Was macht eigentlich Karlsruhe? Die Entscheidungsfindung des Bundesverfassungsgerichts aus sozialwissenschaftlich-empirischer Perspektive' in Michael Wrase and Christian Boulanger (eds.), *Die Politik des Verfassungsrechts—interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Nomos 2013) 176.

48 See also Dreier and Alexy (n 3) 24.

49 Jestaedt (n 5) 532.

50 See also Justin Collings, 'An American Perspective on the German Constitutional Court' in Anna-Bettina Kaiser, Niels Petersen and Johannes Saurer (eds.), *The US Supreme Court and Contemporary Constitutional Law: The Obama Era and Its Legacy* (Nomos 2018) 299;

decision, but a whole set of judgments to substantiate one statement (so-called string citations).<sup>51</sup> Moreover, the standards are usually quoted verbatim from an earlier decision, without making their insertion visible through quotation marks.

The Federal Constitutional Court has developed a sophisticated systematic doctrine (*Dogmatik*) over the years in order to interpret Basic Law.<sup>52</sup> This style of reasoning is often described as standard setting (*Maßstabsetzung*):<sup>53</sup> in most cases, abstract standards are formulated under subsection ‘C I’, separately from the considerations on the specific case under ‘C II’. In this manner, the Court has developed a legal doctrine that is generally accepted as a form of general-abstract constitutional interpretation.<sup>54</sup> This enables the Court to pin down constitutional values<sup>55</sup> and distil principles from concrete legal disputes, serving as a formula for solving future cases. The standards are then reiterated in subsequent decisions concerning the same constitutional provisions. In addition, some of the standards are usually reflected in the so-called guiding principles (*Leitsätze*)<sup>56</sup>, with which the Court usually supplements the published decisions in headnotes at the very beginning of the judgment. These ‘guiding principles’ are said to play an important role in the decision’s further reception as a precedent.<sup>57</sup>

In legal scholarship, the Court’s practice of standard setting has been criticised as being too textbook-like.<sup>58</sup> This is said to result in the risk of applying standards to cases for which they had not been intended and, therefore, of not doing justice to the individual case. In turn, standards could be set for constellations that are not suitable for generalisation.<sup>59</sup> Moreover, the Court is thought to lose the necessary room for interpretation by narrowing down its own standards with every new decision.<sup>60</sup> In this regard, one could also argue that the increasing network of standards results in a *de facto* ‘binding effect’.

In general, the standards are seen as an indispensable ‘intermediary’ between the text of the Basic Law and the concrete individual case, providing guidance and orientation for other national courts applying the Basic Law.<sup>61</sup> In this respect,

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well-known landmark cases are usually referred to with a name that has become generally acknowledged but is not set by the Court itself; see also Dreier and Alexy (n 3) 22.

51 Jestaedt (n 5) 523.

52 Collings (n 50) 299.

53 Oliver Lepsius, ‘The Standard-Setting Power’ in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds.), *The German Federal Constitutional Court: The Court without Limits* (Oxford University Press 2020) 70–130.

54 Ibid 71.

55 Ibid 72.

56 On the use of guiding principles, see Ruth K. Weber, *Der Begründungsstil von Conseil constitutionnel und Bundesverfassungsgericht* (Mohr Siebeck 2019) 67 ff.

57 Dreier and Alexy (n 3) 22.

58 Kaiser (n 29) 6.

59 Oliver Lepsius, ‘Entscheiden durch Maßstabbildung’ in Robert C. van Ooyen and Martin H. W. Möllers (eds.), *Handbuch Bundesverfassungsgericht im politischen System* (Springer VS 2006, 2015) 132.

60 Kaiser (n 29) 6.

61 Ibid 7.

they also facilitate the reception of the Court's decisions in the national legal discourse and lead to transparency.<sup>62</sup> Setting standards also enables the Court to more easily deal with a high case load since it can simply refer to these standards, leaving no further need for justification, especially in relation to the chambers' decisions. Moreover, the Court can thereby produce and display coherence.<sup>63</sup> In this regard, it stabilises its position and authority by means of its standard setting.<sup>64</sup> Therefore, precedents are said to stabilise the normativity of constitutional law.<sup>65</sup> Going even further, the Court's enduring popularity and success is attributed to its jurisprudence using this technique.<sup>66</sup>

#### 2.4 *Preliminary conclusions*

As we have shown, self-references play a pivotal role in the case law of the Federal Constitutional Court, regardless of whether or to what extent one assumes that there is a binding effect of precedents. These self-references are essential for the Court's specific style of reasoning shaped by its standard-setting technique. In addition, they also play an important role in research on constitutional law, which increasingly includes comprehensive empirical studies on the topic. Although in most cases the Court relies on its own case law, it is generally open to including other sources, as we will describe in the following sections.

### 3. References to decisions of national courts

The Federal Constitutional Court's decisions generally contain few references to national court decisions. To better understand the relationship between the Court and the other national courts, we will first highlight the historical and constitutional procedural framework, especially the Court's relationship with the Federal Court of Justice. We will then take a closer look at the constitutional courts of the *Länder*.

Especially in the 1950s, the relationship between the Federal Constitutional Court and the Federal Court of Justice was controversial. As a new court, the Federal Constitutional Court first had to find its role in relation to the Federal Court of Justice, which could build on the tradition of the *Reichsgericht*. The Court managed to establish itself as the court responsible for all questions of constitutional law—with a broad understanding of the very scope of the latter. One exemplary decision regarding this is its judgment on the missing continuity of civil service status in the Federal Republic. In this case, the Court overruled the case law of the Federal Court of Justice and also dealt with Germany's Nazi

62 Weber (n 11) 319 ff.

63 Jestaedt (n 5) 530.

64 Ibid 530; Kaiser (n 29) 6.

65 Payandeh (n 17) 437.

66 Jestaedt (n 5) 235.

past.<sup>67</sup> The interpretation of the Basic Law is finally only incumbent upon the Federal Constitutional Court, which is why it is not bound by the interpretations of other national courts. Consequently, the Court does not refer explicitly to their jurisprudence when interpreting the Basic Law. Certainly, however, the judges find inspiration in the judicial reasoning of the specialised courts.<sup>68</sup>

With regard to constitutional procedural law, the proceedings linking the Federal Constitutional Court and the different courts are the constitutional complaint and the so-called concrete control of norms. The constitutional complaint is provided for in Article 93 Paragraph 4a of the Basic Law. The object of a constitutional complaint can be either a legislative or an executive act, or a judicial decision, with the latter accounting for the highest number of cases by far. If a person claims to have had his or her constitutional rights violated by a court decision, he or she can submit the complaint to the Court within due time.<sup>69</sup> By contrast, Article 100 of the Basic Law provides for the concrete control of norms, which is a referral procedure: if a court considers a statute, the validity of which is at issue in the decision, to be unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Federal Constitutional Court.

The Court first and foremost refers to the specific prior decisions of the specialised courts when it comes to a decision that follows a court proceeding; that is, a constitutional complaint or a concrete control of norms. When reviewing a constitutional complaint, first of all, the criteria of subsidiarity and the obligation to substantiate a constitutional complaint are of particular importance.<sup>70</sup> A constitutional complaint may only be filed after the exhaustion of legal remedies.<sup>71</sup> The Court deduces, from this provision, the requirement to seize all procedural possibilities available in order to prevent or to remedy the alleged violation of fundamental rights. Going even further, this admissibility criterion shows the distribution of competences between the Court and the specialised courts. It is the responsibility of the latter to secure the protection of fundamental rights first, which only falls subsidiarily within the Federal Constitutional Court's jurisdiction.<sup>72</sup>

67 BVerfGE 3, 58; see also Matthias Roßbach, 'Weichenstellung und Vergangenheitsbewältigung im Öffentlichen Dienst—Das Urteil zum G 131' in Florian Meinel (ed.), *Verfassungsgerichtsbarkeit in der Bonner Republik* (Mohr Siebeck 2019) 229.

68 On the verbatim quotation of administrative court interpretations of the constitution without marking them as quotes, see Christoph Möllers, '§ 3 Methoden' in Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann and Andreas Voßkuhle (ed.), *Grundlagen des Verwaltungsrechts*, 2nd ed. (C. H. Beck 2012) para. 13.

69 For further procedural rules, see s 90 ff of the FCCA.

70 Gertrude Lübke-Wolff, 'Substantiierung und Subsidiarität der Verfassungsbeschwerde' (2004) EuGRZ 669.

71 S 90(2) FCCA.

72 For further details, see Andreas Voßkuhle, 'Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte' (2000) 125 AöR 179: 'The relationship between the specialized courts and the Federal Constitutional Court is therefore described as a shared process of constitutional law concretization'.

The obligation to substantiate a constitutional complaint is closely linked to this. In order to enable the specialised courts to review the case on constitutional rights, the complainant has to present all facts underlying his or her complaint in proceedings before the specialised court.<sup>73</sup> Furthermore, the complainant is obliged to present the alleged violation of constitutional law in the proceedings before the specialised courts.<sup>74</sup> Nevertheless, the Federal Constitutional Court generally does not further engage with their constitutional argumentation in its reasoning—except for the presentation of the procedural history at the beginning of the decisions.

Within the federal system of the Federal Republic, it is not only the Federal Constitutional Court that deals with constitutional law. Rather, the *Länder* each have their own constitutions and, accordingly, their own constitutional courts.<sup>75</sup> Generally, the Basic Law prevails over the constitutions of the *Länder* as federal law<sup>76</sup> and the constitutional courts of the *Länder* play a minor role in the constitutional system. This might explain why the Court only additionally—and seldomly—refers to their case law. However, in some cases, the Court engages with decisions of other constitutional courts of the *Länder*. A current example is the so-called parity decision on the question of whether only those parties with quota lists ensuring gender equality should be allowed to participate in elections.<sup>77</sup> The Court's reasoning deals in detail with the argumentation of the decisions of the constitutional courts of the *Länder* of Thuringia<sup>78</sup>, Brandenburg<sup>79</sup> and Bavaria.<sup>80</sup> The procedural interplay and the examples show that the Court interacts in many ways with the national courts. Nevertheless, it rarely cites them or deals with their argumentation in detail.

#### 4. References to decisions of the European Court of Justice and the European Court of Human Rights

Overall, the Court is more reticent about citing European and international courts than it is about citing itself. In view of the importance of the jurisprudence

73 When it comes to the right to be heard, the complainant must already allege possible violations of his or her right to be heard in the proceedings before the specialised courts; see, e.g., BVerfG NJW 2008, 2635.

74 BVerfGE 112, 50 (60–61).

75 On the role of the constitutional courts of the *Länder*, see Peter M. Huber, 'Der deutsche Verfassungsgerichtsverbund: Verfassungsautonomie der Länder und Landesverfassungsgerichtsbarkeit' (2020) 7 SächsVBl 205; Andreas Voßkuhle, 'Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsgerichtsverbund' (2011) 59 JöR 215; Christoph Degenhart, 'Die Verfassungsgerichte der Deutschen Länder als Garanten ihrer Autonomie' (2009) 39 Revista Catalana de Dret Públic 135; Markus Möstl, 'Landesverfassungsrecht—zum Schattendasein verurteilt? Eine Positionsbestimmung im bundesstaatlichen und supranationalen Verfassungsverbund' (2005) 130 AöR 350.

76 See art. 30 of the Basic Law.

77 Federal Constitutional Court, Order of 15 December 2020, 2 BvC 46/19, paras 1–120.

78 ThürVerfGH, Decision of 15 July 2020, VerfGH 2/20, NVwZ 2020, 1266.

79 VerfGBbg, Decision of 23 October 2020, VfGBbg 9/19.

80 BayVerfGH, Decision of 26 March 2018, Vf. 15-VII-16, NVwZ-RR 2018, 457.

of the ECJ and the ECtHR not only for the case law of the Court but also for national law as a whole, the following analysis focuses on the Court's handling of their case law. References to other international courts, such as the International Court of Justice, are very few and will therefore not be considered.<sup>81</sup>

As far as can be seen, an empirical analysis examining the frequency of references to judgments of the ECtHR and the ECJ by the Federal Constitutional Court is still lacking. Examples show that the Court sometimes cites a high number of decisions by these courts. The decision on the Treaty of Lisbon of 2009, for example, contains 22 citations of ECJ decisions and 3 citations of ECtHR decisions, which, compared to 167 self-references, are still fairly low numbers.<sup>82</sup> The decision known as the 'Right to Be Forgotten I' from 2019<sup>83</sup> concerning data-protection law contains 33 citations of ECJ decisions and 14 citations of ECtHR judgments; the corresponding decision, the 'Right to Be Forgotten II'<sup>84</sup>, contains 94 ECJ and 4 ECtHR citations. Other decisions contain particularly high numbers of references to ECtHR jurisprudence: for example, the decision on the prohibition of the right wing 'National Democratic Party of Germany' (NPD)<sup>85</sup> (54) and the decision on the ban on strike action for civil servants<sup>86</sup> (43). The Federal Constitutional Court thus cites both courts with varying frequency and in different contexts, depending on the legal question at stake. The conclusions that can be drawn from purely quantitative observations are admittedly limited. Rather, it is crucial to look at the legal frameworks of the law of the European Union (EU; section 4.1) and the European Convention on Human Rights (ECHR; section 4.2) and at how the national, European and international levels are intertwined.

#### *4.1 The case law of the European Court of Justice*

The question of whether ECJ decisions have a binding effect on the Federal Constitutional Court is essential. A provision such as Section 31 of the FCCA does not exist for ECJ decisions. Moreover, these decisions do not have a legally binding effect in the sense of *stare decisis*. The ECJ thus follows the continental tradition, according to which there is a *de facto* binding effect relying on the persuasive force of the decisions.<sup>87</sup>

81 See von Ungern-Sternberg (n 3) 23 ff.

82 For a graphic visualisation of the network of Federal Constitutional Court decisions that cite or are cited by the Lisbon Judgment, see Ighreiz, Möllers, Rolfes, Shadrova and Tischbirek (n 37) 567.

83 BVerfGE 152, 152—Right to Be Forgotten I; the frequency of citations was checked manually here and in the following.

84 BVerfGE 152, 216—Right to Be Forgotten II.

85 BVerfGE 144, 20—Prohibition of NPD II.

86 BVerfGE 148, 296—Ban on Strike Action for Civil Servants.

87 Manuel Willms, *Die materiell-rechtliche Urteilswirkung im Unionsrecht* (Mohr Siebeck 2020) 109–117.

According to Article 23(1) of the Basic Law, the Federal Republic of Germany shall participate in the development of the EU and may transfer sovereign powers. In principle, therefore, the German legal order is integrated into that of the EU. The Court has repeatedly ruled on the relationship with the ECJ in its case law. Apart from the question on the interplay between the different legal orders, the Court's jurisprudence seeks not to lose its interpretative autonomy on questions of constitutional law.

The starting point of the Court's examination of its relationship with the ECJ dates back to 1974, when it preserved the right to review the compatibility of European law with German fundamental rights in its so-called first 'As long as' decision.<sup>88</sup> Then in 1986, the Court stated in the second 'As long as' decision<sup>89</sup> that legal protection by the institutions of the European Communities, in particular by the ECJ, now met the standards of German fundamental rights, and therefore withdrew the previously assumed general competence of review to measure EU law against the Basic Law.

Although the Court generally made assurances that it would practice restraint in the review of cases concerning union law, it nevertheless developed a doctrinal frame for reviewing union law cases in certain exceptional constellations in the following years. Since the decision on the Maastricht Treaty of 1993, the division of responsibilities between the Court and the ECJ has been referred to as a 'cooperative relationship' (*Kooperationsverhältnis*).<sup>90</sup> In this decision, the Court introduced a test to determine whether an act of European law was covered by the EU's competence or whether it was acting outside its competences (*ultra vires*). The Lisbon decision<sup>91</sup> from 2009 added the test of 'constitutional identity', allowing the Court to examine whether the core area of the Basic Law had been violated by measures taken by European organs, institutions or other bodies.

In 2014, the Court submitted a question for a preliminary ruling to the ECJ in the proceeding on Outright Monetary Transactions for the first time.<sup>92</sup> In the subsequent judgment concluding the proceedings, it went along with the ECJ's reasoning and dealt with it in detail.<sup>93</sup> The Federal Constitutional Court stated that 'the interpretation and application of Union law, including the determination of the applicable methods, is first and foremost incumbent upon the ECJ'.<sup>94</sup> Subsequently, the decision provided a detailed account of how the ECJ specifies the law. The Federal Constitutional Court described its own role as not including the task 'to replace the interpretation of the ECJ with its own when faced with issues of interpretation of Union law that can [...] yield differing results', stressing

88 BVerfGE 37, 271—As long as I.

89 BVerfGE 73, 339—As long as II.

90 BVerfGE 89, 155. On the *Kooperationsverhältnis*: paras 174, 178.

91 BVerfGE 123, 267—Lisbon Treaty.

92 BVerfGE 134, 366.

93 BVerfGE 142, 123—OMT Program.

94 Ibid para 158.

its obligation to ‘respect judicial development of the law by the ECJ [...] as long as the ECJ applies recognised methodological principles and does not act in a way that is objectively arbitrary’.<sup>95</sup>

According to these standards, the stakes for rejecting a ruling of the ECJ are set at a high level. In its decision on the Public Sector Purchase Programme (PSPP) of the European Central Bank, the Court stated for the first time that EU competences were exceeded according to these standards.<sup>96</sup> To be able to partly reject the ECJ’s ruling, the Court used drastic wording to fulfil the previously set standards and declared the ECJ’s reasoning as ‘simply not comprehensible’<sup>97</sup>, ‘simply untenable’<sup>98</sup> and ‘not comprehensible from a methodological perspective’.<sup>99</sup> The decision subsequently deals in detail with the case law of the ECJ, in particular with the principle of proportionality.<sup>100</sup>

Two decisions, pronounced at the end of 2019, known as the ‘Right to Be Forgotten I and II’<sup>101</sup> are particularly important when analysing the standards for the review of fundamental rights in the Europeanised legal sphere. In these decisions, the Court decided upon the question of whether the standard of review of the Charter of Fundamental Rights or the Basic Law applied in cases where union law is concerned. The Court designed a differentiated system for deciding which law was applicable. On the one hand, if legislation that is not fully harmonised under EU law is concerned, the fundamental rights of the Basic Law apply.<sup>102</sup> On the other hand, if national legislation is fully harmonised under EU law, the Court carries out its review on the basis of the Charter. The Court argues that its competence to apply this standard of review follows from Article 23 of the Basic Law.<sup>103</sup>

In the ‘Right to Be Forgotten II’ decision dealing with fully harmonised law, it is particularly interesting to see how the Court refers to the ECJ’s case law. The Court cites ECJ decisions at various points interpreting statutory provisions. It also re-states that ‘it seeks close cooperation with the ECJ’.<sup>104</sup> For the Court, this means that it ‘can thus only apply EU fundamental rights where a relevant question of interpretation has been clarified in the case law of the ECJ or the answer is clear from the outset based on established principles of interpretation’.<sup>105</sup> When the Court then applies this standard of review to the specific case, it explicitly and extensively refers to the relevant case law of the ECJ.<sup>106</sup>

95 Ibid para 161.

96 BVerfGE 154, 17—PSPP.

97 Ibid paras 116, 118.

98 Ibid para 117.

99 Ibid paras 133, 153.

100 Ibid paras 147 ff.

101 BVerfGE 152, 152—Right to Be Forgotten I; BVerfGE 152, 216—Right to Be Forgotten II.

102 BVerfGE 152, 152.

103 BVerfGE 152, 216.

104 Ibid para 68.

105 Ibid para 70.

106 Ibid 152, 216, paras 95 ff.

Following on from the ‘Right to be Forgotten I’ decision, the EU Charter could also be used as a basis for interpreting the fundamental rights of the Basic Law.<sup>107</sup> All in all, the Court is still addressing the handling of ECJ decisions in the case law itself which shows that the clash of decisions and competences is a complex ongoing matter.

#### *4.2 The case law of the European Court of Human Rights*

The decisions of the ECtHR do not have a legally binding effect in the sense of *stare decisis* either. According to Article 46(1) of the European Convention on Human Rights (ECHR), the binding effect of decisions concerns the parties. While the Court considers the ECHR to have the same status as ordinary statutory law, as opposed to the Basic Law’s status as a source of law that has supremacy over legislation,<sup>108</sup> all national courts are legally obliged to consult the Convention for the interpretation of fundamental rights.<sup>109</sup>

The so-called *Görgülü* decision from 2004<sup>110</sup>, originating in a case on family law, even goes one step further. The Court deduces the obligation to interpret the Basic Law in light of the ECHR from the openness of the Basic Law towards international law (*Völkerrechtsfreundlichkeit*) stated in the preamble as well as in Articles 23 to 26 and Article 59(2) of the Basic Law.<sup>111</sup> According to this decision, a violation of the relevant fundamental right and the principle of the rule of law can be invoked if ECtHR case law has not been taken into account by the lower courts.<sup>112</sup> Since then, many decisions by the Court have dealt with ECtHR case law in much greater detail than before; for example, the decisions on preventive detention<sup>113</sup>, on the prohibition of the NPD<sup>114</sup> and on the ban on strike action for civil servants.<sup>115</sup>

#### *4.3 Preliminary conclusions*

To conclude, it can be said that a strict binding effect for the case law of the ECJ and ECtHR—just as for the case law of the Federal Constitutional Court itself—does not exist. Overall, the Court shows a tendency towards incorporating the case law of the two European courts examined here more frequently and more explicitly. In doing so, it partly refers to their case law by means of string citations

107 BVerfGE 152, 152, para 60.

108 On the question of the relationship between international and national law, see von Ungern-Sternberg (n 3) 27 ff.

109 Since BVerfGE 74, 358 (370).

110 BVerfGE 111, 307—*Görgülü*.

111 Ibid paras 31 ff.

112 Ibid paras 60 ff.

113 BVerfGE 128, 326—Preventive Detention II.

114 BVerfGE 144, 20—Prohibition of NPD II.

115 BVerfGE 148, 296—Ban on Strike Action for Civil Servants.

and rather abstract references, but it also goes into detail by examining the reasoning, as shown in the example of the decisions on the right to be forgotten. In the PSPP decision, this culminated in the Court's view that the ECJ's reasoning was ultimately inadequate.

## 5. References to decisions of foreign courts

The citation of foreign court decisions and comparative legal argumentation in German court decisions is a topic of unabated scholarly attention.<sup>116</sup> The Federal Constitutional Court is sometimes considered as 'introverted' in terms of its openness to foreign legal references.<sup>117</sup> Bobek describes the German style of comparative reasoning as being 'in the middle between the axiomatically open English one and the, at least formally, axiomatically closed French one'.<sup>118</sup> In total, the number of Court cases citing the decisions of foreign courts is very small. A study of the Federal Constitutional Court case law between 1951 and July 2007 counted 59 decisions altogether.<sup>119</sup> Moreover, citations of foreign case law appear about twice as often in separate opinions than in the Court decisions themselves.<sup>120</sup> Since separate opinions are not part of the authoritative part of the judgment,<sup>121</sup> but constitute a mere addition to the decision of the Court, they can take greater liberties in their argumentation and choice of sources. Separate opinions are mostly written by one judge alone or in smaller groups, allowing for a more individual style.

The Court cited more foreign case law in its early years during the 1950s. From the 1960s through to the 1990s, a more or less constant number of citations of

116 With respect to German courts in general, see, e.g., Hannes Unberath and Astrid Stadler, 'Comparative Law in the German Courts' in Mads Andenas and Duncan Fairgrieve (eds.), *Courts and Comparative Law* (Oxford University Press 2015) 581 which stresses that comparative law has a long tradition in German private law; see also Ulrich Drobnig 'The Use of Foreign Law by German Courts' in Ulrich Drobnig (ed.), *The Use of Comparative Law* (Kluwer 1999) 127.

117 Kaiser (n 29) 12.

118 Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013) 135.

119 Aura María Cárdenas-Paulsen, *Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts—Analyse der Heranziehung ausländischer Judikatur* (Verlag Dr Kovac 2009) 88; another study from 2013 counts 32 in 1,351 decisions: Stefan Martini, 'Lifting the Constitutional Curtain? The Use of Foreign Precedent by the GFCC, 1999–2010' in Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013) 229, 241 with a restricted sample containing the case collection of the German Federal Constitutional Court and the judgments from three decades (1951–1960; 1971–1980; 2001–2010).

120 Martini (n 119) 247.

121 Ibid.

foreign decisions can be observed.<sup>122</sup> Since the beginning of the twenty-first century, the citation frequency of foreign case law has been on the rise.<sup>123</sup> This can be explained by the increasing Europeanisation and internationalisation being reflected in case law. Another reason might be that more recently appointed judges are more familiar with comparative law.<sup>124</sup>

The Court cited case law from a total of 25 countries up to 2007.<sup>125</sup> The most cited court was the US Supreme Court with 27 cases, which is not surprising considering that the USA are usually said to set an example for constitutional adjudication.<sup>126</sup> The USA are followed by Switzerland (16), the United Kingdom (11), France (10), Italy (9) and the Netherlands (5).<sup>127</sup> In its early years, the Court particularly referred to the US Supreme Court and Swiss jurisprudence.<sup>128</sup> In general, the Court is accused of Euro- and Anglo-centrism when selecting foreign case law.<sup>129</sup> However, the Court now includes a wider range of countries in its comparative law passages.<sup>130</sup> Moreover, it can be noticed that the Court does not only refer to other constitutional courts, but also includes, for example, courts of appeal and other specialised courts.<sup>131</sup>

The Court predominantly refers to foreign and international decisions in cases concerning (private) international law and the law of the EU. Most of these citations, thus, can be described as ‘mandatory’ or ‘advisable’ uses of foreign law.<sup>132</sup> Moreover, Cárdenas-Paulsen notes that the citation of foreign jurisprudence may also be used in the interpretation of fundamental rights or when concretising general constitutional principles. However, these ‘voluntary’<sup>133</sup> uses of foreign law are rare.

The manner of citing foreign case law is similar to the citation of national case law. One can mainly distinguish two variants. Firstly, the Court simply inserts the reference to a case that treats a similar problem in a string citation introduced by the abbreviation ‘cf. also’ without any further explanation;<sup>134</sup> secondly, the outcome of the case is briefly summarised in addition to simply giving the reference. The Court does not typically engage with the cited cases and their factual and

122 Cárdenas-Paulsen (n 119) 88–89.

123 Martini (n 36) 86–87.

124 See Kaiser (n 29) 13.

125 Cárdenas-Paulsen (n 119) 89.

126 See, e.g., Susanne Baer, ‘Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus’ (2015) 63 *JöR* 389, 392.

127 Cárdenas-Paulsen (n 119) 89.

128 *Ibid* 88.

129 Baer (n 126) 392; Martini (n 119) 248.

130 See Bobek (n 118) 144; a recent example is the decision on the adoption of stepchildren by unmarried partners, BVerfGE 151, 101 (141–144) with extensive references to legal frameworks in, e.g., Slovenia, Iceland, Serbia, Australia and New Zealand.

131 Cárdenas-Paulsen (n 119) 183 ff.

132 See Bobek (n 118) 20.

133 *Ibid*.

134 *Ibid* 136.

legal contexts in detail. Moreover, judgments that support the Court's conclusions are mainly cited.<sup>135</sup>

A theoretical discussion concerning the method and value of comparative arguments, as known, for example, from the USA, is mostly missing in the Court's jurisprudence.<sup>136</sup> The Court even explicitly rejected comparative law argumentation in its first decision concerning abortion from 1975.<sup>137</sup> However, this strict refusal did not set the tone for subsequent judgments, since the Court's use of comparative arguments increased in the following years. Especially in more recent decisions, the Court tends to cite a whole series of foreign judgments supporting the Court's finding. In its decision on incest between siblings, for example, the Court cites and even briefly summarises the judgments of several foreign courts from various countries.<sup>138</sup> In a decision from 2011 concerning the implementation of the jurisprudence of the ECtHR, the Court compared its interpretation of the Basic Law in light of international law with a comparative constitutional interpretation. It also cited legal scholar Peter Häberle, one of the most important advocates for comparative law in Germany.<sup>139</sup> The passage is sometimes interpreted as a sign of the Court's affirming the use of comparative law in general.<sup>140</sup>

All in all, however, the importance of foreign case law for the jurisprudence of the Court is rather marginal. This reflects the prevailing opinion in legal scholarship regarding comparative law as being a mere auxiliary argument.<sup>141</sup> Some assume that comparative law is not given any decisive weight by the Karlsruhe Court.<sup>142</sup> However, as former Judge and President of the Federal Constitutional

135 There are also exceptions to this rule. In one of the decisions on abortion, the Court refers to figures on the decline of abortions in the United Kingdom as well as in the former German Democratic Republic, which fundamentally contradict the reasoning of the Court, and it interprets them as not being conclusive: BVerfGE 39, 1 (60)—Abortion I.

136 Bobek (n 118) 136; Martini (n 119) 239.

137 BVerfGE 39, 1 (66–67)—Abortion I. The Court mainly bases its rejection on three arguments: abortion laws of other countries cannot be used as an argument, because they are often highly controversial within the respective countries; foreign legal standards concerning the constitutionality of statutes differ substantially from German standards; lastly, the particular historical experiences in Germany, especially during the time of National Socialism, require different legal solutions particularly with regard to abortion.

138 BVerfGE 120, 224 (231–232)—Incest, citing the Italian Constitutional Court, the Hungarian Constitutional Court, a United States Court of Appeals for the Seventh Circuit of Wisconsin, a Canadian Appellate Court and the Krakow Court of Appeal.

139 BVerfGE 128, 326—Preventive Detention II, para 92: 'Against this background something similar is true of an interpretation of the concepts of the Basic Law that is open to international law as of an interpretation based on a comparison of constitutions: similarities in the text of the norm may not be permitted to hide differences which follow from the context of the legal systems: the human rights content of the agreement under international law under consideration must be "reconceived" in an active process (of reception) in the context of the receiving constitutional system (see Häberle, *Europäische Verfassungslehre* [...]).'

140 See Martini (n 119) 239.

141 *Ibid* 241.

142 Kaiser (n 29) 13.

Court Andreas Voßkuhle reveals, the Court regularly uses comparative law in the process of decision-making in important proceedings when deliberating legal solutions on the bench.<sup>143</sup> Several judges have expressed their support for comparative law argumentation over the years.<sup>144</sup> But even if it plays a significant role behind closed doors, it is usually not reflected in the decisions themselves.<sup>145</sup>

## 6. Conclusions

In conclusion, case law plays a predominant role in the Federal Constitutional Court's jurisprudence, even though the Court does not follow the common law rule of *stare decisis*. Therefore, its handling of case law can be described as ambivalent. The decisions of the Court have a far-reaching explicit binding effect *erga omnes*, according to Section 31 of the FCCA. Furthermore, the broader procedural and institutional frame enables the importance of the Court's adjudication. The growing influence of the Court since its founding has been primarily fuelled by its own case law. In particular, its broad interpretation of the fundamental rights of the Basic Law allows it to permeate all areas of law. Among the various sources invoked by the Court, self-references play the most important role. They enable the Court to set abstract standards that can be applied not only by the specialised courts but also by itself in following decisions. Whereas the debate on the question of whether the Court is bound by its own precedents is primarily led by scholars, the Court's standard-setting is widely acknowledged as a well-established way of rendering constitutional justice in practice.

In the European sphere, the Court has repeatedly decided on its relationship with the ECJ and the ECtHR, thereby outlining the scope and competences of overlapping legal regimes. In this respect, the examples have shown that references to case law are one dimension of an ongoing dialogue between different courts. The references, moreover, are not limited to courts of the supranational and international legal order, but also include decisions of courts from other countries. This can be seen as a sign of the increasing Europeanisation and internationalisation of jurisprudence. The mutual reference of courts in different legal spheres is an important field of study that is undergoing constant change and thus continues to merit our attention.

143 Andreas Voßkuhle 'Rechtspluralismus als Herausforderung: Zur Bedeutung des Völkerrechts und der Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts' (2019) 79 *ZaöRV* 481, 497; see also Stefan Martini and Tina Winter, 'Reflexionspotentiale aufbauen—darum geht es ja letztlich!—Interview mit dem Präsidenten des Bundesverfassungsgerichts Prof. Dr. Andreas Voßkuhle' (*JuWiss-Bllog*, 18 April 2013), [www.juwiss.de/reflexionspotentiale-aufbauen-darum-geht-es-ja-letztlich/](http://www.juwiss.de/reflexionspotentiale-aufbauen-darum-geht-es-ja-letztlich/) accessed on 20 June 2021.

144 Baer (n 126); Bryde (n 35).

145 Martini and Winter (n 143).

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# 5 Precedents and case-based reasoning in the case law of the Hungarian Constitutional Court

*Zoltán Pozsár-Szentmiklósy*

## Introduction

### *On the Constitutional Court*

The Hungarian Constitutional Court (HCC) started to function on 1 January 1990. Right in the very first period of functioning, it had a significant impact on the building process of the state governed by the rule of law. By virtue of its answers to the most challenging dilemmas related to fundamental rights, its governmental structure and the content of its constitutional principles, it quickly earned trust from the Hungarian society as well as recognition at the international level.<sup>1</sup>

The Fundamental Law of Hungary (Fundamental Law), which entered into force on 1 January 2012, and based on that, the Act CLI of 2011 on the Constitutional Court (CC Act), restructured the competences and the profile of the HCC.<sup>2</sup> Based on the present regulation, abstract posterior norm control—which was the most significant power of the Court in the 1990–2011 period—can be initiated only by qualified state organs<sup>3</sup> (contrary to the former regulation which opened this possibility for every individual). In this regard, it has to be noted that—according to the Fundamental Law—fiscal laws cannot be subject to posterior abstract norm control;<sup>4</sup> therefore, the system of protection of constitutional norms is not comprehensive. On the other hand, according to the CC Act, the ‘uniformity decisions’ of the Curia (the highest-instance judicial forum in Hungary), which have normative force and are binding on ordinary courts, can also be subject to posterior norm control.<sup>5</sup>

1 László Sólyom, ‘The Role of Constitutional Courts in the Transition to Democracy. With Special Reference to Hungary’ (2003) 18 *International Sociology* 1, 133–161.

2 See, e.g., Fruzsina Gárdos-Orosz, ‘The Hungarian Constitutional Court in Transition—from Actio Popularis to Constitutional Complaint’ (2012) 53 *Acta Juridica Hungarica* 4, 302–315.

3 Fundamental Law, Article 24. para. (2) e).

4 Fundamental Law, Article 37. para. (4).

5 CC Act Section 37. para. (2).

The Court also has other powers which are linked to the protection of the integrity of the legal system: preliminary norm control of legislative acts and international treaties, concrete norm control initiated by judges while suspending a judicial case, and abstract constitutional interpretation.<sup>6</sup> These powers—which also existed based on the former regulation—were not subject to significant modification with enactment of the Fundamental Law and the CC Act.

At present, the most significant power of the HCC is the constitutional complaint: based on this, limitation of fundamental rights in particular cases can be claimed unconstitutional. Constitutional complaints can be submitted to the Court on three grounds: (a) in the case of a judgment which was based on an unconstitutional piece of legislation (identical to the former regulation), (b) in the case of a judgment based on legislative interpretation which is in contradiction with the provisions of the Fundamental Law (the so-called ‘German-type’ constitutional complaint, introduced in 2011), and (c) if a piece of legislation causes limitation of fundamental rights directly, without its application in an individual case (‘direct constitutional complaint’, also introduced in 2011).<sup>7</sup> It has to be noted that according to a new, controversial provision of the CC Act, state organs can also submit ‘German-type’ constitutional complaints to the HCC if the fundamental right to which they refer is applicable in their case.<sup>8</sup>

As a consequence, one can conclude that according to the 2011 regulation, as well as the related practice, the HCC is not designed to be a significant counterbalance of the political powers anymore, but rather that of the ordinary judiciary.<sup>9</sup>

### *On the particularities of the Hungarian legal system*

The Fundamental Law prescribes the elements of the Hungarian legal system and also the relation between the different types of legal sources. Generally binding rules may be laid down in the Fundamental Law or in laws adopted by an organ having legislative competence and specified in the Fundamental Law.<sup>10</sup> The hierarchical relationship between the different types of laws<sup>11</sup> issued by state organs is also specified in the Fundamental Law. The Fundamental Law recognises the

6 CC Act Chapter II.

7 CC Act Sections 26–27.

8 CC Act Sections 27. para (3).

9 Eszter Bodnár, Fruzsina Gárdos-Orosz and Zoltán Pozsár-Szentmiklósy, ‘Hungary. The State of Liberal Democracy’ in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *2017 Global Review of Constitutional Law* (I-CONNECT—Clough Center 2018) 129.

10 Fundamental Law Article T) para (1).

11 ‘Laws shall be Acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees. In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be laws’. [Fundamental Law Article T) para (2)].

directly binding force of EU regulation,<sup>12</sup> as well as of the generally recognised rules of international law. International treaties become part of the Hungarian legal system after their promulgation in Hungarian laws.<sup>13</sup>

The decisions of the HCC and judgments of ordinary courts can be also considered sources of law, but of course not in the sense used in common law legal systems. This kind of ‘judge-made law’ is a source of the interpretation of the law, taking into consideration its application. However, three important remarks have to be made in this regard.

Firstly, the decisions of the HCC are generally binding and have to be respected by every state organ, individual or legal entity.<sup>14</sup> In the *ruling* of the decisions of the Court, this requirement is rather clear: the statements expressed in the ruling part of a decision (e.g., on the annulment of a certain piece of legislation) have direct effect, directly changing some components of the legal system. However, in the *reasoning* of the decisions, there is no direct effect; therefore, the generally binding nature of it is not unequivocal. The reasonings expressed by the HCC at least do have an indirect effect, since every state organ has an interest in following the interpretation of the Court. Otherwise, future pieces of legislation or judicial decisions (the latter in the case of German-type constitutional complaints) which do not take into consideration the arguments expressed by the Court could be declared unconstitutional in the future by the HCC.

Secondly, based on the provisions of the Fundamental Law, the Curia (the highest-instance judicial forum in Hungary), in order to ensure the uniformity of the application of law by courts, shall issue ‘uniformity decisions’ which are binding on courts.<sup>15</sup> These uniformity decisions can be issued in cases which include theoretical questions that can be considered matters of principle: e.g., if there is a trend that courts, when interpreting the same legal provision, reach different conclusions related to the concerned legal question. Uniformity decisions can be also issued if there is a need for the correction of former uniformity decisions.<sup>16</sup> As a consequence, uniformity decisions in practice function as binding norms for the courts in the legal questions concerned.

Thirdly, an amendment to the Act on the organisation and administration of courts<sup>17</sup> introduced the so called ‘limited precedent system’ in 2020. Based on the new regulation, every final decision of the Curia has (de facto) the binding effect on courts after its publication.<sup>18</sup> As a consequence, individuals and legal entities (the subjects of the concerned legal dispute) are entitled to submit the so called ‘uniformity complaint’ to the Curia if, in a previous procedure, a panel of

12 Fundamental Law Article E para (3).

13 Fundamental Law Article Q para (3).

14 CC Act Section 39. para (1).

15 Fundamental Law Article 25 para (3).

16 Act CLXI. of 2011 on the organization and administration of courts Article 32. para (1) a.

17 Act CXXVII. of 2019.

18 Act CLXI. of 2011 on the organization and administration of courts Article 41/B. paras (1)–(2).

the Curia did not follow in the concerned legal question the previously published legal interpretation of the Curia. The ‘uniformity complaints’ are examined by a special panel of the Curia, which is entitled to repeal the concerned decision and to order a new procedure in the case.<sup>19</sup> As a consequence, the interpretations of the Curia do have the force of a precedent in future cases, and lower courts are also interested in taking those into account.

## **The role of references to national judicial decisions**

As described earlier, the decisions of the HCC can be considered the sources of interpretation of law, or more precisely, the Constitution (the Fundamental Law). Because the Hungarian legal system is not based on precedents in the classic sense,<sup>20</sup> when deciding a case, the HCC is not bound by former decisions (neither its own decisions nor decisions of other judicial fora) dealing with the same legal (constitutional) question. However, in order to build a coherent practice, the Court used to refer to its former, relevant decisions from the very beginning of its activity.<sup>21</sup> Moreover, the Court reiterates stable formulas in the reasoning parts of the decisions in order to emphasise the existence of a consistent practice in the given legal (constitutional) question.<sup>22</sup>

### *The role of self-references in CC adjudications*

Self-references play the most significant role in the practice of the HCC. As explained by László Sólyom, the founding president of the Court, in the early years of its activity, alongside the harmonisation ‘pre-constitutional norms’ with the Constitution by way of abstract judicial review, the Court has played a key role in formulating the meaning of the legal notions which are essential in a state governed by the rule of law.<sup>23</sup>

Every decision in which the HCC interpreted such a legal notion for the first time became the principal reference for future decisions dealing with similar legal (constitutional) questions. The Court has formulated these ‘first’ interpretations

19 Act CLXI. of 2011 on the organization and administration of courts Article 41/D. para (1) c.

20 The described ‘limited-precedent system’ can be considered an exception in this regard.

21 László Sólyom emphasises that the HCC ‘has been able to develop its own approach to the interpretation and contextualization of constitutional rights’. See László Sólyom, ‘The Hungarian Constitutional Court and Social Change’ (1994) 19 *YaleJIntL* 223, 237. One can add that in his concurring opinion to Decision 23/1990. (X. 31.) CC on the death penalty, Sólyom also claimed that the HCC builds a coherent system in its decisions which, as an ‘invisible constitution’, can serve as a stable standard of constitutionality in the future.

22 E.g., ‘... based on its consistent practice, reconfirmed in decisions (...), the Constitutional Court affirms that...’, ‘the core of the case law of the Constitutional Court...’, ‘according to the case law of the Constitutional Court’, ‘in line with the case law of the Constitutional Court’ etc. See, e.g., Decision 3/2020. (I. 3.) CC [purchasing electronic cigarettes] [26], [32], [35] [translated to English].

23 See Sólyom (n 21) 224–225.

in the case of classic fundamental rights,<sup>24</sup> key questions related to governmental structure<sup>25</sup> and constitutional principles<sup>26</sup> in the early nineties.

In some cases, the Court dealt with certain aspects of the concerned constitutional questions a few years later—therefore, these ‘additional’ interpretations were later referred to together with the ‘original’ cases.<sup>27</sup>

There are also few examples of the ‘first’ decisions in certain questions issued in the late nineties or the early 2000s—the reason behind this was mostly related to the complexity of the question, or its later occurrence due to the relatively late legislation.<sup>28</sup>

Until 2012 (entering into force of the Fundamental Law) the Court has used the technique of self-reference by (a) identifying the legal (constitutional) question at hand, (b) naming the first CC decision which interpreted the legal notion considered to be the key element of the legal question, also quoting the most important related ascertainments, (c) enumerating further CC decisions in which the original CC decision was ‘reconfirmed’ and then (d) building the argumentation related to the present case.<sup>29</sup> It has to be noted that due to the complexity of constitutional questions, as well as the requirement of evaluating all relevant circumstances of the case at hand, these ‘first’ decisions did not function as precedents, but rather as an important point of reference in the argumentation of the HCC.

After entering into force of the Fundamental Law, the HCC continued to refer to its former cases. The Court elaborated a standard for the reference to its previous practice. Based on this, the HCC is entitled to refer to the arguments expressed in its decisions issued before entering into force of the Fundamental Law, if this is possible, based on the identity or similarity of the concerned provisions of the Fundamental Law (and also the interpretation rules of the Fundamental Law) and the former Constitution. Moreover, the ascertainments made by the Court related to basic principles, fundamental rights and constitutional institutions which did not change fundamentally in the Fundamental Law are still applicable.<sup>30</sup>

24 E.g., Decision 23/1990. (X. 31.) [death penalty], Decision 15/1991. (IV. 13.) CC [data protection], Decision 64/1991. (XII. 17.) [abortion], 30/1992. (V. 26.) [freedom of speech], 4/1993. (II. 12.) [freedom of religion], Decision 64/1993. (XII. 22.) [right to property], Decision 34/1994. (VI. 24.) CC [freedom of information].

25 E.g., Decision 48/1991. (IX. 26.) CC, Decision 36/1992. (VI. 10.) [the function and competences of the head of the state and of the Government].

26 E.g., Decision 11/1991. (III. 5.) CC [legal certainty], Decision 38/1993. (VI. 11.) CC [separation of powers], Decision 30/1992. (V. 26.) [principle of proportionality], Decision 2/1993. (I. 22.) [representative and direct democracy].

27 E.g., Decision 52/1997. (X. 14.) CC [representative and direct democracy II.], 48/1998. (XI. 23.) [abortion II.], 13/2000. (V. 12.) [freedom of speech—national symbols].

28 E.g., Decision 22/2003. (IV. 28.) CC [euthanasia], Decision 4/2007. (I. 13.) CC [freedom of assembly].

29 See, e.g., Decision 33/2012. (VII. 17.) CC [legal status and remuneration of judges] [94] [translated to English].

30 Decision 22/2012. (V. 11.) CC.

The Fourth Amendment to the Fundamental Law<sup>31</sup> can be described as a line of demarcation regarding the references to former decisions of the HCC. The amendment prescribed that the decisions of the Court issued before entering into force of the Fundamental Law are null and void. It also indicated that the legal effects of the concerned decisions did not change.<sup>32</sup> This provision can hardly be interpreted otherwise than demonstrating force from the side of the National Assembly (alongside its legislative function, also entitled to amend the Fundamental Law with a two-thirds majority vote of its members) against the HCC, which in the previous years has struck down some legislative acts centred in the political agenda of the governing majority. In other words, the parliamentary majority (supermajority) required the Court not to refer to the ‘old’ standards related to constitutional principles and fundamental rights, but rather to elaborate new ones, in accordance with the basic concept of the Fundamental Law.

The HCC did accept this restriction and reformulated its standard concerning the applicability of its former decisions. Based on this new doctrine, the use of arguments expressed in the former decisions of the Court requires detailed reasoning, and it is possible only if the concerned provision of the Fundamental Law and the provision in the former Constitution, as well as their contexts, are identical. Additionally, it is required that based on the interpretation rules of the Fundamental Law and the particularities of the case, such reference (to the former HCC practice) is not excluded, but rather it is required to decide the case. This new doctrine also declared that the HCC can reformulate legal concepts elaborated based on the former Constitution even if the text of the Fundamental Law did not change; rather, the context of the case indicates such reconsideration.<sup>33</sup>

Since then, the Court intends to formulate a new ‘reference decision’ in the concerned legal (constitutional) questions to be quoted in future cases, and to enumerate at the same time its related decisions issued before entering into force of the Fundamental Law in order to demonstrate the consistence of its practice.<sup>34</sup>

31 Fourth Amendment to the Fundamental Law (25 March 2013). The Amendment was subject to intense critiques for other reasons as well. It contained provisions that had already been overruled the CC, such as the definition of family [Decision 43/2012 (XII. 20.) CC], rules on political advertisements in the commercial media [Decision 1/2013 (I. 7.) CC], the criminalisation of homelessness [38/2012 (XI. 4.) CC], etc. Moreover, it excluded the possibility of substantive review of future amendments to the Fundamental Law by the HCC by stating that the Court has competence only for formal (procedural) review of amendments [Article 24. para (5)]. For a detailed analysis, see, e.g., Opinion no. 720/2013 of the Venice Commission.

32 Fourth Amendment to the Fundamental Law, Section 19. para (2). This provision became part of the Closing and Miscellaneous Provisions of the Fundamental Law [point 5]: ‘The decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.’

33 Decision 13/2013. (VI. 17.) CC [31]–[32].

34 Examples on new ‘reference decisions’: Decision 6/2013. (III. 1.) CC [freedom of religion], Decision 3329/2017. (XII. 8.) CC [freedom of speech], 3307/2020. (VII. 24.) [freedom of assembly]. It has to be noted that in some cases the new regulation also indicated the

***The role of references to national judicial decisions***

The HCC is not part of the ordinary judiciary system; therefore, it has no role as an appellate court in ordinary judicial disputes. Instead, the basic function of the Court is to ensure the consistency of the legal system with the Fundamental Law. As described earlier, powers related to different forms of norm control (abstract and concrete, preliminary and posterior) as well as the different types of constitutional complaints (including constitutional complaints claiming the unconstitutionality of the judicial interpretation) support this function. The HCC has the exclusive power of authentic interpretation of the Fundamental Law; therefore, the interpretation of the Constitution by other fora, including ordinary courts, could not be relevant for the Court.<sup>35</sup> In the case of interpretation of other legal provisions (e.g., certain pieces of legislation as objects of norm control), the interpretations of ordinary courts could be taken into consideration by the HCC; however, this usually does not happen. Even when interpreting certain provisions of comprehensive codes of special legal fields (e.g., Civil Code, Criminal Code, Labour Code), based on which there is an extended and stable judicial practice, the Court does not refer to ordinary judicial decisions, but rather to its own decisions related to the legal question at hand.<sup>36</sup> Sometimes the HCC refers to the ‘judicial practice’ in abstract terms.

**The role of references to foreign judicial decisions**

Foreign judicial decisions appear in two ways in the decisions of the HCC. Firstly, the petitioners sometimes underline their arguments in their application by referring to the related practice of foreign courts (in most of the cases, the Bundesverfassungsgericht or the Supreme Court of the United States). In these cases, the HCC does not have to interpret in detail the cited foreign judicial practice—the reasoning of the decision many times does not enter into details in this regard. The second way is much more significant—when the Court deliberately builds its argumentation by citing and interpreting foreign judicial decisions. In some cases this happens by a formal enumeration of the most important ascertainments of the relevant foreign jurisdictions, but there are also examples of substantive

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reconsideration of the former reference decisions, while in other cases former ‘reference decisions’ did not exist—see, e.g., Decision 22/2016. (XII. 5.) CC on constitutional identity.

35 In this regard, it has to be noted that ordinary courts rarely refer in their decisions to the provisions of the Fundamental Law. In the period of the first four years after entering into force of the Fundamental Law (2012–2016), certain provisions of the Fundamental Law were cited only in 3.4% of judicial decisions (2,057 of 60,856). See Zódi Zsolt—Lőrincz Viktor, ‘Az Alaptörvény és az alkotmánybírói gyakorlat megjelenése a rendes bíróságok gyakorlatában—2012–2016’ [‘The Appearance of the Fundamental Law and the Practice of the Constitutional Court in the Practice of Ordinary Courts—2012–2016’] (2017) MTA LWP 22, [http://real.mtak.hu/73198/1/2017\\_22\\_zodi\\_lorincz.pdf](http://real.mtak.hu/73198/1/2017_22_zodi_lorincz.pdf) accessed on 19 July 2021.

36 E.g., Decision 3003/2021. (I. 14.) CC [on the notion of the close relative in the Civil Code].

considerations made based on these. It is important to emphasise that the Court never decides the case exclusively based on foreign precedents—rather it intends to strengthen its reasoning.

*The role of references to judicial decisions of other constitutional courts*

Based on Eszter Bodnár's research results, detailed empirical data show that the HCC refers to decisions of foreign courts (in a horizontal relation, except supra-national courts) with moderate frequency (compared to constitutional courts/supreme courts which frequently cite foreign case law, e.g., Canada, and countries where the relevant court almost never acts so, e.g., the Supreme Court of the United States). More precisely, in the first thirty years of its activity (1990–2019) the HCC referred to foreign law in 2.5% of its cases (246 of 9,766). The actual proportion of references to foreign judicial decisions is narrower, because this number also indicates the references to foreign legislation (constitutions and statutes). The vast majority of these HCC decisions refer to the German jurisdiction. The jurisdictions of the United States, France, Austria, the United Kingdom and Spain are also cited relatively frequently, as well as Central and Eastern European countries, especially Poland. Altogether, the jurisdictions of 28 countries served as a point of reference for the HCC in the first thirty years of its activity.<sup>37</sup>

Some remarks can be made in this regard. The influence of the German legal tradition is strong in the Hungarian legal culture—due historical and cultural reasons. Moreover, when starting their activity, the founding members of the HCC worked with the jurisdiction of the Bundesverfassungsgericht as a model. The legal concepts developed in German doctrine supported the HCC to found coherent answers to the most difficult questions related to the 'constitutionalization' of the legal system in a relatively short period of time. This influence was even stronger than the frequency of formal references of German case law.<sup>38</sup>

Starting from the beginning of activity, the HCC also made efforts to make the results of its activity visible: the most important decisions were translated to English and German and also presented at international conferences. As an early result of this visibility, the Constitutional Court of South Africa in its famous death penalty decision has cited the related Hungarian decision.<sup>39</sup> Due to its role played in the building process of the state governed by the rule of law, the HCC served as a model court in the region in the nineties. Even the visibility of its activity did not change in the previous decades: due to the changes in the related

37 See in detail Eszter Bodnár, 'The Use of Comparative Law in the Practice of the Hungarian Constitutional Court: An Empirical Analysis (1990–2019)' (2020) 61 *Acta Juridica Hungarica*. *Hungarian Journal of Legal Studies* 1, 1–22.

