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APPLICATION OF THE CASE LAW OF FOREIGN COURTS AND DIALOGUE BETWEEN CONSTITUTIONAL COURTS*

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As the number of constitutional courts, i.e. courts vested with the authority to administer constitutional review, increases, the dialogue between courts and/or the application of the jurisprudence of foreign courts by a domestic court acquires more significance. There is a long distance between those advising against a court's reliance on the case law of foreign tribunals and those advocating extensive cooperation between judiciaries. The present Article[1] aims at unveiling the existing approaches and realities based on diverse sources[2].

INTRODUCTORY REMARKS

1 – The history of constitutional courts in a nutshell

In a general perspective, every legal system, in accordance with its historical and cultural development, has had courts and tribunals that are competent in civil, criminal and administrative matters in place. However, the history of existence of courts enjoying the authority in constitutional matters i.e. tribunals responsible for ensuring constitutional supremacy within their respective legal orders is, at least in terms of history of law, relatively short.

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[1] In this case, it is not intended to give a comprehensive account of the subject. Moreover, this task would be impossible given the number of courts and different circumstances.

[2] See, bibliography, annexed.

In traditional European law, in the United Kingdom (Bonham case of 1610)[3] and on the continent, it can be said that sovereign courts, notably courts named "Parliament" in France before 1789, could review legal norms or judicial decisions in terms of superior norms or norms of natural law. However, the term "Constitutional Court" (i.e. a court vested with the authority to exercise "constitutional review") originated and was coined for the first time with the application of the Constitution of the United States of 1787 in the decision of Marbury v. Madison case of 1803[4]. This is the most celebrated decision in the entire body of constitutional law and contains the following phrase, written by the quill pen of Chief Justice Marshall, which would adorn the pediment of any constitutional court: "[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void." Ever since the judgment, the Supreme Court of the United States is considered a doyenne of constitutional courts.[5]

While 19th century was marked by the development of written constitutions in Europe and Latin America, not all of those documents contained provisions on constitutional courts. In the course of decades in the same century, the decision of the Supreme Court of Norway of 1 November 1866 is notable and considered to be the *Marbury v. Madison judgment of Norwegian law*.[6] In 1867, the Tribunal of Austro-Hungarian Empire had an express function to guarantee the rights set forth in the Basic Law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Lands represented in the Council of the Empire. In 1912, the Court of Cassation of Romania also applied the reasoning of *Marbury v. Madison* judgement, having agreed to pronounce itself on the constitutionality of the law necessary for the outcome of the proceedings.[7]

In the course of 20th century, two periods are to be distinguished: the first period covers the first half of the last century. Following the works of Hans Kelsen and the adoption of the Constitution of Austria in 1920, an Austrian-Kelsenian model of autonomous constitutional jurisdiction was established across Europe (Austria, Czechoslovakia, Lichtenstein…). Though the Courts' efficiency regarding the protection of democracy and human rights marked its start with the admission of failure during World War II, the idea of considering the Constitution to be more than merely a political norm and legally binding as well was becoming less debatable with time.

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[3] Despite the fact that the impact of the decision and the commentaries of Sir Edward Coke were under extensive discussions, its existence witnesses the possibility to review the acts of parliament within the common law system. It is noteworthy to draw comparison between the aforementioned judgment and the decision of the Supreme Court of India of 1967 *(Golak Nath v. Sate of Punjab)* where the Court held that "The authority of the Parliament to amend the Constitution is not extended to the amendment of any fundamental right provided therein", AIR, 1967 S.C. 1643 (1967) 2 SCJ (486).

[4] *Marbury v. Madison,* 24 February 1803, 5 US (S.Ct) 137 (1803).

[5] In its decision on *Law Society of Upper Canada v. Skapinker*, the Supreme Court of Canada made an express reference to *Marbury v. Madison,* (1984) 1, RCS, 357.

[6] Eirik Hoølmøyvik, "Why did the Norwegian Constitution of 1814 Become a Part of Positive Law in the Nineteenth Century?" blogit.helsinki.fi/Holmoyvik-paper-Tartu.doc; Katim M. Bruzelius, "Judicial Review within a Unified Country", www.venice.coe.int/WCCJ/Papers/.

[7] The Court of Cassation of Romania, 16 March 1912, #261; See, *Gérard Conac*, *"Une antériorité Roumaine: le contrôle juridictionnel de la constitutionnalité des lois »,* Mélanges *Slobodan Milacic*, Démocratie et liberté : tension, dialogue, confrontation, Bruylant, Belgique, 2007.