38 See, e.g., Catherine Dupre, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart 2003).

39 *S v Makwanyane and Another*, CCT/3/94, 6 June 1995, par. 38, 83.

regulation and practice (summarised earlier) the influence of the HCC on other jurisdictions is much weaker.

### *The role of references to judicial decisions of international courts*

The references to judicial decisions of international courts are relatively frequent in the practice of the HCC. In this regard, references are made in most of the cases to the practice of the European Court of Human Rights (ECtHR), while the European Court of Justice (ECJ) is mentioned by the HCC in cases which require constitutional dialogue in the broad sense. One can also note that these jurisdictions were always in the focus of the HCC: the Court referred to some decisions of these supranational judicial fora even before Hungary's ratification of the European Convention of Human Rights (1993) and Hungary's EU membership (2004).<sup>40</sup>

### *References to ECHR case law*

Evidently, the reference to the case law of the ECHR is present in the practice of the HCC in cases which are related to fundamental rights. The catalogue of fundamental rights included in the 'liberty and responsibility' chapter of the Fundamental Law in the most significant aspects (e.g., related to the function of the concerned rights, the principle of proportionality as a general standard of potential limitations) is similar to the provisions of the European Convention on Human Rights and its protocols. The logic of the Fundamental Law is different from that of the Convention in two aspects. Firstly, the Fundamental Law contains a general limitations clause, which requires respect for the core content of fundamental rights.<sup>41</sup> On the other hand, the Convention, in the case of many rights, specifies those goals which can be considered legitimate when it comes to the limitation of a right. Secondly, the Fundamental Law prescribes certain conditions related to the exercise of some fundamental rights, therefore, the protected scope of the rights could be different compared to the general provisions of the Convention.<sup>42</sup> Alongside other factors, these could be structural reasons why in certain cases the HCC and the ECtHR reach different conclusions.

As mentioned previously, the ECtHR is the most frequently cited supranational forum in the practice of the HCC. From the beginning of its activity until present, the Court has referred to the ECtHR in altogether 866 cases, and in 155 cases to the European Commission of Human rights.<sup>43</sup> Even after the first 'activist'

40 An illustrative example is the decision on the death penalty: Decision 23/1990. (X. 31.) CC.

41 Fundamental Law, Article I. para (3).

42 E.g., 'Exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others.' [Fundamental Law, Article VI. Para (1)].

43 Based on the public database of the HCC: <http://hunconcourt.hu/> (It has to be noted that these numbers cover every occurrence of the terms, including the arguments expressed by the petitioners).

period of the Court (marked by the presidency of László Sólyom), between 1999 and 2008, the Court has referred to 236 decisions of the ECtHR in 65 cases.<sup>44</sup> The cited cases are in many cases Hungarian ones, but there are also examples on the comprehensive analysis of the ECHR practice in a particular question. It is also detectable from the side of the HCC the formal intention to be in conformity with the ECHR practice—therefore, the role of the ECHR references could be considered as ‘quasi-authoritative’.<sup>45</sup> However, the analysis of the practice also shows that the HCC focuses on cases from the ECHR practice on a selective basis, in order to support its own view.<sup>46</sup> This ascertainment is also supported by the relative conformity of the HCC and ECtHR decisions: there are examples on ECtHR judgments declaring the violation of the Convention in a case which was not found previously unconstitutional by the HCC,<sup>47</sup> and also on the change of the approach of the HCC related to a question after a concerned EHtCR judgment.<sup>48</sup>

### *References to ECJ case law*

The HCC refers with relative frequency to the practice of the ECJ. Between 2004 (when Hungary became a member of the European Union) and present, the HCC has referred to the decisions of the ECJ in its reasonings in altogether 161 cases.<sup>49</sup> The references were made in most of the cases in order to support the reasoning of the Court. There are also examples on the citation of more (nine at most) ECJ decisions in a single HCC case.<sup>50</sup>

As for the interplay between the HCC and the ECJ, one has to highlight the concept of the Court on the relationship between EU law and Hungarian law. In its view, the Court has no competence for reviewing the conformity of the Hungarian law with EU law, and the interpretation of the EU law solely belongs to the ECJ.<sup>51</sup> However, in the Decision 22/2016. (XII. 5.) CC (the ‘constitutional

44 Zoltán Sente, ‘A nemzetközi és a külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában 1999–2008. Között’ [‘The Use of the Decisions of International and Foreign Judicial Fora in the Practice of the Hungarian Constitutional Court Between 1999–2008’] (2010) 2 *Jog Állam Politika. Jog- és Politikatudományi Folyóirat* [Law, State and Politics. Journal of Legal and Political Science] 47, 58–59.

45 Sente (n 44) 70.

46 Zoltán Sente, ‘The Interpretive Technique of the Hungarian Constitutional Court: A Critical View’ (2013) 14 *German Law Journal* 8 1591, 1602.

47 See, e.g., Decision 3076/2013. (III. 27.) CC and *Case of Baka v. Hungary*, Application no. 20261/12, 23.06.2016. [ending the term of the President of the Supreme Court].

48 See, e.g., *Bukta and Others v. Hungary*, Application no. 25691/04, 2007.07.17. and Decision 75/2008. (V. 29.) CC [freedom assembly].

49 Based on the public database of the HCC: <http://hunconcourt.hu/> (It has to be noted that this numbers covers every occurrence of the term, including the arguments expressed by the petitioners).

50 Decision 26/2015. (VII. 21.) CC.

51 See Ernő Várnay, ‘Az Alkotmánybíróság és az Európai Bíróság. Együttműködő alkotmánybíráskodás?’ [‘The Constitutional Court and the European Court of Justice. Constitutional

identity decision’) the Court formulated important remarks in relation to its competence and the interpretation of EU law. According to the Court, it has competence for reviewing the applicability of EU regulations which (a) are in contradiction with the level of protection of fundamental rights stipulated in the Hungarian constitutional order, (b) are issued *ultra vires*, and therefore, are in contradiction with the sovereignty of the country and (c) are in contradiction with Hungary’s constitutional identity.<sup>52</sup> The Court stipulated its competence in abstract terms in the previously summarised fields, emphasising the importance of the constitutional dialogue with the ECJ.

However, the genuine form of constitutional dialogue, initiating preliminary reference before the ECJ, did not take place on the part of the HCC until now, a trend which is subject to well-founded critiques in the literature.<sup>53</sup> Until present, a different kind of dialogue took place: the HCC did suspend its decision-making in politically sensitive cases (‘NGO Act’, ‘CEU Act’) in which infringement procedures were initiated by the European Commission, in order to wait for the decision of the ECJ in the concerned cases.<sup>54</sup>

## Conclusions

The practice of the HCC was stable in the past 31 years of its functioning from the point of view of references to judicial decisions. The decisions of the HCC are not precedents in its classic (common law) sense; however, the Court quotes in every case its own relevant practice—in most of the cases by citing the ascertainties of the ‘reference case’ (the first case in which the legal concept/institution/notion was interpreted) and then enumerating other decisions in which the mentioned interpretation was taken into consideration. The purpose of this technique is to highlight the (planned) coherent practice of the Court. One can add that this technique can enhance the transparency of the structure of the reasoning of the decisions. However, alongside the transparent case law, there is also a need for transparent and convincing argumentation in order to strengthen public trust in the activity of the Court.

The reference to other national judicial fora is not present in the practice of the HCC, while decisions of foreign jurisdiction (in a horizontal relation) occur

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Review in Cooperation?’] (2019) LX. Állam és Jogtudomány [State and Legal Science] 2, 63, 64–65.

52 For a detailed analysis, see Veronika Kéri—Zoltán Pozsár-Szentmiklós, ‘The Decision of the Hungarian Constitutional Court on Constitutional Identity [Decision 22/2016. (XII. 5.) CC]’ (2018) *Romanian Journal of Comparative Law* 2, 299.

53 Fruzsina Gárdos-Orosz, ‘Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference’ (2015) *16 German Law Journal* 6, 1569.

54 Resolution 3198/2018. (VI. 21.) CC [NGO Act], Resolutions 3199/2018. (VI. 21.) CC, 3200/2018. (VI. 21.) CC [Act on higher education] Later the ECJ declared in both cases the violation of EU law. For a detailed analysis of the cases which can be considered part of the constitutional dialogue, see Várnay (n 51).

occasionally in the reasonings of the Court. There is an extended practice of references to the ECtHR case law and a relatively less intense practice of references to ECJ decisions. In the case of both supranational jurisdictions, it is required from the HCC to open genuine constitutional dialogues.

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# 6 Precedents and case-based reasoning in the adjudications of the Italian Constitutional Court

*Giovanni Cavaggion*

## 1. The position of the *Corte Costituzionale* in the Italian legal system

In the Italian legal system, the establishment of the Constitutional Court was one of the most prominent changes brought about by the transition from the Fascist regime to the current republican democratic Constitution of 1948. The *Corte Costituzionale* is a specialised and centralised Court vested with the power of constitutional review of legislation in relation to its compatibility with both the fundamental constitutional principles and rights (enshrined in Part I of the Constitution) and the rules that guarantee the balance of power among the different constitutional bodies and their functioning (enshrined in Part II).

The Constitutional Court is regulated by Articles 134–137 of the Italian Constitution, by Constitutional Laws Nos 1/1948 and 1/1953, and by Statutory Law No 87/1953. According to Article 135 of the Constitution, the Court is composed of fifteen judges (each with a term of office of nine years)<sup>1</sup>, selected from among the most senior legal practitioners in the country.

The Italian Constitution designs the Constitutional Court as a ‘pure’ guarantee body. This means that the Court is not part of any of the three traditional ‘powers’ of the European legal tradition (legislative, executive, judiciary), but rather it is a new and independent ‘power’, vested with the task of enforcing the Constitution as the fundamental law of the Republic. More precisely, Article 134 of the Constitution states the following:

The Constitutional Court shall pass judgement on:—controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;—conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;—charges brought against the President of the Republic, according to the provisions of the Constitution.

<sup>1</sup> Five constitutional judges are elected by the parliament in joint session, five are appointed by the President of the Republic and five are elected by the judiciary.

### 1.1. *The interactions between the Constitutional Court and the judiciary*

Naturally, despite being part of a separate and independent power, due to its specific functions, the Constitutional Court is strictly connected to the judiciary and consistently interacts with the other courts and tribunals of the Italian legal system.

Firstly, a connection between the Constitutional Court and the judiciary can be found in the constitutional provision that regulates the composition of the Court and the election of its members (Article 135 of the Constitution).<sup>2</sup> As already mentioned, five out of the fifteen constitutional judges are elected by the judiciary and, more precisely, by the Supreme Courts of the Italian jurisdiction, which are the Court of Cassation (civil and criminal jurisdictions, three constitutional judges), the Council of State (administrative jurisdiction, one constitutional judge) and the Court of Auditors (accounting jurisdiction, one constitutional judge). In addition to *electing* five constitutional judges, the members of the judiciary can also *become* constitutional judges in their own right: Article 135 of the Constitution states that constitutional judges can be chosen (also) from among ordinary or administrative judges of the higher courts.<sup>3</sup>

Secondly, in its day-to-day activities, the Constitutional Court closely interacts with the judiciary in the framework of the so-called incidental constitutional review process. According to Article 134 of the Constitution, the Constitutional Court (and only the Constitutional Court) has the power to adjudicate cases ‘regarding the constitutional legitimacy of the laws and acts having the force of law issued by the State and the Regions’<sup>4</sup> and, consequently, to strike down (annul) those laws that are incompatible with the Constitution.<sup>5</sup> In the incidental constitutional review process, the connection between the Constitutional Court and the judiciary lies in the fact that the *Corte Costituzionale* cannot freely decide on which questions to examine: a law must be brought before the Court by a judge who is presiding over a specific pending case. This means that each of the hundreds of tribunals and courts that compose the Italian judiciary, while presiding over a case, can (and must) refer a ‘question of constitutionality’ to the Constitutional Court, if said tribunal or court (the so-called *a quo* judge) suspects that the law that should be applied to the case might be unconstitutional. From

2 See Federico G. Pizzetti, ‘La Corte costituzionale’ in Paola Bilancia and Eugenio De Marco (eds.), *L’ordinamento della Repubblica. Le istituzioni e la società* (CEDAM 2018) s 2.

3 According to Art 135 Cost., constitutional judges must be selected from among judges (or retired judges) of the Supreme Courts of the Italian jurisdiction, full professors of law and lawyers with at least twenty years of practice.

4 This formula includes statutory laws, governmental law decrees and delegated legislative decrees, as well as regional and provincial laws.

5 Within the constitutional review process, the Constitutional Court can assess both the formal constitutionality (whether the act has come into existence in accordance with the procedures outlined by the Constitution) and substantive constitutionality (whether the contents of the act are compatible with the Constitution) of a law (or an act having the force of law).

this perspective, Italian judges have been described as the ‘gatekeepers’ of the Constitution<sup>6</sup>, because, in order to reach the Constitutional Court, the constitutional review process must usually pass their preliminary scrutiny.

Thirdly, Article 134 of the Constitution states that the Constitutional Court is also vested with the power to decide ‘on conflicts regarding the allocation of power among the branches of the State’. Through this function, the Court enforces the separation of powers as outlined by the Constitution in cases in which a constitutional body denounces that another body of the state has infringed on its constitutional prerogatives. The matter can very well involve the judiciary, since the judiciary itself is a constitutional power and therefore it can become a party in the ‘conflict of powers’.<sup>7</sup>

### 1.2. *The vertical binding effects of the Constitutional Court’s decisions*

The Constitutional Court also interacts with the judiciary at the end of the constitutional review process through its adjudications.

With regard to the vertical binding effects of the Court’s decisions, it is important to keep in mind that, according to Article 136 of the Constitution, ‘When the Court declares the constitutional illegitimacy of a law or of an act having force of law, the law ceases to have effect the day following the publication of the decision’. This means that only the decisions that declare the unconstitutionality of a law (*sentenze di accoglimento*) have a general (*erga omnes*) binding effect in the legal system and therefore are binding for each and every Italian tribunal or court (for the judiciary as a whole). Put differently, when the Court declares the unconstitutionality of a law (or provision), that law loses its effectiveness the day after the Court’s decision is published, and from that moment onwards it can no longer be applied by the judiciary. As a matter of fact, the binding force of these kinds of decisions is so strong that the unconstitutional law loses its effectiveness *retroactively* (*ex tunc*), which means that it can no longer be applied not only in future cases (in which future events will be adjudicated), but also in pending cases (in which past events are currently being adjudicated).<sup>8</sup>

6 See Piero Calamandrei, *La illegittimità costituzionale delle leggi nel processo civile* (CEDAM 1950) XII.

7 This could be the case, just to give a few examples, of a conflict between a tribunal/court and one of the Houses of Parliament regarding the immunity guaranteed to MPs by the Constitution, or of a conflict between the Parliament and a court regarding cases of judicial law-making.

8 The only exception is decisions on past cases that became *res judicata* or past events that are no longer disputable in court. The exception to these exceptions is represented, in turn, by criminal convictions that have become *res judicata*: if the law that established a criminal offence is struck down by the Constitutional Court, all convictions based on said law immediately lose their effectiveness.

It must be noted, however, that these decisions do not qualify as ‘precedents’ (strictly speaking)<sup>9</sup> from the vertical perspective; on the one hand, this is because they do not obtain their binding force from a *stare decisis* doctrine, but rather directly from the Constitution (Article 136 of the Constitution), and on the other hand, because the *Corte Costituzionale* and the judiciary are two separate powers, and consequently the object of the constitutional review performed by the Constitutional Court and the object of the adjudications of ‘regular’ courts and tribunals are fundamentally different in nature.

Conversely, the decisions that reject a question of constitutionality and declare it unfounded (*sentenze di rigetto*) do not have general vertical binding effects, since with these decisions the Constitutional Court only rejects the specific question of constitutionality *as it was raised by the a quo judge in the case at hand*. This does not mean, however, that the law on which the question of constitutionality was raised should automatically be regarded as constitutional. In fact, the same judge (or another judge) could very well raise a new question of constitutionality on the same law, for example, by using a different line of legal reasoning or a new argument.<sup>10</sup>

In light of the foregoing, it can be safely stated that, even though the Constitutional Court is not part of the judiciary *strictu sensu*, the connection between the *Corte Costituzionale* and the other tribunals and courts of the legal system is strong, to the point that scholars often describe it as a ‘permanent dialogue’ that involves the Court, on the one hand, and the ‘thousands of judges’ that compose the judiciary, on the other hand.<sup>11</sup> As I will argue in the following sections, precedents and case-based reasoning play a pivotal role in this dialogue.

## 2. The role of the *Corte Costituzionale*’s references to national judicial decisions

In order to understand the role of references to national judicial decisions (which include self-references and references to the decisions of other national courts and tribunals) in the Italian Constitutional Court’s adjudications, it is necessary to move forward based on the premise that Italy, as with many other continental European legal systems, is a civil law system. This means that in the Italian legal system, judicial precedents are not a source of the law and that the judiciary is

9 On this issue, see Adele Anzon, *Il valore del precedente nel giudizio sulle leggi* (Giuffrè 1995) 137 ff.

10 As a matter of fact, it could be argued that rejection decisions do have a vertical binding effect, which is limited to the prohibition, for the *a quo* judge, to raise a question of constitutionality that is entirely identical to the one that the Court has already rejected. See Giuseppino Treves, ‘Il valore del precedente nella giustizia costituzionale italiana’ in Giuseppino Treves (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale* (UTET 1971) 6.

11 See Segreteria generale della Corte costituzionale, *Che cos’è la Corte costituzionale?* (Corte Costituzionale 2020) 41 ff.

not bound by an obligation of *stare decisis*. Consequently, precedents are, theoretically, deprived of any *legal* binding force both in the horizontal and vertical dimensions. This is also true for the Constitutional Court, which is an independent constitutional body that does not belong to the judiciary (see section 1) but, nevertheless, uses a method of adjudication that is fundamentally jurisprudential in nature.

Actually, it could be argued that it is precisely because its method of adjudication is a jurisprudential one that the Constitutional Court is inevitably drawn towards incorporating references in its decisions.<sup>12</sup> As a matter of fact, precedents are heavily featured in the jurisprudence of the courts and tribunals of civil law systems, in which the *jurisprudence constante* (a series of concordant decisions on the same matter), despite lacking binding legal value, is still regarded as extremely persuasive for subsequent judges (see section 2.1).

Moreover, due to its connection and interaction with the judiciary (see section 1), the Constitutional Court, while interpreting a law in order to assess its (potential) unconstitutionality (especially in the incidental constitutional review process), must often refer, at least to some extent, to the *jurisprudence constante* of other national courts or tribunals (see section 2.2).

### 2.1. The role of self-references

The role and relevance of self-references in the Italian Constitutional Court's decisions has been the object of ample academic debate in the last decades. Historically, scholars developed two different theories on the matter.

The first theory argues that, because precedents have no legal value in the Italian legal system (and since this also applies to the *Corte Costituzionale*<sup>13</sup>), the Constitutional Court can freely choose whether or not to refer to its own previous decisions in its adjudications. However, the Court is by no means (legally) bound to stick by said choice and, consequently, by its own precedents.<sup>14</sup> Differently put, according to this theory, even if an obligation for the Court to justify its choice when disregarding one of its precedent decisions existed, said obligation would not have a legal basis, but rather a 'factual', 'moral', 'rational' or 'cultural' one.<sup>15</sup>

12 Because constitutions are legal texts in their own regard, Constitutional Courts are naturally drawn towards the instruments, criteria, means and techniques of legal and judicial interpretation. See Anzon (n 9) 9.

13 The exception is represented by the Constitutional Court's decisions that declare the unconstitutionality of a law (*sentenze di accoglimento*) ex art 136 Cost. (see section 1.2). However, these decisions are binding for the Constitutional Court from a horizontal perspective and for the adjudication of identical (not just similar) cases, not as 'precedents' *strictu sensu*, but rather because they expunge (annul) the relevant law or provision from the legal system, thus creating a *res judicata* that prevents that same law or provision from becoming the object of future constitutional reviews. On this issue see Anzon (n 9) 144.

14 See Norberto Bobbio, *Studi per una teoria generale del diritto* (Giappichelli 1970) 41 ff.

15 See, *ex multis*, Anzon (n 9) 166.

A second theory argues that the Constitutional Court's precedents (and precedents in general) are provided with (at least) a 'mild' legal value, which finds its basis in the particularly strong 'persuasive effectiveness' of the Court's previous decisions (given its pivotal role as the main safeguard of the Constitution in the legal system) and in the general principles of equality, reasonableness (*ragionevolezza*) and the rule of law that require a minimum level of predictability regarding judicial decisions. According to this theory, these principles compel the Court to maintain a certain degree of stability in its jurisprudence, since it would be illogical (unreasonable), from both a substantial and legal perspective, to differently assess identical or even similar cases without a convincing explanation.<sup>16</sup>

In practice, regardless of which theory is correct, it can be safely stated that the Constitutional Court, since the beginning of its jurisprudential activity in 1956, has, *de facto*, recognised a certain degree of horizontal binding force to its own previous decisions when adjudicating similar cases. It must also be stressed that the stability, in a horizontal dimension, of the Court's jurisprudence is enhanced by the role of the *Corte Costituzionale* as the only body vested with the power of constitutional review in the Italian legal system (see section 1), as well as by the fact that the Court functions as a single panel that does not allow dissenting opinions and that is composed of judges with a fairly long term of office.<sup>17</sup> Therefore, there is basically no risk of diverging decisions on the same matter over reasonably short timeframes. Moreover, the Constitutional Court usually issues a low number of decisions every year (around 300 on average); this indirectly reinforces the stability of its jurisprudence, because a low number of decisions also means minimal variance between them.<sup>18</sup>

Due to the combination of these 'stabilising factors', scholars argue that the horizontal binding force of the Court's precedents is actually quite strong, even though it is not regarded (save for a few exceptions) as legal in nature. Put differently, the fact that the Constitutional Court's previous decisions do not have, in theory, any *legally* binding force in a horizontal dimension for the adjudication of similar cases does not necessarily mean that they do not have, in practice, some level of *substantially* binding (persuasive) force on the Court.<sup>19</sup>

16 See, *ex multis*, Alessandro Pizzorusso, 'La motivazione delle decisioni della Corte costituzionale comandi o consigli?' (1963) 2 *Rivista trimestrale di diritto pubblico* 345. On the possibility of recognising some form of legal value to precedents in general in the Italian legal system see, *ex multis*, Gino Gorla, 'Precedente giudiziale' in *Enciclopedia giuridica* (Istituto della Enciclopedia italiana 1990).

17 See Alessandro Pizzorusso, 'Stare decisis e Corte costituzionale' in Giuseppino Treves (ed.), *La dottrina del precedente nella giurisprudenza della Corte costituzionale*, cit., 55 ff.

18 See Enrico Albanesi, 'The Role of Precedent in the Italian Legal System (with Specific Attention to Its Use Made by the Italian Corte Costituzionale)' (2018) 19 *REDP* 242.

19 The relevance of the Court's own precedents for constitutional judges is confirmed by the fact that a section of the 'dossiers' that the Court's offices and the judges' assistants prepare for each case is always devoted to the review of the Court's previous decisions on the same (or on a similar) matter. See Giacomo Canale, 'L'uso "tendenziale" del precedente nella giurisprudenza costituzionale e i suoi possibili sviluppi futuri' (2020) *Consulta online* 5.

Within this framework, the Constitutional Court regularly refers to its own precedent decisions mainly in order to: (i) found and strengthen its legal reasoning (*ratio decidendi*) when declaring the unconstitutionality of a provision; (ii) argue that a question of constitutionality is unfounded or inadmissible; (iii) rule out that its precedent jurisprudence is applicable to a given case ('distinguishing'); (iv) confirm the *ratio decidendi* of its precedent decision(s), while slightly modifying it and clarifying it, in order to change its scope ('loosening'); and (v) explain the reasons why it chooses not to follow its previous jurisprudence on a given matter ('overruling').<sup>20</sup>

In cases (i) and (ii), the Court uses self-references to reinforce its reasoning and adjudications on a given matter by supporting them through synthetic references to its legal arguments in similar or comparable cases<sup>21</sup>, thus leveraging the 'persuasive force' of its previous decisions. These references usually take the form of a quotation or paraphrase of the part of the previous decision that contains the *ratio decidendi* that the Court laid down in a similar case (which is used to summarise the Court's legal reasoning) and that it wishes to sustain (or apply) in the case at hand.<sup>22</sup> The reference is accompanied by the relevant decision's number and year (for example, 'Decision No 1/1956'), which allows the reader to verify it. Moreover, it is not uncommon for the Court to refer not only to a single precedent, but to a whole line of concurring jurisprudence (*jurisprudence constante*), and therefore to quote a single *ratio decidendi*, accompanied by a list of precedent decisions in which the same *ratio decidendi* was consistently applied (for example, 'Decision Nos 1/1956, 2/1957, 3/1958'). Obviously, the higher the number of concurring previous decisions, the higher the level of persuasiveness is for the *ratio decidendi*.

These kinds of references allow the Court to strengthen the foundation of its legal motivation while avoiding unnecessary repetitions, as would happen if it had to reproduce the same line of reasoning in its entirety every time that it wished to apply a given *ratio decidendi*. At the same time, these references allow the Court to present its legal reasoning as the natural consequence of a harmonious chain of concurring adjudications.<sup>23</sup>

In cases (iii), (iv) and (v), the Constitutional Court refers to its previous decisions in order to rethink its stance on a given matter by either distinguishing between cases, loosening the scope of a previous *ratio decidendi* or, sometimes, by overruling its own previous jurisprudence. The Court is free to do so precisely

20 See Maurizio Pedrazza Gorlero, 'Introduzione ad una ricerca sul precedente nella giurisprudenza della Corte costituzionale' in Maurizio Pedrazza Gorlero (ed.), *Il precedente nella giurisprudenza della Corte costituzionale* (CEDAM 2008) 25 ff.

21 See Gustavo Zagrebelsky, 'Caso, regola di diritto, massima' in Giovanna Visintini (ed.), *La giurisprudenza per massime e il valore del precedente* (CEDAM 1988) 96 ff.

22 It must be stressed that, in some cases, the Court might choose to quote a segment of a previous decision that, while not being technically part of its *ratio decidendi*, still contains an important general statement on a constitutional law matter. See Pizzorusso (n 17) 61.

23 See Pedrazza Gorlero (n 20) 2.

because its precedents, while persuasive, lack a legally binding horizontal force. However, it must be stressed that the *Corte Costituzionale* is the constitutional body vested with the power of striking down (annulling) laws made by parliament, which is, in turn, the only constitutional body directly elected by the people. This means that a shift in the Court's jurisprudence, if it leads to the annulment of laws that are critical for the political programme of the parliamentary majority, risks being perceived as a politically motivated move by the public. Consequently, in light of its complex role in the constitutional system, when the Court considers the possibility of diverging from its previous decisions (through the distinguishing, loosening or overruling techniques), it must be particularly careful, and if it chooses to do so, it must thoroughly explain its legal reasoning.<sup>24</sup>

This is true especially with regard to overruling, because overruling is the jurisprudential technique that creates the highest degree of unpredictability in the Court's adjudications. However, overruling still can (and, in some cases, must) happen, in particular over longer timeframes, when there is a noticeable shift in the *idem sentire* in Italian society on a given matter. A famous example of this is the case of Article 559 of the Italian Criminal Code, under which adultery was punished as a criminal offence only when it was committed by a wife (but not by a husband). The Constitutional Court initially found, with its Decision No 64/1961, that Article 559 was not unconstitutional; the Court argued that a wife's infidelity was perceived, by the legislator and by Italian society, as a more serious offence than that of a husband. However, seven years later, the Court re-examined the matter and overruled its own precedent with Decision No 126/1968, finding that (in an Italian society that was rapidly evolving) Article 559 could no longer be regarded as compatible with the fundamental constitutional principle of moral and legal equality between spouses established by Articles 3 and 29 of the Constitution.

At any rate, it must be stressed that, despite the frequent use of self-references on the Constitutional Court's behalf, there are still many cases in which the Court does not use existing precedents and does not refer to its previous decisions in similar cases. For example, in some cases, the Court might choose to overrule its previous jurisprudence on a given matter without mentioning the precedent adjudications that it is going to disregard.<sup>25</sup> In other cases, the Court might choose to present the *ratio decidendi* of a decision without referring to its existing precedents that leveraged the same line of legal reasoning in similar cases. This can happen precisely because *stare decisis* is not a principle in the Italian civil law system and, ultimately, the Court is free to decide which level of binding force it wishes to recognise regarding its own precedent decisions.

24 See, *ex multis*: Pizzorusso (n 17) 56; Anzon (n 9) 166. In general, on the issues connected with judicial law-making in constitutional courts in Europe, see Monika Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020).

25 See Canale (n 19) 8.

## 2.2. The role of references to national courts/tribunals' decisions

The Italian Constitutional Court also refers, in some cases, to the jurisprudence of other national courts or tribunals. After all, if the thousands of judges that compose the judiciary are the 'gatekeepers' of the Constitution (see section 1.1), it is only natural for the Constitutional Court to take their jurisprudence into account when assessing a case.

Preliminarily, it must be stressed that, obviously, in the incidental constitutional review process, the Constitutional Court must refer to the ordinance of the *a quo* judge, since it is with that ordinance that the question of constitutionality was referred to the Court and the constitutional review process was activated. The ordinance that raises a question of constitutionality, however, is not an actual 'precedent' nor a previous adjudication, because it is not a final decision in a previous similar case, but rather is a temporary processual act from which the incidental constitutional review process originated in the case at hand.

Therefore, when it comes to case-based adjudication, the analysis must focus on the Constitutional Court's references to final decisions of the judiciary in previous cases. This kind of reference is particularly frequent, especially when the Constitutional Court has to determine the correct *interpretation* of the law that has become the object of its scrutiny.

As a matter of fact, all forms of legal reasoning (including constitutional review) must always distinguish between the *text* of the law and the *rule* that can be inferred from said text through its interpretation.<sup>26</sup> A single text can be interpreted in many different ways, and hence it can serve as the legal basis for multiple different rules. This distinction generates a number of possible interactions between the Constitutional Court and the judiciary, as in order to exercise their respective powers, both the Constitutional Court and the other Italian courts and tribunals have to first interpret the text of the applicable law in order to infer a workable rule from it.<sup>27</sup> But what if the Constitutional Court's interpretation and the judiciary's interpretation of the same law diverge?

Normally, the Italian Constitutional Court is not bound to the literal interpretation of the law nor to the interpretation of the law embraced by the judiciary (or by the majority of the tribunals and courts that compose the judiciary). It is precisely due to this perspective that, historically, the *Corte Costituzionale* has claimed the power to declare the incompatibility with the Constitution of a law *as it is interpreted by the judiciary* or, conversely, to declare that a law is not incompatible with the Constitution because *it can be interpreted in other (non-unconstitutional) ways that the judiciary did not consider*.

26 On this matter see Andrea Proto Pisani, 'Three Notes About "Precedent" in the Evolution of the Jurisprudence of the Constitutional Court, in the Jurisprudence of a Necessarily Restored Court of Cassation and in the Interpretation of Processual Rules' (2018) 4 RDRST 188.

27 See Pizzorusso (n 17) 49 ff.

The Italian framework, however, is noticeably complicated due to the existence of the Court of Cassation (*Corte di Cassazione*), which is the highest national court on civil and criminal matters. The Court of Cassation (which is organised in multiple civil and criminal sections) is usually the third-instance court (the court of ‘last resort’) and, under Article 111 of the Constitution, it assesses only whether the first- and second-instance decisions correctly identified, interpreted and applied the existing laws in the case at hand. Consequently, the Court of Cassation cannot assess the merits of the case. Moreover, one of the functions of the Court of Cassation is to ensure the ‘uniform interpretation of the law in the legal system’ (*nomofilachia*).

The Court of Cassation’s decisions, as with the decisions of every other court in the Italian legal system, are not legally binding precedents, although they are ‘final’ in the sense that they cannot be further appealed. However, due to the Court of Cassation’s position as the highest judge in the legal system and due to its task of ensuring that the law is interpreted consistently over time, its decisions are provided with a high degree of ‘persuasiveness’ in their own regard. This is especially true when the Court of Cassation adjudicates a case in its ‘joint sections’ (*sezioni unite*) composition.

In light of this, it comes as no surprise that the powers of the Court of Cassation and those of the Constitutional Court can, in certain cases, interfere with each other. While the Court of Cassation is vested with the power of clarifying (with highly persuasive decisions) the correct interpretation of existing laws, the Constitutional Court is vested with the power to assess the compatibility of existing laws with the Constitution. As already mentioned, in order to perform this task, the Constitutional Court must (obviously) first interpret the law at hand in order to determine its actual meaning. Consequently, the question that the Italian legal system had to answer was whether or not the Court of Cassation’s previous decisions that clarified the correct interpretation of a given law were relevant (and, if they were, to what extent) for the Constitutional Court when assessing the same law’s constitutionality.

In a first phase, the two courts struggled to define their respective roles and powers and sometimes clashed with each other. In a number of decisions following its inauguration in 1956, the Constitutional Court consistently stated that, when interpreting a law in order to answer a question of constitutionality, it did not consider itself bound by the Court of Cassation’s previous decisions that clarified the correct interpretation of the same law. Put differently, the Constitutional Court argued that the fact that a given law was consistently interpreted in a certain way by the judiciary was irrelevant in the constitutional review process: if the Constitutional Court were to find that said law should have been interpreted in a different way, it would have stated so, regardless of how the law actually ‘lived’ in the judiciary’s decisions.<sup>28</sup>

28 See, for example, Decision Nos 8/1956 and 11/1965.

This means that the Court could reject questions of constitutionality that were based on the judiciary's consistent interpretation of a law by simply pointing out that another possible (constitutional) interpretation existed, thus claiming the power to 'reveal' (to the judiciary) the correct interpretation of the law. However, because decisions of *rigetto* are not provided with a general vertical binding force (see section 1.2), the judiciary often ended up insisting on the interpretation that was ruled out by the Constitutional Court, and consequently the Constitutional Court was forced to issue a second decision (this time a legally binding decision of *accoglimento*) on the same matter in order to declare the unconstitutionality of the relevant law *as interpreted by the judiciary*.<sup>29</sup>

In a second phase, the Constitutional Court (starting with its Decision No 276/1974) developed the doctrine of *diritto vivente* ('living law'). According to this theory, *diritto vivente* is created when a specific interpretation of a law (or of a provision) by the judiciary is consolidated and consistent over time, and therefore when all (or most) of the judges in the legal system interpret a given law (or provision) in the same way over a considerable time span. In this case (and in this case only), the Constitutional Court accepted that the relevant law (or provision) must be examined (in the constitutional review) *as it is interpreted by the judiciary* (as it *lives* in the judiciary's interpretation). The Constitutional Court further clarified that in order for an interpretation to be regarded as 'consolidated' (and thus become *diritto vivente*), the interpretation must come from the Court of Cassation, and not from any national court or tribunal.<sup>30</sup> Furthermore, the interpretation must come from the 'joint sections' of the Court of Cassation<sup>31</sup> or, if that is not the case, it must, at least, not be disputed within its sections.<sup>32</sup>

Within this framework, the Court of Cassation's previous decisions gain some level of binding force in the constitutional review process, since they limit the Constitutional Court's margin of discretion in determining the meaning of the laws that it scrutinises.

In a third phase, the doctrine of *diritto vivente* established itself and the two courts overcame their past conflicts (notwithstanding a few exceptions). In the current state of the art, the Court of Cassation is vested with the power of clarifying the correct interpretation of a given law or provision, while the Constitutional Court is vested with the power of declaring that such an interpretation is unconstitutional.<sup>33</sup> Starting with Decision No 276/1974, the Constitutional Court has applied this doctrine in hundreds of cases<sup>34</sup>, in which the Court has assessed both

29 See, for example, Decision Nos 26/1961 and 52/1965.

30 See, *ex multis*, Decision Nos 171/1982, 257/1984, 326/1994 and 41/2006.

31 See, for example, Decision No 260/1992.

32 See, for example, Decision Nos 40/1984 and 32/2007.

33 The Court of Cassation is the primary recipient of the power to interpret the law and the Constitutional Court is the primary recipient of the power to interpret the Constitution. See Antonino Spadaro, *Limiti del giudizio costituzionale in via incidentale e ruolo dei giudici* (ESI 1990) 19 ff.

34 Just to give some examples, see Decision Nos 266/2006, 64/2008, 197/2010, 338/2011, 208/2014 and 1/2015.

the existence of *diritto vivente* and its constitutionality.<sup>35</sup> This, in turn, means that in these decisions, the Constitutional Court refers to the relevant jurisprudence of the Court of Cassation and analyses it in order to determine whether it reaches the level of stability required to be regarded as *diritto vivente*. If that threshold is met, the Constitutional Court considers itself bound by the judiciary's interpretation of the law and cannot suggest other possible (constitutional) interpretations of the same law in order to reject the question of constitutionality. In some cases (which are, currently, not very common), the Constitutional Court has even recognised the existence of *diritto vivente* without mentioning the individual, specific decisions of the Court of Cassation from which said recognition originated: when doing so, the Constitutional Court usually refers, in general, to the 'consolidated jurisprudence of the Court of Cassation' or to the establishment of *diritto vivente* on the matter.<sup>36</sup>

Lastly, it must be noted that in some (quite rare) cases, the Constitutional Court might also choose to refer to the previous decisions of first- or second-instance tribunals and courts. References to these kinds of decisions, however, are far less frequent than those to the Court of Cassation's decisions, because precedents of first- and second-instance judges are not provided a high degree of 'persuasiveness' in the legal system. This means that the Constitutional Court enjoys a wide margin of freedom in interpreting the relevant law, since it is not bound by any kind of *diritto vivente*. From this perspective, the decisions of first- and second-instance judges are usually mentioned by the Constitutional Court merely *ad adiuvandum* to reinforce its legal reasoning on a given issue.<sup>37</sup>

### 3. The role of the Constitutional Court's references to foreign, international and European judicial decisions

In the last couple of decades, the Italian Constitutional Court has shown an increasing willingness to open itself up to a dialogue with the two European supranational courts (the European Court of Justice [ECJ] and the European Court of Human Rights [ECtHR]), on the one hand (see section 3.2), and to a comparative approach towards the jurisprudence of other European (or even Western) national legal systems, on the other hand (see section 3.1).<sup>38</sup>

Consequently, it is not unusual to find, in the Constitutional Court's more recent decisions, references to the precedents of European or foreign courts. These references can be found both in the Court's factual premise (in which the Court reports the arguments of the *a quo* judge and of the parties) and in its legal reasoning (in which the Court actually performs the constitutional review). Moreover, it is possible to further divide this second kind of referencing into two

35 See, *ex multis*, Decision Nos 361/2001 and 20/2009.

36 See, for example, Decisions Nos 32/1995, 25/1999, 264/1999, 117/2000 and 329/2000.

37 A recent example can be found in Decision No 242/2019.

38 See Paola Bilancia, *The Dynamics of the EU Integration and the Impact on the National Constitutional Law* (Giuffrè 2012) 160 ff.

groups: those that are ultimately generic in nature (the foreign and European decisions are referred to as an example of the *id quod plerumque accidit*) and those that effectively serve an independent and noticeable purpose in determining the Court's adjudication.<sup>39</sup>

The following sections will only consider the latter references, since they are the only ones that can be directly attributed to the Constitutional Court and that carry a significant weight in the Court's final decisions.

### 3.1. *The role of the Constitutional Court's references to the judicial decisions of courts in other countries*

Historically, the Italian Constitutional Court has rarely (if ever) referred to the jurisprudence of foreign national courts and was described by scholars as mainly being uninterested in the comparative perspective.<sup>40</sup> This restrictive approach towards the decisions of foreign courts started to change, as already mentioned, in the last few decades, to the point that there are now a few cases in which the *Corte Costituzionale* has referred to the jurisprudence of foreign legal systems in a way that seems to have actually influenced the Court's final adjudication.

However, it must be stressed that, since the Constitutional Court is the only recipient of the power of constitutional review in the Italian constitutional system, it can (obviously) refer to foreign decisions exclusively from an *ad adiuvandum* perspective in order to reinforce and support its argument by pointing out that other courts in Europe (or in the 'Western world') follow (or have followed) its same line of reasoning. This means, of course, that foreign decisions are deprived of any kind of legal binding force.

A noticeable example of the Italian Constitutional Court's use of foreign precedents from an *ad adiuvandum* perspective is Decision No 1/2014, in which the Court had to examine the constitutionality of the election law in force at that time, which, despite adopting a proportional mechanism, granted a considerable majority bonus to the most-voted-for coalition. The Court found that the majority bonus was unconstitutional, because Articles 3, 48 and 67 of the Constitution demand that if the legislator chooses an electoral system based on proportional representation, the said system cannot be excessively distorted after the votes have been cast (as happens with an unreasonably high majority bonus). To support its reasoning, the Court referred to three similar decisions of the German Constitutional Court<sup>41</sup>, arguing that, on electoral matters, the German constitutional system is comparable to the Italian one.

39 See Paolo Passaglia, 'Il diritto comparato nella giurisprudenza della Corte costituzionale: un'indagine relativa al periodo gennaio 2005 –giugno 2015' (2015) Consulta online 592 ff.

40 On the matter, see Vincenzo Zeno-Zencovich, 'Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?' (2005) *Diritto pubblico comparato ed europeo* 1993 ff.

41 Decisions BVerfGE, 2 BvF 3/11 25 July 2012, BVerfGE, 2 BvR 197/79 22 May 1979 and BVerfGE, 2 BvH 1/52 5 April 1952.

In a similar vein, the Constitutional Court used *ad adiuvandum* references to the jurisprudence of foreign courts in its Decision No 170/2014, while declaring the unconstitutionality of the national provision (enshrined in Law No 164/1982), which prescribed that, when an individual completed a gender reassignment process, if they were married, the marriage would automatically lose its effectiveness (having effectively transformed into a same-sex marriage).<sup>42</sup>

Moreover, in its recent Decision No 207/2018, the Constitutional Court referred to previous decisions of the Canadian and English Supreme Courts<sup>43</sup> in order to support its argument that, on the matter of the unconstitutionality of provisions criminalising assisted suicide *per se* (without granting some kind of exception in specific cases), it was necessary to suspend the constitutional review process (for one year) in order to give parliament a chance to amend the existing legislation in a manner compatible with the Constitution.

In other cases, the Constitutional Court chose not to refer to a specific foreign decision, but rather to an entire line of jurisprudence developed by the judiciary of a foreign legal system.

For example, in Decision No 238/2014, while examining the compatibility with the Constitution of the customary international law principle that exempts foreign sovereign states from the Italian civil jurisdiction, the Constitutional Court highlighted how the scope of said principle was gradually narrowed down by the judiciary both in Italy and in Belgium.<sup>44</sup>

Similarly, in its Decision No 10/2015, the Constitutional Court referred to the consolidated jurisprudence of several foreign constitutional courts. The Court did so while explaining its decision to limit (for the first time in its history) the retroactive effects of the annulment of an unconstitutional provision, and argued that, in similar cases, many other European constitutional courts have the power to limit the retroactive effects of their decisions, mentioning the jurisprudence of the Austrian, German, Spanish and Portuguese Constitutional Courts on the matter as an example.

### ***3.2. The role of the Constitutional Court's references to judicial decisions of international and supranational (European) courts***

Historically, the practice of referring to judicial decisions of international (or supranational) courts has not been very common in Italy. However, the European integration process was successful in changing (at least in part) this tendency in recent years. On the one hand, the European Union's (EU's) uniqueness from a

42 The Court referred to the similar conclusions of the German Constitutional Court in Decision BVerfG, 1 BvL 10/05 27 May 2008.

43 Cases *Carter v Canada* [2015] CSC 5 and *Nicklinson et al.* [2014] UKSC 38.

44 The same argument was made by the Court with Decision No 329/1992, and it was similarly supported through references to previous decisions of the constitutional and ordinary courts of several foreign legal systems.

constitutional law perspective led the Italian Constitutional Court to recognise the primacy of European law as a principle of the national legal system as early as 1984 (with Decision No 170/1984). This means that, for those matters in which Italy transferred a part of its sovereignty to the EU's institutions, the Constitutional Court started to look to (and refer to) the jurisprudence of the ECJ as a parameter provided with some level of binding force. On the other hand, the constitutional reform of Article 117 of the Constitution in 2001<sup>45</sup> allowed the Constitutional Court to affirm the primacy of the European Convention on Human Rights (ECHR) over national statutory law (Decision Nos 348/2007 and 349/2007<sup>46</sup>), which inaugurated a new era of references to the ECtHR's decisions.

*a) ECtHR.* With regard to the ECtHR's precedent decisions, the Constitutional Court's references still prevalently fall in the category of *ad adiuvandum* references, and therefore, in most cases, the Court refers to the ECtHR's adjudications in order to strengthen its own arguments on matters that involve the protection of those fundamental rights that belong to the European common constitutional tradition.

This has been the case, for example, for the right of adopted children to know the identity of their biological mother in cases in which she wishes to renounce her anonymity (Decision No 278/2013). The Constitutional Court referred to the ECtHR's decisions in the cases *Godelli v Italy*<sup>47</sup> and *Odièvre v France*<sup>48</sup> in order to reinforce its argument that the Italian provisions on the matter at hand were too strict, because they basically did not allow the biological mother to 'change her mind' under any circumstances (while, on the contrary, the French provisions would allow her to do so), thus infringing on the right to respect for private and family life.

Similarly, the jurisprudence of the ECtHR has been prominently featured in the recent Decision Nos 207/2018 and 242/2019 of the Constitutional Court on the matter of assisted suicide. The Court had to assess the constitutionality of the Italian Criminal Code provision that incriminates whoever helps someone end his or her own life. In this case, the Court referred to the jurisprudence of the ECtHR (in the cases *Pretty v The United Kingdom*<sup>49</sup>, *Koch v Germany*<sup>50</sup> and *Haas v Switzerland*<sup>51</sup>) to argue that the Italian constitutional system as well as the ECHR do not recognise the right to end one's own life.<sup>52</sup>

45 The new para 1 of art 117 states, 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

46 On these decisions see, *ex multis*: Barbara Randazzo, *Giustizia costituzionale sovranazionale. La Corte europea dei diritti dell'uomo* (Giuffrè 2012).

47 Application No 33783/09, 25 September 2012.

48 Application No 42326/98, [GC], 13 February 2003.

49 Application No 2346/02, 29 April 2002.

50 Application No 497/09, 19 July 2012.

51 Application No 31322/07, 20 January 2011.

52 However, the Court ultimately found that the criminalisation of assisted suicide *per se* was unconstitutional (see section 3.1).

After the aforementioned reform of Article 117 of the Constitution in 2001, the Constitutional Court also started to refer (in some cases) to the decisions of the ECtHR as an independent parameter of the constitutional review. More precisely, in order to verify whether a national law is compatible with Article 117 of the Constitution, the Court can now assess its compatibility with the ECHR *as interpreted by the ECtHR*.<sup>53</sup> This means that the *Corte Costituzionale* can refer to the ECtHR's precedents to clarify the meaning of an ECHR provision.

An example of this new kind of reference to the ECtHR's jurisprudence can be found in the Constitutional Court's Decision No 311/2009. The Court had to assess the compatibility with Article 6 of the ECHR (and therefore with Article 117 of the Constitution) of national laws that offer a retroactive interpretation of a previous law, thus conferring on it a specific meaning among the many that would be possible. The Constitutional Court found that Article 6 of the ECHR, as interpreted by the jurisprudence of the ECtHR<sup>54</sup>, does not prohibit 'authentic interpretations' by the legislator, as long as they serve 'overriding reasons relating to the public interest'.<sup>55</sup>

In its Decision No 245/2011, the Constitutional Court struck down the prohibition to marry for foreign citizens illegally residing in the Italian territory (enshrined in Article 116 of the Italian Civil Code), which violated Articles 2 and 29 of the Constitution. The Court found that the prohibition also violated Article 12 of the ECHR, as interpreted by the ECtHR in the case of *O'Donoghue and Others v The United Kingdom*<sup>56</sup>, in which the Court of Strasbourg stated that the margin of appreciation that the Convention grants to member states cannot expand to the point of justifying the implementation of a general prohibition that completely negates the right to marry and start a family, as recognised by Article 12 of the ECHR.

*b) ECJ.* With regard to the jurisprudence of the ECJ, it is important to distinguish between cases in which the Constitutional Court refers to an ECJ decision on a preliminary ruling that the Constitutional Court itself requested, and cases in which the Constitutional Court refers to the ECJ's precedent decisions *strictu sensu*. Cases of the first kind fall within the scope of Article 267 of the Treaty on the Functioning of the European Union, which regulates the request of an ECJ preliminary ruling by a 'Court or Tribunal of a Member State'. In these cases, the

53 On the matter see Vittorio Angiolini, 'L'interpretazione conforme nel giudizio sulle leggi' in Marilisa D'Amico and Barbara Randazzo (eds.), *Interpretazione conforme e tecniche argomentative* (Giappichelli 2009).

54 The Constitutional Court refers to the ECtHR's decisions in the cases *Forrer-Niedenthal v Germany* (Application No 47316/99, 20 February 2003), *Ogis-institut Stanislas, Ogec St. Pie X et Blanche De Castille et al. v France* (Application Nos 42219/98 and 54563/00, 27 May 2004), and *National & Provincial Building Society et al. v United Kingdom* (Application Nos 21319/93, 21449/93 and 21675/93, 23 October 1997).

55 This line of reasoning was sustained by the Constitutional Court with its subsequent Decision Nos 1/2011, 257/2011, 15/2012 and 227/2014.

56 Application No 34848/07, 14 December 2010.

decisions of the ECJ cannot be regarded as actual precedents, since they are just a provisional segment of the constitutional review process.

With regard to references to precedents *strictu sensu*, the Constitutional Court often refers to specific decisions of the ECJ in the so-called *principaliter* constitutional review process, in which the state directly challenges a regional law (or, vice versa, in which the region challenges a national law) before the Court. In fact, in this kind of process, the Constitutional Court can directly strike down regional provisions that are incompatible with European law by leveraging the violation of Articles 11 and 117 (see section 3) of the Constitution.<sup>57</sup> From this perspective, the Court has referred to the jurisprudence of the ECJ in order to assess the compatibility with European law (as interpreted by the Court of Luxembourg), for example, of regional laws that limited the circulation of genetically modified organisms (Decision No 23/2021<sup>58</sup>), that interfered with the criteria for competitive procedures (Decision Nos 160/2009, 184/2011 and 39/2020<sup>59</sup>) and that implemented exceptions to the European regulation on hunting (Decision No 266/2010<sup>60</sup>), on environmental standards of protection (Decision Nos 62/2008 and 67/2010<sup>61</sup>) and on competition (Decision Nos 368/2008<sup>62</sup> and 439/2008<sup>63</sup>).

According to scholars, in these cases, the ECJ's decisions are (at least to some degree) binding for the Constitutional Court, because the ECJ is the only court vested with the power of issuing a final and clarifying interpretation of European law, and therefore its jurisprudence becomes fundamental in determining whether European law has been violated by regional provisions. As a matter of fact, it could be argued that the binding force of the ECJ's precedents is actually higher than that of the Court of Cassation's precedents (see section 2.2), because while the Constitutional Court can interpret national laws (and its interpretations coexist with those of the Court of Cassation), it cannot (conclusively) interpret European law (and so it must inevitably refer to the ECJ's interpretation on the matter).

Moreover, it must be noted that it is not unusual for the Italian Constitutional Court to also refer to the jurisprudence of the ECJ from an *ad adiuvandum* perspective (including references to preliminary rulings requested not by the Court itself, but by other Italian courts or tribunals, or references to decisions regarding

57 See, *ex multis*, Decision No 102/2008. For a comprehensive analysis of the Constitutional Court's decisions that applied this doctrine, see Davide Paris, *Il parametro negletto: Diritto dell'Unione europea e giudizio in via principale* (Giappichelli 2018).

58 The Court referred to the ECJ's precedents in cases C-192/01 and C-165/08.

59 The Court referred to the ECJ's decisions in cases C-147/06 and C-148/06.

60 The Court referred to the ECJ's decisions in case C-118/94.

61 The Court referred to the ECJ's decisions in case C-215/06.

62 The Court referred to the ECJ's decisions on competition in the wine sector in cases C-388/95 and C-347/05.

63 The Court referred to the ECJ's decisions in cases C-107/98, C-26/03, C-458/03 and C-340/04.

other European legal systems). This happened, for example, in decisions on the matters of the recovery of state aids (Decision No 125/2009<sup>64</sup>), the rights of the defendant in criminal trials when the charges are modified by the prosecution (Decision No 192/2020<sup>65</sup>), grave professional misconduct and contract breaches by an economic operator (Decision No 168/2020<sup>66</sup>), *ne bis in idem* in criminal law (Decision No 145/2020<sup>67</sup>), public contracts and competition (Decision Nos 131/2020<sup>68</sup> and 100/2020<sup>69</sup>).

In these cases, the jurisprudence of the ECJ is used by the Constitutional Court to reinforce and support its legal arguments (by showing that they are shared by the Court of Luxembourg), rather than as a means to verify if national law violates European law.

#### 4. Conclusions

In light of all the foregoing, it can be safely stated that case-based reasoning and references to previous judicial decisions (by the Court itself or by other national and supranational tribunals and courts) play a significant role in the Italian Constitutional Court's adjudications. The *Corte Costituzionale* was able to strike a precarious (but reasonable) balance between the fundamental principles of the Italian civil law system (which does not recognise any legally binding force to precedents) and the need to ensure a minimum level of predictability and stability of judicial decisions, on the one hand, and to open itself up to dialogue with other (national and supranational) judicial bodies, on the other hand.

From this perspective, self-references have become (as soon as the Court started functioning) an indispensable part of the *Corte Costituzionale*'s adjudications, and they still represent, as of today, the most heavily featured example of case-based legal reasoning in the Court's adjudications.<sup>70</sup> At the same time, the *diritto vivente* doctrine seems to have been effective in regulating the interaction between the Constitutional Court and the national judiciary by recognising some binding effects to the *jurisprudence constante* of the Court of Cassation, while preserving the Constitutional Court's fundamental role as the only body vested with the powers of constitutional review and interpretation of the Constitution.<sup>71</sup> The European integration process (both within the EU and within the Council of Europe) facilitated the inauguration of a new era in the jurisprudence

64 The Court referred to the ECJ's decisions in cases C-142/87, C-390/98, C-368/04 and C-408/04.

65 The Court referred to the ECJ's preliminary ruling in case C-646/17.

66 The Court referred to the ECJ's decisions in cases C-41/18 and C-267/18.

67 The Court referred to the ECJ's decisions in cases C-524/15, C-537/16, C-596/16 and C-597/16.

68 The Court referred to the ECJ's decisions in cases C-113/13 and C-50/14.

69 The Court referred to the ECJ's decisions in cases C-285/18, C-89/19 and C-91/19.

70 See Canale (n 19).

71 See Proto Pisani (n 26).

of the *Corte Costituzionale*, in which references to supranational decisions are no longer limited to strengthening the Court's arguments, but can become an actual parameter of the constitutional review.<sup>72</sup>

From a methodological perspective, much is yet to be studied, since the *Corte Costituzionale* does not yet seem to have developed an entirely consistent method when it comes to references and case-based adjudication.<sup>73</sup> As argued in the previous sections, within a somewhat well-defined framework, the Court's use of references still presents a certain degree of variability and unpredictability, because the Court enjoys a high degree of freedom precisely because the Italian legal system is a civil law system, and due to the Court's peculiar role and powers.<sup>74</sup> Examples of this variability and unpredictability can be found in cases in which the Court decided to overrule its previous jurisprudence but did not explain why it chose to do so and did not mention the previous decisions that it was going to disregard<sup>75</sup> (see section 2.1); in cases in which the Court recognised (or did not recognise) the existence of *diritto vivente* without referring to the specific decisions of the Court of Cassation that supported its conclusion (see section 2.2); in cases in which the Court leveraged the jurisprudence of foreign constitutional courts to implement new processual instruments for the first time in its history (see section 3.1); or in cases in which it is not entirely clear whether the Court referred to the jurisprudence of the two European courts (the ECtHR and ECJ) from an *ad adiuvandum* perspective or as an independent parameter of the constitutional review (see section 3.2).

Consequently, it remains to be seen whether the slow (but steady) increase in the day-to-day use of references to previous decisions by the Constitutional Court will lead to the stabilisation of its approach to case-based reasoning or to an increase in the unpredictability of its use of judicial precedents.

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72 On the matter see Giuliano Amato and Benedetta Barbisan, *Corte costituzionale e Corti europee: fra diversità nazionali e visione comune* (il Mulino 2015).

73 This is confirmed by the lack, in the last decade, of comprehensive and organic studies on the use of precedents by the Constitutional Court. See Anzon (n 9); Pedrazza Gorlero (n 20).

74 See Canale (n 19) 7 ff.

75 *Ivi*, 8.

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# 7 Precedents and case-based reasoning in constitutional adjudication

The Republic of Latvia

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## Introduction

According to Article 1 of the Constitution of the Republic of Latvia of 15 February 1922<sup>1</sup> (hereinafter—the *Satversme*), the Republic of Latvia (hereinafter—Latvia) is a democratic republic based on the rule of law. One of the constitutional institutions in Latvia that plays a significant role is the Constitutional Court of the Republic of Latvia (hereinafter—the Constitutional Court). It ensures compliance with the *Satversme* and the protection of human rights. The Constitutional Court's judgments have become a reflection of the concise text of the *Satversme*. Moreover, it has also formulated the values upon which the constitutional identity of the state is founded by stating, 'Latvia is based on such fundamental values that, among the rest, include basic rights and fundamental freedoms, democracy, sovereignty of the State and people, the separation of powers and the rule of law.'<sup>2</sup>

The Constitutional Court fulfils its functions by administering justice and hearing cases in a certain procedural order, performing the obligations it has been entrusted with as a constitutional body. In Latvia, justice is also administered by other courts—courts of general jurisdiction, administrative courts and the Economic Affairs Court (hereinafter—courts of the court system). Although each court fulfils its own functions, they all share one aim: ensuring the rule of law. On the most ideal level, this aim can be attained through the cooperation of all courts. Cooperation and judicial dialogue may have various expressions. One of these is also the interaction between the case laws in courts' rulings. As underscored by the Judge of the Supreme Court, V. Krūmiņa, a qualitative resolution to a dispute can be reached only as the result of judicial cooperation and dialogue.<sup>3</sup> The

1 The Constitution of the Republic of Latvia of 15 February 1922, <http://sacima.lv/en/legislation/constitution/> accessed on 18 June 2021.

2 Judgment of the Constitutional Court on 7 April 2009 in Case No 2008–35–01, para 17, [www.satv.tiesa.gov.lv/wp-content/uploads/2008/09/2008-35-01\\_Spriedums\\_ENG.pdf](http://www.satv.tiesa.gov.lv/wp-content/uploads/2008/09/2008-35-01_Spriedums_ENG.pdf) accessed on 18 June 2021.

3 Veronika Krūmiņa, 'Piezīmes pie pārskata par administratīvo tiesu iesniegtajiem pieteikumiem Satversmes tiesā' ['Notes to the Report on Applications Submitted by Administrative Courts to the Constitutional Court'] (2012) 5 Latvijas Republikas Augstākās tiesas Biļetens 13.

method of respectful dialogue is the foundation for judicial cooperation in Latvia since it aims to strengthen judicial power.<sup>4</sup>

‘Judicial dialogue’ is a method that emphasises judicial cooperation on the national level, as well as beyond it. The Constitutional Court also maintains a judicial dialogue with courts outside Latvia’s national borders. The Constitutional Court has not shied away from using the case of law of other countries. ‘Borrowing’ the best practice from the constitutional courts of other countries is a generally known method, which, when the scope is appropriate, is also recognised in Latvia. Using the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) is an integral part of the Constitutional Court’s judicature.

## 1. The position of the Constitutional Court within the judicial system of the state

By fulfilling their functions, constitutional institutions realise public power. The courts of the court system and the Constitutional Court in Latvia are two different constitutional institutions that realise state power.<sup>5</sup> In accordance with Section 1 of the Constitutional Court Law, the Constitutional Court is an independent judicial authority, which, within the jurisdiction specified in the *Satversme* and Constitutional Court Law, adjudicates on matters regarding the conformity of laws and other regulatory enactments with the *Satversme*, as well as other matters regarding which jurisdiction is conferred upon it by the Constitutional Court Law.<sup>6</sup> Those other matters that can be decided by the Constitutional Court are regulated by Section 16 of the Constitutional Court Law.<sup>7</sup> In contrast to other courts belonging to the general court system, the Constitutional Court solves specific disputes regarding the compatibility of legal provisions with the

4 ‘Augstākās tiesas un Satversmes tiesas dialogs stiprina tiesu varu Latvijā’ [‘The Dialogue Between the Supreme Court and the Constitutional Court Strengthens the Judiciary in Latvia’] (2000) 21 Latvijas Republikas Augstākās tiesas biļetens 14.

5 Judgment of the Constitutional Court, Case No 2006–05–01, 16 October 2006, para 10.4.

6 Constitutional Court Law of 5 June 1996, [www.satv.tiesa.gov.lv/?lang=2&mid=9](http://www.satv.tiesa.gov.lv/?lang=2&mid=9), accessed on 17 June 2021.

7 Section 16 of the Constitutional Court Law states that the Constitutional Court also adjudicates cases regarding the conformity of international agreements signed or entered into by Latvia (also until the confirmation of the relevant agreements in the *Saeima*) with the Constitution; the conformity of other laws and regulations or parts thereof with the norms (acts) of a higher legal force; the conformity of other acts of the *Saeima*, the Cabinet, the President, the Speaker of the *Saeima* and the Prime Minister, except for administrative acts, with the law; the conformity with the law of such an order with which a Minister authorised by the Cabinet has suspended a decision taken by a local government council; and the conformity of Latvian national legal norms with those international agreements entered into by Latvia that is not in conflict with the Constitution. Constitutional Court Law of 5 June 1996, [www.satv.tiesa.gov.lv/?lang=2&mid=9](http://www.satv.tiesa.gov.lv/?lang=2&mid=9), accessed on 17 June 2021.

provisions of higher legal force.<sup>8</sup> The Constitutional Court does not review the constitutionality of individual acts (e.g., court judgments or administrative acts). Likewise, the Constitutional Court does not solve civil law disputes, criminal cases, or cases that follow from administrative legal relationships.<sup>9</sup> In other words, the Constitutional Court reviews so-called legal disputes, whereas courts belonging to the court system solve other disputes.<sup>10</sup>

The exclusiveness of the Constitutional Court's function does not mean that other constitutional institutions lose the right to exercise the general right of constitutional control. It is the duty of all institutions to ensure compliance with the Constitution. This is also the duty of the courts belonging to the court system. Therefore, courts, within the framework of each case, must verify the compatibility of the applicable norm with legal norms of higher legal force.<sup>11</sup> If the court hearing the dispute finds that the norm does not correspond to the *Satversme*, it can turn to the Constitutional Court. In Latvia, as in other countries<sup>12</sup>, the Constitutional Court and other courts engage in a dialogue through concrete control, which gives the right, pursuant to Section 19<sup>1</sup> of the Constitutional Court Law, to submit an application by the court (all levels of courts, not only the Supreme Court) that adjudicates on other matters. This means that an application by a court will never be abstract, since the dispute may only concern a legal norm that is needed to adjudicate a certain case.<sup>13</sup>

Regarding the administrative courts, the legislator has granted them the right to perform constitutional review of local government binding regulations and Cabinet regulations, but only if these legal acts are, in the court's opinion, incompatible with legal acts of higher legal force (but not of the *Satversme* or of a norm pertaining to an international treaty). In such cases, the administrative court resolves the dispute itself; it applies the legal norm of higher legal force, such as a provision of the *Satversme*. This practice shows that administrative courts are exercising this right.<sup>14</sup> However, it is notable that the administrative courts have not been authorised to declare a legal norm void.

As it is common for European constitutional courts, the Latvian Constitutional Court's judgment has an *erga omnes* effect: the judgment and the interpretation of a legal provision included in it are mandatory to all persons, including all courts.

- 8 Judgment of the Constitutional Court, Case No 2011–11–01, 3 February 2012, para 11.1.
- 9 Judgment of the Constitutional Court, Case No 2007–03–01, 18 October 2007, para 9; Judgment of the Constitutional Court, Case No 2008–43–0106, 3 June 2009, para 12.
- 10 Judgment of the Constitutional Court, Case No 2020–29–01, 28 January 2021, para 15.1; Judgment of the Constitutional Court, Case No 04–03(99), 9 June 1999, para 1.
- 11 Judgment of the Constitutional Court, Case No 2013–06–01, 18 December 2013, para 14.
- 12 Lech Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 5(1) ICON 46.
- 13 Judgment of the Constitutional Court, Case No 2017–18–01, 26 April 2018, para 22; Decision of the Constitutional Court on terminating legal proceedings, Case No 2008–10–01, 9 September 2008, para 8.
- 14 Līga Dāce, 'Aktuālā prakse Administratīvā procesa likuma 104. panta trešās daļas piemērošanā' ['Current Practice in the Application of Section 104, Paragraph Three of the Administrative Procedure Law'] (2020) 50 Jurista Vārds 30.

As the case law of the court system courts shows, the findings included in the Constitutional Court's judgments are used to develop the courts' reasoning when resolving particular disputes. For example, the Department of Administrative Cases of the Supreme Court's Senate uses the 'doctrine of substantiveness',<sup>15</sup> elaborated by the Constitutional Court; in another case, the Constitutional Court's judicature in the area of fundamental social rights is used<sup>16</sup> by applying the principle that the child's rights take priority, as recognised by the Constitutional Court<sup>17</sup> and the principle of equality,<sup>18</sup> etc. The Supreme Court's database shows that the Constitutional Court's judgments are used very frequently. The Supreme Court only refers once to some judgments by the Constitutional Court in its rulings, but there are also some judgments that are repeatedly referenced. For example, the Constitutional Court's judgment of 6 July 1999 in Case No 04-02(99) and the Constitutional Court's judgment of 27 June 2003 in Case No 2003-04-01 have been used in seven different rulings by the Supreme Court, whereas the Constitutional Court's judgment of 5 December 2001 in Case No 2001-07-0103 has been used in six rulings by the Supreme Court.<sup>19</sup>

Of note, the Supreme Court also uses the interpretation of legal norms provided in the Constitutional Court's decisions on terminating legal proceedings because, pursuant to Section 29 (2<sup>1</sup>) of the Constitutional Court Law, the interpretation of the legal norm provided in the Constitutional Court's decision to terminate the judicial proceedings is mandatory for all state and local government authorities (also courts) and officials, as well as natural and legal persons. Thus, the Constitutional Court's decision of 28 February 2007 on terminating legal proceedings in Case No 2006-41-01 has even been used in four rulings by the Supreme Court; the Constitutional Court's decision of 13 December 2011 on terminating legal proceedings in Case No 2011-15-01; and also the Constitutional Court's decision of 2 March 2015 on terminating legal proceedings in Case No 2014-16-01 have been used in four different rulings.<sup>20</sup> Although not typical, the Supreme Court has even made a reference to the interpretation of legal norms provided in the Constitutional Court's Panel decision of 30 May 2012 on the refusal to initiate Case No 76/2012.<sup>21</sup>

15 Judgment of the Senate Administrative Cases Department, Case No A420132016, SKA-109/2020, 23 December 2020.

16 Judgment of the Senate Administrative Cases Department, Case No A420291417, SKA-474/2020, 22 December 2020.

17 Judgment of the Senate Administrative Cases Department, Case No A420207818, SKA-700/2020, 17 February 2020.

18 Judgment of the Senate Administrative Cases Department, Case No A420264915, SKA-56/2020, 30 April 2020.

19 Citēto nolēmumu rādītājs [Index of Judgments Cited], <http://at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/citeto-nolemumu-raditajs> accessed on 17 June 2021.

20 Ibid.

21 Judgment of the Senate Administrative Cases Department, Case No A420398814, SKA-432/2017, 1 November 2017.

In those instances, when a case is initiated at the Constitutional Court on the basis of an application by a court, the Constitutional Court examines and very meticulously determines the date as of which the legal norm that is incompatible with the *Satversme* should be recognised as being void. It should be noted that the *Satversme* does not regulate the moment when the norm that is declared unconstitutional loses its legal effect. This is regulated by the Constitutional Court Law. In accordance with Section 32 (3) of the Constitutional Court Law, a legal provision that has been declared by the Constitutional Court as non-compliant with a norm of higher legal force must be regarded as not being in effect from the day of publication of the Constitutional Court's judgment (*ex nunc*). This is the so-called general presumption and the most frequently used tool in the practice of the Constitutional Court, and it provides an opportunity for reaching a fair balance between two values: legal certainty and legality. In the meantime, the Constitutional Court Law has granted broad discretion to the Court to decide on the date as of which a legal norm that is incompatible with the *Satversme* becomes invalid. The Constitutional Court, by substantiating its opinion, can rule that the unconstitutional legal norm has become invalid from the day it was adopted (*ex tunc*) or on another day (*ex tunc*), or the date may be set at some point in the future (*pro futuro*). To decide on the moment when the legal norm loses its legal force, the Constitutional Court takes several principles into account: the principle of justice, the principle of legality, the principle of the separation of powers, legal expectations and legal certainty.<sup>22</sup> This is because the law not only authorises the Constitutional Court to do so, but also places responsibility upon it, so that its judgments in the social reality ensure legal stability, clarity and peace.<sup>23</sup> In those instances when the case has been initiated on the basis of a court's application, it is clear that the dispute occurred in the past. Hence, the Constitutional Court, where possible, recognises the anti-constitutional legal provision as being void *ex tunc*, allowing the Court to resolve the dispute within the framework of the *Satversme*.<sup>24</sup>

The use of an interpretation of a legal norm provided by the Constitutional Court and the *ex tunc* nature of the ruling was well demonstrated in a case that was resolved by the Supreme Court quite recently. On 10 December 2020, the Constitutional Court delivered a judgment (in Case No 2020–07–03), by which it recognised the minimum amount of old-age pension as being incompatible with the provisions of Article 109 of the *Satversme*, which, in the applicant's<sup>25</sup>—

22 Judgment of the Constitutional Court, Case No 04–05(97), 11 March 1998, para 5; Judgment of the Constitutional Court, Case No 2016–12–01, 18 May 2017, para 15.

23 Judgment of the Constitutional Court, Case No 2009–11–01, 18 January 2010, para 30.

24 Judgment of the Constitutional Court, Case No 2017–12–01, 18 January 2010, para 23; Judgment of the Constitutional Court, Case No 2016–11–01, 15 June 2017, para 22; Judgment of the Constitutional Court, Case No 2019–01–01, 5 December 2019, para 25.

25 The case was joined with the Ombudsman's application, by which he had contested before the Constitutional Court the compliance of para 2 and para 3 of the Cabinet Regulation of 3 December 2019 No 579 'Regulation on the Minimum Amount of the State Old-age

the Supreme Court's—opinion did not ensure at least the minimum amount of social security.<sup>26</sup> The Supreme Court had to apply the norms<sup>27</sup>, the constitutionality of which was reviewed by the Constitutional Court for this concrete administrative case, because an individual did not agree to the amount of old-age pension that had been established (just below 100 euro per month). It is significant that the Constitutional Court, respecting both the particular case under adjudication as well as other cases, and to protect individuals' fundamental rights with respect to persons who had turned to the court to protect their rights in the procedure set out in the Administrative Procedure Law and with respect to whom the administrative legal proceedings had not yet been concluded, ruled that these norms became void as of the moment when the infringement on these persons' fundamental rights occurred (a past date). That is, the Constitutional Court ruled with respect to all persons that the anti-constitutional norm would become legally void as of 1 June 2021, because the legislator had to be given a reasonable period of time for aligning the system; whereas with respect to persons who had begun to defend their rights in court, it was void as of the moment when the infringement on their fundamental rights occurred (*ex tunc*). In such cases, the Constitutional Court also provides 'hints' on how to deal with the particular legal issue, taking into account that the Court has to substantially apply the provisions of the *Satversme* directly. Also in this case, the Constitutional Court noted that, in assessing whether the minimum amount of old-age pension in each particular case ensured the possibility of the applicant's ability to lead a life that would be compatible with human dignity, the findings expressed in the judgment were directly applicable, *inter alia*, in assessing what kinds of basic needs the person could satisfy and whether this pension, in conjunction with other social security system measures, ensured that the person had the possibility of leading a life worthy of human dignity.<sup>28</sup>

After the Constitutional Court's judgment entered into force on 16 March 2021, the Supreme Court applied the findings expressed in the Constitutional Court's judgment in Case No 2020–07–03, repeatedly quoting statements made by the Constitutional Court, and concluded that the particular person had the right to social security compatible with Article 109 of

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Pension' with art 1, art 91 and art 109 of the *Satversme* of the Republic of Latvia. See the Decision of the 4th Panel of the Constitutional Court on 15 May 2020 to initiate a case.

26 Judgment of the Constitutional Court, Case No 2020–07–03, 10 December 2020, para 3.

27 A case was initiated on the basis of an application by a court regarding the compliance of sub-para 2.2 of the Cabinet Regulation of 5 December 2011 No 924 'Regulation on the Minimum Amount of the State Old-age pension', sub-para 2.1 of the Cabinet Regulation of 22 December 2009 No 1605 'Regulations Regarding the Amount of the State Social Security Benefit and Funeral Benefit, Procedures for the Review thereof and Procedures for the Granting and Disbursement of the Benefits' (in the wording that was in force until 31 December 2019), as well as para 2 and sub-para 3.2 of the Cabinet Regulation of 3 December 2019 'Regulation on the Minimum Amount of the State Old-age Benefit' with art 109 of the *Satversme* of the Republic of Latvia.

28 Judgment of the Constitutional Court, Case No 2020–07–03, 10 December 2020, para 26.1.

the *Satversme* as of the moment when the infringement on fundamental rights occurred (i.e., the moment when the person had turned to the institution on 12 July 2018). Therefore, the judgment of 17 June 2019 by the Administrative Regional Court was revoked and the case was returned for examination anew by the appellate instance court, which will have to find a solution that is compatible with the *Satversme*, thus respecting the ruling made by the Constitutional Court.<sup>29</sup>

A judgment by the Constitutional Court is final. This means that the Constitutional Court's judgment cannot be appealed and it cannot be re-examined by any state or international institution. The Constitutional Court itself has recognised that it is also obliged to respect the findings expressed in its judgments due to requirements regarding the stability of the legal system, continuity, the rule of law and equality.<sup>30</sup> However, a judgment made in a concrete case cannot cover the changes that might happen after it has come into force. If the circumstances of the case change significantly, the claim cannot be considered as having been adjudicated.<sup>31</sup> The thesis upon which the understanding of an adjudicated claim is based is the finding that a claim cannot be regarded as being adjudicated eternally because the Constitutional Court always examines and reviews cases in a particular moment in time, in particular circumstances, and the judgment cannot predict future changes. This means that the constitutionality of a legal norm that has already been reviewed can be re-examined if the actual social reality and the context of the legal relationships have changed.<sup>32</sup> Likewise, changes in the interpretation of a legal norm due to changes in living conditions and in public opinion can be considered as a significant new circumstance due to which the claim cannot be considered as having been adjudicated.<sup>33</sup> For example, in the so-called case of permits for accessing official secrets, the Constitutional Court referred to a previously examined case (No 2002–20–0103<sup>34</sup>), finding that different opinions existed regarding the scope of the contested legal norms and the constitutionality of the application thereof, and that a sufficiently long enough period of time had passed since the previously examined case and important changes had occurred within the legal system, but that the legal regulation 'notwithstanding these changes, as well as the findings included in the aforementioned judgement has remained unchanged'.<sup>35</sup> Therefore, after ten years, the same legal norms were examined once again by the Constitutional Court based on their merits. This means that

29 Judgment of the Senate Administrative Cases Department, Case No A420271718, SKA-259/2021, 16 March 2021.

30 Judgment of the Constitutional Court, Case No 2011–03–01, 19 December 2011, para 14.

31 Judgment of the Constitutional Court, Case No 2002–20–0103, 23 April 2003.

32 Judgment of the Constitutional Court, Case No 2016–06–01, 10 February 2017, para 17.2.

33 Judgment of the Constitutional Court, Case No 2017–25–01, 29 June 2018, para 14.

34 Judgment of the Constitutional Court, Case No 2002–20–0103, 23 April 2003.

35 Judgment of the Constitutional Court, Case No 2016–06–01, 10 February 2017, para 17.7.

no judgment of the Court provides a final interpretation of a legal norm, since it can be re-examined in another case.

The findings expressed previously do not have an impact on rectifying technical errors or imprecisions in the Court's rulings. The Constitutional Court's case law shows that such instances occur when a technical error in the judgment is found at a later date. In such cases, the error is rectified in accordance with paragraph 87, point 7 of the Rules of Procedure of the Constitutional Court at the Constitutional Court's assignments' sitting.<sup>36</sup> In the Constitutional Court's case law, there have only been a couple of such cases, in which a spelling mistake was identified in a judgment that had already been delivered, such as with a reference made to an incorrect section of a provision.<sup>37</sup>

## **2. The role of the Constitutional Court's references to national judicial decisions**

### ***2.1. The role of self-references in the Constitutional Court's adjudication***

In drawing up the Constitutional Court's judgments, the elements included in the Constitutional Court Law (Section 31) are respected, including the introductory part, the facts, the findings and the substantive part in the judgment. Clearly, the entire judgment of the Constitutional Court, not only its substantive part, is binding. The Court's reasoning on which the ruling is based is included in the findings part, which is usually the largest part. As to the methodology, it can be seen that the Court, in analysing the particular issue or in creating the findings part of the judgment, first and foremost begins with the presentation of its former findings that are relevant in the particular case. For example, when searching for the content of a provision on fundamental rights, the Court uses findings set out in previous judgments, if they exist. These findings of the Court also constitute a part of the response to the arguments presented by the applicant and the institution. In view of the fact that during its twenty-five years of existence the Constitutional Court has accumulated sufficient experience, these internal references are particularly obvious in the judgments delivered in recent years. The judgments delivered in its first five years of functioning and the ones delivered later differ significantly. On the one hand, self-references give the possibility of providing more extensive reasoning, as well as emphasising the continuity and uniformity of the Court's reasoning and case law. However, on the other hand, a reasonable balance should always be found in order to prevent the Constitutional Court's judgment from turning into a relater

36 'Rules of Procedure of the Constitutional Court' [www.satv.tiesa.gov.lv/en/2016/02/04/hello-world/](http://www.satv.tiesa.gov.lv/en/2016/02/04/hello-world/) accessed on 17 June 2021.

37 See, for example, Information of the Constitutional Court No 1-4 /100 Riga, 20 January 2005 on the correction of a technical error in Case No 2004-02-0106.

or a reporter of the previous case law without new theses or findings; that is, a self-reference is justifiable if it helps to develop the Court's reasoning, keeping in mind, however, that a judgment cannot only consist of a digest of previous findings.

In providing self-references, the Court basically uses two methods. However, an analysis of the Constitutional Court's judgments does not lead to convincing conclusions that there is always precise compliance with these two methods. To put it more precisely, these two methods are sometimes blended.

If a reference is made to a previous ruling, the text of that ruling can be taken directly and placed in the text of the new ruling, and usually the conclusion that is reached is followed by a reference to the particular Constitutional Court's ruling in brackets, with the words 'see also' or 'see' also being used. Likewise, the phrase 'see for example' appears, which might indicate that this issue has already been dealt with in several judgments of the Constitutional Court, but that only one of the judgments, reflecting this thesis, has been selected. This first method is the most frequently used type of self-reference, and the Court thus demonstrates that such a conclusion had already been made previously and that it is also directly applicable and relevant in this case (judgment).

If a judgment by the Constitutional Court cannot be used identically in the particular situation but is needed to provide the possibility of comparing either two legal institutions or of pointing to a possible similarity between the particular issue to be resolved and a previously resolved matter, such as in another area, or if the idea expressed in the previous judgment is specified in the more recent one, then the phrases 'comp., see, for example' (meaning 'to compare, see for example') or 'comp., see' (meaning 'to compare, see') are used.

It can be observed that the Constitutional Court uses either one or two self-references. In exceptional cases, three self-references can be found. As regards the methodology, this issue is left to the discretion of the particular composition of the Court that delivers the judgment. In view of the binding effect of the interpretation of a norm included in the decision on terminating legal proceedings, the Constitutional Court refers not only to its own judgments, but also to decisions on terminating legal proceedings.

The analysis of the Constitutional Court's judgments shows that a reference is not always made to the first judgment made by the Constitutional Court in which the finding that is used was first determined. If the Court decides to make reference to several judgments, then the first reference should be to the judgment in which the respective idea was expressed for the first time, and the subsequent reference could include another judgment if the particular thesis has been elaborated, updated or specified.

A justice who objects to the opinion expressed in a judgment must express, in writing, his or her separate opinion, which must be appended to the case, but not declared in the Court sitting (Section 30 (6) of the Constitutional Court Law). This means that if a justice does not uphold the view expressed in the judgment, the obligation to prepare a separate opinion (a dissenting or concurring opinion) sets in automatically. Undeniably, these separate opinions by justices do not have

an *erga omnes* effect. Also in Latvia, the justices' separate opinions fulfil the same functions that are recognised and inherent in such opinions generally.<sup>38</sup>

The analysis of the Constitutional Court's judgments shows that it does not make reference to the separate opinions of the Constitutional Court's justices. However, in a judgment in which the Constitutional Court analysed the legislator's work, the Court referred to separate opinions made at the ECtHR, for example, to the joint separate opinions by Judges of the ECtHR Ziemele, Sajó, Kalaydjyeva, Vučinić and De Gaetano, appended to the judgment in the case *Animal Defenders International v The United Kingdom*.<sup>39</sup> In another case in which restrictions to election rights were examined underscoring the development of the Latvian legal system, the separate opinion by ECtHR Judge E. Levits, appended to the judgment by the ECtHR of 7 June 2004 in the case *Ždanoka v Latvia*, was used, and it is even quoted in the Constitutional Court's judgment.<sup>40</sup> The method chosen by the Constitutional Court in the judgment in which the constitutionality of a decrease in judges' remuneration was examined needs to be mentioned as a very peculiar example. That is, in its judgment, the Court included a quote from the case law of the Constitutional Court of the Czech Republic, that the 'absolute inviolability of judges' remuneration would be illusory and contrary to elementary conditions of social reality', and indicated, in brackets, that this quote was from 'the Separate Opinion by Judges Vojen Gutler, Jan Musil and Pavel Rychetsky appended to the Judgement of 14 July 2005 by the Constitutional Court of the Czech Republic in Case Pl. US 34/04'.<sup>41</sup> Whereas in the so-called Latvian–Russian Border Treaty Case, the Constitutional Court, in explaining a state's right to freely give up its freedom, refers to the separate opinion of Judge Dionisio Anzilloti of the International Court of Justice in the case *Customs Regime between Germany and Austria*.<sup>42</sup>

## 2.2. *The role of the Constitutional Court's references to decisions by national courts*

In resolving cases falling within its competence, the Constitutional Court often uses the rulings made by other courts of the court system in its judgments. There are three main reasons for this.

Firstly, in view of the fact that the applicant frequently has his own opinion, but the institution issued the contested legal act (its own), the case law may help

38 See more, for example, Robin C. A. White and Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9(1) HRLRev 37; Fred K. Nielsen, 'Separate Opinion' (1927) 21(3) AJIL 565.

39 Judgment of the Constitutional Court, Case No 2018–11–01, 6 March 2019, para 12.

40 Judgment of the Constitutional Court, Case No 2017–25–01, 29 June 2018, para 13.3.

41 Judgment of the Constitutional Court, Case No 2009–11–01, 18 January 2010, para 10.3.

42 Judgment of the Constitutional Court, Case No 2007–10–0102, 29 November 2007, para 19.

to understand how, actually, the particular norm functions in society. It has been underscored in the Constitutional Court's case law that 'a legal norm cannot be understood outside the practice of its application and the legal system, where it functions'.<sup>43</sup> Therefore, the legal consequences of applying the contested norm, also with regard to the applicant, should always be established.<sup>44</sup> For example, the participants in a case had expressed different opinions regarding the case law that had evolved with respect to the interpretation of a contested criminal law norm. The Constitutional Court, within the framework of objective inquiry, clarified the aspects in the application of this contested norm by using the rulings of four various courts (two instances).<sup>45</sup> Also in another case, in clarifying the practice of a contested norm—that this norm was interpreted and applied in a way that deprived a person of the right to the reimbursement of the state fee if the term of three years, set for the reimbursement, had expired due to reasons beyond the person's control, that is, the duration of the legal proceedings—the Court made reference to a decision by the Panel of Civil Cases of the Riga Regional Court.<sup>46</sup>

The second most frequent reason for referring to the rulings made by other courts is (if one may say so) to provide guidelines to the parties applying legal norms (including a court) for further regulation of the matter (resolving the dispute) by using solutions or findings that have already been used by the courts of the court system. Thus, for example, in one case, the Constitutional Court recognised Paragraph 2 of the Transitional Provision of the Law on Compensating for Damages Inflicted in Criminal Proceedings or Record-Keeping of Administrative Violations as anti-constitutional, insofar as it established the right to claim compensation for non-pecuniary damages with respect to persons for whom the legal grounds for claiming compensation for non-pecuniary damages had occurred no more than six months before this law entered into force, and who had turned to the authority and whose claim regarding compensation for non-pecuniary damage had been dismissed due to the missed deadline.<sup>47</sup> The Constitutional Court, in explaining the legal effects of its judgment, so as to ensure the possibility of individuals who were in particular legal circumstances being able to receive compensation, used, as the basis for its judgment, the statement made by the Department of Administrative Cases of the Supreme Court: 'The term of six months should be recognised as being entirely sufficient to allow a person to reorient themselves to the new legal order after the Compensation Law has entered into force'.<sup>48</sup> Thus, the Constitutional Court, respecting, *inter alia*, the Supreme Court's opinion, ruled that

43 Judgment of the Constitutional Court, Case No 2006–03–0106, 23 November 2006, para 24.5.

44 Judgment of the Constitutional Court, Case No 2012–26–03, 28 June 2013, para 12.1.

45 Judgment of the Constitutional Court, Case No 2020–23–01, 19 February 2021, para 16.2.

46 Judgment of the Constitutional Court, Case No 2020–14–01, 2 November 2020, para 6.4.

47 Judgment of the Constitutional Court, Case No 2020–30–01, 5 March 2021.

48 Judgment of the Constitutional Court, Case No 2020–30–01, 5 March 2021, para 17.

the contested norm should be applied in compliance with the system of the Compensation Law, providing that the persons referred to above had the right to claim the compensation for non-pecuniary damages six months after the Compensation Law entered into force.<sup>49</sup>

Thirdly, the Constitutional Court often refers to the case law of other courts if additional arguments are needed for the interpretation of a legal norm. For example, the Constitutional Court, in interpreting the legal elements of a criminal law provision, provided a reference to the Supreme Court's ruling, which comprised the same interpretation of the legal provision.<sup>50</sup>

An analysis of the case law reveals that, basically, the Constitutional Court makes references to the Supreme Court's case law. This method may be explained by the finality of the Supreme Court's rulings, since they are not subject to appeal, which means that the solution to the matter is final and there can be no more disputes about it. The case law of lower-instance courts is used if their rulings have the nature of a final regulation, not excluding the possibility of using the case law of different instances to demonstrate the diversity in the case law. For example, in one case, providing arguments to the statements made by the *Saeima's* representative on how courts applied legal norms on road traffic, the Constitutional Court, using the rulings by different courts (Riga City Zemgale Suburb Court, Alūksne District Court, the courts of Sigulda and Ogre District Court), reached the conclusion that the case law was different—it lacked uniformity.<sup>51</sup> The case law of lower instance courts may also be used to demonstrate the Supreme Court's functionality. For example, the Constitutional Court, explaining the application of a legal norm in a case, referred to a judgment by Kurzeme Regional Court, as well as the Supreme Court's judgment, by which the aforementioned judgment by Kurzeme Regional Court was revoked and legal proceedings in the case terminated.<sup>52</sup>

A diversity of opinions among courts cannot be excluded. A case that was initiated by the Constitutional Court on the basis of an application by the Administrative Regional Court serves as a good example. In this case, the Administrative Regional Court did not uphold the Supreme Court's case law and, therefore, requested the Constitutional Court to review the compatibility of the provisions of the law 'On Personal Income Tax' that provided that the income from selling one's property was not included in the annual taxable income and was not taxed, except for the sale of such immovable property that the person had owned for less than 12 months, with Article 91 of the *Satversme*.<sup>53</sup> More specifically, the

49 Judgment of the Constitutional Court, Case No 2020–30–01, 5 March 2021, para 17.

50 Judgment of the Constitutional Court, Case No 2020–23–01, 19 February 2021, para 15.

51 Judgment of the Constitutional Court, Case No 2012–23–01, 24 October 2013, para 13.4.2.

52 Judgment of the Constitutional Court, Case No 2014–09–01, 28 November 2014, para 16.

53 Decision of the Constitutional Court of the Republic of Latvia to terminate a case on 13 December 2011 in Case No 2011–15–01.

Department of Administrative Cases of the Supreme Court Senate had explained in other cases that, in determining the tax in such cases, only one criterion, the period of one year during which the real estate had been the person's property, had to be taken into account. Thus, if one or several units of immovable property had been owned by the person for more than one year, the income that the person had gained from the sale of such immovable property (property) was not taxed. The Supreme Court held that there was no need to assess another characteristic: the systemic character of activities or whether these activities (sale of property) had the nature of commercial operations. The Administrative Regional Court did not subscribe to this understanding held by the Supreme Court.

The Constitutional Court, in terminating legal proceedings in this case, provided an explanation regarding the content of the contested norm and upheld the opinion of the Administrative Regional Court, not that of the Supreme Court. It concluded that it had to be determined whether a natural person's activities with respect to the sale of immovable property did not have the features of commercial activity. In practice, this meant that if a person sold several units of property that he had owned for more than a year, the obligation to pay the tax set in. In view of the binding force of the interpretation of legal norms included in the Constitutional Court's decision on terminating legal proceedings, the Department of the Administrative Cases of the Supreme Court Senate, at the plenary session of the Senate, departed from its previous case law, respecting the interpretation of the legal norm provided by the Constitutional Court.<sup>54</sup>

Likewise, the Supreme Court derogated from its initial case law with respect to the protection of local government deputies after the Constitutional Court's judgment in Case No 2017-32-05 came into force, in which the Constitutional Court had noted 'that the verification of an infringement of a local government deputy's subjective public rights, on the basis of the deputy's application, is conducted by the administrative court'.<sup>55</sup> In the cases examined previously, the Supreme Court had recognised that cases regarding requests for information made by local government council members were not to be examined via the administrative procedure. Following the judgment in Case No 2017-32-05, the Supreme Court derogated from its opinion and recognised that 'pursuant to the principle of a democratic state governed by the rule of law and Section 2 of the Administrative Procedure Law, such a dispute is subject to the administrative court's review'.<sup>56</sup>

These examples demonstrate, on the one hand, the Constitutional Court's special role and status in the state but, on the other hand, this status makes the Constitutional Court search for and maintain a respectful dialogue with the

54 Judgment of the Department of Administrative Cases of the Senate of the Supreme Court of 4 June 2012 in Case No A42723108, SKA-28/2012.

55 Judgment of the Constitutional Court, Case No 2017-32-05, 29 June 2018, para 25.

56 Judgment of the Department of Administrative Cases of the Senate of the Supreme Court of 27 November 2018 in Case No 670019217, SKA-888/2018.

courts of the court system. The other courts, even if they do not subscribe to the Constitutional Court's ruling, have an obligation to abide by it. It is understandable that in those cases in which a binding interpretation of a legal norm is provided, courts expect that the Constitutional Court will also examine the Supreme Court's reasoning and, if it does not uphold it, that it will provide counter-arguments.<sup>57</sup> Although in practice a difference of opinions among courts is not observed that often, it means that the legal system is evolving.

### **3. The role of the Constitutional Court's references to foreign judicial decisions**

Although each legal system is unique, modern justice requires maintaining a dialogue with other national courts. As the Constitutional Court has underscored, the *Satversme* in Latvia is interpreted by taking into consideration international commitments, 'as well as taking into account the common constitutional legal heritage of the European States'.<sup>58</sup> Presently, the judicial dialogue with international courts—the CJEU and the ECtHR—is also maintained.

#### ***3.1. The role of the Constitutional Court's references to the judicial decisions of constitutional courts in other countries***

In particular, in the initial stages of the Constitutional Court's practice, when it had not accumulated sufficient practice, the Constitutional Court very frequently referred to the judgments of constitutional courts in other countries. Over time, when the accumulated case law material became sufficiently extensive, this method was gradually abolished. However, recently, there has been a return to the use of judgments made by the courts of other states, or to be more precise, one state, in developing its arguments. It could be said that the use of the case law of other national constitutional courts in the Constitutional Court's judgments has been changeable.

Of course, the case law of other national constitutional courts is not binding. If it is used, then it usually serves as a means of interpreting legal norms or it provides support for the reasoning when dealing with a complicated matter. However, using the case law of other countries should not turn into a 'cherry-picking exercise'.<sup>59</sup> It should be understandable and substantiated.

Most frequently, the Constitutional Court has made references to the judgments of the Federal Constitutional Court of Germany. This choice can be substantiated based on several reasons. The constitutional system of Germany

<sup>57</sup> See Krūmiņa (n 3).

<sup>58</sup> Judgment of the Constitutional Court, Case No 2009-45-01, 22 February 2010, para 9.

<sup>59</sup> Andreas Paulus, 'Engaging in Judicial Dialogue: The Practice of the German Federal Constitutional Court' in Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press 2017) 265.

has always been a source of inspiration for the Latvian constitutional order. For example, in drafting the *Satversme* of 15 February 1922, the Weimar Constitution was taken into consideration.<sup>60</sup> In establishing the Constitutional Court, the model of the German Federal Constitutional Court was studied. Specific procedural issues, such as the right to decide on the so-called adjudicated issue<sup>61</sup>, were developed on the basis of the German Court's experience. The constitutional complaint was constructed by considering Germany's experience.<sup>62</sup> The German Federal Constitutional Court has served as the basis for the development of, for example, the methodology for assessing restrictions on fundamental human rights.<sup>63</sup> Returning to the case law of the German Federal Constitutional Court was especially pronounced in the cases heard by the Constitutional Court in which the principle of human dignity was in focus. One might say that the Constitutional Court has 'borrowed' the method for forming elements of this principle's content from the German Federal Constitutional Court. For example, it was concluded, on the basis of the case law of the German Federal Constitutional Court, that the state's obligation to protect human dignity did not end with the person's death.<sup>64</sup> Likewise, the case law of this court was used in cases heard in 2020 examining the fulfilment of the state's obligation to ensure fundamental social human rights, recognising that in order to ensure human life worthy of human dignity, it was not enough to only guarantee a minimum means of survival, and that social assistance should ensure, at least on a minimum level, that individuals could participate in social, political and cultural life; and that the state had to ensure that each person had an appropriate status as a member of society.<sup>65</sup> In another case heard in 2020, the judgment includes references to the case law of the German Federal Constitutional Court, leading to several conclusions; for example, that ensuring the right to a life worthy of human dignity was a substantive issue of fundamental rights, which should be regulated by parliament with a legal act since this was at the legislator's discretion.<sup>66</sup>

The second most frequently quoted court is the Constitutional Court of the Republic of Lithuania. The use of judgments by this court can be substantiated by the fact that the legal systems of Lithuania and Latvia were in a similar situation and both countries had to deal with essential issues influencing the life of the state and society. An analysis of judgments shows that Latvia has often sought inspiration from the solution to a particular issue in the case law of the Lithuanian Constitutional Court.<sup>67</sup>

60 Jānis Pleps, 'About the Constitution of the Republic of Latvia: History and Modern Days' in *The Constitution of the Republic of Latvia* (Latvijas Vēstnesis 2012) 306.

61 Judgment of the Constitutional Court, Case No 2005-13-0106, 15 June 2006, para 10.1.

62 Judgment of the Constitutional Court, Case No 2001-06-03, 22 February 2002, para 2.4.

63 Judgment of the Constitutional Court, Case No 2001-05-03, 19 December 2001, para 6.

64 Judgment of the Constitutional Court, Case No 2018-08-03, 5 March 2019, para 11.

65 Judgment of the Constitutional Court, Case No 2019-24-03, 25 June 2020, para 17.3.

66 Judgment of the Constitutional Court, Case No 2019-25-03, 16 July 2020, paras 16, 17.

67 Judgment of the Constitutional Court, Case No 2002-12-01, 25 March 2003, para 1.

In its first few years, the Constitutional Court searched for solutions to similar issues in other countries that had also experienced a transformation of their legal systems, and therefore it referred to the experience of courts in other post-socialist countries, such as the Constitutional Court of Slovenia,<sup>68</sup> the Polish Constitutional Tribunal<sup>69</sup>, the Constitutional Court of the Czech Republic<sup>70</sup> and the Republic of Estonia Supreme Court.<sup>71</sup> References made by the Constitutional Court to the judgments of the Supreme Court of Canada<sup>72</sup> and the Supreme Court of the USA<sup>73</sup> can also be found.

By referring to other courts' case law, the Constitutional Court uses two main methods. Most often, the Constitutional Court refers to the case law of other national constitutional courts by providing a short summary or digest of the reasoning provided by the respective court, which is specially adapted to develop the Constitutional Court's arguments. For example, as noted in one case:

Also the Federal Constitutional Court of Germany has recognised that social assistance to persons should ensure at least on the minimum level participation in social, political and cultural life. ... (see Judgement of 5 November 2019 by the Federal Constitutional Court of Germany in Case BvL7/16, Rn.119).<sup>74</sup>

As another example, 'a similar case was reviewed by the Lithuanian Constitutional Court. It has noted that ... (see Judgement of 30 October 2008 by the Lithuanian Constitutional Court in Case No.16/06–69/06–10/07, Para 3.3. and 4.3, available: [www.lrkt.lt/](http://www.lrkt.lt/)).<sup>75</sup>

The Constitutional Court may not present the precise arguments of another court, but it offers up the case law of this other state for comparison, which means that this case law has been examined and used in developing the Constitutional Court's reasoning. For example, in one case, the Constitutional Court explains the Cabinet's right to prepare the draft state budget by 'taking into consideration the existing economic situation, as well as the financial resources actually accessible to the State (compare, see Judgement by the Constitutional

68 Judgment of the Constitutional Court, Case No 2002–08–01, 23 September 2002.

69 Judgment of the Constitutional Court, Case No 2009–11–01, 18 January 2010, para 10.2.

70 Judgment of the Constitutional Court, Case No 2002–08–01, 23 September 2002.

71 Judgment of the Constitutional Court, Case No 2005–16–01, 8 March 2006, paras 15, 17.5.

72 Judgment of the Constitutional Court, Case No 2009–11–01, 18 January 2010, para 9.

73 Judgment of the Constitutional Court, Case No 2010–25–01, 6 December 2010, para 10.

74 Judgment of the Constitutional Court, Case No 2019–24–03, 25 June 2020, para 17.3; see also Judgment of the Constitutional Court, Case No 2001–16–01, 4 June 2002, para 2.1; Judgment of the Constitutional Court, Case No 2015–03–01, 21 December 2015, para 14.2; Judgment of the Constitutional Court, Case No 2019–25–03, 16 July 2020, paras 16, 17.

75 Judgment of the Constitutional Court, Case No 2016–07–01, 18 March 2017, para 25.2.

Court of the Republic of Lithuania of 14 January 2002 in Case No 25/01)<sup>76</sup> In another case, in turn, it explains the principles for the functioning of a local government council and refers, for comparison, to the judgment by the German Federal Constitutional Court: ‘(compare, see Judgement by the German Federal Constitutional Court of 13 June 1989 in case No. 2 BvE 1/88, published BVerfGE 80, 188)’<sup>77</sup>

However, whenever references are made to the rulings made by a court of another state, caution is needed. The case law of another state cannot always be automatically transferred into national law. The case law of another national constitutional court is not binding upon the Latvian Constitutional Court. The content of the constitutional norms may differ, and the legal regulations and the system for the implementation of a certain institution, in general, may differ. Therefore, borrowing ideas and reasoning from other national constitutional courts is possible, but on a comprehensible and explainable level.

### 3.2. *The role of the Constitutional Court’s references to judicial decisions of international courts*

In explaining the development of the Constitutional Court’s judicial dialogue with the European courts—the ECtHR and also the CJEU—several considerations must be taken into account.

In the international law context, the Latvian legal system is characterised by openness, since the provisions of international law, binding upon Latvia, and the principles of international law, are applied directly.<sup>78</sup> In the hierarchy of Latvian legal provisions, the international law provisions of the same legal level take priority over the same level of national legal norms. Moreover, the principle of harmony, which follows from Article 89 of the *Satversme*<sup>79</sup> and which is recognised in the Constitutional Court’s case law, must be taken into account. This means that the aim of the legislator has not been to oppose the norms of human rights included in the *Satversme* in favour of the international ones, but quite the contrary—the legislator aims to achieve harmony between the human rights provisions included in the *Satversme* and the provisions of international law. This, in turn, means that in cases when there are doubts about the contents of the norms of human rights included in the *Satversme*, they should be interpreted in

76 Judgment of the Constitutional Court, Case No 2019–29–01, 29 October 2020, para 21.3.

77 Judgment of the Constitutional Court, Case No 2017–32–05, 29 June 2018, para 21.

78 Artūrs Kučs, ‘Starptautisko cilvēktiesību avotu un Eiropas Savienības tiesību avotu piemērošana Satversmes tiesā’ [‘Application of International Sources of Human Rights and Sources of European Union Law in the Constitutional Court’] in *Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās* [Application of International and European Union Law in National Courts] (LU Akadēmiskais apgāds 2020) 13.

79 Art 89 of the *Satversme* determines that the state recognises and protects the fundamental rights of a person in accordance with the Constitution, the laws and international agreements binding on Latvia.

compliance with the practice of the application of international norms on human rights.<sup>80</sup> It has even been recognised that

[the] practice of the European Court of Human Rights, which in accordance with liabilities Latvia has undertaken [...] is mandatory when interpreting the norms of the Convention. This practice shall be used also when interpreting the respective norms of the *Satversme*.<sup>81</sup>

Methodologically, the norms on international human rights, which are binding upon Latvia, and the practice of their application thereof on the level of constitutional law, also serve as a means of specification to determine the content and the scope of the principles of a democratic state governed by the rule of law, insofar as this does not cause a decrease in the protection of fundamental rights that are included in the *Satversme*.<sup>82</sup>

With respect to European Union (EU) law, the Constitutional Court abides by the principle that, with Latvia's accession to the EU, EU law has become an integral part of the Latvian legal system. This means that the regulatory enactments adopted by the institutions of the EU, as well as the interpretation of these acts enshrined in the case law of the CJEU, are binding upon Latvia. Hence, whenever the content of national legal norms is clarified and legal norms are applied, 'the norms of the European Union law that reinforce democracy and their interpretation, enshrined in the case law of the Court of Justice of the European Union'<sup>83</sup> must be taken into account.

References to the case law of the ECtHR are most frequently found in the Constitutional Court's rulings, because it is sometimes characterised as a 'cooperative system' between domestic courts and the ECtHR.<sup>84</sup> In particular, during the first years of the Constitutional Court's work, the use of the ECtHR's case law served to give greater weight to the Constitutional Court's arguments. Usually, in those judgments that deal with issues of restrictions to fundamental human rights, references to a judgment by the ECtHR can be found. The ECtHR's case law is particularly important in those cases where the content of a particular human rights provision has to be brought to light. Therefore, determining the content of the *Satversme*'s provision is often accompanied by a reference to an ECtHR judgment. For example, in establishing whether the prohibition to also transcribe street names on buildings' number plaques into foreign languages infringed upon the private life or home of the building's owner or legal possessor, the Constitutional Court used the ECtHR's case law in Article 8 of the European

80 Judgment of the Constitutional Court, Case No 2001-08-01, 17 January 2002, para 3.

81 Judgment of the Constitutional Court, Case No 2000-03-01, 30 August 2000, para 5.

82 Judgment of the Constitutional Court, Case No 2019-25-03, 16 July 2020, para 18.

83 Judgment of the Constitutional Court, Case No 2020-31-01, 6 April 2021, para 16.2.

84 Amrei Müller, 'The ECtHR's Engagement with German and Russian Courts' Decisions: Encouraging Effective Cooperation to Secure ECHR Rights' in Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press 2017) 287.