The second period starts from 1945 and can be justifiably characterised as the period of expansion of constitutional courts. In any part of the world, the establishment of a democratic constitution founded on the voters' sovereignty, balanced separation of powers, and respect for rule of law implies the creation of a constitutional court. Germany (1949), Italy (1947), India (1949) – in the form of the Supreme Court- France (1958), Portugal (1976), Spain (1978), most of the countries in central and eastern Europe (except Estonia, where constitutional review is exercised by the State Court), in 1990s, Canada (1982), Botswana (1965), Brazil (1988), Russia (1993), South Africa (1994), Chile (1980, with subsequent changes), Bosnia-Herzegovina (1995), Andorra (1993) and Namibia (1998) experienced either the creation of constitutional jurisdictions or the extension of competences of existing courts ,mostly supreme courts, in the constitutional domain of fundamental rights.

While these courts do not enjoy same status, competences or denomination, let alone complete guarantee of independence, the creation of regional and linguistic assemblies of constitutional courts suffices to argue the above development.[8] Stemming from the abovementioned, there is an important finding that is essential in terms of the topic of the present article: the most recent courts tend to look toward older courts and open dialogue with them. It is true both in terms of institution itself (organisation, competences, procedure etc,) and getting familiar with its jurisprudence if need be.

2. Different types of courts competent to exercise constitutional review

It is universally acknowledged that the courts vested with the power of constitutional review do not fall under certain unique model. The Supreme Court of the United States is defined as a Supreme Court model. The US Supreme Court finds itself on top of the judicial hierarchy and exercises constitutional review only where the case before it, notwithstanding the relevant procedures, involves the assessment of the application of the Constitution or the respect for constitutional provisions and principles by political or legal bodies. The said model *mutatis mutandis* exists in India, Japan, Israel, Australia, Canada, Ireland, Norway and Sweden. The respective statutes of these courts may provide for particular procedures for the cases where constitutional issues are at stake, but those procedures are of secondary character in terms of such courts' general competences.

The European model deriving from Austrian-Kelsenian tradition is characterised by the existence of a court beyond the system of the courts of general jurisdiction and vested with a special competence to review the validity of both legal norms and judicial decisions in terms of a constitution.[9]

[8] See, the assemblies represented at the Conference (the assemblies of courts of Asian, francophone, Commonwealth, new democracy, European, Iberian-American, Portuguese speaking and Arabian countries).

[9] See, the work by my late friend and colleague President Louis Favoreu *Les Cours constitutionnelles*, PUF, France, 1986.

In all above cases, apart from constitutional courts, there are also special traditional courts which can either be divided in accordance with the principle "civil court/criminal court" or with more elaborate specifications as civil, criminal, administrative, financial or special courts.[10]

Statistically, Special constitutional court model is the most popular. Here is a not so exhaustive list of the countries where this model exists: Chile, Brazil, South Africa, Morocco, Germany, Italy, Spain, Portugal, Belgium, France[11], Senegal, Benin, Korea, Russia, Romania, Bulgaria, Andorra, Bosnia-Herzegovina and more generally in countries where the tradition of continental law system is naturally or indirectly present. In this case too, procedures and competences may vary to a great extent from one country to another but eventually the function remains the same: the review of constitutionality of a legal provision or its actual application by a court of general jurisdiction.

The third model, with far less presence, is relevant in terms of countries that do not have an entirely written constitution.[12] The first country to be mentioned in this respect is certainly the United Kingdom. In this case, there is neither a supreme court vested with a power of constitutional review nor a *fortiori*, a constitutional court, despite the fact that the adoption of Constitutional Reform Act of 2005 and creation of the Supreme Court changed the situation to some extent.[13] In case of countries representing the third model, the number of which is gradually decreasing, the following question arises: despite their denominations, can the highest competent courts at national level,revoke those acts enacted by parliament or established in common law due to their failure to comply with superior norms, be these obligations are of either historical or declaratory character, stemming from covenants of classic contents or being of undefined importance or even international obligations?[14] Similar cases are statistically few but have considerable advantages in terms of flexibility.[15]

Finally, the categorisation of constitutional courts is certainly useful for a discussion. However, it may not be automatically considered as such with regard to the subject at stake. The Supreme Court of the US being a prototype of courts enjoying multiple competences is indeed in the centre of the controversy about the recourse to the case law of foreign courts and dialogue between judges.[16]

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[10] See, with regard to the EU Member States a very useful work *Les Juridictions des États membres de l'Union européenne* published by the European Court of Justice, the Office of Official Publications, 2008.