Convention for the Protection of Human Rights and Fundamental Freedoms<sup>85</sup>, whereas in clarifying the content of the first sentence of Article 112 of the *Satversme*, the interpretation of Article 2 of the First Protocol to the Convention provided in the case law of the ECtHR was taken into account,<sup>86</sup> etc. Thus, the case law of the ECtHR is used (for the first time) when the Constitutional Court provides an interpretation of a human rights provision. In its successive judgments, the Constitutional Court may refer both to the case law of the ECtHR and only to its own previous judgment in which the interpretation of the particular norm was provided. The analysis of judgments reveals very diverse approaches.

The case law of the ECtHR has been of great importance in creating the test (method) for restrictions on human rights. For example, the ECtHR's case law influenced the methodology for assessing absolute prohibition, which was used for the first time in the Constitutional Court's practice in 2017 and in several subsequent judgments.<sup>87</sup>

At the same time, it must be noted that the Constitutional Court has rejected the automatic application of the ECtHR's findings. It should also be noted that the Constitutional Court has recognised that the European Convention for the Protection of Human Rights and Fundamental Freedoms envisages the minimum standard of human rights and fundamental freedoms, which does not prohibit the Constitutional Court from reaching the conclusion that the *Satversme* may define a higher level of human rights protection.<sup>88</sup> Likewise, the functions and objectives of each court should always be taken into account. For example, in a case heard by the Constitutional Court, the summoned persons, in their opinions, referred to the ECtHR's judgment in the case *Talmane v Latvia*, and the Constitutional Court, substantially, dismissed this opinion developed by the ECtHR's judgment. The Constitutional Court underscored that in the ECtHR's judgment, the ECtHR fulfilled its basic function—it provided its opinion on the possible violation of the applicant's fundamental rights in the circumstances of the particular case—and it examined the actions by the Supreme Court Senate upon receiving the applicant's cassation complaint rather than the legal regulation on the examination of a cassation complaint. The task of the Constitutional Court is quite to the contrary—it reviews the constitutionality of legal norms within the limits of its competence.<sup>89</sup> The same principle regarding the functional separation of both courts and the scope of an ECtHR case (*Ēcis v Latvia*) (verifying the actual circumstances in which the legal norm was applied) was reiterated in another case that was heard by the Constitutional Court, in which the

85 Decision of the Constitutional Court of the Republic of Latvia to terminate a case on 17 November 2017 in Case No 2017-01-01, para 18.

86 Judgment of the Constitutional Court, Case No 2018-22-01, 13 November 2019, para 15.1.

87 Judgment of the Constitutional Court, Case No 2017-07-01, 24 November 2017, para 19; Judgment of the Constitutional Court, Case No 2020-29-01, 28 January 2021, para 24.

88 Judgment of the Constitutional Court, Case No 2016-06-01, 10 February 2017, para 29.2.

89 Judgment of the Constitutional Court, Case No 2017-23-01, 14 June 2018, para 14.

norm of the Sentence Execution Code, which prohibited a prison inmate from attending a relative's funeral, was reviewed.<sup>90</sup>

The dialogue between the Constitutional Court and the CJEU is maintained if the Constitutional Court refers an issue to the CJEU for a preliminary ruling. It is known that if a question on the interpretation of treaties or on the validity and interpretation of acts of EU institutions is raised in a case pending before a court or tribunal against whose decisions there is no judicial remedy under national law, that the court or tribunal must bring the matter before the CJEU. Of course, there are also exemptions from this rule<sup>91</sup>, but it is clear that the Constitutional Court is 'a court' that applies to the CJEU. Up until April 2021, the Constitutional Court had applied to the CJEU five times. In 2020 alone, the Constitutional Court turned to the CJEU three times. The procedure for preliminary rulings involves cooperation between the national courts and the CJEU, with the aim of ensuring the uniform application of EU law. Submitting a question for a preliminary ruling is sometimes characterised as 'a milestone event', which may even herald the start of a new era.<sup>92</sup> As underscored by CJEU President Koen Lenaerts, this procedure has become one of the mechanisms in the European legal order that allows for the development of a direct dialogue with the national courts and which is maintained and promoted by the Constitutional Court.<sup>93</sup>

It can be observed in the Constitutional Court's case law that references to the CJEU's judicature, in interpreting human rights included in the *Satversme*, are used if the particular matter has not been dealt with in the ECtHR's case law or if the particular issue has been examined very extensively in the CJEU's judicature. For example, very frequent references to the CJEU can be found in those Constitutional Court judgments that deal with taxation issues. Pursuant to the Constitutional Court's judicature, payment of a tax is viewed from the perspective of restricting the right to property, which means that the scope of the right to property, included in the first three sentences of Article 105 of the *Satversme*, is examined in conjunction with EU law and the CJEU's judicature.<sup>94</sup> In another case reviewing the constitutionality of concluding fixed-term employment contracts with the professoriate of higher education institutions, and taking into account, in particular, the EU law on this matter, as well as interpreting the norms of the *Satversme*, the Court has made repeated references to the CJEU's

90 Judgment of the Constitutional Court, Case No 2019–32–01, 18 September 2020, para 14.

91 Judgment of the Constitutional Court, Case No 2008–47–01, 28 May 2009, para 15.2.

92 François-Xavier Millet and Nicoletta Perlo, 'The First Preliminary Reference of the French Constitutional Court to the CJEU: Revolution de Palais or Revolution in French Constitutional Law?' (2015) 16(6) German Law Journal 1490.

93 'United European Legal Space: The Constitutional Court, the Supreme Court and the Court of Justice of the European Union Meet in a Dialogue' (*Constitutional Court of the Republic of Latvia*, 15 March 2021), [www.satv.tiesa.gov.lv/en/press-release/unity-european-legal-space-the-constitutional-court-the-supreme-court-and-the-court-of-justice-of-the-european-union-meet-in-a-dialogue/](http://www.satv.tiesa.gov.lv/en/press-release/unity-european-legal-space-the-constitutional-court-the-supreme-court-and-the-court-of-justice-of-the-european-union-meet-in-a-dialogue/) accessed on 20 June 2021.

94 Judgment of the Constitutional Court, Case No 2017–12–01, 11 April 2018, para 13.

case law.<sup>95</sup> Undoubtedly, it is impossible to reveal the content of the norms of the EU law, which is an integral part of the Latvian legal space, without examining the case law of the CJEU.<sup>96</sup> In one of the so-called Covid-19 crisis cases, the Constitutional Court had to provide an answer to the question regarding whether the restriction included in a national legal act complied with a particular article of the Treaty on the Functioning of the European Union, and the case law of the CJEU was used to clarify its content.<sup>97</sup>

As regards methodology, the Constitutional Court does not usually directly quote the case of law of either the ECtHR or CJEU, but rather it paraphrases it. If the Constitutional Court uses this case law to interpret the *Satversme* and other provisions and it serves as a source of inspiration for the Constitutional Court's conclusions, the following phrases are included in the judgment: 'the European Court of Human Rights has noted' or 'the European Court of Human Rights has recognised', or 'pursuant to the judicature of the European Court of Human Rights', or 'it has been recognised in the judicature of the Court of Justice of the European Union'. Regarding the methodology, it can be discerned that the ECtHR's case law is used to reveal the scope of human rights, whereas the case law of the CJEU is used both in clarifying the scope of fundamental rights and with respect to other criteria regarding restrictions on human rights, for example, in analysing the principle of proportionality or explaining a law. At the same time, the opinion that the judgments do not substantiate that a united methodology is applied for using the CJEU's case law can be upheld.<sup>98</sup>

Undeniably, the ECtHR's case law is encouraging the development of ideas in the Constitutional Court's practice, and the case law that is used proves that the Constitutional Court, in its practice, recognises the authority of the ECtHR.<sup>99</sup> The case law of the CJEU is also binding upon all EU member states. However, it would not be correct to only discuss the impact of the ECtHR and CJEU on (nation) states. The method of dialogue that is maintained means that the national courts also participate in the development of the European or common legal space. The national courts and judges undeniably play a significant role in the uniform interpretation and application of EU law, as well as in the application of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms within the national system, taking

95 Judgment of the Constitutional Court, Case No 2018–15–01, 7 June 2019.

96 Judgment of the Constitutional Court, Case No 2019–33–01, 12 November 2020, para 12.2; Judgment of the Constitutional Court, Case No 2014–36–01, 13 October 2014, para 14.

97 Judgment of the Constitutional Court, Case No 2020–26–0106, 11 December 2020, para 10.1.

98 See Kučš (n 78) 17.

99 Ineta Ziemele, 'The Significance of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Case-Law of the Constitutional Court of the Republic of Latvia' [www.satv.tiesa.gov.lv/en/runas-un-raksti/the-significance-of-the-european-convention-for-the-protection-of-human-rights-and-fundamental-freedoms-in-the-case-law-of-the-constitutional-court-of-the-republic-of-latvia/](http://www.satv.tiesa.gov.lv/en/runas-un-raksti/the-significance-of-the-european-convention-for-the-protection-of-human-rights-and-fundamental-freedoms-in-the-case-law-of-the-constitutional-court-of-the-republic-of-latvia/) accessed on 18 April 2021.

into account the subsidiarity principle.<sup>100</sup> To put it differently, the dialogue is not only one-directional. The dialogue, substantively, is diverse and multi-faceted, which means that the possibilities for the dialogue are inexhaustible and endless.

#### 4. Concluding remarks

In the area of constitutional law and also of human rights, the Constitutional Court is active and open to cooperation with other national constitutional courts and international courts. If the case law of these courts is used, shared conclusions can be drawn that lead to the possibility of formulating a method that is complied with by ‘borrowing’ the judicature of these other countries’ courts and international courts. The Constitutional Court is actively, albeit cautiously, using the case law of other national constitutional courts, both by referring to it directly in its judgments and by gaining inspiration, without making a direct reference to particular cases. The case law of the ECtHR and CJEU, in turn, is binding in view of the binding nature of international commitments as well as the provisions of the *Satversme* (Article 89 and Article 68). One can uphold the conclusion that the engagement with the jurisprudence of foreign and international courts often leads to the formation of well-reasoned conclusions.<sup>101</sup> In other words, judicial cosmopolitanism, the migration of constitutional ideas and judicial borrowing are institutions that are known to the Constitutional Court. These are working tools for judges.

Likewise, the interaction between the national courts, determined by the *erga omnes* effect of the Constitutional Court’s judgment, is also comprehensible and explicable. The interpretation of legal norms provided by the Constitutional Court is also mandatory for courts of the court system, which use it in administering justice and in dealing with particular disputes. The Constitutional Court, in turn, in certain cases in which it is necessary, uses the case law of the court system. The analysis of the practice shows that if a conflict of law arises, the Supreme Court yields to the interpretation of a legal norm provided by the Constitutional Court. In terms of regulation, this response is justifiable. However, overruling the Supreme Court’s interpretation may lead to a confrontation between these two courts. Confrontations should not be feared because it is not always possible to avoid them.

In view of the accumulated case law of the Constitutional Court, judgments containing self-references are typical. Their main aim is to demonstrate the continuity and development of case law. However, diverse practices are observed with respect to self-referencing.

100 Giuseppe Martinico, ‘Is the European Convention Going to Be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ (2012) 23(2) EJIL 407.

101 Izabela Skomerska Muchowska, ‘Judicial Dialogue on International Human Rights Law in Poland and Eastern Europe’ in Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press 2017) 65.

Law is never rigid. It develops and improves. This development and improvement of the law may be ensured by constructive collaboration, in its most diverse forms, between all constitutional institutions, and in particular, between the Constitutional Court and courts belonging to the court system. The Latvian courts are ready to cooperate in the best possible way. This is also proven by case law.

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# 8 Precedents and case-based reasoning in the case law of the Constitutional Tribunal of the Republic of Poland

*Piotr Czarny and Monika Florczak-Wątor*

## 1. Introduction

The Constitutional Tribunal of the Republic of Poland is one of the oldest constitutional review organs in Central and Eastern Europe.<sup>1</sup> The legal basis for its operation was established in 1982, and its first judgment was issued in May 1986.

Under the Constitution of the Republic of Poland, the Tribunal is a part of a separate and independent judicial power.<sup>2</sup> Its judgments are final and of universally binding application. There is no legal possibility of reversing or amending them. The Tribunal is one among the highest organs within the judiciary, not a superior one. The equivalent highest position was also granted to the Tribunal of State, the Supreme Court and the Supreme Administrative Court. All these organs are obliged to apply the Constitution directly, but there are no legal instruments for removing divergences in their constitutional interpretations.

To date, the Tribunal has handed down more than 12,000 decisions, including almost 1,500 judgments on the merits of cases submitted to it.<sup>3</sup> Its 35-year judicial activity can be divided into five periods. The first covers the years 1986–1989 when the Tribunal operated on the basis of the socialist 1952 Constitution. The second concerns the years 1990–1997 when the Tribunal mainly adjudicated upon the principle of a democratic rule-of-law state introduced in December 1989 to the 1952 Constitution. The next period, which followed the entry into force of the 1997 Constitution, can be characterised as the concretisation, by the Tribunal, of the new constitutional rules and principles and the strengthening of its position within the state system. The next period was marked by the constitutional crisis of 2015–2016, which caused a serious conflict between the

1 Piotr Tuleja, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Polen' in Armin von Bogdandy, Petro Cruz Villalon and Peter-Michael Huber (eds.), *Handbuch Ius Publicum Europaeum*, vol. 1 (CH Müller 2009) 457.

2 Art 10 and Art 173 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No 78, item 483, as amended).

3 Data on the number of Constitutional Tribunal (CT) judgments are provided on the basis of a database of judgments available on the CT's official website, <http://otk.trybunal.gov.pl/orzeczenia/> accessed on 30 July 2021.

Tribunal and the parliament, the government and the President of the Republic.<sup>4</sup> Finally, since 2017, as a result of far-reaching changes in its composition,<sup>5</sup> the Tribunal has started to be dependent on the governing political party: Law and Justice.<sup>6</sup>

The aim of this chapter is to answer the question regarding whether and to what extent legal opinions expressed earlier, mainly by the Polish Constitutional Tribunal itself, but also by other (domestic, foreign and international and supra-national) courts and tribunals, determined the subsequent decisions of the Tribunal. As a preliminary research thesis, it was assumed that this influence was not only significant, but also often decisive for further adjudications. The research is based on a quantitative and qualitative analysis of the jurisprudence of the Tribunal, and to the extent to which this issue has been the subject of scientific analysis, the authors have referred to the views expressed in the Polish legal literature.

## 2. The role of references to national judicial decisions

When reviewing the constitutionality of the law, the Tribunal is obliged to comprehensively examine all the relevant circumstances of the case. It is bound by the scope of the review indicated by the initiator of a proceeding but not by a given reasoning. Therefore, the Tribunal may (and even should) *ex officio* take any possible arguments for compliance or non-compliance of the law with the Constitution into account.

One such argument is of a historical nature and refers to previous judicial opinions, which is of particular importance when it derives from decisions of the highest judicial authorities.<sup>7</sup> Previous opinions expressed by courts become part of the judicial standards that are regarded as an important component of the argumentative tradition. In the civil law system, even though a judge is not obliged to follow previous court decisions, references to those decisions occur anyway. In the literature, this is called the practice of informal precedent.<sup>8</sup> Adherence to

4 See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) 11 HJRL 417; Monika Florczak-Wątor, 'The Capture of the Polish Constitutional Tribunal and Its Impact on the Rights and Freedoms of Individuals' in Jürgen Mackert, Hannah Wolf and Bryan S. Turner (eds.), *The Condition of Democracy. Vol 2: Contesting Citizenship* (Routledge 2021).

5 The changes in the composition of the Polish CT were made in an unlawful manner; see the ECtHR judgment of 7 May 2021 in the case *Xero Flor in Poland sp. z o.o. v Poland* (Application 4907/18).

6 Monika Florczak-Wątor, 'The Polish Constitutional Tribunal and Its Transformation' (2020) 32 ERPL 1, 461.

7 Jerzy Stelmach and Bartosz Brożek, *Metody prawnicze. Logika—analiza—argumentacji—hermeneutyka* (Wolters Kluwer 2004) 217.

8 Marcin Matczak, 'Teoria precedensu czy teoria cytowań? Uwagi o praktyce odwołań do wcześniejszych orzeczeń sądowych w świetle teorii wielokrotnych ugruntowań' in Anna Śledzińska-Simon and Mirosław Wyrzykowski (eds.), *Precedens w polskim systemie prawa* (Warsaw University 2010).

the opinions expressed in previous judgments is regarded as a legitimate judicial activity aimed at determining the meaning of legal norms.

### *2.1. The role of self-references in Tribunal adjudications*

A few years ago, a group of Polish legal theorists conducted a thorough empirical study involving the analysis of 150 selected judgments of the Constitutional Tribunal issued in the period from 1986–2009.<sup>9</sup> Their aim was to determine what types of arguments appeared in the Tribunal's interpretations. The research led to the conclusion that the most frequently used arguments were those from the jurisprudence, which, in total, constituted over 26% of all arguments and almost 30% of the volume of the Tribunal's statements on the Constitution. It has been proven that when interpreting the Constitution, the Tribunal refers almost exclusively to its own jurisprudence and not so often to the statements of other courts. It was also noted that almost half of the cases of such argumentation involved references without any broader justification.<sup>10</sup> Thus, this type of argumentation essentially consists of appealing to the Tribunal's own authority as a source of legitimacy for its own statements. This research has led to the conclusion that the most common type of argumentation in the court's practice is the argument 'from its own authority', which can be found in about 60% of its judgments. Arguments from the authority of other courts are less common and occur in one in nine rulings.<sup>11</sup>

Most often, the Tribunal refers to the reasoning part of its previous rulings. It is worth noting here that the aim of the justification of a ruling is to demonstrate the accuracy of the decision, in which accuracy is understood primarily as an attempt to make the decision acceptable to the audience to which it is addressed.<sup>12</sup> In the case of the Tribunal, this audience not only includes the participants of a given proceeding, but also other organs of the state (in particular, the parliament and the courts), the legal doctrine and the general public.

Among the various types of self-references, one should distinguish between the references to the Tribunal's previous judgments determining the interpretation and application of the Constitution and references to judgments concerning the interpretation and application of sub-constitutional legal acts in question before the Tribunal. Self-references to rulings adjudicating on issues concerning Tribunal competences and the constitutional review procedure, as well as self-references to rulings determining the understanding of certain legal institutions, are also of significant importance.<sup>13</sup>

9 See Jan Winczorek, 'Wzorce wykładni konstytucji w świetle analizy treści uzasadnień orzeczeń Trybunału Konstytucyjnego' in Tomasz Stawecki and Jan Winczorek (eds.), *Wykładnia konstytucji. Inspiracje, teorie, argumenty* (Wolters Kluwer 2014) 387–460.

10 Ibid 404.

11 Ibid 422.

12 Marek Smolak, *Uzasadnienie sądowe jako argumentacja z moralności politycznej. O legitymizacji władzy sędziowskiej* (Zakamycze 2003) 10.

13 Aleksandra Syryt, 'Pojęcie "utrwalonej linii orzeczniczej" w orzecznictwie Trybunału Konstytucyjnego' in Mateusz Grochowski, Michał Raczkowski and Sławomir Żółtek (eds.), *Jednolitość orzecznictwa. Standard—instruments—practice* (Sąd Najwyższy 2015) 39.

The approach of the Constitutional Tribunal to quoting its opinions expressed in previous case law has changed over time. Such self-references were scarce in the initial period of its judicial activity, but after the political transformation of 1989–1990, self-quotations became a way of perpetuating the constitutional principles developed in the Tribunal’s case law. In many judgments issued after 1997, the Tribunal comprehensively repeated its case law on various constitutional issues in order to emphasise that the pre-constitutional jurisprudence had also remained valid under the new Constitution.

When making self-references, the Tribunal either cites its previous specific judgments, sometimes analysing them in more detail, or it refers to the line of jurisprudence. In some cases, the Tribunal emphasises that a given view is an element of an ‘established’ (or even ‘well-established’) line of jurisprudence, although it is difficult to indicate the criteria allowing for the recognition that a given line of jurisprudence is ‘established’. Rarely, the Tribunal refers in a general way to the so-called *aquis constitutionnel*; that is, to the whole of its jurisprudential heritage.<sup>14</sup>

Several reasons can be identified as to why the Tribunal uses the argument from its own authority so frequently.

Firstly, the Tribunal assumes that it enjoys the status of the ‘court of the last word’ in constitutional matters and that it is entitled to provide a binding interpretation of the Constitution.<sup>15</sup> In its earlier case law, the Tribunal even claimed that certain excerpts from the reasoning of its judgments have binding force as *ratio decidendi*, supplementing the sentence.<sup>16</sup> This view was later abandoned, but even today, the Tribunal still takes the position that the interpretation presented in the reasoning part of its interpretative rulings is binding on the courts. The Tribunal also finds itself bound by its own interpretations, and hence it refers to the rulings in which these interpretations were expressed.

Secondly, it should be noted that most cases are not decided by a full Tribunal panel but by its smaller panels (three or five judges). This is one of the reasons for the discrepancies in the jurisprudence of the Tribunal. However, the extensive use of self-references allows the public to be persuaded that the views expressed in such rulings issued by small panels are not the result of the subjective beliefs of several judges, but are justified in the jurisprudence of the whole Tribunal.

Thirdly, self-references are regarded as a guarantee of the equal treatment of participants in proceedings before the Tribunal. It is particularly important in cases initiated by constitutional complaints, because the conditions for lodging

14 See CT judgment of 22 July 2010, SK 25/08.

15 CT judgment of 13 November 2013, P 25/12. See also Piotr Czarny and Bogumił Naleziński, ‘Law-Making Activity of the Polish Constitutional Tribunal’ in Monika Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 172.

16 See Monika Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne* (Ars boni et aequi 2006) 61.

complaints are precisely defined in the Tribunal's case law. Since these conditions should be applied equally to all complainants, they should not be unjustifiably modified by the Tribunal in particular cases. Therefore, the Tribunal reiterates these conditions in its subsequent judgments by making self-references.

Fourthly, the persistence of the Tribunal's opinions with regard to the interpretation of the Constitution ensures the predictability of its rulings, and thus the certainty as to the actual content of constitutional norms. Moreover, the opposite situation, in which the Tribunal departs from views that were previously expressed, discourages the courts from adjudicating by taking those views into account.<sup>17</sup> Therefore, not only because of arguments referring to general assumptions on the stability of the law, the relative unambiguity of legal norms and the predictability of Tribunal decisions, but also for pragmatic reasons, the constancy of the Tribunal interpretations achieved by self-references are considered to be of significant constitutional value.

The Tribunal sometimes departs from its previously expressed views; however, it emphasises that this may only take place in exceptional circumstances.<sup>18</sup> Special status has been accorded to the views expressed in judgments announced by the full panel of the Tribunal. If a smaller panel wishes to depart from a view expressed by the full panel, it is obliged to refer the matter to the full panel for adjudication.

The aforementioned research on self-references conducted by Polish scholars has shown that the Tribunal treats its case law as a set of precedents, as evidenced by the high frequency of using arguments from its own authority without providing further justification for their adequacy in a given case. At the same time, however, it does not analyse whether the prerequisites of being bound by a precedent actually exist, assuming that it can freely cite its earlier judgments in each subsequent case that it decides upon.<sup>19</sup> Moreover, there is a problem with selective self-referencing, which is deserving of a negative assessment. The argument from its own authority is frequently abused by the Tribunal by its highlighting those elements of earlier argumentations that fit the assumed direction of the ruling and omitting those elements that support a different view. The practice of selective self-referencing intensified after 2017, and its aim is to use the previous authority of the Tribunal instrumentally to support a new interpretation of the Constitution presented by its current judges.

## *2.2. The role of references to national judicial decisions*

The frequency of references made by the Constitutional Tribunal to the jurisprudence of other Polish courts is low compared to the frequency of references made

17 See SC resolution of 17 December 2009, III PZP 2/09.

18 CT judgment of 26 July 2006, SK 21/04.

19 Marcin Romanowicz, 'Argument z autorytetu w dyskursie sądowym—próba wyjaśnienia' in Tomasz Stawecki and Jan Winczorek (eds.), *Wykładnia konstytucji. Inspiracje, teorie, argumenty* (Wolters Kluwer 2014) 513.

to its own case law. Moreover, arguments ‘from the authority of other courts’ are even less applied than arguments from the opinion of a legal doctrine.

These findings are relatively easy to explain. Firstly, the Tribunal considers that the interpretation of the law by national courts is generally not binding on it.<sup>20</sup> Obviously, the requirement for a comprehensive examination of each case means that the Tribunal does take the various possible judicial interpretations into account. However, the Tribunal is not entitled to correct this interpretation, even when it is defective from the point of view of the Constitution. The latter competence is held by the Supreme Court and the Supreme Administrative Court; hence, any actions of the Tribunal aimed at imposing a specific interpretation of the law on courts are opposed by these highest judicial authorities on each occasion.<sup>21</sup> The Tribunal also has no competence to assess the constitutionality of court rulings. In the constitutional complaint procedure, only the constitutionality of the legal basis of these rulings is examined.<sup>22</sup> Finally, the jurisprudence of common or administrative courts generally does not contribute significantly to the development of constitutional interpretations. Prior to the constitutional crisis, courts rarely ruled directly on the basis of the Constitution, and if they did interpret its provisions, they usually limited themselves to citing the views from the case law of the Constitutional Tribunal. Hence, currently, when reconstructing the content of constitutional norms, the Tribunal almost never takes the way in which they are understood in judicial decisions into account.

On the other hand, the Tribunal refers to judicial decisions relatively often when it comes to reconstructing the content of a contested statutory provision and the practice of its application. When reconstructing the content of a provision, the Tribunal not only relies on its literal wording, but also takes its various possible judicial interpretations into account. The vaguer and more imprecise a statutory provision is, the more significant it is for the Tribunal to determine how this provision is interpreted by courts. The vagueness and imprecision of a legal provision, which cannot be removed through its judicial interpretation, may constitute sufficient grounds for declaring that provision unconstitutional.<sup>23</sup>

Discrepancies in judicial interpretation are generally treated by the Tribunal as a law application issue, which remains outside the scope of its competences. However, there are two types of cases in which judicial interpretation is of decisive importance for constitutional reviews.

20 CT judgment of 8 May 2000, SK 22/99.

21 Rafał Mańko, ‘“War of Courts” as a Clash of Legal Cultures: Rethinking the Conflict Between the Polish Constitutional Tribunal and the Supreme Court Over “Interpretive Judgments”’ in Michael Hein, Antonia Geisler and Siri Hummel (eds.), *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory* (Peter Lang 2014).

22 Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A Contextual Analysis* (Hart 2019) 135.

23 CT judgment of 7 November 2006, SK 42/05.

Firstly, this concerns the case of an ‘established, uniform and widespread judicial interpretation’,<sup>24</sup> which, in the opinion of the Tribunal, determines the content of the examined provision and excludes the possibility for the Tribunal to adopt a different—potentially possible—way of understanding that provision.<sup>25</sup> Of key importance for establishing the existence of this type of interpretation are interpretative resolutions by large panels of the Supreme Court and Supreme Administrative Court, since in practice they determine the manner in which a provision is understood by lower courts. Therefore, in cases in which a charge is raised that the content of the criticised provision has been determined by its well-established, uniform and widespread judicial interpretation, the Tribunal puts forward an inquiry to the Supreme Court or the Supreme Administrative Court in order to receive confirmation that the interpretation is indeed of such a nature. In the opinion of the Tribunal, if a certain manner of understanding a statutory provision has already clearly become established in a judicial practice, and especially if it has found an unambiguous and authoritative expression in the rulings of the Supreme Court or Supreme Administrative Court, it should be deemed that this provision has acquired such content as the highest courts have found in it.<sup>26</sup>

Secondly, the judicial interpretation of the examined provision is important for the Tribunal in those cases in which it issues interpretative judgments.<sup>27</sup> These are rulings in which, in the operative part, the Tribunal states the compatibility or incompatibility of a provision with the Constitution on the condition that this provision is understood in a specific way. Practice shows that, almost always, this particular understanding of a provision cited in the operative part of an interpretative ruling is the understanding already existing in the judicial case law and reconstructed by the Tribunal. Therefore, in the reasoning part of interpretative judgments, to a much greater extent than in the reasoning part of other Tribunal rulings, references to judicial decisions are applied.

As far as the technique of references is concerned, the Tribunal usually refers either to a specific court decision that is relevant for the given case or to a group of decisions. Only exceptionally does the Tribunal use general formulations indicating that certain views or conclusions result from ‘established court jurisprudence’. However, in most cases, the analysis of the court case law by the Tribunal is not of a comprehensive nature. The Tribunal instead identifies and refers to the most important court rulings or to those most frequently cited in the jurisprudence and legal literature. Only exceptionally does the Tribunal assert that a given view is the result of its own analysis of the entirety of the existing court jurisprudence. For example, in one of its decisions, it stated, ‘The Constitutional Tribunal analysed all the published decisions of the Supreme Court and common courts [...] and a

24 This concept appeared for the first time in the CT judgment of 27 September 2012, SK 4/11.

25 CT judgments of 12 December 2005, SK 4/03 and of 28 June 2017, SK 20/16.

26 CT judgment of 3 October 2000, K 35/99.

27 Granat and Granat (n 22) 147–148; Piotr Tuleja, *Orzeczenia interpretacyjne Trybunału Konstytucyjnego* (Ars boni et aequi 2016).

dozen doctrinal commentaries, without finding in them the arguments presented by the applicant.<sup>28</sup> Exceptionally, the Tribunal also uses indirect references to judicial decisions through citing scientific publications and analysing them.<sup>29</sup>

To sum up, the Constitutional Tribunal recognises that in matters involving the interpretation of the Constitution, judicial decisions may not play a decisive role, and, to that extent, it does not refer to them. The situation is different in cases concerning sub-constitutional provisions contested before the Tribunal. The content of these provisions is, in fact, and to a large extent, reconstructed on the basis of the analysis of the relevant judicial decisions.

### **3. The role of references to foreign judicial decisions**

#### ***3.1. The role of references to the judicial decisions of other constitutional courts***

The Polish Constitutional Tribunal quite frequently refers to the jurisprudence of the constitutional courts of other countries. To date, most often and in over 40 cases, it has referred to rulings of the German Federal Constitutional Court (FCC). Much less frequently, it has drawn on the jurisprudence of other European courts, particularly the French Constitutional Council<sup>30</sup> and the constitutional courts of Austria,<sup>31</sup> Italy,<sup>32</sup> Spain<sup>33</sup> and Switzerland.<sup>34</sup> Amongst the Visegrad countries' constitutional courts, the Polish Tribunal has usually quoted the case law of the Czech Constitutional Court<sup>35</sup> and less frequently that of the Slovak<sup>36</sup> and Hungarian<sup>37</sup> Constitutional Courts. Single cases refer to the rulings of the Danish,<sup>38</sup> Estonian,<sup>39</sup> Cypriot<sup>40</sup> and Romanian<sup>41</sup> Supreme Courts or of the

28 CT judgment of 11 December 2018, SK 25/16.

29 See, e.g., the CT decision of 12 December 2005, Ts 112/05.

30 See the CT resolution of 27 September 1994, W 10/93 and its judgments of 24 June 1998, K 3/98, of 12 January 2000, P 11/98, of 27 April 2005, P 1/05, of 17 March 2008, K 32/05, of 24 November 2010, K 32/09 and of 7 October 2015, K 12/14.

31 See the CT judgments of 9 July 2009, SK 48/05, of 10 July 2008, P 15/08, of 26 June 2013, K 33/12, of 27 July 2014, of 10 December 2014, K 52/13 and of 24 November 2010, K 32/09.

32 See the CT judgments of 19 December 2006, P 37/05, of 10 July 2008, P 15/08 and of 7 October 2015, K 12/14.

33 See the CT judgments of 5 October 2010, SK 26/08 and of 3 December 2015, K 34/15.

34 See the CT judgments of 26 November 2003, SK 22/02 and of 25 May 2004, SK 44/03.

35 See the CT judgments of 24 November 2010, K 32/09 and of 23 November 2016, K 6/14.

36 See the CT judgments of 11 July 2012, K 8/10 and of 17 March 2008, K 32/05.

37 See the CT judgments of 19 November 2011, K 11/10 and of 5 June 2012, K 11/10.

38 CT judgment of 11 May 2005, K 18/04.

39 CT judgment of 17 March 2008, K 32/05.

40 CT judgment of 5 October 2010, SK 26/08.

41 CT judgment of 30 July 2014, K 23/11.

French Council of State.<sup>42</sup> In principle, the Polish Tribunal does not refer to the decisions of non-European courts. The exception in this respect is the Supreme Court of the United States, whose decisions it has cited in several cases,<sup>43</sup> as well as the Supreme Court of Canada.<sup>44</sup>

In the 35-year history of the Polish Constitutional Tribunal, one may also note periods of greater and lesser interest in quoting the jurisprudence of other constitutional courts. Undoubtedly, in the first decade of its activity, which preceded the entry into force of the 1997 Constitution, references to the jurisprudence of foreign constitutional courts were scarce. They were made almost exclusively to German jurisprudence with the purpose of reconstructing the meaning of new constitutional principles, such as the principle of political pluralism, sovereignty of the Nation or the separation of powers.<sup>45</sup> From this very early period of the Tribunal's activity, references were also made to some rulings of the French Constitutional Council, indicated as 'an exemplification of the line of constitutional jurisprudence of European democratic states'.<sup>46</sup>

Undoubtedly, after Poland's accession to the European Union (EU) in 2004, the number of cases in which the Tribunal applied the comparative argument based on the case law of foreign courts increased significantly. The constant monitoring of the jurisprudence of EU member states' constitutional courts is justified by the fact that they adjudicate on the constitutionality of the same or similar issues to those decided on by the Polish Tribunal.

An example in this regard is the judgment in which the Tribunal ruled on the constitutionality of the Lisbon Treaty.<sup>47</sup> In the reasoning part of this ruling, the Tribunal referred to the decisions of the constitutional courts of the Czech Republic, Germany, Austria, Hungary, Latvia and the French Constitutional Council. It noted that

a common feature of these rulings is the emphasis on the openness of the constitutional order in the face of European integration, with simultaneous attention paid to the significance of the constitutional and systemic identity—and thus essentially the sovereignty—of the Member States.

The Tribunal also drew attention to the concepts developed by foreign constitutional courts, such as the concept of competences inherent in the exercise of national sovereignty as developed by the French Constitutional Council or the concept of the constitutional court as the guardian of constitutional identity built by the German FCC. The comparative legal analysis led the Tribunal to conclude

42 See the CT judgments of 4 December 2001, SK 18/00 and of 10 November 2004, Kp 1/04.

43 See e.g. the CT judgments of 6 April 2011, Pp 1/10 and of 11 December 2012, K 37/11.

44 CT judgment of 11 October 2016, SK 28/15.

45 See the CT judgments of 22 November 1995, K 19/95 and of 8 March 2000, Pp 1/99.

46 See the CT judgment of 27 September 1994, W 10/93.

47 CT judgment of 24 November 2010, K 32/09.

in this ruling that ‘in the jurisprudence of the European constitutional courts the conviction of the compatibility of the provisions of the Treaty of Lisbon with national constitutions has been expressed’.<sup>48</sup>

Another judgment in which the comparative judicial argument was used in order to assess the constitutionality of national provisions implementing EU regulations was the ruling of 2010<sup>49</sup> on the European Arrest Warrant.<sup>50</sup> Wondering if it had the competence to review the constitutionality of the law implementing framework decisions, the Tribunal pointed out that this question was answered positively by the French Council of State, the Supreme Court of Cyprus and the Czech, Spanish and German Constitutional Courts. Therefore, the Polish Tribunal also found itself competent to examine the constitutionality of provisions implementing the European Arrest Warrant Framework Decision.

Of particular significance are the rulings of other constitutional courts in similar cases to those that the Polish Constitutional Tribunal adjudicated on. In the judgment examining the constitutionality of the obligation to wear seatbelts,<sup>51</sup> the Tribunal followed the reasoning adopted in similar cases by the Austrian and German Constitutional Courts. In turn, in the judgment concerning the constitutionality of regulations governing community gardens,<sup>52</sup> the Tribunal, in order to obtain a broader comparative perspective, presented analogous regulations from other countries together with the assessment of their constitutionality. It noted that the Constitutional Court of the Czech Republic had not yet ruled on a similar issue, while the constitutionality of analogous regulations had been examined by the Slovak Constitutional Court and had also been examined twice by the German FCC. While in the case concerning the obligation to wear seatbelts the decisions of other courts were regarded as an argument in favour of the constitutionality of such an obligation, in the case concerning community gardens, the reference to the case law of other constitutional courts was primarily intended to show the scale and importance of the problem on which the Tribunal was ruling.

As already mentioned, the Polish Constitutional Tribunal has been most influenced by references to the case law of the German FCC. It is possible to indicate three categories of cases in which the case law of the German Tribunal undoubtedly determined the views of the Polish Tribunal.

The first category consists of cases concerning the principle of determinacy in criminal law. This line of references was initiated by the judgment of 26 November 2003, SK 22/02, in which the Tribunal referred to three FCC judgments, from which it follows that the obligation to specify the elements of a prohibited

48 Ibid.

49 CT judgment of 5 October 2010, SK 26/08.

50 See the Framework Decision of the Council of the EU No 2002/584/JHA of 13 June 2002 on the European Arrest Warrant Decision and the surrender procedures between member states.

51 CT judgment of 9 July 2009, SK 48/05.

52 CT judgment of 11 July 2012, K 8/10.

act does not exclude a certain flexibility in criminal law, thus ensuring the possibility of covering, via legal regulations, changing atypical relations and situations. At the same time, the Tribunal found the FCC's view to be 'correct', whereby criminal provisions should be formulated in such a way that 'the risk of criminalisation itself should be recognisable to the addressees of the norm'.<sup>53</sup> This latter view, following the FCC's case law, was referred to in two more judgments of the Tribunal.<sup>54</sup> In its later rulings, the Tribunal also referred, several times, to the FCC case law concerning the principle of determinacy in criminal law<sup>55</sup> as well as to its understanding of violence as an element of a prohibited act.<sup>56</sup>

The second category of cases on which a significant impact from references being made by the Polish Tribunal to the FCC jurisprudence is that of cases concerning the issues of individual rights and freedoms. The Tribunal has cited FCC rulings in cases concerning the protection of individual dignity,<sup>57</sup> personal freedom,<sup>58</sup> freedom of occupation,<sup>59</sup> freedom of assembly<sup>60</sup> and the right to a court.<sup>61</sup> While reconstructing the standard for the right to privacy protection in cases involving citizens' data collection by the police<sup>62</sup> and the Central Anti-Corruption Bureau,<sup>63</sup> the Tribunal referred to the FCC judgment of 3 March 2004 in the *Grosser Lauschangrif* case. A more detailed analysis of the FCC's views on the issue of the collection, by the security services, of telecommunication data on perpetrators was made by the Polish Tribunal in one of its judgments issued in 2014.<sup>64</sup> Two years later,<sup>65</sup> while assessing the constitutionality of a provision on collecting biological material from the accused for genetic testing, the Polish Tribunal referred to an FCC judgment on the constitutionality of a provision allowing the DNA profile of a suspect or convicted person to be determined for the purpose of establishing that person's identity in possible future criminal proceedings. In the latter case, the Polish Tribunal also found the challenged provisions to be in conformity with the Constitution.

The third category of cases with significant references to the FCC jurisprudence are those in which the charge of the unconstitutionality of EU law or national

53 CT judgment of 26 November 2003, SK 22/02.

54 CT judgments of 5 May 2004, P 2/03 and of 28 June 2005, SK 56/04.

55 CT judgments of 5 May 2004, P 2/03, of 25 May 2004, SK 44/03 and of 9 June 2010, SK 52/08.

56 CT judgment of 9 October 2001, SK 8/00.

57 CT judgments of 5 March 2003, K 7/01, of 30 September 2008, K 44/07 and of 28 October 2015, K 21/14.

58 CT judgment of 10 July 2007, SK 50/06.

59 CT judgments of 26 April 1999, K 33/98 and of 10 December 2014, K 52/13.

60 CT judgment of 10 November 2004, Kp 1/04.

61 CT judgments of 3 July 2008, K 38/07, of 3 June 2008, K 42/07 and of 12 May 2011, P 38/08.

62 CT judgment of 12 December 2005, K 32/04.

63 CT judgment of 23 June 2009, K 54/07.

64 CT judgment of 30 July 2014, K 23/11.

65 CT judgment of 11 October 2016, SK 28/15.

law implementing EU law was raised. While examining the constitutionality of the Treaty of Accession,<sup>66</sup> the Tribunal stated that Article 90 of the Constitution, providing for the possibility of transferring the competences of public authorities in certain matters to an international organisation, did not allow for the transfer of those competences to such an extent that the Republic of Poland could not function as a sovereign and democratic state. In formulating this view, it stressed that it is convergent, in principle, with the position of the FCC, and it cited as evidence, in this respect, the judgment of the FCC of 12 October 1993 on the Maastricht Treaty. A comprehensive analysis of the FCC jurisprudence against the background of rulings of other constitutional courts is also contained in the already cited judgments issued in 2010, namely on the European Arrest Warrant and on the Lisbon Treaty, as well as the judgment issued in 2013 on the Stability Mechanism.<sup>67</sup> Such references to the FCC case law can also be found in the judgment of 16 November 2011, SK 45/09, in which the Tribunal stated that its competence to examine the compatibility of EU law with the Constitution was of a subsidiary nature and, therefore, before ruling on the incompatibility of a derived law act with the Constitution, it was necessary to ascertain the content of the act by making a preliminary reference to the Court of Justice of the European Union (CJEU). As the Tribunal added: ‘An analogous view was expressed by the German Federal Constitutional Court in its judgment of 6 July 2010 in the Honeywell case’. The Tribunal further stressed that only exceptionally can a constitutional court directly review the constitutionality of EU acts, citing, in this regard, two judgments of the German FCC in the Solange II case and in the Bananenmarktordnung case. The Tribunal repeated the findings contained in both judgments, stating in particular that

[t]he complainant should be required, when indicating the grounds of the infringement of his freedom or rights [...] to duly substantiate that the challenged act of Union law significantly reduces the level of protection of rights and freedoms in comparison with that guaranteed by the Constitution. Such plausibility is a necessary component of the requirement to demonstrate precisely the manner in which freedoms or rights have been infringed.<sup>68</sup>

In practice, no such case has subsequently arisen, so it is difficult to say whether or not this requirement will actually be enforced by the Tribunal.

It is also worth mentioning those references by the Polish Constitutional Tribunal to FCC rulings that concerned almost identical cases.

Firstly, in its judgment of 30 September 2008, K 44/07, stating the unconstitutionality of a provision authorising the shooting down of an aircraft in the event of its use as a means of terrorist attack, the Tribunal referred to the FCC

66 CT judgment of 11 May 2005, K 18/04.

67 CT judgment of 26 June 2013, K 33/12.

68 CT judgment of 16 November 2011, SK 45/09.

judgment of 15 February 2006, in which a substantially similar provision of the Air Navigation Security Act was found to be unconstitutional. In this ruling, the Tribunal shared the German FCC's argumentation that the provisions in question violated the obligation of the state authority to protect human life and the human dignity of innocent persons (passengers and staff) on board an aircraft.

The second judgment in which the Polish Tribunal relied on a substantially similar earlier FCC decision was the judgment of 24 February 2010, K 6/09, concerning pension benefits for former officers of the security services of the communist state. The challenged regulations provided for a reduction in these benefits, and the Tribunal, after examining regulations in other countries, came to the conclusion that, in general, there was a tendency to limit the pension privileges of these officers and to equalise them with the benefits received by other citizens. Among the countries analysed was Germany, where the FCC found unconstitutional provisions that drastically reduced the pensions of security service officers. However, because the pensions of Polish officers after the reduction were well above average, the Polish Tribunal found the contested regulations to be in conformity with the Constitution. The FCC's ruling was therefore not crucial for the Tribunal's decision, but it allowed the Tribunal to show that it had considered a broader comparative background for the examined issue.

The Tribunal has most often cited individual FCC judgments to support a particular line of argumentation. Less frequently, it has referred to the existence of a 'stabilised' or 'established' line of FCC case law.<sup>69</sup> The Polish Tribunal has also indirectly referred to the FCC case law, quoting scientific works analysing this case law<sup>70</sup> or a report from a non-governmental organisation.<sup>71</sup>

To conclude this section, it is worth quoting a statement made by former President of the Constitutional Tribunal, Marek Safjan, in 1999, in which he pointed out that Poland had succeeded in

adopting the universal values of European democracies, as well as the achievements of other constitutional courts, e.g. those of Germany and Austria, but also those that at the beginning of their journey had encountered similar problems with systemic transformation, such as the Czech Republic, Lithuania, Hungary and Slovenia.<sup>72</sup>

It seems that this statement clearly reflects the general approach of the Tribunal in referring to the case law of other constitutional courts. However, it should also

69 See the CT judgments of 7 September 2004, P 4/04 and of 28 October 2015, K 21/14.

70 See the CT judgments of 7 October 2015, K 12/14, of 26 January 2005, P 10/04 and of 24 November 2010, K 32/09.

71 CT judgment of 4 November 2014, SK 55/13.

72 Marek Safjan gave information on the significant problems arising from the activities and jurisprudence of the CT in 1998 and in the first half of 1999: Speech at a session of the Sejm on 16 December 1999 accessed on 1 August 2021.

be mentioned that the broad references made by the Tribunal to the jurisprudence of other constitutional courts have, to a certain extent, raised concerns in the Polish Supreme Court. It noted that the Polish legal order does not provide for and does not authorise adjudication on the basis of judgments of other European constitutional courts. Therefore, as was emphasised by the Polish Supreme Court in its resolution announced in 2009, the jurisprudential practice of constitutional courts in other countries should not be uncritically transposed or copied within the domestic jurisdiction.<sup>73</sup>

After 2017, when the Tribunal was marginalised by politicians, references to the jurisprudence of foreign constitutional courts began to disappear. This thesis is confirmed by the recently announced judgment that led to the outlawing of abortion in Poland.<sup>74</sup> In this case, the Tribunal did not take any of the case law of the European constitutional courts into account, which was pointed out by Judge Piotr Pszczółkowski in his dissenting opinion. He shared the opinion expressed 23 years earlier by the prominent Tribunal Judge, Leszek Garlicki, who, in his dissenting opinion to the first abortion Tribunal judgment, stated that, in solving the extremely controversial problem of the admissibility of abortion,

one cannot lose sight of the experience of other countries in our circle of civilisation, and in particular the legislative and judicial experience of the countries of Western Europe, whose achievements the Constitutional Tribunal constantly tries to draw on in its judgments.<sup>75</sup>

### *3.2. The role of references to judicial decisions of international courts*

For obvious reasons, the courts most frequently cited by the Polish Constitutional Tribunal are the European Court of Human Rights (ECtHR) and the CJEU. Poland is a member of the Council of Europe (since 1991) and of the EU (since 2004), and thus is obliged to respect the standards developed in the jurisprudence of these courts. The obligation to constantly monitor this jurisprudence concerns all organs of public authority, including the Constitutional Tribunal.

#### *3.2.1. References to ECtHR case law*

The highest number of references to ECtHR case law can be observed in the years 2004–2006, which confirms the already described trend of the increasing frequency of these references just after Poland's accession to the EU. In total,

73 SC resolution of 17 December 2009, III PZP 2/09.

74 CT judgment of 22 October 2020, K 1/20.

75 CT judgment of 28 May 1997, K 26/96.

to date, references to the ECtHR jurisprudence appear in over 420 Tribunal judgments.<sup>76</sup> It is also worth noting that the Tribunal rarely cites a single ECtHR judgment. Most often, it refers to the entire line of judgments concerning a given issue,<sup>77</sup> meticulously describing their evolution,<sup>78</sup> analysing the content of individual judgments and listing the Convention standards formulated on their basis.

There are several reasons for the Polish Constitutional Tribunal to make such extensive use of ECtHR case law.

Firstly, the European Convention on Human Rights may be a pattern of control in proceedings before the Tribunal, and in such cases, the reconstruction of the manner of understanding its provisions on the basis of the ECtHR jurisprudence is of the highest relevance. By doing so, the Tribunal usually refers to at least a few relevant ECtHR judgments, which not only specify but also develop and supplement the content of these provisions.<sup>79</sup>

Secondly, in cases in which the Convention is not the pattern of control, the Tribunal refers to the ECtHR jurisprudence in order to reconstruct the conventional standards of the protection of a given right (freedom) of an individual and to apply them to determine the scope of protection of the same right (freedom) on the grounds of the Constitution.<sup>80</sup> These references are especially used in cases initiated by constitutional complaints for which an international agreement—according to the Constitution—may not be indicated as a pattern of control.<sup>81</sup> The Tribunal states that ECtHR judgments and the standards resulting from them construct the framework and conditions of permissible limitations on individual rights and freedoms,<sup>82</sup> and thus should ‘always be taken into account when interpreting the relevant constitutional norms’.<sup>83</sup> In this way, the Tribunal, while not formally bound by ECtHR case law, is obliged to take the standards resulting from this case law into account.<sup>84</sup>

Thirdly, the Constitutional Tribunal accepts that taking the position developed in ECtHR case law into account is a specific method of interpreting constitutional

76 The CT even stresses that it uses the ECtHR case law ‘to a considerable extent’. See CT judgment of 5 March 2003, K 7/01.

77 Sometimes, the CT also emphasises that this is a ‘fixed’ or ‘established’ line of jurisprudence. See the CT judgments of 30 September 2008, K 44/07, of 12 April 2011, P 90/08 and of 11 October 2015, K 24/15.

78 See, e.g., the evolution of ECtHR jurisprudence on the freedom of association of trade unions described in detail in the CT judgment of 28 April 2009, K 27/07.

79 See the CT judgments of 11 October 2006, P 3/06 and of 12 February 2015, SK 70/13.

80 See, e.g., the CT judgments of 10 May 2000, K 21/99, of 30 July 2014, K 23/11 and of 12 February 2015, SK 70/13.

81 See, e.g., the cases concerning the violation of the constitutional right to a court: CT judgments of 26 June 2006, SK 55/05, of 20 November 2007, SK 57/05 and of 17 November 2009, SK 68/08.

82 CT judgment of 30 October 2006, P 10/06.

83 See the CT judgment of 15 April 2009, SK 28/08. Similarly, see the CT judgment of 17 December 2003, SK 15/02.

84 See the CT judgments of 18 October 2004, P 8/04 and of 20 November 2007, SK 57/05.

provisions concerning individual rights and freedoms.<sup>85</sup> The practical meaning of this so-called pro-Convention interpretation (also called a Convention-friendly interpretation) was explained by the Tribunal as follows:

The Constitutional Tribunal is obliged to apply, within the framework of the constitutionality review it performs, principles and methods of interpretation leading to the mitigation of possible collisions between the standards resulting from Polish applied law and those formulated by the ECtHR.<sup>86</sup>

In this respect, the case law of the ECtHR is treated as an ‘interpretative guideline’, serving, for example, to reconstruct the content of general clauses and undefined expressions.<sup>87</sup> Also, the understanding of certain constitutional principles, such as the principle of equality, was determined by the Tribunal by taking the case law of the ECtHR into account.<sup>88</sup>

Fourthly, the case law of the ECtHR is treated by the Tribunal as a criterion for verifying the correctness of a certain manner of understanding a constitutional provision establishing a right or freedom. The Tribunal then states that its interpretation of the constitutional provision ‘corresponds’<sup>89</sup> to the interpretation of the analogous Convention provision applied by the ECtHR, or that the case law of the Tribunal is ‘convergent’<sup>90</sup> with the case law of the ECtHR. The use of such references is justified by the fact that Poland bound itself to the Convention earlier than it adopted the currently binding Constitution. Hence, many constitutional provisions concerning individual rights are based on the wording of analogous Convention provisions. The findings of the ECtHR concerning the content of the Convention rights are also regarded as determining the content of analogous constitutional rights.

Fifthly, the Tribunal treats the case law of the ECtHR as a precedent that is helpful in resolving cases concerning constitutional rights and freedoms analogous to those of the Convention.<sup>91</sup> However, it is not a binding precedent, but

85 See the CT judgments of 17 December 2003, SK 15/02, of 20 November 2007, SK 57/05 and of 1 April 2008, SK 77/06.

86 CT judgment of 20 November 2007, SK 57/05.

87 See, e.g., the judgment of 19 February 2008, P 48/06, in which the CT established the meaning of the statutory term ‘the interest of the administration of justice’ on the basis of the ECtHR jurisprudence, or the judgments of 15 October 2008, P 32/06 and 7 December 2010, P 11/09, in which, by referring to the ECtHR jurisprudence on ‘reasonable time’, it explained the meaning of the term ‘without undue delay’ appearing in Art 45(1) of the Constitution.

88 See the CT judgments of 23 October 1995, K 4/95 and of 13 May 1997, K 20/96.

89 See the CT judgment of 14 March 2000, P 5/99.

90 See, e.g., the CT judgments of 15 October 2008, P 32/06, of 5 March 2003, K 7/01 and of 23 October 2007, P 10/07.

91 However, the CT does not call ECtHR judgments precedents. The only case in which the concept of a precedent was used in relation to ECtHR case law was the judgment of 12 January 2000, P 11/98, in which the CT stated, ‘There is [...] no such clear proximity between

rather an ‘additional argument’<sup>92</sup> or ‘element of argumentation’<sup>93</sup> supporting the conclusion that the examined provision does or does not violate the Constitution. The Tribunal treats ECtHR judgments issued in Polish cases, which require the implementation of specific provisions, slightly differently. By reviewing the compliance of such regulations with the Constitution, the Tribunal becomes a *de facto* body ensuring the proper implementation of these ECtHR judgments.<sup>94</sup> As the Tribunal emphasises:

[T]he obligation to take into account the effects of the relevant judgment of the ECtHR in the operation of the internal organs of the state obliges it to take into account, within the framework of the review of the constitutionality of norms exercised by it, the standards formulated by the ECtHR in order to eliminate possible collisions between them. The norms contained in the Convention and the case law of the ECtHR may therefore be invoked as an element of argumentation and thus serve to maintain relative uniformity of rulings by legal protection bodies adjudicating on the basis of national and international law.<sup>95</sup>

### 3.2.2. *References to CJEU case law*

The Constitutional Tribunal has also repeatedly referred to the body of rulings of the CJEU. In total, such references have appeared in over 180 Tribunal judgments, including 126 judgments issued at the main control stage and 66 judgments issued at the preliminary control stage.

The first references to the Luxemburg Court case law appeared a decade before Poland joined the EU. In the resolution of 1995, while formulating a binding interpretation of the notion of ‘agricultural producer’, the Tribunal referred to the European Court of Justice (ECJ) case *Denhavit v FZA Warendorf*.<sup>96</sup> Two years later, the Tribunal found the provisions enabling an employer to terminate the employment relationship earlier with a female civil servant discriminatory.<sup>97</sup> It stressed that the principle of equality between men and women was also guaranteed by EU law and, to illustrate how it is understood, it referred to two ECJ

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Polish and Austrian legislation as to consider the Mellacher judgment as a precedent fully controlling the outcome of the present case’.

92 See the CT judgment of 19 April 2005, K 4/05.

93 See the CT judgments of 23 April 2008, SK 16/07 and of 20 November 2012, SK 3/12.

94 See, e.g., the CT judgment of 15 December 2004, K 2/04 issued after the ECtHR judgment of 22 June 2014 in the case *Broniowski v Poland*, or the CT judgment of 19 April 2005, K 4/05 issued after the ECtHR judgment of 22 February 2005 in the case *Hutten-Czapska v Poland*.

95 CT judgment of 20 November 2012, SK 3/12; similarly, see the CT judgments of 23 April 2008, SK 16/07 and of 19 July 2011, K 11/10.

96 CT resolution of 8 March 1995, W 13/94.

97 CT judgment of 29 September 1997, K 15/97.

rulings from the mid-1980s.<sup>98</sup> Although Poland was not a member of the EU at that time, under the provisions of the Association Agreement<sup>99</sup> it was obliged to align its national legislation with EU law. The Tribunal stressed that this also implied an obligation to ‘give the legislation in force such an understanding as will serve to ensure this compliance as fully as possible’.<sup>100</sup> In the pre-accession period, the Tribunal also referred to the case law of the Luxembourg Court within the framework of the so-called pro-EU interpretation. Its significance was explained by the Tribunal as follows: ‘When seeking directions for the interpretation of Polish legislation, preference should be given to such an interpretation which allows a provision of a law to be given the meaning closest to the solutions adopted in the European Union’.<sup>101</sup>

After Poland’s accession to the EU, which took place in 2004, the number of Tribunal references to the case law of the CJEU increased. However, with the onset of the constitutional crisis in 2017, the number of CJEU citations declined again.

As a rule, the Tribunal refers to one or several specific rulings of the CJEU. However, there are also references to the entire line of rulings of the CJEU, which the Tribunal usually refers to as ‘established case law’.<sup>102</sup> The Tribunal then cites at least several CJEU rulings confirming the repetition of certain arguments applied by this body. The Tribunal rarely quotes verbatim from the CJEU.<sup>103</sup> It more often describes the views expressed in those rulings. Indirect references have also occurred; that is, items from the legal literature have been quoted that discussed specific problems on the basis of CJEU jurisprudence.<sup>104</sup>

It should be noted that although general principles stemming from CJEU rulings constitute an element of EU primary law, such rulings cannot constitute a pattern of control in proceedings before the Constitutional Tribunal, since the catalogue of such patterns is closed and only includes legal acts. Rulings of the CJEU, for the same reasons, cannot be subject to control either. In its jurisprudence, the Tribunal also does not assess the accuracy of CJEU judgments, nor does it generally argue with them. Rather, it treats these rulings as binding decisions, especially to the extent that they constitute a source of general legal

98 Similar reasoning was applied by the CT in the judgments of 28 March 2000, K 27/99 and 13 June 2000, K 15/99.

99 Europe Agreement of 16 December 1991 establishing an association between the Republic of Poland, of the one part, and the European Communities and their member states, of the other part (Journal of Laws of 1994, No 11, item 38, as amended), with certain exceptions, entered into force on 1 February 1994.

100 CT judgment of 29 September 1997, K 15/97.

101 CT judgment of 24 October 2000, K 12/00.

102 CT judgments of 15 July 2010, K 63/07, of 16 November 2011, SK 45/09 and of 12 December 2011, P 1/11.

103 Exceptionally, in the CT judgment of 8 December 2007, SK 54/05, an extensive citation of the CJEU ruling can be found.

104 See the CT judgments of 13 September 2005, K 38/04 and of 19 December 2006, P 37/05.

principles of established relevance in the European legal order, such as the principles of effectiveness or the principle of the primacy of EU law. The case law of the CJEU is also treated as a source of obligations incumbent on member states.<sup>105</sup>

For obvious reasons, the Polish Tribunal refers to the jurisprudence of the CJEU primarily in those cases, which to a greater or lesser extent are regulated by EU law. In this respect, three groups of cases may be distinguished in which references to CJEU jurisprudence are particularly numerous. The first group are the so-called European cases, in which the constitutionality of EU regulations or the constitutionality of regulations implementing EU law is examined by the Tribunal. It is worth mentioning again the rulings on the European Arrest Warrant,<sup>106</sup> the Treaty of Accession,<sup>107</sup> the Treaty of Lisbon<sup>108</sup> and the Stability Mechanism.<sup>109</sup> In each of these rulings, the Tribunal referred to the relevant case law of the CJEU. The second group of cases are those which, to a large extent, are governed by EU law; that is, cases concerning economic, tax and consumer law. The third group of cases are those concerning the protection of individual rights, especially EU standards arising from the Charter of Fundamental Rights of the EU. This last group includes e.g. cases concerning the right to equal treatment by public authorities.

It is also worth noting that the reasons for quoting CJEU case law in the Tribunal's judgment texts are varied.

Firstly, the Tribunal refers to the case law of the CJEU in order to determine the content of EU provisions and their actual meaning. This applies to those cases in which EU regulations are a direct or indirect subject of control. To date, the Tribunal has examined an act of secondary EU law only once,<sup>110</sup> but it has repeatedly controlled the constitutionality of regulations implementing directives or framework decisions into the Polish legal order.<sup>111</sup> In all these cases, it was necessary to determine the understanding of EU provisions, and the relevant CJEU rulings were of fundamental importance in this respect. The Tribunal also referred to the jurisprudence of the CJEU in order to determine the nature of a given act of EU law and its position in the system of EU sources of law. For instance, in the ruling of 16 November 2011, SK 45/09, the Tribunal cited several CJEU rulings

105 E.g., in the judgment of 16 November 2011, SK 45/09, the CT indicated the requirement resulting from the CJEU jurisprudence to ensure procedural guarantees for the EU principle of the right to a court in the national legal order.

106 CT judgment of 27 April 2005, P 1/05.

107 CT judgment of 11 May 2005, K 18/04.

108 CT judgment of 23 November 2010, K 32/09.

109 CT judgment of 26 June 2013, K 33/12.

110 In the judgment of 16 November 2011, SK 45/09, the CT found the provision of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be compatible with the Constitution.

111 See, e.g., the CT judgments of 27 April 2005, P 1/04 and of 5 October 2010, SK 26/08, concerning the constitutionality of provisions implementing the Framework Decision on the European Arrest Warrant into the Polish legal order.

indicating that EU regulations were of a general and abstract nature and that their addressees were not only Member States and their bodies but also individuals (private entities). In this case, it also referred to the CJEU rulings indicating that the direct effect was given to the provisions of the regulations, which were clear and precise and did not leave any discretion to the authorities of the member states. These findings were of key importance for the outcome of the case. For the first time, the Tribunal held that it had the power to control the constitutionality of EU regulations challenged in the procedure initiated by a constitutional complaint if these regulations had a normative character and were the legal basis for the final decision concerning the appellant.

Secondly, based on CJEU jurisprudence, the Tribunal reconstructs EU legal standards, which it then relates to national standards, including, in particular, constitutional standards. Such references are of particular importance in the area of the protection of individual rights. The Tribunal emphasised that the EU standards for the protection of fundamental rights resulting from CJEU jurisprudence may not limit the constitutional standards. In the aforementioned judgment of 16 November 2011, SK 45/09, the Tribunal even stated that it had the competence to verify the EU standard for the protection of fundamental rights in situations in which the complainant could demonstrate that the level of protection of this right within the framework of EU law, including in the CJEU jurisprudence, had been so lowered that it did not correspond to the necessary standard of protection resulting from the Constitution. Much more frequently, however, the Tribunal uses the EU standards to clarify, and *de facto* develop, the constitutional standards. As the Tribunal stated in its judgment of 24 November 2010, K 32/09:

[W]hen reconstructing the standard (norm) according to which the assessment of constitutionality is made, one should make use not only of the text of the Constitution itself, but—to the extent to which this text refers to terms, notions and principles known to European law—one should refer to these very meanings.

At the same time, the Tribunal emphasised how the interpretation that was favourable to the European law had its limits, since firstly, it may not lead to results that were contrary to the clear wording of the constitutional norms, and secondly, it may not justify the questioning of the constitutional norms from the point of view of the EU's norms that were contrary to them.<sup>112</sup> Nor can it be a means of amending the Constitution,<sup>113</sup> although it may enable supplementing

112 See the CT judgments of 11 May 2005, K 18/04 and of 11 March 2015, P 4/14.

113 See the CT judgment of 24 November 2010, K 32/09. See, however, Monika Florczak-Wątor, 'Constitutional Change Through Unconstitutional Interpretation' in Martin Below and Antoni Abat i Ninet (eds.), *Revolution, Transition, Memory, and Oblivion. Reflections on Constitutional Change* (Edward Elgar Publishing 2020).

and clarifying it.<sup>114</sup> In the literature, it is also stressed that the method of interpretation discussed here may, in practice, give rise to the need to redefine certain institutions and notions.<sup>115</sup>

Thirdly, the Tribunal refers to the case law of the CJEU within the framework of the aforementioned pro-EU interpretation in order to find such an understanding of a provision of domestic law that is consistent with EU law. If it is found that the requirement of compliance with EU law is met by several results of interpretation obtained by the interpreter, the Tribunal emphasises that the result ensuring the highest possible degree of compliance should be selected. The necessity to apply a pro-EU interpretation is a consequence of the coexistence of national and EU law systems within the territory of the Polish state, which should co-exist on the basis of mutually friendly interpretations and cooperative applications.<sup>116</sup>

Finally, it should be noted that there are also references to CJEU jurisprudence made by the Tribunal as if it were on the margins of the main thread of considerations (*obiter dicta*). Such references, which have an ornamental character, do not have a significant influence on the Tribunal's decisions, and their aim is mostly to indicate that the CJEU has expressed its opinion on a similar issue to that on which the Tribunal has decided.<sup>117</sup>

#### 4. Conclusions concerning methodological problems

In its judgments, the Polish Constitutional Tribunal makes extensive references to its own case law and the case law of other courts. The predominant argument is the argument 'from its own authority', which—despite the fact that it is of great significance because it stabilises and consolidates constitutional jurisprudence—is sometimes overused and also applied in an unreflective manner. The Tribunal treats its jurisprudence as a set of precedents that are potentially relevant for each case that is decided on. It does not refer to previous judgments consistently, although it attaches great importance to developing a well-established line of jurisprudence. The frequency of references to the jurisprudence of other Polish courts is lower and mainly relates to the jurisprudence of the Supreme Court and the Supreme Administrative Court. The Tribunal attaches particular importance to the uniform, established and widespread judicial interpretation, which determines the content of the examined provisions and therefore requires scrupulous establishment. References to the jurisprudence of the constitutional courts of other countries, although used in the arguments of the Tribunal, are of limited practical significance. On the other hand, the Constitutional Tribunal

114 CT judgment of 12 January 2005, K 24/04.

115 See Monika Florczak-Wątor and Andrzej Grabowski (eds.), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz* (Księgarnia Akademicka 2021) 931.

116 CT judgments of 11 May 2005, K 18/04 and of 24 November 2010, K 32/09.

117 CT judgments of 15 April 2008, P 26/06 and of 17 July 2007, P 16/06.

frequently refers to the case law of the ECtHR and CJEU, often treating the pronouncements of the European courts as binding precedents. At the time of the constitutional crisis, a decrease in the interest of the Constitutional Tribunal in developing arguments based on the jurisprudence of foreign courts can be observed.

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# 9 The role of precedents and case-based reasoning in the case law of the Romanian Constitutional Court

*Bianca Selejan-Guțan and Elena-Simina Tănăsescu*

## Introduction

### *General remarks*

The judicial system in Romania is a classic continental (“civil law”) one. The courts of law have a general legal competence, without specialised separate systems. According to the Constitution (Article 126) “Justice is achieved through the High Court of Cassation and Justice and the other courts established by law”. The rules of jurisdiction and procedure are prescribed by subsequent organic laws: laws of judicial organisation and codes of civil and criminal procedure. Independence of judges and independence of justice benefit from important safeguards set forth in the Constitution and in the law on the status of magistrates: irremovability, incompatibility with other functions, a more stable regulation by organic legislation and the supervision from within by the Superior Council of Magistracy (a high judicial council fashioned after the French model).<sup>1</sup>

During the constitutional drafting process of 1990–91, from the outset, the Constitutional Court (hereinafter RCC) was placed outside the judicial system. The Court, inspired by the Kelsenian model of judicial review<sup>2</sup>, is independent from the judiciary as well as from the other state powers. The Court is defined as the main “guardian of the Constitution” and was intended to become a symbol of the rule of law. However, in almost 30 years of existence, the Court has not always proven worthy of these expectations and it often became, especially in the last decade, an instrument for various political forces.<sup>3</sup>

1 See also Bianca Selejan-Guțan, ‘Romania: Perils of a “Perfect Euro-Model” of Judicial Council’ (2018) 19(7) German Law Journal, 17 December 2018 [www.cambridge.org/core/journals/german-law-journal/article/romania-perils-of-a-perfect-euromodel-of-judicial-council/D910A4D3BF0BAF0E5A26C75965C0B31D](http://www.cambridge.org/core/journals/german-law-journal/article/romania-perils-of-a-perfect-euromodel-of-judicial-council/D910A4D3BF0BAF0E5A26C75965C0B31D).

2 See Bianca Selejan-Guțan, ‘La réception du modèle européen de justice constitutionnelle en Roumanie’ in *Impérialisme et chauvinisme juridiques* (Schulthess 2004).

3 See Bianca Selejan-Guțan, ‘The Constitutional Court and Others in the Romanian Constitutionalism—25 Years After’ (2017) 11(4) Vienna Journal of International Constitutional Law 565.

According to the Constitution and its organic law,<sup>4</sup> the RCC has the following categories of powers<sup>5</sup>:

1. *constitutional review powers: ex ante* review of laws, constitutional amendment initiatives, international treaties, *ex post* review of laws and Government ordinances, Parliament's regulations and resolutions, surveillance of the popular legislative initiative;
2. *electoral powers*: surveillance of the respect of the procedure for the election of the President of Romania, validation of the election's result, surveillance of the respect of the referendum procedure and confirmation of the results;
3. *power to solve conflicts between authorities and decide* on other political situations: solves legal conflicts of a constitutional nature between public authorities; establishes the existence of the circumstances justifying the interim of the function of President of Romania and communicates them to the Parliament and government; gives an advisory opinion on the proposal of suspension from office of the President; decides on the complaints of unconstitutionality of a political party.

The interactions between the judicial system and the RCC pertain mainly to the first category of powers related to the constitutional review of legislation. In recent years, some decisions of the Court given in the exercise of other powers had a major influence on the judicial system, especially decisions on legal conflicts of a constitutional nature between authorities. The relationship between the RCC and the judiciary oscillates from a dialogue inherent to the concrete constitutional review to tensions which have arisen especially in the last few years, in the context of interferences of the RCC with the judiciary.

### *The Constitutional Court and Ordinary Courts*

The relationships between the RCC and ordinary courts are twofold. On the one hand, the ordinary courts are "associated" to the process of constitutional adjudication. On the other hand, the Constitutional Court has had an important role, alongside the Parliament, in shaping the legislation related to the judiciary: law on judicial organisation, law on the status of magistrates and the codes of civil and criminal procedure.<sup>6</sup> However, in the recent years, a special stream of the latter type of relationship can be detected: the interference of the Court with the activity of the judiciary, either by declaring unconstitutional some provisions of the laws and requiring specific legal norms on judicial organisation or procedure or by solving so-called "conflicts" between the judiciary and other state powers.

4 Law no. 47/1992, republished in 2010.

5 Bianca Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis*. (Bloomsbury-Hart Publishing 2016) 171.

6 Elena Simina Tănăsescu, 'Cour Constitutionnelle et système judiciaire: des rapports de force?' (2012) 2 *Analele Universității din București—seria Drept* 240–251.

*Constitutional Court and Ordinary Courts—associated in the constitutional adjudication*

The ordinary courts were given a crucial role in the procedure of constitutional adjudication, which was reinforced after the 2003 constitutional amendment.

First, the High Court of Cassation and Justice (hereinafter HCCJ) has the competence of filing unconstitutionality complaints in the RCC against a law within the *ex ante* review, alongside political authorities (Parliament, President, Government) and the Ombudsman. The HCCJ, as well as the Superior Council of Magistracy, may refer to the Constitutional Court requests to solve legal conflicts of a constitutional nature between public authorities.

Secondly, the Constitution gave all ordinary courts a role in the *ex post* constitutional review, within the procedure of solving referrals of unconstitutionality of laws and Government ordinances.<sup>7</sup> Thus, a referral request can be raised only within a litigation before any ordinary court (or court of arbitration), at any time during the procedure, by any of the parties, by the prosecutor or *ex officio* by the court. In all the cases, the court must express its opinion on the referral. If the request is made by the parties or the prosecutor, the court must verify its admissibility and, if admissible,<sup>8</sup> it must submit it to the RCC, which has the sole jurisdiction to solve it.<sup>9</sup>

*Interferences of the Constitutional Court with the judiciary*

By contrast, the relationship of the judiciary with the Constitutional Court bears an important peculiarity: the absence of mutual “checks-and-balances”. The law on the status of magistrates provides for a disciplinary sanction for judges who are responsible for “the non-observance of the decisions of the Constitutional Court and of the decisions of the HCCJ given in the appeals on points of law”. In the absence of checks and balances—even in the case of the aforementioned provision, the RCC is not the one that engages the responsibility of the judges—the potential tensions can be only relieved if one yields to the other.

In a comparative law study, while examining the way in which constitutional courts interact with two types of “external public”—political and judicial—Tom Ginsburg and Nuno Garoupa pointed out, firstly, that “constitutional courts are inevitably political actors”<sup>10</sup> and secondly that this politicisation “may create a

7 See also Elena Simina Tănăsescu, ‘L’exception d’inconstitutionnalité en Roumanie—entre renvoi préjudiciel et exception de procédure’ in Elena-Simina Tănăsescu (ed.), *100 ans d’exception d’inconstitutionnalité en Roumanie, Est-Europa—Numéro spécial* (2013) 17–37, [www.est-europa.univ-pau.fr/est-europa-la-revue/archives/est-europa-2011-/392-2013-numero-special-1-100-ans-dexception-dinconstitutionnalite-en-roumanie.html](http://www.est-europa.univ-pau.fr/est-europa-la-revue/archives/est-europa-2011-/392-2013-numero-special-1-100-ans-dexception-dinconstitutionnalite-en-roumanie.html).

8 Selean-Guțan (n 5) 173.

9 For details, see Bianca Selean-Guțan, ‘L’exception d’inconstitutionnalité—instrument de protection des droits fondamentaux ou technique dilatoire?’ (2012) 1 *Romanian Journal of Comparative Law* 65–78.

10 Nuno Garoupa and Tom Ginsburg, ‘Building Reputation in Constitutional Courts: Political and Judicial Audiences’ (2011) 28(3) *Arizona Journal of International and Comparative Law* 541.

problem in terms of deference by the higher courts. Furthermore, there may be institutional rivalries between the top courts of ordinary jurisdictions—accustomed to their superior place in the judicial hierarchy—and the new constitutional court. This can lead to legal incoherence and gridlock”.<sup>11</sup> The quoted authors also noticed the existence of conflicts between constitutional courts and ordinary courts in many countries, having usually as a cause the rejection, by the highest ordinary courts, of the constitutional courts’ authority in certain cases.

In Romania, partly due to the politicisation of the former, the tensions between the Constitutional Court and judiciary became inevitable. A first factor that triggered latent conflicts was legitimacy. The judicial power, as well as the Constitutional Court, draws its legitimacy from the Constitution. The constitutional judges are appointed by political authorities directly elected by the people, which, from a political and formal point of view, can create a leverage in favour of the Constitutional Court. However, the “functional” legitimacy comes from the public trust in a court’s independence and from the quality of its decisions.

Another potential source of conflicts is the influence of the constitutional case law on the other powers. The Constitutional Court inevitably has a political dimension, by the power to declare legislation unconstitutional. The rivalry with the judiciary may come from the battle for “control of power” or from the fact that the latter does not have the same influence on the political milieu through its decisions.<sup>12</sup>

A third thread of interferences with the judiciary comes from the shaping by the Constitutional Court of the laws on the judiciary and of the Codes of Civil and Criminal Procedure, which can even affect the outcome of particular cases pending before ordinary courts or even finally decided. This phenomenon manifested especially in the last five years and was related to the high-level corruption cases pending or decided by the HCCJ. One example is the “saga” of the alleged irregularity of the five-judge panels of the criminal law section of the HCCJ. The matter at stake was the influence on the procedural course of high-level corruption criminal cases (which were within the jurisdiction of these panels). The Constitutional Court was seized by the representative of a political authority (the Prime Minister) with a request to solve a “constitutional conflict” between the Parliament and the HCCJ for an alleged disregard by the latter of a law adopted by the former. In Decision 685/2018 the Court ruled in favour of Parliament, that the five-judge panels were not legally constituted and ordered the HCCJ to immediately proceed to the drawing lots of all members of the panels. The RCC stated that, in doing so, it actually substituted the ordinary citizen against an unlawful conduct of the supreme court. As a result of the decision, many cases,

11 Ibid 542.

12 Elena-Simina Tănăsescu, ‘L’exception d’inconstitutionnalité qui ne dit pas son nom ou la nouvelle sémantique constitutionnelle roumaine’ (2013) 4 *Revue Internationale de Droit Comparé* 905–939.

including some final ones, were on the brink of being reopened by means of new legislation with retroactive effect.<sup>13</sup>

One year later, the Constitutional Court gave another decision on an alleged “conflict” between Parliament and the HCCJ, this time related to all judges who ruled in criminal cases on corruption. The Court ruled that the fact that corruption cases were not decided by judges “specialised” in corruption (as a law from 2000 requires, but in Romania there is no concept of “specialised” judges because they all have a general competence) leads to such a conflict. Moreover, the Court expressly stated the legal effects of its decision, i.e., that all final court decisions given between 2003 and 2019 by panels which were not “specialised” should be considered “null and void”. This is a serious threat to the principle of *res judicata* and may have serious consequences on the whole judiciary.<sup>14</sup>

Another, more recent, example is Decision 233/2021 in which the RCC declared unconstitutional some articles of the Code of Criminal Procedure regarding the obligation to give reasons to a judicial decision, by stating that the reasons should be given by the judge at the same time with the decision and not “in a delay of maximum 30 days from the public pronouncement of the decision”. This led to a rapid adoption of legislative changes and to a turmoil within the courts, which, due to the lack of sufficient staff, will be forced to delay the pronouncement of decisions even more and thus risk breaching the obligation to solve cases within a reasonable time.

### *The effect of Constitutional Court decisions within the judicial system*

In practice, the recognition and implementation by ordinary courts of Constitutional Court decisions remain problematic. In the period 1992–2003, the *erga omnes* effects of the Constitutional Court’s decisions were not expressly provided for by the Constitution. Therefore, the Court itself had to explain the meaning of the “binding effects” of its own decisions. The Court also explained in detail how an ordinary court should have reacted to a decision declaring the unconstitutionality of a law: by not passively awaiting the intervention of the legislator, but by directly applying the relevant constitutional provisions.<sup>15</sup>

The constitutional amendment of 2003 included more precise references to the binding effects of the Constitutional Court’s decisions. Article 147 of the Constitution was changed in this respect and now it reads as follows: “The provisions of the laws and ordinances in force, [...] which are found to be unconstitutional,

13 Bianca Selejan-Guțan and Elena-Simina Tănăsescu, ‘Romania’ in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *2019 Global Review of Constitutional Law* (Boston College 2020) 282.

14 For details, see Bianca Selejan-Guțan and Elena-Simina Tănăsescu, ‘Romania’ in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *2018 Global Review of Constitutional Law* (Boston College 2019).

15 RCC, Decisions 186/1999 and 169/1999.

shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*”. For the laws declared unconstitutional before promulgation, according to the second paragraph of Article 147, “the Parliament is bound to reconsider those provisions, in order to bring them in line with the decision of the Constitutional Court”.

Therefore, from this moment onward, ordinary courts were bound to take into account decisions of the RCC, because the legal provision in question would be deprived of legal effects once the unconstitutionality decision was published. The role of the RCC should end here: after the law is brought in line with the Constitution by the Parliament, all courts will adjudicate on the basis of the norm shaped thereof. However, especially in the last 10 years, the Court frequently exceeded its “negative legislator” competence and became more and more a “positive legislator”, by changing rather than interpreting the meaning of legal provisions or by informally changing the Constitution.<sup>16</sup>

An interesting aspect of the vertical binding effect of the Constitutional Court’s decisions is the interpretation of the value of the legal reasoning leading to the outcome of the decision. Thus, the Court affirmed that “no other public authority, be it a court of law, may challenge the reasoning resulted from the case-law of the Constitutional Court, being compelled to apply them accordingly [because] the respect of the Constitutional Court’s decisions is an essential component of the rule of law”.<sup>17</sup> The Court had also held—and this became a constant paradigm in its case law—that the principle of *res judicata* applies not only to the operative part of the decisions, but to all reasonings.

This interpretation is excessive, because the Court itself is not always consistent in its own argumentation that leads to different outcomes in similar cases. The intention of the constitutional legislator was hardly to confer binding effects to all reasonings included in a Constitutional Court decision. This interpretation could lead to further contradictions. For instance, what if such a reasoning would prove contrary to a provision of the ECHR or to the case law of the European Court of Human Rights which, according to Article 20 of the Constitution, have priority over national law? Ordinary courts have the right and duty to directly apply the provisions of the international human rights law in such cases. On the other hand, the law on the status of magistrates includes,<sup>18</sup> among the reasons for the disciplinary liability of judges, “the disregard of the decisions of the Constitutional Court”. Therefore, in the case of such a contradiction, the ordinary judge

16 See Bianca Selejan-Guțan and Elena-Simina Tănăsescu, ‘Formal and Informal Constitutional Amendment. Report on Romania’ (2018) 2 Romanian Journal of Comparative Law 399–401.

17 RCC, Decision 1039/2012.

18 Article 99 §), Law no. 303/2004 on the status of magistrates.

either complies with a RCC decision contrary to the ECHR and thus infringes Article 20 of the Constitution, or the judge complies with the ECHR and thus becomes liable under the disciplinary provisions of the law. In this context, it is concerning that the case law of the Constitutional Court must be forcefully imposed on ordinary courts, under the threat of disciplinary actions. Instead, the authority of such decisions should stem from their wise and logic argumentation, which would naturally give them precedential value and transform them into alternative sources of law for ordinary courts.<sup>19</sup>

## **The role of Constitutional Court references to national judicial decisions**

### *The role of self-references in CC adjudications*

Self-referencing may serve a jurisdiction in several ways: it may allow it to emphasise the coherence of its case law or it may provide an opportunity to depart from it and establish a *révirement de jurisprudence* (reversal of constant case law); it may permit shorter decisions in case the matter at stake is constant case law or it may inspire the development of new arguments even when the case law is established; it can provide an opportunity to stress nuances or evolutions in previous rulings or it may even allow a jurisdiction to entirely reconstruct its own reasoning and come to entirely new conclusions. Conversely, the absence of self-referencing permits partings from earlier rulings without public awareness or dealing with each case afresh. Generally, a self-referencing court is highlighting its autonomous character and enhancing its role in the given judicial and institutional context, thus generating the premises for judicial dialogue or autarchy, according to the choice of incumbent judges.

Over the three decades of its existence, the Romanian Constitutional Court started rather timidly to quote its previous rulings, developed into a solidly self-referencing court and, as of late, turned into a mischievous autonomous court. This evolution accompanied the politicisation of the RCC and had a direct and visible impact on its public credibility and functional legitimacy.

In a nutshell, during—roughly—the first ten years of existence, the decisions of the RCC were rather short, presenting very briefly the facts of the case at hand and a bit more in detail the legal framework, but displaying a very short line of argumentation. Following the French model of the *Conseil Constitutionnel*, the average length of a decision was two to three pages, while legal arguments could generally take up one page. Save for notoriously important decisions, such as the one concerning the revision of the Constitution in 2003, which displays 23 pages, the majority of decisions were concise and strict to the object. The limited

19 See also Bianca Selejan-Guțan, ‘Human Rights—An Element of the European Judicial Culture’ in Manuel Guțan and Bianca Selejan-Guțan (eds.), *Europeanization and Judicial Culture in Contemporary Democracies* (Hamangiu 2014) 217–218.

self-referencing of that initial period can be explained by the fact that the RCC was a new institution, its case law was not yet established, its rulings depend on the claims presented by the parties and iterations of legal issues were relatively infrequent.

After the revision of the Constitution in 2003 and the subsequent adjustment of the organic law of the Court in order to accommodate the new attributions it had been granted (review of international treaties, review of parliamentary rulings implementing parliamentary standing orders, the solving of legal conflict of constitutional nature between public authorities), the RCC started to align more and more with the German type of drafting decisions and increased the length of its rulings. However, the enlarged dimensions of its decisions did not automatically mean that the part of the actual legal reasoning has been developed. Rather, the RCC started to self-reference previous case law and contextualise as to adapt it to the case at hand. After—roughly—2012, in parallel with an exponential increase of the number of decisions delivered each year (from merely 6 in 1992 to an average of 1,500 each year after 2010) one can also notice an increase in the number of pages per decision. More often than not, the additional pages represent either a summary of constant previous case law or lengthy quotations of former decisions considered particularly relevant for the case at hand.

A close examination of the entire case law of the RCC shows that the legal reasoning in each case is still limited to one or a few paragraphs, but the technique of drafting the decisions has been improved in the sense that the court no longer decides broadly on the main constitutional issue at stake as it is perceived by the constitutional judges, but instead analyses in detail each claim presented by the plaintiffs and answers it distinctly. This new technique lengthens the decisions and creates room for increased self-referencing since for each claim a different stream of previous case law may be relevant. Apart from making decisions longer and less accessible for the layman, thus decreasing the transparency of the decision-making process inside the Court, the other obvious impact of this new drafting technique is the development of a certain autonomous character of the RCC which, on some rare and therefore even more visible occasions, spills into autocracy.

Thus, while most of the time the RCC extensively quotes its previous rulings and justifies this by the principle of legal certainty and the necessary predictability of its own case law, it also happens that the Court only selectively mentions earlier decisions, most of the time in order to turn away from their original meaning; or it even “forgets” there is relevant previous case law.

For instance, the now-established case law whereby the RCC has gradually added layer after layer to the definition of the concept of “legal conflicts of constitutional nature between public authorities”—which is a new attribution it has acquired after the constitutional revision of 2003—is based on an incremental accumulation of rulings that ended up with a relaxed concept, which allows the Court to deal with almost any interaction public authorities deem proper to raise. Initially a “legal conflict of a constitutional nature between public authorities” presupposed only “concrete acts or actions by which one or more authorities

assume powers, attributions or competences that, according to the Constitution, belong to other public authorities, or omissions reflected in the refusal to fulfil certain acts that fall within their obligations”.<sup>20</sup> Subsequently, in Decision 270/2008, the Court ruled that a “legal conflict of a constitutional nature between public authorities” gives to the Court the power “to resolve on the merits any legal conflict of a constitutional nature arising between public authorities and not only conflicts of competence arising between them”. At this intermediate phase of the evolutionary notion of “legal conflict of constitutional nature”, the RCC stated that its essence is the “institutional blockage” thus produced, but later added that “as far as there are mechanisms allowing public authorities to self-regulate through their direct action and dismantle the institutional blockage, the role of the Constitutional Court becomes subsidiary”.<sup>21</sup> Recently, the RCC held that “legal conflicts of constitutional nature” are not limited to conflicts of jurisdiction, positive or negative, which could create institutional blockages, but concerns “any conflicting legal situation that originates directly from the text of the Constitution” (Decision 901/2009). Even the different interpretation of a constitutional article by various public authorities may lead to a legal conflict of a constitutional nature (Decision 270/2008, Decision 538/2018 or Decision 504/2019). At each step of this evolutionary definition, the RCC duly quoted its previous rulings and formally confirmed them, pretending not to notice that each new decision was not quite contradicting the earlier but was quite different from it. In the end, the RCC declared itself competent to rule over any contradictory interaction between any public authorities and thus able to impose on them specific conducts. This translated, *inter alia*, into the annihilation of the discretionary power of the President of the Romania and the obligation imposed on him to dismiss a chief prosecutor at the mere suggestion of the Minister of Justice,<sup>22</sup> or the obligation of the highest court of the land to reopen final proceedings because the RCC found unconstitutional “the legal paradigm” which defined the “conduct of the High Court of Cassation and Justice” in the absence of any positive or negative conflict of jurisdiction or institutional blockage (Decision 685/2018).

Another illustrative example is Decision 833/2020 where the RCC found that the expression “faultily implements” present in numerous pieces of criminal legislation is not unconstitutional if it refers to the deeds of police officers, who can be sanctioned for such a conduct. In this decision the RCC based its reasoning on the explanatory dictionary of the Romanian language. This would have been no surprise if the RCC had been consistent in its interpretation of this particular expression of criminal law. However, against the background of the relevant case law of the RCC, this proved rather incoherent. Indeed, in a constant and activist case law, initiated with Decision 405/2016 and continued with Decisions

20 RCC, Decision 53/2005.

21 RCC, Decisions 108/2014 or 875/2018.

22 RCC, Decision 358/2018.

392/2017, 518/2017 and 384/2020, the RCC decriminalised the similar conduct of politicians, civil servants and prosecutors when it ruled that the expression “faultily implements”—present in several incriminations of the Criminal Code—is unconstitutional because it is unclear and unpredictable and it must be replaced with the expression “implements by breaking the law”. The Court even went as far as to declare unconstitutional the provision on *lex mitior* of the Criminal Code<sup>23</sup> in order to oblige the legislator to take into account its own definition of those specific crimes, but when it came to police officers it summoned the dictionary and considered crimes must be punished (Decision 833/2020).

In fact, the RCC has rather often resorted to overruling its own decisions without mentioning that it is actually performing a reversal of constant case law. This was the case with specialised panels in criminal law at the High Court of Cassation and Justice, when in Decisions 685/2018 and 417/2019 it declared unconstitutional the fact that nominal composition of such panels was subject to standing orders of the highest court of the land, but in Decision 71/2021 it found that the same reasoning is not valid for any type of specialised panels the High Court may create should its judges deem it necessary. The same was the case with the legal measures adopted in order to fight the COVID pandemic: in Decision 458/2020 it found that measures restricting the free circulation of persons may only be imposed through a law and not through an order of the Minister of Public Health even if the prerogative were granted to the minister by the relevant law on public health, while in Decisions 381/2021 and 416/2021 it found that the same types of measures have both a preventive-educative and a punitive-repressive character and they may be imposed through an administrative act because this has been made possible by a law on public health.

The examples may continue because there is no constitutional or legal provision that would oblige the RCC to remain coherent and consistent in its case law. In fact, when self-referencing, the RCC is rather selective and prefers to quote specific paragraphs of those decisions that best suit the solution it wants to reach in the case at hand and not a general idea held in a line of decisions. This has been noted in several separate opinions in which individual judges preferred to maintain established case law rather than to revert each time to legal *novum*.<sup>24</sup> Therefore, for the RCC, self-referencing represents a mere technique meant to enhance its autonomous character and, at times, to disguise departure from established case law.

### *The role of CC references to national court decisions*

The Constitutional Court does not quote decisions of ordinary courts on a regular basis. There are no decisions of national courts that are regarded by the RCC

23 RCC, Decisions 650/2018 and 651/2018.

24 See dissenting opinions to Decisions 417/2019, 155/2020, 547/2020, 588/2020, 850/2020, 101/2021 etc.

as having a binding effect on its own decisions. On the contrary, on some occasions, the Court even exceeded its own jurisdiction and declared unconstitutional binding judgments of the HCCJ.

A first category of national courts' decisions quoted by the RCC is related to the procedure of solving referrals of unconstitutionality, i.e., decisions by which the ordinary courts submit the referral to the Constitutional Court. In the early period of the Court's case law (1992–2003) the ordinary courts were not willing to comply with the Constitutional Court's decisions and directly apply the Constitution. For example, in 1999, the Supreme Court refused to comply with a previous decision of the Constitutional Court which declared unconstitutional an article of the Code of Criminal Procedure for breaching the constitutional text on access to justice. As a result, other referrals of unconstitutionality on the same text continued to be brought to the Court, although normally they should have been declared inadmissible on grounds of *res judicata*. The Constitutional Court criticised the general approach of the ordinary courts, which erroneously interpreted the notion of "law" from the expression "judges are only bound by the law": "the meaning that these courts give to the term "law" is incorrect, ... leading to the exclusion of the fundamental law.... The constitutional provisions can and must be directly applied by courts when the legislator has not adopted laws by which to apply in detail the constitutional text.... The absence of such laws cannot hinder the immediate application of the will of the constitutional legislator".<sup>25</sup>

In other cases, the Constitutional Court indicated a general behaviour to be followed by ordinary courts, rather than referring to specific decisions. For example, after the accession to the European Union, the Court explained the obligations of the ordinary courts in relation to the European law and Article 148 of the Constitution which establishes the priority of European primary law: "[T]he jurisdiction to decide whether there is an incompatibility between the national law and the EC Treaty belongs to the national courts which, in order to reach a correct and legal conclusion, *ex officio* or at the request of the parties, can address a preliminary request ... to the Court of Justice of the European Communities".<sup>26</sup>

A second category of national court decisions quoted by the Constitutional Court is formed by the decisions of the HCCJ given in its mission to ensure the uniform interpretation of the law. The RCC refers to such decisions mostly by exceeding its own jurisdiction and declaring unconstitutional the *interpretation* of the law provided by the High Court, under the guise of the constitutional review of the legal texts that form the object of the HCCJ's interpretative decisions.

25 RCC, Decision 186/1999. In the same year, the Supreme Court of Justice held in a decision that "the provisions of the Constitution are not addressed directly to ordinary courts, which apply the ordinary law, but only to the legislator.... The Constitutional Court's decisions have the same status".

26 RCC, Decision 1596/2009.

From the outset, it must be pointed out that the Constitutional Court does not have the role of unifying the judicial interpretation. This role belongs to the HCCJ, which has two instruments to this end. The lack of judicial precedents as a part of the Romanian legal and judicial culture<sup>27</sup> led frequently to jurisprudential inconsistency, a phenomenon that was criticised by the European Court of Human Rights as well as by the European Commission. Because the judicial culture is difficult to change, the legislator had to provide tools to address the issue of jurisprudential incoherence: the appeal on points of law and the preliminary procedure of “solving legal issues”, both within the jurisdiction of the HCCJ.<sup>28</sup>

The appeal on points of law (hereinafter RIL) is the main instrument designed “to ensure a unitary jurisprudence” by the HCCJ. RIL may be requested in special circumstances—only if it is proven that the legal issues to which it refers were solved differently by final judgments—and only by specific subjects: the General Prosecutor, *ex officio* or at the request of the minister of justice, the steering board of the HCCJ, the steering boards of the courts of appeal and the Ombudsman.

The new codes of civil and criminal procedure, in force since 1 February 2013 and 1 February 2014 respectively, created another procedure aimed at ensuring jurisprudential consistency: a preliminary ruling procedure, by which the courts called to solve a case in last instance may ask the HCCJ to adopt a “preliminary decision” aimed to “clarify a legal issue” on which the outcome of the case depends.

The interpretation of legal texts included in the decisions given by the HCCJ in both of these procedures are binding to all courts.

In a constant case law until 2013,<sup>29</sup> the RCC acknowledged that procedural rules that give the HCCJ the power to unify divergent jurisprudence “contribute to the achievement of the rule of law” and “the legislator imposed the binding effects of the High Court’s interpretation with a view to a unitary interpretation of the law by courts”. The Constitutional Court also explained its own position towards the jurisdiction of the HCCJ: “[The Constitutional Court], being forbidden to act as a positive legislator ... cannot substitute to the competence of the HCCJ which ... is the only one entitled to decide upon the unified interpretation and application of the law”.<sup>30</sup>

In 2013, the RCC reversed its case law. The Court was ruling on the alleged unconstitutionality of the article on the RIL from the Code of Criminal Procedure. In 2007, following the Parliament’s decision to decriminalise insult and slander by changing the Criminal Code, the Constitutional Court declared such an initiative as unconstitutional, “incompatible with human dignity”, stating also that, since the repealing disposition was declared unconstitutional, “the repealed

27 Selejan-Guțan (n 19).

28 For details, see Selejan-Guțan (n 5) 190.

29 RCC, Decisions 992/2007, 1560/2010, 50/2015.

30 RCC, Decision 1483/2011.

legal provisions continue to produce effects”.<sup>31</sup> However, the Constitutional Court exceeded its power: as a “negative legislator”, it may not adopt, repeal or bring into force legal norms.<sup>32</sup>

In a RIL decision of 2010, the HCCJ argued that declaring decriminalising norms unconstitutional does not mean that the repealed norms automatically re-enter into force and concluded that “the non-exercise, by the Parliament, of the prerogative to re-examine the legal text considered unconstitutional, cannot unilaterally lead to the replacement of the essential legislative power in a rule-of-law state by another authority”.<sup>33</sup> Nevertheless, in 2011, the High Court suddenly changed its compulsory interpretation and stated that the Constitutional Court’s decision must be considered as reinstating the repealed legal dispositions and that the courts should act accordingly.

In 2013,<sup>34</sup> the RCC decided to “admit the referral of unconstitutionality” against the article of the Code of Criminal Procedure regarding RIL and ruled that the 2010 decision of the HCCJ is “unconstitutional and contrary to the Decision of the Constitutional Court no. 62/2007”. Once again, the RCC exceeded its own competence, because the Constitution does not allow it to review judicial decisions, including the generally binding ones of the HCCJ.

More recently, the RCC took a similar approach by stating that an article of the Code of Civil procedure “as interpreted by Decision 52/2018 given by the HCCJ—panel for preliminary rulings” is unconstitutional.<sup>35</sup>

Thus, the references of the RCC to HCCJ decisions is mainly used in order to discuss and even change the interpretation of legal provisions given by the supreme court, although the Constitutional Court does not have jurisdiction over judicial decisions of any kind.

## **The role of CC references to foreign judicial decisions**

### *The role of CC references to the decisions of CCs in other countries*

Academic debates on judicial dialogue or judicial cross-fertilisation or, more specifically, on the use of foreign precedents by constitutional judges<sup>36</sup> irrupted with

31 RCC, Decision 62/2007.

32 See, for details, Eugen Chelaru, ‘The Constitutional Court of Romania and the High Court of Cassation and Justice. Dialogue or Confrontation?’ in Rainer Arnold and Herbert Roth (eds.), *Constitutional Courts and Ordinary Courts: Cooperation or Conflict?* (Universitaetsverlag Regensburg 2017) 138–147; Mircea Criste, ‘Constitutional Review in Romania—a Struggle Between Monologue and Dialogue’ in Rainer Arnold and Herbert Roth (eds.), *Constitutional Courts and Ordinary Courts: Cooperation or Conflict?* (Universitaetsverlag Regensburg 2017) 164.

33 HCCJ, Decision no. 8/2010.

34 RCC, Decision 206/2013.

35 RCC, Decision 874/2018. See, for details, Selejan-Guțan and Tănăsescu (n 13) 279.

36 Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013).

force after the thorough perusal of foreign precedents by the Supreme Court of the USA in 2005.<sup>37</sup> It would be difficult to resume here all arguments invoked in favour of or against the use of foreign precedent in constitutional adjudication.<sup>38</sup> While analogy and dialectical reasoning are recurrently used by all judges, and transnational legal analogy can be facilitated by legal proximity (e.g., European Union), cultural or educational background of judges, scholarship favourable to comparativism, etc., the use of analogy in the area of judicial reasoning may require an adequate methodology and special attention to the way in which reasons are articulated.<sup>39</sup> In order to legitimately fulfil the judicial function, judicial decisions have to be based on reasons acceptable not only to those directly involved, but also to the general public and, in this respect, analogy may prove a double-edged sword.

The RCC is an example, against a general context favourable to comparative law and legal transplants,<sup>40</sup> of the case law at the constitutional level displaying a scarce use of foreign precedent. A thorough research based on quantitative methods that spread over the first 20 years of existence of the RCC<sup>41</sup> identified only 11 decisions (in a total of 11,500 at the cut-off date of that research) in which foreign precedent had been mentioned, 9 of those decisions ruling on fundamental rights and only 2 on institutional matters. Since 2012, the RCC has continued to refer only sparingly to foreign precedents.<sup>42</sup> A slight change in the approach taken by Romanian constitutional judges to foreign precedent

37 See *Roper v Simmons*, 543 U.S. 551 (2005), <https://supreme.justia.com/cases/federal/us/543/551/#tab-opinion-1961712>.

38 On one hand, acknowledging that common issues require common solutions seems a mere truism nowadays, whereas supporters of the comparative and analogical method have always underlined the informative added value residing in the knowledge of other legal systems and precedents, putting forward the fact that recognising differences allows for a better understanding of one's own legal culture. On the other hand, the fear of legal hegemony and the claim for the distinctiveness of a given human and legal community, as well as the issue of the responsibility (towards the people) generated by the legitimacy of one's legal standards coupled with the potential for manipulation inherent to the analogical argument have been invoked in order to defend a more cautious approach with regard to the use of foreign precedent in constitutional adjudication. Also see S. K. Harding, 'Comparative Reasoning and Judicial Review' (2003) 28 *Yale Journal of International Law* 409.

39 Analogy of legal reasoning by referring to foreign precedents involves a double analogy, concerning both the merits and relevant legal principles on one hand and the way to use these elements in a distinct legal argument.

40 Indeed, judicial review in Romania is the result of legal transplant. See Elena-Simina Tănăsescu, 'Constitutional Semantics and Legal Culture' in Manuel Guțan and Bianca Selejan-Guțan (eds.), *Europeanization and Judicial Culture in Contemporary Democracies* (Hamangiu 2014) 121–134.

41 Elena-Simina Tănăsescu and Stefan Deaconu, 'Analogical Reasoning as a Dialectical Instrument' in Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013) 321–345.

42 RCC, Decision 799/2015 quoting case law of the German and Polish constitutional courts, Decision 498/2018 quoting case law of the German constitutional court, Decisions 464/2019 and 465/2019 quoting case law of the French and German constitutional court,

can be noticed over the 30 years of existence of the RCC; it can be resumed as a transition from mere “non-applicable” to “it also happened there”. However, the relevance of foreign precedent in the case law of the RCC remains minor and it does not seem to confirm the thesis of the convergence of common law and civil law or the existence of a consistent judicial dialogue among peers.

As a general trend, in Romanian constitutional case law, foreign precedent is hand-picked and on a random basis. Its use depends on the subject matter at stake in a specific decision and on the appetite of the judge rapporteur for comparative law. In fact, the RCC started to use foreign precedent beyond mere additional information<sup>43</sup> and rather as a useful additional argument only after 2010, when the global financial crisis started to be reflected in constitutional case law worldwide. Referrals are made according to available information; various conversations with judges and clerks of the RCC have shown that one of the main sources of information is the Venice Commission and its dedicated website.

The geographic source of foreign precedent referred to by the Romanian Constitutional Court boasts a broad diversity of countries: from Germany, Austria and France in Western Europe, to Canada and USA in Northern America and to Bulgaria, the Czech Republic, Hungary, Latvia and Lithuania in Eastern Europe. Countries that may be perceived as faced with similar legal issues, particularly those in Eastern Europe, are more frequently quoted than those which might have been previously taken as “raw models” for potential legal transplants. For instance, Decision 137/2019 quotes only the Polish Constitutional Tribunal for refusing to send a preliminary question to the European Court of Justice and not the French, German or Italian counterparts who have initiated the dialogue with the ECJ since long ago.

It is interesting to observe that the comparative argument is rarely mentioned by the parties in front of the court as if they already know that comparative reasoning is not necessarily a strong argument in front of Romanian constitutional judges. No such argument has ever been raised by ordinary judges who refer unconstitutionality questions to the RCC. More often it is the Court itself that searches for positions expressed by its peers, particularly when it knows that a subject matter is common to several of them and particularly in cases dealing with fundamental rights.<sup>44</sup>

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Decisions 104/2018, 137/2019 and 395/2019 quoting case law of the Polish constitutional court.

43 Broad referrals to the “practise of other constitutional jurisdictions” (Decision 115/1996) or to “constitutional case law in other countries” (Decisions 121/2000 and 295/2002) testify that constitutional judges are aware of foreign practice but cannot be considered proper use of foreign precedents.

44 The best example remains the global financial crisis that affected the world and particularly the Member States of the European Union during 2009–2010 and for the legal analysis of which the RCC has referred to the most numerous foreign precedents. See Tănăsescu and Deaconu (n 41) 341.

It is equally interesting to note that foreign precedents are rarely invoked in dissenting opinions. When this happens, it is only in order to underline that even in other places judges have taken a specific position that the dissenting judge needs to emphasise. The relatively small number of separate opinions quoting foreign precedent may display a poor interest of judges in arguing against their colleagues based on comparative grounds as if this kind of legal reasoning were not convincing enough.<sup>45</sup>

In conclusion, foreign precedent is used sparingly and randomly, and it bears little to no real impact on Romanian constitutional case law.