[11] In French context the Constitutional amendment of 23 July 2008 is noteworthy. It enabled the Constitutional Council to exercise after March 1, 2010 *a posteriori* constitutional review of legal provisions.

[12] In fact all of the countries concerned have the elements of written Constitution but they are not finalised in a complete document. In the case of Great Britain, at minimum there are the Parliament Acts of 1911 and 1947 and Scotland Act (1998), Northern Ireland Act (1998), and Wales Act (1998) about the devolution of powers (See, *Erskine May's Treatise on the Law, privileges, Proceedings, and Usage of Parliament, 23rd edition, LexisNexis, UK, p.3, note 1.*). The written Constitution of Australia contains provisions concerning federal and institutional systems but is reticent about fundamental rights. There are written provisions on federal system, rights and freedoms but none about the operation of the federal parliamentary system.

[13] Jeffrey Jowell & Dawn Oliver, *The Changing Constitution,* 6th edition, Oxford University Press, 2007.

[14] On these and other issues, see, *Lech Garlicki, « La légitimité du contrôle de constitutionnalité : problèmes anciens c/ développements récents »*, the present review #78, 2009.

[15] Mauritius is an illustrative example of the mixed system. Even after its transformation into a republic in 1992 Mauritius retained the Judicial Committee of the Privy Council of the Queen as the highest judicial instance. Article 81 of the Constitution permits in certain cases the appeal of the Supreme Court's decisions before the Judicial Committee.

[16] See, the well-known debate between Justices Scalia and Breyer, (see, Bibliography). The controversy originates in the decision of 1989 adopted on *"Stanford v. Kentucky"*, (492, US 361, 1989) and further elaborated in the decision of 1997 passed on *"Printz v. United States"*, (521 US 898, 1997).

This circumstance places the court in the same dimension with other constitutional courts, be they special or general, new or relatively older institutions.

3 – Supranational Courts

Obviously, constitutional courts are the subject of the present article and discussed within national context. No domestic court has and can have competence to base its proceedings on constitutional provisions of foreign countries or replace competent national courts.

The above situation, quite straightforward both in terms of description and dialogue, was enriched after fifty years of the creation and strengthening of supranational courts. These tribunals based on international agreements are vested with excusive competences to settle disputes and at the same time review and interpret legal provisions.

It is universally acknowledged that Europe is a privileged geographical area in this regard. Only the European Court of Human rights in Strasbourg is entitled to definitive interpretation of the implication and effect of the rights set forth in the Convention for the Protection of Human Rights and Fundamental freedoms of 1950. Its jurisprudence is binding on 47 Contracting States of the Convention. Also, 27 Member States of the European Union (gradually since 1951) agreed on the creation of a unique legal order which was integrated into their own legal systems, and its interpretation rests with the competence of European Court of Justice in Luxemburg.[17]

In Americas, although not all the American States are signatories, the Charter of the Organization of American States recognised the competence of Inter-American Court of Human Rights. Ever since 1978, the latter developed jurisprudence which can be qualified as translational.

The African Court of Human and People's Rights set up in Banjul (Gambia) on 3 July 2006 clearly influences the national jurisdictions of the signatory African States.

It is necessary to differentiate these courts from truly international courts such as International Court of Justice and International Criminal Court, both in The Hague, operating in a very special domain.

It is sufficient to read the titles of the instruments, the respect of which the Courts in Strasbourg, San José (Costa Rica) and Banjul are committed to ensure, in order to understand the constitutional interest of the jurisprudence of these different courts.

On its part, Luxemburg Court also developed case law on human rights within the European Union before the adoption of the Charter of Fundamental Rights of the European Union in Nice

[17] CJCE, *Van Gend en Loos*, CJCE, 5 February 1963, Case # 26/62; *Costa v. ENEL*, CJCE, 15 July 1964, *Handelsgesellschaft*, CJCE, 17 December 1970, # 11/70; Case # 6/64 ; *Simmenthal,* CJCE,9 March 1978, Case # 70/77.

in 2000, which later formed part of European Constitution of 2004 and subsequently, due to the failure of the treaty, was enforced by the Treaty of Lisbon of 2007.[18]

When it comes to the protection of fundamental rights and freedoms, such as respect for human dignity, prohibition of inhuman and degrading treatment, freedom of movement, freedom of expression and religion etc, due to the great resemblance between the texts, there is a natural interest to the activities of a supranational judge.[19]

4 – The significance of a dialogue

From a strictly conceptual viewpoint, the notion of dialogue between judges is an object of serious critique. A court typically pronounces itself after extensive deliberation on legal provisions which it should apply in a case filed before it. In no way it implies that the deliberation between dissenting judges is susceptible to lead them to a consensus or a compromise through a public dialogue. It does not prevent judges from exchanging their opinions in order to reduce any disagreement between them and reach consensus or arrive at a unanimous finding. Where court rules enable, an individual opinion of a judge[20] annexed to a judgment takes internal dialogue into account and frequently constitutes an essential source for the analysis of recourse to case law of foreign courts.