### *The role of CC references to judicial decisions of international courts*

#### *The Constitutional Court and the case law of the European Court of Human Rights*

In Romania, Article 20 of the Constitution establishes the priority of international human rights law, ratified by the Parliament, over national law in situations less favourable to the individual. From the judiciary's point of view, this means that any national court should directly apply human rights treaties to the detriment of contrary national laws. This right and duty of the national courts was not exercised in an optimal manner ever since the entry into force of the Constitution.<sup>46</sup>

The RCC had a major contribution to the integration of the European human rights law in the "conscience" of national courts. In an early decision from 1994, the Court stated that the interpretation given by the ECtHR to the Convention is binding for national jurisdictions by virtue of the subsidiarity principle.<sup>47</sup> For almost a decade, ordinary courts didn't seem willing to follow this line. Since 2000, the number of references to ECtHR judgments in the RCC decisions has increased, which is an incentive for ordinary courts to gradually follow its lead, especially after 2003 when the binding effects of the RCC's decisions was clarified by the amended Constitution. Thus, the first main role of the references to ECtHR case law by the RCC was to convince the ordinary courts to accept the case law and the Convention as national law and to apply it accordingly, even though this neither happened overnight nor in a significant number from the outset.

The second main role of the references to the ECtHR case law was the adaptation of the RCC's own case law to human rights standards. The Court used the

45 E.g., in Decision 113/1999 a dissenting judge explicitly declared that "although this could not be held as a purely legal argument in front of the Romanian Constitutional Court" he nevertheless dares to also mention a foreign precedent in order to support his line of argument.

46 See Selejan-Guțan (n 19) 214.

47 RCC, Decision 81/1994.

arguments from the ECtHR's case law to enhance protection of fundamental rights in fields such as quality of the law, access to justice, fair trial, equality,<sup>48</sup> etc. For example, the RCC constantly referred to the ECtHR case law regarding the clarity and accessibility of the law in order to create its own standard of constitutionality.<sup>49</sup> Another matter in which the RCC incorporated the ECtHR standard of protection in its own constitutionality standard regarded the right to the respect of private life and the surveillance measures.<sup>50</sup>

In other cases, the RCC departed from the interpretation given by the ECtHR in its case law or used this case law only in a “parallel” argumentation, without actually using it correctly in its reasoning. One example is the case of insult and slander, in which, despite the case law of the ECtHR regarding freedom of expression and criminal penalties applied to journalists, the RCC kept maintaining that the only effective way to protect the “honour and dignity” was the criminal repression of insult and slander (until 2014, when the New Criminal Code decriminalised these offences). The Constitutional Court also invoked ECtHR judgments in an erroneous way: in a decision concerning the interpretation of the law regarding the more lenient criminal provisions, the RCC quoted the judgment *Maktouf and Damjanovich v Bosnia and Herzegovina* and induced the idea that the Strasbourg Court encouraged a certain interpretation of the national law, while, in fact, it was a more *in concreto* approach, based on the specific circumstances of the case.

The European Court of Human Rights has made some references to the decisions of the RCC. A recent one is in the judgment *Kovesi v Romania*, in which the ECtHR decided that there had been a violation of the applicant's right to access to a court as a consequence of an interpretation of the law given in a decision of the Constitutional Court: “[I]n its decision of 30 May 2018 the Constitutional Court specifically mentioned that, in the particular circumstances of the applicant's case, the administrative courts had limited powers to review the presidential decree for the applicant's removal [from office as a chief-prosecutor of the National Anti-corruption Directorate].... In view of these specific limits set by the Constitutional Court, the Court considers that a complaint before the administrative courts would have been ... offering only a formal review. Such an avenue would not have been an effective remedy for the core of the applicant's complaint.... In the Court's opinion, this can hardly be reconciled with the essence of the right to access to a court.... On the basis of the above-mentioned considerations, the Court ... concludes that the respondent State impaired the very essence of the applicant's right of access to a court owing to the specific boundaries for a review of her case set down in the ruling of the Constitutional Court.”<sup>51</sup>

48 RCC, Decision 632/2018.

49 Bianca Selejan-Guțan, ‘La qualité de la loi comme standard de constitutionnalité’ (2020) 1 Romanian Journal of Comparative Law 112–122.

50 RCC, Decision 91/2018.

51 *Kovesi v Romania*, 3594/19, 5 May 2020, par. 153–158.

This is one of the most critical stances taken by the Strasbourg Court vis-à-vis the RCC's decisions. It is worth mentioning that the ECtHR also noted "the growing importance which Council of Europe and European Union instruments attach to procedural fairness in cases involving the removal or dismissal of prosecutors", which added emphasis to the overall critical opinion.

In an older case, *Dumitru Popescu (no. 2) v Romania*,<sup>52</sup> the ECtHR held that the conclusion of the Constitutional Court in a decision relevant to the case, that the applicable national law was compatible with Article 8 of the Convention, was contrary to its own arguments. However, in the light of its "fourth instance doctrine", the Strasbourg Court did not assess on the merits what it called "an error of application or interpretation of the Court's case-law by a national constitutional judge".

In other cases, the references of the European Court to the decisions of the RCC were more positive, for example in the inadmissibility decision *Ionel Panfile v Romania*<sup>53</sup>, in which "the Court takes account of the Constitutional Court's reasoning, which confirmed that the Romanian legislature had imposed new rules in the field of public-sector salaries for the purpose of rationalising public expenditure, as dictated by the exceptional context of a global crisis on a financial and economic level.... The Court sees no reason to depart from the Constitutional Court's finding that the contested measures pursued a legitimate aim in the public interest". Other references, without any comments, were made to the case law of the RCC regarding the right to property and the legislation on the compensations due to the owners of buildings nationalised by the communist regime.<sup>54</sup>

### *The Constitutional Court and the Court of Justice of the European Union*

Romania has been a member state of the European Union since 2007. The Constitutional Court had started to refer to European law before the accession, but the references to the case law of the Court of Justice of the European Union started to appear only in 2006. According to a recent statistic, from 2000 until 2017, there were only 105 references to the CJEC/CJEU case law in the Constitutional Court's decisions.<sup>55</sup>

There are several types of references to the CJEU case law: conceptual clarifications, simple references, authority citations or supporting arguments for the RCC's own reasoning. For example, the RCC invoked a judgment of the CJEU in order to interpret the notion of "court", competent to address preliminary

52 *Dumitru Popescu (no.2) v Romania*, 71.525/01, 26 April 2007, par. 101–102.

53 Dec. *Ionel Panfile v Romania*, 13902/11, 20 March 2012, par. 21.

54 *Maria Atanasiu and Others v Romania*, 30767/05 and 33800/06, 12 October 2010, par. 68–70.

55 Dragoș Călin, *Dialogul dintre tribunalele constituționale și Curtea de Justiție a Uniunii Europene* (Editura Universitară 2018) 179.

references requests to the European Court<sup>56</sup> or found supporting arguments to change its own case law on the age of retirement in CJEU judgments concerning equality (equal pay for equal work between men and women<sup>57</sup>). Other decisions referred to the CJEU case law as an authority in matters like *res judicata*, legal certainty,<sup>58</sup> access to confidential information,<sup>59</sup> human dignity as a limit to constitutional amendment.<sup>60</sup>

Perhaps the most interesting discussion about the dialogue between the Romanian Constitutional Court and the Court of Justice of the European Union relates to the preliminary ruling procedure. The preliminary reference is considered an effective instrument not only of judicial dialogue, but also of ensuring the compliance between national law and European law. As a part of the judicial dialogue between constitutional courts and the ECJ, the preliminary ruling could prove useful by helping the former to fulfil their task to interpret the national legislation in the light of the Constitution as well as of EU law. As J. H. H. Weiler put it, “The Court of Justice, within the frame of a loyal cooperation, needs the constitutional courts and cannot therefore afford to lose the confidence of national judges, who practically control the reference for preliminary ruling”.<sup>61</sup>

Since 2007, the RCC has rejected several requests to address a preliminary reference to the ECJ.<sup>62</sup> The first preliminary ruling request was addressed by the RCC in November 2016 and pertained to the free movement of persons, as regulated by Directive 2004/38/EC, in relation with a same-sex third country-national spouse. It is worth mentioning that the Court used this procedural instrument only as a last resort, after not being able to reach a decision in one year of deliberation in the case, which regarded the referral of unconstitutionality of an article of the Civil Code. In the request, the CC invoked the case law of the ECJ in *Maruko*, *Romer* and *Parris*,<sup>63</sup> in which the European Court stated that “as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States” but also judgments like *Carpenter* and *Metock*,<sup>64</sup> in which the ECJ held that there is a right for citizens of the EU to be joined or accompanied by family members even though they are third country nationals. The RCC’s request to the ECJ was to clarify the term “spouse” within the meaning of the Directive 2004/38 read in the light of Articles 7, 9, 21 and 45 of the EU Charter of Fundamental Rights and to answer if the Member

56 RCC, Decision 1166/2009.

57 RCC, Decision 1237/2010.

58 RCC, Decision 365/2014.

59 RCC, Decision 568/2015.

60 RCC, Decision 465/2019.

61 J. H. H. Weiler [interview] in Dragoş Călin (ed.), *Dreptul Uniunii Europene și tribunalele constituționale ale statelor membre* (Editura Universitară 2015) 386–287.

62 Călin (n 55) 226–227.

63 *Maruko*, C267/06, 1 April 2008, EU:C:2008:179; *Romer*, C147/08, 10 May 2011, EU:C:2011:286; *Parris*, C443/15, 24 November 2016, EU:C:2016:897.

64 *Carpenter*, C60/00, 11 July 2002, EU:C:2002:434; *Metock*, C127/08, 25 July 2008, EU:C:2008:449.

States are required “to grant the right of residence in its territory for a period longer than three months to the same-sex spouse of a Union citizen”.<sup>65</sup>

Following the answer of the European Court, which stated, “Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38”, the RCC ruled<sup>66</sup> that “the relationship of a same-sex couple is included in the meaning of the notions of ‘private life’ and ‘family life’, just like the relationship of a heterosexual couple”. Thus, the Court interpreted the impugned Civil Code article to be constitutional only insofar as it allows the exercise of the right to reside in the Romanian territory to the spouses in same-sex marriages concluded in an EU Member State.

A recent ECJ judgment<sup>67</sup> opened a different type of “dialogue” with the RCC. The judgment was given in response to a series of preliminary ruling requests from several Romanian national courts, which regarded the status and value of the EC Decision 2006/928 which instituted the Cooperation and Verification Mechanism on Romania at the moment of the adhesion; rule of law-related matters in relation to the changes to the laws on the judiciary (the creation of the Special Section for investigating criminal offences within the judiciary [SIIJ], the Judicial Inspectorate, the accountability of magistrates etc.).

The answer of the ECJ to the question regarding the primacy of the EU law was awaited with great interest, particularly against the case law of the RCC which, in Decisions no. 104/2018 and 682/2018, ruled that “since the meaning of Decision 2006/928/EC ... has not been clarified by the Court of Justice of the European Union as regards its content, character and temporal limit ..., that Decision cannot be considered as a reference norm for the judicial review”. Back then, the RCC refused to make any further reference to Decision 2006/928/EC and considered that the legislator is within its margin of appreciation, as provided by the ‘constitutional identity’ corroborated with national sovereignty, whenever it is making laws regulating the substance matter of topics covered by the Cooperation and Verification Mechanism (hereinafter CVM).

The ECJ judgment of 2021 has managed to clarify the nature and legal effects of the original legal instrument which is the CVM and to emphasise the binding and enjoined direct effect to the benchmarks fixed by the CVM. The ECJ also obliged regular courts to ensure the full effect of all aforementioned legal instruments, including by leaving unapplied, if necessary, any contrary provision

65 *Coman & Hamilton*, C673/16, 5 June 2018, EU:C:2018:385.

66 RCC, Decision 534/2018.

67 *Asociația Forumul Judecătorilor din România*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, 18 May 2021, EU:C:2021:393.

of national law, even subsequent, without having to request or await the prior elimination of it by legislative means or by any other constitutional process. By the same token, the ECJ has put forward a substantive approach of the rule of law, thus also creating a potential mandatory character for the recommendations made by the European Commission in its regular reports. Without overtly confronting the RCC,<sup>68</sup> the ECJ considerably reduced the margin of appreciation of Romanian authorities and obliged them to comply with the substance matter of the CVM.<sup>69</sup>

Only a few days after this salient judgment, the RCC responded with Decision 390/2021, given in the *a posteriori* review of several articles from the Law on the judicial organisation that pertain to the SIIJ. The Court literally renders the ECJ judgment devoid of any effect in respect to national courts and practically forbids the latter to apply EU law and disregard contrary provisions of the national legislation.<sup>70</sup> In the name of an undefined concept of “constitutional identity”, the RCC held that the operative part of the ECJ judgment which said that a national court is authorised to disregard a national law that is contrary to the realm of application of Decision 2006/928/EC as a part of the EU law “has no basis in the Romanian Constitution because the CVM reports elaborated according to Decision 2006/928/EC ... are not rules of European law that a national court can directly apply by disregarding a national norm. The national judge cannot be put in the situation of deciding to apply with priority some recommendations, to the detriment of a law declared constitutional by the Constitutional Court”. The RCC even declared that the ECJ ruled *ultra vires* when empowering national judges to disapply national law contrary to EU law.

## Conclusions

In guise of conclusions, since the analysed examples speak for themselves, only a few remarks are necessary:

- a) The Romanian Constitutional Court does not have a coherent and consistent system of references to its own case law.
- b) References to national courts’ decisions are scarce in the RCC’s case law and are used mainly to change the interpretation of legal texts and sometimes to extend its jurisdiction on ordinary courts’ case law.
- c) The few references to foreign judicial decisions do not have a true impact on the RCC’s case law.

68 The RCC had explicitly refused a direct dialogue with the ECJ in Decision 137/2019.

69 Elena-Simina Tănăsescu and Bianca Selejan-Guțan, ‘A Tale of Primacy: The ECJ Ruling on Judicial Independence in Romania’ (*Verfassungsblog*, 2 June 2021), <https://verfassungsblog.de/a-tale-of-primacy/>.

70 Bianca Selejan-Guțan, ‘A Tale of Primacy Part II. The Romanian Constitutional Court on a Slippery Slope’ (*Verfassungsblog*, 18 June 2021), <https://verfassungsblog.de/a-tale-of-primacy-part-ii/>.

- d) There are no jurisprudential conflicts between the case law of the ECtHR and the one of the RCC. The hesitations and incoherence that may have characterised some of the RCC's approaches towards the European law of human rights can be explained also by the fact that “constitutional courts ... of post-communist countries were not ‘born’ continuing a tradition of European judicial culture, with human rights as a salient element”.<sup>71</sup> They were given the mission to rapidly integrate these human rights protection standards and sometimes they did not rise to the expectations. What Western jurisdictions achieved in over 50 years, the post-communist ones were required to do in far less.
- e) The references to the case law of the CJEU and the dialogue with the Luxembourg court have become a “hot potato” in the hands of the RCC. From explicitly refusing a dialogue through the preliminary reference procedure to the open conflict generated by Decision 390/2021, the case law related to the effects and primacy of the EU law still leaves place for development.

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<sup>71</sup> Bianca Selejan-Guțan, ‘Human Rights in Romanian Courts: A European Perspective?’ in Rainer Arnold (ed.), *The Convergence of Fundamental Rights Protection in Europe* (Springer 2016) 123.

spécial 2013) 17–37, [www.est-europa.univ-pau.fr/est-europa-la-revue/archives/est-europa-2011-/392-2013-numero-special-1-100-ans-dexception-dinconstitutionnalite-en-roumanie.html](http://www.est-europa.univ-pau.fr/est-europa-la-revue/archives/est-europa-2011-/392-2013-numero-special-1-100-ans-dexception-dinconstitutionnalite-en-roumanie.html), accessed 18 June 2021.

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**Part III**

**International courts in  
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# 10 Court of Justice of the European Union—‘stone-by-stone’ case-based reasoning

*Alicja Sikora*

## 1. Introduction

The role of judicial precedents is a “transversal, permanent and haunting”<sup>1</sup> question linking the legal theory and the judicial practice. The question about precedents and case-based reasoning is inextricably linked to the functioning of the judiciary and it also plays an important role in the jurisprudence of the Court of Justice of the European Union (hereafter the “Court”)—even though its forms are so heterogeneous that they escape any attempts at encapsulation within a single theory. Its role cannot be properly understood in abstraction from the Court’s role as a court engaging in judicial creativity, anchored in the normative indeterminacy of the European legal order. In his seminal article revealing the intricacies of the internal working method of the Court, K. Lenaerts denoted the development of the judicial discourse by the Court as the “stone-by-stone” approach.<sup>2</sup> This expression also serves as a defining metaphor for the present contribution.

Through meticulous construction of coherent lines of case law, the Court has played, since the creation of the European Communities, the constitutive role in the process of European legal integration, epitomised by the invocation of the Treaties as constitutional foundations of the European Union.<sup>3</sup> As is often noted in the legal literature, the Court relies on this invocation, in order to consolidate the EU legal order, as well as to consolidate its own role at the apex of the EU judiciary. The Court “deduces a comprehensive demand for legal protection from the constitutional qualities of the Treaties” while widening “the content of the norm text” and also its own jurisdiction.<sup>4</sup> In the context of the Court’s

1 Denys Simon and Anne Rigaux, ‘Le précédent dans la jurisprudence du juge de l’Union’ in *Europe(s), droit(s) européen(s): liber amicorum en l’honneur du professeur Vlad Constantinesco* (Bruylant 2015) 547, 547.

2 Koen Lenaerts, ‘How the ECJ Thinks: A Study on Judicial Legitimacy’ (2013) 36 *Fordham International Law Journal* 1302, 1356. See also Koen Lenaerts, ‘EU Citizenship and the European Court of Justice’s “Stone-by-Stone” Approach’ (2015) 1 *International Comparative Jurisprudence* 1.

3 Joseph Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403.

4 Christian Möllers, ‘Pouvoir Constituant—Constitution—Constitutionalisation’, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing 2010).

judicial discourse, the case-based reasoning and precedents, while performing a role of “prior decisions that function as models for later decisions”,<sup>5</sup> operate at a more profound layer and constitute the fundamental constitutional tool for building legitimacy, both of the Union law, as autonomous legal order, and of the jurisprudence of the Court itself. This intense function constitutes inevitably a major source of complexity in analysing the role of precedents and case-based reasoning in the jurisprudence of the Court. As a source of judicial legitimacy, the case-based judicial discourse has allowed the Court, in the judicial dialogue with the national courts of the EU Member States, including the constitutional courts, to “gradually, but inexorably” re-create the European Communities and the European Union and its legal order,<sup>6</sup> to construct the foundations for the system of protection of the fundamental rights which paved the way for the proclamation of the Charter and to contribute to the development of the overarching concept of the Union foundational values and in particular the value of the rule of law.<sup>7</sup>

The present contribution attempts to explore the constitutional and constitutive role of case-based reasoning in the EU legal order, from several intertwined perspectives. This chapter is structured as follows. Section 2 gives an overview of the evolution of the characteristic judicial style of the Court. Subsequent sections analyse the role of precedents and case-based reasoning as methods for constructing autonomy and ensuring legitimacy of EU law (section 3), striking the balance between stability and change (section 4) and safeguarding unity and coherence of EU law (section 5).

## 2. The evolution of the court’s role and its style of reasoning

The history of the Community and EU law is to a large extent a continuous “history made of many judicial stories”.<sup>8</sup> Since its foundation in 1952, the Court of Justice practice is, on its own, a synonym of a “narrative of a founding and later, the transformation of a new court in its own right in post-war Europe”.<sup>9</sup> Under Article 19(1) TEU, provision which has remained essentially identical since Article 31 of the European Coal and Steel Community (ECSC) Treaty, the Court of

5 D. Neil MacCormick and Robert S. Summers, ‘Introduction’ in D. Neil MacCormick and Robert S. Summers (eds.), *Interpreting Precedents. A Comparative Study* (Routledge 2016).

6 Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

7 Koen Leenerts, ‘New Horizons for the Rule of Law Within the EU’ (2020) 1 *German Law Journal* 29.

8 Antoine Vauchez, ‘EU Law Classics in the Making, Methodological Notes on Grands arrêts at the European Court of Justice’ in F. Nicola and B. Davies (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2021).

9 Ditlev Tamm, ‘The History of the Court of Justice of the European Union Since its Origin’ in *The Court of Justice and the Construction of Europe, Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 9.

Justice has been vested with a mission “to ensure that in the interpretation and application of the Treaties the law is observed”. Its creation is inevitably anchored in a vision and spirit of a new legal order tasked with a mission of ensuring a *common* political and economic future. Nowadays, the common, constitutional axiology of the Union is expressed in Article 2 TEU, according to which the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, *inter alia*, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU.<sup>10</sup>

Every discussion touching upon the authority of precedents and case-based reasoning is inseparable from horizontal considerations on the role of a judge, on the relationship between law and time and the necessity to give reasons of the merits of the solution adopted.<sup>11</sup> In a multi-level, pluriconstitutional and dynamic European legal order, the case-based reasoning and has a particularly constitutive and constitutional role of ensuring autonomy, unity, cohesion, uniformity and legal certainty of EU law.<sup>12</sup> As noted by Advocate General Maduro, those values are of particular importance in the context of a decentralised system of EU law.<sup>13</sup> The precedent is equally a tangible, enabling factor of the European integration.<sup>14</sup>

In this regard, it is worth noting that the origins of the method of reasoning characteristic to Court’s decisions are closely connected to the national legal traditions of the civil law tradition, while at the same time this method breaks with this tradition on a number of accounts. As noted by Maurice Lagrange, “The judicial system set up under the Treaty draws directly on French administrative law”, incorporating “virtually the entire range of procedures available in the French administrative courts, including actions for annulment, action[s] for failure to act and non-contractual liability”.<sup>15</sup> More importantly, scholars note that,

10 Opinion 2/13 (Accession of the European Union to the ECHR), 18 December 2014, EU:C:2014:2454, par. 168.

11 Simon and Rigaux (n 1) 578.

12 Daniel Kelemen and Susanne Schmidt, ‘Introduction—the European Court of Justice and Legal Integration: Perpetual Momentum?’ (2012) 19(1) *Journal of European Public Policy* 1–7; Susanne Schmidt, ‘Who Cares About Nationality? The Path-Dependent Case Law of the ECJ from Goods to Citizens’ (2012) 19(1) *Journal of European Public Policy* 8.

13 Opinion of Advocate General M. Poiares Maduro, *Cipolla*, C-94/04, EU:C:2006:76, par. 28.

14 As noted in the literature, once fixed in a given domain, European rules such as relevant Treaty provisions, secondary legislation, and the European Court of Justice’s (ECJ) case law generate a self-sustaining dynamics that leads to the gradual deepening of integration in that sector and, not uncommonly, to spill-overs into other sectors (W. Sandholtz and Alec Stone Sweet, *European Integration and Supranational Governance* (OUP 1998) 4–5- quotation after AN EVER MORE POWERFUL COURT, p. 30).

15 Mélanges Fernand Dehousse (Vol. 2, 1979), [www.cvce.eu/content/publication/1999/1/1/30dbbb02-97f2-46ad-898c-49b074cb2ab2/publishable\\_en.pdf](http://www.cvce.eu/content/publication/1999/1/1/30dbbb02-97f2-46ad-898c-49b074cb2ab2/publishable_en.pdf), at 4.

notwithstanding the civil law traditions of the founding Member States, under the preponderant influence of the French legal tradition of “*jurisprudence*”, the founding treaties and currently, EU treaties, do not specify “any indication of the sources of law which the Court of Justice should apply”.<sup>16</sup> Indeed, “imposition of a system of binding precedent on the Union judicature would be a significant departure both from the practice followed in the Member States in their own legal order, and from international practice”.<sup>17</sup> By the same token, other authors observe that “a doctrine of binding precedent on common law lines, would have been entirely inappropriate in what was originally a court of first and last resort, many of whose decisions could only be changed by amending the founding Treaties”.<sup>18</sup> Yet, in its practice of relying on the past judgments, the Court draws from the richness of the national legal traditions since “although the Court’s way of formulating principles, or general propositions of law, is closely akin to the methods used by the French Conseil d’État, its techniques of relying on previous cases, or invoking the authority of its own case law and determining the ratio decidendi of earlier judgements, are not dissimilar to those used by English common law courts”.<sup>19</sup>

In its classical understanding, “The role of the Court is always and necessarily evolving: the process of implementing the EU Treaties is an evolving process; the case-law evolves; interpretation of the Treaties ... evolves if it is to remain ... a living instrument”.<sup>20</sup> Consequently, the EU legal order is viewed as a construction permeated by the progressivity and continuity of the case law of the CJEU built from case to case “through which the judge has been able to specify, from detail to detail, most of its doctrine”.<sup>21</sup> Since the EU Court’s case law is one of the sources of the Union law, without putting into question the constantly growing body of the EU substantive law, the EU legal order is considered “judge-made” law.<sup>22</sup> Contributing to the evolution of EU law is, however, not an exclusive and self-originated task of the Court. In the light of the founding treaties under the preliminary ruling procedure currently enshrined in Article 267 TFEU, the *national* judge is equally an *EU law* judge. Given the role of effective national judiciary in the application and respect of EU law, the national judge is even considered the

16 Kieran Bradley, ‘Vertical Precedent at the Court of Justice of the European Union’ in Kieran Bradley, Noel Travers and Anthony Whelan (eds.), *Liber Amicorum in Honour of Nial Fennelly* (Hart 2014) Oxford, 47, 49.

17 *Ibid.*

18 Anthony Arnall, ‘Owning up to Fallibility: Precedent and the Court of Justice’ (1993) 30 CMLR 247.

19 T. Koopmans, ‘Stare Decisis in European Law’ in D. O’Keefe and H. Schermers (eds.), *Essays in European Law and Integration* (Kluwer 1982) 27.

20 Francis Jacobs, ‘The Court of Justice in the Twenty-First Century: Challenges Ahead for the Judicial System’ in *The Court of Justice and the Construction of Europe, Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 49–59.

21 Jean Bouloisa and Roger-Michel Chevallier, *Les grands arrêts de la jurisprudence de la Cour de justice des Communautés européennes* (Daloz 1974) xi.

22 Opinion of Advocate General Fennelly, *Merck*, C-267/95 and C-268/95, EU:C:1996:228.

“first judge of the European Union”.<sup>23</sup> The landmark precedents, in particular in the formative phase of the European Communities, have been indeed a result of a preliminary ruling request from the national courts where the question of interpretation or validity of EU law arose. In this context of the judicial dialogue under Article 267 TFEU, has been directly linked with the *ratio decidendi* and *erga omnes* authority of the Court’s judgments rendered in the context of a preliminary ruling procedure.<sup>24</sup> In this context, the precedent is viewed in its most expansive, horizontal perspective, involving a judicial dialogue with the national courts, including the constitutional courts of the Member States.

More recently, in its case law regarding the independence of the national judiciary, the Court ruled that Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.<sup>25</sup> As persuasively claimed by Advocate General Bobek in another recent case related to the CILFIT doctrine, “The overall purpose of the preliminary rulings procedure, is no doubt to assist national courts in resolving individual cases involving elements of EU law. That case-focused ‘micro purpose’ certainly serves, in the long run, the more systemic ‘macro purpose’ of the preliminary rulings procedure. It gradually builds up a system of precedents (or, in the language of the Court, established case-law), which helps to ensure the application of EU law uniformly across the European Union”.<sup>26</sup>

Against the background of this extremely dense and gradually woven texture of the Court’s jurisprudence, the method by which Court builds upon its earlier judgments cannot be described in one univocal manner, although it is possible to identify several defining traits of this method.

Firstly, the Court’s case law is characterised by a relatively high—bearing in mind that it is the supreme and the constitutional court within the Union legal order—number of judgments delivered annually.<sup>27</sup> Secondly, the Court applies a “strict version of the principle of collegiality”, which means that it only renders

23 Fennelly Nial, ‘The National Judge as Judge of the European Union’ in Allan Rosas, Egils Levits and Yves Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law—La Cour de Justice et la Construction de l’Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Springer 2013) 61.

24 Opinion of Advocate General Capotorti, C-130/79, EU:C:1980:121, Express Dairy Foods, par. 2, referring to Advocate General Werner in his opinion delivered in Case 112/76, Manzoni v Fonds National de Retraite des Ouvriers Mineurs [1977] ECR 1647 at p. 1662.

25 Opinion 1/09 (Agreement creating a Unified Patent Litigation System), 8 March 2011, EU:C:2011:123, par. 66; *Inuit Tapiriit Kanatami v Parliament and Council*, 3 October 2013, C-583/11 P, EU:C:2013:625, par. 90; *T & L Sugars and Sidul Açúcares v Commission*, 28 April 2015, C-456/13 P, EU:C:2015:284, par. 45.

26 Opinion of Advocate General Bobek, *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:291, par. 55.

27 The number of cases completed annually in the last five years oscillates between 700 and 865. See Court of Justice of the European Union, Annual Report 2020, p. 207, [https://curia.europa.eu/jcms/jcms/Jo2\\_7000/en/](https://curia.europa.eu/jcms/jcms/Jo2_7000/en/) accessed on 25 May 2021.

“committee judgments” for which neither concurring nor dissenting opinions are allowed and instead “compromise is the name of the game”.<sup>28</sup> The combination of these two features “leaves an unmistakable imprint and produces a typical style of reasoning”.<sup>29</sup> For instance, the consensus-building requirement implies that the judicial discourse cannot be as profuse as it would be in the presence of dissenting opinions, since the reasoning must accommodate as many different opinions as possible and, as a consequence, must be limited to the “very essential”.<sup>30</sup> It may however be noted that the judicial style of the Court has evolved over time;<sup>31</sup> in particular, the length of reasoning of the judgments has nearly doubled between the 1990s and 2010s, and they have arguably become more explicit and openly drafted.

Thirdly, as regards the value of precedents, generally speaking, even though the Court does not recognise the doctrine of *stare decisis* which is typical for common law system, and hence is not formally bound to follow its previous judgments, in practice, the Court extensively relies on the existing case law.<sup>32</sup> This reliance on the “jurisprudence”, that is, a consistent body of case law, which is quintessential to the Court’s method, is encapsulated in the standard formula “according to the Court’s settled case-law” (“selon une jurisprudence constante de la Cour”), which from the methodological perspective requires at least two earlier precedents to be quoted. The formula in question reflects both the fact that the case law is established (“jurisprudence constante”) and the fact that it constitutes a single coherent, harmonious body (“une jurisprudence”). The reference to the settled case law is an essential part of the Court’s reasoning and is a necessary element just as well in the chamber judgments as in the Grand Chamber or the Full Court judgments.

The fourth typical feature of the Court’s style of reasoning is the fact that the Court’s decision contains “the precise wording of a particular phrase in past judgments”.<sup>33</sup> This method of quotation has a self-reinforcing function, since it reflects the fact that the judicial decision connects to the existing jurisprudence and constitutes a brick in the body of “jurisprudence constante”. The downside is that the replication of verbal formulas may lead to a perception of judicial pronouncements “as if they were legislation or set

28 Lenaerts (n 2) 1303 quoting Sir Konrad Schiemann, ‘Should We Come Together? Reflections on Different Styles of Judicial Reasoning’ (2006) 9 *Zeitschrift für Europarechtliche Studien* 1, 7.

29 Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans, ‘Introduction’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds.), *Judging Europe’s Judges* (Hart 2013) 6.

30 Lenaerts (n 2) 46.

31 Michal Bobek, ‘Of Feasibility and Silent Elephants’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds.), *Judging Europe’s Judges* (Hart 2013) 197, 204.

32 Arnall (n 18) 247.

33 Lenaerts (n 2) 1303 quoting Sir Konrad Schiemann, ‘From Common Law Judge to European Judge’ (2005) 13 *Zeitschrift für Europäisches Privatrecht*, 745.

in stone”.<sup>34</sup> There is no “unpacking of their content”, no critical analysis of the past precedents, but instead a “string citation” and “general precedent incantations”.<sup>35</sup>

This last feature goes beyond the aspect of using literal quotations and often amounts to what has been described as the use of “judicial formulas” coined in the “grands arrêts” in such a way that some judgments resemble a “collage” of judicial formulas.<sup>36</sup> This method of discourse can be described as creation of “supporting structures”<sup>37</sup> or, as defined in a more playful fashion, “a Lego technique”,<sup>38</sup> which is typical for the Court case law, and in some cases leads to the impression that it is the formulas which are speaking and not the Court.<sup>39</sup> The criticism which can be addressed to this style of discourse is that it underestimates the argumentative nature of law and relies on the authority and reputation of the Court, as the decision maker.<sup>40</sup>

Furthermore, as some scholars rightly observe, “the judgment’s ‘embeddedness’ in previous case law and value as a precedent in subsequent cases” must be seen through the prism of respective judicial remedies available before the EU Courts.<sup>41</sup> Revisiting and providing for dynamic, evolving interpretation is equally one of the core characteristics of the Court case law, which is in itself a very important source of EU law. The drafting style of the Court is a direct consequence of the elements intrinsic in the dynamics of Article 267 TFEU, which is the crucial mechanism for ensuring the uniformity and coherence of EU law. The inter-judicial dialogue underlying Article 267 TFEU is “deeply intertwined with the way in which the ECJ builds up its argumentative discourse”, whereby the Court must “strike the appropriate balance between different levels of specificity and generality in its reasoning”.<sup>42</sup> If the reasoning were too laconic, or too abstract, this would deter national courts from engaging in the judicial dialogue, whose purpose is, first and foremost, to usefully contribute to the solution of the case pending before the referring national court.

Finally, the Court’s approach is characterised by gradual development, the “stone-by-stone approach” in its proper meaning. This approach means that the questions of law resolved by the Court are limited to those raised by the case at

34 Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice—Unfinished Business* (Cambridge University Press 2014) 96.

35 *Ibid* 100–101.

36 Loïc Azoulay, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization’ (2008) 45 *CMLRev* 1335, 1339.

37 Joxerramon Bengoetxea, D. Neil MacCormick and Leonor Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in Gráinne de Búrca (ed.), *The European Court of Justice* (Oxford University Press 2001) 66.

38 Jacob (n 34) 95–97.

39 Azoulay (n 36) 1339–1340.

40 Jacob (n 34) 102–103.

41 Mattias Derlen and Johan Lindholm, ‘Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions’ (2015) 16 *German Law Journal* 1073.

42 Lenaerts (n 2) 1369.

hand—as regards other questions they remain to be resolved for the future cases.<sup>43</sup> This feature is prominent in cases of constitutional importance, in which an “incremental approach”<sup>44</sup> is particularly justified so as not to pre-empt the future jurisprudential choices.

All in all, the particular style of judicial reasoning developed by the Court is consistent with its special role as “a constitutional umpire operating in a multi-layered system of governance”, engaged in what is often “a risky venture” of stating what the law is.<sup>45</sup>

### 3. Constructing autonomy and ensuring legitimacy of EU law

The importance of case-based reasoning in the Court’s case law cannot be properly understood in abstraction from the role of the Court in creating the autonomy and ensuring legitimacy of EU law. From its very foundation the Court was confronted with the “constitutional lacunae” left by the authors of the founding Treaties. As argued by President K. Lenaerts, in order to honor its constitutional mandate in autonomous legal order, the Court could not limit itself to a formalistic understanding of the rule of law.<sup>46</sup> Hence, the ensuing choice was inevitable—the Court had to accomplish the task of completing the constitutional lacunae left by the authors of the Treaties, by interpreting the Treaties as a “living constitution”.

This special, historical role of the Court is exemplified in several strands of constitutional jurisprudence: the affirmation of the principles of primacy and direct effect,<sup>47</sup> the incorporation of fundamental rights into the EU legal order as general principles of EU law,<sup>48</sup> the duty of consistent interpretation (“interprétation conforme”), the principle of State liability, the principles of effectiveness and equivalence.<sup>49</sup>

The construction of those fundamental features of the EU legal order through the case law. Thus, for example, the affirmation of the requirement for national law to be interpreted in conformity with EU law<sup>50</sup> and the principle of State liability for loss and damage caused to individuals as a result of breaches of

43 Ibid 1356.

44 Ibid 1369.

45 Ibid 60.

46 Koen Lenaerts, ‘The Court’s Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds.), *Judging Europe’s Judges* (Hart 2013) 13, 13.

47 5 February 1963, van Gend & Loos, 26/62, EU:C:1963:1; Costa v ENEL, 6/64, EU:C:1964:66.

48 7 December 1970, Internationale Handelsgesellschaft, 11/70, EU:C:1970:114.

49 20 February 1979, Rewe-Zentral, 120/78, EU:C:1979:42.

50 10 April 1984, von Colson and Kamann, 14/83, EU:C:1984:153, par. 26, 5 October 2004, Pfeiffer and Others, C-397/01 to C-403/01, EU:C:2004:584, par. 114.

European Union law<sup>51</sup> is based on the idea that those principles are “inherent in the system of the treaties”, (“inhérent au système des traités”). This formula indicates that the principles in question are in essence judicial creations<sup>52</sup> and their legitimacy is largely based on the constitutional authority of the Court. The judicial activism of the Court created the need for a particularly persuasive quality of judgments and their coherence, as a necessary precondition for the internal legitimacy of the Court.

The external and internal legitimacy can be seen as two complementary perspectives.<sup>53</sup> Whereas external perspective is deeply intertwined with the role of the courts in democratic society, the internal legitimacy looks at the quality of the judicial process and in particular the quality of the legal reasoning.<sup>54</sup> From this angle, the crucial element of internal legitimacy is coherence of the court’s rulings with the existing case law.

In the context of the “groundbreaking” constitutional cases, the Court has gradually developed a particular style of reasoning which allows it to achieve this internal legitimacy. The persuasiveness of the argumentative discourse is built up progressively, “stone-by-stone”.<sup>55</sup> Thus, the Court regularly employs sophisticated judicial formulas that suggest continuity of the interpretative solutions and their overriding rationale.<sup>56</sup>

As demonstrated by L. Azoulai on the basis of examples of judgments in Viking<sup>57</sup> and Laval<sup>58</sup>—the judicial formulas forged in the constitutional cases constitute both “conceptual and ideological framework” for the Court’s legal reasoning and act as elements offering “security and permanence”, without dictating the actual outcome which remain open to the process of judicial creativity.<sup>59</sup>

These elements fall into the special, targeted perspective of “reasoning with previous decisions”<sup>60</sup> which is typical for the judicial style of the Court decisions and has played the crucial role in ensuring internal legitimacy to the body of case law gradually and incrementally constructed by the Court. In this manner, the

51 19 November 1991, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, par. 35; 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, par. 31.

52 Stephen Weatherill, ‘The Court’s Case Law on the Internal Market: A Circumloquacious Statement of the Result, Rather Than a Reason for Arriving at It?’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds.), *Judging Europe’s Judges* (Hart 2013) 87, 89.

53 Lenaerts (n 46) 13.

54 *Ibid* 14.

55 Lenaerts (n 2) 1351.

56 Azoulai (n 36) 1339.

57 11 December 2007, *International Transport Workers’ Federation and Finnish Seamen’s Union* (‘Viking’), C-438/05, EU:C:2007:772.

58 8 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809.

59 Azoulai (n 36) 1339–1340.

60 Jan Komárek, ‘Reasoning with Previous Decisions: Beyond the Doctrine of Precedent’ (2013) 61 *The American Journal of Comparative Law* 149.

Court creates “supporting structures”<sup>61</sup> emphasising the connections between the parts of the legal system.

This style has been consolidated in more recent constitutional cases: Opinion 2/13, *Achmea, Juges portugais*. In these cases, the Court consistently describes “the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law” gradually leading to the statement of “the fundamental premiss” on which the EU law is based: that “each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”, which is followed by the affirmation of the constitutional features of the EU judicial system, including, as its keystone, the preliminary rulings mechanism, which “has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties”.<sup>62</sup>

These and other judicial formulas constitute the connecting strands of the body of case law which allow the line of cases to be retraced to the earlier and the subsequent judgments. As a consequence, in order to fully apprehend the approach of the ECJ in an area of EU law, it is not sufficient to study the “groundbreaking” case, but also the relevant case law predating as well as postdating that case.<sup>63</sup> On the other hand, this approach and the related style for the judicial discourse is not to immune criticism, particularly from the perspective of its cryptic, Cartesian style. Indeed, as J. H. H. Weiler argued, the “stone-by-stone” approach itself may be seen as an argument invoked to defend the Court’s sometimes cryptic and apodictic judicial style, by replying that the reasons for the groundbreaking judgments must be seen in the light of the case law as a whole.<sup>64</sup>

There may be truth in all those arguments, which moreover tend to converge into the main point of this contribution: whilst the judicial system of the Union does not rely on a binding authority of precedent,<sup>65</sup> the case-based reasoning, in its particular form, typical for the Court’s judicial style, lies at the core of the development of the EU legal order. At the centre of this judicial style, the precedent is important legitimising factor.

#### 4. Striking the balance between stability and change

The analysis of the precedents and case-based reasoning in the jurisprudence of the Court is intrinsically linked to the discussion concerning the Court’s role

61 Bengoetxea, MacCormick and Soriano (n 37) 66.

62 Opinion 2/13 (Accession of the EU to the ECHR), 18 December 2014, EU:C:2014:2454, par. 168 and 173, 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117, par. 33, 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, 33–37.

63 Lenaerts, EU Citizenship (n 2) 2.

64 J. H. H. Weiler, ‘Epilogue: Judging the Judges—Apology and Critique’ in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds.), *Judging Europe’s Judges* (Hart 2013) 235, 249–250.

65 Arnull (n 18) 230, 248.

in the EU legal order. The role of the EU judicial system consists, primarily, in ensuring consistency and uniformity in the interpretation of EU law.<sup>66</sup> There is however also a wider, evolutionary role of the Court which consists in advancing the development of EU law in particular through the interpretation of the founding Treaties as “living instruments”. These two aspects of the Court’s role in the EU legal order are also reflected in its judicial discourse, particularly relating to the judicial dialogue in the context of the preliminary rulings procedure.

The Court itself rarely explicitly addresses the nature and characteristics of its own judicial style. As noted in the legal literature, “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. In informal discussion the constant jurisprudence of the Court is often produced as an apparently conclusive answer to what is seems *prima facie* to be an appropriate solution”.<sup>67</sup> Furthermore, the analysis of the methods of reasoning of the Court would not be complete without taking into account the discussion apparent in the Opinions of its Advocates General.

The EU legal order evolves through the constitutive precedents, marked by rare, cautiously considered phenomenon of “*revirement de la jurisprudence*” (overruling), justified by developments that have taken place in other areas of the legal system or by new factors, which may justify adaptation or even review of its case law. As noted by Advocate General Maduro, “Stability is not and should not be an absolute value”.<sup>68</sup> More generally, as indicated by Advocate General Lagrange, “The Court of Justice should ... remain free when giving its future judgment ... no one will expect that, having given a leading judgment ... the Court will depart from it in another action without strong reasons, but it should retain the legal right to do so”.<sup>69</sup> In his opinion in case *Merck v Primecrown*, Advocate General Fennely, for his part, elaborated upon the meaning of a precedent and *stare decisis*. While admitting that, as a matter of principle, the Court is not bound by its own previous judgments in the way comparable to the two common law jurisdictions who rely on the *stare decisis* “as the normal, indeed almost universal, procedure”, Advocate General Fennely emphasised that these jurisdictions will depart from the previous judgments “‘for compelling reasons’ ... where it appears to be clearly wrong. ... However desirable certainty, stability and predictability of law may be, they cannot ... justify a court of ultimate resort in giving a judgment which they are convinced, for compelling reasons, is erroneous”.<sup>70</sup>

66 Opinion 2/13 (Accession of the EU to the ECHR), 18 December 2014, EU:C:2014:2454, par. 174.

67 Gordon Slynn, ‘The Court of Justice of European Communities’ (1984) *International & Comparative Law Quarterly* 409, 423.

68 Opinion of Advocate General M. Póitares Maduro, *Cipolla*, C-94/04, EU:C:2006:76, par. 29.

69 27 March 1963, *Da Costa and Others* (28/62 to 30/62), EU:C:1963:6. Opinion of AG Lagrange, point II. p. 42.

70 5 December 1996, *Merck and Beecham*, C-267/95 and C-268/95, EU:C:1996:468, 139–146.

The role of the precedent and case-based reasoning as elements of the constant search for balance between stability and change may be further examined from two angles. Firstly, it is important to look into its role in the functioning of the preliminary rulings procedure which constitutes the “keystone”<sup>71</sup> of the EU judicial system. Secondly, the concept of “revirement” (“overruling”) must be considered, given its specificity in the EU legal context. Indeed, the overruling is a reverse of the precedent and both concepts entertain a “symmetrical” relationship.<sup>72</sup>

It is important to note that the preliminary rulings procedure itself undergoes constant evolution. “As the environment has changed and the system has matured, the nature of the preliminary rulings procedure has evolved as well. A procedure originally conceived as being one of partnership and judicial cooperation amongst equals has gradually and rather inevitably developed into one which places greater emphasis on precedent building for the purpose of systemic uniformity”.<sup>73</sup>

This special role of the precedent and case-based reasoning may be illustrated by the functioning of the preliminary rulings mechanism in the context of the CILFIT judgment<sup>74</sup> in which the Court consolidated its case law on the duty of a national court to refer and the related exceptions of “acte clair” and “acte éclairé”. In particular, the concept of “acte éclairé” within the meaning of the CILFIT judgment addresses the situations in which there exists already a precedent in the body of the case law developed by the Court.<sup>75</sup> This concept draws from the earlier *Da Costa* judgment, in which the Court stated that “the authority of an interpretation ... already given by the Court may deprive the obligation [to refer] of its purpose and thus empty it of its substance”.<sup>76</sup> Another important implication of the existence of a precedent can be drawn from the case law confirming the principle of State liability for the damage caused by the infringement of EU law by a national court adjudicating at last instance. In *Köbler*<sup>77</sup> the Court has confirmed the possibility of obtaining redress in such a situation, rejecting the arguments based on *res judicata*, the independence and authority of the judiciary. At the same time, the Court held in assessing the condition according to which the breach must be “sufficiently serious” regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, and that, in any event, an infringement of EU law will be sufficiently serious where the

71 Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, par. 176.

72 Simon and Rigaux (n 1) 547.

73 Opinion of Advocate General Bobek, *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:291, par. 124.

74 6 October 1982, *CILFIT and Others*, 283/81, EU:C:1982:335, par. 16.

75 Opinion of Advocate General Bobek, *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:291, par. 65.

76 27 March 1963, *Da Costa and Others*, 28/62 to 30/62, EU:C:1963:6, page 38.

77 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, par. 36.

decision concerned was made in “manifest breach of the case-law of the Court in the matter”.<sup>78</sup> Furthermore, the requirement to interpret national law in conformity with EU law includes the obligation, imposed on the national courts, to change their established case law if that case law is based on an interpretation of national law that is incompatible with EU law, as interpreted by the Court. Hence, a national court cannot validly claim that it is impossible for it to comply with the duty of *interprétation conforme* because of the existing national case law having precedential value.<sup>79</sup>

As a consequence, the precedent plays a dual delineating role in relation to the duty to refer: on the one hand, the existence of a precedent removes the duty to refer, provided that the national court complies with its obligation to follow the Court’s case law; on the other, the existence of a precedent may give rise to the duty to refer to the extent that the national court entertains doubts as to the scope and authority of the existing case law of the Court. The possibility to question the interpretation provided in the past judgments, and ask the Court to revisit or nuance it, is an intrinsic part of the judicial dialogue underpinning the preliminary rulings mechanism under Article 267 TFEU. As Advocate General M. Bobek observed in his recent opinion, “A national court, and in particular a national court of last instance, is always allowed to invite the Court to adapt, refine, clarify, or even depart from its previous decisions. However, if a national court of last instance wishes to depart from the interpretation of EU law previously adopted by the Court, that national court is under an obligation to make a reference, explaining to the Court the reasons for its disagreement and, ideally, setting out what ought to be, in the view of the referring court, the proper approach”. Thus, a “clarification” of case law within the meaning of CILFIT case includes situations in which a national court invites the Court to nuance or depart from its case law or brings to the attention of the Court divergent solutions present in its case law.<sup>80</sup>

The case law of the Court contains several prominent examples of requests from the national court to revisit the existing jurisprudence. For instance, in *Merck II*,<sup>81</sup> the UK High Court sought to ascertain whether it is necessary to reconsider the principles laid down in an earlier case, *Merck I*,<sup>82</sup> concerning the possibility to prohibit the importation of patented pharmaceutical products marketed in another Member State. After meticulous analysis of the reasons given by the national court, the Court concluded that the arguments for reconsideration of the rule in *Merck I* are not such as to call in question the precedent, since those

78 30 September 2003, Köbler, C-224/01, EU:C:2003:513, par. 56.

79 (Judgment of 19 April 2016, DI, C-441/14, EU:C:2016:278, par. 33–34) Judgment of 17 April 2018, Egenberger, C-414/16, EU:C:2018:257, par. 72–73.

80 Opinion of Advocate General Bobek, *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:291, par. 164–165.

81 5 December 1996, *Merck and Beecham*, C-267/95 and C-268/95, EU:C:1996:468, 33–37.

82 4 July 1981, *Merck*, 187/80, EU:C:1981:180.

arguments “have not shown that the Court was wrong in its assessment” of the balance between the principle of free movement of goods and the right to protection of patents. Further, however, the Court engaged in an analysis, whether the scope of the principles laid down in the earlier case law must be “restricted”.<sup>83</sup>

More recently, in *Taricco I*<sup>84</sup> the Italian *Corte Costituzionale* raised the question of a possible breach of the principle *nullum crimen, nulla poena sine lege*, as a consequence of the obligation stated in *Taricco I*<sup>85</sup> judgment which would lead the national court to disapply the provisions of the Italian Criminal Code. While reaffirming its judgment in *Taricco I*, the Court added an important “clarification” by holding that the obligation to disapply the national provisions of criminal law finds its limit where it conflicts with the principle of legality as enshrined in Article 49 of the Charter. If that were the case, which is left to the national court to assess, then the national court would not be obliged to comply with the obligation stemming from Article 325 TFEU, to adopt effective and dissuasive penalties in order to protect the financial interests of the Union. The *Taricco* saga has wider implications and gave rise to numerous commentaries.<sup>86</sup> For the purposes of the present contribution, it is important as an example showing the particular method used by the Court to revisit its own jurisprudence.

Numerous other examples—such as, recently, in relation to the scope of the obligation to carry out a strategic environmental assessment, which is one of the key instruments of EU law for attaining a high level of protection of the environment—allow an insight in a judicial discussion whereby the Court, after meticulous analysis of the reasons provided by the national court, concludes that “there is nothing to justify a reversal of the case-law of the Court of Justice”.<sup>87</sup> The requests to revisit earlier precedents can therefore be considered constitutive elements of judicial dialogue, which is integral to the functioning of the EU legal order.<sup>88</sup>

While the Court has explicitly recognised the value of the dialogue between judges, insofar as it may lead to clarifications or adjustments to the existing case law, at the same time, the Court has been traditionally very cautious in addressing the concept of “revirement”, i.e., overruling its past judgments or even “loath to openly depart from precedents”.<sup>89</sup> This position is interesting, because there are no formal objections or limits for the Court to depart from its case law. The examples of explicit overruling in the Court’s case law are extremely rare; only

83 5 December 1996, *Merck and Beecham*, C-267/95 and C-268/95, EU:C:1996:468, 43.

84 5 December 2017, *M.A.S. and M.B. (‘Taricco II’)*, C-42/17, EU:C:2017:936, following C-105/14, *Taricco*, EU:C:2015:555.

85 C-105/14, *Taricco*, EU:C:2015:555.

86 See ‘Editorial Comments’ (2020) 57 CMLRev, 965.

87 *A. and Others (Wind turbines at Aalter and Nevele)*, C-24/19, Opinion of Advocate General, EU:C:2020:143, par. 53–57, judgment, EU:C:2020:503, 36–51.

88 Opinion of Advocate General Tanchev, *A. B. and Others (Nomination des juges à la Cour suprême—Recours)*, EU:C:2020:1053, C-824/18, par. 81.

89 Jacob (n 34) 159.

very few judgments contain the formulas stating: “la Cour estime nécessaire de reconsidérer l’interprétation retenue dans cet arrêt” (“the Court believes it necessary to reconsider the interpretation given in that judgment”),<sup>90</sup> “contrairement à ce qui a été jugé jusqu’ici” (“contrary to what has previously been decided”)<sup>91</sup> or “cette conclusion doit cependant être reconsidérée” (“that conclusion must however be reconsidered”).<sup>92</sup>

Instead of explicitly departing from its earlier case law, the Court uses various implicit techniques, providing a nuance or an explanation or imposing additional conditions which effectively “marginalise” the scope of application of its earlier judgment. In this context, as Advocate General Bobek has observed, “‘clarification’ often serves as a euphemism for effective overruling”.<sup>93</sup> The fact of adding important nuance to the earlier case law is explicitly reflected in the judicial reasoning, through the use of expressions such as “cela étant, il convient d’ajouter” (“that being so, it must be added”).<sup>94</sup>

The controversies related to such technique may be illustrated by the recent line of case law concerning the conditions for a supplementary protection certificate for a new therapeutic application of an active ingredient, in the light of the *Neurim* judgment.<sup>95</sup> The Court has been asked to revisit *Neurim* in two subsequent cases: in *Abraxis*,<sup>96</sup> despite the explicit suggestion by Advocate General Saugmandsgaard Øe,<sup>97</sup> the Court decided to nuance its earlier case law rather than explicitly revising it. Several months after the delivery of that judgment, a second request was brought forward by the Court of Appeal of Paris, asking the Court to revisit its case law. In his opinion, Advocate General Pitruzzella explicitly raised the issue of the appropriate method of ‘revirement’, stating that while in the past the Court has chosen not to explicitly overrule its judgment in *Neurim*, it should take this step in the present case in the interests of legal certainty, rather than engaging the technique of “marginalization” of past judgment.<sup>98</sup> In *Santen*<sup>99</sup>, while accepting the substance of the reasoning, the Court did not choose to “dare to take the leap” as suggested by its Advocate General.

The Court’s method consisting of explaining and refining its case law is, in itself, perfectly legitimate and should not be regarded as a mere avoidance

90 7 October 1990, HAG GF, C-10/89, EU:C:1990:359.

91 Keck, C-267/91 and C-268/91, par. 16. There is of course a number of less prominent examples; see for instance C-424/09, par. 24, in which the Court has “rectified” its judgment in C-149/05 Price, par. 39.

92 25 July 2008, Metock and Others, C-127/08, EU:C:2008:449, par. 58.

93 Opinion of Advocate General Bobek, Consorzio Italian Management e Catania Multiservizi, C-561/19, EU:C:2021:291, footnote 142.

94 5 December 2017, M.A.S. and M.B., C-42/17, EU:C:2017:936, par. 43.

95 19 July 2012, *Neurim Pharmaceuticals*, C-130/11, EU:C:2012:489.

96 1 March 2019, *Abraxis Bioscience*, C-443/17, EU:C:2019:238, 43.

97 Opinion of Advocate General Saugmandsgaard Øe, *Abraxis Bioscience*, C-443/17, EU:C:2018:1020.

98 Opinion of Advocate General, *Santen*, C-673/18, EU:C:2020:34, par. 62.

99 9 July 2020, *Santen*, C-673/18, EU:C:2020:531.

technique. Indeed, as judgment in *Keck*<sup>100</sup> shows, the line between overruling and nuancing is very thin. A departure from earlier jurisprudence does not have to amount to “an across the board abandonment or wholesale epistemic eradication”.<sup>101</sup>

Still, the Court’s hesitance to mark a clear departure from its case law, when appropriate, stands in contrast to the practice followed by national supreme courts, as well as to the clear suggestions by the Advocates General pointing to the importance of explicit overruling for the legal certainty.<sup>102</sup> It is important to note that while the courts are not precluded from departing from their consistent case law, such departure leads to an enhanced obligation of reasoning. In the light of the case law of the European Court of Human Rights, the requirement of judicial certainty and the protection of legitimate expectations do not involve the right to an established jurisprudence; however, the existence of well-established jurisprudence may lead to a duty to make a more substantial statement of reasons justifying the departure, so as to ensure the respect of the right to effective judicial protection and the requirements of fair trial.<sup>103</sup> The importance of that obligation was underlined by Advocates General in relation to the General Court.<sup>104</sup>

Thus, as it has already been explained, the techniques of “revirement implicite” employed by the Court are not objectionable as such, provided that the judgment gives a clear statement of reasons and contains a possibility for the party to request a limitation of the temporal effects of a decision. In the latter respect, the interpretative rulings of the Court, under Article 267 TFEU, clarify and define the meaning and scope of the rule as it always stood, with the consequence that the interpretation must be applied to legal relationships arising and established before the judgment. However, exceptionally, the Court may, in application of the general principle of legal certainty inherent in the EU legal order, restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed: those concerned must have acted in good faith and there must be a risk

100 24 November 1993, *Keck and Mithouard*, joined cases C-267/91 and C-268/91, EU:C:1993:905.

101 Jacob (n 34) 172.

102 Opinion of Advocate General Jacobs, HAG GF, C-10/89, EU:C:1990:112, par. 67.

103 In such situations, in the past ECtHR found a breach of Article 6 § 1 of the Convention in respect of the applicant’s right to receive an adequately reasoned decision. See ECtHR, 14 January 2010, *Atanasovski v the former Yugoslav Republic of Macedonia* (CE:ECHR:2010:0114JUD003681503, § 38); ECtHR, 7 June 2007, *Salt Hiper, SA v. Spain* (CE:ECHR:2007:0607JUD002577903, § 26); and ECtHR, 30 November 2010, *S.S. BALIKLIÇEŞME Beldesi tar. kal. Kooperatifi v Turkey* (CE:ECHR:2010:1130JUD000357305, § 28).

104 As indeed underlined by Advocates General in relation to the case law of the General Court: opinion of Advocate General Bobek, C-240/18 P, par. 125, Opinion of Advocate General Bot, C-479/17 P, par. 116.

of serious difficulties.<sup>105</sup> The strict conditions for the application of that exception, which in itself is not limited to the situations in which the Court “clarifies” its case law, but covers also other situations in which the implications of the interpreted EU rule were objectively and significantly uncertain, appear consistent with the fact that “revirement prospectif” is considered as an exception in both civil and common law traditions.<sup>106</sup>

## 5. Ensuring “unity and coherence” of EU law

The third crucial and structural aspect of the role of precedents and case-based reasoning in the Court case law stems from the EU judicial architecture. The history of the EU judicial system was marked by a milestone decision to establish, in 1989, the Court of First Instance (currently the General Court), created out of desire to maintain the efficiency and quality of judicial scrutiny in the Community legal system.<sup>107</sup> This was followed by the establishment of the Civil Service Tribunal, abolished in the context of a recent judicial reform of the General Court. Since its “inevitable”<sup>108</sup> establishment, and in the course of successive extensions of its jurisdiction, the General Court was entrusted with the handling of ever more extensive areas of jurisdiction in order to enable the Court to focus on its fundamental mission to ensure the uniformity and coherence of Community (EU) law.<sup>109</sup> In the context of such a vertical relationship, as argued in the legal literature, the question as to the value of precedent touches not so much the authority of precedents itself, but rather the very relationship between the two judicial instances.<sup>110</sup>

It would be, however, an oversimplification to present this relationship as being strictly hierarchical. The General Court has asserted its growing role in the EU judicial architecture by engaging in a jurisprudential discussion and has proven its ability and willingness to advance new legal interpretations, particularly in relation to the right of to a court,<sup>111</sup> the area of competition law,<sup>112</sup> environment<sup>113</sup> or access to documents,<sup>114</sup> to quote but a few examples.

105 See, for instance, 3 October 2019, Schuch-Ghannadan, C-274/18, EU:C:2019:828, par. 61.

106 Opinion of Advocate General Bobek, C-379/19, footnote 31.

107 A. Collins, ‘The Time Factor in Proceedings’ in *De 20 ans à l’horizon 2020*, Actes du colloque, Cour de justice de l’Union européenne, Luxembourg 2011, pp. 77–92, at 77.

108 G. Slynn, ‘Court of First Instance of the European Communities’ (1989) 9(3) *Northwestern Journal of International Law & Business* 542.

109 K. Lenaerts, ‘Le Tribunal de première instance des Communautés européennes: regard sur une décennie des activités et sur le rapport du double degré d’instance au droit communautaire’ (2000) (3–4) *Cahiers du droit européen* 323.

110 Simon and Rigaux (n 1) 551.

111 3 May 2002, *Jégo-Quéré v Commission*, T-177/01, EU:T:2002:112.

112 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289.

113 13 December 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v Commission*, T-339/16, T-352/16 and T-391/16, EU:T:2018:927.

114 19 March 2013, *In ’t Veld v Commission*, T-301/10, EU:T:2013:13.

The establishment of the General Court has gradually led to the authors of the Treaties to redefine the relationship between the EU courts and insert specific mechanisms ensuring the unity and coherence of EU law. Firstly, introduction of the possibility to establish specialised courts and the consequent attribution of (potential) appellate jurisdiction to the General Court has led to the establishment of a review procedure by the Court of Justice, where there is a “serious risk of the unity or consistency of Union law being affected” (Article 256(2) second subparagraph TFEU)<sup>115</sup>. Pursuant to Article 62 of the Statute of the Court, if the First Advocate General considers that there is a serious risk of the unity or consistency of EU law being affected, he may propose that the Court of Justice review the decision of the General Court.

The review procedure allowed the Court to develop its particular judicial strategy of “protection” of its jurisprudence.<sup>116</sup> Even though the overall number of initiated review procedures is not very high, the questions reviewed under this procedure, which became inapplicable with the dissolution of the Civil Service Tribunal, have led to the precedential judgments. In particular, most recently, the Court ruled on the question of whether the appointment of a judge to an EU court may form the subject matter of a review of indirect legality or whether such a review is excluded or limited to certain types of irregularity in order to ensure legal certainty and the force of *res judicata*.<sup>117</sup> In earlier cases, the Court examined, *inter alia*, the questions whether the interpretation of the Staff Regulations is consistent with the requirements relating to the organisation of working time contained in Directive 2003/88,<sup>118</sup> or whether the interpretation of the concept of a “reasonable period”, in the context of a time limit for annulment action brought against the European Investment Bank, interferes with the right to an effective judicial remedy enshrined in Article 47 of the Charter.<sup>119</sup>

The functioning of the review procedure is closely connected to the value of the precedents in EU case law. This thesis is very well illustrated by the formulation of the criteria of review, that is the serious risk of the unity or consistency of EU law, which involve, in particular, four considerations: firstly, whether the judgment of the General Court is capable of constituting a precedent for future cases; secondly, whether the General Court has departed from the settled case

115 A review procedure is also envisaged in Article 256(3) third subparagraph TFEU in relation to decisions given by the General Court on questions referred for a preliminary ruling. However, so far, the General Court has not been attributed the jurisdiction to decide on preliminary rulings (see Report of the Court of Justice submitted pursuant to Article 3(2) of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, [https://curia.europa.eu/jcms/jcms/Jo2\\_7031/en/](https://curia.europa.eu/jcms/jcms/Jo2_7031/en/) accessed on 25 May 2021).

116 Simon and Rigaux (n 1) 552–555.

117 26 March 2020, Review Simpson and HG v Council and Commission, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232.

118 19 September 2013, Review Commission v Strack (C-579/12 RX-II, EU:C:2013:570).

119 8 February 2013, Review of Arango Jaramillo and Others v EIB, C-334/12 RX-II, EU:C:2013:134.

law of the Court; thirdly, whether the General Court's errors concern a concept of wider application, beyond the law relating to the employment of EU officials; and fourthly, whether the rules or principles which the General Court has failed to comply with occupy an important position in the EU legal order.<sup>120</sup>

Finally, somewhat similar links to the role of precedent in maintaining the unity and consistency of EU law can be deduced in the recently introduced filtering mechanism for appeals relating to decisions by certain EU agencies.<sup>121</sup> Pursuant to new Article 58a of the Statute of the Court the appeals lodged in certain areas, which are, essentially, already subject to the double control because of the establishment of quasi-judicial bodies within the framework of EU agencies in question, are not examined on the merits unless the Court of Justice decides that they raise "an issue that is significant with respect to the unity, consistency or development of Union law".

While it remains to be seen how the criteria of "unity, consistency or development of Union law" will be interpreted in practice, the formulation of the first two criteria for admission of an appeal to a large extent echoes the criteria of the review procedure.<sup>122</sup> In view of the limitation on appeals, the role of precedents and related reasoning will have even stronger implications for the jurisprudence of the General Court. As Advocate General M. Bobek observed, "It will be of crucial importance that the General Court maintains the horizontal coherence of its case-law. It of course remains possible for the General Court to depart from lines of case-law previously embraced by it. However, any such departures must be intentional and properly explained and reasoned, ideally by an enlarged formation of that court in order to ensure their visibility and legitimacy".<sup>123</sup>

The introduction of this new procedure evidences the fact that the constant evolution of the EU judicial architecture sees the Court being the final arbiter on the questions of law, and having a special role in ensuring the unity and consistency of the EU legal order. In this context, as well, a systemic parallel may be drawn to the role of the Court in ensuring uniformity in the context of preliminary ruling proceedings.<sup>124</sup>

## 6. Conclusion

The precedent and case-based reasoning in the context of the Court's case law, as illustratively described in the "stone-by-stone" metaphor and the reference to

120 Opinion of Advocate General Sharpston, C-542/18 RX-II and C-543/18 RX-II, EU:C:2019:977, par. 144 and references to the case law.

121 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2019 L 111, p. 1).

122 Marc-André Gaudissart, 'L'admission préalable des pourvois: une nouvelle procédure pour la Cour de justice' (2020) *Cahiers de droit européen* 177, 188.

123 Opinion of Advocate General Bobek, C-702/18 P, par. 73.

124 Opinion of Advocate General Bobek, *Consorzio Italian Management e Catania Multi-servizi*, C-561/19, EU:C:2021:291, par. 126.

creation of “supporting structures”, is a crucial element in the Court’s method of conducting a judicial discourse, in dialogue with the national courts and other international courts. While remaining open to criticism due to its formal, Cartesian manner of argumentation, the particular reasoning style developed by the Court must be viewed in the light of the special gap-filling role of the EU judiciary in constructing the EU constitutional edifice. From a wider perspective, this approach reflects upon the general role of a judge, who must “proceed from one case to another seeking, as points come up for decision, to make the system consistent, coherent, workable and effective”.<sup>125</sup>

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125 David Edward, ‘Judicial Activism: Myth or Reality?’ in *Legal Reasoning and Judicial Interpretation of European Law* (Trenton 1995) 66–67, quoted after Bengoetxea, MacCormick and Soriano (n 37) 67.

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# 11 Precedent in the system of the European Convention on Human Rights

*Krzysztof Wojtyczek*

## Introduction

The operation of the European Convention on Human Rights system raises the question as to what extent it is based on precedents.<sup>1</sup> Is the European Court of Human Rights required to follow its case law, and does it actually follow its earlier case law? The purpose of the present chapter is to briefly reassess the role of the ECtHR's case law in its own case law and the approach developed in this respect by the Court.

## 1. The normative framework

The rule of *stare decisis* does not apply in international law, and international courts are not bound by precedents.<sup>2</sup> Under Article 59 of the Statute of the International Court of Justice, 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. The same instrument characterises judicial decisions as 'subsidiary means for the determination of the rules of law' together with the 'teachings of the most highly qualified publicists of the various nations' (Article 38 para. 1 d).

1 See for instance Michał Balcerzak, *Zagadnienie precedensu w międzynarodowym prawie praw człowieka* (Dom Organizatora 2008); A. Palanco, *Le précédent dans la jurisprudence de la Cour européenne des droits de l'homme* (Bruylant 2019); idem: 'La prise en compte du précédent interne par la Cour européenne des droits de l'homme' in *Le précédent en droit international* (Pedone 2016); N. Aloupi, C. Kleiner (dir.) and D. Popović, 'The Role of Precedent in the Jurisprudence of the European Court of Human Rights' in D. Spielmann, M. Tsirli and P. Voyatzis (eds.), *La Convention européenne des droits de l'homme. Mélanges en l'honneur de Christos Rozakis* (Bruylant 2012); H. Raspail, 'La prise en compte du précédent interne par la Cour européenne des droits de l'homme' in *Le précédent en droit international* (Pedone 2016); L. Wilhaber, 'Precedent in the European Court of Human Rights' in P. Mahoney et al. (eds.), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal* (Carl Heymans Verlag 2000).

2 G. Acquavaria and F. Pocar, 'Stare Decisis' in *Max Planck Encyclopedia of International Law* (Oxford University Press 2008), R. Wolfrum and A. Peters (eds.), <http://opil.ouplaw.com> accessed on 28 January 2021.

The European Convention on Human Rights settles this matter in the following manner (in Article 46, entitled ‘Binding force and execution of judgments’, para. 1): ‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties’. Technically, similar to the ICJ, the binding force of a *final judgment of the Court* is limited to a particular case and to the parties to this case. This is further explicitly confirmed in Article 30 of the Convention. This provision (in the new wording given by Protocol no 15) orders the following: ‘Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber’.<sup>3</sup> One must note that the letter of the provision limits its applicability to judgments previously delivered by the Court, setting aside decisions; however, the same logic should apply also to results that are inconsistent with a decision previously delivered by the Court. Decisions declaring applications inadmissible or admissible, delivered by the Court, may settle important legal issues such as the notion of jurisdiction under Article 1 of the Convention<sup>4</sup> or the question of remedies to be exhausted in a specific legal system.<sup>5</sup>

Under Article 30, a chamber is not obliged to relinquish jurisdiction, even if the resolution of a question before the Chamber might have a result that is inconsistent with a judgment previously delivered by the Court. The provision clearly grants discretion to the chambers in this respect. The issue is regulated differently in the Rules of the Court (Rule 72 para. 1), according to which, when a resolution of a question raised in a case before the Chamber might have a result inconsistent with the Court’s case law, the Chamber shall relinquish jurisdiction in favour of the Grand Chamber. The question may arise whether such an obligation excluding any discretion is compatible with Article 30 of the Convention granting discretion. One has to stress that, at the same time, a relinquishment to the Grand Chamber is relatively rare. The Court develops its case law without relinquishing cases to the Grand Chamber.

In addition, the Court has created the function of the *Jurisconsult* in the registry. Its role has been defined in Rule 18B3 of the Rules of the Court in the following way:

3 The Explanatory Report to Protocol no 15 contains the following explanation:

‘16. Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court, which had indicated that it intended to modify its Rules of Court (Rule 72) so as to make it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law (3). Removal of the parties’ right to object to relinquishment will reinforce this development’.

4 *Banković and Others v Belgium and Others*, decision [GC], 52207/99, 12 December 2001.

5 *Demopoulos and Others v Turkey*, decision [GC], 46113/99 et al., 1 March 2010.

For the purposes of ensuring the quality and consistency of its case-law, the Court shall be assisted by a Jurisconsult. He or she shall be a member of the Registry. The Jurisconsult shall provide opinions and information, in particular to the judicial formations and the members of the Court.

One also has to note here that the mission of the Court is limited in practice in respect of the imposition of sanctions and reparatory measures for the violations of the Convention. Under Article 46 para. 2 of the ECHR, ‘The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution’. Only exceptionally, the Court recommends or imposes some individual or general specific measures. The choice of the individual and general measures belongs to the respondent State which acts under the supervision of the Committee of Ministers of the Council of Europe,<sup>6</sup> which does not reason its decisions in this domain. This means that the practice with respect to individual and general reparatory measures is subjected to a different logic and cannot be characterised in terms of the precedent.

## 2. The position of the High Contracting Parties

The question of consistency of the ECtHR’s case law has been discussed at several inter-governmental conferences, gathering the High Contracting Parties.<sup>7</sup> In the 2011 Izmir Declaration, the Conference inserted the following statement:

5. [The Conference] Reaffirms *the importance of a consistent* application of the principles of interpretation.

In the 2013 Brighton Declaration, the Conference expressed the following views:

Judgments of the Court *need to be clear and consistent*. This promotes legal certainty. It helps national courts apply the Convention more precisely, and helps potential applicants assess whether they have a well-founded application. *Clarity and consistency are particularly important when the Court*

6 K. Wojtyczek, ‘Judicial and Non-Judicial Elements in the Enforcement Mechanism of the European Convention on Human Rights’ in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano* (Springer 2019).

7 High Level Conferences on the Future of the European Court of Human Rights: Inter-laken, 19 February 2010; Izmir, 26–27 April 2011; Brighton, 19–20 April 2012; High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility”, Brussels, 27 March 2015; High-Level Conference on Reform of the Convention System, Copenhagen, 12–13 April 2018; all declarations quoted are [www.coe.int/en/web/execution/political-declarations](http://www.coe.int/en/web/execution/political-declarations) accessed on 29 June 2021; the emphasis has been added.

*addresses issues of general principle.* Consistency in the application of the Convention does not require that States Parties implement the Convention uniformly. The Court has indicated that it is considering an amendment to the Rules of Court making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case law.

[The Conference] Welcomes the steps that the Court is taking to maintain and enhance the high quality of its judgments and in particular to ensure that the *clarity and consistency* of judgments are increased even further; *welcomes the Court's long-standing recognition* that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart without cogent reason from precedents laid down in previous cases.

Most recently, the 2018 Copenhagen Declaration expressed the following stance on this issue:

27. The quality and in particular *the clarity and consistency* of the Court's judgments are important for the authority and effectiveness of the Convention system. They provide a framework for national authorities to effectively apply and enforce Convention standards at domestic level.

The Conference therefore: ...

29. Welcomes efforts taken by the Court to enhance the *clarity and consistency* of its judgments.

Consistency of case law is visibly a matter of significant importance for the States. The different declarations clearly express the concerns of the governments. Simultaneously, the High Contracting Parties approve the Court's case law, affirming the role of precedents, and welcome different efforts aimed at increasing the case law's consistency. Consistency is crucial for the implementation of the Convention because it facilitates the adaptation of legal systems to the standards of the Convention.

### 3. The notion of inconsistency between judgments

Article 30 of ECHR uses the term 'inconsistent'.<sup>8</sup> This raises the question of what the notion of consistency and inconsistency mean with respect to judicial decisions and judgments. The notion of coherence and contradictions (inconsistencies, discordances) in law has developed for the assessment of relations between general legal rules.<sup>9</sup> Inconsistencies between legal rules are rarely logical

<sup>8</sup> For a general presentation of this provision see in particular W. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015) 709–712.

<sup>9</sup> See, for instance C. Perelman (ed.), *Les antinomies en droit* (É. Bruylant 1964); Z. Ziemiński, 'Kinds of Discordance of Norms' in W. Krawietz et al. (eds.), *Theorie der Normen: Festgabe für Ota Weinberger zum 65. Geburtstag* (Duncker & Humblot 1984).

inconsistencies. More frequently, they are praxeological inconsistencies. It means that the legal principles or rules are inconsistent if the application of one annihilates the practical consequences of another.<sup>10</sup> In such situations, a rational person would find it irrational to accept the set of legal effects entailed by both rules. The question to which extent a legal rule thwarts the consequences of another legal rule may be a matter of subjective assessment. Very often, two reasonable jurists may legitimately disagree on the issue of whether there is an inconsistency.

The question is even more complicated in the case of inconsistencies between individual judgments or decisions. The question arises whether Article 30 of the ECHR pertains only to the operative part or also to the general principles established by the Court or, more broadly, to the arguments invoked by the Court. The term ‘result’ may suggest that the notion of inconsistency is limited to the operative part. In contrast, as individual decisions and judgments usually concern different parties and pertain to individual circumstances involving different third persons, the risk that their operative parts will collide is minimal. Moreover, the provision uses the term ‘resolution of a question’ (*solution d’une question*), which encompasses both individual and general questions. It seems that the provision refers also to the principles and rules relied on and applied by the Court. The term ‘result inconsistent with a judgment previously delivered by the Court’ (*contradiction avec un arrêt rendu antérieurement par la Cour*) would then encompass the results of interpretive decisions which constitute part of the reasoning of the judgment. It would then pertain to legal principles and rules as a result of interpretive decisions.

If the resolution of a general question before the Chamber has a result different from a judgment previously delivered by the Court, it does not necessarily mean that this different result is inconsistent with a previous judgment.

The issue may be illustrated by the following examples: the ECtHR may declare a legal principle or rule applicable to certain types of situations. The question may arise whether the same principle or rule should apply in another type of situation.<sup>11</sup> Does extending the applicability of the legal principle or rule in question to other situations entail an inconsistency? The ECtHR may declare that a certain situation is covered by an exception to a legal principle or rule. Does extending the scope of exceptions to other situations<sup>12</sup> entail an inconsistency? Human rights militants may argue that judgments extending the scope of application of the existing principles and rules are not inconsistent with previous judgments and that it is the role of the Court to adopt such judgments.

10 Z. Ziemiński (n 9) 473 and pp. 483–484.

11 Examples: *Eskelinen and others v Finland*, 63235/00, 19 April 2007, extending the scope of application of Article 6 standards; *Šilih v Slovenia*, 71463/01, 9 April 2009, extending the obligation to investigate to events which occurred before the entry into force of the ECHR in respect of the respondent State; *Ćwik v Poland*, 31454/10, 5 November 2020, extending the exclusion of evidence to evidence stemming from torture by private parties.

12 *Zdanoka v Latvia* [GC], 58278/00, 16 March 2006, case concerning the scope of exceptions to the right to run in parliamentary elections.

The question is, however, much more complicated. Firstly, the reinforcement of the protection of certain Convention values often entails a weaker protection of other values protected by the Convention, let alone fundamental individual or public interests not encompassed by the Convention. It may, in particular, call into question the Convention rights or principles colliding with the other rights at stake. Secondly, the reinforcement of the protection of certain Convention values may contradict the earlier Court's explicit statements that the State enjoys a wide margin of appreciation in a certain area. Thirdly, from a linguistic and logical perspective, the answer will depend *inter alia* on the meaning of the principles and rules in question and, in particular, on the answer to the question to which extent they are formulated in a manner limiting their scope of applicability. This may be illustrated by the following example. A court declares that the hypothesis of a legal rule R imposing the obligation O consists of a set A of factual situations. The situation S1 is implicitly, but nonetheless unequivocally, left out of the set A. The same court later declares that the hypothesis of a legal rule R imposing the same obligation O, consists of a set B of factual situations, which encompasses set A and some other situations not belonging to set A such as situation S1. The second pronouncement is inconsistent with the first one with respect to situation S1 unless it is shown that the intention of the law-maker was not to limit the applicability of the rule R to set A and the intention of the court which interpreted the rule R was to leave open the issue of applicability of rule R to situations such as S1. The answer may then depend upon the existence of a rule R2 (or principle P) requiring, directly or indirectly, to leave situation S1 out of the scope of applicability of rule R.<sup>13</sup>

One may propose here the following interpretive solution which may be helpful to solving the problem in part. A 'resolution of a question before the Chamber has a result inconsistent with a judgment previously delivered by the Court', particularly if the following test is fulfilled: the Court relying solely on the principles and rules formulated and applied in a previous judgment would have reached an outcome different from the outcome reached upon the basis of principles and rules as formulated and applied in the instant case. The outcome means, here, either the pronouncement of admissibility or inadmissibility of an application or the pronouncement of the question of (non-)violation of the Convention.

One may also try to resolve the question of whether there is an inconsistency between two (draft) judgments or decisions by resorting to the fictitious figure of a rational judge, similar to a certain extent to the one of a rational legislator.<sup>14</sup> The question to answer is the following: can a rational judge, i.e., a judge

13 For instance, the principle protecting the exercise of State sovereignty as an argument against extending the scope of application of Article 6 to disputes involving civil servants: see *Eskelinen and Others v Finland*, mentioned earlier) or the principle of non-retroactivity of treaties as argument against applying the Convention to facts predating its entry into force; see *Šilih v Slovenia*, mentioned earlier.

14 L. Nowak, 'De la rationalité du législateur comme élément de l'interprétation juridique' (1969) *Logique et analyse* 65–86.

systematising the relevant legal rules in a complete and consistent system and guided by a coherent set of values, reconcile the judgment or decision in case A with the judgment or the decision in case B?

#### **4. The position of the ECtHR on the precedential value of its own case law**

An analysis of the case law shows that the Court systematically refers to the earlier case law. Under the argumentative strategy chosen by the Court, a judgment or a decision is usually presented as a consequence of principles formulated in earlier case law. The identification of relevant quotes from the case law is, therefore, a matter of primary importance. The Court's own case law is by far numerically the most important source of law quoted in its decisions and judgments. The whole system is therefore largely self-referential. The ECtHR's decisions and judgments are considered, by itself, to be an essential and uncontested element of the ECHR law.

The Court has explained its approach in this respect in the following terms:

It is true that, as she submitted, the Court is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.<sup>15</sup>

The formula used currently is worded as follows:

While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.<sup>16</sup>

This approach triggers a few remarks. Firstly, following precedent is a matter of free choice of the Court.

<sup>15</sup> *Cossey v The United Kingdom*, 10843/84, 27 September 1990.

<sup>16</sup> *Eskelinen and others v Finland*, 63235/00, 19 April 2007; see also and compare *Demir and Baykara v Turkey*, 34503/97 12 November 2008, para. 153; *Mursić v Croatia*, 7334/13, 20 October 2016, para. 109; *Scoppola v Italy* (No. 3), 126/05, 22 May 2012, para. 94; *Bayatyan v Armenia*, 23459/03, 7 July 2011, para. 98; *Mackay and BBC Scotland v The United Kingdom*, 10734/05, 7 December 2010, para. 22; on the different formulations see Popović (n 1), *passim*.

Secondly, this choice is justified by two main considerations: legal certainty and foreseeability on the one hand and equality before the law on the other hand. Past judgments and decisions constitute an obvious guidance for the States and individuals who try to understand the meaning of vague provisions of the Convention and therefore cannot be ignored because otherwise the whole human rights protection mechanism becomes unforeseeable. Simultaneously, inconsistencies in the case law entail a situation in which similar situations are treated in substantially different ways, which violates the principle of equality before the law.

Thirdly, following precedents is the default rule, while departing from precedents is a permissible exception requiring a ‘good reason’, even if maintaining a dynamic and evolutive approach is seen as a requirement.

Fourthly, the formula used leaves a wide discretionary power to the Court for two reasons. On the one hand, it is not clear which judgments and decisions constitute precedents and which elements of a judgment or decision may have a precedential value. On the other hand, the concept of ‘good reasons’ justifying departure from earlier case law is broad and vague. Depending on the needs, the accent may be placed upon the lack of reasons justifying a departure from the case law for the purpose of maintaining the existing approach or upon the changing conditions in Contracting States for the purpose of modifying the interpretation of the Convention.

Fifthly, under the approach adopted by the Court, the composition which is the first to deal with a legal issue determines, to a large extent, the way all other compositions will adjudicate on the same legal questions.

Sixthly, numerous judges feel bound to follow the Grand Chamber case law, even if they disagree with it,<sup>17</sup> whereas others adopt the opposite viewpoint. Moreover, the approach of specific judges may vary considerably. Whereas some judges think with common law concepts of *ratio decidendi*, *obiter dicta* and similarity or possibility of distinguishing facts, many others simply identify the relevant principles explicitly established in the previous cases and apply them to a new case, without trying to establish the intent of the judges who decided previous cases.

The Court explains further its approach in the following terms:

However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to *any evolving convergence as to the standards to be achieved* (see, among many other authorities, *Christine Goodwin v the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI, and *Bayatyan v*

17 Joint partly concurring opinion of judges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto de Albuquerque, *Yob-Ekale Mwanje v Belgium*, 10486/10, 20 December 2011; Concurring opinion of Judges Sajó, Tsotsoria, Wojtyczek and Kucsko-Stadlmayer, *Kraulaidis v Lithuania*, 76805/11, 8 November 2016.

Armenia [GC], no. 23459/03, § 98, ECHR 2011- ..., and the case law cited in those judgments)<sup>18</sup>

The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a *continuing international trend* in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.<sup>19</sup>

A reason which may justify a departure from the existing case law may consist in a significant societal evolution in an importance of States, presented as ‘*evolving convergence as to the standards to be achieved or as a continuing international trend*’.

It is also interesting to note that sometimes the Court refers to its practice:

The Court has already held that it has been its practice to examine the overall length of the proceedings complained of (see *SOFTEL, spol. s r.o. v Slovakia* (no.2), no. 32836/06, § 21, 16 December 2006, with further reference). The Court takes the view that the remedy under Article 35 of the Convention is susceptible of providing appropriate and sufficient redress only where it allows for an examination of the proceedings in their entirety (see Bako cited previously). As regards applications against Slovakia, such is not likely to be the case where, as the Constitutional Court’s decision in the present case suggests, separate complaints had to be lodged at different points in time in respect of each level of jurisdiction and while the proceedings were pending before each individual court involved. Such an approach would exclude a review of the duration of the proceedings in their entirety and is susceptible of leading to a result inconsistent *with the Court’s practice*.<sup>20</sup>

Such references to the practice are nothing else than references to case law.

The analysis of the case law shows that the Court differentiates the importance of the Court’s case law. The Court stresses particular importance of the precedents pertaining to procedural issues:

The same is true, a fortiori, with regard to procedural rules, where legal certainty is of particular importance and the Court’s precedents should be followed even more strictly so as to ensure that the requirements of

18 *Scoppola v Italy* (No. 3) [GC], 126/05, 22 May 2012, para. 94, emphasis added; see also *Christine Goodwin v The United Kingdom* [GC], 28957/95, 11 July 2002, para. 85.

19 *Christine Goodwin v The United Kingdom*, mentioned earlier, para. 85, emphasis added.

20 *A.R., SPOL. S R.O. v Slovakia* 13960/06, 9 February 2010, para. 37, emphasis added; see also *S.A.S. v France* [GC] 43835/11, 1 July 2014, para. 114; *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [GC], 47848/08, 17 July 2014, para. 96.

foreseeability and consistency, which serve the interests of all the parties to the proceedings, are met.<sup>21</sup>

Under this approach, the foreseeability and consistency in procedural matters is an essential requirement of procedural justice.

Another important factor is the type of composition which issued a judgment of the decision and its ‘age’:

Where the precedent in question is a relatively recent and comprehensive judgment of the Grand Chamber, as in the present case, a Chamber which is not prepared to follow the established precedent should propose relinquishment of the case before it to the Grand Chamber. None of the parties to the present case has proposed relinquishment to the Grand Chamber and in any event it would remain for the Chamber to decide whether to act on any such request (see, for example, *Hartman v the Czech Republic*, no. 53341/99, § 8 in fine, ECHR 2003-VIII, and *Kuznetsova v Russia*, no. 67579/01, § 5, 7 June 2007).<sup>22</sup>

Precedents emanating from the Grand chamber have a greater weight than chamber judgments, let alone committee cases. Recent precedents have a greater weight than older precedents. This raises the question as to how long judicial pronouncements not restated in subsequent case law keep a precedential value.

Cases are assigned to a committee formation if there is a well-established case law on the matters to be decided. They may be therefore considered authoritative information about well-established case law. In contrast, the Court is reluctant to refer to cases decided by committee formation, and numerous judges consider that committee decisions and judgments have very limited precedential value.

## 5. The structure of the reasoning: ‘general principles’ and ‘their application’

If the Court wishes to give its judgments an *erga omnes* effect, it is important to formulate general principles concretising the Convention provisions, which provide clear guidance for the States in the application of the Convention in future similar cases.<sup>23</sup> The ECtHR’s reasoning usually distinguishes between general principles and their application; however, this division is not always applied consistently. The title ‘general principles’ may suggest that this part of the reasoning formulates in an exhaustive way the applicable legal rules or, in other words,

21 *Sabri Güneş v Turkey* [GC], 27396/06, 29 June 2012, para. 50.

22 *Jones and Others v The United Kingdom*, 34356/06, 40528/06, 14 January 2014, para. 194.

23 See on this question the Dissenting Opinion of Judge Wojtyczek, *Biržietis v Lithuania*, 49304/09, 14 June 2016.

the major premise of the legal syllogism, whereas the title ‘application of these principles’ suggests that this part of the reasoning consists of the explanation of the subsumption and of the formulation of the conclusion. However, additional general principles are often restated in the application part<sup>24</sup> and new general principles are even more often stated in the application part and not among the ‘general principles’ part. Such an approach may raise the questions of why certain general principles are relegated to the application part and whether these principles are conceived as relevant in future cases.

The general principles usually leave a certain discretion as to their application. The scope may vary considerably from a very narrow margin to a very broad one, depending upon the rights at stake and the specificity of the interference. In this context, the approach of the Court, which relies upon the distinction between ‘general principles’ and their ‘application’, raises the question of whether the Court feels bound only by the general principles or also by the way the principles are applied in concrete cases. In other words, does the manner in which the Court exercised discretion in the past cases constitute a guidance for future cases? A common law lawyer will probably tend to consider that precedent is not limited to general principles and that the manner the Court has applied the general principles to also has a precedential value, which should be considered while deciding future cases, even if this manner remains unstated in terms of more general guidelines. Many lawyers from civil law jurisdictions consider that only general principles are important from the viewpoint of ‘the interests of legal certainty, foreseeability and equality before the law’. What matters the most is a consistency in the formulation of the relevant general principles. The manner in which the general principles are applied is secondary, unless this manner becomes the object of new principles which are explicitly formulated and upgraded as relevant general principles.

## **6. The practice of invoking precedents**

The interpretation and application of the Convention requires the correct identification of all relevant rules. Any provision should be read in the context of the whole text in general and other detailed applicable provisions, in particular. The Court has stated the following principle in this respect:

Regard must also be had to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.<sup>25</sup>

<sup>24</sup> See, for instance, *Bilgen v Turkey*, 1571/07, 9 March 2021 para. 53, 54, 55, 58 and 62; *Kurt v Austria*, 62903/15, 15 June 2021, para. 200; *Georgia v Russia* (II) [GC], 38263/08, 21 January 2021, para.128–135.

<sup>25</sup> *Magyar Helsinki Bizottság v Hungary* [GC], 18030/11, 8 November 2016.

This means that the Court must consider all the relevant provisions and the case law under all relevant provisions. Given that the case law deals with numerous different issues under a same provision, it is also necessary to identify all relevant general principles formulated under the provision in question.<sup>26</sup> This creates a difficulty of correctly identifying and presenting them in an exhaustive and coherent way in the ‘general principles’ part. This exercise may be even more complicated because the relevant general principles may often collide. In the situation in which the general principles collide, the Court may either find a solution on an ad hoc basis, by formulating new rules or principles reconciling the conflicting principles, or, at least, by providing a methodology for approaching the conflict.<sup>27</sup>

Legal scholarship has tried to elaborate a typology of possible approaches to precedent.<sup>28</sup> Without entering into details, it suffices to note here, briefly, the great diversity of drafting the judgments and decisions in this regard. The Court approaches and presents the existing case law in various ways, depending on the specificity of the cases and, probably, the preferences of the judge drafting the judgment.

In some cases, the Court refers briefly to earlier case laws without restating the principles set forth there.<sup>29</sup> If there are repetitive cases against a specific State, the Court delivers the first judgment in a leading case and then the Court relies on this judgment in similar repetitive cases.<sup>30</sup> The first judgment may be a pilot or a quasi-pilot judgment in which the Court orders certain general measures to be taken.<sup>31</sup>

In most cases, the point of departure is an attempt to synthesise the existing case law.<sup>32</sup> This synthesis may be repeated from an earlier judgment.<sup>33</sup> The synthesis is particularly required if a case involves several relevant principles spread so far in different judgments or decisions and which have never been put together so far.<sup>34</sup> In such a case, it is necessary to identify and restate all relevant principles. The Court may restate some principles directly quoting an earlier judgment,<sup>35</sup>

26 See for instance *J.K. and Others v Sweden* [GC], 59166/12, 23 August 2016, para. 77–105; *Milosavljević v Serbia*, 57574/14, 25 May 2021, para. 50–54.

27 *Von Hannover v Germany* (No. 2) [GC] 40660/08, 60641/08, 7 February 2012, para. 108–113.

28 E. Lambert, *Les effets des arrêts de la Cour européenne des droits de l’homme* (Bruylant 1999) 404–420.

29 See for instance *Labudek v Poland*, 37245/13, 4 June 2020, para. 28; *Bechta v Poland*, 39496/17, 20 May 2021, para. 25.

30 See for instance *Uncuoğlu v Turkey*, 13196/07, 5 September 2017, para. 40.

31 For instance, *Rutkowski and Others v Poland*, 72287/10, 13927/11 and 46187/11, 7 July 2015, relied on in *Lewandowski v Poland*, 29848/17, 18 March 2021, para. 19.

32 See for instance, *Eweida and Others v The United Kingdom*, 48420/10 et al., 15 January 2013; *Gough v The United Kingdom* 49327/11, 28 October 2014, para. 164–170.

33 *Guz v Poland*, 965/12, 15 October 2020, para. 84.

34 *J. K. and Others v Sweden*, mentioned earlier, para. 77–105.

35 Ibid para. 77.

whereas others are formulated in paraphrases summarising or synthesising the existing case law.<sup>36</sup>

The case law has developed certain formulations of the applicable general principles used—without changes or with minor changes—in subsequent judgments.<sup>37</sup> The general principles established by the Court (such as proportionality, foreseeability of the domestic law or non-discrimination) often leave a wide discretion to the Court; thus, there is no need to overrule them nor no incitement to further develop them because this may reduce the decision-making freedom of the Court.

There are, however, situations in which the Court adopts an analytical approach. In these cases, the Court refers to the relevant case law, judgment by judgment or decision by decision, explaining their rationale briefly.<sup>38</sup> This approach, similar to the analysis of precedents in common law jurisdictions is more frequent in cases against common law States. It may also be applied where the general principles have not been formulated with clarity or if there are divergences in the case law.

It may also happen that the Court combines both approaches, i.e., a synthesis of settled general principles with a case-by-case analysis in respect of more controversial questions.<sup>39</sup>

A deeper analysis shows that references to the case law may be sometimes selective. The approach is even more selective with respect to cases concerning metarules such as directives of interpretation. The Court has formulated certain principles of Convention interpretation;<sup>40</sup> yet, in many hard cases, the Court interprets the Convention without resorting at all to its case law determining these principles.<sup>41</sup>

Another example of case law which has not been followed are the pronouncements on compensation for non-pecuniary damage. The Court has formulated the applicable rules in two Grand Chamber judgments: *Chiragov and Others v Armenia (Just Satisfaction)*<sup>42</sup> and *Sargsyan v Azerbaijan (Just Satisfaction)*<sup>43</sup>. Under these two judgments, such compensation is not automatic but is reserved

36 Ibid para. 103.

37 Compare for instance *Ziemiński v Poland (No. 2)*, 1799/07, 5 July 2016, para. 39; *Tavares De Almeida Fernandes and Almeida Fernandes v Portugal*, 31566/13, 17 January 2017, para. 57; *Zybertowicz v Poland (No. 2)*, 65937/11, 17 January 2017, para. 44.

38 *Zdanoka v Latvia*, mentioned earlier, para. 106–111; *Chong and Others v The United Kingdom*, 29753/16, 11 September 2018, para. 85–90 *Hodžić v Croatia*, 28932/14, 4 April 2019 para. 44–47; *Georgia v Russia (II)*, mentioned earlier, para. 113–124 and 128–135.

39 *M. N. and Others v Belgium* decision [GC], 3599/18, 5 May 2020, para. 96–109.

40 *Magyar Helsinki Bizottság v Hungary* [GC], no. 18030/11, 8 November 2016, paras. 118–125, and *Slovenia v Croatia*, (decision) [GC], no. 54155/16, 18 November 2020, para. 60.

41 On this question see the Dissenting Opinion of Judge Wojtyczek in *Smiljanić v Croatia*, 35983/14, 25 March 2021, point 2.

42 [GC] 13216/05 12 December 2017, para. 57.

43 [GC] 40167/06, 12 December 2017, para. 39.

for situations in which ‘the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further’ [than a mere finding of a violation]. Nevertheless, the practice of the chambers is to systematically award compensation for non-pecuniary damage, unless very special circumstances justify not to award any such compensation. The applicable rules set forth by the Grand Chamber are never referenced.

Special difficulties arise in situations of divergence in case law. Divergences may occur if judgments cite only cases presenting one viewpoint, whereas other judgments cite only cases in which the Court expressed a divergent viewpoint on the same legal question. Divergence in case law calls for harmonisation by the way of a Grand Chamber judgment.<sup>44</sup>

The prevailing attitude is to reaffirm principles set out in an earlier judgment.<sup>45</sup> Simultaneously, the Court has developed different techniques for changing its case law.<sup>46</sup> It happens that the Court departs from the earlier case law without explicitly stating this fact.<sup>47</sup> The new jurisprudential developments may be presented as a necessary consequence of the earlier case law. In some cases, the Court explicitly differentiates the facts of the case from the facts of an earlier judgment:

In the Court’s view, the present case falls to be distinguished from that of *Doorson*.... In other cases, the Court may decide a novel legal issue and formulate new general principles, issue relying upon general principles pertaining to another issue, implicitly assuming or explicitly stating the similarity of the matters.<sup>48</sup>

In some rare cases, the Court explains the need to clarify the case law.<sup>49</sup> Even less frequently, the Court may state the need to develop<sup>50</sup> or adapt<sup>51</sup> the case

44 See for instance the Dissenting Opinion of Judge Sicilianos, *Muršić v Croatia*, 7334/13, 12 March 2015 and *Muršić v Croatia* [GC], mentioned earlier, para. 107–115.

45 See *Scopola* no 2, para. 96.

46 On this issue see A. Mowbray, ‘An Examination of the European Court of Human Rights Approach to Overruling its Previous Case Law’ (2009) 9(2) *Human Rights Law Review* 179–201.

47 See for instance *Mamatkulov and Askarov v Turkey*, [GC] 46827/99 46951/99, 4 February 2005 overruling *Conka and Ligue des droits de l’homme v Belgium* (decision), 51564/99, 13 March 2001; see also *Smiljanić v Croatia*, mentioned earlier, and the Dissenting Opinion of Judge Wojtyczek appended to it.

48 *Van Mechelen and Others v The Netherlands*, 21363/93 et al., 23 April 1997, para. 64; *Catt v The United Kingdom*, 43514/15, 24 January 2019, para. 104.

49 *Magyar Helsinki Bizottság v Hungary*, mentioned earlier, para. 156: *In short, the time has come to clarify the classic principles*. See also *Schatschaschwili v Germany* [GC] 9154/10, 15 December 2015, para. 110; *Ibrahim and Others v The United Kingdom* [GC] 50541/08 et al., 13 September 2016, para. 257.

50 *Vilho Eskelinen and Others v Finland*, mentioned earlier, para. 56.

51 *Centrum För Rättvisa v Sweden* [GC], 35252/08, 25 May 2021, para. 261; *Big Brother Watch and Others v The United Kingdom* [GC], 58170/13 62322/14 24960/15, 25 May 2021, para. 347.

law. It is in a very rare situation that the Court overtly acknowledges that it departs from the case law.<sup>52</sup> The main justification provided is the change of circumstances or the emergence of European consensus or at least the existence of international trends. Although the case law may be quite dynamic in some domains, it develops in practice without formal overruling.<sup>53</sup> The Court may also warn that it may reconsider its approach in the future.<sup>54</sup>

Separate opinions written by ECtHR judges show that they usually focus on questions related to the correct identification and interpretation of the relevant case law.<sup>55</sup> The issue of identification of the relevant case law further concerns the following questions: 1) which legal principles and rules established in the case law are relevant and 2) what is the exact meaning of the principles and rules established therein. Most disputes between the majority and minority concern these issues. The separate opinions invoke, more rarely, the principles of interpretation formulated in the case law and rely only exceptionally on the rules of interpretation codified by the Vienna Convention on the Law of Treaties.<sup>56</sup> This shows, firstly, that the judges of the ECtHR attach a special importance to arguments relying on the case law. The identification and interpretation of the relevant case law play a fundamental role in the process of application of the Convention by the Court. Second, this fact also shows the difficulties in many cases with the identification and interpretation of the relevant judgments and decisions which have to be taken into account in a specific case. The selection of relevant case law and its interpretation may often be a matter of very subjective assessments.

## **7. Precedents emanating from other international courts and treaty bodies**

The mission of the Court is limited and defined in the following way in Article 19: ‘To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto’. The Convention also defines the jurisdiction of the Court in a limitative manner (Article 32 para. 1): ‘The jurisdiction of the Court shall extend to all matters concerning

52 See for instance *Stes Colas Est and Others v France*, 37971/97, 16 April 2002, para. 41; *Stafford v The United Kingdom* [GC], 46295/99, 28 May 2002; *Bayatyan v Armenia*, mentioned earlier, para. 109; *Kudła v Poland* [GC], 30210/96, 26 October 2010: *In the Court’s view, the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1.*

53 See for instance *Ćwik v Poland*, mentioned earlier.

54 *Zdanoka v Latvia*, mentioned earlier, para. 135.

55 See for instance Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, *Janowiec and Others v Russia*, 55508/07, 29520/09, 21 October 2013; Dissenting Opinion of Judge Koskelo, *S.M. v Croatia*, 60561/14, 19 July 2018, para. 24–27; Partly Dissenting and Partly Concurring Opinion of Judge Koskelo, joined by Judges Wojtyczek and Sabato, *Penati v Italy*, 44166/15, 15 May 2021.

56 Joint Partly Dissenting Opinion of Judges Cafilisch, Türmen and Kovler, *Mamatkulov and Askarov v Turkey*, mentioned earlier.

the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47'. The Court underlines itself that it 'is not competent to rule formally on compliance with domestic law, other international treaties or European Union law (see, for example, *S.J. v Luxembourg*, no. 34471/04, § 52, 4 March 2008, and *Jeunesse v the Netherlands* [GC], no. 12738/10, § 110, 3 October 2014)... The jurisdiction of the European Court of Human Rights is limited to reviewing compliance with the requirements of the Convention'.<sup>57</sup>

Meanwhile, the ECHR is interpreted in the context of other relevant rules of international law applicable in relations between the parties.<sup>58</sup> For the purpose of establishing their content, the Court relies, if necessary, upon the decisions of the competent treaty bodies.<sup>59</sup> For questions of general international law, the Court relies upon the judgments and advisory opinions of the International Court of Justice.<sup>60</sup> This is particularly important for the application of customary international law and of the rules of *ius cogens*. The confirmation of such rules in the international case law is the best evidence of their recognition.

Similarly, other international courts and treaty bodies, while referring to the ECHR as part of relevant legal framework, rely upon the interpretation of this treaty as established by the ECtHR. The International Court of Justice has expressed the following view summarising the general international practice in this respect:

66. Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

57 *Avotiņš v Latvia* [GC], 17502/07, 23 May 2016, para. 100.

58 For instance: *Al-Adsani v The United Kingdom* [GC], no. 35763/97, 21 November 2001, para. 55.

59 See on this question L. A. Sicilianos, 'Le précédent et le dialogue des juges: l'exemple de la Cour européenne des droits de l'homme' in *Le précédent en droit international* (Pedone 2016).

60 See, for instance *Cyprus v Turkey* (Just satisfaction) [GC], 25781/94, 15 May 2014, para. 24–25, 41, 45–46; *Hassan v The United Kingdom* [GC], 29750/09, 16 September 2016, para. 35–37, 77, 102–104.

67. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.<sup>61</sup>

## Conclusion

The judges of the European Court of Human Rights attach a very high importance to the existing case law. There can be no doubt that the coherence of the case law is an important argument in the internal work of the Court. The judges draft their judgments in a manner that the outcome is usually presented as the necessary consequence of the earlier case law. Simultaneously, the case law displays a considerable variety of drafting techniques in this domain.

If the term ‘source of law’ means sources referred to in the reasoning of judicial decisions,<sup>62</sup> then the ECtHR’s own case law is a source of law. The approach vis-à-vis the case law is, however, considerably flexible. The precedents are often followed but are not considered binding. The Court develops the case law, usually without overtly departing from precedents. These developments often reflect societal changes and are particularly visible under Article 8 of the Convention. The approach of the ECtHR seems more conservative in respect of more ‘technical’ legal issues under the Convention.

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61 ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, 30 November 2010, para. 66–67.