The term "dialogue of judges" is commonly used to denote a phenomenon which encourages certain courts to take the jurisprudence of foreign or supranational courts into consideration. It concerns the confirmation, elaboration or rejection of the jurisprudence of foreign countries through the decisions of national courts.

Direct dialogue certainly takes place between the representatives of various courts within the framework of numerous bilateral and multilateral meetings[21] or between the representatives of courts and other bodies. But, it is logically impossible to equate an individual dialogue between judges with the genuine dialogue between courts.

Therefore, from classical viewpoint, there can be horizontal dialogue between courts at the same level, *i.e.* national courts and vertical dialogue where supranational courts are involved which is similar, to a certain degree, to the relations between a federal court and the courts of federal subjects.

[18] By the time of the revision of the present article (April 2009) the Treaty of Lisbon was not yet in force. *Note from the author:It came into force on December 1, 2009.*

[19] See, the conference organised by the European Court of Human Rights in Strasbourg on 9 December 2008 to celebrate 60th anniversary of the Universal Declaration of Human Rights (www.echr.coe.int).

[20] The above term is far more preferable than the reference to "dissenting opinions". Judges being in the majority often express themselves with no less vigour and interest as those in the minority. According to many commentators such opinions constitute the finest source for better understanding dialogues between judges.

[21] The Cape Town Conference and the conferences of regional and linguistic networks constitute the best examples.

While no national court is able to avoid some form of horizontal dialogue, only the courts of States making up a supranational union can participate in vertical dialogue.

It is also possible to initiate mixed dialogue, e.g., where a court of a country that is not a member of a supranational union is interested in the jurisprudence of the latter and seeks to get familiar with its reasoning and findings. This was the case where the Supreme Courts of Canada and South Africa, always displaying much interest in the case law of other countries, applied the jurisprudence of the European Court of Human Rights at least in terms of the titles of documents.

It is desirable to have more than horizontal dialogue. However, even where it is the most important form of a relation, there is no reason not to be involved in the other two forms of a dialogue.

I – A REGULAR DIALOGUE

Constitutional courts, despite their status and modalities of intervention, maintain real dialogue between each other and each other's jurisprudences. This process is witnessed by many factors, be it references to foreign case law in a court's decisions or the individual opinions attached to a decision or in academic discourse. Hence, the existence of the concept of legitimacy of a dialogue which we shall now turn to study.

A – Legitimacy of a dialogue

There are few constitutions similar to that of South Africa that provide for the reliance by courts and *a fortiori* constitutional courts on foreign law and jurisprudence of foreign courts in their deliberations.[22] In terms of textual application of foreign precedents, constitutional nationalism clearly prevails and will dominate for a while.[23] However, despite their subsequent use, the legitimacy of such researches is no more disputed.

The majority of courts and their members justify inquiries into and application of foreign precedents of either foreign or supranational courts with similar arguments. When a court faces a

[22] Article 39.1 of the Constitution of South Africa: "Interpretation of Bill of Rights. 1.When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

[23] With a less provocative wording than the South African Constitution, Article 10.2 of the Spanish Constitution of 1978 establishes a link between domestic and foreign laws: "2. Provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.

serious legal issue, has no relevant precedents of its own and the relevant constitutional provisions to be interpreted are relatively vague, it is in its interest, from intellectual and legal point of view, to get acquainted with the discourse and solution by other courts in analogous situations. In this case intellectual curiosity rapidly adds to strictly documental interest.

Clearly, the legitimacy of such inquiries of any form depends on a number of circumstances. The approach of courts in common law systems, where studies into precedents and their invocation constitute basic culture, is different from the courts of continental law systems where national identity, to the contrary, has always been considered the strongest factor. The linguistic aspect, especially for English speaking countries, is often referred to as a strong factor in terms of judicial influence. Generally, the legitimacy of enquiries of precedents is justified by either cultural proximity or the resemblance of the texts to be applied or by the simple fact of one court having a longer history than another.[24]

Justice Scalia believes in the interpretation of the US Constitution according to the standards in place when it was adopted (1787). Accordingly, only those precedents of common law should be applied which existed before the adoption of the Constitution. Only a few judges oppose this approach which, in the opinion of Justice Scalia's colleague Justice Breyer, is perfectly natural.[25] Certainly, those engaged in the study of precedents or expressing themselves on the issue insist on individual nature of the measure and the degree of caution applied when resorting to foreign precedents. However, it is not disputed that there is some legal benefit in enquiring into the reasoning and approach taken by other competent courts in analogous situations. The said argumentation on a horizontal dialogue is reinforced where there is a vertical dialogue too and the courts, be they constitutional or not, are aware that they are obliged to some extent to make sure that their findings do not run counter to the jurisprudence of competent supranational courts. The case of the States being the High Contracting Parties to the European Convention on Human Rights is the best example in this regard. The application of the jurisprudence of Strasbourg Court by the Contracting States is based on the principle *Pacta sunt servanda* which is complemented with the risk of the supervision on the part of the ECtHR in case of strong divergence from its case law.

For the Member States of the European Union, the inquiry into the legitimacy of the application of precedents is out of question as they are obliged to do so under the integration of their legal system into that of the EU. It is worth mentioning that one of the distinguished members of the Constitutional Council of France used the term the "dialogue of judges" to differentiate it from the "domination of judges" and from the "war of judges".[26]

[24] See, e.g. the influence of German case law in the development of the jurisprudence of Hungary.

[25] See, Bibliography.

[26] Conclusions *Bruno Genevois*, Conseil d'Etat, 23 December 1978, ministre de l'intérieur c/Cohn-Bendit. *Les grands arrêts de la jurisprudence administrative*, Dalloz, France, 2007, 16e édition, p.644 ; *Recueil Dalloz*, 1979.155.

b – Elements of a dialogue

There obviously is no automatic mechanism governing the enquiry into foreign precedents and judges' dialogue. Every court or judge has a specific method in accordance with the respective Statutes and personal standpoint. Everyone also agrees that it is impossible to collect all relevant precedents due to the lack of access to documents or linguistic barriers. Some of the aspects, however, need to be highlighted in this regard.

There is a clear advantage of the older courts or courts which are close in terms of geography or culture.[27] That is the reason why no one wonders about frequent reference to the US Supreme Court in the data on foreign courts' jurisprudence. It is an absolute forerunner which has developed diverse jurisprudence that is considered to be liberal and numerous individual opinions of judges enable better understanding of the approaches taken by the US Supreme Court.[28]

At the world congress held in Chile, Mr Justice Wolfgang Hoffmann-Riem of the Federal Constitutional Court of Germany pointed out in express terms that while the interpretation of a Constitution is the exclusive competence of a national court, it is possible to apply the approaches taken by foreign countries namely the Supreme Court of the US.[29]

The members of the Supreme Court of Canada, e.g., justify the application of the case law of the US Supreme Court not only in terms of geographical reasons, but based on the legal proximity in light of the adoption of the Canadian Charter of Rights and Freedoms in 1982.[30]

Furthermore, of all the European courts of the second half of the 20th century, the Federal Constitutional Court of Germany is clearly distinguished. While it was established following the Basic Law of 1949, the diversity of its jurisprudence, the depth of reasoning, and the most positive image of the Federal Republic at global level furthered this reputation.

Amongst the courts that emerged recently, the jurisprudence of the Constitutional Court of South Africa should be noted especially with regard to capital punishment, on the account of which the Court is often cited and commented upon in other courts' decisions.[31]

When the constitutional courts of the Member States of the European Union pronounce themselves on the compatibility of a new treaty with their national constitutions or about the constitutionality of the Framework Decision on the European Arrest Warrant, it is natural that each

[27] To point out the suggestion of Namibia the Supreme Court of which applies not only the jurisprudence of the Constitutional Court of South Africa but also the decisions of the courts of Zimbabwe, Rhodesia and Zambia these countries are close not only in terms of geography but also culture, history, politics and constitutions". (See, the report of *Irene Spingo*, *Bibliography*).

[28] It would be very interesting to have a comprehensive study on: "The Influence of the Jurisprudence of the Supreme Court of the Unites States on other Courts".

[29] "There are not many examples of explicit citation to foreign constitutional decisions in the collected decisions of the German Constitutional Court, but one can identify the influence of other courts nonetheless. This is specially true of the United States Supreme Court...". (See, Bibliography).

[30] *Claire L'Heureux-Dubé*. See, Bibliography.

[31] *S. v. Makawanyane*, 6 June 1995, case # CCT/3/94 (www.constitutionalcourt.org.za/).

court systematically researches the approaches and decisions taken by other courts. In the case of Spain, Mr. Justice Luis Lopez Guerra did not hesitate to write: "the references to the jurisprudence of the constitutional courts of other countries or to that of the European Court of Human Rights are frequent in the decisions of the Constitutional Tribunal of Spain".[32] It is noteworthy that the adopted judgments are clearly similar.