62 Compare Jerzy Wróblewski, *The Judicial Application of Law* (Springer 1992) 85, speaking about the source of law in the decisional meaning.

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**Part IV**

# **Comparative analysis**



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# 12 The role of precedents and case-based reasoning in constitutional adjudication

A comparative study

*Monika Florczak-Wątor*

## 1. Introduction

The aim of this chapter is to present the final conclusions—from a comparative perspective—on the role of precedents and case-based reasoning in the constitutional adjudication of all the courts covered by our research. It should be emphasised that this comparative study requires the specificities of the three categories of courts distinguished in the volume to be taken into account—namely, common law courts, civil law courts and European international courts. Courts falling into each of these categories adjudicate within different legal orders, performing different functions and tasks. Their role and significance in applying and developing both national and international law is also diverse. For this reason, comparative conclusions will generally be formulated separately in relation to each of the aforementioned court categories. Only at the end of this chapter will the final remarks common for all analysed jurisdictions be briefly presented.

## 2. Case-based reasoning of common law courts

### 2.1. *Introductory remarks*

In our study, the United States of America, Canada and Australia represent countries with a common law system, a characteristic feature of which is the ability of judges to make law by formulating general rules and principles in the process of adjudicating individual cases. These rules and principles as precedents can be applied in subsequent cases.<sup>1</sup> According to the doctrine of *stare decisis*,<sup>2</sup> lower courts should take account of and follow the earlier-established precedents of higher courts, including

1 For the nature of precedent, see Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2011); Michael J. Gerhard, *The Power of Precedent* (Oxford University Press 2008); Ewoud Hondius (ed.), *Precedent and the Law* (Bruylant 2007); Michael J. Gerhard, 'The Role of Precedent in Constitutional Decision-Making and Theory' (1991) 60 *George Washington Law Review* 1, 68–159; D. Neil MacCormick, Robert S. Summers and Arthur L. Goodhart (eds.), *Interpreting Precedents: A Comparative Study* (Routledge 1997).

2 *Stare decisis* is a Latin expression meaning 'to stand by decisions and not to disturb settled matters'. See Justice Malcom Rowe and Leanne Katz, 'A Practical Guide to Stare Decisis' (2020) 41 *WRLSI* 1, 1.

supreme courts.<sup>3</sup> The precedents may have a binding or persuasive character. However, as Paweł Laidler emphasised in his chapter on the US Supreme Court, establishing a precedent in a concrete case does not directly mean its application in all similar disputes because, despite obvious similarities between the facts and circumstances of two cases, a judge may decide not to apply the precedent and to create a new rule.

Supreme courts play a special role in the common law system, because their judgments—and thus also their precedents—are particularly strongly binding for lower courts. All the courts we chose for our comparative study (i.e., the US Supreme Court, the Supreme Court of Canada and the High Court of Australia) also perform the function of constitutional courts, creatively interpreting the highest law in the state, as well as developing, modifying and supplementing it. Moreover, they are faced with a significant task in terms of ensuring the coherence of the law as well as its stable and consistent interpretation and application. Therefore, there is no doubt that the supreme courts' precedents in common law systems are an important source of law, both for the judiciary and for other branches of government.

## 2.2. *Self-references*

In the jurisprudence of the highest courts of the common law system, the most significant references are those that draw on the courts' own body of case law. Although the supreme courts are generally not bound by their earlier rulings, they try to follow them, because it guarantees the consistency, predictability and continuity of the law. The self-referencing technique is used particularly often in the jurisprudence of the US Supreme Court. As Paweł Laidler points out in his chapter, all majority opinions of the Court in the twentieth and twenty-first centuries referred to earlier Court's jurisprudence, which served both for historical and ideological reasons. Bradford W. Morse and Kimia Jalilvand, authors of the chapter on the Supreme Court of Canada, also note that the latter Court applies extensively its own prior judgments for resolving new disputes, because it prefers to sustain the existing law, unless changed circumstances warrant recasting prior case law or changing it more drastically.

Although *stare decisis* plays a significant role in the common law system by guaranteeing the application of precedents by courts (including supreme courts), it cannot be assumed that this doctrine compels courts to follow precedents in all similar cases. In the countries analysed in this volume, precedents can only be overruled if there are good reasons for doing so, although, at the same time, it should be noted that these reasons are defined differently in particular constitutional jurisdictions.

3 On the *stare decisis* doctrine, see, e.g., William O. Douglas, 'Stare Decisis' (1949) 49 *Columbia Law Review* 6, 735–758; Lewis F. Powell, 'Stare Decisis and Judicial Restraint' (1990) *Washington and Lee Law Review* 47, 281–311; Richard H. Fallon, 'Stare Decisis and the Constitution: An Essay on Constitutional Methodology' (2001) 76 *New York University Law Review* 2, 570–597; Frederick Schauer, 'Stare Decisis and the Selection Effect' in Christopher J. Peters (ed.), *Precedent in the United States Supreme Court* (Springer 2013) 121–133.

Cases of supreme courts overruling previously established precedents are also rare. Pawel Laidler, citing data provided by the Congressional Research Service, emphasised that there have been only 233 cases in which the US Supreme Court overruled its prior decisions. Selena Bateman and Adrienne Stone claim that the High Court of Australia is also very reluctant to depart from earlier precedents. However, in constitutional cases, this Court is expected, at least by some justices, to be more ready to change its opinion which is justified by the lack of parliamentary competence to correct errors in constitutional interpretation. Hence, if the High Court of Australia concludes that a constitutional precedent is flawed, it should correct it by itself. However, as Selena Bateman and Adrienne Stone emphasised, this particular treatment of constitutional precedents has not caught on in the judicial practice of the High Court of Australia. In turn, the Supreme Court of Canada is generally entitled to depart from its previous case law. As Bradford W. Morse and Kimia Jalilvand point out in their chapter, the ability of this court to overrule its own decisions is in line with the theory of the constitution as a 'living tree', which requires interpreting the constitution in light of present-day circumstances and taking a practical rather than a historical approach in decision-making.<sup>4</sup>

### *2.3. References to the case law of national courts*

References to national court decisions regularly appear in the case law of the highest courts in common law countries, although they are obviously not used as often as self-references are. The decisions of lower courts are cited in the introductory parts of the decisions of higher courts, in which the course of proceedings to date is described, including decisions made in a given case by courts of subsequent instances. They are also referred to in the argumentative parts of the decision, in which the courts present the development of a line of case law on a given issue, while at the same time indicating their decision as the next and therefore necessary element of this chain of settled case law. The higher courts, however, do not only apply the case law of the lower courts if they consider it to be persuasive, but also, as was mentioned by Selena Bateman and Adrienne Stone in their chapter on the High Court of Australia, if they wish to distinguish between new and old cases or to reject previous precedents.

### *2.4. References to the case law of foreign and international courts*

When deciding cases on constitutional matters, common law supreme courts very rarely refer to the case law of foreign or international courts. This is due to both

4 This metaphor of the constitution as the living tree is widely used in the Canadian literature and jurisprudence. See Wil Waluchow, 'Constitutions as Living Trees: An Idiot Defends' (2005) 18 *Canadian Journal of Law & Jurisprudence* 207–247; Vicki C. Jackson, 'Constitutions As "Living Trees"? Comparative Constitutional Law and Interpretative Metaphors' (2006) 75 *Fordham Law Review* 921–960.

the lesser influence of international law on the domestic legal order of common law countries and the reluctance of common law judges to follow the reasoning of international courts. For many years, a noteworthy exception in this respect has been the case law of the English courts, which, especially in the early days of all the courts analysed, constituted an important point of reference and source of inspiration. As Selena Bateman and Adrienne Stone point out in their chapter, currently the High Court of Australia regularly cites cases from the superior courts of other common law countries, most usually the UK, the USA, Canada and New Zealand. It refers much less frequently to the jurisprudence of international courts, including the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Similarly, Bradford W. Morse and Kimia Jalilvand note that despite the involvement of the Supreme Court of Canada in global organisations, international law and foreign judgments are incorporated into Canadian jurisprudence with caution and with persuasive rather than binding authority. These authors also emphasise the high frequency with which this court cites the jurisprudence of the US Supreme Court. They stress that the Supreme Court of Canada also occasionally uses the case law of other countries, such as Australia and New Zealand. However, the practice of applying this type of comparative argument is slightly different in the case law of the US Supreme Court.<sup>5</sup> As Paweł Laidler notes, in this court, making direct references to the opinions of foreign judges is still exceptional and it is unlikely to be changed in the coming years, due to the dominant conservative ideology of the contemporary Court.

### 3. Case-based reasoning of European Constitutional Courts

#### 3.1. *Introductory remarks*

European constitutional courts have been established at different times and under different political conditions.<sup>6</sup> Although there are a number of significant differences between them in terms of their location in the structure of state bodies, the manner of shaping their composition, the scope of competences and

5 See Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 4, 519–541; Stephen A. Simon, 'The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study' (2013) 1 *Journal of Law and Courts* 2, 279–301; Angioletta Sperti, 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2014) 393–410.

6 Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 817–820; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008) 1–4.

the manner of proceeding, what they do have in common is that they are based on the same constitutional review model established a hundred years ago by the Austrian legal theorist Hans Kelsen. European constitutional courts also apply a similar method of argumentation while reviewing the constitutionality of the law because they analyse the content of the constitution and the examined legal regulations, taking into account the views presented in the literature and court rulings. In constitutional adjudications the argument from judicial authority appears much more frequently than the argument from the authority of legal science. Constitutional courts refer to their own jurisprudence as well as to the jurisprudence of other domestic, foreign and international courts. Such references serve, on the one hand, to reconstruct the judicial understanding of the law and its application in practice, and, on the other hand, to build up the authority of judicial bodies and strengthen the impact of their case law on the legal and non-legal reality. References to case law have led to the development of the practice of ‘informal precedents’ in civil law states. Although such precedents are not a source of law and are not binding upon constitutional judges, in fact they determine the content of decisions in constitutional cases in a manner analogous to that which takes place in common law states.

### *3.2. Self-references*

All the constitutional courts we have examined most often refer in their constitutional argumentation to their own case law. This way of arguing, based on its own authority, is particularly characteristic for the German Federal Constitutional Court, which, within its seventy years of constitutional adjudication, has dealt with innumerable constitutional problems by developing model solutions to them that were later applied by other constitutional courts. Consequently, the power of influence of the Federal Constitutional Court has not only a national but also an international dimension.<sup>7</sup> Undoubtedly, the high citation rate of the Court’s decisions by other constitutional courts, especially those from the region of Central and Eastern Europe, is one of the reasons for which the Federal Constitutional Court is highly interested in developing its own body of jurisprudence, and also through its frequent citation. As Brun-Otto Bryde once observed, the characteristic feature of the style of reasoning applied by the Federal Constitutional Court is that ‘it basically cites only its own precedents’.<sup>8</sup> The statistical research presented by Ruth Weber and Laura Wittmann in their chapter shows that references to its earlier case law occur in more than 90% of the German Federal Constitutional Court’s decisions, and that it cites, on average, 45 of its own previous decisions in each of its subsequent rulings.

7 András Jakab, ‘Judicial Reasoning in Constitutional Courts: A European Perspective’ (2013) 14 German Law Journal 8, 1275.

8 Brun-Otto Bryde, ‘The Constitutional Judge and the International Constitutionalist Dialogue’ (2005) 80 TulLRev 203, 206.

Several reasons for such frequent self-quotations also in the jurisprudence of other European constitutional courts can be identified. Firstly, constitutional courts assume the status of courts of last resort with power to determine the constitutional interpretation of any law, which means that the views expressed in their judgments have universally binding value. For this reason, when referring to existing principles of constitutional interpretation, they are *de facto* referring to their own case law. Secondly, constitutional courts' references to previous case law serve to implement the principle of equality before the law. Applying the same rules developed in earlier case law to participants in judicial proceedings guarantees their fair treatment. Thirdly, the repetition of certain views expressed earlier in the case law of constitutional courts creates a sense of predictability and rationality regarding their decisions, and thus builds their authority in the eyes of other State bodies, courts and citizens. Fourthly, the fact that new judges refer to the rulings passed by their predecessors guarantees the continuity of the constitutional court's judicial activities despite personnel changes within it, as well as the permanence of its jurisdiction and the views expressed therein. This, in turn, contributes to building the so-called institutional memory of the State organ and its resistance to political fluctuations and current events. Bianca Selejan-Guțan and Elena-Simina Tănăsescu, in their chapter on the Romanian Constitutional Court, draw attention to the more practical reasons for using the self-referencing technique. It allows the court to limit the argumentation contained in the reasoning of a decision and to refer, in this respect, to another decision in which the argumentation has already been presented in a more comprehensive way. It also makes it possible to emphasise the nuances of the case law or the evolution of the views expressed by the constitutional court in its earlier rulings, thus showing the complicated nature of the problem being decided. Giovanni Cavaggion, in turn, in his chapter, draws attention to the specific reasons as to why the Italian Constitutional Court refers to its earlier case law. This court applies self-references in order to rethink its stance on a given matter by distinguishing between cases, loosening the scope of a previous *ratio decidendi*, or, sometimes, by overruling its own previous jurisprudence and, at the same time, explaining the reasons why it has chosen not to follow its previous decision on a given matter.

None of the constitutional courts we examined have developed a consistent methodology for applying self-citation. Rarely do constitutional courts consistently refer to the first of their judgments in which a given view was expressed. Often, in order to show that a given view is established in jurisprudence, they cite completely random judgments expressing this view, without analysing in any depth the specifics of the cases in which these judgments were issued or any possible modifications of the previously expressed views. The argument from the well-established line of jurisprudence is thus not used in a manner that would allow for the reconstruction of the development of the constitutional court's case law on the given issue. There is also a problem relating to the selectivity of judicial references in the jurisprudence of constitutional courts. The selective application of references, based on unclear criteria, promotes the formation of an inconsistent and uneven line of jurisprudence. Constitutional courts do not cite

the entirety of their earlier case law concerning a given problem, which would make it possible to present their comprehensive standpoint in this regard; instead, they cite selected judgments as arguments supporting particular theses. Consequently, despite numerous self-quotations existing in the constitutional court's jurisdiction, the design of its previous case law body concerning a given issue is necessarily distorted.

All constitutional courts frequently refer to their earlier judicial statements in a manner abstracting from the circumstances of the case within which those statements were formulated. At the same time, these statements are generalised in subsequent references, becoming peculiar standards defining the direction of later jurisprudence. As Ruth Weber and Laura Wittmann point out, this way of quoting the German Federal Constitutional Court's earlier decisions is referred to in the literature as 'decontextualisation'. At the same time, however, they draw attention to the development by the Court of a sophisticated systematic doctrine (*Dogmatik*) concerning the interpretation of the Basic Law. This style of reasoning, described as standard setting (*Maßstabsetzung*), consists of formulating abstract standards under the subsection 'C I', separately from the considerations on the specific case under 'C II'.<sup>9</sup> These standards are then repeated in subsequent decisions concerning the same constitutional provisions, which favours their consolidation. In addition, some standards then find their expression in the so-called guiding principles (*Leitsätze*), which complement the published decisions in headnotes at the very beginning of the judgment. These guiding principles play, as Ruth Weber and Laura Wittmann underline, an important role in the further reception of the court's decisions as precedents.

In the jurisprudence of the European constitutional courts, despite the absence of a comprehensive and coherent methodology for the application of self-references, it is possible to identify and indicate certain common methodological tendencies that have developed in this regard. These allow for the following conclusions to be drawn.

Firstly, constitutional courts make somewhat different references to rulings that prejudge a particular way of interpreting and applying the constitution and rulings that concern the interpretation and application of the law under review. In the former case, the constitutional court's self-references serve to reconstruct certain universal standards that could be applied to the resolution of the same or similar problems. In subsequent judgments, these standards are not only confirmed and thus consolidated, but also clarified, or even developed or modified. This makes the standard formulated in a decision of a constitutional court against the background of a particular problem acquire an even more universal character, thus also finding application in the settlement of problems that are different from the original problem. By citing its own jurisprudence, the constitutional court

9 Oliver Lepsius, 'The Standard-Setting Power' in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger (eds.), *The German Federal Constitutional Court: The Court without Limits* (Oxford University Press 2020) 70–130.

encloses the text of the constitution and makes it a living instrument adapted to an extra-normative reality, thus responding to ever-new challenges and threats. Self-references also allow for the clarification of constitutional notions and the scope of competences. A good example in this respect may be the history—as described by Bianca Selejan-Guțan and Elena-Simina Tănăsescu in their chapter—of the formation in Romanian Constitutional Court jurisprudence of the meaning of the term of legal conflicts of a constitutional nature between public authorities. Subsequent decisions of this Court have contributed to expanding the scope of cases covered by this legal term, and thus also to expanding the scope of its own competences. Finally, in 2018, the Romanian Constitutional Court stated that it had the power to resolve any contradictory interactions between any public authorities.

On the other hand, the second type of aforementioned references occurring in the jurisprudence of the European constitutional courts (i.e., references to rulings on the interpretation and application of the legal regulations under review) is more technical in nature. These references most often serve to confirm the legitimacy of the choice of a particular way of understanding the regulation, and less often to show an alternative method of its interpretation or application. These references are also of a more specific nature and more often serve to determine the content of a provision in the context of the practice of its application rather than to reconstruct some more general standards on their basis.

Secondly, references made by European constitutional courts to their own case law are most often of a reporting nature. These courts report their previous findings on a given issue or even merely note that the issue has already appeared in their case law. As Anita Rodiņa rightly notes in her chapter on the Latvian Constitutional Court, when referring to previous case law in this way, the constitutional court should maintain a reasonable balance, since a self-reference is justifiable only if it helps to develop and refine the court's reasoning. A constitutional court's decision cannot be a mere compilation of various arguments plucked from other judgments and linked together in an incoherent and illogical manner. It therefore makes sense for a constitutional court to look back at its earlier judgments only if the application of the findings made in those judgments will actually help in deciding the new case.

Thirdly, all the European constitutional courts we have studied are unlikely to refer to dissenting opinions that are filed in a given case, since they are an expression of a judge's separation from the position taken by the majority of the panel. Dissenting opinions generally do not serve to unify jurisprudence; instead, they highlight the complexity of the problem in question and the possibility of an alternative solution.<sup>10</sup>

In most of the countries we studied, there is a very clear tendency: the longer a constitutional court has been adjudicating, the more often and willingly it refers

10 See Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14 *German Law Review* 8, 1345–1371.

to its previous case law. One might say that this is natural; after all, the passage of time increases the number of rulings issued by the court to which it can refer afterwards. In turn, each ruling contains a solution to specific constitutional problems that may be useful in subsequent cases. Building constitutional arguments on the basis of previous court decisions fosters the development of a constitutional tradition and legal culture. It is worth noting, however, that in countries where the constitutional court has been taken over by politicians, thus losing its authority and the attribute of independence, we observe the opposite tendency, consisting of the court dissociating itself from its earlier rulings and building a new jurisprudence from scratch.

The most glaring example of sanctioning this practice is the Fourth Amendment to the Fundamental Law that was adopted in Hungary on 25 March 2013. As Zoltán Pozsár-Szentmiklósy pointed out in his chapter, according to this amendment, Hungarian Constitutional Court decisions issued before the Fundamental Law entered into force are null and void. As a consequence of this amendment, the quotability of previously issued decisions by the Hungarian Constitutional Court has been significantly restricted. Nowadays, the reference to the previous decision can only be made if this decision concerned a constitutional provision that was identical in content to that of the new constitution, and each such decision is subjected to a detailed analysis as to whether the argumentation contained therein can be used. This new way of using references to its own pre-constitutional jurisprudence enables the new Hungarian Constitutional Court to reformulate legal concepts developed under the previous constitution, even when the constitutional provisions underlying these concepts have remained unchanged in the new constitution.

Poland is another example of a country where the constitutional court is reserved regarding its previous jurisprudence.<sup>11</sup> The judges sitting in the current Polish Constitutional Tribunal distance themselves, in particular, from three rulings issued in 2016 by the judges of the previous Constitutional Tribunal. These rulings are unfavourable to the new judges, because they undermine the constitutionality of the legal basis for the operation of the new Constitutional Tribunal.<sup>12</sup> The aforementioned rulings were not published by the government for many months, and then, after their publication, they appeared in the Polish

11 See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 58–88; Aleksandra Kustra, 'Poland's Constitutional Crisis. From Court-Packing Agenda to Denial of Constitutional Court's Judgments' (2016) *Toruńskie Studia Polsko-Włoskie* 12, 343–366; Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland' (2019) *Hague Journal on the Rule of Law* 11, 417–422; Monika Florczak-Wątor, 'The Polish Constitutional Tribunal and its Transformation' (2020) 32 *European Review of Public Law*, 461–471.

12 See judgments of the Polish Constitutional Tribunal of 9 March 2016, K 47/17 (amendment to the 2015 Law on the Constitutional Tribunal), of 11 August 2016, K 39/16 (new 2016 Law on the Constitutional Tribunal) and of 7 November 2016, K 44/16 (rules for the appointment of the President and Vice-President of the Constitutional Tribunal).

Constitutional Tribunal's online database of rulings as 'adjudications' instead of 'judgments'. This term 'adjudications' was applied in order to emphasise that the rulings in question have no legal force. The judges of the current Polish Constitutional Tribunal are also challenging the legality of two other Tribunal judgments issued in 2015, stating that the election of three new Tribunal judges—including the one who continues to serve as the Tribunal's Deputy President to this day—has been in violation of the Constitution.<sup>13</sup> Two years later, this illegally appointed judge of the Tribunal presided over a panel that found that the Tribunal's previous rulings did not concern the legality of the election of the new judges, but only contained abstract considerations concerning statutory interpretation.<sup>14</sup> This kind of distortion of the meaning of previous Tribunal's judgments was not only in clear contradiction to their content, but it also did not correlate, in any way, to the circumstances of their issuance. The new Constitutional Tribunal also began to very selectively refer to its previous case law in matters concerning guarantees of constitutional rights and freedoms of an individual. As a consequence, it significantly reduced the standards of protection of many fundamental rights and freedoms, such as the freedom of assembly,<sup>15</sup> or the right to the legal protection of life.<sup>16</sup> It also departed from its earlier view regarding the manner of shaping the composition of the National Council of the Judiciary. While the Tribunal had previously taken the view that judges elected by the judiciary should have a majority in the Council,<sup>17</sup> in one of its judgments handed down during the current constitutional crisis it stated that this rule was not determined by the Constitution and that judges to the National Council of the Judiciary could be elected by the Parliament.<sup>18</sup> The new interpretation of Article 186 of the Polish Constitution<sup>19</sup> fails to recognise, however, that the politicisation of the National Council of the Judiciary and the subordination of this body to the parliamentary majority will prevent it from performing its primary function of safeguarding the independence of the courts and the judiciary.

13 See judgments of the Polish Constitutional Tribunal of 3 December 2015, K 34/15 and of 9 December 2015, K 35/15. The illegality of the changes in the composition of the Polish Constitutional Tribunal was confirmed by the ECtHR. See its judgment of 7 May 2021 in the case *Xero Flor in Poland sp. z o.o. v Poland* (Application 4907/18).

14 Judgment of the Polish Constitutional Tribunal of 24 October 2017, K 1/17.

15 Judgment of the Polish Constitutional Tribunal of 16 March 2017, Kp 1/17.

16 Judgment of the Polish Constitutional Tribunal of 22 October 2020, K 1/20. This ruling has sparked a wave of protest because it led to the outlawing of abortion in Poland.

17 Judgment of the Polish Constitutional Tribunal of 18 July 2007, Case No. K 25/07.

18 The judgment of the Constitutional Tribunal of 25 March 2019, Case No. K 12/18. See also Monika Florczak-Wątor, 'The Capture of the Polish Constitutional Tribunal and Its Impact on the Rights and Freedoms of Individuals' in Jürgen Mackert, Hannah Wolf and Bryan S. Turner (eds.), *The Condition of Democracy. Vol. 2: Contesting Citizenship* (Routledge 2021) 132–134.

19 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No 78, item 483, as amended).

It should be made clear that the two aforementioned constitutional courts consciously departing from their earlier case law and building a new jurisprudence from scratch under the condition of a constitutional crisis constitute an exception in comparison with other European constitutional courts, which, although formally not bound by their jurisprudence, respect it in practice, realising that it constitutes an element of their identity and an important factor in building their authority. This does not mean, however, that constitutional courts do not depart from previously expressed opinions when they deem it necessary or advisable. A good example in this respect is the German Federal Constitutional Court, which accepts that the binding effect of its decisions concerns not only their operative parts, but also includes the supporting reasons (*tragende Gründe*) behind their decisions. At the same time, however, as Ruth Weber and Laura Wittmann pointed out in their chapter, this court repeatedly emphasises that a binding effect does not exist for the Federal Constitutional Court itself and has specified that the Court may abandon its legal opinions expressed in an earlier decision, even to the extent that they were fundamental to the decision at that time.<sup>20</sup> Also the Polish Constitutional Tribunal, as we emphasised together with Piotr Czarny in our chapter, accepts in its jurisprudence that while hasty changes to the position of the Tribunal under the influence of a changing socio-economic or political situation must be regarded as inadmissible, in certain circumstances abandoning an earlier expressed view may be justified by the need to protect the constitutional freedoms and rights of citizens.<sup>21</sup> The Italian Constitutional Court takes a similar stance. Giovanni Cavaggon pointed this out in his chapter by stating that, in light of the complex role of this court in the constitutional system of Italy, each case departing from earlier jurisprudence requires caution and a reliable justification of the reasons for taking such a decision.

### *3.3. References to the case law of national courts*

The frequency of references made by European constitutional courts to the jurisprudence of other national courts is low compared to the frequency of references to their own jurisprudence. National courts rarely resolve complex constitutional problems by themselves, and their jurisprudence, as well as their interpretation, is not binding on the constitutional courts. Nor do national courts apply the constitution to the extent that constitutional courts do. Consequently, they are less likely to interpret it, and if they do, they usually rely on the interpretation of the constitution provided by the jurisprudence of the constitutional court. For this reason, the jurisprudence of ordinary courts does not contribute to the

20 BVerfGE 4, 31 (38). See also other decisions of the Federal Constitutional Court mentioned by Ruth Weber and Laura Wittmann in their chapter: BVerfGE 20, 56 (87)—Party Financing I; 77, 84 (104)—Temporary Employment; 82, 198 (205); and 104, 151 (197)—NATO Strategy.

21 Judgment of the Polish Constitutional Tribunal of 26 July 2006, SK 21/04.

development of the constitution to the extent that the jurisprudence of the constitutional court does.

In our research, however, we have been able to identify and describe, in individual chapters, those cases in which references made by European constitutional courts to the case law of national courts are most frequent.

Firstly, constitutional courts refer to the case law of other national courts when reconstructing the content of the provisions under examination and the practice of their application. As Anita Rodiņa pointed out in the chapter on the Latvian Constitutional Court, this court accepts that a legal norm cannot be understood in isolation from the practice of its application and the specificity of the legal system in which the norm operates.<sup>22</sup> The same position is taken by the Polish Constitutional Tribunal. It is worth noting, however, that the frequency of referring to the jurisprudence of domestic courts in order to reconstruct the practice of interpretation of the analysed provisions varies among the examined constitutional courts. While, in the case law of some of them, such references occur, in the case law of the Hungarian Constitutional Court, as Zoltán Pozsár-Szentmiklósy points out, such references are almost non-existent, although the court sometimes refers to ‘judicial practice’ in abstract terms. Similarly, the authors of the chapter on the Romanian Constitutional Court, Bianca Selejan-Guțan and Elena-Simina Tănăsescu, argue that this court does not quote decisions of ordinary courts on a regular basis. Furthermore, Ruth Weber and Laura Wittmann note that the German Federal Constitutional Court rarely even refers to the case law of the constitutional courts of the Länder, since the Basic Law prevails over the constitutions of the Länder as federal law and the constitutional courts of the Länder play a minor role in the constitutional system.

Secondly, more national court judgments are cited by European constitutional courts in cases in which there is a divergent interpretation of the contested provision and an unclear practice regarding its application. As we pointed out together with Piotr Czarny in our chapter on the Polish Constitutional Tribunal, the more ambiguous and imprecise the contested provision is, the more important it is to determine how it is interpreted by the courts, and thus also the more frequent the references are to rulings of other courts that appear in the constitutional court’s decision. In cases in which the challenged provision is understood and applied uniformly, the frequency of citation of other courts’ rulings in the decision of the constitutional court is lower. The lack of divergence within the judicial interpretation of a provision results in its content often being reconstructed by the Tribunal on the basis of linguistic interpretative methods, which do not require references being made to judicial decisions.

Thirdly, constitutional courts also refer to the jurisprudence of other courts when this jurisprudence has permanently shaped the understanding of the challenged provisions. Both the Italian and Polish Constitutional Courts, in their

22 Judgment of the Latvian Constitutional Court, Case No 2006–03–0106, 23 November 2006, para 24.5.

early jurisprudence, ignored the established understanding of the legal provision in judicial practice. In the cases in which there was a motion pointing to an incorrect interpretation determining the content of the examined provision, these courts indicated that alternative methods of interpretation should be applied. At the same time, by not being able to correct the faulty interpretation and impose on the legislator the duty to change it, both constitutional courts had to rule a second time on the same case, declaring unconstitutionality of the law as interpreted by the judiciary.<sup>23</sup> In its current jurisprudence, the Polish Constitutional Tribunal stresses that the ‘established, uniform and widespread judicial interpretation’<sup>24</sup> determines the content of the examined provision and excludes the possibility for the Tribunal to adopt a different—potentially possible—way of understanding it. In turn, the Italian Constitutional Court, as described by Giovanni Cavagion in his chapter, developed the doctrine of *diritto vivente* (‘living law’), according to which, when a specific interpretation of a legal provision by the judiciary is consolidated and consistent over time and all judges interpret this provision in the same way over a considerable time span, this provision must be reviewed by the Italian Constitutional Court as it is interpreted by the judiciary (as it ‘lives’ in the judiciary’s interpretation). Both the Polish and the Italian Constitutional Court accept that an interpretation can be considered ‘established’ when it has found its acceptance in the case law of the highest courts (i.e., the Italian Court of Cassation and the Polish Supreme Court). In this way, referring to the case law of these very courts has become a necessary element of the constitutional review process, at least in those cases in which the aforementioned problem of uniform, established and widespread judicial interpretation has arisen.

Fourthly, the constitutional court’s reference to the jurisprudence of national courts may be motivated by the intention of subjecting the courts’ interpretation of the law to scrutiny. The issue of the constitutional court’s competence to control the constitutionality of judicial interpretation is highly contentious in the relations between constitutional courts and supreme courts. This is because it creates the space for the constitutional court to broaden its competences and enter into areas that have, to date, been reserved exclusively for the judicature. Nevertheless, the power to control the constitutionality of the Court of Cassation’s interpretation of laws is vested in the Italian Constitutional Court, which therefore, in this type of case, refers to judgments issued by the Court of Cassation, on the basis of which it reconstructs the interpretation in question. Similarly, the Romanian Constitutional Court refers to the rulings of the High Court of Cassation and Justice, which is responsible for providing a uniform interpretation of the law, in order to review the constitutionality of this interpretation. The authors of this chapter, Bianca Selejan-Guțan and Elena-Simina Tănăsescu,

23 For the Italian Constitutional Court see its decision Nos 26/1961 and 52/1965, and for the Polish Constitutional Tribunal see its judgment of 2 March 2004, SK 53/03.

24 This notion appeared for the first time in the judgment of the Polish Constitutional Tribunal of 27 September 2012, SK 4/11.

also point out that the Romanian Constitutional Court's invocation of the High Court of Cassation and Justice's interpretation is a form of discussion between both courts that sometimes creates pressure for the latter to make a change in this interpretation.

The European constitutional courts have not developed a consistent methodology in terms of referring to the jurisprudence of other courts. Constitutional courts quote either single judgments or groups of judgments of other courts, and in the latter case, those may be both judgments that are consistent forming a uniform line of jurisprudence, as well as judgments containing divergent solutions, showing, for example, alternative ways of interpreting the examined provisions. Certain tendencies may also be identified when it comes to the choice of judgments cited. Constitutional courts most often cite judgments of courts that are placed highly in the structure of judicial power, and of courts that have ruled in the last instance in a given case. These are often judgments that are also indicated in the literature or judicature as being of key importance for a given issue. The reason for citing the case law of supreme courts is also linked to the power of these courts to unify judicial decisions and to influence the interpretation applied by lower courts. It is true that in civil law countries, these lower courts are not formally bound by the decisions of higher courts. However, they do in fact respect those decisions, both because of the authority of the higher courts and because of the fact that the higher courts have the power to overturn the decisions of lower courts that apply an interpretation of the law that is, in the opinion of the higher courts, incorrect. An additional argument justifying a constitutional court's reference to the case law of the supreme court may be the one indicated by Anita Rodiņa in her chapter on the Latvian Constitutional Court. She points out that the decisions of the Latvian Supreme Court are final and not subject to appeal, and this means that the solution to the matter contained in this decision is also ultimate and cannot be challenged.

References to judicial decisions are obviously more frequent in the rulings of constitutional courts issued in the concrete constitutional review procedure than in the abstract review procedure. When considering a constitutional complaint, a constitutional court analyses rulings passed against its background. Even if it is not competent to examine the constitutionality of those judgments, it analyses, as pointed out by Ruth Weber and Laura Wittmann, the exhaustion of legal remedies by the applicant. The subsequent judicial decisions issued in the complainant's case are generally cited in the historical part of the decision of the constitutional court. Also, the decisions of the constitutional court, rendered in the procedure initiated by a legal question submitted by the ordinary court, generally contain references to the case law of the latter court. The legal question is formulated against the background of a specific case in which decisions have often already been issued by lower instance courts. Therefore, in the legal question, and later in the decision of the constitutional court, the previous judicial decisions issued in the given case are referred to in a reporting manner.

### *3.4. References to the case law of foreign constitutional courts*

European constitutional courts make moderate reference to the case law of other constitutional courts. The court that is most frequently cited by them is the German Federal Constitutional Court, which is not only the longest-lasting court among those included in our research, but it also has the most inspiring case law for other courts. The Federal Constitutional Court itself, on the other hand, as Ruth Weber and Laura Wittmann point out in their chapter, very rarely quotes decisions of foreign courts. In the period between 1951 and July 2007, such references appeared in only 58 decisions. Most often, these were references to decisions of the US Supreme Court, and less often to other Western European countries such as Switzerland, Great Britain, France, Italy and the Netherlands. Ruth Weber and Laura Wittmann also note that foreign courts are cited twice as often in dissenting opinions to decisions of the Federal Constitutional Court than in the decisions themselves.

The Federal Constitutional Court is a source of inspiration for all the Central and Eastern European courts included in this research. The analysis made by me and Piotr Czarny shows that German jurisprudence is particularly strongly explored by the Polish Constitutional Tribunal in cases concerning the protection of individual rights and freedoms, and in those concerning European Union (EU) law or national law implementing EU law. The Polish Constitutional Tribunal has also, on several occasions, decided cases analogous to those resolved previously by the Federal Constitutional Court. Sometimes in these cases, it has repeated the argumentation of the German court and the direction of its reasoning. Examples of such judgments include those issued in cases concerning the possibility of shooting down an aeroplane if it is used as a means to carry out a terrorist attack,<sup>25</sup> the obligation to wear seatbelts in motor vehicles<sup>26</sup> and the prohibition of the use of a telephone by a provisionally arrested person to communicate with his or her defence counsel.<sup>27</sup>

Among other European courts, the examined constitutional courts most frequently cite decisions of the constitutional courts of Italy, Austria, Spain and Switzerland. The constitutional courts of Central and Eastern Europe relatively frequently also cite the decisions of other constitutional courts of the region. European constitutional courts hardly ever cite the decisions of non-European courts in their jurisprudence. The exception in this respect is the US Supreme Court, which within all the countries under study is the most frequently cited court of the common law system. A second court that is also cited, although sporadically, is the Supreme Court of Canada. In the group of countries covered by our research, references to foreign courts are rarely made by the Romanian Constitutional Court. As Bianca Seleşan-Guţan and Elena-Simina Tănăsescu point out in their chapter, the relevance of foreign precedents in the case law of this

25 Judgment of the Polish Constitutional Court of 30 September 2008, K 44/07.

26 Judgment of the Polish Constitutional Tribunal of 9 July 2009, SK 48/05.

27 Judgment of the Polish Constitutional Tribunal of 25 November 2014, K 54/13.

court remains minor, and it does not confirm the thesis on the convergence of common law and civil law or the existence of a consistent judicial dialogue among peers. This type of comparative law argument appears much more frequently in the case law of the Latvian, Polish and Hungarian Constitutional Courts.

In the jurisprudence of the analysed European constitutional courts, especially those from Central and Eastern Europe, one may also observe periods of greater and lesser interest in the case law of foreign courts. Undoubtedly, however, there was an increase in the frequency of application of this comparative argument in the period following the accession of the analysed countries to the EU. This can be explained by the fact that constitutional courts have often ruled on the constitutionality of the same EU regulations, or on similarly structured legal acts implementing EU regulations in the national legal systems. In their rulings, the courts deciding these cases often later reviewed the rulings issued by other constitutional courts that had previously decided on analogous cases. A good example in this respect may be the ruling of the Polish Constitutional Tribunal on the constitutionality of the Lisbon Treaty,<sup>28</sup> which referred to the judgments of the constitutional courts of the Czech Republic, Germany, Austria, Hungary and Latvia, as well as to the decision of the French Constitutional Council.

References to the case law of foreign courts in the decisions of the European constitutional courts, like other judicial references, raise various methodological problems. Firstly, these references are used selectively; they do not take all of the decisions of foreign constitutional courts in similar cases into account. Secondly, as a rule, these references are not accompanied by a closer analysis of the ruling or the legal state against which the ruling was issued. Most often, the references are limited to signalling the fact that a foreign constitutional court has passed a judgment in a similar case, or to quoting the main thesis of that judgment. Thirdly, it is not always clear what purpose the constitutional court wishes to achieve by using such a comparative argument, or why it cites this particular judgment rather than another (similar) one. Meanwhile, as Anita Rodiņa rightly notes in her chapter, using the case law of other countries by a constitutional court should be understandable and substantiated; otherwise, it will turn into a 'cherry-picking exercise'.<sup>29</sup> Fourthly, the jurisprudence of the constitutional court of one country, including that concerning a similar or even the same legal problem, cannot always be directly transferred to the legal order of another country. Fifthly and finally, the case law of foreign constitutional courts is not binding on the constitutional courts of other countries. At most, it may serve as a source of inspiration in the process of seeking the best way to solve a given constitutional problem.

28 Judgment of the Polish Constitutional Tribunal of 24 November 2010, K 32/09.

29 Andreas Paulus, 'Engaging in Judicial Dialogue: The Practice of the German Federal Constitutional Court' in Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press 2017) 265.

### 3.5. *References to the case law of international European courts*

All European constitutional courts analysed in this volume are constitutional organs of states that are members of the two most important European integration organisations, namely the Council of Europe and the EU. The constitutional courts of these countries are therefore obliged to respect the standards developed in the case law of the ECtHR and the CJEU. Additionally, both the European Convention on Human Rights and EU law may be subject to constitutional court review, and may themselves, to some extent, be a point of reference for assessing the legality of acts of domestic law. In both of these cases, in order to reconstruct the content of the Convention and EU law, it is reasonable for the constitutional courts to analyse the jurisprudence of the ECtHR and the CJEU, respectively.

The jurisprudence of both European courts is, however, not only invoked by constitutional courts in cases in which international or EU law is the object or pattern of control. The rulings of these bodies formulate certain standards of protection of individual rights and freedoms and the conditions for their restriction, which correspond to constitutional standards, and thus in the process of reconstructing the content of the latter, constitutional courts refer to the former. Taking into account the views of the ECtHR and the CJEU is also a peculiar method of interpreting constitutional provisions and is referred to in the literature as a pro-conventional interpretation and a pro-EU interpretation. The Latvian Constitutional Court even accepts, as noted by Anita Rodiņa in her chapter, that in those cases in which there are doubts about the content of individual rights expressed in the Constitution, one of the possible ways to remove these doubts is to interpret the provisions constituting these rights in compliance with the practice of the application of international norms on human rights:

[The] practice of the European Court of Human Rights, which in accordance with liabilities Latvia has undertaken ... is mandatory when interpreting the norms of the Convention. This practice shall be used also when interpreting the respective norms of the *Satversme*.<sup>30</sup>

Constitutional courts also treat the jurisprudence of the European international courts as a precedent to assist in deciding similar cases involving individual constitutional rights and freedoms analogous to those of the Convention or the EU.

As a rule, a constitutional court may refer to one or several specific rulings of the aforementioned European courts that are relevant to a given case. There are also references to entire lines of case law, which allow constitutional courts to establish the recurrence of certain arguments used by the ECtHR and the CJEU, and even to reconstruct the process of their modification.

30 Judgment of the Latvian Constitutional Court, Case No 2000-03-01, 30 August 2000, para 5.

The relatively high frequency with which European constitutional courts, especially those from Central and Eastern Europe, refer to the case law of the ECtHR and the CJEU testifies to the pro-European attitude of these courts and their awareness of the existence of common European principles and values. Constitutional courts use the argument from the authority of the European courts for persuasive purposes in order to strengthen their own position and the view they present on a given issue. Recourse, by constitutional courts, to the case law of the ECtHR and the CJEU also builds trust in both of these judicial bodies in the Member States and encourages national courts to make use of this case law in their own cases.

It is worth noting, however, that in the jurisprudence of the Federal Constitutional Court, the frequency of references to the jurisprudence of the ECtHR and the CJEU is not particularly high, although there are decisions in which one can speak of an accumulation of such references. Ruth Weber and Laura Wittmann, in their chapter on the German Federal Constitutional Court, give as an example the decision on the Treaty of Lisbon of 2009, containing 22 citations of European Court of Justice decisions and 3 citations of ECtHR decisions, which, compared to 167 self-references, are still fairly low.

Finally, it is worth noting that European constitutional courts have the power to address preliminary questions to the CJEU.<sup>31</sup> The submission of such a question requires the constitutional court to analyse the relevant EU provisions, as well as the accompanying decisions of the CJEU. The preliminary question procedure enforces cooperation between the national court on the one hand and the CJEU on the other hand. These considerations have a very practical dimension, for as is well known, some of the constitutional courts examined have already submitted such preliminary questions to the CJEU.<sup>32</sup>

## 4. Case-based reasoning of European international courts

### 4.1. *Introductory remarks*

The ECtHR and the CJEU are not classical constitutional courts. Moreover, they do not rule on the basis of a classic constitution, but on the basis of the

31 A. Norberg, *Preliminary Rulings and the Co-operation Between National and European Courts* (University of Lund 2006); G. Martinico, 'Preliminary Reference and Constitutional Courts: Are We in the Mood for Dialogue?' (2009) Tilburg Institute of Comparative and Transnational Law Working Paper 10, 11, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1483664](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483664) accessed on 18 October 2021.

32 See Aleksandra Kustra, 'The First Preliminary Questions to the Court of Justice of the European Union Referred by Italian Corte Costituzionale, Spanish Tribunal Constitucional, and French Conseil Constitutionnel' (2013) *Comparative Law Review* 16, 159–182; F. Fontanelli and G. Martinico, 'Cooperative Antagonists. The Italian Constitutional Court and the Preliminary Reference: Are We Dealing with a Turning Point?' (2008) *Eric Stein Working Paper* 5, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1299280](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299280) accessed on 18 October 2021.

European Convention on Human Rights and of primary and secondary EU law, respectively. Nevertheless, as explained in the Introduction, they were included in our research, the results of which are presented in this volume, not only because both the Convention and EU law are acts of constitutional rank within the framework of the Council of Europe and the EU, respectively, but also because these European courts formulate standards in their jurisprudence that are equivalent to constitutional standards. Moreover, when the autonomy and independence of national courts is seriously threatened, as is the case in Poland and Hungary, the ECtHR and the CJEU become guarantors of the Member States' respect for the fundamental principles of democracy, the rule of law and human rights.

#### *4.2. Self-references*

International courts are not bound by precedents because, as Krzysztof Wojtyczek explains in his chapter, the rule of *stare decisis* does not apply in international law. This also applies to the ECtHR and the CJEU, which are not formally bound by their previous judgments. The analysis of the jurisprudence of both these courts, however, leads to the conclusion that they systematically refer to their earlier case law. Alicja Sikora, in her chapter on the jurisprudence of the CJEU, stresses that although this court does not recognise the doctrine of *stare decisis*, in practice it extensively relies on existing case law. Also Krzysztof Wojtyczek, in analysing the case law of the ECtHR, emphasises that the court has a very self-referential style of adjudication, and its judgments at a large extent are a consequence of principles formulated in earlier case law. The current approach of the latter court to the issue of being bound by its own case law is well expressed by a formula presented in one of its judgments:

While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.<sup>33</sup>

The ECtHR differentiates between the importance of its precedents on the basis of at least three criteria: the nature of the case at issue, the type of composition of the court and the 'age' of the decision. The Court also emphasises that it is more strongly bound by its decisions issued in procedural matters in which foreseeability and consistency are particularly desirable. It also accepts that Grand Chamber judgments are more significant than chamber judgments and that recent judgments should prevail over old ones.

Of particular importance in the jurisprudence of both European courts are the so-called general principles, which are most often the point of reference for

33 See the ECtHR ruling of 19 April 2007 in *Eskelinen and Others v Finland*, 63235/00.

subsequent case law. The general principles arising from the case law of the CJEU are one of the sources of EU law, which in this respect is a classic example of a judge-made law.<sup>34</sup> EU law is therefore not only clarified in the case law of this court, but is also creatively developed and supplemented. This not only causes the CJEU to reach back to its earlier case law to draw inspiration from it in order to decide on subsequent cases, but also to find in it a legal basis in the adjudication process. Moreover, in the jurisprudence of the ECtHR, the general principles are of great importance as they concretise the provisions of the European Convention on Human Rights, providing clear guidance for the States in the application of the Convention in future similar cases. General principles give the ECtHR rulings an *erga omnes* effect, but, at the same time, they leave room for a certain amount of discretion regarding their application. As Krzysztof Wojtyczek notes in his chapter, there is some doubt as to whether the court only feels bound by the general principles or also by the way in which the principles are applied in concrete cases. However, what really matters is consistency in the formulation of the relevant general principles. The manner in which they are applied is, in his view, secondary, unless it becomes the object of new general principles.

The practice of invoking precedents, by both European international courts, is very diverse. As Alicja Sikora points out in her chapter, the CJEU very often refers to its previous case law using the formula ‘according to the Court’s settled case law’, which reflects both the fact that the case law is established and the fact that it constitutes a single, coherent harmonious body. The CJEU prefers to quote its earlier judgments verbatim (a string citation) rather than to paraphrase them. For this reason, a characteristic element of its style of reasoning is the occurrence in its judgments of many quotations from earlier judgments, which are neither accompanied by any extensive commentary nor subjected to any more detailed analysis. The Court’s case law is also characterised by the ‘stone-by-stone approach’. As explained by Alicja Sikora, this approach means that the questions of law resolved by the court are limited to those raised by the case at hand, and as regards other questions, they remain to be resolved for future cases.

On the other hand, the ECtHR, referring to its previous case law, applies—as pointed out by Krzysztof Wojtyczek—three different styles of reasoning. The first is the reporting approach, in which the ECtHR synthesises its previous case law on a given issue and compiles general principles stemming from this case law. The second is the analytical approach, in which the court analyses its prior rulings in greater detail. Finally, the mixed approach combines the two, taking into account both the general principles arising from the case law of the court and the specificity of the cases against which those principles have been formulated. In ECtHR jurisprudence, there is also a problem relating to the selective application of self-references. Moreover, as Krzysztof Wojtyczek points out, this court does not

34 See Monika Kawczyńska, ‘The Court of Justice of the European Union as a Law-Maker: Enhancing Interpretation or Acting Ultra Vires?’ in Monika Florczak-Wątor (ed.), *Judicial Law-Making in European Constitutional Courts* (Routledge 2020) 203–220.

always respect the directives for the interpretation of the Convention formulated earlier in its case law.

Although for both European courts legal certainty and the stability of the law as well as the predictability of its interpretation and application are among their priorities, their role is also to develop that law and to initiate its change, in particular by interpreting the European Convention on Human Rights and the founding treaties of EU law as ‘living instruments’. Departures from the views expressed in earlier rulings, however, are rare and always require a detailed justification. As Alicja Sikora points out in her chapter, only very few CJEU’s judgments contain formulas such as, ‘The Court believes it necessary to reconsider the interpretation given in that judgment’, ‘Contrary to what has previously been decided’, or ‘That conclusion must however be reconsidered’. Often, however, the CJEU modifies its view expressed in a previous judgment in a more nuanced way by using the technique of clarification or elaboration. Meanwhile, as Advocate General Bobek has observed, “‘Clarification’ often serves as a euphemism for effective overruling”.<sup>35</sup> Similarly, the ECtHR has also developed various techniques for changing its case law. Sometimes it does not emphasise that it has deviated from its previous case law; usually, it tries not only to signal a change in its position, but also to justify it, for example, by noting the different circumstances of the new case and the one against which the previous ruling was made.

#### **4.3. *References to the case law of other courts***

In their rulings, both the ECtHR and the CJEU refer to the common European constitutional traditions of the states that are members of the Council of Europe and the EU.<sup>36</sup> These traditions are reconstructed not only on the basis of the constitutional regulations of those states, but also—or perhaps even primarily—on the basis of constitutional practice and jurisprudence. The latter takes into account the jurisprudence of both constitutional and ordinary courts. In the EU legal order, however, the case law of the national courts has a slightly different meaning than in the Convention order. The national judges are, at the same time, the EU law judges, who not only apply EU law but also contribute to its development. As Alicja Sikora notes in her chapter, a national judge is even considered the ‘first judge of the European Union’.<sup>37</sup> The procedure for a question

35 Opinion of Advocate General Bobek, *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:291, fn 142.

36 As Wojciech Sadurski indicated, ‘The “constitutional tradition common to the members states” of the European Union is a term of art, and has been included both in the foundational documents of the EU and in the jurisprudence of the ECJ, understood as one of the sources of law’. Wojciech Sadurski, *European Constitutional Identity?* (2006) EUI Working Paper LAW 33, 2–8.

37 Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Allan Rosas, Egils Levits and Yves Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and*

put forward for a preliminary ruling and submitted by a national court to the CJEU is a classic example of a dialogue between these courts, which serves not only to seek an optimal interpretation of EU law but also to correct and improve it. The powers of judicial review in the EU legal order are also divided between national courts and the CJEU.<sup>38</sup> National courts can refuse to apply national law that is incompatible with EU law.

Rarely do the two European courts refer to the case law of other international courts. However, as Krzysztof Wojtyczek points out, in the jurisprudence of the ECtHR, there are, for example, references to judgments and advisory opinions of the International Court of Justice. They are of particular importance for the application of customary international law and the rules of *ius cogens*.

## 5. Conclusions

Comparative research on the constitutional jurisprudence of the supreme courts in the common law system, constitutional courts in the civil law system and European international courts leads to the conclusion that there is great diversity in the practice of referring to previous judicial precedents in these courts. All the courts examined most often refer to their own body of case law and there is no doubt that the argument from their own authority is the dominant argument in judicial reasoning. To a lesser extent, decisions of national courts are cited in the jurisprudence of courts deciding on constitutional disputes. These decisions are not treated as judgments of a constitutional nature and they are not binding for the constitutional courts. However, the greatest differences between the courts adjudicating in constitutional cases concern the use of the comparative argument referring to the jurisprudence of foreign courts and international courts. The constitutional courts included in this study, especially the courts from Central and Eastern Europe, make extensive use of references to the case law of foreign and international jurisdictions. Much more cautious use of this argument can be observed in the case law of European international courts, including the ECtHR and the CJEU. In case of supreme courts from common law countries, references to foreign and international rulings are used to a marginal extent. What is undoubtedly common for all three categories of courts examined in this study is the lack of a coherent and rational methodology for applying references in constitutional cases, both with respect to references to their own jurisprudence, as well as to the jurisprudence of other domestic, foreign and international courts. This is unquestionably an issue that requires further in-depth research and studies.

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*Perspectives on Sixty Years of Case-law—La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Springer 2013) 61.

<sup>38</sup> See opinion of the ECtHR No 1/09 (Agreement Creating a Unified Patent Litigation System) of 8 March 2011, EU:C:2011:123, para 66.

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