There is one more aspect related to the language used by courts on one hand and by judges on the other hand. It is often noted that the judges educated in the United States naturally tend to apply the jurisprudence of the US Supreme Court, while those educated in Germany apply the jurisprudence of the Federal Constitutional Court in Karlsruhe.[33] In the case of Botswana, the judges educated in continental law will naturally apply precedents of the relevant countries and those knowledgeable of common law will resort to the case law of the Great Britain and other similar countries.[34]

To return to the example of American judge Stephen Breyer, the perfect command of French clearly enables him to better understand the peculiarities of the jurisprudence of the Constitutional Council of France.

In light of the well known challenges related to the accurate translation of national courts' decisions, the efforts of those courts to translate the decisions and the most important acts, upon delivery or after some time, into an international language are welcome.[35] It is, however, to be borne in mind that there are numerous challenges to legal translation and decisions can be better understood not only in the original language but also in a national legal context. Serious mistakes made in translation that will eventually be reflected in application, can be consequences of the failure to take these precautions.

The last element is related to the importance of university doctrine. It is obvious that influential legal journals published in the languages of broader use have a great impact in the research of precedents and the judges' dialogues. The authors try to address the comparisons of decisions and establish similarities and discrepancies with certain caution.

And finally, the existence of various data on constitutional proceedings, e.g. the data of the Venice Commission, is a significant resource which should be applied with caution and is still rarely used.[36]

[32] See, Bibliography.

[33] See, the report of Akiko Jima on Japan (Bibliography).

[34] See, the report of Charles Manga Fombad (Bibliography).

[35] The Federal Constitutional Court of Germany publishes many of its decisions in the English and French languages on its website (http://www.bundesverfassungsgericht.de). The Constitutional Council of France does the same in German, in English and sometimes in Spanish. (www.conseil-constitutionnel.fr/). To the contrary the website of the Supreme Court of the US is only in English.

36 See, in French and in English, *le Bulletin de jurisprudence constitutionnelle et la banque de donnée*, *CODICES* (www.venise.coe.int/).

II – A LIMITED DIALOGUE

The most interesting aspect of the application of foreign precedents aims at studying how those precedents are invoked by the courts and judges when adjudicating. It is therefore necessary to discuss the reasonableness of precedents and their effects.

A – The reasonableness

All existing analyses point out that during deliberations, a court will not be able to apply any foreign jurisprudence. It is therefore necessary to discuss the criteria of reasonableness of the precedents which should be taken into consideration during the analysis and application of precedents.

In the case of constitutional courts which form the part of a State under the jurisdiction of a supranational entity, the reasonableness is easier to establish. The subordination to some union on the basis of directly applicable treaty *ipso facto* creates due preconditions of reasonableness. The States signatory to the European and American Conventions acknowledge common political and legal values. The Treaty on European Union (1992) confirms Member States' "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law". The preamble of the European Convention refers to "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". The Preamble of American Convention specifies that "[t]he American states signatory to the present Convention, Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man". Accordingly, there can be no doubt as to the constitutionality of the unity of these values, to the respect of which these Courts are committed.

When a competent supranational or constitutional court interprets an international agreement or a constitutional provision, the issue of reasonableness is always at stake. While it does not mean that reasonableness becomes binding, it cannot be ignored that it is necessary to take into account the factual and legal considerations being in the ground of a respective decision.

When national courts directly provide for interpretation in accordance with universal international law, it is difficult to ignore reasonableness. A comparison of national and international texts on basic rights shows the tendency of resemblance with international instruments. Some acts may even refer to international conventions (e.g. the ECHR) as in the case of the Charter of Fundamental Rights, although it does not have a positive legal value. Accordingly, there is reasonableness at stake.[37]

[37] In its edition emanated from Lisbon Treaty approved by the European Parliament on 29 July 2007 the Charter of Fundamental Rights states (Article 52, paras. 3-4) on the one hand that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by

In a horizontal dialogue, the criteria of reasonableness should be assessed not only in their entirety but also with regard to particular elements of the case at stake. Certainly, the edition of the texts to be used and national peculiarities they contain is of significance. It is also important to discuss whether foreign precedents are relevant to the case. It does not mean that one or another aspect of the alternative should be ignored. It means that pragmatic solution or abstract discussion should not be given the same doctrinal value. It is common in the field of human rights that national courts apply the decisions adopted under similar texts that are not sufficient for the formation of certain "common law".[38] However, this does not make the subject of the present Article less interesting. To the contrary, it enables better understanding of the application of different decisions and accordingly makes the discussion by a relevant court easier.

There is one particular aspect relevant to the present topic. It is "the complexity of the participation of the supreme courts of development countries in judges dialogue''[39]. Apart from the dialogue between "the South and the North", it is concerned with the adequacy of this dialog and the influence of legal heritage, which in most cases is the heritage of "one and the same historical model."

While the reasonableness criteria are easier to define in terms of basic rights, it is not so straightforward in those cases where national constitutional courts are requested to adjudicate on functioning of national institutions, e. g. where the dispute concerns the division of powers in federal states. In such cases, the decisions of American and German Courts can be applied, but with due respect to the norms of the respective constitutions in order to avoid the misunderstanding of autonomy and the control of federal subjects. It is paradoxical that the Canadian Supreme Court applied British jurisprudence with the view of interpreting the Constitutional provisions of 1867.[40]

It is also possible, e.g., in terms of the division of powers or parliamentary immunity, to enquire of solutions that can be found in other countries that may have a similar constitution. This principle is acknowledged in various States well enough to consider the application of important precedents. To the contrary, it is surprisingly difficult to apply foreign case law to understand the division of powers better within the executive and legislative details as these issues are governed too differently in different countries.

To sum up, each precedent which appears to be of some interest from this, or another perspective, should be an object of deep analysis, which means those involved in the analysis should have a fair knowledge of the peculiarities of a given country.

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the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"; and on the other hand, "[i]nsofar as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[38] See, *Constitution et éthique biomédicale* (*Noëlle Lenoir, Bertrand Mathieu et Didier Maus, dir.*), La Documentation Française, France, 1998.

[39] See, Bibliography.

[40] "Specifically, the Privy Council established the principle of interpretation of Canada's federal structure as a principle of strict literal interpretation, favouring the power of the provinces over those of the federal government", see, the report of Gianluca Gentili (Bibliography).

B – Precedents effect

THE MOST DEBATABLE ISSUE IS CERTAINLY THE EFFECT OF PRECEDENTS.

On one hand, the supporters of national approach, e.g. Mr. Justice Scalia, do not consider that the fact of adoption of a judgment by a court of acknowledged reputation should influence the deliberations of other courts. To the contrary, the majority of those expressing themselves on the issue consider that the application of foreign precedents is the best means of forming one's opinion. However, a national constitutional court should certainly base its deliberation on the provisions of domestic law, be it the Constitution or other norms having the same effect. Stemming from the above-mentioned, there are three levels of the effects of precedents.

The first level can be qualified as "documental effect". In fact there is no logical reason for a national court to forbid itself the compilation of documental data which will enable it to analyse the new and delicate issue before it better.

a) Documental effect

The Constitutional Council is a body which is particularly cautious when it comes to the application of foreign precedents necessitated by the issue before it. The Council systematically collects documents on foreign jurisprudence, and after the adoption of the respective decision, this documentation is published and made accessible for the public through the Council's website.[41] When the courts need to review the issues falling under bioethics, freedom of religion or inhuman or degrading treatment of punishment, the collection of these documents is absolutely necessary.

The famous judgment on the abolishment of capital punishment by the Constitutional Court of South Africa on 6 June 1995[42] is a good example. The judgment was written by the president of the Court and it was adopted unanimously. It invokes the precedents of the courts of Canada, England, Australia, New Zealand, the US, India, Tanzania and Hungary, and also on international norms and decisions taken on the basis of Vienna Convention on the Law of Treaties, the European Convention (the Court and the Commission), International Covenant on Civil and Political Rights (and Human Rights Committee of the UN), Inter-American Convention on Human Rights (and the Court) and The International Labour Organization. Although the jurisprudence of American, Canadian and German courts prevail, the reference to other case law is obvious. In total, out of 146 paragraphs, 76 (33-109) are dedicated to the analysis of international and comparative laws. After motivated discussion, the answer to the question on the constitutionality of capital punishment is given with a

[41] See, *Olivier Dutheillet de Lamothe,* Bibliography.

[42] See, note #31.

finding in paragraphs 144-146, under which "Article *277(1) a* of the Criminal Code must be declared unconstitutional in terms of Article 11(2) of the Constitution*"*.[43] At the given stage, foreign precedents assisted judges in forming their opinion.[44] However, none of them are referred to in the judgement.

b) Convincing effect

The second stage can be qualified as a "convincing effect". It is frequently used in judges' communications and academic discourses. In fact, it is concerned with the knowledge of how the right judicial decisions can assist the formation of relevant opinions through confrontation or accommodation. When, e.g., a national court takes a similar decision with regard to a basic right or defines the scopes of similar limitation and constitutional provisions that do not oppose each other, is this not a sufficient argument for the application of these precedents ? Or can they only be the elements of autonomous discussion?

The answer to the question above varies in accordance with national legal traditions, the implication of the precedents used and the intention of the relevant court. Stemming from the communication between common law courts system, the latter, as in the case of Canadian and Indian Courts, believes in convincing effect of the foreign precedents.[45]

With regard to Canada, Cianluca Gentili points out the concept of "legal cosmopolitism" elaborated by Justice La Foreste, but at the same time remembers the cautious and moderation of Justice Wilson.[46] The latter particularly stated, "This Court has consistently stated that even though it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it has generated."[47] The aforementioned statement may equally be made by judges of other constitutional courts too.

To the contrary, the Hungarian Court applies many German precedents in order to validate its discourse, but prefers to fit them into the national context.[48] Stemming from this fact, there can be two different situations: one can be "reasonable argument" and the other "legal argument". A good example is served by Andorran Constitutional Court's recent decision on the right to reasonable

[43] The provisional Constitution of 1993 is implied.

[44] The following extract from para. 110 is particularly significant: *"…* the interpretation of section 1 of the Canadian Charter of Rights may be of assistance to our Court, but that there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with".

[45] In her report on the Supreme Court of India, Valentina Rita Scotti wrote: "The Court uses foreign legal doctrine to affirm the definition of some legal institution not well defined after the independence, but also in those cases it quote the doctrine it tries to internalize it putting together with Indian legal tradition" (Bibliography).

[46] See, Bibliography.

[47] *"*This Court has consistently stated that even though it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it has generated.*"* *Lavigne v. Ontario Public Service Employees Union*, (1991. 2 SCR 2001).

[48] See, the report by Zoltán Szente (Bibliography).

terms of proceedings. The Court stated that: "According to the jurisprudence of the ECtHR, the Court numerously held that in order to assess the alleged violation of the said right *inter alia* a fair balance should be struck between the complexity of the case, the behaviour of judicial organs and of the parties."[49] The wording "according the jurisprudence of the ECtHR" points out the significance of the Court's practice, but at the same time the possibility to develop the discussion in other or opposite direction.

c) Binding effect

The third consideration concerns the genuine "effect of a decision" which the foreign precedents have. It means that constitutional courts cannot ignore the said fact and if they still do so, they will have to take a risk of limitations. This hypothesis is true where a national constitutional court, e.g. a constitutional or supreme court of a federal subject, is not fully independent and is subject to possible limitations, e.g. in Europe on the part of the ECtHR or Luxembourg Court[50], Commonwealth country or Judicial Committee of the Privy Council of the Queen.[51]

To some extent, a constitutional court is subordinate to the interpretation given by a superior court. The discourse needs to be consolidated with arguments and beyond the scopes of basic negative reaction. It is frequently pointed out that in the countries subject to the jurisdiction of the European Court of Justice and the ECtHR, constitutional courts receive the jurisprudence of the Strasbourg Court more and more intensively where it is applicable, e.g. legislative validations in France or the interpretation of the right to property in Czech Republic.

CONCLUSIONS

The development of the recourse to the jurisprudence of foreign courts and the dialogue between constitutional courts are the best indicators not only of the generalisation of constitutional courts, but also the expansion of common constitutional values. It is common knowledge that even the oldest courts, or those most integrated in solid national constitutional identities, are rather open to act in favour of communication through the exchange of constitutional jurisprudence. Eventually, the boundaries naturally follow the values stemming from political decisions, whereas the dialogue and the recourse to jurisprudence exist within a union only.

[49] The Constitutional Court of Andorra, 12 January 2009, case 2008-26-RE.

[50] For Italy the Constitutional Court, 24 October 2007, case 349/2007; Constitutional Council (France), 1 July 2004, case 2004-497 DC; See, P. boni et D. Maus, Bibliography, # 92-101.

[51] Judicial Committee is competent with regard to the following independent States: Trinidad and Tobago, Dominica, Kiribati and Mauritius. See, Kenneth Keith, "The Interplay with the Judicial Committee of the Privy Council", in Louis Blom-Cooper QC, Brice Dickson et Gavin Drewry, *The Judicial House of Lords, 1876-2009,* Oxford University Press, 2009.

This certainly is not an obstacle to a discussion, the first stage of a dialogue, to engage those sharing similar aspirations to know them and understand each other better.

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